**Inevitable Asymmetries:
Presenting an Ethical Imperative to Transcend the Language of Rights**

By
Victoria Louise Ridler
B.A. International Development Studies and Political Science

Submitted to:
The Faculty of Graduate Studies and Research
In partial fulfillment of the requirements for the degree of Masters of Arts

Supervisor: Professor Alan Hunt

Carleton University, Department of Law
Ottawa, Ontario
September 2006

© Victoria Louise Ridler, 2006

Library and
Archives Canada

Bibliothèque et
Archives Canada

Published Heritage
Branch

Direction du
Patrimoine de l'édition

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 978-0-494-23315-3

Our file Notre référence

ISBN: 978-0-494-23315-3

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

Canada

Abstract

The invocation of a liberal language of rights carries with it conceptions about what is just or unjust in our relationships. It has been the purpose of this thesis to both explore and develop what these conceptions are, and to consider how they are compromised in the use of a liberal language of rights itself. From the tradition of deontological justifications for rights, an ethos of relational equality and liberty is identified and articulated. The concept of symmetry, both in application of moral principle and relationships of duty is then introduced as a way of understanding the liberal expression of that ethos. It is argued that the use of a language of rights as a 'meta-language' for justice fails to reflect the symmetry it is believed to represent, and that we must transcend rights discourse, embracing the concept of generosity, to preserve the very ethos invoked in the discourse.

Acknowledgements

For not only his guidance, support, and all the duties a supervisory role usually entails, I am grateful to Professor Alan Hunt for his patience with me during what has been a longer than expected thesis process. I wish to thank Professor Sheryl Hamilton, the second reader for this thesis, who has provided both invaluable guidance as well as supportive counsel. I would like to acknowledge the Carleton University Law department, both its administrative staff and teaching faculty, for facilitating my intellectual development and providing the academic environment that has allowed me the opportunity to embark upon the project of writing a Master's thesis. In particular, I would like to thank Andrew Squires and Professor Peter Swan for their encouragement and guidance. Credit must also be given to those friends and colleagues who have been supportive of me throughout this process – in proofreading, printing and delivering drafts, and the many small things that are too numerous to mention but which have been critical to the completion of this project - in particular, I would like to thank; Bianca Ridler, Lisa Drouillard, David Macartney, Siovene Bourgeois, Rajiv Prasad, Matthew Stone, Catharine Grant, Justin Igloliorte, Katie Vitale and Barbara Dearborn.

Table of Contents

Introduction	1
Chapter 1 Engaging Rights Discourse	3
1.1 The Language and the Discourse	3
1.2 The Meaning of 'Right'	7
1.3 Equality and Substantive Rights	11
1.4 Deontological versus Consequentialist Justifications for 'Rights'	13
1.5 Communitarian Critiques of Liberal Rights Discourse	18
1.6 Liberalism, Identity and Values	21
1.7 Engaging in the Discourse	23
Chapter 2 An Alternative Expression	28
2.1 A Constructive Model of Justice	30
2.2 Duty and Rights	34
2.3 Equality	41
2.4 Relational Equality and Duty	45
2.5 A Linear Continuum Expressing Equality in Duty	46
Chapter 3 Taking Equality Seriously	49
3.1 The Right, the Good, and the Context of Justice	50
3.2 A Meta-Language for Justice	58
Chapter 4 Symmetry and Generosity	67
4.1 Symmetry from the Perspective of the Subject	69
4.2 Young on Symmetry and Generosity: Reversibility and Gifts	73
4.3 The Baby, the Bath-Water, and Taking Equality Seriously	78
4.4 Closings and Adjudication	82
Conclusion An Imperative to Transcend Rights	84
Transcending Rights	86
Bibliography	88

Introduction

A day seldom goes by when I do not witness the word ‘right’ or ‘rights’ invoked in some political, legal, or moral context. Whether it is in regards to human rights abuses, the rights one has as a ‘consumer’, or some passionate comment by an acquaintance about how such and such a person has no right to treat someone else in a certain way, ‘rights talk’ saturates modern Western discourses.

While certain uses of the concept of rights may not carry with them strong sentiments of justice, most of these invocations reveal something about our conception of what is just or fair in our relationships with each other. This thesis was born of a sense, or intuition, concerning what that conception might look like and the implications it has for a critique of a use of a language of rights itself.

In the first chapter of this thesis, the general field of ‘liberal rights discourse’ is explored. This exploration exposes the theoretical traditions and debates with which the thesis engages. It also exposes an ‘ethos’ found within deontological justifications for rights that resonates with the sense of what it is we are invoking when we talk about rights. In the second chapter this ethos is examined in greater detail through Ronald Dworkin’s concept of a ‘right to equal concern and respect’. From this analysis, it is argued that ‘rights’ must be understood as relational in nature based on a relational reading of both the concepts of liberty and equality as they appear in the deontological liberal tradition. The concept of symmetry, in application of moral principle and in relations of duty, is then introduced as a means for understanding this relational nature and as a model for articulating different expressions of this ethos. It is with this

conceptual tool that in the third chapter rights discourse is critiqued. Using Jean-François Lyotard's concept of a 'differend', it is argued that the expression of symmetry in relations of duty as 'reciprocal and equal abstract rights' fails to reflect the symmetry imagined by liberal theorists when rights are used as a meta – or universal – language of justice. Finally in the fourth chapter, the idea of generosity is considered and presented as a way of preserving the ethos of relational equality and liberty at the heart of liberal rights discourse. In the willingness to open to alternative expression of justice and engage in the language of another (moving beyond the language of 'rights') a less compromised expression of symmetry is (paradoxically) achieved.

In arguing for a self-imposed asymmetrical duty toward others (generosity), this thesis departs significantly from established critiques of, and justifications for, liberal rights. It is both a critique of 'rights' and a tribute to them. In founding its normative assertions upon an ethos found within deontological justifications for rights, it captures an important sense of what it is we invoke in the idea of rights – a sense of what is just or unjust in how we govern our relationships with others – and in so doing it is from the liberal tradition itself that the imperative is presented to transcend the language of rights.

1. Engaging Rights Discourse

Liberal rights discourse is a rich and complex conversation – from classical liberal theories to contemporary communitarian or feminist critiques. It reaches across disciplines and engages not only philosophers and social scientists, but it is also normalised throughout political and social expression (most prominently as ‘basic human rights’). In this chapter, a rough sketch of the varying themes which animate this discourse will be described and explored. Although the relevant sections will take the form of a categorization of liberal rights discourse, it is meant to be neither definitive nor exhaustive, but rather to serve as a bumpy roadmap to orient the reader within the landscape from which this thesis emerges. Before a tour of liberal rights discourse is taken however, the chapter will begin with defining what is meant by the terms ‘a language of rights’, ‘liberal rights discourse’, and ‘discourse’ more generally and then proceed by what is meant by ‘right(s)’ in the liberal tradition.

1.1 The Language and the Discourse

Throughout this thesis the reader will find reference to; ‘liberal rights discourse’, a ‘language of rights’, and ‘discourse’ as a sociological concept of communication more generally. While these different terms might often appear interchangeable in their usage, they are used here to refer to distinct phenomena.

Liberal rights discourse refers specifically to an academic tradition of liberal theory concerning rights, as well as to those critics who may not fall within the ‘liberal’

tradition itself, but who engage directly with the discourse on liberalism and rights. In this sense, liberal rights discourse refers broadly to what could be described as the conversation in academia concerning liberalism and rights. Where this conversation begins and ends is perhaps more difficult to define. Different general categories are considered in the following chapter and include debates concerning what substantive form rights ought to take, different philosophical and theoretical justifications for rights, and communitarian critiques of liberal rights. However, these categories are not self-contained units of conversation but flow into and beyond each others' 'boundaries'.

Communitarian critiques of liberal rights, for example, are one of the most rigorous theoretical engagements with liberalism and rights and reached a climax during the 1990s. Dealing primarily with the universal nature of rights proposed by liberal theorists as well as the problems associated with liberal conceptions of the subject as an autonomous individual, communitarians put into question the foundations of liberal rights theory.¹ The communitarian critique then re-emerged during the end of the last decade and at the beginning of the new millennium in the form of the 'Asian Values' debate. Sparked by international events illustrating 'human rights' abuses in East Asian - in particular the events occurring at the Tiananmen Square protests of 1989 and the subsequent pressures placed on international economic relations between major trading partners in the East and West - the Asian Values debate re-captured the theoretical concerns of communitarianism in the form of a debate about the Western imposition of

¹ See for example: Sandel, M. (1981). *Liberalism and the Limits of Justice*, Cambridge: Cambridge University Press; MacIntyre, A. (1988). *Whose Justice? Which Rationality?*, Notre Dame: University of Notre Dame Press; Kymlicka, W. (1989). *Liberalism, Community and Culture*, Oxford: Clarendon Press; Bell, D. (1993). *Communitarianism and Its Critics*, Oxford: Clarendon Press.

particular values upon the rest of the (non-Western) world.² Through the Asian Values debate, the communitarian and liberal dialogue found renewed relevance in a context that was politically, and economically, charged. The new context also highlighted the emerging significance of 'Human Rights'.³

From the United Nations' *Universal Declaration on Human Rights* (1948), to the rhetoric of International Development and financial institutions (such as the World Bank and the International Monetary Fund), and the slogans of social justice activists on the streets, human rights have become perhaps the most visible (and *audible*) expression of a 'language of rights'. While human rights are not generally considered reducible to 'liberal' rights *per se*, their form, content, and justification have emerged from a Western liberal historical context.⁴ This is not to say that their content or their justification are exclusive to Western liberal ideals, but it is to suggest that they can be understood as an extension of (and perhaps an evolution of) liberal rights discourse. The relationship between Communitarianism and the field of Human Rights also shows the ambiguity in defining distinct categories of the discourse as one debate flows into another. Further, reference to human rights is part of the liberal rights discourse while not limited to it, constituting an element of the broader phenomena which is described here as a language of rights.

² The Asian Values debate also captured elements of a debate about cultural relativism as they concern the claims of universalism associated with Human Rights.

³ See for example: Bauer, Joannr R. and Daniel A. Bell (eds). *The East Asian Challenge for Human Rights*. Cambridge: Cambridge University Press, 1999; Ness, Peter Van (ed). *Debating Human Rights*. London: Routledge, 1999; de Bary, Wm. Theodore. *Asian Values and Human Rights*. Cambridge Massachsetts, Harvard University Press, 1998

⁴ As the Asian Values debate demonstrates, many theorists argue not only for the compatibility of Human Rights with non-Western cultural values (as well as arguing that elements of either the principles of human rights or their norms may exist in Non-Western cultures), but that human rights as a norm ought to be understood as having gone beyond the individualism of the liberal tradition. Further, it has also been suggested that in order to proceed forward toward international consensus on human rights, the substantive content of human rights must be inclusive to what has been historically understood as non-western values. (See for example: Taylor, Charles. "Conditions for an Unforced Consensus on Human Rights". In *The East Asian Challenge for Human Rights*. Bauer & Bell (eds), New York: Cambridge University Press, 1999.)

While ‘liberal rights discourse’ has been used to refer to the general academic conversation relating to liberalism and rights, a language of rights is a broader and quite distinct concept. A language generally refers to a *method* of communication - usually some system of signs, including oral, written, and physical expressions. Its use here builds on this meaning, emphasising the element of a particular method in which the system of signs influence what is said and how the world is experienced. In this way it also builds on the sociological meaning of a discourse, which represents the inter-subjective meanings of signs within a particular social/cultural context. Thus, a language of rights is a phenomenon found beyond the more particular academic discussion termed here ‘liberal rights discourse’, and in this thesis it will include communication that uses the term ‘right(s)’ to represent basic normative principles that: (a) are generally taken as given, and; (b) that have historically developed within a Western and liberal cultural context. This includes not just institutional uses of the language, but the language in the vernacular as well, such as when someone thinks or expresses themselves through a language that incorporates the term ‘right’ or ‘rights’ in the capacity described above.

In the third chapter, the ethical implications resulting from *how* a language of rights is invoked is explored more thoroughly, and in the following sections of the first chapter, ‘liberal rights discourse’ is explored in some of its most significant theoretical debates. Both must be understood, however, in the context of the broader question of this thesis. Although a language of rights is so broadly defined here that the use of the term ‘right(s)’ may imply different meanings and associated justifications, it is through an exploration of the academic discourse on liberalism and rights that the author searches for a particular ‘ethos’ that captures a *sense* of justice – and, in particular, what is just or

unjust in our *relationships* - that is invoked in the use of the term. Although this ethos may not be universally inscribed in every use, it is an ethos that the author believes gets at the heart of what gives rights their appeal and devoted defence. Further, it is an ethos that provides a normative base from which to consider the implications of how a language of rights is used.

1.2 The Meaning of 'Right'

In *Political Innovation and Conceptual Change*, Richard Dagger traces the history of the word 'right' to suggest how the concept has evolved and what it 'means' today. Dagger argues that although 'rights'⁵ as an idea or notion is "virtually as old as civilization itself", the specific conception of 'rights' (articulated as such) likely emerged in the Middle Ages. From an association with the Latin word *rectus* - meaning 'straight' - right has evolved from a standard of morally correct action, to the justification for an action (or norm to govern actions) based on a moral entitlement:

By analogy with the physical sense, the primary moral sense of 'right' was a standard or measure of conduct. Something was right – morally straight or true if it met the standard of rectitude or rightness . . . If something was done 'with right,' 'by right,' or even 'in right,' then it was rightfully done, or done in accordance with the standard of right conduct. From here, the next step was to recognize that actions taken 'with right' or 'by right' are taken as *a matter of right*. The transition is from a belief that I may do something because it is right . . . to the belief that I may do something because I have a right to do it. Once this transition is achieved, 'right' can mean not only a standard, but also a justificatory claim to act in a certain way – a claim that becomes a kind of standard itself.⁶

⁵ The plural expression of the word 'right' in this context will be used to represent a (singular) concept or idea. Thus 'rights' will be treated grammatically in these instances as singular to express a commonality of conceptual meaning given to the use of 'rights' in the liberal tradition.

⁶ Richard Dagger. "Rights", in *Political Innovation and Conceptual Change*, Terrence Ball et al (eds). Cambridge: Cambridge University Press, 1989, page 294.

While Dagger highlights the ‘possessive’ quality of rights, citing theorists who describe the idea of a ‘right’ as a form of dominium over the self and as a ‘thing’ which one can ‘hold, stand on, or act within’, he also emphasises the evolution of the concept as an *entitlement* – an emphasis that has particular relevance for this thesis. It will be argued that because of its *relational* quality, the concept of a right implicitly entails an obligation located elsewhere which must conform to, or provide for that entitlement. In this way, a ‘right’ is necessarily expressed in relation to a duty: it is a norm (or a moral or ethical justification for a norm) which governs (or is sought to govern) relations. However, an important part of the evolution of the meaning of ‘right’ as a norm based on a moral entitlement has been its growth within *liberal* rights discourse. Thus beyond its meaning as a norm concerning moral entitlement generally, rights have come to be associated with certain qualities that make ‘rights’ a liberal concept – qualities which are generally identified with the concepts of equality and liberty.

To witness the significance of equality in liberal rights discourse, one need only consider the idea of ‘human rights’ - one of the most influential normative concepts in today’s political, and perhaps even moral, landscape. That all humans are entitled to certain basic rights *because* they are human expresses important egalitarian principles. Indeed, the *UN Universal Declaration on Human Rights* (1948) begins its preamble with the “. . . recognition of the inherent dignity and the equal and inalienable rights of all members of the human family . . .” Whether it is the idea of ‘human dignity’ or that all men are ‘born equal’, liberal rights discourse, and the idea of ‘human rights’ more specifically (echoing elements of the ‘natural law’ tradition), entail basic assumptions about the moral worth of a human being and the rights that reflect that worth. Even if

only imagined as something like a lowest common denominator of moral consideration, it can be inferred that this moral worth is something that everyone, by virtue of being human, possesses equally regardless of their other particular traits or attributes.

Liberty plays a similar essential role within the discourse –even to the name of the ‘liberal’ tradition itself. The birth of the idea of liberal ‘rights’ is generally attributed to political theorist Thomas Hobbes who spoke of a ‘natural right’ of all men found in a ‘state of nature’.⁷ While Hobbes is not usually considered a liberal theorist *per se*, he laid the foundations for the liberal conception of a (self-interested) rational agent who relinquishes his natural right to liberty in exchange for security. Since Hobbes, the significance of liberty has been extensively explored by liberal theorists in connection to ‘rights’. An important contribution in this regard has been the work of Isaiah Berlin.

In “Two concepts of liberty” Berlin explores what he terms ‘negative’ and ‘positive’ liberty-(or freedom, which he uses interchangeably with liberty). Negative liberty refers to what is probably more commonly thought of as liberty – liberty as non-interference:

I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area in which one can act unobstructed by others . . . you lack political liberty or freedom only if you are prevented from attaining a goal by human beings. Mere incapacity to attain a goal is not lack of political freedom.⁸

In this description, negative liberty is understood in relational terms to others. Positive liberty, on the other hand, refers to a relationship between one’s actions and one-self.⁹

⁷ Thomas Hobbes. *Leviathan*. London: Penguin Classics, 1985.

⁸ Isaiah Berlin. “Two concepts of Liberty”, in *Liberalism and its Critics*. Michael Sandel (ed), New York: New York University Press, 1984, pages 15-16.

⁹ While I have described the relationship in positive liberty as one with ones ‘authentic’ will (or one with one’s self), the idea of an unauthentic self suggests the influence of those outside the self, and in this respect may also

Beyond not being ‘prevented’ by other persons from doing what one chooses, it is the process of ‘free’ choice itself that positive liberty concerns which includes the ability to manifest one’s will *and* the ability to *know* one’s will:

The positive sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind . . . I wish to be a subject, not an object: to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were from outside.¹⁰

This second conception of liberty (positive liberty) relates to a stream in liberal philosophy concerning the meaning of (and necessary conditions for) autonomy. Within these theories, autonomy concerns one’s ability to express a will conceived as authentically one’s own, often identified as essentially rational in nature. But whether concerned with negative or positive conceptions of liberty, the ideal of liberty (or freedom) is a constitutive part of liberal rights discourse in which ‘rights’ are often conceived of as an entitlement, or *freedom*, to something.

Thus, in consideration of development of ‘rights’ within liberal discourse, the following three characteristics are stipulated as part of a working definition of the meaning of ‘right(s)’ for the purposes of this thesis:

- a) a ‘right’ is understood as a ‘right to’ something and is therefore a claim of *entitlement*. Although it has evolved from the moral concept ‘of right’, rights as norms are not restricted to the ‘moral’ terrain, and include, for example, legal and political rights;

be considered relational in nature. However, it is relational in a much less direct way. Therefore, although both positive and negative liberty might be understood as relational, positive liberty is perhaps more obliquely so.
¹⁰ *supra* note 8 at pages 22-23

- b) 'rights' reflect a relational concept in that the entitlements of a person entail a duty on the part of others to provide for or 'respect' that entitlement. In this sense, they are norms that govern (or are sought to govern) relationships, and;
- c) As a result of the evolution of the idea of rights within *liberal* rights discourse, constitutive elements of a contemporary meaning of rights include the idea of liberty and equality.

1.3 Equality and the Substance of Rights

From the Asian Values debate and the search for a consensus on human rights, to early debates on distributive justice, what *content* rights ought to have encompasses much of liberal rights discourse. While multiculturalism perhaps plays a larger role in recent debates – moving rights away from elements of their legacy of individualism – even within the more confined norms of 'liberalism' as such, much of the substance of rights has been up for contention. The following section will consider the significance, on a theoretical level, of these debates without engaging directly with the defence of, or attack on, any particular rights. Further, because the significance of multiculturalism to the discourse will be considered in greater detail later in the chapter, this section will focus on the debate over substance in the more specifically liberal tradition as it concerns the roles of the ideals of 'equality' and 'liberty'.

The interface of liberty and equality in liberal rights discourse is often a site of both harmony and conflict. While the concepts are taken to be definitively linked, they are also distinct and often posited against one another depending upon the approach. As a

result, it is also at this site that much of the rich debate over rights occurs in an effort to establish what substantive form rights ought to take.

One way of categorising this debate is according to the extent that liberty is argued to be sacrificed such that people have not only formal equality of 'right', but also 'equality of opportunity' or even 'equality of result.' In what is known as distributive justice, it is argued that resources must be redistributed, i.e. removed from at least one person such that others have access to those resources. The welfare state, guaranteeing certain basic resources (such as health care or education), is an example. Through taxation, the state redistributes resources such that all citizens have access to certain services. Elements of this approach are reflected within the UN Universal Declaration on Human Rights (1948) which states that, "economic, social and cultural rights indispensable for . . . [the] dignity and the free development of . . . personality."¹¹ Liberal political and legal theorist, Ronald Dworkin, known especially for his contribution relating the significance of 'equality' in a liberal conception of rights, provides the following justification for the interpretation of equality beyond that of equality in liberty:

The liberal, drawn to the economic market and to political democracy for distinctly egalitarian reasons, finds that these institutions will produce inequalitarian results unless he adds to his scheme a different sort of rights. These rights will function as trump cards held by individuals; they will enable individuals to resist particular decisions in spite of the fact that these decisions are or would be reached through the normal workings of general institutions that are not themselves challenged. The ultimate justification for these rights is that they are necessary to protect equal concern and respect.¹²

While distributive justice can be argued for in the context of negative liberty, such that the current economic system or distribution of resources is seen as interfering in some

¹¹ United Nations. UN Universal Declaration of Human Rights. 1948
<http://www.un.org/Overview/rights.html>

¹² Dworkin, Ronald. "Liberalism", in *Liberalism and its Critics*. Michael Sandel (ed), New York: New York University Press, 1984, page 71.

way with a person's liberty – it is more often argued that economic systems, distribution of resources, or patriarchal relations for example, create an environment where formal equality (such as equality before the law) becomes meaningless if there is not some degree of equality of opportunity, if basic needs are not being met, or if equality to certain rights does not equally account for differences. The issue of 'equal but different' moves the discussion beyond the economic sphere and situates it firmly within fields such as feminist legal studies, or critical race theory, for example. Such approaches are sometimes described as prioritizing equality over liberty – which 'libertarians', for example, reject on principle. Robert Nozick, infamous for his contribution to libertarian theory, argues for a minimalist state and minimal direct interference in the lives of individuals.¹³

While these different approaches consider the best means of enacting the principles of equality or liberty in the substance of rights, they do not consider a general justification for rights themselves. In the following section the differing approaches to justifying rights are considered.

1.4 Deontological versus Consequentialist Justifications for 'Rights'

Deontology and consequentialism refer to two opposing ways of justifying a normative theory.¹⁴ The literal meaning of deontology is the science of duty or moral obligation. Its adjective, deontic, generally refers to a 'branch of philosophy that deals with duty or

¹³ Nozick, Robert. *Anarchy State and Utopia*. New York: Basic Books, 1974.

¹⁴ Although deontology as a normative approach is set apart from consequentialism in most accounts, there comes a point at which it is difficult to imagine the justification for a duty without also imagining an expected outcome of that duty – i.e. a consequence. Indeed, from both a consequentialist approach as well as a deontological one, there are several ways in which a breakdown of the dichotomy might be imagined. However, while some of this relationship will be explored in the second chapter, for now the distinction between the two will be both accepted and used to explore the differences in approaches and issues in different streams of liberal rights discourse.

obligation'.¹⁵ Originating from the Greek word *deon* – meaning 'one must' – deontology concerns '*irreducible, distinct, duties*'.¹⁶ The primacy of duty is *irreducible* in the respect that the *duty to* is the end in itself rather than the consequences of that duty.

In liberal rights discourse, deontological justifications combine the idea of the individual as a moral 'end' in herself or himself with the irreducibility of duty. Invoking principles of equality and liberty as they apply to the individual, they are associated with Kantian moral philosophy and provides a justification of rights as a duty to respect the equality and liberty of the individual, not for some other purpose (such as overall good to a community), but as an end itself.¹⁷ Those advocating (or working from) this approach are sometimes referred to as 'Kantian liberals' and advance theories described as 'Kantian contractualism'. In this approach, respect for persons is paramount and "... demands that we refrain from imposing our view of the good life on them. Only principles that can be justified to respect the personhood of each. Thus the tendency of recent liberal theory ... to transform the social contract from an account of the state to an overall justification of morality, or at least social morality."¹⁸

A consequentialist justification for a liberal norm of rights, on the other hand, is concerned with the overall consequences for, rather than specific duties towards, individuals, or people more generally (inclusive of a 'collective'). Such a justification would not necessarily consider rights understood in terms of liberty or equality themselves as the primary 'good' or value, but would justify rights on the basis for some

¹⁵ *The New Shorter Oxford English Dictionary*. Oxford: Oxford University Press, 1993

¹⁶ McNaughton, David. "Deontological Ethics". In E. Craig (Ed.), *Routledge Encyclopedia of Philosophy*. London: Routledge, 1998.

<http://www.rep.routledge.com/article/L015>

Accessed October 15, 2005.

¹⁷ Theorist of this tradition include (at least in part) the philosophical justifications of John Rawls, Ronald Dworkin, and Bruce Ackerman.

¹⁸ Gaus, Gerald and Shane D. Courtland. "Liberalism". In *The Stanford Encyclopaedia of Philosophy*, 2003: at Page 2. <http://setis.library.usyd.edu.au/Stamford/entries/liberalism> Accessed October 15 2005

other good they might provide for. Traditionally, a consequentialist justification might be conceived as mainly utilitarian, however, there are many ways in which this approach is imagined and used.

In one of its main expressions, ‘perfectionism’, consequentialism is generally associated with the work of John Stuart Mill in which the value placed upon ‘rights’ is associated with the ‘good’ that comes of freedom. In this traditional form, liberty is seen as providing the greatest opportunity for human improvement and development.¹⁹ The moral ‘end’ is not necessarily liberty itself, but what liberty provides. According to Gaus and Cortland in their overview of philosophic liberalism, “Mill’s *On Liberty* based the case for the primacy of freedom on the goodness of developing individuality and the cultivating capacities . . . on this view, the right thing to do is to promote development, and only a regime securing each individual extensive liberty can accomplish this.”²⁰ Thus, the perfectionist justification for liberal rights is based on the good consequences of rights rather than an inherent good of the rights themselves.

Related to perfectionism is the consequentialist justification for liberal rights based on the moral theories of value pluralism and value subjectivism. These alternative ontological views on value are related because they emphasise the importance of liberty for the ‘good’ because of the options they provide (similar to a perfectionist approach), but with differing reasons for *why* those options (or choices, and the ‘liberty to choose’ more generally) are good. According to a perfectionist justification, liberty is important because it is the best means for human development; however, from the consequentialist perspectives that incorporate value pluralism and subjectivism, it is because ‘the good’

¹⁹ *ibid* page 1.

²⁰ *ibid* page 1.

cannot be determined by a process external to the individual that liberal rights provide the best norm of governance. Nevertheless, neither of these moral theories concedes to value relativism. Both value pluralism and value subjectivism are ontological theories of the good because they assume that there is an *objective* good. In both cases however, the means of determining the good cannot be completely external to individual preference because the ‘good’ itself is either ‘subjective’ or ‘plural’. Both approaches also theorise the good differently from each other.

Contemporary value *pluralism* is based largely on the work of Isaiah Berlin. Theorists of this tradition argue that while there is objective value, there are many different values, and that some of these values might be incommensurable – that the relative worth of a value cannot be measured by the same standard. Contemporary value pluralists include George Crowder who argues that liberal rights are the best (although not necessarily the only) means to promote diversity²¹, and John Gray who argues for agonistic liberalism (a political, rather than legal or abstract approach to liberalism) that allows for the contestation in hierarchy of values, such that liberalism remains open to the demands of value pluralism.²² According to Crowder:

. . . [value pluralism] refers to not to people’s contingent beliefs about value, but rather to what actually is valuable or good for human beings independent of their beliefs about these matters. Value pluralism thus includes the idea of moral objectivity . . . It adds to this the distinctively pluralist view that these objective goods are also irreducibly multiple because ‘incommensurable’ . . . basic human goods (which may include liberty, equality, justice, loyalty, knowledge, and so on) are independent sources of value and ethical argument.²³

Similarly John Gray emphasises:

²¹ George Crowder. “From Value Pluralism to Liberalism”, in *Pluralism and Liberal Neutrality*, Richard Bellamy and Martin Hollis (eds). Frank Cass & Co., London (1999) at pages 2-18

²² John Gray. *Enlightenment’s Wake: Politics and Culture at the Close of Modernity*. New York: Routledge, 1995

²³ *supra* note 21 page 2.

The important point to note here is that if value pluralism is correct, then these are *truths*, correct moral beliefs about the world. The thesis of the incommensurability of values is not then a version of relativism, of subjectivism, or of moral scepticism, though it will invariably be confused with one or another of these doctrines: it is a species of moral realism, which I shall call 'objective pluralism'.²⁴

Value subjectivism, however, assumes that value will depend on a person's individual experience, historical contexts, desires, etc. such that the ability to exercise choice is essential to an individual's access to 'the good'. As opposed to value pluralism, value subjectivism does not assume that there is 'objective' value, but rather that value is by its very nature subjective. The link between value pluralism, subjectivism and liberal 'rights' is the argument that liberal rights are the best *means* to these other goods.

Pluralism more generally - the "multiplicity of beliefs and ways of life that are characteristic of modern society"²⁵ - as opposed to value pluralism (which makes certain ontological claims about the plurality of values), also plays an important role in contemporary deontological theories. Kantian contractualists will argue that the primacy of a duty to respect or ensure the rights of the individual allows for pluralism because it provides individuals the liberty to choose ways of life that best reflect their own values and identities. Rather than supporting a consequentialist argument that pluralism itself ought to be protected (or encouraged) Kantian contractualism is amenable to pluralism *through* the individual and as a result of individual liberty.

²⁴ *supra* note 22 at page 70.

²⁵ *supra* note 21 at page 2.

1.5 Communitarian critiques of liberal rights discourse

An important critique which applies to a 'deontological' approach to liberal theory is what has been called the communitarian critique. The communitarian critique has provided the base for some of the most substantial critiques of, and engagements with, liberal rights discourse in the last two decades; and although it no longer constitutes the most active theoretical engagement with rights theory today (and has been critiqued in its right), its contribution is relied upon heavily through its contribution of what have become established concerns over the individualism associated with liberal rights discourse generally, and with the deontological tradition more specifically.

As its name suggests, the communitarian critique of liberalism and its focus on 'individual' rights articulates the ways in which liberalism may be seen as problematic for the importance of community. However this critique is diverse in the ways in which community figures in. According to Daniel Bell, who has written prolifically on communitarianism, there are three main variants of the communitarian critique. Without suggesting that Bell's categorization ought to be accepted in any definitive sense, his categories of communitarian critique do provide a valuable starting point for discussion, and are:

- 1/ "methodological claims about the importance of tradition and social context for moral and political reasoning,"
- 2/ "ontological or metaphysical claims about the social nature of the self," and;
- 3/ "normative claims about the value of community".²⁶

²⁶ Daniel Bell. "Communitarianism" in *Stanford Encyclopaedia of Philosophy* 2004: page 1
<http://setis.library.usyd.edu.au/Stanford/entries/communitarianism/>
 Accessed October 15 2005

Beginning from the last, the third type of communitarian critique – normative claims about the value of community – is perhaps the least directly related to the liberal discourse on rights, depending on one’s interpretation. If interpreted as regarding the value of community to individual well being, this critique closely approximates the second category of critique, ‘ontological and metaphysical claims about the social nature of the self’. However, the way Bell uses this category is to engage in a more practical discourse concerning policies that focus on community well-being with the understanding that individuals need community well-being for their personal well-being. While not ‘theoretical’ in approach, this category maintains the individual as the ultimate subject of moral consideration, and closely approximates the second category only on a practical level.²⁷ However, this third category can also be interpreted as referring to the normative value of community where a *collective* is seen to be the subject of value independent of the value it may have for individuals *per se*.

In *Human Rights in a Pluralist World*²⁸, a book produced from two UNESCO conferences on human rights, the relationship between human rights and what has come to be called ‘collective rights’ is explored. Increasingly, ‘collective rights’ are argued to be basic *human rights*. While critics disagree, stating that the only subject of a human right can be a human being, others argue that collective rights reflect collective goods that are essential to human dignity²⁹, or that collective rights must be understood in the contexts of political struggle³⁰ - where inequities in power can only be appropriately challenged through collective identities. However, although these arguments have

²⁷ *ibid* at pages 16-24.

²⁸ Berting, Jan, et al. (eds). *Human Rights in a Pluralist World*. Westport: Roosevelt Study Center, 1990.

²⁹ *ibid* at page 34

³⁰ *ibid* at page 36

political appeal, they do not move rights discourse away from the individual as the ultimate bearer of rights:

There is a case to be made for a more holistic view that, borrowing a natural model from acoustics, thinks of the rights vested in the individual in terms of the 'fundamental' and their collective implications – the contexts for their effective realization – in terms of 'harmonics.' For, as we know, the 'fundamental' divested of harmonics is a sound without meaningful resonance, like the clashing of a cymbal; while the harmonic cannot be said to have a substantive existence divorced from the fundamental. Such a model would enable us to envisage the evolution of human rights in terms of their enrichment through the addition of new harmonics, rather than in terms of linear development. It would moreover provide, in a pluralist world, for a spectrum of approaches to human rights: it would enable each culture – like the instruments of an orchestra – to have its own distinctive voice while remaining securely grounded in the 'fundamental' of individual rights. That could be the basis for a genuine concert of nations in the human right field.³¹

As this concluding remark from the introduction displays, collective rights, and the value of community (such as providing solidarity, group identification, or other collective goods), are still predominantly viewed as *of value to individuals as the ultimate subject of consideration*.

This is not to say that there might not exist some arguments which look upon group identity as more than the sum of its parts, of moral significance beyond its significance to the individual, or that there may not be a sophisticated alternative interpretation of the relationship of individual to group that cannot be reduced to the individual as the subject of consideration. It is, however, to suggest that contemporary liberal discourse is still resistant to the idea of rights beyond those where the individual is the *ultimate* subject of consideration. This distinction might easily be confused with the distinction between deontological or consequentialist justifications for rights. However, both deontological and consequentialist justification for 'rights' generally (though not

³¹ *ibid* at pages vii-ix

necessarily) concern the individual as the subject of rights, but for different reasons. Consequentialist justifications usually focus on the individual as the ultimate subject of moral consideration, but on a value for the individual (or individuals) as a consequence of rights, rather than upon the duty to respect or provide for rights to the individual as the end in themselves. Interestingly, if the value of community *is* primary, liberal rights – concerning collective or individual goods – might still be agreed upon as a norm. This approach has been embraced in political liberalism.

Political liberalism describes those theories of liberalism where the ability to agree on certain liberal norms provides the justification for legitimate governance. This approach includes the account of ‘overlapping consensus’ that John Rawls argues for in *Political Liberalism*³² as well as Charles Taylor’s account of “Conditions for an Unforced Consensus on Human Rights”³³. In such a justification for the liberal norm of ‘human rights’, it is completely conceivable that the reasons for reaching consensus on certain rights as governing norms may not be based in a liberal conception of liberty, equality or individualism. In this case, it may be that the ends of rights might be conceived of as preferred norms because they suit some other value(s) best, or even adequately.

Bell’s first category - methodological critiques about the importance of tradition and social context for political and moral reasoning – concerns the universalistic claims of liberalism, in particular the ‘original position’ (from which subjects ‘imagine’ themselves outside of their own contexts to discover the principles that would be fair for everyone to live by) argued by John Rawls as a source for establishing universalizable norms. Bell describes this debate as ‘Universalism versus Particularism’, and cites the

³² Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1993

³³ Taylor, Charles. “Conditions for an Unforced Consensus on Human Rights”, in *The East Asian Challenge for Human Rights*. Bauer & Bell (eds), New York: Cambridge University Press, 1999

work of Charles Taylor and Alasdair MacIntyre as examples of the critique that moral, political, or legal principles cannot be abstracted outside of context, but are in fact context specific. In addition, Bell cites the work of Michael Walzer and Iris Marion Young who focus on the implications for distributive justice in an *abstract* conception of rights.³⁴ It is however, the second critique which has the greatest implications for this thesis and is the source of a rich liberal response.

The second category of critique - ontological or metaphysical claims about the social nature of the self - Bell describes as a critique of liberalism's individualism. Citing the work of Charles Taylor and Michael Sandel, Bell discusses the critique of the importance of the social to the individual identity and the need to secure more than individual autonomy in our governing norms³⁵. This critique is the one which will have the most relevance to the theme of this thesis because it raises the question of whether or not a deontic approach to liberalism in some way threatens the social identity of an individual.

1.6 Liberalism, Identity and Values

Thus far, value pluralism has been discussed in the context of consequentialist justifications for rights, and the relevance of pluralism to contemporary deontological justifications for rights only briefly considered. However, the idea of value pluralism along with ontological or metaphysical claims about the social nature of the self have been responded to through Kantian contractualism as well as what is sometimes referred to as 'contextual liberalism'.

³⁴ *supra* note 23 at page 2.

³⁵ *supra* note 23 at page 10

John Rawls for example, the creator of the idea of the ‘veil of ignorance’, has moved away from the detached, atomistic, rational agent as the necessary subject of his political philosophy. More recently, the trend in liberal theory has focused on the subject of liberal theory as a subject with a socially constructed identity, contextualised in a history, culture, and place. Just as Alasdair MacIntyre once criticised liberalism for robbing the individual of their narrative – the story in their lives which provides purpose and that is necessarily connected to a history and concept of the good³⁶ – liberal rights theorists have responded by arguing that the liberal subject is ‘situated’, and that liberal rights do not rob the individual of this identity, but in fact protect or enable it.

However, if the value-pluralists have it right, and values are not only plural, but incommensurable – how does a theory of rights, which is based on certain universalizable norms, respond to the problem of incommensurability? One response to this concern has been political liberalism, allowing room for differing justifications for agreed upon norms. Others, however, argue that a justification for rights itself is universalizable, and in fact, that value pluralism provides additional reasons for why such a justification is important. This is largely based on the argument that ‘the right’ and ‘the good’ can be distinguished.

According to this second position, ‘the right’ refers to a framework of basic liberal rights which can be neutral toward different conceptions of the good. In the theories presented by Jurgen Habermas and Rainer Forst, for example, universal rights based on ‘moral’ principles and enacted as positive law are distinguished from and the diversity of ethical norms. Ethical norms in turn are expressed through the liberty

³⁶ MacIntyre, Alasdair. “The virtues, the unity of human life, and the concept of a tradition”, in *Liberalism and its Critics*. Michael Sandel (ed), New York: New York University Press, 1984

provided by universal rights and may also become enacted as positive law without compromising universalised law. In this approach, differing values can be reflected as social, political or legal norms, so long as they do not conflict with the basic framework of liberal rights which allows and enables this diversity. True to a Kantian contractual tradition, universal norms must be agreed upon (or be generally and reciprocally justified) to qualify.

1.7 Engaging in the discourse

It is an implication of my argument that Western liberal forms of life are not, in truth, always worthy of allegiance: they may not be the forms of life that best meet the demands of the universal minimum content of morality, and their adoption may entail the loss of precious and irreplaceable cultural forms. A further implication is that, where the liberal form of life is worthy of allegiance, it is so not because it is in the form of life blessed by reason, or the one in which human beings are as such best flourish, but simply because it is an element in a choice-worthy tradition or form of life, to which some human beings find themselves constitutively, but at the same time contingently, attached.³⁷

In the above quote, John Gray, an advocate of ‘agonistic liberalism’ and value pluralism, touches upon several major themes in liberal rights discourse to which this thesis seeks to respond. Firstly, it is a starting point of this thesis that there is something worthy in the liberal conception of rights. Specifically, the ethos of equality and liberty as they apply to the individual as a moral subject is one that the author finds deeply compelling and that resonates with an intuition concerning the sense of justice that is invoked when people speak in a language of rights. The source of appeal that this ethos possesses may be due to a particular socially constructed history, the nature of the human mind, or even an ontological essence of justice that liberalism reflects – but such possible sources are not

³⁷ *supra* note 22 at page 86.

the subject of this thesis. Rather the subject of this thesis begins with the assumption of the value of such an ethos, and a value in exploring how it may be conceived, extended, and most importantly, identified within the liberal justification for rights to illuminate the contradictions of its extension through certain uses of the language of rights.

Secondly, John Gray speaks of a concern that the ‘adoption’ of Western liberal forms of life may entail the loss of ‘precious and irreplaceable life forms’. Unlike Gray, this thesis is not concerned with the potential for loss itself, but rather the inherent paradox it seems to present for the ethos of liberalism. When loss is the result of relations of domination or the imposition of norms, for example, it speaks directly of a violation of the principles of equality and liberty.

Finally, true to the philosophy of value pluralism Gray also emphasises that liberalism “is not the form of life blessed by reason, or the one in which human beings as such best flourish”. This thesis assumes a scepticism concerning our ability to know either the ‘right’ or the ‘good’ in any greater ontological or metaphysical sense. While those engaged in liberal rights discourse are resistant to value relativism (a conclusion that is sometimes the result of a sceptical epistemological position that challenges ontological value claims), often arguing for a softer pluralist position, the epistemological approach of this thesis is such that it seeks to avoid truth claims in any absolute sense and is even open to the possibility of value relativism. Thus, assuming that we can not ‘know’ the good or the right in this respect, the question this thesis responds to is: if we are committed to certain liberal values, how should we govern our relations with others who may not share our values?

This thesis is a response to, and a critique of liberal rights discourse. It engages specifically with theoretical justifications for rights and inspired by the ethos of equality and liberty imbued in the discourse, it has as its beginning point a commitment to the individual as the subject of moral consideration. It also takes seriously the concerns expressed in critiques that liberalism might deny some individuals full expression of their particular identities and values. Reflective of the paradoxes implicit in rights discourse, it is the very ethos of liberal rights that makes such a denial problematic.

The first part of this thesis is devoted to identifying and articulating the ethos described above – an ethos that informs rights discourse, but is not reducible to it. It is an ethos that is located within the deontological tradition, and includes theorist such as John Rawls, Ronald Dworkin, Bruce Ackerman, Jurgen Habermas (in his work on constitutional democracy) and Rainer Forst. However, it will be through a deep reading of Ronald Dworkin's classic work 'Taking Rights Seriously' that the following chapter will focus.

The second part of the thesis explores the existing critiques of neutrality – in particular those presented by value pluralism, as it applies to liberal deontological theoretical approaches. Departing from the established critiques, however, the chapter will develop a further critique of the neutrality of the language of rights from Jean-François Lyotard's concept of a 'differend'. These two critiques combined will form the argument that a language of rights, when used as a metalanguage for justice, is in conflict with the ethos outlined in the first part of the thesis.

The final part of the thesis will then explore alternative expressions of the ethos identified which might better respond to the critique developed in the second part of the

thesis. It will be argued that while the symmetry and *neutrality* imagined in liberal rights discourse is unattainable even on a theoretical level, by exploring the possibilities of asymmetry in our relations of duty in the form of generosity we may come closer to the very ethos that informs the discourse.

2. An Alternative Expression

In the first chapter of this thesis, the terrain of liberal rights discourse was explored. The purposes of this exploration were multiple and included establishing a working definition of liberal 'rights' as well to laying bare the ground from which this thesis emerges and situates itself. However, the purpose was also to begin the process of identifying an ethos of equality and liberty that emanates from within the discourse - and while it might be said that such an ethos is found throughout the discourse in a general sense, it was the theoretical tradition identified as a 'deontological approach' to rights that was selected as most strongly resonating with this ethos.

In the following chapter the work of Ronald Dworkin (as found in *Taking Rights Seriously*, 1977) will be explored with some depth. While there are numerous theorists who are generally identified with a deontological approach to justifying liberal rights (John Rawls, Bruce Ackerman, and some less obvious including Jurgen Habermas and Rainer Forst, to name a few), in *Taking Rights Seriously*, Dworkin provides an analysis of deontological justifications of liberal rights through the early work of John Rawls that strikes at the heart of the ethos this thesis examines. Indeed, his concept of a 'right to equal concern and respect' that is developed and presented in this piece has since served as a benchmark for how equality is understood in contemporary deontological liberal theory.³⁸ However, there are several other reasons that made this selection seem appropriate, and include his methodological approach (an approach with is compatible

³⁸ Dworkin, Ronald. "Justice and Rights", in *Taking Rights Seriously*. London: Duckworth, 1977. While Dworkin has published significantly since the time of this particular publication, I have choose to focus exclusively on his theory as expressed in this document, in part because of its significance and prominence in liberal rights discourse as well as because this chapter is more concerned with the conceptual analysis of liberal theory provided in this particular text than with representing the views of the author over time.

both with the epistemological assumptions of this thesis and which provides important clues to the role of duty in Dworkin's theory) as well as his distinction between rights and duty-based approaches to justice. Each of these elements provides important points of engagement as well as departure for the final section of this chapter, in which an alternative way of expressing the ethos of equality and liberty in rights discourse will be presented and used as a normative base from which a critique of rights as a 'meta-language for justice' will be developed in the following chapter.

In 1971, John Rawls wrote what is now a primary reference for liberal theories of justice and rights. In *A Theory of Justice*, Rawls argues for certain universal principles of 'justice as fairness' based on what 'reasonable men and women' would choose as governing principles if they had no knowledge of their actual identities (characteristics, preferences, social class, etc.). The 'Original Position' describes a hypothetical situation in which people would agree (in a form of social contract), whilst situated behind a 'veil of ignorance', to those principles and norms that ought to govern society.³⁹ While the Original Position has been criticised from a variety of perspectives (some of which were discussed briefly in the first chapter), its intuitive appeal has made it an enduring (although highly contested) concept. It is the intuitive appeal of the 'Original Position' that Dworkin seeks to explore and explain by probing into what he describes as Rawls' 'deep theory', i.e. those principles that inform the very conditions of the original position itself.

³⁹ Rawls, John. *A Theory of Justice*. Cambridge Massachusetts: The Belknap Press of Harvard University, 1971.

2.1 A Constructive Model of Justice

In some respects a defence of the Original Position, Dworkin describes the context in which the original position ought to be understood. In this case Dworkin is responding to the criticism that being bound by, or having norms imposed upon a person as the result of a *hypothetical* contract (one in which there is no actual participation or consent), is highly problematic for a theory of justice. Dworkin himself emphasises the normative significance of contract and the necessary conditions of consent that it entails (an emphasis that will be explored in greater detail to illuminate elements of Dworkin's 'deep theory'). However, he defends the Original Position against this particular critique by arguing that the Original Position was never intended as a binding form of social contract, but rather as an intuitive notion that appeals to our sense of justice, a notion that needs to be understood in the context of 'reflective equilibrium'.

Reflective equilibrium is a process developed by Rawls as a method for thinking about justice. Based on a coherence model of knowledge, it is a process in which the subject seeks to harmonize their moral intuitions with moral principles, or theories to explain those intuitions, such that they are consistent with one another. For example, if I have the moral intuition that it is wrong to cause my cat to suffer, then in a process of reflective equilibrium I might consider that intuition alongside other moral intuitions to the conclusion that the moral principle informing these intuitions is that I think it is wrong to 'needlessly', or excessively, cause any sentient being (any being capable of experiencing suffering) to suffer. This principle however, might have to be adjusted or reconsidered if I think it is okay for those beings, such as chickens or cows, to suffer if it means that I can buy cheap meat in the supermarket, or, it might mean that I would have

to reconsider or adjust my moral conviction that it is okay to buy meat in a super market. In either case, it is assumed that we ought to seek coherence amongst our moral convictions, both intuitions and principles, such that they do not contradict.

According to Dworkin, reflective equilibrium might be interpreted in two competing ways with very different significance for how we understand the Original Position. In the example described above, both moral convictions and moral principles are considered to be at least fallible, such that in a process of reflective equilibrium both are open to 'reflection' and reconsideration. However, if it is believed that certain convictions represent moral *truths* then those convictions could not be up for reconsideration, or as Dworkin describes it, it would be a case of 'tampering with the evidence'. This approach to moral knowledge Dworkin describes as a natural model of justice in which certain initial moral convictions are considered true in an objective and ontological sense. These convictions then serve as the evidence from which moral theories, or other, less certain convictions, must be adjusted. If inconsistencies occur between convictions that are both considered 'correct' it would be assumed that some unifying principle must exist, but has yet to be discovered. If applied to a theory of justice, then something like Rawls' Original Position might be conceived of as a type of moral evidence from which other theories must be adjusted. Thus a 'natural model of justice':

. . . presupposes a philosophical position that can be summarized in this way. Theories of justice, like Rawls' two principles, describe an objective moral reality; they are not, that is, created by men or societies but are rather discovered by them, as they discover laws of physics. The main instrument of this discovery is a moral faculty possessed at least by some men, which produces concrete intuitions of political morality . . . ⁴⁰

⁴⁰ *supra* note 38 at page 160

Dworkin argues however, that in reading Rawls carefully, it is clear that such a model does not represent the way in which Rawls intends reflective equilibrium, nor the Original Position, to be understood. Rather, the Original Position is meant to provide a (fallible) piece of intuitive evidence from which to consider and examine what we believe to be just. Thus, he argues, the Original Position ought to be understood within the context of a ‘constructive model of justice’, which “. . . does not support the policy of submerging apparent inconsistency in the faith that reconciling principles must exist.”⁴¹

In examining the Original Position, Dworkin is not satisfied with leaving the theory as a useful framework by which to think about just results. Instead, he wishes to take the process of reflective equilibrium a step further and consider what principles inform the original position itself and provide it with its intuitive appeal in the first place. These underlying principles are what Dworkin refers to as the ‘deep theory’ of Rawls’ theory of justice, and provide valuable insight into the type of ethos this thesis seeks to identify and engage. The significance of placing his analysis of the Original Position within the contexts of a ‘constructive model of justice’ is multi-fold. Firstly, by placing the hypothetical notion of the Original Position within the context of reflective equilibrium, it averts the critique that the ‘Original Position’ is meant to provide binding norms without due regard for the issue of consent. This is significant especially for its compatibility with demands for democratic, or procedurally constructed, concepts of justice. Rather than simply suggesting that we can establish governing norms deductively from the Original Position, understanding the Original Position in the context of reflective equilibrium (and a constructive model of justice) means that it serves as a way to think about justice rather than as a process that justifies *the imposition* of those norms

⁴¹ *ibid* at page 162

themselves. A construction model of justice has several other important implications however, which are not alluded to by the critique of the Original Position discussed. The way in which Dworkin presents his readers with the argument that reflective equilibrium ought to be understood in the contexts of a constructive model of justice involves an implied normative duty that takes *coherence* and the importance of *justification* very seriously when seeking legitimacy for a particular theory of justice. Rather than ‘submerging’ elements of a theory of justice that conflict, the implied duty is to *justify* to others through demonstrating that the theory is coherent. And finally, although it will not be explored or developed here in any depth, a constructive model of justice is epistemologically open and compatible with more sceptical approaches to ‘knowledge’. While this makes it more compatible with the particular epistemological approach of this thesis, its relevance is more nuanced and concerns principles of equality on a deeper level. In a very general sense, where a ‘natural’ approach to justice assumes ‘privileged’ access to knowledge about the just, fair, or right, a constructive model entails no such assumption. While the relationship between epistemology and ethics will be set aside, it is suggested here that the ethos of equality and liberty that is being explored can not only be adequately understood in the context of an epistemological openness, but is *better* understood through it.

In the following sections, and in much the same way that Dworkin probes Rawls’ theory of justice to uncover his ‘deep theory’, this chapter will probe Dworkin’s analysis to uncover principles which can be said to echo the ethos of equality and liberty in liberal rights discourse, and the constructive model of justice will serve as an important piece of evidence in identifying the significance of *duty* to Dworkin’s ‘deep theory’.

2.2 Duty and Rights

To identify the ‘deeper theory’ that lies beneath the Original Position, Dworkin looks to those conditions that define the position itself, i.e. the contract and the veil of ignorance. While the veil of ignorance demonstrates the significance of *equality* to Rawls’ deep theory (to be explored later in this chapter), equality is ultimately expressed in Dworkin’s interpretation as a *right* to equal concern and respect. This is because Rawls’ deep theory is identified as reflective of a ‘rights-based approach’, an approach that “takes rights so seriously as to make them fundamental in political morality”.⁴²

The key to this interpretation is the use of a contract. While it has been argued that the foundation of Rawls’ position concerns liberty as the logical result of the use of the contract, Dworkin argues that the *result* of the contract must not be confused with what infuses the contract with its moral-political significance, thus “[the contract] must be seen as a kind of halfway point in a larger argument, as itself a product of a deeper political theory that argues for the principles *through* rather than *from* the contract. We must therefore try to identify the features of a deeper theory that would recommend the device of a contract as the engine for a theory of justice. . .”.⁴³ In the step of reflective equilibrium that probes further, Dworkin seeks to understand why it is that we would want to use the idea of an Original Position in the first place.

The contract, according to Dworkin, pre-supposes an individual who must be *consenting* for a rule or law to be applied to him. The need for a consenting individual must take rights to somehow be ‘natural’ in the sense that they provide a beginning point

⁴² *ibid* at page 169

⁴³ *ibid*

for political morality, “. . . in the sense that they are not the product of legislation, or convention, or hypothetical contract.” According to this interpretation, rights are a beginning point because they assume a certain non-reducible sanctity to the necessary consent of an individual to have terms of a contract (or norms) made binding upon them. True to a constructive model of justice however, Dworkin uses the idea of ‘natural’ with caution, and qualifies it as something like a choice in fundamental concepts, a choice one would presume enters into this web of reflective equilibrium in which both our moral convictions and the principles imagined to support them are fallible and open for reconsideration:

. . . on the constructive model, at least, the assumption of natural rights is not a metaphysically ambitious one . . . This requires no ontology more dubious or controversial than any contrary choice of fundamental concepts would be, and, in particular, no more than the hypothesis of a fundamental goal that underlies the various popular utilitarian theories would require . . . the assumption that rights are in this sense natural is simply one assumption to be made and examined for its power to unite and explain our political convictions, one basic programmatic decision to submit to this test of coherence and experience.⁴⁴

What Dworkin identifies as a rights based approach is then juxtaposed against two others: a goal-based approach and a duty-based approach. The goal-based approach is one he associates with utilitarianism, where rights might be a valued norm, but valued for the sake of some other more important goal, such as the overall welfare of mankind, or in classic utilitarian formulation ‘the greatest good for the greatest number’. Similar to other forms of consequentialism identified in the first chapter, if rights of the individual are valued, they are valued as a means to some other end rather than as an end in themselves. Contrary to the categorisation provided in the first chapter of thesis however (which distinguished between deontological and consequentialists justifications for rights as two

⁴⁴ *ibid* at pages 176 to 177

primary categories) Dworkin introduces *within* deontological justifications for rights two further separate approaches – a ‘rights-based approach’ and a ‘duty-based approach’: A distinction that will be challenged by this thesis in preference for a relational understanding of ‘rights’.

According to Dworkin, a duty based approach is “concerned with the moral quality of his [the individual’s] acts, because they suppose that it is wrong, without more, for an individual to fail to meet certain standards of behaviour.” A rights-based approach, however, concerns “the independence rather than the conformity of individual action.” Although both approaches concern ‘moral rules’ and ‘codes of conduct’, Dworkin argues that rights-based approaches treat codes of conduct as instrumental, “perhaps necessary to protect the rights of others, but having no essential value in themselves.”⁴⁵ Thus, Dworkin identifies the ends of the two approaches as distinct. For one, it is the virtue of the act itself, for the other the freedom (or the ‘independence of individual action’) it provides. In this case, a norm concerning ‘rights’ may be relational in nature, but their justification (i.e. the ‘approach’), may not. In what could be described as an ironic extension however, if the purpose of the norm concerns the results they have, i.e. a state of freedom for the individual, rather than a concern for some type of virtuous behaviour on the part of the individual, then this approach to justification may better be described as a *consequentialist* rather than a particular form of deontological justification for rights (although still conforming to the classic association of the individual as ‘an end in themselves’) - rights become a form of ‘goal’ oriented justification, but the goal is the state of freedom provided for rather than any further results of that freedom. However, it will be argued here, that although Dworkin may appear to be concerned with the results

⁴⁵ *ibid* at page 172

of rights rather than the norm (or the code of conduct) itself, if that end –freedom - goal is understood as relational it will undermine the distinction between the duty in this case, and the result, and bring us to the significance of the norm itself as the center of the theory which, in its relational character, must include both duty and entitlement.

Freedom and liberty in liberal rights discourse often refer to the same concepts. Isaiah Berlin, for example, describes freedom and liberty to be generally understood as “. . . the degree to which no man or body of men interferes with my activity.”⁴⁶ In this case freedom (or liberty) as a state of being is defined according to a relationship between the individual and others. ‘Non-interference’ is not only a means to the end of freedom, but its defining characteristic, and without reference to the *relationship* between the person who is ‘free’ and those who might (if not bound by some norm) interfere, the word is vacated of its particular meaning in the liberal context.⁴⁷

Further, liberal rights discourse is consumed with freedom as a form of autonomy, and although autonomy, often laden with notions of an authentic will and the ability for an individual to know and express that will, at its roots concerns the idea of self-rule as opposed to a state of being ruled by others. As Berlin described *Four Essays on Liberty*:

The fundamental sense of freedom is freedom from chains, from imprisonment, from enslavement by others. The rest is extension of this sense, or else metaphor. To strive to be free is to seek to remove obstacles; to struggle for personal freedom is to seek to curb interference, exploitation, enslavement by men whose ends are theirs, not one's own. Freedom, at least in its political sense, is co-terminous with the absence of bullying or domination.⁴⁸

⁴⁶ Berlin, Isaiah. “Two concepts of Liberty”, in *Liberalism and its Critics*. Michael Sandel (ed), New York: New York University Press, 1984, at pages 15-16.

⁴⁷ While freedom or liberty is also often used to describe freedom from something other than the impositions of others, such as some other thing, or even feeling that is seen as an obstacle in some manner, such a use still involves a relation with that other thing as the constitutive element of its meaning.

⁴⁸ Berlin, Isaiah. *Four Essays on Liberty*. London: 1969 at page ivi

Thus, when Dworkin speaks of the significance of contract to Rawls' deep theory, he is concerned with the autonomy of the individual, the individual who is unbound by the rules of others unless s(he) consents to it.

To explore possible objections however, it is crucial to consider whether the argument can be made that the 'state' of freedom refers not to that relational moment between the individual and the absence of interference or domination by others - that the idea of a rights based approach *could* be severed from the norm or behaviour entailing duty in its development in liberal rights discourse.

In *Leviathan*, Thomas Hobbes describes what he calls a 'right of nature', which all men possess prior to entering a social contract:

THE RIGHT OF NATURE, which Writers commonly call *JusNaturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.⁴⁹

Hobbes further explains that the right of nature refers to unfettered action in which "everyman has a Right to every thing; even to one anothers body."⁵⁰ He uses this conception of a right of nature to support the conclusion that man's natural prudent reasoning will result in the decision to enter into a contract (forbearing certain natural rights) with a sovereign to obtain security. "The Right of Nature" is a right to liberty, but not a right to non-interference. It involves neither a forbearance on the part of others not to interfere, nor duty of the subject not to interfere with others. This begs the question of whether it is in fact a *right* (as interpreted here), or claim of entitlement at all. It is argued here however, that regardless of whether or not it is a 'right' or 'entitlement', this 'state'

⁴⁹Hobbes, Thomas. *Leviathan*. London: Penguin Classics, 1985. at page 189

⁵⁰ *ibid* at page 190

of 'liberty' could be described as a significant conceptualization of autonomy; not autonomy in the sense of non-interference (or idealised knowledge of self and will), but in the lack of a *duty* to anything outside the self. i.e. in a complete lack of duty to others. Although perhaps not a 'right', the concept of freedom in Hobbes' 'right of nature' is still defined by its relations to others, because it is defined by its absence of duty, and in a sense, the 'right of nature' is perhaps better understood as an *absence* of right, but an equal absence of right.

Thus, it is argued that what Hobbes identifies as a 'Right of Nature' should be thought of as a norm of non-obligation or duty. Such a suggestion however, by no means empties it of its relevance for liberal 'rights' discourse; in fact on the contrary. While it posits a norm in which there are no guarantees or protections of persons from the abuses of others, there is also an absence to be bound to those abuses as the result of duty. Within this dark story of man at war against man, we find the critical principles of equality and liberty essential to the liberal ideal, but through equality in the absence of duty to others. Freedom remains relational, but rather than relational in the form of entitlement, its defining characteristics concerns the role of duty.

The second argument explored here is whether a right (or freedom) could be understood in a non-relational form if it were severed from its attachment to equality. In such an imagining, rights are those moral (and/or political or legal) entitlements that one may have without any duty to grant a similar right to others. In a hierarchical society for example, someone may have complete and unfettered rights to anything, and this could be conceived as a right if all others within the society had a duty to either passively not interfere or to actively enable access to those things. In this sense, a right of an individual

may not entail any related duty which that individual owes to others. Thus a right could exist without duty within a norm applicable to one particular individual. However, while this is certainly not a liberal conception of right,⁵¹ it still doesn't escape its relational quality. Although the particular individual who has unfettered rights does not have obligations, others do. The norm itself must concern both the entitlements provided for, and some other duty to respect that entitlement.

The third argument considered here is for the separation of a rights-based and a duty-based approach on the basis of the *reasons* for why freedom (understood as a relational concept) is valued. From the perspective of psychological egoism, Rawls' 'reasonable men and women' are envisioned as basically self-interested individuals. As such, the argument of a just system appeals only to an individual's idea of what will likely benefit them personally, which is why the constraint of the veil of ignorance is a necessary condition - otherwise, individuals would simply choose those principles that would best serve them personally. But this ignores why we would choose to think about justice from the perspective of the Original Position in the first place. It is the conditions of the original position, in a sense the conditions that constrain individual self-interest, that makes it significant to a liberal concept of justice. It would be hard to imagine that the purpose envisioned in Dworkin's idea of a rights-based approach to justice (as fairness) would be conceived as simply a theory for how an individual might best secure interests for himself regardless of others (although this might be conceivable in the case of political liberalism). More importantly however, imagining a theory of justice without concern for others would be inconsistent with Dworkin's own commitment to a

⁵¹ It fact, equality in applying moral principles in a liberal framework would often not involve equal 'rights' of all sorts, but rather equal 'fundamental rights' such as the right to equal concern and respect that Dworkin advocates. As such, a right without a clear corollary obligation of a particular individual is still possible within a liberal rights framework.

‘constructive model of justice’, in which he clearly identifies what he considers to be a basic *duty to justify* the norms of governance to those who would be affected or bound by them, as:

[The constructive model of justice] demands that decisions taken in the name of justice must never outstrip an official’s ability to account for these decisions in a theory of justice, even when such a theory must compromise some of his intuitions. It demands that we act on principle rather than on faith. Its engine is a doctrine of responsibility that requires men to integrate their intuitions and subordinate some of these, when necessary, to that responsibility. It presupposes that articulated consistency, decisions in accordance with a program that can be made public and followed until changed, is essential to any conception of justice.⁵²

Thus, it is argued that contrary to Dworkin’s categorization of ‘deontological’ approaches to rights and his identification of Rawls’ theory of as a ‘rights-based’ rather than a ‘duty-based approach’, Dworkin’s interpretation of Rawls’ ‘deep theory’, and in fact Dworkin’s own ‘deep theory’ is a form of deontology, where rights and *freedom* - if understood as relational – aren’t conceptually separable from duty. Furthermore, it could be argued that the project of identifying ‘just norms’ implicitly concerns duty. A duty a subject feels compelled to endeavour to find, construct or understand the fairness of how we engage with others, especially when considered in the context of a commitment to equality. It is in this regard that Dworkin’s approach is in fact a deontological one in the classic sense of the central role of *duty*, because it ultimately concerns a concept of justice that is itself relation and inseparable from the norms it entails.

2.3 Equality

Responding to those who would interpret Rawls’ deep theory as based on the principle of liberty, Dworkin argues that in fact, it is the principle of *equality* within a ‘rights-based

⁵² *supra* note 38 at page162

approach' that sits at the foundation of Rawls' theory of justice. This he justifies with reference to the condition of ignorance placed upon the Original Position. In a similar approach to his analysis that Rawls' theory must 'take rights so seriously so as to make them fundamental to political morality', he argues that the intuitive appeal of the Original Position, and its greatest significance for a constructive model of justice, is the conditions of the original position rather than the results. Of equality, he argues that "... in one way Rawlsian men and women cannot choose other than to protect it. . . The right of each man to be treated equally without regard to his person or character or tastes is enforced by the fact that no one else can secure a better position by virtue of being different in any such respect."⁵³

The ignorance of the participants to this hypothetical contract demonstrates the significance of equality because "[m]en who do not know to which class they belong cannot design institutions, consciously or unconsciously, to favour their own class. Men who have no idea of their own conception of the good cannot act to favour those who hold one ideal over those who hold another. The original position is well designed to enforce the abstract right to equal concern and respect, which must be understood to be the fundamental concept of Rawls's deep theory."⁵⁴ By imposing the condition of ignorance, the Original Position inherently limits the choices that would favour one identity before another. As a condition, it implies that fair, or just, outcomes are associated with those outcomes which do not favour any one set of interests above another based on *who* those interests would belong to, supporting Dworkin's thesis that equality is fundamental to Rawls' deep theory. The form which Dworkin articulates this

⁵³ *ibid* at page 179

⁵⁴ *ibid* at page 181

principle is then married to his concept of the importance of rights as the ‘right to equal concern and respect’. However, what exactly a ‘right to equal concern and respect’ entails needs further consideration and exploration.

As discussed briefly in the first chapter of this thesis, there are a variety of ways in which the idea of equality has been used and conceptualised in liberal rights discourse. A typical categorization might include, for example, equality of right, equality of opportunity, and equality of result. Each of these ideas concern a normative claim about how a subject ought to be treated. What unites these ideas, and lies at the centre of Dworkin’s ‘right to equal concern and respect’ is that the person (the individual) is always considered of equal moral worth in some way, with differences in imagining how that worth is seen to be best protected or respected. Equality of right, for example, would signify that all people would have equal rights which they can claim, and are treated ‘equally’ according to those rights. Equality of opportunity may entail that people are treated differently, such that there is a more level playing ground from which people may make claims. Advocates of equality of opportunity recognise that ‘formal equality’, the equality of right that allows one to make the same rights claims as anyone else, does not account for the substantive difference in peoples real and specific lived situations, in which such right claims may have markedly different implications. Equality of result moves further along this spectrum and concerns human needs and dignity in such a way that regardless of what right or opportunity is available to an individual, it is the duty of a particular governing system to ensure certain needs are met. In this case it is a duty concerned with the substantive results it provides for people.

What these three approaches share is a conception of a duty toward the individual, a duty that somehow imagines the individuals as equal in something like moral consideration. According to Dworkin, fundamental to the theory of justice as fairness is “a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings”⁵⁵. By emphasising that it is a right owed to them *not* by virtue of any particular characteristic they possess or the particular ‘identity’ they are born into, but ‘simply as human beings’, he emphasises the difference between an equal right to respect and concern, and equality in a descriptive sense.⁵⁶

The ‘deep’ theory which I would like to draw out from this discussion would be that in this liberal approach the object of a theory of justice (a human being) is considered to be worthy of ‘equal consideration’ in the application of moral principles informing that theory of justice, and; that this theory of justice is a deontological one in the sense that it concerns a normative theory about the relationship of the self and other, articulated as

⁵⁵ *ibid* at page 182

⁵⁶ However, upon closer scrutiny, this distinction begins to disintegrate because a *right* to equal concern and respect is contingent on the subject having certain characteristics that qualifies them for this right, in Dworkin’s case it is firstly because they are human beings. This is qualified further still, however, by a Kantian conception that the *reason* for why certain subjects are morally considerable is because these subjects have a capacity for “correct” moral reasoning themselves - thus the inclusion of the characteristics of human being and then more specifically, human beings with a “capacity to make plans and give justice”. In this respect, Dworkin’s identification of a more abstract and fundamental conception of equality, the kind of equality that evokes an important intuitive response, is a right that is not completely disengaged from descriptive content of the subject of rights, albeit highly abstract and inclusive in their substantive content. This has significant implications for ethical theory. For example, in her article “Who are Laws Persons? From Cheshire Cat to Responsible Subjects” (MLR 66(3), May) Ngaire Naffine, provides an account of the different ways in which ‘persons’ have been imagined in the law. Within this account she draws important attention to the exclusive nature of some of these approaches, identifying the ‘rational subject’ as one such example. Who is considered a person before the law, and in political theory has important implications for both who is left out, and (I would add) for those who may not be served through inclusion. Of those excluded for consideration according to Dworkin’s criteria expressed in *Taking Rights Seriously* would be children, the mentally incompetent, and certainly any being who is ‘non-human’. Further, the Kantian slant of the ‘characteristics’ of the moral subject denote a dangerous idea that only those capable of ‘correct’ moral reasoning are the objects of justice. Although this is apparently qualified by the provision that there is not objective measure of such reasoning, it would seem to have potential implications for those who hold a highly distinct sense of morality from that which the individual considering such a model possesses.

‘rights’ that concerns the duty ‘owed’ to others out of respect and concern for their equal moral worth. It is from these premises of deontological liberalism that I propose an alternative interpretation of the ‘ethos’ of equality and liberty in liberal rights discourse that is not reducible to imagining relations in terms of ‘rights’. This alternative interpretation, or approach, works from a marriage of ‘duty’ and ‘equality in moral consideration’ and will allow for theoretical consistency and a freedom in critiquing rights discourse without discarding some of its most inspiring principles.

2.4 Relational Equality and Duty

In *Freedom and Reason* (1963) R.M. Hare presents an argument for the universability of moral statements - the idea that any two or more relevantly similar objects being morally evaluated must receive the same moral evaluation.⁵⁷ Universality in this case does not refer to the universalism often associated with liberal rights discourse in which it is assumed that one can abstract rights through a rational process that are necessarily just in all cases, or that principles are somehow externally valid in themselves. It does, however, concern a certain process of abstraction and application of principle. It is the idea that a *principle* ought to be applied equally to *all persons* if they are conceived to be of equal moral considerability.⁵⁸ Thus equality in this respect is a relational rather than a

⁵⁷ Hare, Richard Mervyn. *Freedom and Reason*. Oxford: Oxford University Press, 1965 at page 33. While many discuss ‘equality in consideration’ in contemporary rights, Hare is associated with emphasizing the link between reason, certain logical forms, and concepts of equality. See for example: Timmons, Mark. “Logic of Ethical Discourse”, in E. Craig (ed), *Routledge Encyclopedia of Philosophy*. London, Routledge.

⁵⁸ Ironically while this principle will be used here to support a deontological interpretation of ‘the ethos’ of liberalism, Hare uses it as a justification for utilitarianism, and certainly it is a good fit. If people have equal ‘moral worth’, then there is a strong argument to consider the value of human good (whether that be understood as freedom, wellbeing or some other goal) cumulatively such that there is the greatest overall good for the greatest number of people. Without delving into the depths of the debate between utilitarianism and deontological approaches to liberal rights, I will argue that the general logical form of applying a principle equally doesn’t lead necessarily to a utilitarian approach, but is ‘open’ in the sense that the results of the process will depend upon the principles applied.

descriptive concept. It concerns the application of moral principle toward moral ‘objects’ from the perspective of a subject making moral assessments. If imagined in mathematical terms, a principle would function like an equation, and ‘human beings’ as the variables which are not distinguished from one another based on any particular characteristic when the equation (moral principle) is applied. By extending this concept of equality to the relational interpretation of liberty, one finds the skeletal structure of a deontological liberal ethos.

2.5 A Linear Continuum Expressing Equality in Duty

The linear continuum presented here describes different ways in which duty might be expressed according to a principle of equal application. Within the spectrum, three points are identified starting from an absence of duty and proceeding to asymmetric duties:

- a) Equal absence of duty
- b) Equal and reciprocal duties
- c) Asymmetrical duties of generosity

Within the first point along the ‘spectrum of duty’ – equal absence of duty- one finds the type of freedom which Hobbes describes as ‘The Right of Nature’. This is a concept of freedom in which individuals equally ‘have a right to everything’ as Hobbes would describe it, or in which there is an equal absence of duty or entitlement. This vision of relationships is an integral part of liberal rights discourse because it establishes the basis of autonomy as self-rule by creating an argument that none (until some contract has been consented to) have a ‘right’ or claim of duty over others.

The second point along the continuum is where most contemporary rights

discourse falls. It concerns an equality in liberty where ones 'liberty' ought to only be limited by the equal liberty of others. Not only are none obliged to an asymmetrical relation of domination/submission, but all are equally entitled to some aspect of self rule, and all are equally obligated to defer to that right in others. Where the language of rights takes hold and entitlement claims are made in the name of equal consideration and respect, equality of right, a basic right to justification, democratic participation or representation in the norms which govern individuals and groups. In the ultimate paradox of liberalism, equal concern in the formation of rights and norms of governance always involves some concession of the autonomy envisioned in the first position within a spectrum of duty of 'equal absence of duty'.

The third point along the continuum – asymmetrical duties of generosity – might at first appear the furthest away from the type of equality and liberty identified as reflecting a liberal ethos. However, if asymmetrical relations are conceived as a form of generosity rather than an externally imposed duty it does not compromise the principles of autonomy.

By creating a mirror image of rights discourse through the lens of equality in duty it is hoped that this chapter has accomplished two tasks: the first to capture something of the ethos of equality and liberty in a way that makes sense of some of its most significant deontological expressions. The second, to do so in a way that allows us to reflect on rights and challenge them without being trapped in its image – i.e. to find a language that can be used to critique rights discourse without reverting to it.

In the following chapter, a serious critique will be assaulted upon the second position of this spectrum. By challenging the arguments made by many liberal theorists

(considering in particular the work of Rainer Forst) that legal norms can be *neutral* to plural identities (ethical, cultural, *linguistic*), the paradoxically *unequal* consideration of others that occurs within this position will be explored (with particular reference to the concept of a differend developed by Jean-François Lyotard). It will be argued that while asymmetrical relations of generosity may at first sight least resemble the ethos of equality and liberty found within the liberal rights discourse, it may in fact be this position that best responds to a need to do justice to that ethos.

3. A Language for Justice

Of the many meanings given to 'neutrality' in the Oxford English Dictionary, it is the meaning given for the field of physics that might have the greatest significance for contemporary rights discourse. Neutral, as an adjective, refers to "designating or situated at a point or on a line or plane where opposing forces are in equilibrium."⁵⁹ If one were to imagine a see-saw, 'neutral' would be that point where its supporting center (its fulcrum) would be placed such that the see-saw remained in perfect equilibrium: neither end advantaged at the expense of the other, neither end 'lifted' such that the other was 'lowered'.

The political meaning of neutrality is quite distinct and refers more directly to the relationship among states. For example, a neutral state would be one that simply took no part in a conflict, stepping aside to allow the competing interests and powers to fight it out for themselves, i.e.: "not assisting or actively taking the side of either of two belligerent States or groups of States at war; taking neither side in a dispute, disagreement or controversy."⁶⁰ This political notion of neutral differs substantially from the first described. Rather than referring to a point which maintains an equilibrium between two sides, it describes a position separate altogether. The first definition refers to a balancing point on (or within) the see-saw, the second definition has nothing to do with maintaining the equilibrium between the two sides - which way the see-saw falls. It would be a position somewhere else in the play-ground altogether. The first describes

⁵⁹ *The New Shorter Oxford English Dictionary*. Oxford: Oxford University Press, 1993. page 1910

⁶⁰ *ibid*

finding that place of balance or fulcrum, the second describes a place external to the balance.

In the second chapter, contemporary ‘deontological’ rights discourse was described as expressing ‘equality’ of duty where not only are none obliged to an asymmetrical relation of domination/subordination, but all are equally entitled to some aspect of asserting their self-rule, and all are equally obligated to defer to that right of others. The ideal of neutrality in the norms of governance is the mechanism that allows for the image of symmetry to remain intact. It will be argued in this chapter, however, that the neutrality of norms envisioned in this position attempts to occupy both definitions of neutrality just given – attempting to situate itself such that opposing forces are brought into equilibrium AND to situate itself such that it is removed from those forces, occupying no ‘place’ on the see-saw. In doing so, the ideal of neutrality masks its own asymmetry, blinding liberal rights theory to its impositions - to its subordination of alternative discourses of justice.

3.1 The Right, the Good, and the Context of Justice

A critical claim of liberal theory is that the state (or liberal system of governance) can govern deontologically in such a way that it is ‘neutral’ to different conceptions of the good – allowing individuals (and communities) the freedom to live according to their own ethical beliefs and identities, such that one person’s conception of the good is not imposed upon another. Thus, the liberal theorist distinguishes between the ‘good’, i.e. different conceptions of how one ought to live, and the ‘right’ – those universal norms that are ‘neutral’ to conceptions of the good and allow their expression provided they are

not preventing the equal rights of others to do the same. As Jeremy Waldron, who has written extensively on the subject of liberal neutrality, describes it:

Neutrality itself and the principles associated with it, such as justice, freedom and individual rights, are principles of political right: their point is to define a framework within which individuals ought to be able to pursue any conception of the good they please. The conception they choose must of course fit within the framework of right, for the framework exists in order to ensure that each person's pursuit of the good (as they see it) is compatible with everyone else's pursuit of the good (as they see it). In this sense, the right is said to be prior to the good, even though the right exists in order to accommodate the good.⁶¹

However, as discussed in the first chapter, there are those who would criticize this conception by arguing that the necessary abstraction and universalism that accompanies such a rights based approach has the consequence of denying people their ethical identities – identities that are constructed in the context of community and intersubjective meaning - that the 'rights bearing individual' is necessarily ripped from his or her context of identity to become a subject of such rights. While many contend that one can be the subject of rights while still expressing diverse ethical identities and values, the most systematic theoretical defence of the compatibility of such a rights-based approach (that is both universal and abstract) and diverse identities is presented by Rainer Forst in his book *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism* (2002).

According to Forst, there are certain principles which can be understood as distinct from general conceptions of the good, and can justify certain legal norms as *neutral*. Moving away from the language of the 'good' and the 'right', Forst makes this distinction based on a conceptual separation of the 'moral' and the 'ethical' person.

⁶¹ Waldron, Jeremy. "Neutrality, Political". In E. Craig (ed), *Routledge Encyclopaedia of Philosophy*. London: Routledge, 1998. Retrieved October 26, 2005, from <http://www.rep.routledge.com/article/S041SECT4>

However, a clarification in terminology will be useful, as the meaning which Forst associates the terms are somewhat different from their ‘conventional’ usage.⁶²

Generally, an ethic refers to a system of (or a logical relationship between) morals⁶³. It is a system that provides a structure, a methodology, or an approach to thinking through moral issues. If considered in reference to a process of reflective equilibrium, for example, it might be conceived as the methodology of reflective equilibrium itself, or a combination of convictions and principles that is developed into a system that makes sense of those convictions and principles. Morality, on the other hand, has tended to be defined according to specific convictions. In Forst’s usage, however, these meanings are (in a way) reversed. Rather than the moral referring to the particular, and the ethical to the abstract principles that make sense of our moral convictions, morality is the abstract, the *principles* of justice which are argued to be universal - and the ethical are those values which are *specific* to the individual or community.⁶⁴

From this meaning of the moral and the ethical, Forst argues that moral norms are universal, and protect the specific, *contextual* identities of individuals. This is because moral norms, according to Forst, can only qualify as such if they are justified according to the principles of reciprocity and generality. The generality of moral norms refers to their universability. They are not imposed upon people, or deduced from any ‘higher’ principles, but rather, they are those norms which can be discursively agreed upon. Thus generality, rather than containing any specific rights *per se*, is a limiting condition upon norms that are discursively produced. If they can be applied generally, it is because they

⁶² By conventional, I refer both to my own previous experience with the term, but also as defined within the Oxford English Dictionary.

⁶³ *supra* note 59 at page 856.

⁶⁴ This approximates, but doesn’t replicate, the sociological use of the terms in which ethics are considered to be subjective guides to how one should live or act, where ‘morals’ are external rules or codes of conduct that prescribe the behaviour of members of a particular community.

can be accepted generally. Reciprocity, on the other hand, refers to the idea that if something can be accepted as 'general' it must also be reciprocally provided for.⁶⁵ Just as in Hare's description of the universability of moral principles, it is not enough to apply them to the self (or the other) in any particular instance, but that they are applicable equally to all persons. Thus, if one concedes of a principle as general, one must also be willing to respect its application to others. As applied to 'rights', only those rights which can be 'generally' justified might be understood as 'universal', and if they are universal they must be reciprocally provided for. Thus 'moral' norms constitute those which can be generally and reciprocally justified and legitimated such that they are both granted and accepted universally. This is essential for Forst's argument for the neutrality of law, because "the identity of the legal person presents, as it were, the external abstract cover for the *ethical person*; it protects the particular identity of a person and at the same time constrains it according to universal principles."⁶⁶ Positive law may reflect ethical identities, and not only 'moral' ones, but they must do so without conflicting with universal moral norms.

In responding to communitarian concerns, Forst stresses that an individual can be understood as a deontological subject without association to a specific type of 'identity'. What he means by this is that an individual can be understood as a *moral subject* without having to succumb to an identity classically conceived in liberal political theory – i.e. a self-interested agent separable from his or her social (and historical) context. As a deontological subject, s/he is owed moral consideration (to have norms reciprocally and generally justified), but s/he is not confined to an identity as a self-interested agent. Forst

⁶⁵ Forst, Rainer. *Contexts of Justice*. Berkeley: University of California Press, 2003 at pages 80 to 81.

⁶⁶ *ibid* at page 25

pays tribute to the idea that individual identities are not ‘chosen’ but are constructed within their social realities, and that those identities are reflected in diverse ethical, political, and legal norms. This, he contends, is not in contradiction with universal morality and the ethical neutrality of the law, because those norms which are universal are only those which can be justified to all, and while they *limit* what can be legitimately enacted as positive law, they only limit according to the basic principles of reciprocity and generality. This limitation is the basis for the neutrality of law.

Recognition of the threshold of reciprocity and generality is a normative demand that is indispensable for members of a legal community. The principle of neutrality, which implies this threshold (and the boundary between contexts of justification), serves therefore in liberal theory to justify individual rights to freedom of ethical self-determination within the bounds of morality. These individual rights are reciprocally justified, negative rights to the possibility of determining ‘positive’ projections of ways of life. . . ⁶⁷

Thus, Forst seeks to define neutral law as situated on the see-saw of identity, such that individuals are free to express their diverse ethical identities (and create positive law that reflect those identities) so long as they are limited from preventing others from doing the same. Through the principle of generality and reciprocity, Forst expresses that position on the second point of the continuum of duty – equal and reciprocal relations of duty. Importantly, he does so such that rights and duties are not understood as ‘imposed’ from above, but (as is a common theme in contemporary rights discourse) as discursively constructed through a process of justification.⁶⁸ In this way, it is argued that legal norms, and universal rights, can be understood as neutral without preventing context specific expression of ethical identity – in essence, reflecting the classic liberal distinction

⁶⁷ *ibid* at page 45

⁶⁸ It would be prudent to ask whether these theoretical imaginings are in themselves possible to implement in the ‘real world’. The literature of cosmopolitanism for example, delves into questions on the efficacy of different governing institutions to respond to such ideals, and indeed, how those ideals ought to be interpreted. While this is an important point of inquiry, it is not an inquiry with which this thesis engages.

between the ‘good’ and the ‘right’.

Basic individual rights are therefore guaranteed by norms that ‘cannot be reasonably rejected,’ norms that conform to the *strict* criteria of reciprocity and generality. Thus no person can *reciprocally* dispute with good reasons another person’s rights and justified claims that he or she asserts for him- or herself e.g. the right to one’s own way of life and any argument that generalizes ethical values must be formulated in a way that can be accepted generally. Reasons must be justified in strict reciprocity and generally legitimate norms that, by observing the ‘threshold’ established by these two criteria, do not violate a persons’ elementary rights claims to autonomy and grant these claims – through the positivization of such norms – a concretized, protective legal status. . . Basic personal rights are rights to personal autonomy within the limits of generally justified principles – they can be *defended* or *restricted only* by strict, moral-universal arguments. In this sense they are *justified* (and always justifiable), not simply ‘given’ *basic* rights.⁶⁹

Because each individual is understood as a deontological subject, none are obligated to asymmetrical relations of domination and submission; all are bound by the norms that are generally and reciprocally justified. Thus, while the right to justification is universally available, its universality is only ‘imposed’ to prevent non-universalised norms from being imposed upon those who do not share the same ethical values.

However, occupying a ‘place’ on this see-saw has complex implications and reflects the difficulty in deciphering the meaning of neutrality. To occupy a place entails an involvement in the relationship between values, but it is an involvement imagined as separate from those values it seeks to maintain in equilibrium. Whether it is the distinction of the ‘right’ versus the ‘good’, or the ‘moral’ versus the ‘ethical’, the implication is that neutrality is both actively involved in protecting the ‘right’ or the ‘moral’, while somehow remaining neutral to the ‘ethical’ or the ‘good’. While the specific value of ‘neutrality’ is invoked to balance the autonomous claims of others, it is antithetical to those claims which threaten that balance. According to Jeremy Waldron, it

⁶⁹ *supra* note 65 at page 80-81

is for this reason that liberal theory cannot adequately respond to the criticism of

Communitarianism:

Liberals believe that the shaping of human lives by the individuals who are living them is a good thing, and so they adopt principles of right (including the principle of neutrality) which seek to minimize the coercive impact of other people's views on that process. It is true that some individuals choose to shape their lives (or would like to shape their lives) in accordance with a communitarian conception. But that choice amounts in part to a proposal to govern or interfere with others' shaping of their lives, and this the liberal cannot tolerate. In other words, far from the liberal being required to be neutral between communitarian and non-communitarian conceptions of the good, the liberal's adoption of the neutrality principle is an expression of opposition to the very idea of a communitarian conception of the good.⁷⁰

The extent to which the 'shaping of other peoples lives' might be understood as 'interference' versus a natural process of socially constructed identity would however, depend on a number of factors, including the concept of autonomy being used.⁷¹ As such, it would seem that the theory of justice presented by Forst could be used to support an argument that Waldron exaggerates the proximity of some ethical norms to the threshold of morality. But this does not resolve the question of the complex (and paradoxical?) nature of neutrality itself, as neutrality is antithetical to those positions which are non-neutral. For example, within the 'spectrum of duty' described in the last chapter, the second position (described as the contemporary liberal notion of symmetrical and equal

⁷⁰ *supra* note 62

⁷¹ As discussed briefly in the first and second chapters, autonomy, which generally refers to 'self' rule, is a relational concept which can be interpreted in a variety of ways. For example: it can mean that none is obliged to 'external' rule, such as in a Hobbesian state of nature; it could refer to a state of 'negative freedom' in which others have a duty not to interfere with one's self-rule, however, autonomy, as discussed in the context of Isaiah Berlin's description of positive freedom, is also sometimes defined as the 'true' uninfluenced will of the individual exercised as self-rule. In this last case, the social construction of identity would be problematic if interpreted as a form of 'brain-washing' or influence which would steer an individual away from his or her 'true will'. It is assumed that deontological theory as represented by Forst for example, does *not* accept this latter version of autonomy.

obligation) demands the act of *governance* to provide for that ‘balance’.⁷² Thus, within liberal rights discourse, ‘neutral’ describes those institutions, systems or ‘authority’ which govern such that none are (theoretically) subjected to asymmetrical relations of duty *and* that all are guaranteed certain equal *rights* to their own self-governance. In this sense, it is not only universal in application, but plays an *active* role in the governance of relations, and suppresses those that would ‘tip’ the see-saw, or as Waldron describes, “. . . neutrality is itself a value: it is a normative position, a doctrine about what legislators and state officials ought to do.”⁷³

This value, while incapable of being neutral to those positions which resist it (such as those which would see certain relationships of domination and subordination imposed), may in fact be a value that best reflects an ethos of equality and liberty through a particular interpretation/expression of equality in duty. Certainly, to argue that it *is* a value does not dismiss it as a value of worth, but it remains important to unravel its assumed meaning and reflect upon the implications of this meaning for the ethos discussed in this thesis. While neutrality as used by Forst and other liberal theorists concerns an active governing duty to equally protect autonomy, it is decidedly not ‘neutral’ about the values that inform it or come into contestation with it – it does not sit somewhere else in the playground, comfortably independent and non-engaged with what way the see-saw tips rather, it defines its role actively enforcing its interpretation of equality in duty.

⁷² The extent to which liberal rights theory entails a role of governance is certainly contestable, particularly as it applies to those conceived of as ‘outside’ of, or separate from a liberal community. However, recent trends in cosmopolitanism as well as the popular concept of universal human rights all suggest that liberal rights theory is moving in the direction of an inclusive nature.

⁷³ *supra* note 58.

What will be argued in the next section is that the interpretation of equality of duty expressed in rights discourse is not only not neutral to those values that contest it, but that by imposing the terms of discourse it specifically imposes asymmetrical expectations of duty upon those it governs. It is often argued in liberal rights discourse that as long as rights are ‘open’ to be discursively constructed, democratically consented to, or reciprocally and generally justified, they constitute a *neutral* language of justice.⁷⁴ The imagined neutrality of the language of rights is often conceived as both situated on the see-saw, but also independent of it as a value *different in kind*. By constructing the dichotomy between ‘right’ and the ‘good’, or between the ‘moral’ and the ethical’ it not only justifies its imposition above other values (as their referee in a sense), but it blinds those in the discourse to the claims of justice it subordinates and *silences*.

3.2 A Metalanguage for Justice

A new ideal has triumphed on the world stage: human rights. It unites left and right, the pulpit and the state, the minister and the rebel, the developing world and liberals of Hampstead and Manhattan. Human rights have become the principle of liberation from oppression and domination, the rallying cry of the homeless and the dispossessed, the political programme of revolutionaries and dissidents. But their appeal is not confined to the wretched of the earth. Alternative lifestyles, greedy consumers of goods and culture, the pleasure seekers and playboys of the Western world . . . have all glossed their claims in the language of human rights . . . Human rights are trumpeted as the noblest creation of our philosophy and jurisprudence and as the best proof of the universal aspirations of our modernity, which has had to await our post-modern global culture for its justly deserved acknowledgement. – Costas Douzinas, *The End of Human Rights*. Oxford: Hart Publishing, 2000 at page 1

From its more obvious expression in the ideal of human rights to its deft incorporation (both on a constitutive and justificatory level) in theories of global democracy, the

⁷⁴ Liberal theorists Jurgen Habermas and Rainer Forst, for example, argue this position.

language of rights is *pervasive*, further, it is often presented as, or assumed to be *universal*.

‘Universal’ is an adjective often used to describe something that is thought to be applicable in *all* cases. From the perspective of deontological rights theorists, it is generally assumed that rights are not only open and malleable enough to reflect the values of those who ‘have’ them, but that they are essentially neutral such that they may serve as a universal language of justice. Thus, rights discourse is imagined as a universal language of justice that serves as an authoritative framework through which we can consistently adjudicate what is just. Another way of describing this imagined universal language of justice would be as a *meta-language* for justice. A meta-language refers to a level of language that is, in a sense, a ‘higher’ language that can adjudicate between different discourses. The use of the concept of a meta-language is helpful because it both builds upon the idea of universality but it also articulates a *relationship* directly with other languages. What is argued here is that while the relationship between a meta-language and other languages is imagined to be universally inclusive, it is necessarily repressive to alternative concepts of justice – and mystifying the relations of dominance and subordination. This argument begins from the very meaning of ‘discourse’ itself and how it relates to the way in which we might *think* about justice.⁷⁵

Discourse theory is a broad and heterogeneous genre. In a very general sense, a *discourse* refers to more than single phrases or speech acts, and represents the inter-subjective meanings of signs within a particular social/cultural context. According to the *Johns Hopkins Guide to Literary Theory and Criticism*, “a ‘discourse’ is not merely a

⁷⁵ The reference to discourse in this section is distinct from the meaning given to ‘liberal rights discourse’ in the first chapter (which was used to describe a particular academic tradition). In this section the sociological meaning of discourse concerns more directly the idea of a ‘language of rights’.

linguistic unit, but a unit of human action, interaction, communication, and cognition”⁷⁶.

Although discourse theory generally accepts a distinction between a ‘reality’, the signified (or mental image/concept) and the signifier (or ‘sign’), it also draws attention to the relationship amongst these component parts. According to such theory, these meanings cannot be abstracted from their cultural context. As such, the social influences not only how the signified (or concept) becomes expressed, but also the concepts (and cognition) themselves. In essence, the social influences how we know and experience the world by shaping the signified itself.

Thus understanding rights as a *discourse* is significant in several ways. Firstly because of what discourse, and language theory can tell us about how our concepts are both shaped by our social world as well as how our concepts shape our experiences of the world. This is not to suggest that a discourse will create a ‘false’ experience of a reality (as is sometimes implied in the meaning of an ideology), but rather that it will privilege a certain form of experience above another. Secondly, it will influence *what can be expressed* and *how* or *if* it will be expressed.

The concept of a *differend* advanced by Jean-François Lyotard is helpful in considering the implications of discourse for a language of justice. A differend refers to the moment or juncture when two heterogeneous discourses interface in a conflict *and* when there is no common language to (equitably) adjudicate between the two:

As distinguished from litigation, a differend would be a case of conflict between (at least) two parties that cannot be equitably resolved for lack of a rule of judgement applicable to both arguments. One’s side legitimacy does not imply the other’s lack of legitimacy . . . a genre of discourse supplies a set of possible phrases, each arising from some phrase regimen. Another genre of discourse supplies another set

⁷⁶ Michael Groden and Martin Kreiswirth (eds). *The John Hopkins Guide To Literary Theory & Criticism*. Baltimore: The Johns Hopkins University Press, 1997
http://www.press.jhu.edu/books/hopkins_guide_to_literary_theory/discourse-_1.html

of other possible phrases. There is a differend between these two sets (or between the genres that can call them forth) because they are heterogeneous. And a linkage must happen 'now'; another phrase cannot not happen.⁷⁷

and that:

A case of differend between two parties takes place when the 'regulation' of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.⁷⁸

Indeed, it may provide a valuable exercise to consider examples of moments when a phrase has yet to be developed in one language that can adequately translate the concepts of another to emphasise the significance of this moment. If one considers the existing differences in how languages represent concepts as well as the differences that exist in how people can and do experience the world through the concepts that language provide, the idea of a 'wrong' that is not yet signified in the language of the 'other' becomes not only comprehensible but plausible. However, such an exercise, although valuable, is not necessary to illustrate the significance of the differend itself. The significance of this moment, this 'differend', is that an injustice occurs. If one side cannot adequately express a certain concept of being wronged then there is a lack of equity as the concepts of one language (the language of the adjudicator) become privileged above the language, and expressions of injustice, of others.

The described scenario, however, refers only to situations when there is a specific concept already in existence that may or may not already have a signifier in another discourse. The idea of a differend, however, has further implications such as the possible impact of a differend over time. A differend not only concerns an inequitable

⁷⁷ Lyotard, Jean-François. *The Differend : Phrases in Dispute*. The University of Minnesota Press: Minneapolis, 1988 at page xi

⁷⁸ *ibid* at page 9

adjudication in a particular moment because the ‘victim’ injury cannot adequately be expressed in the language of adjudication, but it also has the possibility of changing the very concept of an injury itself. Injuries which once had a signifier might lose appropriate signs to express them altogether or the very concept of a particular injury might become lost itself. The ethical significance of this latter element is perhaps more difficult to contemplate. If an injury ceases to be an injury because it is somehow ‘lost’ then there is no more injury, and so arguably, no injustice to the person who might once have been a victim. On the other hand it may be important to contemplate ways of ‘seeing’ injury, such as becoming aware, for example, of systems of structural racism or sexism. In this case not only would the ability to express an injury be lost, but the ability to recognise an injury, or the source of injury, could be lost. It is an interesting position to suggest something of an ontology of injury – that an injury could exist before it is experienced as such. It would be a position that opens for consideration complex ideas about symptoms of injuries, systemic injustice, etc., and while this may be an important area of inquiry, it will not be explored with any depth here. Its significance however, is noted as adding to the possible impact of a differend if it concerns not only those injuries that are already signified in another language, but those injuries or injustices that are yet to be signified at all that are lost altogether as an experience to be articulated. Such concerns are in addition to the significance of the moment when a concept of injustice exists but lacks an active signifier in the discourse of the other. In this latter case, the question follows of what happens if a concept of injustice remains unexpressed?

According to Lyotard, a phrase must always follow a phrase, and that even a silence is a phrase:

... a genre of discourse supplies a set of possible phrases, each arising from some phrase regimen. Another genre of discourse supplies another set of other possible phrases. There is a differend between these two sets (or between the genres that can call them forth) because they are heterogeneous. And a linkage must happen 'now'; another phrase cannot not happen.⁷⁹

In this sense we might interpret any phrase that occurs at the juncture of the differend as one which does not do 'justice' to the other – but that a phrase is inevitable (as perhaps is the adjudication). What this also speaks to is *translation* - when what is expressed or attempted to be expressed in the discourse of the other enters as a signifier in the language of the adjudication, but where that signifier does not adequately represent the signified. In a rights discourse, expressions of injustice become 'translated' into rights claims, but will these claims adequately signify the original concept? What happens when heterogeneous expressions of moral, legal and political concepts become *translated* into rights discourse? Ought something be done to prevent such a translation? Lyotard presents us with an imperative to find the idioms that can express such silenced or translated wrongs:

The differend is the unstable state and instant of language, wherein something which must be able to be put into phrases cannot yet be. This state includes silence, which is a negative phrase, but also calls upon phrases which are in principle possible. This state is signaled by what one ordinarily calls a feeling: 'One cannot find the words,' etc. A lot of searching must be done to find new rules for forming and linking phrases that are able to express the differend disclosed by the feeling, unless one wants this differend to be smothered right away in a litigation and for the alarm sounded by the feeling to have been useless. What is at stake in literature, in a philosophy, in a politics perhaps, is to bear witness to differends by finding idioms for them.⁸⁰

While it may be argued that discourses are never fully 'closed systems' and remain open to change and rupture, in the moment that they are experienced, discourses influence and

⁷⁹ *ibid* at page xii

⁸⁰ *ibid* at page 13

direct what can or will be said - and even what is conceived or experienced. Lyotard's imperative that we need to 'bear witness to deferends by finding idioms for them' can be interpreted as an ethical imperative to do *more* – more than sit comfortably within what we think to be a good language of adjudication and actively seek to 'find' or, as I will suggest, to *hear* those claims of justice that do not translate, or that are altered in translation.

In order to do so, however, the language of rights and the particular expression of equality in duty which informs it cannot be understood as neutral in the sense of serving as a universalised meta-language. We must be able to see the asymmetry implied in controlling the terms of discourse – and in suppressing alternative expressions of justice because they do not conform to a language of 'rights'.

A helpful way of imagining how asymmetry is masked behind a veil of 'neutrality' is to describe it in the context of an *ideology*. According to Trevor Purvis and Alan Hunt, a discourse is something that is "... borne though language and other systems of signs, it is transmitted between people and institutions and, perhaps most important of all, *it makes a difference*; that is, the way in which people comprehend and make sense of the social world has consequences for the direction and character of their action and inaction"⁸¹. Ideology, on the other hand is described as a particular type of effect that a discourse may have. This effect would exhibit a tendency to "mystify" some aspect of social (or material) relations as well as a form of *directionality*, i.e. "... the way in which the interpellation of a subject position operates systematically to reinforce and

⁸¹ Purvis, Trevor, and Alan Hunt. *Discourse, Ideology, Discourse, Ideology, Discourse, Ideology*. . . *The British Journal of Sociology*, 44(3) September 1993: pp 474

reproduce dominant social relations”⁸². Accordingly, these particular interests (or values) mystify on a level in which they cease to exist in the realm of ‘thinking’ as they become a *way of thinking*, and thus ideology becomes a ‘lived experience’.⁸³

Thus, it is argued that remaining within this second position described as being on the ‘spectrum of duty’ –where the ‘right’ or the ‘moral’ is distinguished from the values it seeks to keep in equilibrium – compromises the very ethos that informs it in several significant ways. The first is that it presumes a role of governance. In applying ‘neutrality’ to govern others, it clearly places the values of those who advocate neutrality above those who do not.⁸⁴ In the classic paradox of liberalism, the domination of a liberal ‘morality’ must be imposed upon others such that a certain sphere of their autonomy is ‘preserved’. Without the domination of a ‘neutral law’ there is no protection for that autonomy conceived of as the reciprocal restriction from interference in the assertion of self-rule. While a state of non-obligation may imagine autonomy simply as a position in which there is no *obligation* to submit to the rule of others, the liberal position of *reciprocal* duty imagines that autonomy in both a restricted and protected sense: restricted and protected by limitations of non-interference, or as Rainer Forst would argue, by the principles of reciprocity and generality. Such a position however, clearly places the values of the liberal subject (the individuals or institutions which assume the moral role of governing others) above the values of dissenting others – in essence,

⁸² *ibid* at page 486

⁸³ However, to constitute an ideology as defined by Purvis and Hunt, this ‘taken for grantedness’ of the concept of rights must also exhibit elements of directionality - of supporting a relationship of domination and subordination. By subordinating alternative expressions of justice, liberal rights discourse (when used as a meta-language of justice) subordinates those who experience justice in an alternative discourse.

⁸⁴ Although it won’t be explored here, it has also be argued by some that what is perceived as an ‘equilibrium’ of differing values or identities, in fact is not, and that what is perceived as equilibrium only reflects the position of the viewer. So for example, if looking at a see-saw, where a position of balance occurs will depend upon the angle from which you are looking at. Theories of feminist epistemology challenge that there is any view ‘from nowhere’ from which a correct perspective could be ascertained.

creating the non-symmetrical duty of some to submit to the governance of others, even if only to ‘prevent’ others from dominating others. While this is an important argument, and one that is captured by Jeremy Waldron’s critique of the relationship between liberalism and Communitarianism, it is one from which this thesis departs to argue from a different perspective the way in which the liberal expression of equality of duty creates asymmetrical relations of obligation. This different perspective concerns language – the way in which we express, and the expressions which we understand.

It has been argued here that when we use the language of ‘rights’ as a meta-language for justice, we silence or alter alternative expressions of, or claims to, justice. This privileges certain expression above others, imposing a duty on those who think of justice in a different form of expression to speak ‘our’ language. Fundamentally inter-linked with the assumed role of governance, the liberal conception of neutrality not only suppresses those expressions that may be anti-thetical to its values, but it insist on the language of rights as *the* universal or meta-language of justice, and in this way it also *mystifies* its relation of domination.

However, to suggest that there be a duty on the part of those (individuals or institutions) who would govern the actions of others, to attempt to hear or understand an alternate expression of justice (one outside of its own language of adjudication) is to suggest another form of asymmetry – an asymmetrical relation of duty to the other that is not necessarily imposed equally upon the other. In the next chapter the implications and possibilities of such a duty will be explored as the third position along the spectrum of duty, asymmetrical relations of generosity.

4. Symmetry and Generosity

In the second chapter of this thesis, the concept of symmetry was explored in two distinct, but related ways. The first, following in the tradition of R.M. Hare's moral universalism, was symmetry in application of moral principle to all those considered to be objects of equal moral worth. This was expressed in liberal rights discourse through the ideals of universalism and generality such that any 'moral' principle ought to be equally applied to any person. It was not, however, reducible to equality in 'treatment' *per se*. As a sort of intuitive aid, one could represent this process as mathematical, where the object of moral consideration (the individual) is imagined as a variable of equal value in an equation. While the equation changes depending upon the principle in consideration and the context within which it is applied, the human variable is always afforded the same 'moral value'. Thus although the results change with the changes in the equation, the generality of moral application is maintained, and liberal universalism as the equal inclusion of persons as variables in the process is actualised. Thus, equality in consideration then, understood as symmetry in moral application, was not reducible to equal *treatment*. How a principle was actualised depended both on what the principles were and on the elements of the equation (the context) that altered the result. Such symmetry lies at the heart of the liberal defence of distributive justice – and is famously theorised by Ronald Dworkin as a 'right to equal respect and concern'.

Symmetry in application of moral principle was then applied in the context of liberal rights discourse in a way that results in the ideal of a relational equality between

individuals. In applying the concept of duty to the objects of (equal) moral consideration, the asymmetrical nature of relations of domination and subordination were rejected in favour of 'symmetry'. This was firstly imagined as a symmetrical absence of duty (such as in a 'Hobbesian' state of nature), secondly as *reciprocal* duties (contemporary deontological rights discourse), and lastly as *asymmetrical* duties of generosity. The final suggestion of symmetry in relations imagined as *asymmetrical* is, of course, paradoxical. Asymmetrical relations of duty (as generosity) appear to be in conflict with the meaning of symmetry (not to mention the seemingly paradoxical use of 'duty' and 'generosity' to describe the same activity). However, it was argued that the real paradox (and conflict) arises in the step taken from the first position on the spectrum of duty, 'symmetrical absence of duty', to the second, reciprocal duties as envisioned in liberal rights discourse. The paradox emerged, as explored in the last chapter, as the conflict in which the imagined symmetry between individuals not only demanded governance over others, but also privileged the concept of justice as expressed in the language of rights over other possible expressions. Thus it was argued that *applying* a norm of reciprocal duties (imagined as symmetrical relationships) resulted in the asymmetry of domination. Even if 'rights' were imagined to be discursively and democratically produced, by only working through the language of rights (treating it as a meta-language for justice) it silenced or subordinated alternative expressions of justice - demanding that some speak the language of others, while those others remained comfortably within their own expression and paradigms of justice, expecting the world to *translate* into their language. Asymmetrical relations of generosity, however, maintained the autonomy of the individual (autonomy

as an essential component of the theorizing of equality in duty) by relying upon the self-imposed duty to others that would not demand the same duty in return.

Thus, ‘symmetry’ has been considered in two distinct and related ways: the symmetry in application of principle from the self toward others; and symmetry in relationships – in this case, relations of duty. The two converge in liberal rights discourse through the equality in consideration afforded all persons, leading to an application of the principle of liberty (and obligation) equally to those the objects of moral consideration. This, in turn, concerns the imagined *relations* of duty between persons, i.e. what we ‘owe’ one another according to that relational principle of equality explored in the second chapter.

In this chapter, the idea of symmetry will be further examined to both develop the relationship between the first and second concepts of symmetry described above, as well as to the end of supporting the argument that symmetry as a model of relations of duty is theoretically problematic in its expression on the second position of the spectrum of duty – reciprocal rights. From a more developed concept of symmetry, the idea of generosity will be explored with reference to contemporary political thought (in particular the work of Iris Marion Young), and finally; the political implications of a critique of rights as a metalanguage for justice as well as the significance of ‘generosity’ in relation to the law will be considered.

4.1 Symmetry from the Perspective of the Subject

The term ‘subject’ can refer to a variety of different and sometimes conflicting concepts. As a noun it can refer to a person or a thing which is being ‘discussed or dealt with’, such

as the *subject* of a conversation, or the *subject* of an experiment. As a noun it can also refer to ‘a thinking or feeling entity; the conscious mind or ego.’ As an adverb, it often refers to something that is ‘dependent or conditional upon’, or ‘under the control or authority of’, something other than itself. To *subject* someone to something involves an *action* to cause or force them to undergo something (or to bring them under the control or authority of something). A related derivative, ‘subjection’ describes the state of being subjected to something. To be subject to the law for example, would mean that one is under the control or authority of the law. To be a subject of the law on the other hand, means that one is recognised by the law as a person, an entity capable of bearing rights and duties – an ambiguous interface between liberty and subjugation!

Its sociological usage derives from its philosophical meaning, ‘the thinking or feeling entity, the conscious mind or ego’, and refers most generally, to the subject as an actor (rather than the object of an action). However, unlike the abstract and ‘autonomous’ subject implied in the philosophic tradition, the sociological tradition has embraced the theories of structuralism and post-structuralism such that the actor is understood as socially embedded rather than as an abstract agent expressing ‘autonomous’ will.

Within liberal philosophy, one will find a variety of these usages, as well as different possible interpretations. When the liberal theorists speaks of the moral subject, do they refer to the actor who is giving *others* moral consideration (the Kantian individual imbued with the capacity for correct moral reasoning, or Dworkin’s individuals who can ‘give’ justice)? Or does the subject in fact refer to the objects of moral theory, such that the moral subjects are those who are given moral consideration in a theory of justice? It would seem that these particular subjects of liberal theory inhabit

something of both meanings. They are moral subjects in the sense that they are valued as having equal moral consideration *because* they are ‘minds’ and actors that have the capacity to theorize about justice (which raises the important question - that will not be explored here - concerning how those who are not deemed ‘rational’ fit within the theory). With these various meanings and relations in mind, the concept of the ‘self’ and ‘other’ will aid in (temporarily) fixing the meaning of the subject as an actor for the purpose of conceptual clarity in the theory laid out in this thesis.

If one considers that rights discourse concerns relationships, those relationships can be envisioned as between something conceived of as the ‘self’, and something conceived of as external to the self (other to the self, separate to the self and distinguishable from the self in some way). This external to the self is often identified as the ‘other’. Selves and others can be imagined as individual persons, or as groups of persons sharing some common characteristic that allows them to be distinguished from others. The *way* in which the concept of self and other can help in maintaining a consistent meaning of subject, is if subject is regarded as a self – the mind which is theorizing about others. The others that it theorizes about might be selves as well, in fact it is assumed they are, but in theorizing a relationship between the self and the other(s) one theorises others as objects of that moral theory rather than as subjects. This is not to say that interaction or understanding of another’s perspective may not influence that moral theory, or indeed, construct the identity of the subject. It is to argue however, that moral theory is *situated*.

It is of methodological and ethical significance that this thesis concerns the way in which a subject might think about relations between a ‘self’ and ‘others’, as well as

others and others. Certainly, if we are concerned with questions of just governance in the liberal tradition, governance concerns those beyond ourselves. However, this thesis does not make the methodological move (or ontological claim) of presuming a universal moral theory in the sense of a theory which must be accepted by others. Rather, it begins with a commitment to certain values, and then analyses how those values are expressed in moral, political, and legal theory, and whether that expression is appropriate to the values identified. These values are not taken to be universal in the sense of being held universally, nor are they taken to be universal as something more than the particular values held by some (in this case the ‘subject’) – but they are universal in terms of how they are applied within a given subject’s moral theory. Universality concerns the universal consideration of others within their given theory, not the ‘universality’ of the theory itself. It is in this sense that symmetry may be maintained from the perspective of the subject, even if not attainable through the ‘governing’ of relations.

Just as this thesis assumes that the ‘neutral’ values of the ‘right’ or the ‘moral’ are in fact particular values – it must also imagine that these values are situated in a location. This location, it is suggested, has a ‘self’ as a subject – an actor imagining what is fair in regards to how they are treated and how others ought to be treated. Thus, while the imagined symmetry of duty in liberalism cannot perfectly reflect the ethos of liberty and equality informing it – it doesn’t necessarily compromise the original symmetry in the equal consideration of persons according to generalized moral principle. What is argued here is that to adequately respond to the equality imagined in individuals (the objects of moral consideration), the self (that subject which theorises about justice) must subsume its own equality to that of the objects of its moral consideration. This would not be a duty

imposed from without, but one that would be self-imposed. An intriguing nuance of the relationship between the symmetry as universalised moral application and the symmetry imagined in relations themselves concerns the step between how one extends the particular, located originator of a moral theory who imagines that none ought to have asymmetric relations of duty imposed upon them, to the extension of governing relations, or interfering with relations outside their own to the end of maintaining that balance. It is precisely this paradox however, that was explored in the third chapter of this thesis that haunts the liberal rights paradigm. While ‘generosity’ does not in itself contain the asymmetry of governance, it provides a tool to perhaps more closely approximate the very ethos of the moral position liberalism envisions.

To provide some flesh to the theory explored here, the following section will turn to the work of Iris Marion Young. Although it should be noted that while the ideas of symmetry and generosity Young uses are not interchangeable with those defined here, the results of her exploration provide useful examples and insight.

4.2 Young on Symmetry and Generosity: Reversibility and Gifts

In recent social, political and legal philosophy, there has been a popular turn toward the concept of ‘generosity’, exemplified by the attention given to the work of Emmanuel Levinas in critical legal circles. Although a more thorough consideration of the burgeoning literature in this general area will not be considered here, an illuminating example of a theorization of symmetry and generosity in political theory is found in the work of Iris Marion Young.

In “Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought”,⁸⁵ Young critiques the vision of moral respect as one that involves moral ‘reciprocity’ between subjects and ‘reversibility’ (i.e. the ability to take into consideration the perspectives of others in moral judgment through a process of imagining their perspective).⁸⁶ It is a vision, according to Young, that is ‘neither possible nor morally desirable’.⁸⁷

Her primary contention concerns the idea of reversibility – symmetry understood in terms of identity. She makes the argument that it is ontologically impossible to ‘imagine’ oneself to be in the position of another because identities are unique and situated, as individuals “bring different life histories, emotional habits and life plans to a relationship, which makes their positions irreversible.”⁸⁸ As a powerful example of a failed attempt at such a reversal, Young cites the story of a public opinion survey conducted on able-bodied people about how they would feel if they were disabled. In ‘I’d rather be dead than crippled’ Young describes the story of how public policy was formed that devalued the lives of people with disabilities because ‘able-bodied’ people felt that such a life would be less worth living. The problem was that those who did have disabilities did not agree, and that those who had not experienced the identity of having a disability could not actually know what it was like to have a disability.

When asked to put themselves in the position of a person in a wheelchair, they do not imagine the point of view of others; rather, they project onto those others their own fears and fantasies about themselves . . . with careful listening, able bodied people can learn to understand important aspects of the lives and perspectives of people with disabilities. This is a very different matter from imaginatively

⁸⁵ Young, Iris Marion. “Asymmetrical Reciprocity: On moral Respect, Wonder and Enlarged Thought.” *Constellations* 3(3) 1997

⁸⁶ She interprets this position from the work of Sylva Benhabib in *Situating the Self*, where Benhabib builds upon Habermas’ theory of communicative action.

⁸⁷ *supra* note 85 at page 340

⁸⁸ *ibid* at page 347

occupying their standpoint, however, and may require explicit knowledge of the impossibility of such a reversal.⁸⁹

In believing we can speak for others by imagining ourselves to be in their position and thus understand their perspective, Young argues that ‘reversibility’ in fact “closes off the creative exchange these differences might produce with one another if we consider them symmetrical and suggest that, despite serious divergences in their experiences and values, one person can put herself in the place of another.”⁹⁰

Reversibility is further made ‘ontologically’ impossible by the dialectic process of identity construction. To be an ‘other’ means that one is constructed as an ‘other’ by someone else. The relationship between identities is an integral part of identity construction. The very experience of the particular way in which others construct, know or see a person is an essential part of the identity which that person comes to inhabit, an experience that is ‘unique’ to their position in relation to others. This compounds the relation of inequality where someone of a ‘privileged’ identity seeks to know another through the idea of reversibility because it prevents the possibility of more genuine understanding, and the moral respect that the ‘other’ occupies a unique – and relationally different – identity. In the context of structural differences in identity where those in a position of privilege (in terms, for example, of class, gender) project onto others what they believe their experience to be, the subject of that position of privilege ignores the uniqueness of the other identity, as well as the relationship of power between them. It is for this reason that Young suggests a stance of moral humility:

It is more appropriate to approach a situation of communicative interaction for the purpose of arriving at a moral or political judgement with a stance of moral

⁸⁹ *ibid* at page 344

⁹⁰ *ibid* at page 347

humility. In moral humility, one starts with the assumption that one cannot see things from the other person's perspective, and waits to learn by listening to the other person . . .⁹¹

Thus, moral humility for Young involves listening. If one can never know the experience or perspective of the other,⁹² and if moral respect means taking the perspectives of others into consideration when making a moral judgement or decision, then 'imagining' oneself to know the position of another is an impediment to that respect. However, Young's concern about reversibility itself appears to say little about symmetry in terms of relationships. To say that identities are irreducible is not the same as to say that their relationship cannot be symmetrical in terms of moral duty to each other. The whole idea of moral equality is generally meant less in a descriptive sense (concerning the particular attributes or characteristics of an object of moral consideration), and more in the sense of 'recognising' the moral significance of the other as a subject themselves - the equality at the heart of 'autonomy' in deontological liberal rights discourse. Yet, Young's critique of reversibility does provide insight. Firstly, it can be interpreted as supportive of the critique in the third chapter of this thesis. If using a language of rights as a meta-language for justice silences or subordinates the perspectives of others, then according to Young, it would be an obstacle to 'moral respect' itself. Secondly, and more significantly, the idea of humility does not 'fit' in with the idea of symmetry. While the act of humility might be 'reflected', as it were, the nature of humility is such that it would not demand that reciprocation:

⁹¹ *ibid* at page 350

⁹² The way in which Young differentiates between understanding as a process of learning something new versus reconstructing what one knows is not wholly convincing. However, for the moment, it will be assumed that there is a difference between simply translating and relating an experience to something one already knows and learning something new – the dynamics of which will not be explored here.

A respectful stance of wonder toward other people is one of openness across, awaiting new insight about their needs, interests, perceptions or values . . . answers are always gifts. The transcendence of the other person always means that she can remain silent, or tell only part of her story, for her own reasons.⁹³

Humility as an act of generosity, is fundamentally asymmetrical. It does not demand the return of humility. Although humility in discursive ethics may seem far from the liberal ethos explored here, it does in fact share important common characteristics. They are both concerned with the 'other' as a non-reducible 'deontological' subject – one that is recognised as an 'end' in themselves. Young's implicit use of deontological conceptions of personhood in her moral theory make it relevant to the moral theory of deontological liberal rights discourse, but where Young describes the 'transcendence' of the person, the deontological liberal theory outlined in this thesis speaks of autonomy and moral equality. Thus the above quote can also be understood in the context of duty and autonomy – and herein lies the dilemma for symmetry. If a subject demands a 'response' from the object of their moral theory as a form of 'reciprocal' duty, it is an affront to their autonomy. It is an affront to their autonomy because it imposes an asymmetrical relationship subordinating the 'other's' self-rule to the relationship that the self would like to open or have. Additionally, it cannot be presumed to be in the other's interest because that would assume the ability to know the perspective of the other. Further, the deontological approach of the moral subject is resistant to the reduction of that subject to its interests. The idea of autonomy as self-rule, concerns an allusive idea of will that evades the paternalistic concern with 'interests'. However, without establishing some type of reciprocity in relations, autonomy has little practical value in a state where none are obligated to either passively 'not interfere' with its expression nor actively enable.

⁹³ *supra* note 85 at page 358

But the reciprocity imagined in the liberal state of neutrality cannot be symmetrical not only because it demands the ‘governance’ of that symmetry, but because the very expectation of reciprocity as a ‘duty’ entails an asymmetry in that relationship. However, this asymmetry is, in a sense, reversed if takes the asymmetrical form of generosity from the position of the subject - a reversal which has an important political appeal if the subject is also assuming a role of governance between the relations of others.

4.3 The Baby, the Bath-water, and Taking Equality Seriously

Criticizing liberal ideas of ‘rights’ is by no means a new activity. In the first chapter, important critiques (from communitarian scholars in particular) were outlined. Setting aside these theoretical objections for the moment, however, few can deny the dramatic significance that rights have had as a political tool for change, and many may object to a project that could diminish their efficacy. Thus, it is then important to consider the practical and political implications of a critique of rights discourse and how the critique of rights from a political perspective may relate.

In an important article by Alan Hunt and Amy Bartholomew, Hunt and Bartholomew tackle a number of such political critiques of rights by arguing that critics of rights fail to understand that ‘rights’ constitute multiple and overlapping discourses. While challenging one discourse for a perceived inadequacy, critics fail to recognise that the inadequacy can often be resolved by delving into another level of rights discourse. Hunt and Bartholomew described these different levels of discourse as:

legal rights (rights recognized, and potentially protected by litigation), constitutional rights (rights recognized and potentially protected, by litigation appealing to express constitutional provisions), moral rights (rights-talk placed within moral discourse) and finally, rights-claims

(claims or demands advanced by social interest or movements involving an aspiration to convert a moral right into a legal or constitutional rights)⁹⁴

Thus, a critique of the political value of a rights discourse in terms of its actual legal or constitutional form, would not necessarily lead to a critique of a discourse of rights claims or moral rights. To demonstrate this, Hunt and Bartholomew discuss some of the various critiques coming from both the Critical Legal Studies (CLS) Movement and the political Left, including a critique of the utility of rights which is aimed primarily at what legal and constitutional rights provide as they stand. It is often suggested that rights do not take adequate consideration of human needs, or that they serve the interest of those who are already the more privileged in society over those who are less so. As a response, Hunt and Bartholomew argue that one could equally pose the question of what capitalism would look like without liberalism and its attachment to rights. Certainly there is no argument presented to suggest that rights and capitalism are necessary to sustain one another. Similarly, it is suggested that while there may be inadequacies within the legal rights framework, it doesn't follow that the political economy situation would be better without them⁹⁵.

Hunt and Bartholomew also identify a deterministic element in some of the critiques, specifically in the work of Alan Freeman. Freeman's focus is on rights as ideology. He argues that anti-discrimination law actually serves to rationalize continued discrimination within the system.⁹⁶ But by arguing that "anti-discrimination law has been more important for legitimating existing class and race relations than it has been for

⁹⁴ Alan Hunt and Amy Bartholomew. "What's Wrong with Rights?" *Journal of Law and Inequality*, 9 1990 at page 7

⁹⁵ *ibid* at page 3

⁹⁶ *ibid* at page 22

ameliorating racism and discrimination”⁹⁷ Hunt and Bartholomew argue, he diminishes the real struggles and contests that were necessary to have gained these rights in the first place, “. . . this failure to attend to the real struggles for, around and within anti-discrimination law suggest a blindness to the participants, organisations, strategies and contestations involved in the fight for civil rights”⁹⁸.

However, identifying the problem of determinism doesn’t remove the potential for certain legal and constitutional rights to have an ideological effect. It can be argued that when afforded certain rights within a given political legal system, there is the potential of a false security. Having certain ‘rights’ in place might suggest to some (or be used to suggest to some) that the political does not need to be struggled over - because we already have the necessary provision within our legal and political framework to protect our interests. This provides an implicit support for the status quo. In the case of anti-discrimination law for example, while eschewing equality seems to actually subvert efforts at making more significant changes to racist or class structures - blind justice does not seem to have the capacity to see or respond to structural or systemic racism.⁹⁹ This is what Hunt and Bartholomew have referred to as the ‘constitutional mythology’ – that equality is capable in itself of overcoming a racist past.¹⁰⁰

In this regard, the political and legal expressions of rights remain open to the richness and normative recognition of the moral or ethical language of rights. And as a political language of justice, there can be little doubt that the language of rights has provided voice and expression for claims of injustice around the world - a voice that is

⁹⁷ *ibid* at page 23

⁹⁸ *ibid* at page 28

⁹⁹ *ibid* at page 24

¹⁰⁰ *ibid* at page 25

made understandable and compelling by its very emersion in the language of rights.¹⁰¹

Although the argument presented by Hunt and Bartholomew doesn't resolve the critique of the language as a meta-language for justice, they do present a compelling argument for the political efficacy of the language itself. If this is the case, it could be argued that a critique of rights as a political, ethical, or legal language is counter-productive to the real and significant gains in equality, liberty, and maybe well-being that it has provided.

While some substantive 'rights' or instrumental usage of a 'rights' language may be problematic, critiquing the language of a theory of rights as a whole could be analogous to throwing the baby out with the bath-water.

However, the relative success of any given discourse or language is not compelling as a reason to dogmatically defend it - to say that rights 'do a good job' at something does not mean that we cannot strive for better. Rather than simply taking rights seriously, it is argued here that we need to take equality seriously. In interpreting the ethos of equality and liberty in liberal rights discourse as concerning the relational quality of equality and liberty, we are presented with an imperative to confront the asymmetry and non-neutrality in the expression of equality of duty perceived as a governed symmetrical relation of reciprocity. Further, it is argued that upon this confrontation, self-imposed asymmetry may present us with an alternative that does not succumb to the fallacy of symmetry or neutrality. In understanding normative theory as situated in a place – within the values and contexts of the identity of the subject – it allows us the possibility of taking on a greater duty to the other without compromising the autonomy so central to the liberal ethos. Through an action of generosity, the self can

¹⁰¹ For an excellent discussion on the possibilities for rights to function as a *counter hegemonic discourse*, see: Hunt, Alan. "Rights and Social Movements: Counter-Hegemonic Strategies". *Journal of Law and Society*. 17(3) 1990

attempt to learn from, understand and hear the expressions of injustice (and justice) that the 'other' confronts us with, without necessarily translating it into our own language. To do so means that we have to be open to those expressions which fall outside of our comfortable discourses. What at first appears to be an affront to the ethos of rights may present it with a richer expression. Such an openness does not mean discarding the idea of rights, but rather their transcendence. It is through a deep analysis of what gives rights their intuitive appeal, and in this case through and analysis the work of Dworkin (and in turn, Rawls), that an ethos of equality and liberty were identified. In this sense, it is through rights that we come to a place to critique and demand more. While the political, legal and ethical languages of rights may have much to offer us, to real political consequence, the political consequence of silencing alternative expressions, and even the arrogance of translating all expression of justice into 'our' own comfortable languages, also has real political consequences. Thus while it is not argued that rights ought to be abandoned, it is argued that we must to more to preserve a commitment to the very ethos that inform the discourse.

4.4 Closings and Adjudication

While the law has been discussed somewhat obliquely within the scope of this thesis, it has also been at the heart of the subject matter. Although the significance of rights discourse traverses moral, political, and legal terrain – the way in which liberal rights imagines an expression of equality in duty has been to imagine some form of governance, protecting the (relational) equality and liberty of individuals. That norm of governance is perhaps most significantly explored as the normative or ethical justification and

legitimation for legal rights and duties. In attacking the neutrality of the language and theory of rights, it has been equally an assault on the (ethical) neutrality of the law. However, unlike moral philosophy, where it might be possible to be infinitely generous, infinitely open to listen, the law must adjudicate. In coming to a decision there occurs a necessary closure of that openness. However, it is prior to that moment of adjudication that there exists the possibility for generosity – the generosity implied in openness to transformation, to learning, to hearing alternative expressions of justice. Where and how this can occur - whether it be in the process of legislation, in the normative conceptualisation of the interface between different legal systems and cultures, or in the application and interpretation of ‘law’ itself – is not the question of this thesis. Rather, it is to delve into the normative foundations of a discourse to present the theoretical imperative to do more.

Conclusion:

The Imperative to Transcend Rights

This thesis has been about what it is we *invoke* when we speak in the liberal language of rights, and then to consider certain consequences that invocation entails. Deeply compelled by an intuitive sense of what rights say about our ideas of justice in the context of the relationships between people, the author engaged and explored rights discourse to identify an ethos within liberal rights theory that resonated with that intuition. It was within the deontological tradition of rights discourse, specifically deontological *justifications* for ‘rights’ (where the duty to the individual was paramount to any particular good outcomes that duty may result in) that an ethos of ‘equality’ and ‘liberty’ was sifted out. In the first chapter, it was posited that rights are always relational to duty, but in the second chapter the relational nature of rights was developed through a relational interpretation of the ideals of liberty and equality themselves.

Working from Dworkin’s ‘right to equal concern and respect’ the principle of equality was read as relational rather than descriptive – as an equality in application of moral principle to all human beings rather than an equality in any particular descriptive attribute, or equality in treatment *per se*. Relational equality thus introduced the first element of what the author has described as the ideal of ‘symmetry’ in liberal rights discourse. Symmetry in this first sense of the term concerned symmetry (or equality) in application of principle.

In a similar process, but relying in particular on Hobbes' 'Right of Nature', the relational nature of liberty was explored in the concepts of 'non-interference' and absence of duty. It was argued that liberty, in the liberal deontological tradition, concerned ones *relation* to something that could restrict self-rule – either through norms of obligation to others (duty), or through the interference of others. It was then through a marriage of relational equality and liberty that the second use of the concept of symmetry was born – symmetry in relations of duty. In this way, a sketch was laid that described a way of understanding the ethos of liberal rights that was not reducible to the concept of rights itself. Through symmetry in moral application and symmetrical relations of duty, none were envisioned to be obligated to hierarchical relations of domination or subordination. Further, it was suggested that liberal rights discourse could be understood as different expressions on a continuum, from symmetrical, or equal absence of duty (the Hobbsian state of nature) to reciprocal abstract rights and duties (contemporary rights discourse). However, it was also argued that asymmetric relations of generosity reflected this ethos, and was ultimately more compatible with it than the first two expressions of symmetry in duty.

The reason for suggesting this third expression along the 'continuum' concerned the theoretical implications of using 'rights' discourse as a metalanguage for justice. This included both the well explored arguments developed against the possible neutrality of the law, but more significantly the undeveloped critique that the use of *any* language as a meta-language for justice necessarily silenced or altered alternative expressions of justice. Because language always shapes what is or can be expressed, those concepts of injustice that might be signified in another language may lack an appropriate sign in the

language of rights. In what Jean-François Lyotard has described as a ‘differend’, a moment or juncture occurs when two heterogeneous discourses interface in a conflict and there is no common language to (equitably) adjudicate between the two.

By remaining comfortably within the language of rights as the meta-language of justice (and adjudication), the symmetry imagined in contemporary liberal rights discourse is compromised. In privileging certain expressions over others, a duty is imposed upon some to speak the language of others, potentially subsuming, altering, or silencing their experiences of injustice.

Transcending Rights

An epistemological openness has lain at the foundation of this thesis. In harmony with Dworkin’s own ‘constructive model of justice’, no objective criterion has been suggested to ascertain or adjudicate claims of justice. Far from a postmodern disdain for normative theory however, the author has taken seriously the imperatives for coherence and justification, as well as the particular ideals of equality and liberty that traverse liberal rights discourse. While liberal conceptions of universalism as a theory that is either universally valid or universally held have not been embraced (and indeed considered dangerous to the very values this thesis explores), universalism understood as symmetry in application of principle was an essential component of the ethos of equality. It was argued that normative theory must be understood as situated within the values and contexts of the identity of the subject that is theorizing about justice. In this way, universalism as symmetry occurs from a place, and concerns the ‘moral considerability’ of others. Further, understanding normative theory as situated allows the possibility of the

subject taking upon greater duties towards the objects of their theory without compromising the autonomy so central to the liberal ethos of equality and liberty. Thus ‘asymmetric relations of generosity’ has been presented here as an alternative expression of the symmetry imagined in relations of duty. Because a duty to the other is self-imposed without expectation of reciprocation, it does not externally impose relations of domination, subordination or asymmetric obligation.

In a similar thrust to what Iris Marion Young describes as ‘moral humility’ this thesis presents the imperative to do more than is generally conceived from within the liberal rights paradigm. To ‘do more’ would constitute moving beyond symmetry, and to take upon the self a duty to the other to attempt to hear, understand, listen, and perhaps *learn* from their alternative expressions of the just. Yet, moving beyond symmetry may allow us the opportunity to move closer to it in a way that reliance upon a ‘neutral law’ or ‘universal meta-language for justice’ does not present. In assuming a duty to the other, a bridge between expressions and ways of experiencing the world may be opened that otherwise is subsumed beneath a tide of ignorance to our own impositions.

That liberal rights discourse has provided a powerful and important expression for particular conceptions of justice is not in dispute here. Indeed, it has been in and through rights discourse that we are presented with the very imperative to move beyond it. In embracing the ethos of equality and liberty at the heart of liberalism – we embrace the very imperative to transcend their expression as a ‘neutral’ or ‘universal’ language of justice.

Bibliography

- Alasdair MacIntyre. "The virtues, the unity of human life, and the concept of a tradition", in *Liberalism and its Critics*. Michael Sandel (ed), New York: New York University Press, 1984.
- Bauer, Joannr R. and Daniel A. Bell (eds). *The East Asian Challenge for Human Rights*. Cambridge: Cambridge University Press, 1999.
- Bell, Daniel. "Communitarianism" in *Stanford Encyclopaedia of Philosophy* 2004
<http://setis.library.usyd.edu.au/Stanford/entries/communitarianism/>
- Berlin, Isaiah. "Two concepts of Liberty" in *Liberalism and its Critics*. Michael Sandel (ed), New York: New York University Press, 1984.
- Four Essays on Liberty*. Oxford: Oxford University Press, 1969.
- Berting, Jan et al. (ed). *Human Rights in a Pluralist World*. Westport: Roosevelt Study Center, 1990.
- Crowder, George. "From Value Pluralism to Liberalism", In *Pluralism and Liberal Neutrality*, Richard Bellamy and Martin Hollis (eds). London: Frank Cass & Co., 1999.
- Dagger, Richard. "Rights", in *Political Innovation and Conceptual Change*, Terrence Ball et al (eds). Cambridge: Cambridge University Press, 1989.
- Dworkin, Ronald. "Justice and Rights", in *Taking Rights Seriously*. London: Duckworth, 1977.
- "Liberalism". In *Liberalism and its Critics*, Michael Sandel (ed), New York: New York University Press, 1984.
- Forst, Rainer. *Contexts of Justice*. Berkeley: University of California Press, 2003.
- Gaus, Gerald and Shane D. Courtland. "Liberalism". In *The Stanford Encyclopaedia of Philosophy*, 2003.
<http://setis.library.usyd.edu.au/Stanford/entries/liberalism>
- Gray, John. *Enlightenment's Wake: Politics and Culture at the Close of Modernity*. New York: Routledge, 1995.
- Groden, Michael and Martin Kreiswirth (eds). The John Hopkins Guide To Literary Theory & Criticism. Baltimore: The Johns Hopkins University Press, 1997
http://www.press.jhu.edu/books/hopkins_guide_to_literary_theory/discourse-_1.html

- Hare, Richard Mervyn. *Freedom and Reason*. Oxford: Oxford University Press, 1965.
- Hayden, Patrick. *The Philosophy of Human Rights*. St. Paul: Paragon House, 2001.
- Hobbes, Thomas (1651). *Leviathan*. London: Penguin Classics, 1985.
- Hunt, Alan and Amy Bartholomew. "What's Wrong with Rights?" Journal of Law and Inequality, 9 1990.
- Hunt, Alan. "Rights and Social Movements: Counter-Hegemonic Strategies". Journal of Law and Society. 17(3) 1990.
- Lyotard, Jean-François. *The Differend : Phrases in Dispute*. The University of Minnesota Press: Minneapolis, 1988.
- McNaughton, David. "Deontological Ethics". In E. Craig (Ed.), *Routledge Encyclopedia of Philosophy*. London: Routledge, 1998.
- Nozick, Robert. *Anarchy State and Utopia*. New York: Basic Books, 1974.
- Purvis, Trevor and Alan Hunt. *Discourse, Ideology, Discourse, Ideology, Discourse, Ideology . . .* The British Journal of Sociology, 44(3) September 1993.
- Rawls, John. *A Theory of Justice*. Cambridge, Massachusetts: The Belknap Press of Harvard University, 1971.
- Rawls, John. *Political Liberalism*. New York: Columbia University Press, 1993
- Taylor, Charles. "Conditions for an Unforced Consensus on Human Rights". In *The East Asian Challenge for Human Rights*. Bauer & Bell (eds), New York: Cambridge University Press, 1999.
- The New Shorter Oxford English Dictionary*. Oxford: Oxford University Press, 1993.
- Timmons, Mark. "Logic of Ethical Discourse", in *Routledge Encyclopedia of Philosophy*. E. Craig (ed), London: Routledge 1998.
- United Nations. UN Universal Declaration of Human Rights. 1948.
- Waldron, Jeremy. "Neutrality, Political". In E. Craig (ed), *Routledge Encyclopaedia of Philosophy*. London: Routledge, 1998.
- Young, Iris Marion. "Asymmetrical Reciprocity: On moral Respect, Wonder and Enlarged Thought." Constellations 3(3) 1997.