Liberalism and the Limits of Justice

second edition

MICHAEL J. SANDEL

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SECOND EDITION

A liberal society seeks not to impose a single way of life but to leave its citizens as free as possible to choose their own values and ends. It therefore must govern by principles of justice that do not presuppose any particular vision of the good life. But can any such principles be found? And if not, what are the consequences for justice as a moral and political ideal?

These are the questions Michael Sandel takes up in this penetrating critique of contemporary liberalism. He locates modern liberalism in the tradition of Kant, and focuses on its most influential recent expression in the work of John Rawls. In the most important challenge yet to Rawls's theory of justice, Sandel traces the limits of liberalism to the conception of the person that underlies it, and argues for a deeper understanding of community than liberalism allows.

For this second edition Sandel has addressed criticisms of the first edition in a new preface, and has written a new chapter considering Rawls's latest work.

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To my parents

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Preface to the Second Edition
The Limits of Communitarianism

Much has changed in the landscape of political philosophy since this book first appeared. The 1980s and 1990s brought an avalanche of books and articles devoted to what now goes by the name of the 'liberal-communitarian' debate. Meanwhile, John Rawls, whose deservedly celebrated work *A Theory of Justice* was the primary focus of my critique, has recast his theory in important ways. In the new final chapter for this second edition, I examine the revised version of liberalism that Rawls presents in his recent work. In this preface, I wish to register some unease with the 'communitarian' label that has been applied to the view advanced in *Liberalism and the Limits of Justice (LLJ)*.

WHERE COMMUNITARIANISM GOES WRONG

Along with the works of other contemporary critics of liberal political theory, notably Alasdair MacIntyre,[1] Charles Taylor,[2] and Michael Walzer,[3] *LLJ* has come to be identified with the 'communitarian' critique of rights-oriented liberalism. Since part of my argument is that contemporary liberalism offers an inadequate account of community, the term fits to some extent. In many respects, however, the label is misleading. The 'liberal-communitarian' debate that has raged among political philosophers in recent years describes a range of issues, and I do not always find myself on the communitarian side.

The debate is sometimes cast as an argument between those who prize individual liberty and those who think the values of the community or the will of the majority should always prevail, or between those who believe in universal human rights and those who insist

1 See Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981).

2 See Charles Taylor, *Philosophical Papers, vol. I: Human Agency and Language; vol. II: Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985); and Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989).

3 See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

there is no way to criticize or judge the values that inform different cultures and traditions. Insofar as 'communitarianism' is another name for majoritarianism, or for the idea that rights should rest on the values that predominate in any given community at any given time, it is not a view I would defend.

What is at stake in the debate between Rawlsian liberalism and the view I advance in *LLJ* is not whether rights are important but whether rights can be identified and justified in a way that does not presuppose any particular conception of the good life. At issue is not whether individual or communal claims should carry greater weight but whether the principles of justice that govern the basic structure of society can be neutral with respect to the competing moral and religious convictions its citizens espouse. The fundamental question, in other words, is whether the right is prior to the good.

For Rawls, as for Kant, the priority of the right over the good stands for two claims, and it is important to distinguish them. The first is the claim that certain individual rights are so important that even the general welfare cannot override them. The second is the claim that the principles of justice that specify our rights do not depend for their justification on any particular conception of the good life or, as Rawls has put it more recently, on any 'comprehensive' moral or religious conception. It is the second claim for the priority of right, not the first, that *LLJ* seeks to challenge.

The notion that justice is relative to the good, not independent of it, connects *LLJ* to writings by others commonly identified as the 'communitarian critics' of liberalism. But there are two versions of the claim that justice is relative to good, and only one of them is 'communitarian' in the usual sense. Much of the confusion that has beset the liberal-communitarian debate arises from failing to distinguish the two versions.

One way of linking justice with conceptions of the good holds that principles of justice derive their moral force from values commonly espoused or widely shared in a particular community or tradition. This way of linking justice and the good is communitarian in the sense that the values of the community define what counts as just or unjust. On this view, the case for recognizing a right depends on showing that such a right is implicit in the shared understandings that inform the tradition or community in question. There can be disagreement, of course, about what rights the shared understandings of

a particular tradition actually support; social critics and political reformers can interpret traditions in ways that challenge prevailing practices. But these arguments always take the form of recalling a community to itself, of appealing to ideals implicit but unrealized in a common project or tradition.

A second way of linking justice with conceptions of the good holds that principles of justice depend for their justification on the moral worth or intrinsic good of the ends they serve. On this view, the case for recognizing a right depends on showing that it honors or advances some important human good. Whether this good happens to be widely prized or implicit in the traditions of the community would not be decisive. The second way of tying justice to conceptions of the good is therefore not, strictly speaking, communitarian. Since it rests the case for rights on the moral importance of the purposes or ends rights promote, it is better described as teleological, or (in the jargon of contemporary philosophy) perfectionist. Aristotle's political theory is an example: Before we can define people's rights or investigate 'the nature of the ideal constitution', he writes, 'it is necessary for us first to determine the nature of the most desirable way of life. As long as that remains obscure, the nature of the ideal constitution must also remain obscure.'[4]

Of the two ways of linking justice to conceptions of the good, the first is insufficient. The mere fact that certain practices are sanctioned by the traditions of a particular community is not enough to make them just. To make justice the creature of convention is to deprive it of its critical character, even if allowance is made for competing interpretations of what the relevant tradition requires. Arguments about justice and rights have an unavoidably judgmental aspect. Liberals who think the case for rights should be neutral toward substantive moral and religious doctrines and communitarians who think rights should rest on prevailing social values make a similar mistake; both try to avoid passing judgment on the content of the ends that rights promote. But these are not the only alternatives. A third possibility, more plausible in my view, is that rights depend for their justification on the moral importance of the ends they serve.

4 *The Politics of Aristotle,* 1323a14, ed. and trans. by Ernest Barker (London: Oxford University Press, 1958), p. 279.

THE RIGHT TO RELIGIOUS LIBERTY

Consider the case of religious liberty. Why should the free exercise of religion enjoy special constitutional protection? The liberal might reply that religious liberty is important for the same reason individual liberty in general is important – so that people may be free to live autonomously, to choose and pursue their values for themselves. According to this view, government should uphold religious liberty in order to respect persons as free and independent selves, capable of choosing their own religious convictions. The respect the liberal invokes is not, strictly speaking, respect for religion, but respect for the self whose religion it is, or respect for the dignity that consists in the capacity to choose one's religion freely. On the liberal view, religious beliefs are worthy of respect, not in virtue of their content but instead in virtue of being 'the product of free and voluntary choice'.[5]

This way of defending religious liberty puts the right before the good; it tries to secure the right to religious freedom without passing judgment on the content of people's beliefs or on the moral importance of religion as such. But the right to religious liberty is not best understood as a particular case of a more general right to individual autonomy. Assimilating religious liberty to a general right to choose one's own values misdescribes the nature of religious conviction and obscures the reasons for according the free exercise of religion special constitutional protection. Construing all religious convictions as products of choice may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity. Some may view their religious beliefs as matters of choice, others not. What makes a religious belief worthy of respect is not its mode of acquisition – be it choice, revelation, persuasion, or habituation – but its place in a good life, or the qualities of character it promotes, or (from a political point of view) its tendency to cultivate the habits and dispositions that make good citizens.

To place religious convictions on a par with the various interests and ends an independent self may choose makes it difficult to distinguish between claims of conscience, on the one hand, and mere pref-

5 The phrase is from *Wallace v. Jaffree*, 472 U.S. 38, 52–53 (1985): "Religious beliefs worthy of respect are the product of free and voluntary choice by the faithful."

erences, on the other. Once this distinction is lost, the right to demand of the state a special justification for laws that burden the free exercise of religion is bound to appear as nothing more weighty than 'a private right to ignore generally applicable laws'.[6] If an orthodox Jew is granted the right to wear a yarmulke while on duty in an air force health clinic, then what about servicemen who want to wear other head coverings prohibited by military dress codes?[7] If Native Americans have a right to the sacramental use of peyote, then what can be said to those who would violate state drug laws for recreational purposes?[8] If Sabbath observers are granted the right to schedule their day off from work on the day corresponding to their Sabbath, does not the same right have to be accorded those who want a certain day off to watch football?[9]

Assimilating religious liberty to liberty in general reflects the liberal aspiration to neutrality. But this generalizing tendency does not always serve religious liberty well. It confuses the pursuit of preferences with the performance of duties. It therefore ignores the special concern of religious liberty with the predicament of conscientiously encumbered selves – claimed by duties they cannot choose to renounce, even in the face of civil obligations that may conflict.

But why, it might be asked, should the state accord special respect to conscientiously encumbered selves? Part of the reason is that for government to burden practices central to the self-definition of its citizens is to frustrate them more profoundly than to deprive them of interests less central to the projects that give meaning to their lives. But encumbrance as such is not a sufficient basis for special respect. Defining projects and commitments can range from the admirable and heroic to the obsessive and demonic. Situated selves can display solidarity and depth of character or prejudice and narrow-mindedness.

The case for according special protection to the free exercise of religion presupposes that religious belief, as characteristically practiced in a particular society, produces ways of being and acting that are worthy of honor and appreciation – either because they are admirable in themselves or because they foster qualities of character

6 The phrase is from *Employment Division v. Smith*, 494 U.S. 872, 886 (1990).
7 See *Goldman v. Weinberger*, 475 U.S. 503 (1986).
8 See *Employment Division v. Smith*, 494 U.S. 872 (1990).
9 See *Thornton v. Caldor, Inc.*, 474 U.S. 703 (1985).

that make good citizens. Unless there were reason to think religious beliefs and practices contribute to morally admirable ways of life, the case for a right to religious liberty would be weakened. Pragmatic considerations would, of course, remain; upholding religious liberty could still be justified as a way of avoiding the civil strife that can result when church and state are too closely intertwined. But the moral justification for a right to religious liberty is unavoidably judgmental; the case for the right cannot wholly be detached from a substantive judgment about the moral worth of the practice it protects.

THE RIGHT TO FREE SPEECH

The link between rights and the goods rights protect is also illustrated by recent debates about free speech and hate speech. Should neo-Nazis have the right to march in Skokie, Illinois, a community with large numbers of Holocaust survivors?[10] Should white-supremacist groups be allowed to promulgate their racist views?[11] Liberals argue that government must be neutral toward the opinions its citizens espouse. Government can regulate the time, place, and manner of speech – it can ban a noisy rally in the middle of the night – but it cannot regulate the content of speech. To ban offensive or unpopular speech imposes on some the values of others and so fails to respect each citizen's capacity to choose and express his or her own opinions.

Liberals can, consistent with their view, restrict speech likely to cause significant harm – violence, for example. But in the case of hate speech, what counts as harm is constrained by the liberal conception of the person. According to this conception, my dignity consists not in any social roles I inhabit but instead in my capacity to choose my roles and identities for myself. But this means that my dignity could never be damaged by an insult directed against a group with which I identify. No hate speech could constitute harm in itself, for on the liberal view, the highest respect is the self-respect of a self independent of its aims and attachments. For the unencumbered self, the grounds of self-respect are antecedent to any particular ties and attachments, and so beyond the reach of an insult to 'my people'. The liberal would therefore oppose restrictions on hate speech, except

10 See *Collin v. Smith*, 447 F. Supp. 676 (1978); *Collin v. Smith*, 578 F.2d 1198 (1978).
11 See *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

where it is likely to provoke some actual physical harm – some harm independent of the speech itself.

The communitarian might reply that the liberal conception of harm is too narrow. For people who understand themselves as defined by the ethnic or religious group to which they belong, an insult to the group can inflict a harm as real and as damaging as some physical harms. For Holocaust survivors, the neo-Nazi march was aimed at provoking fears and memories of unspeakable horrors that reached to the core of their identities and life stories.

But to acknowledge the harm that hate speech can inflict does not establish that the speech should be restricted. The harm such speech inflicts has to be weighed against the good of upholding free speech. With speech as with religion, it is not enough simply to invoke the claims of thickly constituted selves. What matters is the moral importance of the speech in relation to the moral status of the settled identities the speech would disrupt or offend. If Skokie could keep out the Nazis, why could not the segregationist communities of the South keep out civil-rights marchers of the 1950s and 1960s? The Southern segregationists did not want Martin Luther King, Jr., to march in their communities any more than the residents of Skokie wanted the neo-Nazis to march in theirs. Like the Holocaust survivors, the segregationists could claim to be thickly constituted selves, bound by common memories that would be deeply offended by the marchers and their message.

Is there a principled way of distinguishing the two cases? For liberals who insist on being neutral with respect to the content of speech, and for communitarians who define rights according to the prevailing values of the communities in question, the answer must be no. The liberal would uphold free speech in both cases, and the communitarian would override it. But the need to decide both cases in the same way displays the folly of the nonjudgmental impulse liberals and communitarians share.

The obvious ground for distinguishing the cases is that the neo-Nazis promote genocide and hate, whereas Martin Luther King, Jr., sought civil rights for blacks. The difference consists in the content of the speech, in the nature of the cause. There is also a difference in the moral worth of the communities whose integrity was at stake. The shared memories of the Holocaust survivors deserve a moral deference that the solidarity of the segregationists does not. Moral dis-

criminations such as these are consistent with common sense but at odds with the version of liberalism that asserts the priority of the right over the good and the version of communitarianism that rests the case for rights on communal values alone.

If the right to free speech depends for its justification on a substantive moral judgment about the importance of speech in relation to the risks it entails, it does not follow that judges should try, in each particular case, to assess the merits of the speech for themselves. Nor, in every case involving religious liberty, should judges undertake to assess the moral importance of the religious practice at issue. On any theory of rights, certain general rules and doctrines are desirable to spare judges the need to recur to first principles in every case that comes before them. But sometimes, in hard cases, judges cannot apply such rules without appealing directly to the moral purposes that justify rights in the first place.

One striking example is the opinion of Judge Frank Johnson in the 1965 case that permitted Martin Luther King's historic march from Selma to Montgomery. Alabama Governor George Wallace tried to prevent the march. Judge Johnson acknowledged that the states had the right to regulate the use of their highways, and that a mass march along a public highway reached 'to the outer limits of what is constitutionally allowed.' Nevertheless, he ordered the state to permit the march, on grounds of the justice of its cause: 'The extent of the right to assemble, demonstrate and march peaceably along the highways', he wrote, 'should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.'[12]

Judge Johnson's decision was not content-neutral; it would not have helped the Nazis in Skokie. But it aptly illustrates the difference between the liberal approach to rights and the approach that would rest rights on a substantive moral judgment of the ends rights advance.

Cambridge, Massachusetts
December, 1997

12 *Williams v. Wallace*, 240 F. Supp. 100, 108, 106 (1965).

Acknowledgments

This book began life in Oxford in the late 1970s, a stimulating time for the study of political philosophy, especially so at Balliol College. I am indebted to teachers and friends of those years and since, who taught me much of what I have written here. Thanks are due first of all to William Connolly, Richard Fallon, Donald Herzog, Steven Lukes, David Miller, Alan Montefiore, Judith Shklar, and Charles Taylor, all of whom read an earlier version of this essay and offered valuable comments and criticisms. Their advice was all to the good, and does not account for whatever weaknesses remain. Some, however, are implicated a little more deeply. Among my contemporaries while abroad, Ronald Beiner, Richard Fallon, and Scott Matheson bear a special responsibility. Discussions and travels with them helped shape these thoughts, and made for intellectual comradeship of the highest order. I owe my deepest debt to those among my teachers whose influence is most present in this work: Ronald Dworkin, whose arguments demanded a better answer than I could offer at the time; Charles Taylor, who broadened Anglo-American horizons and taught the relevance of Aristotle and Hegel; and especially Alan Montefiore, who made philosophy inescapable, and set me on this path six years ago.

In preparing the material for the second edition, I am indebted to critics and friends (in some cases, one and the same) who have responded to the arguments presented in the first edition. I would like to record a special debt to John Rawls. His powerful statement of liberal political philosophy inspired this book from a distance. In the years since, I have had the good fortune to know him as a kind and generous colleague.

Introduction
Liberalism and the Primacy of Justice

This is an essay about liberalism. The liberalism with which I am concerned is a version of liberalism prominent in the moral and legal and political philosophy of the day: a liberalism in which the notions of justice, fairness, and individual rights play a central role, and which is indebted to Kant for much of its philosophical foundation. As an ethic that asserts the priority of the right over the good, and is typically defined in opposition to utilitarian conceptions, the liberalism I have in mind might best be described as 'deontological liberalism', a formidable name for what I think will appear a familiar doctrine.

'Deontological liberalism' is above all a theory about justice, and in particular about the primacy of justice among moral and political ideals. Its core thesis can be stated as follows: society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of *right,* a moral category given prior to the good and independent of it.

This is the liberalism of Kant and of much contemporary moral and political philosophy, and it is this liberalism that I propose to challenge. Against the primacy of justice, I shall argue for the limits of justice, and, by implication, for the limits of liberalism as well. The limits I have in mind are not practical but conceptual. My point is not that justice, however noble in principle, is unlikely ever fully to be realized in practice, but rather that the limits reside in the ideal itself. For a society inspired by the liberal promise, the problem is not simply that justice remains always to be achieved, but that the vision is flawed, the aspiration incomplete. But before exploring these limits, we must see more clearly what the claim for the primacy of justice consists in.

THE FOUNDATIONS OF LIBERALISM: KANT VERSUS MILL

The primacy of justice can be understood in two different but related ways. The first is a straightforward moral sense. It says that justice is primary in that the demands of justice outweigh other moral and political interests, however pressing these others may be. On this view, justice is not merely one value among others, to be weighed and considered as the occasion arises, but the highest of all social virtues, the one that must be met before others can make their claims. If the happiness of the world could be advanced by unjust means alone, not happiness but justice would properly prevail. And when justice issues in certain individual rights, even the general welfare cannot override them.

But the primacy of justice, in its moral sense alone, hardly distinguishes this liberalism from other well-known varieties. Many liberal thinkers have emphasized the importance of justice and insisted on the sanctity of individual rights. John Stuart Mill called justice 'the chief part, and incomparably the most sacred and binding part, of all morality' (1863: 465), and Locke held man's natural rights to be stronger than any commonwealth could override (1690). But neither was a deontological liberal in the deeper sense that concerns us here. For the full deontological ethic is not only about morals but also about the foundation of morals. It concerns not just the weight of the moral law, but also the means of its derivation, what Kant would call its 'determining ground' (1788).

On the full deontological view, the primacy of justice describes not only a moral priority but also a privileged form of justification; the right is prior to the good not only in that its claims take precedence, but also in that its principles are independently derived. This means that, unlike other practical injunctions, principles of justice are justified in a way that does not depend on any particular vision of the good. To the contrary: given its independent status, the right constrains the good and sets its bounds. 'The concept of good and evil is not defined prior to the moral law, to which, it would seem, the former would have to serve as foundation; rather the concept of good and evil must be defined after and by means of the law' (Kant 1788: 65).

From the standpoint of moral foundations, then, the primacy of justice amounts to this: the virtue of the moral law does not consist in

the fact that it promotes some goal or end presumed to be good. It is instead an end in itself, given prior to all other ends, and regulative with respect to them. Kant distinguishes this second-order, foundational sense of primacy from the first-order, moral sense as follows:

> By primacy between two or more things connected by reason, I understand the prerogative of one by virtue of which it is the prime ground of determination of the combination with the others. In a narrower practical sense it refers to the prerogative of the interest of one so far as the interest of the others is subordinated to it and is not itself inferior to any other (1788: 124).

The contrast might also be drawn in terms of two different senses of deontology. In its moral sense, deontology opposes *consequentialism;* it describes a first-order ethic containing certain categorical duties and prohibitions which take unqualified precedence over other moral and practical concerns. In its foundational sense, deontology opposes *teleology;* it describes a form of justification in which first principles are derived in a way that does not presuppose any final human purposes or ends, nor any determinate conception of the human good.

Of the two strands of the deontological ethic, the first is no doubt the more familiar. Many liberals, not only deontological ones, have given special weight to justice and individual rights. This raises the question of how the two aspects of deontology are related. Can liberalism of the first kind be defended without recourse to the second? Mill, for one, thought so, and argued for the possibility, indeed for the necessity, of detaching the two.

To have a right, says Mill, is 'to have something which society ought to defend me in the possession of' (1863: 459). So strong is society's obligation that my claim 'assumes that character of absoluteness, that apparent infinity, and incommensurability with all other considerations, which constitute the distinction between the feeling of right and wrong and that of ordinary expediency and inexpediency' (1863: 460). But if it be asked why society must meet this obligation, it is for 'no other reason than general utility' (1863: 459). Justice is properly regarded as 'the chief part, and incomparably the most sacred and binding part, of all morality', not by reason of abstract right, but simply because the requirements of justice 'stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others' (1863: 465, 469).

It is proper to state that I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being (1849: 485).

The overriding importance of justice and rights makes them 'more absolute and imperative' than other claims, but what makes them important in the first place is their service to social utility, their ultimate ground. 'All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and color from the end to which they are subservient' (1863: 402). On the utilitarian view, principles of justice, like all other moral principles, take their character and color from the end of happiness. For 'questions of ends are . . . questions about what things are desirable', and happiness is desirable, in fact 'the only thing desirable as an end', because 'people do actually desire it' (1863: 438). In this the teleological foundation and psychological assumptions of Mill's liberalism become clear.

For Kant, by contrast, the two aspects of deontology are closely connected, and his ethics and metaphysics argue powerfully against the possibility of having one without the other. Against a position such as Mill's (and that of modern-day 'rule utilitarians') the Kantian view suggests at least two compelling objections. One says that utilitarian foundations are unreliable, the other that unreliable foundations, where justice is concerned, can be coercive and unfair.

Utilitarianism is unreliable in that no merely empirical foundation, utilitarian or otherwise, can secure absolutely the primacy of justice and the sanctity of individual rights. A principle that must presuppose certain desires and inclinations can be no less conditional than the desires themselves. But our desires and the means of satisfying them typically vary, both between persons and, over time, within individual persons. And so any principle that depends on them must be similarly contingent. Thus 'all practical principles which presuppose an object (material) of the faculty of desire as the determining ground of the will are without exception empirical and can furnish no practical laws' (Kant 1788: 19). Where utility is the determining ground – even 'utility in the largest sense' – there must in principle be cases where the general welfare overrides justice rather than secures it.

Mill in effect concedes the point, but would question whether justice should be *that* unconditionally privileged anyhow. He acknowledges that the utilitarian account does not make justice absolutely prior, that there may be particular cases 'in which some other social duty is so important as to overrule any one of the general maxims of justice' (1863: 469). But if, by this qualification, the happiness of mankind is advanced, what grounds could there be for affirming the primacy of justice more completely?[1]

Kant's answer would be that even exceptions in the name of human happiness must be rejected, for the failure to affirm absolutely the primacy of justice leads to unfairness and coercion. Even if the desire for happiness were universally shared, it could not serve as basis for the moral law. Persons would still differ in their conceptions of what happiness consists in, and to install any particular conception as regulative would impose on some the conceptions of others, and so deny at least to some the freedom to advance their own conceptions. It would create a society where some were coerced by the values of others, rather than one where the needs of each harmonized with the ends of all. 'Men have different views on the empirical end of happiness and what it consists of, so that as far as happiness is concerned, their will cannot be brought under any common principle nor thus under any external law harmonizing with the freedom of everyone' (Kant 1793: 73–4).

For Kant, the priority of right is 'derived entirely from the concept of *freedom* in the mutual external relationships of human beings, and has nothing to do with the end which all men have by nature (i.e. the aim of achieving happiness) or with the recognized means of attaining this end' (1793: 73). As such, it must have a basis prior to all empirical ends. Even a union founded on some common end which all members share will not do. Only a union 'as an end in itself which they all ought to share and which is thus an absolute and primary duty in all external relationships whatsoever among human beings' can

1 Mill goes on to claim that justice just *is* whatever utility requires. Where the general maxims of justice are outweighed, 'we usually say, not that justice must give way to some other moral principle, but that what is just in ordinary cases is, by reason of that other principle, not just in the particular case. By this useful accommodation of language, the character of indefeasibility attributed to justice is kept up, and we are saved from the necessity of maintaining that there can be laudable injustice' (1863: 469).

secure justice and avoid the coercion of some by the convictions of others. Only in such a union can no one 'compel me to be happy in accordance with his conception of the welfare of others' (1793: 73–4). Only when I am governed by principles that do not presuppose any particular ends am I free to pursue my own ends consistent with a similar freedom for all.

On the Kantian view, the two strands of the deontological ethic hang together. The moral priority of justice is made possible (and necessary) by its foundational priority. Justice is more than just another value, because its principles are independently derived. Unlike other practical principles, the moral law is not implicated in advance in various contingent interests and ends; it does not presuppose any particular conception of the good. Given its basis prior to all merely empirical ends, justice stands privileged with respect to the good, and sets its bounds.

But this raises the question what the basis of the right could possibly be. If it must be a basis prior to all purposes and ends, unconditioned even by 'the special circumstances of human nature' (1785: 92), where could such a basis conceivably be found? Given the stringent demands of the deontological ethic, the moral law would seem almost to require a foundation in nothing, for any material precondition would undermine its priority. 'Duty!' asks Kant at his most lyrical, 'What origin is there worthy of thee, and where is to be found the root of thy noble descent which proudly rejects all kinship with the inclinations?' (1788: 89).

His answer is that the basis of the moral law is to be found in the subject, not the object of practical reason, a subject capable of an autonomous will. No empirical end but rather 'a subject of ends, namely a rational being himself, must be made the ground for all maxims of action' (1785: 105). Nothing other than 'the subject of all possible ends himself' can give rise to the right, for only this subject is also the subject of an autonomous will. Only such a subject could be that 'something which elevates man above himself as a part of the world of sense' and enables him to participate in an ideal, unconditioned realm wholly independent of our social and psychological inclinations. And only this thoroughgoing independence can afford us the detachment we need if we are ever freely to choose for ourselves, unconditioned by the contingencies of circumstance. On the deontological view, what matters above all is not the ends we choose