

ARE THERE DERIVATIVE NATURAL RIGHTS?

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I. An Odd Question

Are there derivative natural rights? At first glance, this appears to be quite an odd question. One is tempted to answer, "Of course not." Natural rights are conventionally conceived of as absolute protections for individuals that spring directly from either the word of God or human nature. Few theorists currently accept that any such entities exist and almost all would contend that, if they did, they would necessarily be morally fundamental in nature. However, in their recent book, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (hereinafter *Liberty and Nature*), Douglas Den Uyl and Douglas Rasmussen argue both that natural rights exist and that they have a morally derivative status. How they arrive at this novel conclusion makes quite an interesting study. For, whether one is convinced by their argument or not, it seems to highlight a distinction between the moral and political domains that contemporary social philosophers, especially communitarians, too often overlook. For this reason alone, I believe it to be well worth examining.

Before proceeding, however, I would like to introduce two terminological conventions and briefly survey the current thinking about rights. As a first convention, I will be employing the more expressive language of "option" and "welfare" rights to refer to the distinction conventionally drawn between negative and positive rights.¹ Thus, an option right is a right that protects autonomy, one that guarantees that certain choices will be left up to the rightholder. Option rights provide individuals with a sphere of freedom within which they may act as they wish. A welfare right, on the other hand, is a right to be provided with something. Welfare rights are entitlements to goods or benefits. Secondly, Den Uyl and Rasmussen do and I will talk about a

¹See Martin P. Golding, "The Concept of Rights: A Historical Sketch," in *Bioethics and Human Rights* (Boston: Little, Brown, 1978), p. 44.

right being "absolute." This term is employed to indicate that the right may not justifiably be abridged by appeal to other moral considerations, not that it is unlimited in scope. For example, legally speaking, the right of free speech is famously limited in scope, but within that scope may not be abridged. Thus, it is absolute. In this sense, the term 'absolute' is used to indicate that a right is not merely a *prima facie* right.²

As I have written elsewhere,³ there are two distinct conceptions of what are variously called natural, human, or fundamental rights that are currently recognized within the literature. The first, which I call the classical conception, is typically associated with the natural rights thinking ascribed to Hobbes and Locke and, more recently, with the Kantian-based theory of Robert Nozick. The defining characteristic of this conception of rights is its deontological character. Under it, rights are not regarded as means to the achievement of more fundamental moral ends. Rather, respect for rights is itself a fundamental requirement of morality.

Under the classical conception, basic rights have four essential features: 1) they are absolute, 2) they are option rights, 3) they do not conflict with each other, and 4) they are possessed exclusively by individual human beings. 1) They are absolute because they are morally fundamental, deriving directly from (respectively) human nature, the word of God, or the categorical imperative. These rights cannot be overridden because there exist no more significant moral considerations to override them. 2) They must be option rights because human beings are naturally or divinely invested with free will or because the categorical imperative requires respect for the autonomy of rational beings. Thus, the purpose of these rights must be to protect human beings' capacity to choose. 3) They do not conflict with each other, i.e., they are compossible, because as option rights they consist exclusively of injunctions not to interfere with other people's choices, and thus impose only duties of non-interference. Since all such duties can be fully

²See Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice Hall, 1973), pp. 80-81.

³See John Hasnas, "From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights," *Northwestern University Law Review*, vol. 89 (forthcoming, 1995).

satisfied by mere inaction, compliance with one of these rights never requires an individual to violate another. Finally, 4) they may be possessed only by individual human beings, i.e., there are no group or animal rights, because only individual human beings possess the free will or autonomy that these rights are designed to protect.

The second conception of rights, which I call the contemporary conception, derives from the interest-based theory advanced by Jeremy Bentham and the utilitarians and has widespread support among contemporary rights theorists. This conception is teleological in nature in that it views rights as instruments for the realization of more basic moral interests. Under the contemporary conception, rights are entitled to respect solely as means to the achievement of these interests.

Under the contemporary conception, human or fundamental rights⁴ have the following four essential features: 1) they are *prima facie*, 2) they may be option or welfare rights, 3) they may conflict with each other, and 4) they may be possessed by any entity capable of having interests. 1) They are *prima facie* because as instruments for the attainment of more fundamental interests, they have no inherent value and may be overridden whenever doing so would better serve the relevant interests. 2) They may be both option rights and welfare rights because both being free from outside interference with one's choices and having others provide one with goods or benefits can serve as instruments for the attainment of these interests. 3) They may conflict because the positive actions required by a welfare right can intrude upon a zone of non-interference protected by an option right. As a result, the only way to enforce the welfare right would be by violating the option right, and *vice versa*. Finally, 4) such rights are not limited to individual human beings, since as means to the attainment of more fundamental interests, they may reasonably be said to be possessed by any entity that can have such interests, including groups and animals.

⁴Theorists who subscribe to the contemporary conception of rights typically do not believe in "natural" rights.

In *Liberty and Nature*, Den Uyl and Rasmussen advance what appears to be a classical conception of natural rights. They refer to the rights they argue for as "Lockean rights,"⁵ which they describe as absolute,⁶ compossible,⁷ option rights⁸ possessed exclusively by human beings.⁹ Yet, unlike other adherents of the classical conception, they make no claim that respect for them is a fundamental requirement of morality. Instead, they offer the type of justification usually associated with the contemporary conception of rights. Den Uyl and Rasmussen explicitly claim that human beings possess natural rights only because this is necessary to human well-being.¹⁰ Hence, for them, natural rights have a truly derivative status. How do they arrive at this seemingly paradoxical position?

II. The Derivation of "Aristotelian" Rights

A. The Basis in Aristotelian Ethics

In *Liberty and Nature*, Den Uyl and Rasmussen claim to provide an Aristotelian basis for natural rights. I emphasize the last three letters of 'Aristotelian' to indicate that the authors are not asserting that Aristotle himself either supplied a basis for natural rights, believed that there were such things as natural rights, or even understood what a right was. On the contrary, they are at pains to make clear that they regard themselves merely as working within an Aristotelian tradition or one "which involves the novel use of positions of Aristotle, but without necessarily being historically linked with Aristotle or working within Aristotle's framework and method."¹¹ This is

⁵Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, Illinois: Open Court Publishing, 1991), p. 80.

⁶*Ibid.*, p. 85.

⁷*Ibid.*, p. 86.

⁸*Ibid.*, p. 82.

⁹See generally *ibid.*, pp. 78-87.

¹⁰See *ibid.*, p. 87-88.

¹¹*Ibid.*, p. xv.

important to keep in mind because the use they make of some of Aristotle's positions is novel indeed.

At first, however, the authors purport to hew closely to Aristotle's ethical thought. On their account, Aristotle's ethics is based on two fundamental premises. The first is that a human being is properly defined as a rational animal. This does not represent an *a priori* definition, but a distillation of all that science has to tell us about the nature of human beings. The second is that in order for any being to realize its natural end or *ergon*, it has to actualize its potentialities as the type of being that it is. From this, it follows that living rationally or intelligently is the human *ergon*, "that-for-the-sake-of-which all human actions are done and that which constitutes the standard by which actions are to be evaluated."¹²

Den Uyl and Rasmussen go on to explain that when one realizes one's *ergon*, when one lives rationally or intelligently, one flourishes as a human being or experiences *eudaimonia*. *Eudaimonia* is the "state of well-being which is achieved by self-actualization and characterized by maturation."¹³ It is happiness, not in the sense of the mere gratification of desire, but in the sense of the satisfaction associated with living well; a state of happiness one achieves only through one's own choices and actions. On this approach, *eudaimonia* *is* living rationally or intelligently and represents a human being's ultimate moral end.

At this point, Den Uyl and Rasmussen make two important points about *eudaimonia*: it is individuated and it is an inclusive rather than a dominant end. It is individuated in that what it means to live rationally varies from person to person. There is no single set of actions that constitutes rational living for all human beings. What one must do to live well depends on one's particular capabilities and circumstances. Since "[g]oodness is always what is good *for* the

¹²*Ibid.*, p. 35. The authors realize that this derivation appears to run into the is-ought problem and confront this issue directly. See *ibid.*, p. 41-57. However, the question of whether they have done so adequately is beyond the scope of the present consideration.

¹³*Ibid.*, p. 36.

individual living thing and is not some abstract property or relation,"¹⁴ one is living rationally when one is fully realizing one's own potential as an individual human being. As Den Uyl and Rasmussen explain this,

[O]ne's generic potentialities are never separate from one's individuating potentialities, and every person needs to develop his own version of human flourishing. For example, one person may spend a comparatively larger amount of time and effort developing his personal relationships than someone else, while another person may spend more time and effort developing his physical health. To ignore either would be a mistake, but the emphasis put on each is a matter of degree; and the proper balance or 'mean' is only something that the individual can determine for himself in light of his own unique potentialities, needs, and circumstances.¹⁵

In contending that *eudaimonia* is an inclusive rather than a dominant end, the authors are suggesting that even though it is the ultimate moral end, it is not the only thing of intrinsic value. In their view, *eudaimonia* is not a single end such that all intermediate ends have value exclusively as means to its attainment. Rather, it is an inclusive end, one that contains within itself all of the many other intrinsically valuable ends. Just as the portrait presented by a completed jigsaw puzzle is the integration of the shapes and colors of the individual pieces, for Den Uyl and Rasmussen, *eudaimonia* is the integration of the many things that are valuable in themselves. For them, "the other final ends . . . are 'included' in the ultimate end as expressions of it."¹⁶

From this understanding of *eudaimonia*, Den Uyl and Rasmussen derive the crucial importance of self-directedness or autonomy. Because living rationally or intelligently is "the overarching end or virtue which integrates and unifies all the other ends of human flourishing,"¹⁷ they contend that right action necessarily requires the exercise of human reason and intelligence. "[I]t is the individual human being directing and using his own mind to take actions to achieve ends that is absolutely necessary for human fulfillment. Thus, self-directedness or autonomy is an

¹⁴*Ibid.*, p. 56.

¹⁵*Ibid.*, p. 70.

¹⁶*Ibid.*, p. 66.

¹⁷*Ibid.*, p. 71.

inherent feature of any activity being constitutive of human well-being."¹⁸ It is not just that autonomy is necessary for human well-being in the sense that health, wealth, pleasure and friendship are. Because human flourishing consists in the *process* of living rationally or intelligently, it requires not merely that one possess these things, but that one acquire them by the use of one's reason and intelligence. For this reason, the authors regard self-directedness or autonomy as centrally important to moral action.

Den Uyl and Rasmussen are careful to point out that the possession of self-directedness or autonomy does not guarantee that one will, in fact, flourish. Rather, their point is that because human flourishing consists in an activity by which human beings realize their potential, it is impossible without self-direction. Their claim is that self-direction is a necessary condition, not merely for human flourishing, but for the very possibility of human flourishing.

Based on this account, the authors claim to have described a humanistic and individualistic Aristotelian natural-end ethics. "It is humanistic because human flourishing is the ultimate moral standard; it is individualistic because human flourishing is always understood as the flourishing of the individual human being."¹⁹ Further, because it recognizes that human beings are by nature "social and political animals [that] live best in a human community that has the rule of law,"²⁰ they claim that it is neither narrowly egoistic nor atomistic. This, then, constitutes the ethical platform from which the authors' derive their rights claims.

B. The Realm of Rights

To understand the authors' argument for natural rights, one must appreciate that despite containing the above described account of Aristotelian normative theory, *Liberty and Nature* is not really a book about ethics. Den Uyl and Rasmussen include their account of Aristotelian ethics, not because they intend to address any specific ethical issues, but because they regard it as

¹⁸*Ibid.*

¹⁹*Ibid.*, p. 75.

²⁰*Ibid.*

necessary to their derivation of natural rights. In *Liberty and Nature*, Den Uyl and Rasmussen see themselves as presenting an essentially political argument.

It is important to realize that for Den Uyl and Rasmussen, rights do not function in the normative realm. Their purpose is not to give human beings direction as to how to live a good life. They are not guides in the quest for self-actualization and they play no direct role in helping human beings attain *eudaimonia*.²¹ This can only result from living in accordance with virtue as discerned by practical reason. For Den Uyl and Rasmussen, as for Aristotle, ethics is not a matter of rights.

In Den Uyl and Rasmussen's formulation, rights serve a purely political function. Their purpose is to ensure a political environment in which it is possible for individuals to live virtuously. For them, rights are exclusively designed to "provide guidance in the creation of a constitution which will be the basis for a legal system that protects"²² the possibility of virtuous action.

This is not to say that rights are without normative import. Rights have normative force, but this force is limited to the political arena. The authors refer to rights as "meta-normative" principles which serve only to prescribe the legal arrangements by which society is to be governed, or as they express it, "[r]ights are a moral concept which provides the normative basis to law."²³ As this limited range of normative application indicates, for Den Uyl and Rasmussen, politics, not ethics, is the realm of rights.

C. How *Not* to Derive Natural Rights

At this point, there appears to be a rather straightforward way to derive a set of natural rights. One would begin by listing the conditions necessary for any human being to attain

²¹The authors are at pains to point out that rights "do not provide guidance to individuals in the conduct of their lives. . . . It is . . . absolutely crucial that rights not be treated as a moral guide to self-perfection. *Ibid.*, p. 111-13.

²²*Ibid.*, p. 111.

²³*Ibid.*, p. 112.

eudaimonia. This would consist of the things that any human being would need in order to have a chance of reaching his or her potential, i.e., of living rationally or intelligently, regardless of the differences among these potentialities. For example, people would obviously need the freedom to make important life decisions for themselves since self-direction is necessary for flourishing. However, they would also need such things as the basic material resources necessary to sustain life (food, shelter, clothing, etc.), a minimally decent education, freedom from oppressively discriminatory treatment by their fellow citizens, and perhaps even access to adequate health care to have a reasonable chance of actualizing their potential. When this is coupled with the observation that the purpose of rights is to ensure a political environment in which it is possible for individuals to realize their potential, it would seem to authorize the conclusion that individuals possess rights to liberty, minimal material welfare, a minimally decent education, freedom from discrimination, and health care. Further, these rights would be natural rights because they protect the things necessary for human beings to realize their *ergon* or natural end.

Although such an argument might be suggested by the work of some of the virtue ethicists,²⁴ this is emphatically not the direction taken by the authors of *Liberty and Nature*. In fact, they appear to regard this line of argument as akin to a category mistake. According to Den Uyl and Rasmussen, this argument incorrectly treats rights as normative, rather than meta-normative, principles.

Recall that for Den Uyl and Rasmussen, normative principles are those designed to promote human flourishing. If all individuals were to abide by such principles, each would be more likely to experience *eudaimonia*. In the above argument, the specified rights impose obligations on the members of society not to deprive one another of their liberty, to provide

²⁴See e.g., Martha Nussbaum, "Nature, Function, and Capability: Aristotle on Political Distribution," in *Oxford Studies in Ancient Philosophy* (Oxford University Press 1988), p. 145; Amartya Sen, "Capability and Well-being," in Amartya Sen & Martha Nussbaum (eds.), *The Quality of Life* (Cambridge: Oxford University Press, 1993), p. 30. Note that I am not claiming that these theorists present this, or any other, argument for natural rights. I am merely suggesting that such an argument could reasonably be derived from their work.

everyone with the material resources necessary for survival, to provide everyone with a minimally decent education, to refrain from invidious discriminatory behavior, and to provide everyone with adequate health care. These obligations are imposed in order to create an environment in which human beings are likely to flourish. Thus, the purpose of these obligations, and hence of the rights that impose them, is to promote human flourishing. However, this implies that the rights are serving as normative principles.

According to Den Uyl and Rasmussen, the error in the above argument is a failure to appreciate the significance of the words "it is possible" in their claim that the purpose of rights is to ensure a political environment in which it is possible for individuals to realize their potential. They argue that there is an essential distinction between providing for the possibility of self-perfection and aiding in its actualization. In describing rights as meta-normative principles, the authors are indicating that they view rights as limited to ensuring the existence of the conditions that make self-perfection possible. For them, rights do not and cannot aid individuals in actualizing their potential as human beings. The authors believe that those who fail to appreciate this distinction are making what we may characterize as the "modal mistake."

D. The Modal Mistake

To appreciate the nature of the modal mistake, one must refer back to the definition of *eudaimonia*. Recall that Den Uyl and Rasmussen characterize *eudaimonia* as an activity, not as a passive state of being. For them, human flourishing consists in *the process of* realizing one's potential as a human being by correctly integrating ends that are valuable in themselves into the inclusive end of living rationally or intelligently. Human flourishing is not merely living in accordance with virtue, but doing so through the effective exercise of one's practical reason; *eudaimonia* is not the *state* of having actualized one's potential, but the *process* of actualizing one's potential through one's own efforts.

According to the authors, this implies a qualitative distinction among goods. Unlike possessing necessary material resources, being educated, being free from discrimination, and

having adequate health care, "self-directedness or autonomy is not merely the necessary means to human well-being. Rather it is an inherent feature of those activities which constitute the human good that is human flourishing."²⁵ Although many human goods may, in fact, be necessary for human flourishing, all but self-directedness or autonomy are conceptually separable from it. However, as a constitutive part of flourishing, self-directedness or autonomy is not merely "an activity (a virtue) which is an end in itself. It is . . . nothing less than the very form, the only form, of *the* natural end of man."²⁶

Den Uyl and Rasmussen assert that this gives self-directedness or autonomy a pre-eminent place among human goods. To flourish, individuals must exercise their practical reason to select the package of human goods most likely to lead to their self-perfection given their potentialities and circumstances. Hence, these goods are subject to the balancing and trade-offs of the dictates of practical reason. However, as a constitutive element of every individual's self-perfection, self-directedness or autonomy must always be present for one to flourish. In other words, in order to flourish, one must be self-directed or autonomous *regardless of one's potentialities and circumstances*. Hence, unlike other human goods, self-directedness or autonomy is not subject to the application of practical reason.

This difference between self-directedness or autonomy and other human goods forms the basis of Den Uyl and Rasmussen's distinction between the meta-normative and normative realms. All human beings must be self-directed in order to flourish. Therefore, it is necessary to provide an environment in which human beings can act autonomously for there to be the possibility of flourishing. Once such an environment has been established, each human being must face the question of how to exercise his or her autonomy in order to flourish. The purpose of meta-normative principles is to provide the environment within which autonomous activity may take

²⁵*Liberty and Nature*, p. 93.

²⁶*Ibid.*, p. 94. The authors seem to be suggesting a distinction analogous to that between contingent and logical necessity. For a more detailed explanation of this distinction, please see *Liberty and Nature*, p. 93-94.

place. Normative principles, on the other hand, are designed to guide individuals in the exercise of their autonomy.

Meta-normative principles may be thought of as principles designed to ensure the possibility of action in accordance with normative principles. They do not directly promote human flourishing, but rather secure a domain for self-directed or autonomous action, a domain within which human beings are free to exercise their practical reason. Normative principles operate within this domain as guides to practical reason. Their purpose is to promote human flourishing by aiding the individual in his or her effort to assemble the package of human goods most appropriate to his or her circumstances.

Den Uyl and Rasmussen consider rights to be meta-normative principles. As such, they stand outside the scope of practical reason and, hence, outside the realm of ordinary moral discourse. Rights are *political* entities whose purpose is to establish a *political* environment within which individuals are able to discover and act upon their moral obligations. The authors recognize that, functioning within this environment, human beings have many positive moral obligations to each other. They might agree that individuals are morally obligated to provide others with a minimal level of material resources, to provide others with a minimally decent education, to refrain from discriminating against others, and perhaps even to provide others with adequate health care. Their contention is that such obligations do not arise from rights, but from the application of practical reason to the circumstances of human life.

As this analysis should make clear, Den Uyl and Rasmussen's objection to the argument at the beginning of this section is that it incorrectly treats rights, which are meta-normative principles designed to secure the *possibility* of self-perfection, as though they were normative principles designed to aid in the actualization of self-perfection. For them, basing an argument for rights on what is necessary for individuals to flourish rather than on what is necessary to guarantee an environment in which flourishing is possible is to make the modal mistake. It is to confuse the moral with the political realm. The authors regard this as an extremely serious error.

[I]f the distinction between normative principles and meta-normative principles is not clearly made, especially if rights are conflated with principles whose function is to guide personal conduct seeking the end of self-perfection, then rights are subject to application by practical reason and thus may be judged as inappropriate for the person in the situation in which he finds himself. . . . It is, therefore, absolutely crucial that rights not be treated as a moral guide to self-perfection. It is disastrous to both prudence and politics when this occurs, not to mention clear thinking.²⁷

E. How to Derive Natural Rights

At this point, it should be clear how Den Uyl and Rasmussen derive their natural rights. They consider rights to be meta-normative principles whose purpose is to establish and protect a political environment in which human flourishing is possible. Since self-directedness or autonomy is what makes human flourishing possible, this implies that rights must establish and protect a political environment in which each individual is able to engage in self-directed or autonomous activity.

It is important to note that the authors are not arguing for an atomized amalgamation of isolated individuals. They explicitly recognize that each individual "is a social and political animal, whose very maturation as a human being requires others."²⁸ Den Uyl and Rasmussen are presenting an argument for a properly structured *society*, an arrangement by which human beings live together and interact with each other. Therefore, to fulfill their purpose, rights must secure a political environment in which each individual may live among and interact with others while simultaneously retaining the ability to autonomously direct his or her own actions. In a sense, rights must enable individuals to carry a sphere of autonomy around with them as they interact with other human beings.

The problem, of course, is that human beings may interact with each other either voluntarily, on the basis of mutual consent, or coercively, by forcing one party to act in a way that he or she has not freely chosen. For rights to create an environment in which human beings may interact with each other and yet each remain self-directed or autonomous, they would have to

²⁷*Ibid.*, p. 113.

²⁸*Ibid.*, p. 114.

restrict the range of human interaction to the voluntary. Therefore, Den Uyl and Rasmussen believe that to ensure the possibility of human flourishing, rights must secure a political environment in which each citizen exists within his or her own moral territory, within "a sphere of moral authority that is completely one's own"²⁹ and is proof against the unwanted intrusions of one's fellow citizens. As they express it, "rights define a set of compossible moral territories."³⁰

It is clear from this approach that Den Uyl and Rasmussen are arguing for a classical conception of rights. The rights necessary to establish and protect the requisite political environment, which according to the authors are precisely the Lockean rights to life, liberty, and property traditionally recognized by classical liberals, must be understood as absolute, compossible, option rights possessed exclusively by human beings. The rights must be option rights because their purpose is to secure the possibility of self-directed or autonomous activity for every individual. Option rights are designed to create precisely that personal moral territory that the authors demonstrate to be prerequisite for human beings to have the opportunity to flourish.³¹ The rights are compossible because they issue only negative injunctions not to deprive others of their life, liberty, and property without their consent. Thus, if all human beings were to elect to interact with each other on a purely voluntary basis, these injunctions could be conjointly satisfied.³² Further, the rights are absolute because, as meta-normative principles, they stand outside the normative realm, and, hence, outside the domain of practical reason. They are not

²⁹*Ibid.*, p. 104.

³⁰*Ibid.*, p. 106.

³¹Indeed, as discussed in §II(C) above, for Den Uyl and Rasmussen, the very idea of welfare rights embodies a category mistake. Obligations to provide for the welfare of others arise in the normative realm where rights have no place. Rights exist only in the meta-normative realm and only for the purpose of securing the possibility of flourishing, which requires only that self-directed or autonomous action be possible. As they express it, "rights cannot be positive because to make them so would remove the distinctive need for having a concept of rights in the first place--namely, to provide the individual with a context for eudiamonic achievement." *Ibid.*, p. 107-08.

³²It should be noted, however, that an extremely well-crafted theory of private property is required for this set of rights to be truly compossible.

normative goods to be selected or discarded as circumstances dictate, but principles designed to guarantee the *possibility* of virtuous action. Without the environment they create, moral activity cannot take place. Hence, they may not be overridden by substantive moral considerations.

Finally, the rights are possessed only by individual human beings because their purpose is to create an environment in which *human* flourishing is possible. Under the authors' Aristotelian approach, living rationally or intelligently is the distinctive *ergon* or natural end of individual human beings and rights are specifically designed to provide an environment within which it is possible for such beings to realize this end. Hence, rights are meaningful entities only when associated with individual human beings.

This last point also demonstrates that the rights Den Uyl and Rasmussen are advocating are indeed natural rights. For the authors, rights are necessary precisely because human beings are the kind of beings they are, rational animals who can flourish only through self-directed or autonomous action. Human nature requires self-directed or autonomous action for self-perfection, and rights to life, liberty, and property are necessary to ensure that individuals are able to engage in such action. Hence, for Den Uyl and Rasmussen, the existence of rights follows directly from the requirements of human nature.

Thus, the authors are advancing a classical conception of natural rights. However, unlike the traditional theories of natural rights, Den Uyl and Rasmussen's theory is not deontological in character. Respect for these rights is not a fundamental requirement of morality. Strictly speaking, it is not a requirement of morality at all. Rather, Den Uyl and Rasmussen's natural rights are justified on teleological grounds as necessary instrumentalities for the achievement of human well-being. For them, rights are entitled to respect solely as means to the realization of this fundamental moral value. Hence, for Den Uyl and Rasmussen, natural rights truly have a derivative status.

III. A Hint of an Objection

It is not the purpose of this article to subject Professors Den Uyl and Rasmussen's

argument to rigorous analytical scrutiny. That must be left to scholars better versed than I in virtue ethics generally, and Aristotelian ethics in particular. Rather, I would like to examine some of the implications the authors' theory may have for contemporary social philosophy. However, before proceeding to that, I would like to at least suggest what may be a weak point in the authors' theory.

Professors Den Uyl and Rasmussen claim that, given human nature, self-directedness or autonomy is a constitutive element of all virtuous action, and hence, that human flourishing is impossible in its absence. However, to say that human flourishing is impossible in the absence of self-directed or autonomous action is not to say that it is impossible unless *all* human action is self-directed or autonomous. Unless *eudaimonia* requires that absolutely all of an individual's actions be virtuous actions, it would seem that human beings can flourish as long as their actions are *substantially*, as opposed to totally, self-directed or autonomous.

This is significant because the authors base their argument for natural rights on the claim that human flourishing requires a political environment in which self-directed or autonomous activity may take place. However, if human flourishing requires only that human beings be *substantially* self-directing or autonomous, then the requisite political environment need not be one in which *all* human action may be self-directed or autonomous. One that ensured that human beings could be substantially self-directing or autonomous would be sufficient.

If this is the case, the authors' argument for their set of natural rights would appear to be considerably weakened. It may well be that each citizen must possess a set of absolute, option rights to life, liberty, and property in order to maintain a political environment in which human action may be *totally* self-directed or autonomous, i.e., one in which all permissible human interaction is voluntary. However, it is far from clear that each citizen must possess this set of rights to maintain a political environment in which all citizens, though subject to moderate amounts of coercive interference with their choices, are *substantially* self-directing or autonomous. On my reading, Professors Den Uyl and Rasmussen's theory appears to be

vulnerable to objection at this point.

IV. Implications

In *Liberty and Nature*, Den Uyl and Rasmussen draw a sharp distinction between the normative (moral) and meta-normative (political) realms. I believe this distinction to be an extremely useful one that has interesting implications for contemporary social philosophy. Specifically, I believe that greater attention to this distinction would help resolve the dispute between the adherents of the contemporary and classical conceptions of rights as well as undermine the chief communitarian criticism of the liberal emphasis on individual rights.

A. The *Non Sequitur* of the Rights Dispute

I would like to suggest that the ongoing dispute between the adherents of the contemporary and classical conceptions of rights may be due to the failure to clearly distinguish between the normative and meta-normative realms. To show that this is the case, let me focus our attention on the normative realm for the moment. This is the realm of moral obligation, the realm in which human beings must employ their practical reason to discover how they should behave if they are to flourish. Although each individual has different potentialities and functions in different circumstances, there are certain actions that will be required of most human beings most of the time. For example, in most circumstances, self-perfection will obligate human beings to refrain from invidious discriminatory behavior, to avoid being cruel to animals, to provide the minimal material resources necessary for survival to those in need, and to make some contribution to efforts to ensure that all people receive a minimally decent education, and perhaps even adequate health care. These obligations are neither universal nor absolute; in many cases, they may be overridden by more important moral considerations. However, they do represent a set of obligations that, all else being equal, tend to promote the flourishing of those who meet them.

Upon careful reflection, we may be able to compile a list of moral obligations that human beings must generally meet in order to flourish. This list could then serve as a useful guide to one's practical reason, as a sort of road map to self-perfecting activity. Of course, one could not

attain *eudaimonia* by blindly following such a map. Just as, when following a real road map, one must depart from the main routes due to construction and weather conditions, and to arrive at one's local destination, so too, when following a moral map, one must depart from its generalized prescriptions due to one's potentialities and circumstances, and to realize one's individuated form of *eudaimonia*. However, in the same way that the road map remains a valuable aid to automotive travel, these generalized prescriptions are nevertheless a valuable tool for moral development.

Although some of the obligations on this list may be entirely self-regarding, many of them (such as those mentioned above) will impose duties upon individuals to act in the interests of other parties. These other-regarding obligations may be viewed from the perspective of either the bearer of the obligation or the recipient of its benefit. From the perspective of the recipient, each item on the list will constitute a description of the way he, she, or it is morally entitled to be treated, all else being equal. When adopting the perspective of the recipient, these generalized moral entitlements are often referred to as rights. Notwithstanding Den Uyl and Rasmussen's objection to the use of the term 'rights' in this context, let us temporarily accept the characterization of these normative entitlements as "moral rights."

What characteristics would these "moral rights" have? They would obviously be *prima facie* since they hold only "all else being equal" and may be overridden whenever more important moral considerations are at stake. They could be either option or welfare rights because living rationally or intelligently in society will usually require individuals to both respect the autonomy of others and provide them with certain benefits. These "rights" could obviously conflict because the particular circumstances in which an individual must act and his or her specific potentialities will often produce a clash among his or her general moral obligations.³³ Finally, the "rights" may be possessed by individuals, groups, or animals because living rationally or intelligently will usually require individuals to treat each entity in an appropriate way. What this suggests is that the contemporary conception of rights is an accurate description of what we are presently calling

³³This is precisely why virtuous living requires the application of practical reason.

"moral rights," of human beings' general moral obligations when viewed from the perspective of the party entitled to receive the benefit of these obligations.

Let us now turn our attention to the meta-normative or political realm. Within this realm, rights are meta-normative principles designed to maintain a political environment in which it is possible for human beings to attain *eudaimonia*. For the sake of clarity, let us refer to rights of this type as "political rights." As discussed in §II(E), the authors have argued that because self-directedness or autonomy is a constitutive element of human flourishing, the maintenance of a political environment in which such flourishing is possible requires that individuals possess absolute, option rights to life, liberty, and property. If, contrary to my suggestion in §III, the authors are right about this, they will have established that the classical conception of rights is an accurate description of "political rights."³⁴

What this suggests is that the philosophical dispute over whether the contemporary or classical conception of rights constitutes the correct conception of rights may be a *non sequitur*. The dispute may derive entirely from an unwarranted assumption that there can be only one type of right. If this is incorrect, if different realms of discourse require qualitatively different types of rights, then it would be pointless to argue about which is the uniquely correct conception of rights. There would be no such conception.

Den Uyl and Rasmussen may be right in arguing that because human beings must discover their moral obligations by exercising practical reason in particular circumstances, there can be no absolute rights in the moral realm. However, it may also be the case that, within the realm of moral discourse, there is need for a conception of rights that allows us to refer to the type of treatment individuals, groups, and animals are, all else being equal, entitled to expect from any human being. If so, then the contemporary conception of rights is the correct conception of rights *for the moral realm*. However, the authors may also be right in contending that, to have any chance of flourishing, human beings need a sphere of autonomous action that is absolutely

³⁴See p. 17 above.

guaranteed by the state. This would mean that, within the realm of political discourse, there is need for a conception of rights that allows us to refer to protections for the autonomy of individual human beings that can not be overridden by moral considerations arising out of any set of particular circumstances. If so, then the classical conception of rights is the correct conception of rights *for the political realm*.

This observation may go a long way toward explaining why the dispute between the contemporary and classical conceptions of rights appears so intractable. Since each conception is appropriate within its proper realm of discourse but inappropriate outside of it, the failure to distinguish between realms of discourse will necessarily lead to unresolvable conflict. The value of Den Uyl and Rasmussen's distinction between the normative and meta-normative realms is that allows us to escape the false dilemma of having to interpret rights exclusively under either the contemporary or classical conceptions.

B. The Communitarian Confusion

Communitarians are famous for criticizing liberalism for the primacy of place it accords to individual rights. They contend that by defending "the priority of the individual and his rights over society,"³⁵ liberals subscribe to an atomistic view of human beings as isolated, self-sufficient individuals rather than social beings embedded in their community. Since this view of individuals as worlds unto themselves is incompatible with any objective conception of the common good, communitarians claim that liberalism requires a wholly subjective conception of value. Thus, they contend that liberals have no choice but to regard individuals as self-interested utility maximizers, and hence, a liberal society must inevitably be one in which individuals selfishly shun the common good for the pursuit of personal satisfaction.

This attack is directed against what the communitarians regard as the heart of liberalism, the attempt to derive morality from a set of pre-existing individual rights. Communitarians

³⁵Charles Taylor, "Atomism," in Alkis Kontos (ed.), *Powers, Possessions, and Freedoms: Essays in Honor of C. B. MacPherson*, (Toronto: University of Toronto Press, 1979), p. 39.

recognize that rights privilege the subjective interests of individuals over the good of the community. For this reason, they regard any morality based upon rights as one that must divorce rights from responsibilities by elevating the former over the latter. Hence, they view the liberal project as doomed to produce a morality of selfishness and license. Given this view, it is perhaps only a small exaggeration to say that, for many communitarians, rights, rather than money, are the root of all evil.³⁶

To my mind, this criticism is based on a serious misconception of the liberal project which can only arise from a conflation of the normative and meta-normative realms. Communitarians seem to view liberals as attempting to derive a *moral system* from an abstract set of pre-existing *moral* rights. I would suggest that liberals are not attempting to derive a moral system at all. Rather, they are concerned to develop a set of political restraints on the power of the state in order to ensure that human beings are able to fulfill their antecedently-existing, independently-derived moral obligations. The pre-existing, pre-social rights that liberals support are *political* rights whose purpose is solely to establish the political relationship between the citizens and the state, not the moral relationships among the citizens. Communitarians are quite correct to point out that one cannot derive substantive moral obligations from such rights, but this is because such rights were never intended to be the source of moral obligations.

The distinction between the political and moral realms was certainly the hallmark of the classical liberals who, far from attempting to derive morality from rights, almost invariably derived political rights from underlying moral obligations, usually the obligation to serve the common good. For example, John Locke believed that moral obligations arose from the law of nature which God had written into the fabric of the universe and which required human beings to

³⁶It is beyond the scope of the present work to canvas communitarian criticism of liberalism beyond this generalized overview. For more detail, see Charles Taylor, "Atomism," note 35 above; Alasdair MacIntyre, *After Virtue* (Notre Dame: Notre Dame University Press, 1981); Michael Sandel, *Liberalism and the Limits of Justice*, (New York: Cambridge University Press, 1982).

preserve not only themselves, but all humankind.³⁷ For him, rights derived from this moral law, and, in civil society, served the express purpose of ensuring that the power of the state "be directed to no other *end*, but the peace, safety, and *public good* of the people."³⁸ In similar fashion, John Stuart Mill derived his classic argument for the political right to liberty from the underlying moral duty to promote the common good that lay at the heart of his utilitarianism. Adam Smith, perhaps the archetypical classical liberal, argued that the value of individual liberty followed not from the moral necessity of some abstract set of rights, but from the fact that when human beings are free to pursue their own interests they are "led by an invisible hand" to "promote the public interest."³⁹

My comments in §IV(A), should suggest that Den Uyl and Rasmussen's charge that all theorists who treat rights as normative entities are making the modal mistake is unfair. However, I believe it is an apt charge to bring against the communitarians. It seems fair to say that they have mistaken the liberals' espousal of political rights designed to ensure a social environment within which it is possible for human beings to fulfill their antecedently-existing moral obligations for the espousal of fundamental moral premises from which these obligations are to be derived. Communitarians do seem to suffer from the not uncommon confusion of the normative and meta-normative realms that Professors Den Uyl and Rasmussen warn us against. For this reason, even if *Liberty and Nature* does nothing more than focus attention on the qualitative distinction between the political and moral realms, if all that it demonstrates is that political rights designed to establish the proper relationship between individual citizens and the state are not directly translatable into prescriptions for morally proper interpersonal relationships, I believe it will have made an valuable contribution to contemporary social philosophy.

³⁷See John Locke, *Essays on the Law of Nature*, Wolfgang von Leyden (ed.) (Oxford: Clarendon Press, 1975), pp. 157-58; John Locke, *Second Treatise of Government*, C. B. MacPherson (ed.) (Indianapolis: Hackett Publishing Co.,1980), §6.

³⁸John Locke, *Second Treatise*, note 37 above, §131.

³⁹Adam Smith, *The Wealth of Nations* (New York: Random House, 1937), p. 423.

V. Conclusion

In this Article, I have tried to present a concise rendition of the "Aristotelian" argument for a Lockean conception of natural rights that Professors Den Uyl and Rasmussen advance in *Liberty and Nature*. Although I have hinted at a possible source of objection, I have left rigorous scrutiny of the argument to others. Instead, I have sought to highlight the value of the distinction the authors draw between the "normative" and "meta-normative" realms in the course of making this argument. I have attempted to show that greater attention to the suggested difference between the political and moral enterprises may help resolve a long-standing controversy over the nature of rights as well as allow liberals to answer the central communitarian objection to their project. For this reason, I believe that, regardless of its ultimate success, the argument of *Liberty and Nature* is worthy of serious consideration.