2: Law, Liberty, and Justice

A. The Purpose of This Chapter

In chapters three through nine we shall be asking what the law ought to be in respect to suicide, the definition of death, the liberty of competent persons to refuse medical treatment, and the various forms of euthanasia. Such questions cannot be answered without invoking some standards which good laws meet and which bad laws fail to meet. In the present chapter we try to clarify some of the standards we shall assume and apply in subsequent chapters.

Our treatment of standards for good law will be limited in two ways.

First, we make no attempt to articulate a complete political philosophy or philosophy of law. Rather, we assume that there is a working consensus underlying American government and legal practices. We shall try to articulate this underlying consensus—which can be called "the American proposition"—and to present considerations which will lend initial plausibility to the standards of good law which it implies.

The ethical theory which we shall present and apply in chapters eleven and twelve will make it possible for us to provide a more adequate defense of these standards in chapter thirteen. It is worth noting that the standards of good law implicit in the American proposition differ little from those generally accepted in liberal-democratic nations which enjoy a jurisprudence formed by the tradition of British common law.

Second, there are many questions about the nature of law and about standards for good law which will not be crucial for settling the issues to be discussed in this book. For example, a good law must be a general rule or a directive issued in accord with one or more general rules; it cannot be a mere ad hoc imperative. A good law must be communicated effectively to those who are to be guided by it; it should not be retroactive; it must be clear, not vague; it must be consistent with other legal rules in force; it must require those who are to be guided by it to do only what is humanly possible; it should be constructed to last, not to be in need of constant tinkering; and it

must be susceptible to effective and consistent practical application. We assume that such standards, while in need of explanation, are noncontroversial. They have been discussed by others.[1] We also assume that most philosophical controversies about the ultimate nature of law have little relevance to the problems we are going to consider.

Stated affirmatively, our main business in the present chapter is merely to articulate the notions of liberty and justice which will be crucial in almost every discussion in chapters three through ten.

Because of our limited purpose, we are interested in only one part of the theory of justice—namely, the justice a fair constitution should embody and will communicate to laws made in accord with it. There are many injustices in the society at large which are not the concern of the state; we will not be concerned with them, for good laws touch only on the justice which is the concern of the state. Even within this limit we attempt in the present chapter to articulate only a few common propositions which will be in play throughout subsequent discussions. These common propositions will be supplemented in connection with the construction and criticism of arguments on each issue.

B. Just Law and the Consent of the Governed

The people of the United States, like the people of any other nation, live together; they share a common life, cooperate together, and sometimes get into more or less serious conflict with one another. Laws are an important type of rule for directing the behavior of individuals and of various sorts of groups, such as families, corporations, and unincorporated voluntary associations, insofar as this behavior contributes to or potentially impinges upon the common life. The legal system, considered as a whole, claims authority to provide comprehensive and supreme direction for human behavior in the nation, and to give public validity to all other normative arrangements affecting members of the nation and its guests.

Obviously, not all norms of behavior are laws. There are moral norms which are not part of the legal system. Moral rules such as people help their neighbors who are in need, be grateful to friends who do favors and give gifts, and shape their feelings and attitudes in altruistic ways are not and cannot be laws. Such rules are beyond the power of law to enforce; the requirements of generosity and gratitude are too fine and too diverse to be specified and adjudicated, and the private character of feelings and attitudes puts them beyond the effective jurisdiction of law, at least of law which stops short of inquisitorial methods.

It often is thought that what is characteristic of law is that it is an order backed up by the coercive power of the state. But not all rules backed by

coercive sanctions of one sort or another are laws. Apart from the orders and threats of employers and parents directed towards employees and small children, there are other examples of orders backed by threats which fail to have the character of law although they are issued by the dominant power in a certain territory.

For example, if the Mafia gains control of a certain region and manages it by terrorism, its orders fall short of the character of law; there are no general rules which define and limit such officers and their powers, and so there is no stable social order to which both the terrorist chiefs and their victims are subject. Similarly, if a powerful nation gives orders directly to the citizens of an adjacent nation and backs these orders with threats, such orders do not have the character of law, although those who are commanded might comply for fear of the consequences if they fail to do so.

Law, in short, presupposes that there is a political society, that those directed by law are members of the society or guests living within it, and that those directing by law are officers of the society, with powers defined and limited by the legal system itself.

The governing body of a political society at least claims legitimacy—that is, a status of right to rule which makes its power have the character of authority rather than of mere brute force. The claim of legitimacy implies that laws are proposed as rules which deserve respect and obedience. Every government claims that its laws have a reasonable basis which makes them worthy of moral respect in a way that arbitrary orders backed up by threats never can be—even though the prudent person respects terrorist threats. The latter respect is pragmatic and prudential, not moral. In claiming legitimacy a government claims that *virtuous* citizens will respect its authority.

To the extent that Americans think of their government as legitimate, then, they think of the laws as making a moral claim upon their minds and hearts. What do they suppose to be the basis of this moral claim?

They do not consider the moral claim of the law to be analogous to the moral claim of rules laid down by parents for the guidance of their children. Parents are naturally in a better position to direct their children than are the children themselves. Children ought to obey because parents know better and because, presumably, they have their children's interests in view when directions are given.

But among competent adults insofar as they function as members of a political society, none are naturally the superiors of others. This point provides a basis for understanding the principle of equality enunciated by the Declaration of Independence: All men are created equal. The equality asserted is not in natural endowments, in possessions, in achievements, or in virtue, but solely in political competency: No one is naturally a ruler, no one is naturally a subject, and there are no natural slaves.

If these positions are accepted—that is, if one agrees that the legitimacy of government is not analogous to parental authority and is not a function of the prerogatives of innately superior individuals—then the original question stands. What is the basis for the legitimacy of government according to the American conception of it?

The American proposition suggests the answer: Governments obtain legitimacy from the *consent of the governed.* We believe that this position can be understood in such a way that it is defensible as the right answer to the question. But there are many ways to misunderstand "consent of the governed." To avoid these misunderstandings, we must say something about consent. In particular we must consider briefly four points: (1) the scope of consent; (2) the normative element involved in consent which gives legitimacy; (3) those whose consent is required; and (4) the mode of voluntary acceptance which counts as consent.

First, the view that the legitimacy of a government depends upon the consent of the governed should not be taken to imply that each and every act of government requires consent of the people. If such were the case, a nation would be no more than a group of people acting together only when and just so long as each member of the group saw fit to participate. Political society would have no more stability than a group of children playing voluntarily together in a park.

Thus, when particular acts of government are in question, one does not determine their legitimacy by asking whether they directly have the consent of the people. One rather asks whether these acts are lawful. And ultimately questions about the lawfulness of the government's own acts must be resolved by appeal to the supreme law of the land: the Constitution. The consent which makes a legitimate democratic government is consent to the constitutional system, which provides the basic political organization of society, lays down basic rules and procedures, defines the most important and permanent offices, and determines how power is to be allocated and legally checked.

Thus the Preamble to the Constitution of the United States makes fully explicit the dependence of this basic law upon consent, and also makes clear the locus and the effect of this consent: "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."[2]

Second, the consent of the people to a constitution which gives a government legitimacy—that is, moral authority—cannot arise from the mere fact that people do accept it; the acceptance also must have a certain moral quality. An agreement such as a mere social contract, adopted under a threat of one sort or another, could determine what a group of people will do together. But such an agreement of itself could not give legitimacy to the government and its laws. One cannot derive an "ought" from an "is." The

mere fact of consent, if it is a fact without some inherent moral force, would not turn power into just power, into authority.

Consent given by someone who is not competent, by someone acting on the basis of ignorance or error concerning what is being approved, or by someone acting under psychological coercion is valueless. Such consent provides no moral basis for government. Moreover, if one consents to something to which one ought not to consent—for example, to do something wrong in itself—the consent, even if wholly voluntary, gives no color of morality to what is effected. So the consent which gives legitimacy to government is only such personal compliance as members of the society ought to give and do voluntarily give.

Many people comply with the demands of the law because they fear punishment. And many people accept a constitutional arrangement because they want for themselves protection of certain goods, such as life, liberty, and what Jefferson called "the pursuit of happiness." (This latter can be understood, in accord with the dictum that happiness means different things to different people, as the doing of those things by any individual which that individual considers to be inherently worthwhile.) People want protection of these goods against the behavior of others—other people in the society and other powers outside it—which would render them insecure. In other words, many people accept a constitutional arrangement because they do not want to be killed, raped, enslaved, beaten, deprived of their possessions, and so on.

The vulnerability of most persons, even of those who are personally very strong, to harm by other individuals or groups, together with the limits of the ability of the strong to protect those for whom they care, makes clear why most people do consent to a constitution. Almost any government is better than none at all. But these facts do not show that people ought to consent. And, as we have argued, legitimacy does not depend on the fact alone, but only on the fact of consent together with its quality as a morally justified act.

The moral justification for consent begins to appear if one notices that there is nothing irresponsible or arbitrary in the concern of people for basic goods such as life, liberty, and the pursuit of happiness. Security in such goods is no mere subjective demand. It is a requirement entailed by reasonable care about them, not only as they pertain to oneself but also as they can be shared in by others—including in "others" both those for whom one specially cares, as one's family and friends, and also those for whom one has no more but also no less than the respect for any fellow human being from whom one would wish a like respect towards oneself.

Thus as soon as the focus shifts from the fact that people want certain things to the inherent goodness of some of the things which are wanted, the claims of reasonableness come into play. Concern for the basic goods is a response to their inherent appeal. Thus, the concerned person can give a justification for

his or her concern; consent to government is not a brute fact. "Why do you consent to a constitution?" Not merely "Because I *want* protection," but "Because my responsibility for my own life and other goods, and for the security of others for whom I care, demands that I obtain protection."

If consent is justified in this way, the principle of one's concern extends to all others who can enjoy these goods and who need security in them. Human life and the other basic goods are no less exigent in whomever they happen to be at stake than they are in oneself and in those to whom one is specially attached. This is the point we meant to suggest by saying that reasonable care about goods must extend to those whom one merely recognizes as fellows in the community of mutual human respect for the dignity which attaches to every person as such.

Thus, justified consent which provides the basis for legitimate government arises not merely from a coincidence of individuals' concerns about their own security and welfare (and that of those dear to them) but also from a truly common concern about goods recognized as having an inherent and common appeal to reasonable persons.

From the vantage point of this insight it is clear that the idea of fundamental rights and the idea that one's consent is necessary for the legitimacy of government are closely related. One *ought* to consent to government because it is more than a device for getting what one wants, more even than a common facility by which all living in a certain place can obtain together what they want individually. Government is required to secure rights. Rights are grounded in goods of persons which are prior to their merely factual desires—"prior" in the sense that the goods make the desires reasonable as well as stimulate them psychologically.

These goods deserve to be recognized, appreciated, respected, and promoted whether people are disposed to do so or not. Of course, all who are sane are disposed to do so when it comes to themselves, and to those for whom they specially care. But hardly anyone is consistently disposed to do so when it comes to others, to strangers or competitors. Then the inherent and common appeal to reasonable persons of life, liberty, and the pursuit of happiness takes on the exigence of a duty demanding respect for a right. Hence, the Declaration of Independence does not say that everyone *wants* security in life, liberty, and the pursuit of happiness. This factual premiss would be inadequate for the argument. The Declaration asserts that every person is endowed with an unalienable *right* to these goods.

The introduction of a normative element into the definition of the consent which is required for the legitimacy of government implies that there can be constitutions which deserve consent and those which do not deserve it, constitutions which make a moral claim and those which fall short of making a claim or which make only a false claim to the moral approval of the people. It

is clear that people can either consent or refuse consent to a constitution of either sort. Thus, there are four possible situations. There are constitutions worthy of consent which receive it; those worthy of consent which do not recieve it; those unworthy of consent which nevertheless receive it; and those unworthy of consent which do not receive it.

In our view it is only in the first of these cases that there is a morally legitimate government which is established by the constitution in respect to those people who do consent to it. This situation alone determines a central, paradigmatic sense for "government," "political authority," "law," and "rule of law." All of these expressions, of course, are used in ordinary language of regimes which fall short of morally legitimate government. But the American proposition is that valid laws must meet the test of constitutionality, and that the constitution must be such that it deserves and receives the consent of the governed, which alone gives government legitimacy.

The second and the third possibilities raise interesting questions. One can imagine an instance in which very difficult circumstances limit the possibilities of effective government. A strong but benevolent group takes control, perhaps in the wake of some man-made or natural disaster, and establishes a rudimentary but just regime. In the circumstances people ought to consent. But perhaps many do not. In such a case power is exercised justly by the ruling group, and those who oppose the regime will be in the wrong. Yet in the absence of consent this arrangement which deserves consent falls short of the status of legitimate government. There is not yet a political society, for those who are ruled do not consider themselves in community with those who exercise power, though power is exercised justly and for good purposes.

Again, and more easily, one can imagine a regime which does not deserve consent. There seems to have been very widespread consent to the Nazi regime in Germany, not only in the early stages when Hitler was careful to preserve the formalities of constitutional rule but even in the later stages when many people realized that the regime was thoroughly criminal. The immoral ideology and systematically unjust practices of the Nazis destroyed the legitimacy of their regime, which no longer preserved the rights for which governments are instituted among men. Yet the consent of the governed continued to be given, and the Nazi regime derived power—although not just powers—from this support.

The case of a constitution which is unworthy of consent and which does not receive it can be illustrated—if we accept the argument of the Declaration of Independence—by the regime of the British Crown over the American colonies which revolted. The king had been a legitimate ruler, but his own lawlessness and disregard for rights destroyed his legitimacy. The colonists had consented to British rule, they then withdrew their consent. The bonds were dissolved and a new set of politically independent states formed, to be

governed internally by their own constitutions and in respect to one another and other nations by their federal constitution.

The introduction of a normative aspect into the consent which is required to make government legitimate raises at once the third of the questions we listed above: Whose consent is necessary? In any society there are two classes of people who are not likely to consent to a just constitution insofar as it is such.

First, there are those who are not competent for such a voluntary act: children, the severely retarded, and so on. These present no serious problem for a theory of legitimate government. They can be treated as if they were citizens in the fullest sense by an extension to them of the rights and duties of which they are capable, but government acts toward them in a quasi-parental fashion rather than in a fully political fashion.

Second, there are those who are competent to consent but who do not choose to consent, even though the constitution is just. Such persons usually will acquiesce in the operation of the constitution and comply to a great extent with the laws. But they do so out of self-interest. They do not respect law; they do not distinguish between just power and mere force.

The question is: Does a government lack legitimacy because it does not have the consent of such persons? In our view the lack of the moral support of those who care little or nothing about morality in no way detracts from the legitimacy of government. It is the consent of those, the upright, who care about justice and are interested in the issue of the government's legitimacy which is decisive. In the fullest sense only they are governed by laws; only they are directed by lawful authority. Citizens whose involvement in political matters is based on self-interest rather than on justice are governed by law only in a derivative and imperfect sense. The lack of their consent is irrelevant to the moral claim of the law upon the minds and hearts of persons who are responsive to moral claims.

Morally speaking, persons who acquiesce in the operation of the constitution and conform to the laws out of mere self-interest are aliens to the political society. If they live in it with the status of citizens, they nevertheless function as if they were not committed to the rights which true citizens respect because of their response to the appeal of basic common goods, such as life, liberty, and the pursuit of happiness.

There is, finally, the question of the sort of voluntary acceptance which constitutes consent. Clearly, that sort of voluntary acceptance which is mere acquiescence and conformity out of self-interest does not constitute consent. Acceptance of an unjust regime out of morally upright concern for peace and various other human goods also is insufficient to constitute consent. There is even the possibility, already mentioned, of a benevolent dictatorship, a rudimentary but just regime which establishes order in a disaster situation; good

persons might comply without having any opportunity to participate in deliberation and decision making. Here, compliance would not be consent, and no government in the full and unqualified sense would exist, although such a situation could easily unfold into a just constitution which would receive the consent it deserved from upright people.

What would be necessary to transform a benevolent despotism into a truly just government, its edicts into laws in the fullest sense? All that would be needed would be the consent of those subjects concerned about justice. One can imagine their consent being given explicitly, by some sort of referendum which approved the regime's effort, to unite all who accepted it into a political society. But such an explicit act of consent would not be necessary.

One also can imagine the regime beginning to articulate general rules, to make clear its purposes and guarantee its own self-restraint in the interests of justice. Those subject to the regime then might respond beyond the requirements of mere self-interest or moral concern about the goods directly at stake, but in accord with the need of the regime for willing cooperation with its purposes and projects. The extension of such willing cooperation would imply that one accepted the regime as such, and wished to consolidate and develop it. This implication in the acts of upright people agreeing with the regime's purposes would constitute consent to it.

Obviously, if the regime were able to provide possibilities for specifically political acts, such as voting for representatives who would make laws, then participation in the political process by upright persons who viewed their participation as cooperation, not merely as action required by the objective situation to minimize evils, would constitute consent.

However consent was given, once it was given, the regime would become a legitimate government in respect to those who consented. For others in its territory it would function in some ways as a government, but the full character of lawful authority would not be present, even though it might exercise power toward others than its full members—including children, aliens, citizens uninterested in justice, and upright citizens who had not yet had occasion or opportunity to do anything which would constitute consent.

If consent is to be taken seriously, there always must be assumed a possibility of nonconsent. Usually consent theories of legitimate government suggest two possibilities of nonconsent. First, even if one is a citizen by birth in a certain nation, most people are free to emigrate, and thus can remove themselves from the jurisdiction of their native land. Immigrating into a country—assuming one is concerned about legitimacy and accepts one's new homeland for the sake of its just constitution—certainly would imply consent. Not emigrating when one might—with the same assumptions—also would imply consent. Second, people can rebel or can initiate the first steps toward rebellion. In the context in which the Declaration of Independence was written, the

alternatives of consent and refusal of consent were clearly marked, to separate the loyalists from the revolutionaries who founded the American nation.

But the preceding analysis of consent makes clear that there is a subtler alternative which can distinguish consent from nonconsent. When morally upright persons—the sort of persons who are concerned about the legitimacy of government—face the laws, they have a choice between regarding them as a set of facts which must be taken into account prudently and regarding them as reasonable guides to the common political life of the society and its common purposes. If upright persons regard the laws as mere facts ignored at peril, then they do not consent. If they formerly consented and now no longer do so, their behavior might not change much. But they lose respect for government and the laws; they participate, not as cooperators in a process to which they are committed as worthwhile in itself, but as independent actors who must live with realities from which they have become alienated. The possibility that the acceptance of unjust laws with respect to euthanasia and related questions would lead to this sort of withdrawal of consent on the part of morally upright citizens of the United States is an important one we shall consider in later chapters.

The preceding considerations about consent make clear in what sense it can be held that the consent of the governed provides the basis for the moral claim which is embodied in the laws.[3] Moreover, these considerations show that governments are legitimate—they derive their just powers and exercise authority which is quite distinct from mere force—only if they receive consent from the relevant persons and in the relevant way.

The main objections normally proposed against consent theories can be briefly indicated and answered.

First, consent is said to be a fiction, since no explicit contract ever is made. Our reply is that consent can be and often is implicit in cooperation with a regime when cooperation goes beyond necessity—beyond dealing with the reality of government power or the acceptance of an unavoidably bad situation—and amounts to moral recognition of the government as legitimate.

Second, mere acquiescence is obviously possible without moral significance, since people can acquiesce from motives of self-interest or to minimize evil without making any commitment to cooperate. We agree. Not all acquiescence constitutes implicit consent. But, as we have explained, certain kinds of action which involve acquiescence do imply that consent which gives government legitimacy.

Third, consent is impossible unless there are real alternatives, and it is argued that often there are none. We deny that there are no alternatives to consent. The possibility of acquiescence without commitment to the regime is the most important of these and always available to the people. Released from a moral bond to the laws as such, people in this situation might still

conform, but they will do so on principles other than those of the law-abiding citizen who considers the government legitimate.

Fourth, consent is never unanimous. This is admitted. A government which in some ways is one and the same thing with respect to all subject to its jurisdiction is morally different things to different people. If it is a just government for some who do consent to it, it also can be a just substitute parent for some incompetent to give consent or to refuse consent, a just host for some who are guests, a just enemy for some who are outlaws, and so on.

It is clear, of course, that there might be many just constitutional arrangements to which people have consented and do consent. For our present purposes, however, it is necessary to consider only one type of constitutional arrangement: that of the United States and of polities similar to it. Our next question, then, is: To what do Americans consent, and how do they justify their consent?

C. The Common Good

In what we have said thus far, little has been said about the coercive power of the state. Yet as a matter of fact, every political society uses force to back up its regime, whether or not this regime is a legitimate government. So much is this the case that—as we mentioned above—a monopoly on coercive power is often considered to be the defining characteristic of the state. On our account this characteristic is less important.

Yet it is not insignificant. Governments are instituted to protect unalienable rights—life, liberty, and the pursuit of happiness. In a world in which there always are domestic outlaws and foreign enemies prepared to violate these rights, an important function of the state is to protect them not only by the rule of law but also by force. If government is legitimate, force is used lawfully in the service of justice. It is certainly part of the American proposition that it is the business of government to establish justice and to provide for the common defense, by using proportionate force when necessary to protect rights against outlaws and enemies.

But it also is clear that there is consent to government for the sake of promoting and protecting a wider range of goods than those which fall within the narrow boundaries of security. The phrasing of the Declaration which refers to a right to the "pursuit of happiness"—a positive if personalized set of goods and activities—already suggests this. And the Preamble to the Constitution mentions the promotion of the general welfare as one of the purposes for which the fundamental law is established.

Some have held that it is unjust to use governmental authority beyond the minimum ends of guaranteeing peace and security, law and order—protecting

life, bodily integrity, physical liberty, and property. But no such suggestion ever has been seriously entertained by the American people or by the people of any other modern, democratic state. Indeed, the very concern for political equality which entails the demand that government be by consent of the governed also tends to generate a demand for the extension of government into those areas of social and economic relationship where exploitation of the weak by the strong is likely to occur—even without overt violence—if the state does not foster institutions more responsive to a fair sharing of human goods than to the mere satisfaction of selfish or arbitrary demands.[4]

For Americans, then, the common good or the public interest is not limited to protection against overt violence and security in possessions. Our common political purposes comprise other goals than these, and so we consent to a government with authority to promote wider purposes. These purposes are a set of goods which Americans do in fact reasonably care about and do not believe capable of being promoted effectively except by means of the apparatus of the state, under direct control of the government.

The various goods which comprise the common good include some which are considered to be inherently worthwhile by many members of the society. The protection of human life is one such good; education is another. Yet some, perhaps increasingly many, members of society consider these goods to be in themselves of merely instrumental value. There are other goods included in the common good which are universally considered merely instrumental. For example, the provision of public roads, of a system of weights and measures, of a postal service, of a monetary system, of a legal form of bequest—all these are in the purely instrumental category.

Thus, an important part of the general welfare is the facility provided by law for members of the political society to carry out their private purposes in ways which the authority of government will recognize and its power, if need be, support. Besides legal facilities for contract and bequest, civil law provides a whole apparatus for private transactions, for holding and using property, for settling private disputes peacefully and impartially, and so on. And material facilities which are provided by government to promote the general welfare are not limited to economic and fiscal ones; public hospitals also are such a facility, and even amenities such as public parks and museums are developed and maintained for the sake of the general welfare.

From the preceding considerations it is clear that the common good of American society is not made up of an invariable set of intrinsic and instrumental goods. The human condition clearly requires that considerations of security and protection against violence remain a basic purpose of political society, and therefore that the power of government be used or available for use for this purpose. Certain less fundamental purposes also are likely to remain constant: for example, provision of a monetary system. But the com-

mitment of American society to other goods has varied in the past and can vary in the future. Our nation has been less committed than it now is to promoting health, education, and welfare; one can imagine a future in which it will be less committed to these purposes than it is at present.

However, such changes in the goods which political society pursues do not change the fundamental character of the American proposition. We did not become a new nation when the Social Security Act was passed; enactment of a thoroughgoing program of socialized medicine would not radically alter the basic law of the land. Likewise, citizens who consent to the constitution do not alter their consent each time the government concerns itself with some new area of public interest.

In short, the actual content of the common good has varied to some extent and could vary much more. Such variation does not alter the nature of the state or affect the consent which the people give to the constitutional system. This conclusion raises two questions. First, are there any limits to what might be regarded as pertaining to the common good or the public interest? Second, if the particular goods which comprise the overall purpose of the state do not themselves serve as the object of consent—that is, are not themselves that to which the people make the common commitment which knits them into a unified political society—then what is the object of consent?

The answer to the first of these questions is that there *are* some limits as to what may be rightly considered to be part of the public interest or common good—and thus part of what people consent to when they consent to the regime as just, and in this way give it the legitimacy of a government which exercises just powers with the consent of the governed.

The very notion of a *common* good or of a *public* interest suggests that there is a contrasting category of goods which are *individual* or *private*. The Declaration of Independence listed liberty as one of the goods to which men have a right, and also listed the pursuit of happiness, which can hardly be understood except in a way which leaves room for a plurality of individual life-styles and private conceptions of what is intrinsically worthwhile. The Preamble to the Constitution likewise takes as one of the fundamental purposes of government to "secure the Blessings of Liberty to ourselves and our Posterity." If all goods were included in the common good, if all interests could be absorbed within the public interest, it would be hard to make sense of such a purpose.

In the *Federalist Papers* Hamilton explained that bills of rights usually are required in a state to make clear the privileges of subjects which are not to be infringed by the ruler. He maintained that such a statement of rights really is unnecessary in a constitution founded by the people themselves, precisely ordained by them to preserve liberty.[5]

Later, Madison argued for the amendments which became the Bill of Rights

of the United States Constitution, but he did not deny Hamilton's libertarian argument and its assumptions. In fact, he admitted the force of the argument against the proposed amendments that by enumerating certain rights it might seem that others were disparaged. Madison sought to obviate this difficulty by means of a provision which became the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[6]

The most notable example of the exclusion of certain purposes from the concerns of government, whereby these purposes are reserved in the domain of liberty for individual pursuit and for cooperative pursuit in nonpolitical, voluntary associations, is in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " While this protection of liberty originally applied only to the federal government, not to the States, it has been extended to the latter, and this exemplifies well the concern of Americans that their government be limited.

Reflection upon reasons for excluding religion from the domain of governmental concerns will suggest why the public interest must be limited, not only in this but in other matters as well.[7] We noted above that the common good includes goods which the political society as such can *effectively* pursue; religion clearly is not one of these. Experience had shown that the coercive power of government cannot effectively promote sincere religious faith, and that attempts to promote religion by state action lead to formalism as well as to strife, rather than to piety together with peace and security for all.

Furthermore, religion seems to be one of those goods which is inherently suited to pursuit by private, fully voluntary associations rather than by public institutions. The privilege of pursuing one's own ultimate destiny in one's own way, immune from public interference, seems to be a central element in each person's pursuit of happiness. Governmental interference in this area is regarded by Americans as an unjust infringement upon a basic zone of liberty.

It should be noted that some Americans favor what is said in the First Amendment about religion because it is a necessary implication of their own religious beliefs or disbeliefs. For example, some religious persons hold that religion is so much a personal and private affair, an encounter between the individual conscience and God, that no human agent can be anything but an obstruction. They thus reject government involvement because they reject anything like an institutional church. Some nonreligious persons hold that religion is so pernicious that the government must keep clear of it, or so much a matter of mere subjective feelings that there is no rational way to deliberate and decide about it—that anyone's religion is fine for him or her. On this basis, such people give their own theological—or should we say, "atheological"?—twist to the First Amendment.

Those who personally hold such beliefs and disbeliefs are, of course, entitled as Americans to do so, and they are free to favor the American system for their own religious reasons. But to insist upon any such reason as the necessary significance of the First Amendment would be, paradoxically, to read into it precisely the establishment of religion which it was intended to forbid. And any consistent juridical interpretation of the First Amendment in accord with the perspective of one or another specific theology or atheology would certainly lead to decisions which would inhibit the free exercise of alternative forms of belief, which the First Amendment was intended to protect.

Thus a nontheological—and nonatheological—understanding of the limitation placed upon government by the First Amendment is essential if it is to fulfill its own purpose consistently. The principle underlying American respect for freedom of religion is a very general one, a principle very basic to the American conception of political life. The principle can be stated as follows. The public interest extends only to those goods the cooperative pursuit of which gives political society the unity which it has. Since the common pursuit of goods in political society does not encompass all the goods which men and women can pursue and wish to pursue, there is a wide sphere of individual and social activity which lies outside political society, and thus outside the legitimate concern of government and direct regulation by law.

The exclusion of religion from the concerns of government both in the beginning and today is sufficiently explained and justified by the fact that many people who are ready to share in American political society reject religious faith, and many hold diverse faiths which cannot be rendered compatible without unacceptable compromise. Moreover, cooperation in political society for other purposes is possible—as proved by the American experience—without religious unity. Thus, government based upon consent cannot infringe upon religious liberty. Analogous arguments will make clear why there are other fundamental liberties which Americans consider nearly as inviolable as freedom of religion.

It follows from the preceding argument that it is a serious mistake to regard the public interest as the sum of all the private interests of those who make up the political society, the common good as the sum of all the individual goods of the members of the community. Private interests and individual goods account for diversity within American society. Such interests distinguish a variety of life-styles without necessarily throwing them into opposition with one another, that is, without making them political opponents and compelling them to organize political parties on religious or ideological lines.

Thus, by its very nature the public interest or the common good does not embrace all the goods pursued by members of the political society. It embraces only those goods to which they have a common commitment precisely

insofar as they are all citizens of the same nation, members of the American polity.

Any attempt to extend the public interest or the common good to include activities which are properly private would lead to an unjust governmental infringement upon the liberty of members of the political society. This injustice is one which would never be consented to by upright members of any political society; it is one which Americans do not consent to.

In this way we reach the answer to the first of the questions posed above: Are there any limits to what may rightly be regarded as pertaining to the public interest or the common good? There are limits. The limits ultimately are drawn by the principle that all members of the political society should at all times be at liberty in all areas of life concerned with purposes which are not effectively pursued through the common activities of the political society. There will of course be dispute about the application of this principle. But where it applies, violation of it always will be gravely unjust and will detract from the legitimacy of government, which extends no further than the consent of the governed.

These same principles—liberty and justice—provide the basis for answering the second of the questions posed above: What is the object of consent—to what is it that Americans commit themselves together in a way which forges them into a single polity?

Since the particular goods which comprise the public interest are variable, it is the justice of the constitutional framework itself to which the members of a political society based upon consent of the governed primarily give their consent. Moreover, this very quality of the constitutional framework—the justice which alone makes it worthy of consent—demands that the liberty of the members of the political society be respected. To understand the thesis that according to the American proposition liberty and justice are the basic principles of legitimate government, we now consider the nature of liberty and justice, and the relationship between them.

D. Justice as the Chief Common Good

The conception of justice which is relevant here is justice as fairness. As we noted above, the reasonableness of pursuing common objectives by public means and governmental authority requires that the benefits of the pursuit be fairly distributed, and that the burdens of the effort also be fairly allocated. The normative element in the consent of the governed is based upon the distinction between merely wanting certain goods such as security and respecting these as goods which are as exigent for others—whom one merely regards as fellow humans with the respect one wishes from them—as for

oneself and those close to oneself. Thus, laws get moral force from the common good only if they articulate a system of cooperation which, besides being effective, also is a fair system. Government may not pursue the common good by every expedient means, even by destroying some members of the polity for the sake of greater benefits to others. Such an approach would be unfair.[8]

This point, of course, raises the question what "fairness" means. It is tempting to suggest that "fairness" means "sameness" in the sense that all should be treated alike. But treating everyone the same would, if taken in all strictness, destroy the order of society in which different persons with different needs, abilities, tasks, contributions, merits, and risks cooperate together in one effort precisely by making the most of their diversity and complementing one another's limitations. The very differences among people are not negligible from the point of view of justice; it belongs to equal dignity that individual characteristics be appreciated and respected. This appreciation and respect is a most important part of the American proposition. It distinguishes the ideal of American polity from that of any society which loves liberty less than a form of equality which demands uniformity and conformity and forgoes the uniqueness of individuals for the sake of an egalitarian ideal of justice.

Thus, like "sameness," "equality" also is too easily assumed to be a helpful notion in understanding fairness. Actually, in political society the quantitative implications of equality generally are irrelevant. When the concept suggests anything very definite, it is likely to suggest something which is an impossible goal and a questionable ideal.[9] Of course, Jefferson assumes the principle that all men are created equal in the Declaration, but this principle must be understood as the exclusion of *inequality*—the inequality which obtains in a polity in which the constitution assumes natural castes, so that some are naturally rulers and others naturally subjects.

The concept of fairness which determines the consent of Americans to their basic law, the constitutional framework, can be clarified by considering a small private association or club. In such an association—assuming it to be voluntary at least in the way in which consent of the governed must be voluntary—it is easy to see what would be fair. Even if such an association were organized for immoral purposes, one could see that some ways of organizing it would be fair and others unfair to the members. Such a club will have its constitution and rules, even if these are not expressly formulated and written down. If these rules and procedures were understood, one would be able to tell at once whether the club was fair or unfair.

Would one who shared the commitment to the common purpose around which the organization was formed be willing to belong to it, accepting whatever role and responsibilities in it for which one was fitted? Would one be

willing to have someone for whom one cared deeply—such as one's dear child—cooperate in the club (assuming there to be no objection to its purpose), accepting any position in it, abiding by its rules, dealt with by its procedures, to the extent of the reach of its constituting purpose? Considering the organization coolly and as a nonparticipant, would one who came to know and sympathize with each member be content with that member's lot in the club? If the answer to these questions is affirmative, the association has a fair constitution. But if the answer is negative, then the organization in some way lacks basic fairness.

Thus the fairness of a constitution means that the procedures and the rules and the limits of political society are such that reasonable participants would not feel exploited if they were in any role in the society, and they would be willing to have others with whom they identified by ties of affection or sympathy in any role in it. By "reasonable participant" here we mean one who is genuinely concerned about the common good—not one who uses the political process without commitment to the common purpose of political society. A reasonable participant, thus, is one who is neither motivated merely by self-interest nor by laudable desire to minimize evil in a bad situation, one whose motive is the intent of the goods embraced within the public interest, the disinterested intent which does to others as one would be done by, and which thus is able to confer authority and form community with all those who agree in working for and seeking to enjoy together these same goods.[10]

Another way of articulating the point we have just made is that the fairness which constitutes a political society in justice is no more and no less than equality in human dignity and mutual respect which is dictated by the golden rule or principle of universalizability. The difference between particular acts of individuals shaped by this moral principle and the justice of a constitution is that the latter systematically institutionalizes the principle, and thus presents an embodiment of it which can itself be understood as a good which is promoted, respected, shared, and enjoyed by the members of a polity who find their political association not merely useful but inherently good, personally fulfilling, gratifying to their personal need for harmony between their individual identities and social solidarity.

From the vantage point of this account of justice as fairness, one can understand and appreciate both the force and the limitations of other more specific principles which often are proposed in an attempt to define the demands of justice.

Does fairness demand that in an ongoing process of interpersonal relationship between two or more persons the interrelationship be equalized so that the benefits and burdens, the advantages and disadvantages, to each participant balance out? Often this is the case, for in many relationships, such as those involving contracts and torts, only such a balance provides a rule which

reasonable persons will accept for themselves and so seek to impose on others. But in other relationships, such as the care provided by the strong and healthy for the weak and sickly, such equalization is out of the question and is not demanded by justice, since one would wish oneself, one's dear child, or any person for whom one felt sympathy to receive at least some support and assistance which could never be balanced by an equal repayment.

Does fairness then demand that each member of society contribute according to capacity and receive according to need? Again, especially when one thinks of the basic necessities of life and provision for them, fairness does seem to require equality defined by proportionality to principles of capacity and need. Yet there must be limits to the demand for contribution according to capacity or there will be nothing of an individual's own which can be used with liberty for the pursuit of happiness. And needs which go beyond the basic necessities, needs which are generated by the self-indulgence and self-destructiveness of some members of society, needs which are artificially created—the need for the latest toys—are needs that cannot expect the same respect as needs for minimally adequate diet, basic health care, shelter, clothing, elementary education, and the like.

Does fairness demand that members of the political society who contribute more than others to its well-being receive proportionately in recompense? Up to a point, certainly. Veterans programs for those who have risked their lives in a shooting war are seldom criticized. Yet perhaps certain civil officers contribute more than other citizens to the well-being of political society by making considerable personal sacrifices to enter and remain in public service. Still, it is not necessarily unjust if such persons are not rewarded as well for services rendered as the presidents of many large corporations or even as some star athletes.

Finally, in the allocation of the costs and losses of the common pursuit of political society some members foresee and accept avoidable risks for the sake of the common good, while other members have no opportunity to foresee and avoid (or at least insure against) these risks. Does fairness demand recognition of this willingness to contribute and to serve? In many cases an affirmative answer no doubt is indicated; those who volunteer for extremely hazardous duty in wartime, for instance, deserve something from their compatriots that others do not. Yet this principle cannot, any more than the others, be elevated into an absolute criterion of justice. Often members of society do not foresee risks only because they lack intelligence or information. If such persons accept the responsibilities which fall to them, they seem hardly less deserving than those who make similar contributions with greater foresight, which would have permitted them to avoid the risks they accept with greater voluntariness.

In short, a reasonable participant in political society, considering its basic

law in the light of the moral principle of the golden rule (or universalizability principle), will sometimes think in terms of one, sometimes in terms of another, criterion in specifying just balance or proportion. And the selection and application of these specifying criteria, as well as their mutual limitation, is a work solely for the fair-mindedness of a person who respects others with the respect he or she wishes from them. Such a person also is prepared to give a public account of judgments in terms which will deserve and can be expected to receive approval as reasonable by other reasonable participants in the society.

If one understands fairness as we have explained it, one can readily understand why fairness often demands procedures which limit the government's effort to maintain law and order. Limitations on search and seizure, the requirement that a person be indicted, and the conduct of a trial with many protections for the accused (who is presumed innocent until proven guilty)—these provisions do not make for maximum efficiency in the processes of criminal justice. They do not promote law and order if this is understood merely as a state of affairs providing the maximum level of security for almost all citizens. But these protections contribute greatly to the fairness of criminal procedure. In this way they contribute to law and order insofar as this good is understood as an aspect of justice, as part of the object of the reasonable consent which gives government legitimacy and makes the legal process an exercise of lawful authority rather than of mere repressive power.[11]

Fairness in legal procedure and in the administrative procedure of government is essential, but it does not by itself constitute the fairness which legitimates just laws. Within limits, at least, one can imagine laws unfair as to their substantive provisions fairly administered and enforced. Thus, the laws themselves also must be fair. The purpose of any particular law—the mischief it is to remedy or the good it is to promote—dictates what classifications of persons may be made without arbitrary discrimination by which some are benefited or burdened unfairly in comparison with other members of the society. And, of course, if a law is to be fair, its very purpose cannot be discriminatory.[12]

Fairness in the laws themselves is part, at least, of what is meant by "the equal protection of the laws." If this phrase is considered not only as a legal standard to be applied by judges but also as a political standard to be respected by responsible legislators, equal protection also demands that the variety of projects undertaken by political society and the level of public commitment to various projects mandated by government power reach a balance which will be generally acceptable to reasonable participants in the society.

No single project undertaken by government makes equal demands or provides equal benefits to all. But a fair political process, with checks and balances working properly, limiting the power of majorities and the great influ-

ence of powerful minorities, should result in a mix of public activities satisfactory enough that reasonable participants in all the various roles in the society will find the whole package satisfactory. None will feel singled out for extraordinary burdens or ignored in the distribution of benefits, at least not in the long run, in a manner which would amount to being "picked on"—unfairly treated in comparison with society's "pets."

E. The Relationship between Justice and Liberty

But even the addition of the fairness required by equal protection of the laws to the fairness required by due process is not enough for the fairness needed to justify the laws of a polity which is based upon the consent of the governed. Another condition is necessary. As we have noted above, it is an injustice if government injects itself into matters which lie outside the common good. Such infringement is an unfair violation of the liberty of members of the polity. On this basis, the Fourteenth Amendment to the Constitution of the United States forbids every state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[13] And the Ninth Amendment, as we have already mentioned, recognizes the rights retained by the people, the zone of liberty which lies outside the common good.

This aspect of constitutional fairness has several important implications in addition to the proscription of treating as public those matters which are properly private.

The first of these implications is that a fair regard for the liberty of persons forbids government to coerce citizens into cooperating in programs not essential to the common good which they sincerely and reasonably believe to be seriously wrong.

We have inserted "not essential to the common good" in the preceding sentence because there are cases in which conscientious objections of some citizens must be overridden to prevent unjust harm to what all agree to be included in the common good. For example, defensive wars must be fought despite the objections of pacifists, and their participation cannot be altogether avoided to the extent that they remain members of the society whose resources and institutions are being employed for purposes which they deplore.

But when there is no such overriding public necessity, the liberty of citizens is at stake if the government embarks upon projects which offend the consciences of citizens. They should be able to remain good citizens without having infringed their liberty to stand aloof from what they detest as evil, and they cannot stand aloof if government wantonly disregards their misgivings, since these limit their consent, while they are drawn along willy-nilly with public policies and acts which they deplore.

A second implication of the libertarian aspect of the requirements for justice is that unless it is essential for the common good, government should not try to prevent citizens from doing those things which they regard as transcendently important. For example, deeply held conscientious convictions about what is ultimately true and good often are believed to carry with them an obligation to communicate these beliefs to others. On this basis, it seems to us, the First Amendment is sound in closely linking freedom of religion with liberty of speech and of the press, with the right to assemble peacefully and to petition for the redress of grievances. All of these guarantees protect the rights of conscience insofar as conscience is not only a standard of private morality for one's individual life but also a standard of one's personally responsible participation in various relationships with others, including the relationships of political society.

It also is worth noticing that respect for liberty of conscience is important for the effectiveness of a free polity. When many participants in a society regard themselves as conscience bound to do certain things, especially to communicate their deeply held convictions to others even at a grave risk to their own peace and security, then any attempt by governmental power to prevent such communication is likely to be self-defeating. While the liberties which are guaranteed by the First Amendment sometimes appear in the short run to have a disturbing effect upon American society, on the whole and in the long run respect for these liberties not only contributes very importantly to justice but also promotes stability in a practical way, by avoiding the unstabilizing effects of conscientiously motivated subversive activities.

A few additional remarks will help to clarify the relationship between justice and liberty.

First, it is not only the case that liberty must be protected by just laws; it also is the case that the formation and functioning of political society itself is a most important exercise of the liberty of its members. The consent of the members of the polity to the constitutional framework, their acceptance of particular laws, their participation in the political process by voting and accepting office, by protest and petition, and so on—all these are exercises of liberty. The real participation of citizens in the political process as an exercise of liberty gives meaning to the formulation of Lincoln that American government not only is of the people (as is any government) and for the people (as is any just government) but also is by the people.

Nevertheless, although justice and liberty mutually depend upon one another, they are not identical. Indeed, they are quite distinct.

Justice is an attribute of the polity insofar as it is a unity organized by its constitution, laws, and procedures, a unity formed by common consent in response to the common demand of the common good. Justice characterizes the single social order primarily and all its parts and aspects secondarily and

derivatively insofar as the political order of society is founded upon the moral principle of universalizability—which dictates equal dignity and mutual respect—and not on mere power.

Liberty is a relation of individuals and groups within political society insofar as they are not *subject to* lawful authority. Liberty exercised for the common good becomes the working of political society, the activity of the people as governing rather than as governed. Liberty to act or to refrain from acting for other purposes is the scope for personal and social flourishing which is privileged against the demands of political society and immune from the coercive sanctions which government legitimately uses to protect justice when it is at stake.

F. Liberty and Justice as a Sufficient Standard

We believe that the foregoing discussion makes clear that justice—including fair respect for liberty—is the one component of the common good which is necessary and constant. Therefore, justice and liberty included in it together provide the standard by which the legitimacy of laws and proposed laws ought to be evaluated. Moreover, considering the diversity of deeply held positions on the questions to be dealt with in this book, we think that this standard is the only one which all parties to current debates must accept if they wish to argue as Americans committed to the American proposition.

The exclusive use by us of this standard to evaluate laws and proposed laws is likely to provoke objections from two quarters. First, some will deny that even these standards provide a moral basis for laws. Second, there will be those—including some who join in making the first objection—who will require either a different standard or a more ample one for evaluating laws.

Those who make the first objection might argue as follows. The preceding account of the standards which good laws must meet rests too heavily upon moral conceptions which may have been widely accepted two centuries ago but which no longer are supported by the consensus of the American people. The Declaration of Independence, in mentioning "unalienable rights," invoked a whole theory of natural law which today is widely rejected. Certain facts of the human constitution and condition which are contingent but not alterable by human effort do assure that people will seek peace and security. The interplay of diverse desires and the balancing of the pressures of special-interest groups do assure that most people will be patient with the workings of the contemporary welfare state. But facts such as these do not show that government has a moral basis in natural rights, rights which belong to all individuals antecedent to the rights which are bestowed by the law itself.[14]

In chapter eleven of this book we shall articulate a moral theory which

stands on its own without the historical support of traditional theories of natural law, and which also can deal with the criticisms made against all of the more popular current theories of ethics. Having articulated this theory, we shall in chapter thirteen provide a properly ethical defense of the standard of good law which we have proposed.

But a brief response to the objection is appropriate here. To deny that liberty is a good which makes a moral demand is to admit that slavery might be morally acceptable—a proposition no one dares or seems even inclined to defend today. To deny that justice is a good which makes a moral demand is to admit that discrimination without basis in any difference which would be considered relevant by reasonable participants in the society could be morally acceptable—another proposition no one dares or seems even inclined to defend today. If the rights of people not to be enslaved and not to be discriminated against are rights which government ought to recognize and defend whether it does so or not, if these are rights not bestowed by any government but only recognized and enforced by some governments—those which are just—then there are natural rights, and all forms of legal positivism are gravely mistaken.

There is further reason why liberty must be admitted to make a moral demand. As we noted already, it is an injustice for the state to infringe upon legitimate liberties. This supposes that liberty is a great good, and indeed it is. Individuality and nonpolitical community are important goods which presuppose liberty—the scope for private action respected and defended by a just government. Autonomy ought to be respected sufficiently to allow a wide range of opportunity for private initiative.[15]

This is not to say, of course, that all who favor liberty do so out of regard for these goods. Some simply wish to be allowed to do as they please, whether for moral or immoral reasons. But the fact that people sometimes accept government for nonmoral or immoral reasons does not impugn the moral quality of the principle upon which government deserves consent. Such persons are not relevant in determining the moral legitimacy of government. Nevertheless, many people do seek to promote and protect liberty for all; they appreciate liberty as a good which always deserves concern and respect, whether that liberty is exercised by those with whom one agrees or not. All who take this attitude do treat liberty as a moral principle of law, and in so doing belie their own theoretical disclaimers of natural law and natural rights.

We turn now to the second objection: that some alternative or more ample standard than liberty and justice is required to evaluate laws and proposed laws. We already noted at the beginning of this chapter that there are many standards good laws must meet having to do with their workability as part of a legal system which does the job which law should do in guiding cooperation among members of the polity. These standards are not in question here; they

are essentially noncontroversial. What is at issue here are suggestions of substantively different or supplementary standards for good law.

Of course, there is one other widely invoked standard which is quite distinct from the one we propose. It is the utilitarian standard of the "greatest good of the greatest number." Many who propose laws with respect to the matters considered in this book explicitly or implicitly appeal to this standard.[16] We shall scrutinize this standard from the perspective of ethical theory in chapters eleven and thirteen. In the latter chapter we shall show that utilitarianism does not and cannot account for the concern for liberty and justice for all which is fundamental to the American proposition. We shall show that utilitarianism leads to a merging of the public and the private; moreover, it cannot work as a public philosophy without imposing the moral beliefs of some upon others who regard such beliefs as false and their practical implications as thoroughly abhorrent. Utilitarianism, although accepted by many people today, is far from being a philosophy to which the American people as a whole have consented.

The objection that a more ample moral standard than liberty and justice is required to judge laws and proposed laws is a more serious one. Many people will object: Fundamental human goods such as human life itself are the foundation of both private morality and of the morality of law. Both individuals and societies, including political society and its government, ought to respect and promote these goods. In particular, government ought to protect life, for its protection is part of the basic purpose of any polity. Thus, it will be argued, moral respect for life by the political society is demanded, as the phrases "right to life" and "sanctity of life" suggest. Life, considered from this perspective, seems to be a direct, immediate, and absolutely essential part of the common good. How, then, can a standard for judging the adequacy of laws and proposed laws with respect to euthanasia and related questions neglect to focus upon this obviously relevant good?

We feel the force of this objection and well understand the insight of those who will make it. Nevertheless, we believe that there are several reasons why the good of human life should not be invoked as the standard for evaluating the laws and proposed laws to be discussed in chapters three through ten.

First, we admit that the protection of life is an important part of the common good. Nevertheless, it is not clear to us that the protection of life to which all upright people consent is proposed as part of the common good of political society precisely insofar as human life is a basic good of persons—that is, insofar as human life has sanctity. Many who are concerned to protect human life regard it as a most important instrumental value, not as an inherent good of persons which has the status of an absolute principle of morality. As we shall show in chapter eleven, section H, we consider this instrumentalist view mistaken. But we think it would violate the liberty of those who

believe this proposition to demand that they accept the inherent goodness of human life as a direct, immediate, and essential part of the common good.

Second, we are convinced that almost everyone who is not already firmly opposed to euthanasia would regard as question begging the appeal to the good of human life as to a basic principle by which to settle the jurisprudential issues to be discussed in this book. If people can reasonably dissent from the position that the sanctity of life is an intrinsic component of the common good of political society, the charge of question begging would be justified. If those who would defend human life most effectively wish to show that there are arguments which are not question begging for their position, these arguments must be cogent; they cannot simply assume a principle which has been called into question.

The difficulty is intensified by the fact that the value judgment which is under fire is not simply that persons have an unalienable right to life, but also that the good of human life must be included in the common good of political society in such a way that the law will respond to life as to a principle so fundamental that it will require the overriding of conflicting claims of beneficence toward the suffering and liberty of those who wish to end their own lives voluntariiy. We do hold that there is an unalienable right to life. We doubt that the other disputed judgment—that life is a direct component of the common good of political society in the required way—is defensible. If it is a sound proposition, it needs to be demonstrated, and we see no way to demonstrate it.

Whether or not this disputed proposition is true, we think it would be a mistake to try to use it as a basic principle in defense of human life in the debate over euthanasia and the related questions to be considered here. We shall show that the demands of liberty and justice are such that most of the proposals which tend to infringe upon the sanctity of life must be rejected *as bad laws* by the narrower standard we have proposed. Moreover, arguments which appeal to liberty and justice alone cannot easily be ignored in American political and legal debate. This standard is one which most people in our pluralistic society do accept; when they do not consistently accept it, they can hardly plausibly deny it.

Moreover, arguments in defense of life grounded in the standard of liberty and justice for all avoid even the appearance that those who would defend life simply are trying to impose their sectarian morality upon the whole society. Avoiding this false appearance will disarm the rhetorical weapon which has been most effectively used by those who would legalize acts destructive to human life. That weapon can be rearmed and turned about: In the euthanasia debate, as we shall show, it is those who advocate killing who are trying to impose their morality on the society as a whole.

It is very urgent that the debate about euthanasia be removed from the political arena in which it appears that competing special-interest groups are

simply trying to impose their contrary moral opinions upon society. If this continues to be the level at which debate is conducted, those who would defend human life surely will lose most of the battles, even if they win an occasional skirmish. Those who would legalize euthanasia fully realize this fact. They have selected the arena and the weapons which maximize the chances of their own success. If one or another morality is imposed upon American society during the next few years, the morality imposed will not be that of the inherent sanctity of life.

The use of a narrower standard for judging laws and proposed laws, then, will tend to move the debate over euthanasia into an arena in which friends of life have some chance of success. For this reason, in the chapters which follow we do not ask: What should the laws be if they are to promote human life, respect its sanctity, protect the absolute right to life? Rather we ask: What should the laws concerning euthanasia and these other issues be if they are to be compatible with the fundamental American commitment to liberty and justice for all?

G. Privacy and Liberty

In recent years American courts have been invoking a right of privacy, giving it status as a fundamental right of Americans under the United States Constitution. This right served as a principle in the Quinlan decision and in certain other decisions touching on issues with which we are concerned in this book. It is likely to be invoked in many future cases concerned with these issues. Therefore, we wish to clarify what is meant by "right of privacy" and to show how this right is related to liberty.

The right of privacy as a principle for deciding constitutional issues first emerged in the United States Supreme Court decision in *Griswold* v. *Connecticut* (1965). In this decision the Court struck down a Connecticut statute forbidding the use of contraceptives.

In his opinion for the Court, which apparently was joined unreservedly only by Justice Clark, Justice Douglas argued that specific guarantees of the Bill of Rights have penumbras, formed by emanations from these guarantees. Hence, although nothing in the Constitution says that anyone has a right to use contraceptives, the various rights of privacy guaranteed therein somehow embrace the privacy or intimacy surrounding the marriage relationship in such a way that the states are prohibited by the Constitution from treating as a crime the use of contraceptives by married couples. Since the various rights from which the right of marital privacy emanates are fundamental, state laws forbidding the use of contraceptives by the married sweep too broadly and invade an area of protected freedom.[17]

Five other members of the Court wrote or joined in opinions concurring in

the result supported by the opinion of the Court, but on somewhat different reasoning.

Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, emphasized that the right infringed by the Connecticut statute was that of *marital* privacy. Douglas's rationale involving penumbras and emanations is replaced in Goldberg's opinion by an appeal to the Ninth Amendment, which reserves to the people unspecified rights not mentioned in the other articles of the Bill of Rights. Goldberg asserts that the Ninth Amendment means nothing if it does not protect fundamental, personal rights. Marital privacy, he argues, is among these rights and is infringed as much by a law forbidding the use of contraceptives as it would be by one mandating that couples be sterilized after having two children.

Fundamental rights are distinguished from the general liberty of citizens. Judges are to determine which rights are fundamental by looking to the traditions and collective conscience of the people, by considering the relationship of rights under consideration to the principles of liberty and justice which underlie all of the nation's civil and political institutions, and by taking account of the bearing of particular rights upon specified constitutional guarantees and the experience of a free society. By these tests Goldberg believes marital privacy to be a fundamental right. If a less-than-fundamental aspect of personal liberty were at stake, a state would have only to show that the law which infringed upon it was reasonably related to some permissible public purpose. But in the case of a fundamental right the regulatory effort of a state could stand as constitutional only if its infringement of the right were *necessary* to serve a subordinating public interest which is *compelling*.[18]

Justices Harlan and White, in separate concurring opinions, appealed to no right to privacy; they made no use of the distinction between liberty in general and fundamental rights. They approached the issue by way of the Fourteenth Amendment's guarantees of due process and liberty. The Connecticut law forbidding the use of contraceptives simply seemed to Harlan and White too arbitrary and unreasonable to be consistent with the constitutional guarantees of the Fourteenth Amendment.[19]

Justices Black and Stewart, joining each other in dissenting opinions, opposed the majority and would have held the Connecticut statute constitutional. While they considered the law a bad, even silly, one, they did not find in it any conflict with a constitutionally guaranteed right which would render the statute unconstitutional.[20]

In 1969 the United States Supreme Court held that one could watch obscene movies in one's own home; this action is protected from unwarranted governmental intrusions into privacy.[21] This decision hardly required appeal to the new concept of privacy; it could as well have been justified by old-fashioned, hard-core privacy.

In 1972 the Court struck down a Massachusetts statute forbidding the distribution of contraceptives to unmarried persons. This decision was based upon the decision in *Griswold* together with the guarantee of equal protection of the laws. In this way the right of *marital* privacy in the earlier decision was extended:

> If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[22]

In the 1973 *Abortion Cases* the Court relied very heavily upon the right of privacy developed in these earlier cases. Admitting that the Constitution mentions no such right, the Court nevertheless maintains that it has itself long recognized certain areas or zones of privacy. The right of privacy might be located in the Fourteenth Amendment's protection of liberty or in the Ninth Amendment's guarantee of rights not specifically mentioned. Wherever found, the right of privacy, the Court asserts, is broad enough to cover a woman's decision to have an abortion. Still, the right is not absolute; it is subject to some limitations. It would have to give way to state interests when they become dominant. These state interests include the health of the pregnant woman herself during the second one-third of pregnancy and the life of the fetus once it becomes "viable." Still, as a fundamental right, only a compelling state interest could override the right to abortion embraced within the personal right of privacy.[23]

In a concurring opinion Justice Douglas distinguishes among levels of rights. Some, he holds, are absolute; among these are the rights guaranteed by the First Amendment. Others are not absolute, yet are fundamental. They are subject to regulation for the sake of a compelling state interest. Douglas divides these other fundamental rights into two groups, placing first those to do with marriage, procreation, the raising of children, and placing at the lowest level of fundamental rights a variety of liberties including the "freedom to walk, stroll, or loaf."[24]

It is not our purpose here to criticize the decisions which we have been summarizing. Our own understanding of the American proposition is such that the decisions prior to those in the *Abortion Cases* seem to us plausible, without reference to a specific or general right of privacy, in view of the Ninth Amendment and the privileges or immunities clause of the Fourteenth Amendment (although in present constitutional law the latter clause does not have the use we would assign to it in protecting liberty). We shall discuss the *Abortion Cases* in chapter eight, section G; our criticism of the decision in these cases is based on factors other than the right of privacy invoked by the Court. Also, in section D, above, we have argued that a fair regard for liberty

forbids government to compel people to act against conscience or to prevent people from doing what they consider to be transcendently important unless such compulsion or prevention is essential to the common good. This principle would serve to distinguish fundamental rights from aspects of liberty which government might reasonably restrict when such restriction is helpful, although not essential, to the pursuit of some public purpose. Thus, we can make sense of the distinction between rights which are fundamental and other liberties which are not fundamental. But our principle for making this distinction probably does not coincide exactly with the principles assumed by any of the members of the Supreme Court, who make the distinction on their own diverse, and apparently incompatible, principles.

Our present purpose is to make clear what it means if courts appeal to the right of privacy to decide cases concerning euthanasia and the related questions to be considered in this book. In our view such an appeal is less a way of grounding a conclusion than it is a way of expressing a conclusion. There is no jurisprudential tradition behind the right of privacy which would determine how to extrapolate the implications of this right to issues to which it has not already been applied. But the determination of the United States Supreme Court that there is a right of privacy and that it is in some sense fundamental makes it possible for a court which decides that some aspect of liberty ought to be protected against any but an overriding or compelling state interest to express its decision by asserting that the liberty to be protected falls within the undefined scope of the right of privacy.

Respected legal commentators—both those who are satisfied with the Court's efforts to define new constitutional protections and those who are critical of these efforts—agree in considering the new right of privacy to be no more than a certain area of liberty or autonomy.

Louis Henkin does not think that the Court has gone beyond the bounds of proper judicial innovation. But neither does he think that the Court has provided a satisfying rationale for the zone of autonomy or immunity to regulation—the area of liberty—which it refers to by "right of privacy." Henkin makes clear that this is not privacy in any traditional sense and that it is being developed on an issue by issue basis in order to extend to certain other areas of life that kind of protection which hitherto was given to the rights mentioned in the First Amendment, rights considered in some special way to be fundamental. Henkin also points out that the Court has not clarified what a *fundamental* right is, and thus is forced to assert without cogent arguments that certain liberties have this status. Finally, he notes that the Court has not made clear what makes some state interests compelling.[25]

Clearly, not every liberty can be given the same jurisprudential status as the fundamental rights of freedom of religion and freedom of speech. John Hart Ely, who would not have opposed the legalization of abortion by statute,

has argued very strongly that the Supreme Court crossed the bounds of proper judicial activity in its decision in the *Abortion Cases*. After quoting a passage in which the Court points out the difficulties a woman denied abortion might experience, Ely comments:

> All of this is true and ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests. I suppose there is nothing to prevent one from using the word "privacy" to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in *every* case. Our life styles are constantly limited, often seriously, by governmental regulation; and while many of us would prefer less direction, granting that desire the status of a preferred constitutional right would yield a system of "government" virtually unrecognizable to us and only slightly more recognizable to our forefathers.[26]

Ely's conclusion is that the Court is legislating rather than adjudicating; he considers this wrong. Henkin, although his attitude is different, does not disagree with Ely's description. Henkin concludes his argument that the Court has provided no rationale by which to distinguish what is and what is not covered by the right of privacy by asking the rhetorical question:

> Is it, as some suspect, that the game is being played backwards: that the private right which intuitively commends itself as valuable in our society in our time, or at least to a majority of our Justices at this time, is called fundamental, and if it cannot fit comfortably into specific constitutional provisions it is included in Privacy?[27]

Whatever one thinks of the issue about which Henkin and Ely disagree—the legitimacy of what the Court is doing—there can be little doubt as to the point on which they agree: The right of privacy is not a new discovery so much as a new creation. (It is interesting, but for our present purpose only incidental, that the weight of legal commentary seems more to favor Ely's than Henkin's side of the issue on which they disagree.[28])

It might be suggested that the Supreme Court could simply maintain consistently that there are many rights reserved by the Ninth Amendment to the people and protected against abridgment by the states by the privileges or immunities clause of the Fourteenth Amendment. This approach would have the advantage of admitting the responsibility of the Court to protect liberty in its whole breadth, regardless of the mention or lack of mention of certain rights in the Constitution. Such protection would seem, as Goldberg argued in *Griswold,* to be in line with the intent of the Ninth Amendment. Unmentioned rights hardly can be disparaged more effectively than by being denied the protection given to those which are mentioned.

However, an approach along these lines would hardly require a compelling

state interest to be at stake to justify any limitation upon any of these liberties. In other words, if the whole scope of liberty were admitted to be the iceberg of which the new right of privacy is only the tip, then the Court would have to admit that a criterion must be articulated for considering some rights embraced by privacy to be *fundamental* ones, which can be overridden only by a *compelling* state interest. If some liberties are not shown to be fundamental, then they might be overridden by interests no more compelling than those which justify statutes requiring motorcyclists to wear helmets, fundamentalists to forgo snake-handling, and both sadistic and careless persons to treat animals kindly.[29]

Our conclusion is that none of the issues which are to be discussed in this book can be settled by appealing to a right of privacy. If one becomes convinced that liberty and justice require that the state not interfere in certain kinds of action affecting human life, one can formulate one's *thesis* by saying that such acts are embraced within the "right of privacy." But this formulation will be question begging if it is used in an attempt to *establish* immunity from state interference in any particular case. No one can say what the right of privacy might embrace, except in the conclusion of an argument showing what liberties ought to be respected more than others or in the conclusion of an argument showing what the Supreme Court is likely to decide.

H. Law, Liberty, and Morality

To complete our discussion of the principles for judging laws, we must say a bit more about the relationship between law and morality. The issue about imposing morality needs some further clarification. This clarification will bring out further aspects of the nature of liberty.

The main proposition concerning the relationship between law and morality is that law cannot and ought not to attempt to enforce all of morality.[30] Several considerations show why this is so.

First, law cannot reach the thoughts and decisions of persons to the extent that these are not expressed in some overt way. Purely inner thoughts, attitudes, and choices are beyond the reach of evidence—unless one accepts the use of the rack and the thumbscrew in interrogation. Attempts to regulate purely inner matters lead to unenforceable laws. Nevertheless, this private area is the primary locus of morality and immorality. Morality is of the heart, in good will and ill will, in the deepest recesses of conscience. Thus, the primary moral act, the act of choice, is beyond the effective reach of law. Political jurisdiction certainly ends before one reaches the inner core of a person where he or she is alone—or alone with God.

Second, law cannot in practice and ought not to try to establish justice in

every aspect of intimate relationships, including the relationships between family members. For example, it certainly is unfair for parents to favor one child and to pick on another; it also is unfair for a friend to make a promise and then to renege on it without adequate reason. Ingratitude to a generous benefactor also is unfair. The law can reach none of these situations considered simply as such, although it can deal with gross child abuse and neglect, breach of contract, and literal biting of the hand that feeds one.

Third, there are moral responsibilities whose fulfillment is of little or no worth unless it is wholly voluntary. The obligation to be grateful is like this. So also are the obligations to repent one's sins, to adore God, to seek his kingdom and justification. The fact that legal coercion breeds hypocrisy which wholly blocks true piety and participation in the good of religion is by itself enough reason to exclude from the law rules requiring prayer, sacrifice, and other religious acts.

Fourth, if the law tries to impose a moral ideal, there are many situations in which the attempt will be self-defeating. For example, laws which prescribe what is contrary to the conscientious judgments of many people are likely to be self-defeating, inasmuch as these people will feel bound in conscience to disobey them. Government lacks the wholehearted support of those who are not conscientious; if it also alienates those who are, it loses a very important source of its legitimacy and effectiveness. Similarly, if law imposes a moral ideal which to most citizens lacks moral force—for example, in the prohibition affair—disregard of the law is likely to be massive and the law unenforceable.

This is not to say that there are no circumstances in which law may not require behavior which is considered by some citizens morally unacceptable, or prohibit some acts which are approved by most members of society. For example, laws forbidding racial discrimination are based upon a moral view which is not accepted by all and which is considered false by some. But the moral view in question is not a sectarian one held as a private morality by those who oppose racial discrimination. Rather, it is a basic demand of justice required by equal protection of the law. By contrast, a moral norm forbidding the use of alcoholic beverages or one forbidding private sexual immorality—acts in which many people choose to engage—cannot justly be enforced by law except to the extent that acts which are morally offensive to many members of society also offend public peace and order, or in other ways take on an aspect of injustice, and can be forbidden to the extent that they have this aspect.

Nevertheless, the relationship between law and morality is not such as to make unreasonable the public attempt to enforce by law a moral norm other than justice and respect for liberty when there is no significant disagreement on the matter among reasonable participants in the society, and when enforcement can serve some purpose. A project of enforcement of morals,

under some conditions, can be as reasonable a governmental function as its more utilitarian activities of providing a monetary system or setting aside public parks. An appropriate basis for enforcing morality exists when there is a broad consensus that a certain type of act either is wrong or obligatory, and when those who would not spontaneously follow the norm do not regard its violation as a matter of deeply held conscientious conviction, but rather merely regard the norm as a demand they would personally prefer not to follow.

An example of a case which meets the requirement—where enforcement of the moral norm can be accepted as a welcome contribution to the common good—is in laws forbidding cruelty to animals, excluding bear-baiting, bull-fighting, and the like. Such laws are enforceable and do contribute to the common good by restricting impulses which interfere with the formation of dispositions of sensitivity and humanity which are widely held to be important for good character.

Inasmuch as law is limited and the domain of liberty not subject to law is very extensive, individuals and nonpolitical groups obviously are left by law at liberty to engage in many immoral acts. Every privilege carries with it a corresponding immunity, and every immunity entails a corresponding privilege. If law ought not to forbid certain immoral acts, then people have the privilege of committing these immoral acts. Thus a privilege often is a legal right, a license, to act in a morally irresponsible and wrongful way.[31]

However, such a right is no entitlement. It provides no basis for the person who is at liberty to act immorally to exact the cooperation of others, the support of society, or the use of public facilities in support of this liberty. If people do have a right to view pornographic films in the privacy of their own homes, this privilege is not an entitlement to the services of a professional moving-picture projectionist who prefers not to accept such work, nor is it an entitlement to the share one might claim for other uses of the municipal entertainment and recreation budget to purchase such films for the local library, nor is it an entitlement to a subsidy from the National Endowment for the Arts to help produce such films.

Finally, the commitment to respect very extensive liberty—and the act of legally recognizing and vindicating some particular liberty—is not rendered morally objectionable because those making the commitment or performing the legal act are morally certain that the privilege legalizes immorality and is certain to be abused by its immoral exercise.[32] This predictable consequence of liberty is but a side effect, foreseen but unsought, of the limitation of government which is demanded by justice. Like God, men and women who respect liberty intend a good and merely accept the very great evil of its immoral abuse. Political society cannot seek to suppress all immoral acts without seeking to extirpate liberty, which is totalitarian.

Totalitarianism is evil even if it seems necessary for the promotion of morality. The end does not justify the means. Totalitarianism in the service of moral fanaticism—as much as in the service of any other end—violates liberty and justice and offends the dignity of human persons. For the sake of justice and human dignity, the liberty to act immorally must be respected and protected by law, although this liberty need not be facilitated by law, since no privilege as such entitles one to the means required for its exercise.

To defend liberty even when it is immorally abused is true tolerance. To claim that every lawful exercise of liberty is morally acceptable for those who choose to adopt it is a false toleration, which implies ethical subjectivism. As we shall show in chapter thirteen, the latter in turn entails the principle required for a totalitarianism distinct from, but no less onerous than, that of the moral fanatic.