

### 3 Community and Rights

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#### *Liberal Community*

It is widely thought that liberalism as a political theory is hostile to, or anyway not sufficiently appreciative of, the value or importance of community, and that liberal tolerance, which insists that it is wrong of government to use its coercive power to enforce ethical homogeneity, undermines community.<sup>1</sup> I shall try to test these assumptions.

Very different arguments, using very different concepts of community, have been used to attack liberal tolerance in different ways. I distinguish four such arguments: The first is an argument from democratic theory which associates community with majority. In *Bowers*, Justice White suggested that the community has a right to use the law to support its vision of ethical decency:<sup>2</sup> it has a right to impose its views about ethics just because it is the majority. The second is an argument of *paternalism*. It holds that in a genuine political community each citizen has a responsibility for the well-being of other members and should therefore use his political power to reform those whose defective practices will ruin their lives. The third is an argument of *self-interest*, broadly conceived. It condemns atomism, the view that individuals are self-sufficient unto themselves, and emphasizes the wide variety of ways—material, intellectual, and ethical—in which people need community. It insists that liberal tolerance undermines the community's ability to serve these needs. The fourth, which I shall call *integration*, argues that liberal tolerance depends on an illegitimate distinction between the lives of individual people within the community and the life of the community as a whole. According to this argument, the value or goodness of any individual citizen's life is only a reflection and function of the value of the life of the community in which he lives. So citizens, in order to make their own lives successful, must vote and work to make sure that their fellow citizens lead decent lives.

Each of these arguments uses the concept of community in an increasingly more substantial and less reductive way. The first argument, that a

democratic majority has a right to define ethical standards for all, uses community only as a shorthand symbol for a particular, numerically defined, political grouping. The second argument, which encourages paternalism, gives the concept more substance: It defines community not as just a political group, but as the dimensions of a shared and distinct responsibility. The third argument, that people need community, recognizes community as an entity in its own right, as a source of a wide variety of influences and benefits not reducible to the contributions of particular people one by one. The fourth argument, about identification, further personifies community and describes a sense in which a political community is not only independent of, but prior to, individual citizens. In this Article, I focus on this fourth argument, partly because I have not discussed it before, but also because I find its root idea, that people should identify their own interests with those of their political community, true and valuable. Properly understood, the idea furnishes no argument against liberal tolerance, and no support for *Bowers*. On the contrary, liberalism supplies the best interpretation of this concept of community, and liberal theory the best account of its importance.

#### I Community and Democracy

Some liberals have thought that liberal tolerance can be fully justified by John Stuart Mill's harm principle, which holds that the state may properly restrain someone's liberty only to prevent his harming others, not himself. In *Law, Liberty and Morality*, H. L. A. Hart argued that this rules out legislation making homosexual acts criminal. But Hart's argument is sound only if we limit harm to physical injury to person or property. Every community has an ethical environment, and that environment makes a difference to the lives its members can lead. A community that tolerates homosexuality, and in which homosexuality has a strong presence, provides a different ethical environment from one in which homosexuality is forbidden, and some people believe themselves harmed by the difference. They find it much harder, for example, to raise their children to instincts and values of which they approve.

The first argument against liberal tolerance declares that questions about the shape of a democratic community's ethical environment should be decided in accordance with the majority's will. It argues not merely that whatever decisions the political officials elected by the majority make should be accepted as law, but that these political officials should make decisions that reflect the preferences of a majority rather than any minority.<sup>3</sup> This is substantive rather than merely procedural majoritarianism. The argument does not assume that any minority's moral views are base or wicked, but only that

when opinion divides about the proper ethical environment for a community, it is unfair to allow a minority to dictate to majority will.

This assumes, however, that the contours of a community's ethical environment must be decided collectively, in a winner-take-all fashion, so that either the majority or some minority must determine, exclusively, its shape. If that assumption were true, then the argument would plainly be powerful. Some issues must, indeed, be decided in close to a winner-take-all way, and in those instances, one group's view must prevail entirely, to the total exclusion of any other. For example, whether the nation should adopt a particular version of a Strategic Defense Initiative (SDI). But democracy does not demand that all political decisions be winner-take-all. On the contrary, in one central sphere of life—the economic environment—justice requires exactly the opposite.

The economic environment in which we live—the distribution of property and preferences that creates supply, demand, and price—affects us even more obviously than our ethical environment does. I am harmed by the fact that I own less property than I might, and that others have different tastes than I might want them to have. The economic environment may frustrate my efforts to raise my children to have the values I might wish them to have; I cannot, for example, raise them to have the skills and experience of collecting Renaissance masterpieces. But even if a majority of citizens wanted to assign all economic resources to themselves, it would not be just for them to do so. Justice requires that property be distributed in fair shares, allowing each individual person his or her fair share of influence over the economic environment. People disagree, of course, about what constitutes a fair share, and a good part of modern political argument reflects that disagreement.<sup>4</sup> But my present point does not depend on any particular conception of distributive justice because any remotely plausible theory will reject the principle of exclusive majoritarian control.

If we take a parallel view of the ethical environment, then we must reject the claim that democratic theory assigns a majority complete control of that environment. We must insist that the ethical environment, like the economic, be the product of the choices individual people make. Of course neither of these environments should be left completely to unregulated individual choices. We need laws to protect the economic environment from theft and monopolization, for example, and zoning regulations that respond to market externalities. These laws help insure, so far as possible, that the economic environment has the shape it would have if resources were fairly distributed and markets were perfect.

The ethical environment requires regulation in the same spirit, to limit a minority's impact on the ethical environment to the impact its numbers and tastes justify. Zoning regulations which restrict the practice of potentially offensive acts to special or private places serve that purpose, for example. But

restricting a minority's impact on the ethical environment through zoning is very different from cheating a minority of any impact at all, which is what the majoritarian argument proposes.

If we treat the ethical environment in the same way we treat the economic environment—allowing it to be fixed by individual decisions made against the background of a fair distribution of resources—then we reject the majoritarian claim that the majority has a right to eliminate whatever it finds harmful in the ethical environment. Each member of the majority has a right only to a fair impact on his environment—the same impact as any other single individual. He has no right to the environment that would make it easiest for him to raise his children to hold his favored opinions. He must try to do his best, to that end, in the environment fairness provides.

Can we find any reason to treat the ethical environment differently from the economic environment? Some economic issues, such as SDI, must be decided collectively, all one way or the other, rather than as a resultant of individual forces. And our sense of integrity and fairness require us to decide some issues of principle in the same way for everyone.<sup>5</sup> For example, officials should not aim to execute some proportion of convicted murderers to match the proportion of citizens who favor capital punishment. But neither of these reasons for making some political decisions collectively provides any argument for fixing a community's ethical environment that way. There is no practical reason why that environment must be exactly what some group thinks best. And since the various individual acts and decisions that contribute to forming an ethical environment are no more the acts of government than the various individual economic decisions that fix the economic environment are, there is no question of government violating integrity by letting individuals make these decisions in different ways.

We should not subject the ethical and economic environments to different regimes of justice because they are not two distinct environments, but interdependent aspects of the same one. The value of the resources someone controls is not fixed by laws of property alone, but also by other departments of law, stipulating how he can use that property. So moralistic legislation, which discriminates amongst some uses of property or leisure, always affects price and value to some degree. In some circumstances that effect is significant: morally inspired prohibition laws, for example. Any plausible regime of distributive justice must therefore take into account the degree of liberty citizens have in judging when resources are fairly distributed.<sup>6</sup> If we insist that the value of the resources people hold must be fixed by the interaction of individual choices rather than by the collective decisions of a majority, then we have already decided that the majority has no right to decide what kinds of lives everyone must lead. Once we accept that the economic and ethical environments are unified, in other words, we must accept liberal tolerance in matters of ethics because any contrary view denies the unity.



The majoritarian argument we have been considering is politically the most powerful argument against liberal tolerance. It was allowed a conspicuous place in the majority opinion in *Bowers*. This part of our overall discussion is therefore of considerable practical importance. But it is important to bear in mind its limits. It is aimed only at the majoritarian argument; it should not be taken as a statement of the exclusive ground of liberal tolerance, or as resting the entire value of liberty on an economic analogy. Nor does it purport to define any special rights to particularly important liberties, like freedom of speech or association. It only denies the majoritarian argument's essential premise that the shape of the ethical environment as a whole must be fixed winner-take-all by the majority's wishes. If the concept of community has an important role in the criticism of liberal tolerance, it must be in a more robust sense than simply as a name for a political unity over which majority rule roams.

## II Community and Concern

The second communitarian argument, the argument of paternalism, appeals to the idea of community in a more robust sense. It begins in the attractive idea that a true political community must be more than a Hobbesian association for mutual benefits in which each citizen regards all others as useful means to his or her own ends; it must be an association in which each takes some special interest in the well-being of others for its own sake. The argument adds that people who are genuinely concerned about others take an interest in their *critical* as well as their *volitional* well-being. I must explain that distinction, because it is crucial to the argument of paternalism.<sup>7</sup>

There are two senses in which people have interests, two ways in which their lives can go better or worse. Someone's volitional well-being is improved whenever he has or achieves something he wants.<sup>8</sup> But his critical well-being is improved only by his having or achieving those things that he should want, that is, achievements or experiences that it would make his life a worse one not to want. We can make this distinction subjectively, as a distinction between two ways in which a person might understand or regard his own interests. I myself, for example, consider some of the things I want very much as falling under my volitional interests. I want good food, and fewer visits to the dentist, and to sail better than I do, and my life therefore goes better when I have them. But I do not think that I ought to want these things, or that my life would be a poorer one if for some reason I did not. But I take a different view of other things I want: such as having a close relationship with my children, and achieving some success in my work. I do not think that having a close relationship with my children is important just

because I happen to want it; on the contrary, I want it because I believe a life without such relationships is impoverished. We make the same distinction objectively, that is, as a distinction not between two ways in which people might regard these interests, but between two classes of interests people actually have. People can fail to recognize their own critical interests. It makes sense to say that someone who has no regard for friendship or religion or challenging work, for example, leads a poorer life for that reason, whether he agrees or not. We also make critical judgments about ourselves; people all too often come to think, toward the end, that they have ignored what they only then realize is really important to their lives.<sup>9</sup>

The distinction is complex and can be explored and criticized in many different ways. Some, for example, will be skeptical about the whole idea of critical interests or well-being. They may think that since no one can prove that it is in anyone's critical interests to want something he does not, then the whole idea of critical well-being is mistaken. I shall not try to answer that skeptical objection here. I shall assume, as I believe most of us do in our ordinary lives, that we all have both kinds of interests. We can use the distinction between volitional and critical interests to distinguish two forms of paternalism. Volitional paternalism supposes that coercion can sometimes help people achieve what they already want to achieve, and is for that reason in their volitional interests. Critical paternalism supposes that coercion can sometimes provide people with lives that are better than the lives they now think good and coercion is therefore sometimes in their critical interests.

The second communitarian argument appeals to critical rather than volitional paternalism. It forces us to confront a philosophical issue about critical well-being. We can evaluate someone's life in two ways. We can look, first, at the components of that life: the events, experiences, associations, and achievements that make it up, and ask whether in our view these components, in the combination we find them, make a life good. We can look, second, at the attitudes of the person whose life it is. We can ask how he judges those components; we can ask whether he sought them or regards them as valuable, in short endorses them as serving his critical interests.

What view should we take about the relationship between these two ways of looking at the critical value of a life? We should distinguish two answers. The *additive* view holds that components and endorsements are separate elements of value. If someone's life has the components of a good life, then it has critical value. If he endorses these components, then their value increases. The endorsement is frosting on the cake. But if he does not, the value of the components remains. The *constitutive* view, on the other hand, argues that no component contributes to the value of a life without endorsement: If a misanthrope is much loved, but disdains the love as worthless, his life is not much more valuable for the affection of others.

The constitutive view is preferable for a variety of reasons. The additive

view cannot explain why a good life is distinctively valuable for or to the person whose life it is. And it is implausible to think that someone can lead a better life against the grain of his most profound ethical convictions than at peace with them. If we accept the constitutive view, then we can answer the argument from critical paternalism in what we might call its crude or direct form. Suppose someone who would lead a homosexual life does not, out of fear of punishment. If he never endorses the life he leads as superior to the life he would otherwise have led, then his life has not been improved, even in the critical sense, by the paternalistic constraints he hates.

We must recognize a more subtle aim of critical paternalism, however. Suppose the state deploys a combination of constraints and inducements such that a homosexual is converted and does in the end endorse and appreciate the conversion. Has his life then been improved? The answer turns on an issue I have so far neglected: the conditions and circumstances of genuine endorsement. There must be some constraints on endorsement; otherwise critical paternalism could always justify itself by adding chemical or electrical brainwashing to its regime.

We must distinguish acceptable from unacceptable circumstances of endorsement. The distinction, as we know from the history of liberal theories of education, is a difficult one to draw, but any adequate account of acceptable circumstances would, I believe, include the following proposition. We would not improve someone's life, even though he endorsed the change we brought about, if the mechanisms we used to secure the change lessened his ability to consider the critical merits of the change in a reflective way. Threats of criminal punishment corrupt rather than enhance critical judgment, and even if the conversions they induce are sincere, these conversions cannot be counted as genuine in deciding whether the threats have improved someone's life. The second communitarian argument is therefore self-defeating.

### Notes

1. Throughout this essay I distinguish ethics from morality. Ethics, as I use the term, includes convictions about which kinds of lives are good or bad for a person to lead, and morality includes principles about how a person should treat other people. So the question I consider is whether a political community should use criminal law to force its members to lead what a majority deems good lives, not whether it should use the law to force them to behave justly to others.

2. 478 U.S. 186 (1986).

3. We might object to procedural as well as substantive majoritarianism in the case of enforcing morals; we might say that such questions should be decided not by elected officials but by a constitutional court like the Supreme Court. I am not considering that procedural question in this lecture, however. See Dworkin, *What is Equality, Part 4: Political Equality*, 22 U.S.F. L. REV. 28-30 (1987); Dworkin, *Democracy: Equality and Constitution*, forthcoming in the Alberta Law Review.

4. In my view, fair shares are those that equalize, so far as this is possible, the opportunity costs to others of the material resources each person holds. See Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). I restrict the opportunity-cost test to material (or, as I have sometimes said, impersonal) resources, because that test is not appropriate for personal resources like talents and health.

5. For an account of the requirement of integrity, and of the issues of principle it demands be decided the same for everyone, see R. DWORKIN, *LAW'S EMPIRE* (1987), especially Chapter 6. For a more extended discussion of the distinction between matters of principle like those cited in the text, and matters of policy like SDI, see R. DWORKIN, *A MATTER OF PRINCIPLE* (1986), especially Chapter 3.

6. This argument is developed at considerable length, and its consequences for liberalism described, in Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1988).

7. This discussion of this section draws on material in lectures I gave last spring at Stanford University under the auspices of the Tanner Foundation. These will appear in a forthcoming collection of Tanner Foundation lectures to be published by the Foundation. Readers who wish to see an expanded discussion of the distinction between volitional and critical interests, and reasons for preferring the constitutive to the additive view of critical interests, should consult those lectures.

8. That characterization of volitional interests ignores the fact that some of the things a person wants may conflict with other things he wants. But the refinements needed to take account of that fact are not necessary for the general distinction between coalitional and critical interests I make in the text.

9. The distinction between critical and volitional well-being is not the distinction between what is really in my interests and what I only think is. My volitional interests are genuine, real interests, not merely reflections of my present judgments, which I may later decide are mistakes, about where my critical interests lie. The two kinds of interests, the two modes of well-being are distinct. I can intelligibly want something without thinking it makes my life a better life to have; indeed a life in which someone only wanted what he thought it in his critical interests to have would be a sad, preposterous mess of a life. I should add (because the question was raised at the conference) that I use the term "critical interests" rather than "real interests" to avoid suggesting what this footnote denies, that the contrasting "volitional" interests are in some way illusory or bogus.

## JOHN FINNIS

### *Rights and Equality of Concern and Respect*

It is sometimes argued that to prefer, and seek to embody in legislation, some conception or range of conceptions of human flourishing is unjust because it is necessarily to treat with unequal concern and respect those members of the community whose conceptions of human good fall outside the preferred range and whose activities are or may therefore be restricted by the legislation. As an argument warranting opposition to such legislation