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Rights and Education

The issue of human rights, both in education and the larger society, has grown increasingly as a matter of widespread concern. The analysis that follows represents an attempt to deal with the issue of rights in a meaningful fashion.

Many writers have held that for every right there is a duty, and for every duty there is a right. If a person has a right to act, he also has a duty to recognize the rights of others and not restrain them in the execution of their rights. Rights and duties generally are held to be correlative.

We can approach the matter another way: If a person has a right to act, others have a duty not to restrain him; whereas if someone has a duty not to act, others have a right not to be affected by his actions. A simple correlation between rights and duties cannot always be claimed. A chairman may be said to have the duty of presiding at all meetings of an organization, but it would be misleading to assume that the members have the right of having him preside. The chairman may have the right to cast a vote, but it is not ordinarily anyone's duty to allow him to do so, even though he ought to be allowed. Thus, although many rights and duties are correlative, there is no logically necessary connection between the two.

In the manner of duty and obligation, "ought" implies the ability to perform the act. We ascribe rights to infants, psychotics, the severely retarded, and even animals; but we do not ascribe corresponding duties. Therefore, it would be unreasonable to ascribe a duty that lies beyond a person's capacity to fulfill.

Another distinction needs to be made: One may talk about his rights in terms of what is "the right thing to do," which calls for certain prudential considerations in determining when one should demand that others fulfill certain duties toward him. To know that one has a right is one thing; to know at what point or situation he should demand it is another. Should Jones demand payment of a loan to his friend even though he knows that his friend would be hard pressed financially to pay it? Jones has a right through the agreement with his friend to

expect prompt repayment, but, under the circumstances, to make this demand may not be thoughtful or considerate. In this case, however, Jones' right to receive payment is not in question.

There are rights which are not necessarily to one's advantage: One has rights (when they don't interfere with others) to drink heavily, take an excessive number of pills, and overeat. Though rights, generally speaking, are designed to protect interests, they are not always protected interests. Thus, it would be misleading to define a right as an interest protected by law if interests are conceived as desires or advantages.

Rights may take other forms as well. A right may take the form of a power to legitimately perform an act in the case of making a will, appointing an agent, or transferring ownership of property. Rights, in some cases, may be considered immunities from liabilities and damages which restrain others from interference.

Rules and Cases. At this point let us approach rights in terms of the use of rules and cases. Does it make sense, for instance, to say that rights derive from rules whenever corresponding duties are involved? If Smith borrows $50.00 from Jones, would it be sensible to say that there is a rule that may be applied to the case to show that Jones has a right to demand repayment of the debt? By examining moral and legal rules to help adjudicate conflicting claims over rights may help to indicate that rules may, in some instances, help in decision-making; yet we should be forewarned that no logically necessary conditions can be found in such decision-making.

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By turning our attention to legal reasoning, further limitations may be observed in the use of rules. Rules, as used in legal reasoning, depend upon the particular facts of a particular case for their meaning. The basis of legal reasoning is the case and, therefore, law may be thought of as the accumulation of cases. Rules are derived from particular cases and, as cases pertaining to certain types of conflicts over rights accumulate, the rules derived from earlier cases are enlarged upon. The full scope of a rule cannot be given at any one time, since their scope is modified, enlarged, or restricted with additional cases. A case may display certain similarities to earlier cases; but, yet, it is never identical to them. A legal decision represents what is considered right or just at a certain time and place under particular facts and circumstances by certain judges. In another court (as cases appealed to higher courts sometimes indicate) the decision may be different. Rules, at best, do not "decide" conflicts over rights — they are useful in the process of legal decision-making. However, their relevance and application are not self-evident and, since they are derived from previous cases which pertain to particular types of conflicting claims, their relation to a particular case under consideration must be re-

evaluated. Although a large backlog of cases has not been recorded for moral, rather than legal, disputes over rights, it would be wise, when cases are available, to examine how particular rules were derived and compare their application in these earlier cases to the circumstances and conditions of the case presently disputed to determine its relevance, if any.

Although the case approach may be instructive as to the derivation of rules in the adjudication of conflicting claims, legal systems themselves pose serious problems because they do not inquire whether the distribution of a system of rights itself is just, since the law is not the judge of the norm it defines. The law establishes a distribution of rights as a normative equilibrium for society. It is what those who legislate have stipulated as the normal condition of society, which they would by law preserve, and if lost, by law restore. Thus, some way is needed to evaluate the varying degrees of justice offered by various legal systems.

Perhaps we can approach the issue of rights in another way. In doing so, it may prove instructive to turn to Thomas Hill Green. Green's nineteenth century liberalism provided an alternative to the pleasure-pain notions of Bentham's utilitarianism, opposed early liberalism that conceived freedom as an absence of restraint, and developed a position without resort to Locke's conception of natural rights.

Rights for Green are powers secured by social recognition. A right is a claim that is common to the individual and to others. In other words, an individual regards the claim which he makes for himself as conditional upon recognizing a like claim in others. It would be misleading to say that awareness of rights is prior to institutions or institutions are prior to rights: institutions are the social machinery by which rights are actualized. Rights and duties are neither natural nor derived from a sovereign power. Only as members of society recognizing common interests do individuals have rights. Government, for Green, functions in an ancillary, rather than creative, relation to morality by offering a framework in which social institutions can flourish and morality can develop.

Green relates rights to society rather than positing a universal statement of rights. Rights which ought to be recognized depend upon the common good actually recognized by the society at the time. But we may ask whether it is not possible for the government to distort the common good by establishing laws that individuals believe to be unjust? Has the citizen any rights against the state? Since Green conceives the state as the protector and reconciler of rights, there can be no right to disobey the law except in the interest of the state; that is, only to help the state correspond more closely to its role as reconciler and protector of rights. But our earlier criticism of legal systems

applies to the state since the state is not the judge of the norm it defines, but only adjudicates conflicts within a pre-defined equilibrium of rights, and the system itself may have certain unjust features.

The problem that Green leaves us with is not only that the reformer as well as the revolutionary may grow impatient with a system that depends upon the acknowledgment of rights by social recognition, but the conception of the common good and the many conflicts over rights which will surely arise in any society are problematic in Green's system. Whenever a conflict over rights exists, the disputants will not only assert the rightness of their position but may also contend that their position contributes more fully to the common good by distributing more widely a greater degree of benefits with a minimum of deleterious consequences. It is questionable that in a complex, interdependent society a single, unitary good will be agreed upon.

Let us then turn to two principles that should be a reference point whenever conflicts arise over rights. Justice is the principle by which a legal system should operate in adjudicating claims. The principle could be stated negatively: persons are not to be differentially treated unless there are relevant and sufficient reasons for doing so. The justification for differential treatment can be determined by examining the rules applicable in the context to see if they are being correctly applied. This procedure will suffice in most cases. However, when this breaks down, we are led to the principle of human dignity as a guideline for all social relations and as a basis for evaluating the rules whenever the rules themselves become the subject of dispute.

The principle of human dignity is formulated in terms of certain social criteria. First, two definitions will be introduced: *power* and *scarcity*.

Power is participation in making decisions. A has power over B with respect to the values C if A participates in decisions affecting the C policies of B.

Scarcity is found in all societies. Scarcity exists whenever the demand for goods, services, or opportunities exceeds the supply.

Keeping these two definitions in mind, the social dimensions of human dignity can be stated as follows:

Basic Axiom: The Good Society is one wherein each person is doing that for which he is best suited.

This axiom is realized by the following principle: "Power should be so allocated in any given society that scarce goods, services, or opportunities should receive distribution priorities to provide: (1) opportunities for each person to develop his abilities, and (2) opportunities to use these abilities in tasks for which he is best suited."

Whenever conflicts arise with this principle, the *procedure of differential need* can be applied: (1) the length of time and the subsequent resources involved for a person in developing the abilities of the person(s) involved, and, (2) the relative ability of each person to provide on his own all or some proportion of the needed resources.

Let us now apply this social formulation of the principle of human dignity first to the issue of teacher strikes and then to the forms of protests and demonstrations engaged in by some university students.

Do Teachers Have a Right to Strike?

Although teachers have the right to strike in some Canadian provinces, teacher strikes are prohibited by law in at least 15 states in the U.S., and some state courts have ruled that teacher strikes are illegal even in the absence of such legislation. Obviously, teachers cannot claim a legal right to strike in those states (although they may use the strike to test the constitutionality of such statutes). The question that we wish to consider is whether teachers can ever claim a *moral* right to strike?

It is frequently contended that a strike is damaging to children and a threat to the welfare and security of the public. However, it should be noted that schools are closed for the summer and holidays during the academic year, for sports events, inclement weather, teachers' conventions and for other reasons without anyone becoming disturbed over harm done to children.

Whenever teachers have serious grievances, furtive disobedience or silent acquiescence are not viable alternatives for the correction of injustices, since by their failure to bring social abuses to public attention the continuation of the abuses goes unchecked. It is generally thought that obedience under legal protest would be the most justifiable alternative for teachers since they would be operating within the framework of the law to make their grievances known. The most effective mode of obedience under legal protest is collective bargaining. Since bargaining power may be defined as ability to get another to agree on one's own terms, meaningful negotiations cannot take place unless each party has a reasonable degree of bargaining power. Whenever collective negotiations are not open, or provisions for making them a viable means of resolving disputes are not available, teachers will have to use other measures for seeking redress of grievances.

Sanctions, which take various forms, have been employed more frequently in recent years. They are likely to be used when provisions for collective negotiations are not available, or when impasses have been reached and the school board, in the eyes of teachers, has become unyielding. The extreme form of sanctions — mass resignations of teachers and the encouragement of teachers not to accept employment

in the school district or the state — is a work stoppage not dissimilar to a strike. However, the damages may be greater than a brief strike if the demands of teachers are not met and the sanctions continue for an extended time period.

From the point of view of claiming a moral right to strike, we may wish to examine the claim briefly in terms of T. H. Green's conception of rights. Green, as you recall, held that rights are powers secured by social recognition, a claim that is common to the individual and others. Rights which ought to be recognized contribute to the common good of society at that particular time. Now, we have seen that in some states teacher strikes are prohibited, and in other states without such legislation they may be ruled against in the courts. Clearly, in these cases the strike cannot secure legal social recognition. Its chance of securing moral recognition seems to be tied to a number of factors. One thing that teachers could do if they feel that a strike in a particular case is morally justifiable is to help educate the public to the reasons that brought about the strike, the nature of existing conditions in the schools which they oppose, and explain that a work stoppage in the form of a strike will not have the dire social consequences that the public has been led to believe.

It has already been noted that no dire results obtain from the closing of schools for holidays and other events. What teachers must do to secure social recognition of a right to strike is to show that collective negotiations are prohibited or are inadequate to deal with the problem in the particular case. That, if available, they have been tried and found wanting. That the educational conditions to which teachers and children are daily exposed are highly undesirable and have not been corrected even though they have repeatedly been brought to the attention of educational authorities. The use of sanctions, it could be shown, would unnecessarily delay the correction of highly undesirable educational conditions.

In other words, teachers must show the steps which they have taken and which have failed to resolve the controversy and bring about some desired changes. Thus before teachers can claim a moral justification for striking, they must first utilize legal devices for redress of grievances; but when these devices fail and sanctions will delay correcting and, hence, permit the worsening of conditions, the strike becomes a viable alternative. Thus, in those cases where all legal alternatives have been tried and exhausted, justification could be based upon the moral rightness of the strike by calling to public attention the existing conditions, the exhaustion of legal alternatives, and the predicted correction of these conditions by striking. There may be cases where teachers could show a moral justification of a particular strike and, hence, gain acknowledgment of a right to strike in a particular case only to find practical and prudential considerations inopportune and hence, having untoward future consequences.

The case may further be tested by applying the principle of human dignity. It is necessary to move to the principle because it is assumed that the strike is illegal, appeal cannot be made to the legal system, and thus we wish to examine the moral rightness of the act.

Once legal alternatives have been tried and exhausted, the principle could be used to show that deteriorating educational conditions would be a case falling under the principle; whereas teachers striking for the sake of greater material benefits probably would not be covered by the principle. Let us state the principle as a major premise: "Power should be so allocated in any given society that scarce goods, services, or opportunities should receive distribution priorities to provide: (1) opportunities for each person to develop his abilities, and (2) opportunities to use these abilities in tasks for which he is best suited." Now let us state the minor premise: "Empirical evidence exists that in the X public school system educational conditions have so deteriorated that opportunities no longer exist for each person to develop his abilities." We conclude "Since legal alternatives have been exhausted and conditions are worsening, a strike is morally justifiable under the stated conditions."

Student Militance

Let us see how the principle may be applied in the case of student militance on university campuses. Universities should provide sufficiently responsive mechanisms and procedures by which student grievances may be heard, and whenever universities fail to do so, students must either swallow their grievances or engage in demonstrations in order to get a hearing. Assuming that such mechanisms exist, they should not be used as a subterfuge behind liberal rhetoric that tenaciously attempts to maintain the existing equilibrium irrespective of the possible legitimacy and feasibility of student demands. Students, wherever they have exhausted existing mechanisms without achieving desired changes, may resort to peaceable demonstrations. Should these demonstrations fail to bring any concessions from the administration, students can either soften their demands or give up or transfer elsewhere or resort to violent demonstrations. In the latter case they would be violating property laws and laws protecting persons (assuming the violence took this form). Drawing upon our principle once again, if students could show that they are being denied the opportunity to develop their abilities, that they have tried legal redress of grievances to no avail, then their violent demonstrations are morally legitimate. However, first of all they must make their case with respect to the minor premise (and this is not easy to do); secondly, they must determine whether their violent demonstration denies more opportunities than it provides for all the university's students — not only during the demonstrations but in terms of the immediate educational consequences

of the acts. Their actions can be morally justified only when these conditions have been fulfilled.

In conclusion, let me say that I hope that communication among faculty, students, and administration will become increasingly open and facilitating so that more violent means will no longer be necessary. However, if our universities rapidly are becoming miniature microcosms of the larger society, and if we agree with Herbert Marcuse that the larger society is controlled by totalitarian one-dimensional thinking operating behind a facade of liberal rhetoric, then I am afraid campus convulsions will grow stronger in the months ahead.