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Individualism, Equality, and Rights: Reactions to Jackson, Priest, And Katz

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Owen Fiss was a central participant in a monthly discussion group that we both attended for more than twenty years and that provided some of the most exciting intellectual conversations of my life. Owen's contributions to these intense discussions were marked by a wonderful combination of intellectual insight and moral power. I cannot count the number of times I found myself brought up short by his reminder that I had left out some crucial dimension of the question in my zeal to make a philosophical point. I owe him a great deal, and it is therefore a particular pleasure to join in honoring him on this occasion.

As a philosopher among lawyers, I have been learning a great deal at this conference. But I have also been feeling a philosopher's instinctive urge to make distinctions, and I want to begin by mentioning several that seem to me to be important.

The first concerns Individualism, which has been mentioned frequently in our discussions. 'Individualism' is a term that arouses strong passions. But can be used to refer to a number of quite different things that, particularly because of these passions, it is important to distinguish. To begin with, there is what I will call Normative Individualism, which is the thesis that what is basic in our criticism of laws and institutions are the claims of individuals (as opposed to, say, claims of groups.) I defended this doctrine yesterday in some remarks from the floor, which drew wide criticism. As I made clear in those remarks, I believe that Normative Individualism is correct. It may sound heretical to say this at a conference in honor of the author of *Groups and the Equal Protection Clause,*[1] but I want to argue that the important points in that classic essay are in fact consistent with Normative Individualism.

Normative Individualism needs to be distinguished from several other things with which it is sometimes confused. The first is the idea that individuals are normally concerned solely with the pursuit of their self-interest, and that this is in fact the outlook that it is rational for them to have. Individualism in this sense is no part of Normative Individual-

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1. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 107-177 (1976).

ism as I am understanding it. That doctrine allows that the aims that individuals pursue are often, and quite properly, concerned with the interests of others — of members of their family, their community, or people elsewhere whom they see as in need of help. So Normative Individualism and the doctrine that emphasizes and glorifies self-interest are completely different ideas, and are only misleadingly lumped together under the same name.

Another way in which a theory can be "individualistic" is by holding that solutions to social problems should be sought by looking solely at individual transactions rather than structural features of legal, economic, and political institutions. It is an important recurrent theme in Owen's writing that we must look beyond solutions that are individualistic in this sense, and I very much agree with him on this point. But I don't think that in order to make this point and to take it seriously we need to reject Normative Individualism. Individualism about solutions may be part of, say, libertarianism, but it is not entailed or even supported by Normative Individualism, properly understood. The term "Individualism" may have negative connotations in progressive circles, but I believe it is a mistake to suppose that we should reject Individualism in all its forms. This stance puts one in opposition to things that one need not fight against, and which I believe are in fact correct.

To illustrate this point, let me return for a moment to *Groups and the Equal Protection Clause.* Central to that article is what Owen called the "group disadvantaging principle."[2] Although groups play an essential role in this principle, accepting it does not involve a departure from Normative Individualism. Being identified as a member of a group widely regarded as inferior, and being denied access to important opportunities on that basis, is a distinct kind of harm to an individual. This harm cannot be characterized without reference to a (socially defined) group, but it is nonetheless a harm to the individuals involved, and we properly object to this kind of identification because it is something individuals have reason to object to. We must, of course, take into account the group nature of this harm in order to think clearly about what would constitute an effective remedy. For example, an individual's ability to protect his or her interests through electoral politics depends on the ability to form a politically effective group of people who either share this interest or are willing to cooperate to promote it. Individuals who have such an interest are unlikely to be able to do this if those who share it are disenfranchised and politically isolated. As Owen notes, this fact about disadvantaged groups supports the case for judicial intervention as a

2. *Id.* at 147-77.

remedy.[3] Although the idea of a group is essential to Owen's argument in these ways, accepting his argument does not require any departure from Normative Individualism. It remains the case that what we are ultimately responding to are the claims of individuals for fair treatment.

My second point concerns equality, and is a response to George Priest's remarks about relative poverty. He asked whether, if everybody were quite well off, it would still matter from the point of equality whether some people have more wealth or much higher income than others. I think that it might. A concern for the plight of people who are (in absolute terms) very bad off is not the only reason for being concerned with equality. Even if everyone in a society is quite well off in material terms, large differentials in wealth and income can still be objectionable. These differentials may, for example, enable some people to exercise unacceptable forms of power over others. They can make equality of opportunity difficult to sustain, because some people will have greater access to education and other goods that are necessary to compete for jobs. Also, even if no one in a society is bad off in absolute terms, significant differences in wealth and income can generate demeaning differences in status, because some people are unable to live in a way that is "respectable" according to the norms of that society. In short, many different values are at issue in discussions of equality, and some of these values concern relative as well as absolute poverty.

Now let me turn to some questions raised by Vicki Jackson's paper about the interaction and possible conflict between ideas of liberty and equality in general, and in particular about the relation between ideas of equality and the First Amendment. In discussing rights, I think it is important to distinguish between a right and the interests or values that the right serves to foster and protect. For example, we should distinguish between privacy (how much privacy people enjoy and why it is of value) and the *right* to privacy (the conditions under which a person's rights would be violated). In the case of freedom of expression, the distinction I have in mind is between values having to do with expression, such as robust and wide open political debate, and the *right* to free speech as it is enshrined in the First Amendment. In my view, our understanding of a right consists of conclusions about how the discretion of governments and other actors to act or refrain from acting must be constrained if important interests and values are to be adequately protected. Thus, to claim that a certain action violates freedom of expression is to claim that a constraint barring such actions is necessary if the relevant values are to be adequately protected and that such a constraint is feasible—that its cost in terms of other values is one worth paying.

3. *Id.* at 152-54.

A conception of a right thus involves both an evaluative component (a conception of the values needing protection and their importance relative to other concerns) and an empirical component (claims about how things go if governments and other agents are left free to act in certain ways, and how they will go if this discretion is constrained). Comparative information of the sort that Jackson discusses, about what has or has not impeded democratic institutions in other societies, is obviously relevant to the latter question.

We can defend a conception of a *moral* right by addressing these two questions directly: by arguing that certain values *are* important enough that people can demand a constraint on others' discretion to act in order to protect those values, and that certain constraints in particular are a feasible way of offering this protection. When a legal right is at issue, of course, things are somewhat different. The First Amendment makes a right to freedom of expression part of our constitutional law, and the question of how this legal right is to be understood is in large part an interpretive one — a question, for example, of what conception of the relevant values best accounts for our established jurisprudence.

On the view I am describing, a conclusion about the content of a right — for example, what does or does not violate our right to freedom of expression — always involves, at least implicitly, a balancing of competing values. Since such a conclusion involves a claim about what constraints are necessary and feasible, it will depend on conclusions about the relative importance of the values promoted by free expression and whatever other values may be affected by that constraint, or the lack of it. But what is balanced here are certain values or interests that are protected by, or affected by, the right. The right itself is not being balanced against other values. Rather, its content is being determined through a process that involves (among other things) balancing of interests.

Two things mentioned in Jackson's paper illustrate the difference between balancing of interests and what is (misleadingly in my view) called balancing of rights. First, she urges the possibility that "older" constitutional provisions such as the First Amendment can be reread in the light of later provisions, which may, for example, give greater weight to equality. The view of rights that I have been urging can easily allow for this. A conclusion about the content of a right depends, I have said, on conclusions about how the values at stake — those being protected and also others that are at risk — are to be understood and their relative importance assessed. On this view, later constitutional enactments can affect the content of a right, since they can lead to different conclusions about what understanding of these values is supported by

the best interpretation of our overall constitutional jurisprudence. In this way, later enactments can affect the balancing of values that goes into determining the content of a constitutional right. This seems to me a good way to understand what Jackson suggests with her statement "equality norms must be reconciled with our understandings of earlier guarantees of liberty."[4]

But I would contrast this with what Jackson describes as the Canadian model, according to which some rights are interpreted very broadly with the understanding that these rights may be balanced against other rights. In Keegstra, for example, Jackson notes that the Canadian Supreme Court agreed "that the challenged statute infringed the 'freedom of expression' secured by Charter section 2" but held that the question was whether this restriction was "demonstrably justified in a free and democratic society."[5] What this model calls for is a balancing of rights against other considerations. To me, this undermines the very idea of a right, and I share Owen's worry that there is "no principled way" to carry out this kind of balancing.

The kind of balancing I am suggesting is, in at least one clear sense, "internal" to our understanding of the right of freedom of expression itself. It is part of figuring out what that right itself entails. But it is not necessarily "internal" in another sense that Owen suggested and Jackson discusses. This is the sense in which an argument about the right of freedom of expression is "internal" to that right if the values— such as equality — that it takes to be balanced against the values of expression narrowly understood are themselves substantially grounded in those very values. This may be true in some cases, such as campaign finance, but I would not hold that the only values that can be appealed to in arguing about the proper understanding of the right of freedom of expression are ones that are "internal" in this sense. I agree with Jackson in finding unpersuasive the claim that the interests that are appealed to in defense of hate speech statutes are internal in this sense.

In conclusion, I want to raise a point — a question really — about Stan Katz's paper. His paper was something of a wakeup call that made me wonder whether I was naïve in my attitudes toward human rights. I came to the paper as an enthusiast for (at least some) human rights. I believe that the recognition of these rights is important because they provide necessary protection for many people across the world. These people will not have this protection unless they can make an effective

4. Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 296 (2003).

5. *Id.* at 305.

appeal to these rights either within their own domestic courts, or to some influential outside authority or body of opinion.

So, as a believer in human rights, I have found myself embarrassed by the United States' reluctance to ratify even the most basic human rights conventions, and by our refusal to accept the International Criminal Court. So I didn't know quite how to respond when I read the passage from Katz's paper where he writes, "We simply do not accept that the United Nations or any other international body embodies the will of the American people sufficiently for it to establish rules enforceable in American courts. We are all Brickerites, to this extent, especially wary of the possibility that exogenous norms will be bootstrapped into the domestic order by treaty, executive agreement, or otherwise."[6]

Are we all Brickerites (at least to this extent)? Am *I* a Brickerite? When Katz writes about what "we" think, is he including *himself*? He sometimes seemed ambivalent on this point.[7] I find that historians and philosophers use the first-person plural in different ways. As a historian, Katz can talk about "us," that is, our history, without necessarily sharing the attitudes that he attributes to "us," that is, to Americans. By contrast, when philosophers use the term "we," it usually has a more committal and presumptuous character. When, in a philosophical article or talk, I write that "we" think a certain thing, I mean that this is something that *I* think, and I am presumptively claiming that my audience does so as well. This assumption may sometimes be unwarranted, perhaps even offensively presumptuous, and in that respect the historians' "descriptive" use of "we" may be preferable. But to a philosopher's ear, it can sound troublingly ambiguous and non-committal. So part of my problem in reading this particular passage lies in the uncertainty of whether to read Katz's "we" in this more committal, philosophers' sense.

In any event, Katz's remark challenged me to ask myself, whether I am, after all, a Brickerite, at least to the extent he has in mind. This led to a dialogue with myself about how I ought to feel about the ratification of international human rights norms. What are the reasons that might lead one to favor ratification? One might want human rights made part of American law because one thought one might need their protection. I don't think this occurred to Senator Bricker. I doubt that he felt that he might need the protection of norms not recognized in American law. But other Americans, such as people on death row, may have that need.

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6. Stanley N. Katz, *A New American Dilemma?: U.S. Constitutionalism vs. International Human Rights*, 58 U. MIAMI L. REV. 323, 340 (2003).

7. At many points he seems to suggest that the Brickerism he attributes to us is justified. But in the last sentence of the paper, in which he says that we may not be up to the challenge of rethinking our constitutional legacy and its relation to human rights, he seems to be suggesting that he thinks this rethinking is called for.

In my own case however, that wasn't what I was thinking. A less self-interested view lay behind my naïve enthusiasm. It might be put in the following simple three-step argument.

There are people in other countries who suffer violations such as torture, arbitrary arrest, and imprisonment, which violate widely recognized human rights. These are not merely bad things to have happen — like the suffering caused by floods and earthquakes. They are also moral wrongs; people have valid claims against others that these things not be done. Effective protection against such violations would therefore not merely be a good thing; it is also something to which people have strong moral claims. For people to have such protection, their governments must recognize that these people have a right not to be treated in these ways. If the only way of bringing this about is for some external body to bring pressure to bear on their governments to recognize these rights, and if this could be done without other bad consequences, then it should be done. That is the first premise.

The second premise is that if the first principle applies to other countries, then it applies to us in the same way. We're not a moral exception. Therefore, third, we ought to ratify human rights conventions and accept the authority of international bodies to enforce them.

How could one escape this argument? One could reject the first premise. One way would be to reject it piecemeal, by objecting to some of the particular rights that are enumerated in human rights conventions. My argument did not specify which rights I had in mind. It traded on the assumption that these were rights against torture and imprisonment without trial, and others of comparable importance. Yet given any list of human rights, there may be some that do not have this urgency, and the case for enforcement of these particular rights may not be as compelling.

While Katz offered the objection that some interpretations of human rights might conflict with our Constitution, the kind of Brickerism involved in the quote I read from his paper was not piecemeal rejection of this kind. It was more general, and in principle. So I will focus on that kind of wholesale rejection.

One way to reach such a result would be to reject the second step in my argument. One might agree that the violation of certain human rights is morally unacceptable, and that people in other countries will have effective protections against such violations only if some outside body has the power to force their governments to recognize these rights. But while concluding that other countries ought to accept this authority, one might deny that this applies to the United States. The claim would be that we are different; we don't have to accept this authority even though we think the governments of other countries should. Perhaps

many of "us" accept this kind exceptionalism, and it may be a part of current U.S. foreign policy. But it runs against what seems to me an absolutely fundamental moral axiom of universalizability.

If, then, one wanted to reject the conclusion of the argument, at least as it applies to us, one would need to reconsider whether the first premise should be rejected or accepted only in some more qualified form. Once one sees what this premise would demand of us and determines that demand to be unacceptable, then one may go back and reconsider the premise itself. This is a common form of moral argument and is not at all unprincipled if we are willing to grant to others the exceptions we claim for ourselves. So let's consider the seemingly strongest version of the first premise — strong because narrowly tailored to provide for enforcement only of a small class of the most urgent and least controversial human rights such as the right against torture and against imprisonment without trial — and ask what principled reasons one might have to reject this premise.

The objection Katz suggests is that accepting the authority of an international body to interpret these rights and take steps to enforce them (perhaps only in the form of sanctions, let's assume) would be incompatible with the autonomy of our own legal system. It would be incompatible, as he sometimes puts it, with "our attachment to popular constitutional sovereignty."[8]

Would this, then, be an unacceptable intrusion? First, we should bear in mind that we are not talking about the enforceability of requirements that would have no basis in American law. The question at issue is whether certain human rights provisions should be made part of American law by being ratified by the Senate. So "popular constitutional sovereignty" is, at least at that stage, not an issue. Where it becomes an issue is in the possibility that an international body might interpret even the most basic and seemingly uncontroversial of human rights in a way that runs contrary to settled features of American law. To take a not at all farfetched example, such a court might find that capital punishment was ruled out by the most basic human rights, or it might object to our treatment of some of those we have imprisoned in the "war on terror."

I do not see that such decisions would be objectionable infringements of our sovereignty. But my acceptance of them is of course made

8. Katz, *supra* note 6, at 344. His inclusion of the words "our attachment to" raises the ambiguity I mentioned above. Is he simply observing that many (most?) Americans would reject international enforcement of human rights for this reason? Or is he endorsing the claim that it is a good and sufficient reason for this rejection? The question I am addressing is of course the latter: whether (to use the philosophers' parlance) we should take this reason to be good and sufficient.

easier by the fact that I would agree with the substance of the decisions involved. To put my thinking about the question to the test, I need to imagine a substantively erroneous decision that would bring to the forefront the question of the legitimacy of the international body itself. Consider, then, the possibility that an international court might hold that affirmative action policies allowed by American courts violated a basic norm of equal treatment, or that our laws permitting abortion violated a basic "right to life." Would objections to such results on grounds of the lack of authority of the bodies in question be stronger than, say, objections to the decision of an international trade authority imposing sanctions on us for our trade policies? In each case, one could ask, "Who do they think they are?" In each case it could be answered, "an international body whose authority we have recognized in a treaty ratified by the Senate." The question remains whether there is a stronger reason, in the former case, to withhold ratification.

What special reason do we have to refuse to accept the authority of an international body's decisions about the most basic human rights? Should we be less willing to put our trust in such decisions than in the similar decisions of our own Supreme Court? In deciding whether to accept judicial review of this kind, does it make a difference whether the decisions will be made by Americans or by "outsiders"?

In either case, we would be placing ourselves in the hands of a court, making ourselves subject to its interpretation of basic moral norms that have been established as legal norms. The wisdom of doing this, I suggest, turns on the grounds we have for thinking that the court's decisions on the whole will be guided by a discourse that is in touch with the relevant values. If we have grounds for thinking that it will be so guided, then we have reason to accept the decisions that result, even though we know that in some cases these decisions will be mistaken.

My reaction to Katz's paper thus brings me back to a theme in Owen's work, which is that adjudication, at the highest levels, is a process of articulating the public values embodied in our Constitution.[9] The restriction to values embodied in *our Constitution* is natural in this context, since Owen was discussing our Supreme Court, and *our Constitution* is its assigned text. It is clear that jurists in other countries understand these values differently. The understanding of freedom of expression in the United Kingdom, France, and Germany, for example, is in certain respects less protective of expression than the standard interpretation of our First Amendment. This probably reflects both a different balancing of the underlying values and different assessments of

9. This is a principal theme in, for example, Owen M. Fiss, *The Supreme Court 1978 Term - Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

the available institutional strategies for protecting these values. Given these differences, I would be very reluctant to have us ratify a treaty giving an international body a final say over freedom of expression as it applies to us. So in this case, I too am a Brickerite.

For sake of consistency, then, must I say that if people in any other country judge that the international understanding of some right runs contrary to the way that right is understood in their constitutional tradition then they are justified in refusing to recognize the authority of any international body to interpret and enforce that right? What if the right in question is the right not to be subject to torture, or not to be imprisoned without trial, and the constitutional tradition in question rejects this right, or interprets it in a way that permits wide use of these means?

I do not want to accept this conclusion. It does not seem to me that appeal to one's "constitutional tradition," no matter what its content may be, trumps all appeal to human rights. So if I am to be consistent I must interpret my Brickerism with regard to the First Amendment in some narrower way. On reflection, then, I would say that my rejection of international authority in that case is based not just on the fact that it is likely to run contrary to the particular understanding of freedom of expression embodied in our constitutional jurisprudence, but also on the fact that this understanding of that right is morally defensible (even if, arguably, it is not the only morally defensible understanding of that value). The problem in the other two cases is that the very weak understandings of the rights against torture and arbitrary imprisonment that I was imagining are not morally defensible. My reaction, then, reflects the view that there are at least some basic rights whose validity does not depend on their being embodied in our Constitution or any other, and which constrain our thinking about appeals to legal and constitutional autonomy.

This brings us back to the question of whether we should ratify a treaty that would give some international body authority to make binding interpretations of fundamental rights such as the two I have been discussing. I have been suggesting that the argument for Brickerism in this case comes to rest on the claim that we are justified in refusing to trust the interpretations of such a body. Even with respect to these most basic and least controversial rights, the likelihood of decisions that are not actually guided by the relevant values is sufficiently great that we, and other countries as well, are justified in rejecting such an authority, despite its possible benefits. I find this a depressing conclusion, and I am reluctant to accept it. But most of those who mentioned the issue to me after our session seemed to support it. This suggests that Katz's descriptive claim about "us" may be largely correct.