

Part I

The Dilemma of Legal Perspectivalism

Contemporary moral philosophy, political theory, and jurisprudence have converged to create a quite baffling dilemma. This dilemma is generated by the apparent incompatibility of three principles, each of which grounds features of our system of law and government, and each of which carries substantial normative weight. The first I shall call the principle of weak retributivism – a moral principle doctrinally entrenched in American civil and criminal law, which holds that individuals who are morally justified in their actions ought not to be blamed or punished for those actions. The second is the principle of the rule of law – a complex jurisprudential principle that requires law to conform to a set of formal values, such as generality and coherence, as a means of protecting substantive moral values like liberty and equality. The third is the principle of democracy and the separation of powers – a principle of political morality that vindicates the right of majorities to be self-governing by assigning policy-making powers to a democratic legislature and restricting the executive and judiciary to the secondary tasks of policy implementation and application.

These three principles now serve as cornerstones of our legal and political systems. Yet, if they are genuinely incompatible, one or more of them must be abandoned. We must resign ourselves to the punishment of the justified or sacrifice systemic values that have long been invoked to justify our commitment to structural pluralism and rule-governed adjudication.

Chapter 1

The Incompatibility of Weak Retributivism, the Rule of Law, and the Separation of Powers

Since our fundamental commitments to weak retributivism, the rule of law, and the principles of democracy and the separation of powers are not in obvious conflict, the dilemma engendered by their mutual defense takes some construction. Let me begin at its seemingly remote beginning.

MORAL CORRESPONDENCE

Consider the following hypothetical. Smith is attacked by a hoodlum while walking her dog through the city park. Smith justifiably believes that her life is in peril, and she is thus forced to choose between killing the hoodlum and being killed or maimed herself. Jones is a jogger who witnesses the hoodlum's attack on Smith. Unable to affect the hoodlum's conduct, Jones must choose between permitting Smith to kill the hoodlum and intervening to prevent that killing. Long is a concession stand owner who also witnesses the event. Long is unable to affect the conduct of either the hoodlum or Smith, and so can only choose between restraining Jones from intervening to prevent the hoodlum's death or allowing that intervention.

The morality of each actor's choice appears to be determined by what I shall call the "correspondence thesis." The correspondence thesis asserts a moral claim about the justification of codependent actions. It holds that the justifiability of an action determines the justifiability of permitting or preventing that action. According to the correspondence thesis, if Smith is justified in killing the hoodlum (as a means of self-defense), then Jones is not justified in intervening to prevent that killing, and, hence, Long is justified in restraining Jones's intervention.

The correspondence thesis rests on the intuition that, since an action cannot be simultaneously right and wrong, it cannot be the case

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that one actor may be justified in performing an act while another may be simultaneously justified in preventing that act.¹ The intuitive plausibility of the thesis can be cashed out as follows.

Step One: Right action is action that accords with the balance of reasons for action.² Reasons for action are objective in the sense that their right-making characteristics are universal. If it is right for one to do an act, it must be right for all others that one do it. If, for Smith, the balance of objective reasons for action favors action A (where A is killing the hoodlum in self-defense), then the balance of reasons in favor of Smith's doing A must be the same for Jones and Long, namely, it must dictate the conclusion on their part that it is right that Smith do A.

Step Two: Where other actors face choices between alternative actions that will or will not thwart action A, the rightness of A entails the wrongness of those actions that will thwart A. For example, Jones faces the choice between intervening to prevent Smith from killing the hoodlum or not intervening. It would be morally anomalous if

¹ As Immanuel Kant argued:

Each member of the commonwealth has right of coercion in relation to all the others, except in relation to the head of state. For . . . he alone is authorized to coerce others without being subject to any coercive law himself. . . .

But if there were two persons exempt from coercion, neither would be subject to coercive laws, and neither could do to the other anything contrary to right, which is impossible.

Immanuel Kant, On the Common Saying: "This May be True in Theory, But it Does Not Apply in Practice," in *Kant's Political Writings*, ed. Hans S. Reiss, trans. H.B. Nisbet (Cambridge and New York: Cambridge University Press, 1970), 61, 74–5 (emphasis added).

² Joseph Raz puts this principle as follows: "It is always the case that one ought, all things considered, to do whatever one ought to do on the balance of reasons." Joseph Raz, *Practical Reason and Norms*, 2d ed. (London: Hutchinson & Sons, 1990), 36. As Raz makes clear, the phrase "ought all things considered" functions in this principle to indicate "what ought to be done on the basis of all the reasons for action which are relevant to the question, and not only on the basis of the reasons the agent in fact considered or could have considered." *Ibid.* For similar statements of the conditions of right action, see Stephen Darwall, *Impartial Reason* (Ithaca, NY: Cornell University Press, 1983), 99; John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, Belknap Press, 1971), 341, 408. For alternative conceptions that epistemically limit the conditions of right action, see Richard A. Fumerton, *Reason and Morality: A Defense of the Egocentric Perspective* (Ithaca, NY: Cornell University Press, 1990), 90–128; Donald Davidson, *Essays on Actions and Events* (Oxford: Clarendon Press, 1980), 21–42. I criticize such alternative conceptions in Chapter 10.

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A were the right thing for Smith to do, while preventing A would be the right thing for Jones to do. The objective reasons that constitute the content of morality must make it right (for Jones as for everyone else) that Smith do A, so those same reasons seemingly cannot make it right that Smith not do A. Hence, the balance of reasons for action must demand the permission of justified actions and the restraint of attempts to thwart justified actions.

It is useful at this early stage to stop to consider a series of objections that might be made to the correspondence thesis. By putting these to rest at this point, one can both better appreciate the claim made by the correspondence thesis and forestall future confusion about its implications. First, one might be tempted to resist the correspondence thesis because of the following sort of case. Suppose that Green has grounds for reasonably believing that she is being stalked by a man who seeks to kill her. Suppose further that she reasonably believes that a man who she discovers quietly circling her house is in fact the stalker. She thus reasonably believes her life to be in peril and shoots at the man as he approaches her. However, the man, Brown, is in fact the meter reader for the electric company who is on her property to perform the routine task of monitoring her use of electricity. Reasonably believing his life to be in peril, Brown shoots back, misses, and is killed by another shot from Green.

Is this not a case of two individuals who are each entitled to attempt to prevent the other from doing a justified act? Does this case not demonstrate that the correspondence thesis is false, because the justifiability of Green's conduct does not make it unjustifiable for Brown to resist it, and the justifiability of Brown's conduct does not make it unjustifiable for Green to resist it? Each appears to be justified in attempting to thwart the actions of the other, and, as such, the justifiability of one actor's conduct does not appear to determine the justifiability of the other's attempt to prevent that conduct.

This analysis is initially plausible only because the meaning of the phrase "justified action" is equivocal. The phrase is alternatively employed to capture both right action and nonculpable action. But the conditions of right action and the conditions of nonculpable action are distinct. And the correspondence thesis is a thesis that is solely about the conditions of right action; it is not a thesis about the conditions of nonculpable action. Let me explain.

An individual is nonculpable if she does an action justifiably believing it to be right. Alternatively, an individual is culpable if she

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does an action believing it to be wrong or unjustifiably believing it to be right.³ Culpability is thus a condition of an actor's state of mind: It reflects the degree of epistemic justification with which an actor concludes that her actions are right. An actor is epistemically justified in believing an action to be right if, under the circumstances, she has invested a reasonable amount of time, talent, diligence, and resources to acquire information about her circumstances and to determine the demands of morality within those circumstances. She has invested a reasonable amount of time, talent, diligence, and resources at these tasks if, crudely speaking, the costs of investing more of these goods are greater than the costs of a wrong decision discounted by its probability.⁴ In the case of Green and Brown, one might well conclude that Green justifiably believed that she was entitled to shoot Brown. She rightly believed that an innocent person is entitled to use deadly force in cases of imminent peril, and, given what she knew of the activities of her stalker, she reasonably concluded that she was in such peril and, thus, that the costs of investing further time to determine more accurately the identity of the unknown man in her garden were sufficiently great as to outweigh the discounted costs of shooting an innocent man. At the same time, Brown justifiably believed that he was entitled to defend himself. He rightly concluded that, as an innocent person, he was entitled to use deadly force to defend himself against imminent peril, and he invested a reasonable amount of time and diligence to determine that Green was indeed placing him in such peril.

The correspondence thesis is plainly false if it is construed as a thesis about the conditions of culpability. Two individuals can justifiably believe that they are each entitled to thwart the actions of the other, because they each can possess sufficiently different amounts of information, time, talent, and resources to make it reasonable for them to entertain different beliefs about what they are each entitled to do. One actor thus may be epistemically justified in believing that she should do an action that another actor is epistemically justified in be-

³ For an extensive discussion of the distinction between wrong-doing and culpability, see Heidi M. Hurd, "What in the World is Wrong?," *Journal of Contemporary Legal Issues* 5 (1994): 157–216.

⁴ There are certainly credible accounts of culpability that do not explicitly rely on the kind of cost-benefit analysis that I have employed here. For a discussion of these alternative conceptions of culpability and a defense of the claim that even deontologists should employ a cost-benefit theory of culpability, see Heidi M. Hurd, "The Deontology of Negligence," *Boston University Law Review* 76 (1996): 249–72.

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believing that he should thwart. Construed epistemically, it is thus false that the justifiability of an action determines the justifiability of permitting or preventing that action.

However, the correspondence thesis is not an epistemological thesis about the conditions of culpability; it is a metaphysical thesis about the conditions of right action. While culpability is a function of an actor's state of mind, the rightness of an action is a function of the degree to which the action satisfies the objective criteria specified by our best normative theory. The claim made by the correspondence thesis is that the criteria of right action specified by our best moral theory – whatever that moral theory may be – cannot make contradictory actions simultaneously right. While two individuals might be justified in *believing* that it is right to thwart the actions of the other, it cannot in fact be right for each to thwart the actions of the other. If the action of one individual is in fact right, it cannot be simultaneously right for the other to prevent that action.

Thus, while Green and Brown may have reasonably believed that they should shoot one another, only one of them acted rightly in so doing. Since Brown was not in fact attacking Green, Green did not in fact act rightly in shooting Brown. Had she refrained from shooting Brown, an innocent life would have been saved at no cost to her own life. If it is categorically wrong to take an innocent life (according to our best deontological theory), then Green acted wrongly, albeit nonculpably, in shooting Brown, because Brown was in fact an innocent actor. If it is right to maximize the preservation of innocent lives (according to our best consequentialist theory), then Green acted wrongly, because her action took one innocent life without in fact saving others (for her life would have been preserved had she not shot Brown). Once it is clear that the correspondence thesis is not a thesis about culpability, but a thesis about right action, it is clear that hypotheticals such as that involving Green and Brown are not counterexamples to it.

However, it might be thought that, while the previous hypothetical of Green and Brown makes the correspondence thesis plausible for both deontological and consequentialist accounts of right action, the truth of the thesis is in fact theory-dependent. While the thesis might be necessarily true of a consequentialist account of right action, it need not be true of a deontological account of right action. I shall have a great deal to say about this suggestion in Chapters 10 and 11, which are devoted to determining the relative truth of the correspondence thesis for consequentialists and deontologists. At this stage,

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however, it is worth recognizing the plausibility of the thesis for both types of theorists.

Consequentialists are committed to the claim that right action consists in maximizing good consequences or minimizing bad consequences. Monistic consequentialists embrace a single-valued theory of the good. Thus, utilitarians define the good in terms of human pleasure. Egoists define the good in terms of what will serve the individual's own interests, and virtue theorists define the good in terms of what will make individuals virtuous. Pluralist consequentialists, on the other hand, embrace a multivalued theory of the good. They maintain that the good should be maximized, but then define the good in terms of some complex combination of the previously mentioned types of values.

As a thesis about the conditions of right action, the correspondence thesis appears necessarily true for consequentialists.⁵ In our previous tale, in which Smith is attacked by a hoodlum while Jones and Long look on, the death of the hoodlum is a better state of affairs than its only alternative, the death of Smith (assuming, of course, that our best consequentialist theory prefers innocent lives to culpable ones). And it is a better state of affairs not only for Smith, but also for Jones and Long. Since the only criterion of right action for the consequentialist is whether an action promotes good states of affairs, it follows that Smith, Jones, and Long should all promote this good state of affairs. At the very least, it cannot be right on consequentialist grounds for Jones to interfere with Smith's act of self-defense, even if for some reason it is not obligatory of Jones to join Smith in her endeavor.

In contrast to consequentialists, deontologists are committed to the claim that the goodness of an act lies not in its consequences, but in the inherent quality of the act itself. According to deontological moral theories, certain act-types are intrinsically right or intrinsically wrong. Thus, if it is right to preserve an innocent life, one cannot take an innocent life, even if, in so doing, one saves a great many more innocent lives.⁶ Contemporary deontologists often cash out this anti-

⁵ Chapters 10 and 12 are devoted to a much more extensive analysis of this supposition.

⁶ As Finnis puts it, "one should not choose to do any act which *of itself does nothing but* damage or impede a realization or participation of any one or more of the basic forms of human good." John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 118.

[This] perhaps unfamiliar formulation . . . is well recognized, in other formulations: most loosely, as "the end does not justify the means"; more

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consequentialist claim by describing morality as a set of agent-relative categorical imperatives.⁷ Morality directs each agent not to kill an innocent person, even if such a killing will prevent a greater number of killings by others.

A deontological, or agent-relative, theory of morality does not share the characteristic that appears to make the correspondence thesis necessarily true for the consequentialist. It is logically possible that a (certain type of) deontological theory would render the correspondence thesis false.⁸ Suppose, for example, that morality contained an agent-relative permission (or obligation) to kill when necessary to preserve one's own life. Under such a moral directive, it would be right for Smith to defend herself by killing her attacker. But suppose that this morality also contained an agent-relative obligation (or permission) to prevent killings by others, even when those killings are in self-defense. Then it would be right for Jones to prevent Smith from (rightly) defending herself. In such a theory, there is no correspondence between what it is right for Smith to do and what it is right for Jones to do.

While such a deontological theory entails the rejection of the correspondence thesis, it does not contain any formal contradiction. Yet its content is highly implausible. Agent-relative morality is still universal: If it is right for Smith to defend her own life, it is right for Jones to defend his own life. The view considered here has to both admit this and contend that it is also right for Jones to prevent Smith from defending her life. The agent-relativity of such a deontological morality prevents these norms of rightness from contradicting one another, but it does not prevent their mutual assertion from being highly untenable. If morality were to combine such maxims, then there would

precisely, though still ambiguously, as "evil may not be done that good might follow therefrom"; and with a special Enlightenment flavour, as Kant's categorical imperative: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."

Ibid., 122, quoting Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. Lewis W. Beck (Indianapolis: Bobbs-Merrill, 1959).

⁷ See, for example, Thomas Nagel, *The Last Word* (New York and Oxford: Oxford University Press, 1997), 119–25; Thomas Nagel, *The Possibility of Altruism* (Oxford: Clarendon Press, 1970), 90–5; Thomas Nagel, *The View From Nowhere* (New York: Oxford University Press, 1986), 152–4; Thomas Nagel, *Equality and Partiality* (Oxford and New York: Oxford University Press, 1991), 40, 85–6; Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), 143.

⁸ Chapter 11, however, constitutes a defense of the claim that a plausible deontological theory would incorporate the correspondence thesis.

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be times when we would be forced to confront one another in moral combat. Others would be called on to prevent us from doing what we would be entitled, and perhaps obligated, to do. Morality would make us moral gladiators in an arena in which one's moral success would depend on another's moral failure.

On pain of condemning us to moral combat, it thus would seem that any plausible deontological moral theory would subscribe to the correspondence thesis. If this is true, then the correspondence thesis does not depend for its intuitive viability on any particular moral theory.

LEGAL PERSPECTIVALISM

Compelling as the correspondence thesis appears to be on any plausible moral theory, its intuitive appeal seems to give way when one is forced to take into account role-related considerations. Suppose now that Smith is married to a man who frequently beats her and her three children. She rightly believes that her husband will eventually attempt to kill them all. She also rightly believes that at that point she will be unable to defend any of them. And she rightly believes herself to be unable to secure their safety if they attempt to flee from him. She thus plausibly takes the balance of reasons for action to favor a preemptive strike, notwithstanding the fact that she recognizes and takes seriously the law's refusal to recognize a special battered spouse defense to homicide. She waits until her husband is asleep, enters his bedroom, and fatally shoots him.

Suppose that Jones is a judge who must decide whether to convict or acquit Smith. Jones considers Smith morally justified in shooting her husband, because Jones concurs that the balance of reasons applicable to her choice favored such a killing. But Jones is a judge charged with the task of applying the law, and the law does not permit the acquittal of those who claim self-defense but admit the absence of any imminent threat of harm. Jones, like Smith, must thus decide whether to break the law. He must decide whether to comply with the decision rule that demands punishment of those who kill without a *legal* justification or to break that rule and acquit one who possesses a *moral* justification.⁹

⁹ It will be useful throughout discussions of legal perspectivalism to invoke the distinction between conduct rules and decision rules coined by Jeremy Bentham

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Suppose, finally, that Long is responsible for designing and maintaining our political and legal systems. Among the many tasks required to foster democracy, preserve the separation of powers, maintain law and order, and ensure right action by citizens and officials is the task of appointing and disciplining members of the judiciary. Long, like Jones, recognizes the plausibility of Smith's claim of justification. Long also recognizes that Jones might rightly conclude that he should acquit Smith, notwithstanding the decision rule that requires her punishment. Long thus faces the choice between disciplining Jones, should Jones fail to comply with the decision rule, or licensing the sort of judicial legislation that justified judicial disobedience would represent.

We are now in a position to appreciate the dilemma with which we began. Jones and Long face choices that pit our fundamental moral, political, and jurisprudential values against one another. If the correspondence thesis applies to acts of punishment in the same way that it applies to preventative and permissive acts, then it would seem that Jones should acquit Smith, and Long should not discipline Jones for such an acquittal. It also would seem that the correspondence thesis should be as true of acts of punishment as of acts of prevention,¹⁰ because punishment labels an act as wrong and thus serves to prevent future actors (including the actor who is punished) from performing that act in similar circumstances. If Smith's act is right, it would seem wrong to respond to that act with sanctions that imply either that Smith should not have performed that act or that future actors should not perform the same act in similar circumstances. But if judges like Jones acquit those who are morally justified in breaking the law, what will become of the rule of law? Law seemingly ceases to be law if judges are entitled to rethink its wisdom in every case to which it applies

and famously exploited by Meir Dan-Cohen. Conduct rules constitute those rules that are intended to guide the daily behavior of citizens. Decision rules constitute those rules that are intended to guide judges in the adjudication of disputes concerning citizens' behavior. See Jeremy Bentham, *A Fragment on Government and An Introduction to the Principles of Morals and Legislation*, ed. Wilfred Harrison (Oxford: Oxford University Press, 1948), 430; Meir Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law," *Harvard Law Review* 97 (1984): 625–30.

¹⁰ But see the extended discussion of this claim in the first section of Chapter 12, which makes clear the potential moral differences between preventing a moral act and punishing a moral act – differences that make it possible that an act can be moral only if punished.