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Agency, Authority and The Logic of Mutual Recognition

Stuart Toddington

Introduction

The Political Philosophy of Liberalism has often been expressed incompletely, one-sidedly and inconsistently, and we now see it split asunder into seemingly irreconcilable paradigms of thought. These paradigms, familiar to us as Libertarianism, Egalitarianism and Communitarianism, are the product of sustained divergences in emphasis in the characterisation of the foundational norms, rights and duties held to be deducible from the ultimate or ‘final’ worth of the choice-making individual. This fragmentation should come as no surprise, for the axiological implications of the concepts of freedom and agency are diverse and complex. Accordingly, from general notions of liberty and equality we have constructed a variety of competing constitutional models based on the idea of the acknowledgment or, in a broad sense, the ‘recognition’ (horizontally, between individuals and vertically, between state and individual), of inviolable rights.

These models of constitutional authority and inter-personal obligations have been historically, and are at present, seen to be constraining of social relations and persons and ridden with internal logical and ideological tensions. In particular an influential body of Hegelian inspired critique has suggested that the dialectical deficiencies of the dominant models of late modernity inhere in the ‘atomised’ or ‘self-supporting’, characterisations of the individual agent inherited from Hobbes and Locke and ‘transcendentally’ affirmed in Kant. The perspective of ‘egoistic-atomism’, it is said, appears an obstacle not only to the coherent articulation of the compatibility of liberty and equality, but to the attempt to express communal conceptions of constitution and subject. In this paper, using as a frame of reference Alan Brudner’s influential analysis of these issues in his *Constitutional Goods*,¹ and against the backdrop of an Hegelian inspired critique of institutional justice, constitutionalism and human rights,² I want to argue that we can

¹ Brudner, Alan, *Constitutional Goods* (Oxford, Oxford University Press, 2004)

² Valuable accounts of the background are to be found in Costas Douzinas, “Identity, Recognition, Rights or What Hegel Can Teach Us About Human Rights” *Journal of Law and Society* (Vol. 29, No.3, September 2002) pp.379-405; Jurgen Habermas, “From Kant to Hegel and Back Again” *European Journal of Philosophy* (1999, 7:2)

take full advantage of the various understandings of Hegel's notion of 'mutual recognition' without drastic phenomenological reconstruction of the Cartesian or Kantian subject. In our desire to go beyond what Brudner calls the *modus vivendi* of 'cold respect' found in atomistic conceptions of liberty and equality,³ and in our enthusiasm to reconfigure the Communitarian *reaction* to these incomplete paradigmatic accounts as fully mutualised Ethical Life or Dialogical Community, we risk overlooking the scope for theoretical reconciliation between Kantian and Hegelian forms of recognition between persons. This lost opportunity can only be an impediment to progress in ethics, legal theory and wider sociological critique, for Brudner, in the introductory phase of *Constitutional Goods*, presents us with a superb evolutionary model of the 'career of authority' towards a form of 'ideal recognition' in autonomy and self-authorship which, *formally*, would serve us well as the standard Jurisprudential reference point for the concept.

I approach these problems in three parts. I begin in *Part I* by giving a short account of Hegel's original motivations in rejecting Kant's *phenomena/ noumena* distinction before going on to discuss Brudner's dissatisfaction with the model of subjectivity as it appears in recent decades - notably in Rawls' account of the relationship between Political Philosophy and Constitutional Law. In *Part II* I want to suggest that, in Brudner, the attritional atomism inherent in the heterogeneous development of libertarian thinking is too readily identified with Kant in general, and with a permissive understanding of Kantian 'freedom of choice', in particular. From here Brudner attributes the shortfall from the constitutional ideal to the atomistic inadequacies found in Kant's theory of property.⁴ I will suggest that although Kant and Hegel appear to differ in their accounts of primordial property and its various functions, a nexus - in the normative logic of agency - is to be found when we examine the dualities that exist in the Hegelian conception of recognition (*Anerkennung*). This convergence offers an opportunity for rapprochement, and I want to moot the possibility that the indispensable idea of 'mutual recognition' is normatively general and need not be given an idiosyncratically Hegelian interpretation. Our common concern should simply be to aim at

pp. 129–157; Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. 1995. Polity Press.

³ Brudner, Alan, *Constitutional Goods* (Oxford, Oxford University Press, 2004) See e.g., pp. 63-73

⁴ See *Ibid.* pp. 61- 63.

a transparent articulation of how, precisely, subjective claims of right are not merely externalised, but genuinely transformed into *objectively* valid claims. In *Part III* I argue that Brudner's proposed solution to the problem of articulating an 'inclusive' conception of *equality* displays an undeniable convergence with the Alan Gewirth's justificatory account of the mutual obligations *objectively* inherent in the notion of agency. Although usually received as a development of Kant's ethical rationalism, it is, ironically, Hegel's account of *external freedom* that gives us the clearest insight into the objectively rational mutual recognition of agent rights to be found in Gewirth. By way of this nexus I suggest that Kantian and Hegelian conceptions of subjectivity can be reconciled.

I

Authority and the Phenomenology of the Subject

To make a case for the 'atomistic' subject against a social or *communal* conception in the context of this discussion is to claim with Kant, against Hegel, that conscious freedom can be achieved by the isolated ego through *a priori* or transcendental reflection alone. This is not to suggest that a Constitutional Theory so informed must reject the idea of community, nor is it to relegate all but the basic atomistic concerns of property and personal security to the sphere of what is arbitrarily designated as *the private*.⁵ Defending freedom and self worth from this perspective does, however, require us to acknowledge the limitations of a discipline such as Constitutional Theory. These are reached not by outlawing intrusions into what has previously and uncritically been reserved as the sphere of the *private*, but rather when Constitutional Theory judges that it cannot complete itself without resolving issues which appears to lie beyond the cognitive scope of the rational understanding. Hegel's initial motivation to reject not only Kant's systematic philosophy of the subject, but the entire interior or 'mentalist'⁶ framework of phenomenology that preceded it, lies precisely in the refusal to accept the inward looking constraints of a Philosophy of Right based upon transcendental deductions of *morality*.

For Kant, these boundaries are imposed by the limits of *phenomenal* apperception; this suggests that a *noumenal*

⁵ See Ibid pp. 436,437 where Brudner refers to the arguments at pp. 52-87 of T.R.S Allen's *Constitutional Justice* (Oxford, Oxford University Press 2000)

⁶ This term Habermas uses to refer to Cartesian and Kantian phenomenology as distinct from putatively 'de-transcendentalised' approaches. See Habermas, Jurgen "From Kant to Hegel and Back Again" *European Journal of Philosophy* (1999, 7:2) pp. 129-157 see esp. pp. 129 -131

‘otherness’ lies beyond the atomistic subject’s internal schema of understanding. Hegel’s response to this, consummately expressed by Habermas, was to set aside these contrasts “...and to free the essentially practical spontaneity of the transcendental subject from the prison of self-enclosed interiority of an ego narcissistically aware of its own operations.”⁷ In its place Hegel sought to recast the subject/object relation not as an unbridgeable chasm, but through the externalisation of freedom as Objective Spirit, as a permanently live connection, where, “...consciousness is already and always with its other” in an ever-presently mediated praxis of history, language, work and creation. In this process, cognitive relationships between the self and the world, and the self and others expressed in belief, judgement and action constitute the external expression of the unity of Reason.⁸ It is not the constant recourse to *internal* subjectivity that brings this emancipation to fruition, but rather, according to Hegel, freedom is experienced when it is expressed externally, and the giving and taking of an agent’s reasons for action, mediated by a shared ethical-institutional context, is recognised by others.⁹ It is with this understanding of the role of ‘mutual recognition’ that Brudner sets out to argue for a unified or ‘inclusive’ conception of liberalism.

Brudner’s suggestion is that we re-examine the way in which classical liberal philosophy foresaw and strove to avoid the self-subverting reflexivity of defending the *subjectivity* of Right at the expense of abolishing the *objectivity* of the Good and in so doing set the worth of each individual against the possibility of expressing this worth in our communal institutions. Brudner explains that, in paradigmatic isolation, none of the atomistically, ‘ego’ based conceptions of liberal rationality can support theoretically, or practically, a sustainable social order so described.¹⁰ He explains and illustrates how adopting an inordinate emphasis on any particular element produces a self-subverting logic: prioritising and protecting Liberty militates

⁷ Habermas, Jurgen “From Kant to Hegel and Back Again” *European Journal of Philosophy* (1999, 7:2) ISSN 0966–8373, Blackwell) pp. 129–157 at p.134

⁸ Ibid. p.136: Habermas cites this as ‘Hegel, G.W.F. (1949), *Phänomenologie des Geistes*. Leipzig: Felix Meiner 229.’

⁹ The clearest account of the problem, if not its solution is to be found in Robert Pippin, “What is the Question for which Hegel’s Theory of Recognition is the answer?” *European Journal of Philosophy* 8 (2):155–172 (2000)

¹⁰ See Brudner, Alan, *Constitutional Goods* (Oxford, Oxford University Press, 2004) pp 27-33

against Equality and Community; an obsessive pursuit of Equality impinges dramatically and irrationally on the idea of individuality and basic Liberty. Further, even when it is accepted that Community is necessary to the flourishing of individuality, if we hold it out to be the repository and ultimate arbiter of The Good, we overwhelm the very worth of the autonomous individual that all Liberals (should) seek to cherish. Brudner wants us to accept, with Hegel, that to be recognised as a free being by another free being defines the ultimate worth of the individual. *Mutual recognition* of this worth *between* individuals, and the nourishing reconciliation of this mutuality reflected in the *ends* of familial and economic institutions of civil society *is* community. And only in this communally rational condition - which Hegel refers to as *Sittlichkeit* - can we genuinely experience ourselves as free individuals. This unity of freedom exemplifies what Brudner sees as the fully integrated ‘complex whole’ of liberalism which can be seen to encompass the ‘simple wholes’ or paradigms of 20C liberalism. By contrast, the competing paradigms - particularly in the divergent development of accounts of liberty and equality - might be described as attempts at *partially* and selectively satisfying isolated aspects of these aspirations in giving constitutional expression in terms of ‘self-interest’ to an empirical ‘common will’ falling short of a ‘universal will’. Communitarianism hitherto, although itself an incomplete expression of the the ‘complex whole’ envisaged by Hegel, is nevertheless a rich source of critique. It offers the antidote to the liberal thesis of ‘voluntarism’ that inevitably results in characterising government as bereft of any warrant to promote and endorse particular *ends* of individual agency:¹¹ This limit of legitimate governance - to remain neutral with respect to The Good - is the inevitable result of the atomistic model of individual self-sufficiency that liberals endorse, the model that Sandel famously called the ‘unencumbered self’: “...unencumbered, that is, by any obligations or relationships not freely chosen. Since it is not the ends we choose but rather the fact that *we are capable of choosing* that is *essential to our personhood*¹² It is the ‘unencumbered’ self, of course, that

¹¹ See for example Michael J. Sandel *Public Philosophy: Essays in Morality and Politics*, (Cambridge MA: Harvard University Press 2005). Sandel, at p.292 says, that for liberals:

A just society seeks not to promote any particular ends, but enables its citizens to pursue their own ends, consistent with a similar liberty for all; it therefore must govern by principles that do not presuppose any particular conception of the good

¹² *Ibid.* Emphasis added.

gives rise to the dissatisfaction with two familiar and closely related doctrines of liberal thought: the priority of subjective right, and the incommensurability of goods. Brudner says:¹³

We can summarize all this by saying that, for the prevailing theory, there are constitutional rights, but no constitutional goods. That is, there are no human goods qualified to override fundamental rights and so none fit in that sense for constitutional status.

This general retrospective on the fate of liberalism is not contentious, and there is no doubt that Brudner is right when he reminds us of our recently lowered expectations of the role of a ‘first’ (political) philosophy and its relationship to constitutional theory. Political Philosophers (such as Rawls), says Brudner, now accept that the account of political legitimacy they are striving to establish is, in essence, a reasoned defence of constitutional arrangements and decision-making that would appeal to or satisfy only those who already see the importance of rationally defending such things. This is achieved ‘by designating a conception of justice appropriate for a certain political *culture* as distinct from the universal theory that might be proposed by a *metaphysical* liberalism’. Rawls tells us that Political philosophy, blinded itself to the fact that ‘the free use of reason’ *reasonably* produces a *plurality of views* about what is legitimate in a free and equal society.¹⁴ In this sense, Political Philosophy has now *become* Constitutional Theory insofar as the proper remit of the latter is ‘the search for a justification that is cogent to those who share the basic assumptions of a political culture’.¹⁵ But, says Brudner, the Rawlsian interpretation of the solution to the liberal ideal falls short in several ways. First, the agenda presented to the free and equal parties to the Rawlsian contract is a *fait accompli* focussed on stability rather than fairness, but vitally, the *philosophical conception* of the ‘free and equal’ individual lurking behind ‘the veil of ignorance’ is not just any individual, it is a particular type of *atomistic* individual. Thus we see a “...surreptitious privileging of one particular conception – that of the abstract self as originator of its fundamental ends – and the privatization of all others.”¹⁶

¹³, Alan Brudner *Constitutional Goods* (Oxford, Oxford University Press, 2004) p.21

¹⁴ Ibid. p.5

¹⁵ Ibid. p.6

¹⁶ Ibid. p.18

The central objection, therefore, is that the conception of the subject determines the very idea and content of *public* reason, thus consensus is not ‘overlapping’ as Rawls envisages, but rather, because “...the reasons supporting the consensus are external to the conception that generated the principles in the first place, it will be a sheer accident if all the principles are derivable from a particular philosophic view, or congruent with it, or compatible with it.” The result is not a universal or ‘inclusive’ principle, but a *modus vivendi* where persons agree contingently to accommodate other views of freedom. This vision of ‘atomistic’ and fragmented inter-subjectivity held together ‘abstractly’ and artificially by ‘socially contracted’ compromises is, of course, the ‘empty’ procedural anathema to Hegel’s universal vision.¹⁷ ‘Justice as Fairness’ appears public in *form* in that its criterion is acceptability by all who are regarded as ‘free and equal’; but, asks Brudner, is it public in *content*?² Determining the *content* of justice turns, he says, on how we are we to ‘flesh out’ the meaning of ‘free and equal’.¹⁸

Brudner’s first step towards answering this question is to offer an ‘inclusive’ conception of Liberalism to which all *essentially* liberal factions can subscribe. All philosophical views are included in a way that allows each to ‘write a part of the content of political justice and each sees its portion guaranteed by the sovereignty of the inclusive whole’.¹⁹ It is a conception of public law where libertarian, egalitarian and communitarian perspectives are *integrated* – not by sublimating one into another point of view, “...but by satisfying in moderation the human aspirations it [the perspective] represents within a bounded domain. In this way the inclusive conception may be said to apply the idea of justice as fairness to perspectives rather than to individuals stripped of their perspectives.” The rallying point is an invitation to reaffirm the fundamental values of liberal philosophy in a formulation Brudner calls ‘the liberal confidence’. Brudner says:²⁰

That claim consists of the following propositions: that the individual agent possesses final worth (which I

¹⁷ See Hegel’s passages on ‘Transition from Property to Contract, §§ 71 -76 esp. *Hegel’s Philosophy of Right* (T. M Knox [Trans] Oxford, Clarendon Press 1978) pp. 57 -59 esp. §75 at p.59

¹⁸ Ibid. p8

¹⁹ Ibid. p.19

²⁰ Ibid. p.13

shall sometimes call end-status) so that there is *no more* fundamental end to which it may be unilaterally subordinated; that it does so on its own, that is, as a separate individual, distinct from (that is, not immersed in or obliterated by or subsumed under) other individuals as well as from the larger groups, society, or political association of which it is a member; and that and that the individual's worth is inviolable, which means that everyone is under a duty to respect it by forbearing from attempts to subdue the individual's agency to his own ends or to some supposed superior end such as tribe, nation, society or state. This set of propositions constitutes what I shall call the liberal confidence.

The objective is clear: the 'inclusive' conception is achieved when the *concepts* of Liberty, Equality and Community can be expressed rationally and be shown to imply each other consistently. This is the goal of dialectical completeness which furnishes us with the genuine understanding of the import of the axiom expressed in 'the liberal confidence'. Whether or not this requires a wholesale re-orientation of our conception of the subject remains to be seen, but it will be useful at this point to consider *generally* what *any* attempt to construct a minimal *constitutional* apparatus would look like if it were to serve the 'liberal confidence' as stated.

II

Authority, Agency and Final Worth

The 'final worth' of the individual must begin with an understanding of the nature and locus of this worth. The core attribute is that of agency - the ability to employ means in pursuit of ends freely chosen. In any plausible conception of association, the individual exercise of this ultimately valuable attribute requires forbearance on the part of other agents similarly constituted. The ultimate valuing of agency as *generic* in the individual implies *in this regard* the relational attribute of equality among individuals. This conception of the locus and ground of equality is logically pristine and, as it relates to the philosophical concept of freedom, entirely immune to the contingent 'alterity' of conditions of historical and natural advantage or disadvantage. This is not to deny, however, that in the reality of association, these unevenly distributed slices of 'luck' must inevitably diminish or enhance the agent's capacity for freedom. The practical realisation of the concept of equality, therefore, poses a complex problem of institutional design, and the need for mutual forbearance under conditions of *inviolable* agent equality implies some form of successful recognition of individual claims expressed 'horizontally' (that is, between

agents) in this regard. Thus the *assertion* of inviolability requires a justificatory account of the origin and nature of these implied universal and reciprocal rights and duties. The simple question to be answered and not merely assumed to be obvious is: *Why should I take into account the interests of others when I act?*²¹ An equivalent formulation of this question, and one which might help us to move towards an ecumenical view on these matters, would be: *What, in respect of my dispositions to action, is required of my being a person and recognizing other persons as such?*²¹ A philosophically sound response to this question would provide the normative grounding of the *horizontal* relation in question and serve as the basis of an account of the *vertically* ‘recognised’ (i.e. coercive but, ideally, ‘self-imposed’) authoritative guarantees of normative reciprocity. This task is unavoidable in any political philosophy: it applies to Hobbes, Locke, Rousseau, Kant, Hegel, or Rawls and Habermas. It might be expressed as a ‘social contract’ relation, but it need not, and nothing yet turns on the notion of ‘self-imposition’ at this point.

We can say that in our model considered horizontally, agents *A* and *Ao* ‘recognise’ in some consensual sense that interest claims *p*, *q*, *r*, are to be reciprocated, then *A* and *Ao* can ‘agree’ or ‘consent’ to be bound on the vertical relation by an authority, *V*, by virtue of the fact that they would choose to self-impose coercive guarantees which maintain institutional protection of the conditions under which interests *p*, *q*, and *r*, might be realised. This can occur ‘empirically’ in respect of any interests whatsoever, or ‘ideally’ – that is, where a conception of ‘real’ or objective interests in autonomy and freedom is factored into the model. In this latter case, however, an important distinction is to be made. In an empirical model of agreement or consensus, although agents *A* and *Ao* (as subjects) surrender to *V* (as ruler) in an apparently symmetrical transaction, and *V*’s commands become ‘pre-emptive’ or ‘exclusionary’ reasons²² for action for *A* and *Ao*. This is to say that they effectively replace the free individual’s own reasons for action. This *self-interested* arrangement, however, (for example in Hobbes) is the product of *contingently* united wills as opposed to a genuinely *universal* will. In describes a form of recognition between agents (or ‘persons’) that acknowledges authority as legitimate not in the

²¹ See *Hegel’s Philosophy of Right* (T. M Knox [Trans] Oxford, Clarendon Press 1978) [PR] p. 37: §35 ‘Be a person and respect others as persons’.

²² See the discussion in Brudner, Alan, *Constitutional Goods* (Oxford, Oxford University Press, 2004) at pp. 41-43 and also in, Joseph Raz *The Morality of Freedom* (Oxford: Clarendon Press, 1986) p.26

comprehensive or ‘inclusive’ conception of freedom, but in merely partial aspects of it. The relations between agents, and between agents and authority under what appears as a ‘common’ or united will are thus *grounded* in *partial* interests. These relations of recognition constitute ‘cold respect’, not genuinely ‘dialogic’ association.²³ The shortfall from the integrated or inclusive ideal and thus from the emergence of authority as ‘ideal recognition’ can be illustrated by rigorously applying, as Brudner suggests, Rousseau’s test for legitimacy: namely, that the subject insists on ‘remaining as independent as before submission to authority’. This test is not met in our example, for in return for guarantees of protection to pursue empirical interests p , q and r (for example, rights to various forms of acquisition), V is invested with unlimited authority whilst recognising no reciprocal duty to secure the genuine independence of the subjects who consented to the rule in question. Brudner’s perfectly valid point is that an ideal symmetry is achieved – an ideal form of recognition – between ruler and ruled only when the self-interested surrender is seen as the individual subject’s quest to make its own right to independence the validating source and practical guarantee of *public reason*. The duty of authority will be reflected in its constitutional commitment to the protection of cultural, familial and communal institutions which embody and promote the kind of comprehensive autonomy and independence in ‘self authorship’ that comes with a fully dialogic conception of the self.

The ‘liberal confidence’ holds that the individual is of ‘final worth’; there is *no more fundamental end* to which it should be unilaterally subordinated. The individual’s worth resides in *the capacity* to act purposively for ends which are freely chosen – not in the perceived worth of *the ends themselves*. This is the simple but revolutionary perspective behind the maxim that ‘subjective right’ (to exercise agency) is to override *The Good* (all and any ends to which the exercise of agency is directed). The doctrine of the *incommensurability of goods* encourages us accept that there is no rational justification available to allow us to rank one end above another, and this is the logic that has aggrandised choice-making into the supreme right of humanity. It is the simple and unavoidable concomitant of the idea that we are all equal when conceived as units of value in the *generic* possession of *the capacity for agency*.

²³ Brudner, Alan, *Constitutional Goods* (Oxford, Oxford University Press, 2004) p.44

This is now a standard line, but it is not an unproblematic one. For, although it is difficult to give a plausible account of why 'ends' should be regarded as good or valuable *intrinsically*, life for philosophers is not made any easier by merely transforming the problem into one of explaining why *agency* should be regarded as valuable in itself – that is, without any material reference to the value of ends or purposes envisaged. Because if we abstract all our intuitions and sentiments about what constitutes a worthwhile human existence – intuitions which naturally relate to the value we place on human aspiration and *achievement* – we need to endow the final worth of agents with something that is plausibly regarded as not just valuable, but *ultimately* valuable. This is achieved by a subtle but important move which seeks to invest *any* agent's capacity to choose and act (for whatever purposes) with some kind of dignity or creativity which in some way ennobles the basic capacity of agency beyond the bare conscious and physical abilities of action. This move certainly exudes a rhetorical force, but the axiological addition has not always appeared obvious.

The problem that arises when we deny the doctrine of The Good, that is, when deny the *objective* existence of intrinsically valuable ends of human striving, we leave ourselves *no option* but to relocate the reason for acting (for any purposes at all) *within* the individual *subject*. And this in turn means we can but invent a constitutional narrative to explain why 'agency' or 'freedom' or 'choice' is to be regarded as the 'final worth' of the individual and why everything should revolve around it. How, in other words, and against the backdrop of Revealed Ends, are we to explain why 'free choice' can be made to appear as a suitable new ground of constitutional order?

Brudner says:²⁴

... to establish abstract choice's credentials as a new principle of public order it was also necessary to show that despite its vacuity it was something worthy of ordering public life on its own. This too Kant famously argued. Freedom of choice qualifies as a fundamental end because it is...the only absolute or unconditioned end - that is, the only end whose worth is not relative to the sensibility of individuals.

In explaining Kant's view in more detail, he adds:²⁵

²⁴ Ibid. p.61

²⁵ Ibid p.62

Freedom is an absolute end because it is universally and necessarily presupposed in action pursuant to subjective ends. Behind every end given by an appetite lies the agent whose end it is and who decides whether to accept it or reject it as a motive for action. Thus freedom is also a *final* end, though not in the sense of an excellence or perfection to be achieved or hoped for, rather its finality consists in its being a formal capacity for purposiveness lying behind all action for specific purposes. As a final end, moreover, the agent's freedom is its dignity or absolute worth, that by virtue of which it commands respect for its liberty so long as its acts to respect the equal liberty of others. This dignity, which Kant called the right of humanity in our own person, is inviolable.

The 'Dignity' of Freedom as Public Principle

Brudner's rendition above captures the Copernican spirit of the new constitutional principle, but we should reflect briefly on the detail. In the *Groundwork*, the idea of Freedom (as autonomous will) *abstracted* from any purposes and motivated only by the universality of the moral law, is established. It is the capacity to be discriminating in one's choices on the basis of this unconditioned judgment that imparts a 'dignity' to choosing²⁶. The unconditioned will is the locus of the inviolable good of humanity - and thus contains the required *gravitas* logically and rhetorically to allow it to serve as a putative final end for constitutional purposes. It is also, as Brudner observes, the ground of the singular 'Right of Humanity'.²⁷ Freedom, as Duty, Dignity and the ground of the Right of Humanity should not, of course, be conflated with a range of other motivations to action appearing variously as 'Concupiscence', 'Desire', 'choice' and so on, and as we find enumerated and defined in precise detail at [6:213] of the *Metaphysics of Morals*.²⁸ It is here that we can

²⁶ Immanuel Kant, *Groundwork of the Metaphysic of Morals* (H.J.Patton [Trans] Harper Torchbooks, New York, 1964 p.102 (77). "Reason thus relates every maxim of the will, considered as making universal law, to every other will and also to every action towards oneself: it does so, not because of any further motive of future advantage, but from the Idea of the *dignity* of a rational being who obeys no law other than that which he at the same time enacts himself."

²⁷ Immanuel Kant, *The Metaphysics of Morals* (Gregor M. [Trans.] Cambridge University Press, Cambridge 2008) p.30 [6.238]: "Freedom, (independence from being constrained by another's choice, insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity".

²⁸ *Ibid.* p13

see that ‘choice’ as Kant defines it should not be taken as synonymous with ‘freedom of choice’, rather, this appears as the distinction between, respectively, *Willkür* and *Wille*. Human choice (*Willkür*) says Kant, might be *affected* by impulse without inevitably being *determined* by impulse, it is thus not pure in itself, but can be determined to actions by the pure will: “*Freedom of choice*” says Kant, “...is this independence from being determined by sensible impulses;”.

We should also note that in the second of the quotations from Brudner above (at fn. 25), the suggestion that the ‘...formal capacity for purposiveness lying behind all action for specific purposes’ if it is to be regarded as a ‘final end’ again refers to the universal form of the pure will that imparts a dignity to choosing. This formulation of freedom as a ‘capacity’ for ‘purposiveness’ invites an almost inevitable ambiguity in that it differs from, but it is intimately connected to, two other conceptions closely related to the transcendental-moral grounds of ‘final worth’. One is the notion of ‘desire’ which Kant sees as “...the faculty to do or refrain from doing what one pleases.. [that, insofar as] it is joined with one’s consciousness of the ability to bring about its object by one’s action...is called *choice* (*Willkür*) ...”.²⁹ The other is this very ‘ability’ itself, which is the idea of agency understood *instrumentally* simply as the set of physical and cerebral capacities indispensably required to employ means in the pursuit of ends –*whatever* the origin or status of the ends in question. This being said, have a pretty accurate sketch of the ‘atomistic’ or transcendental model of worth that emerges from the notion of individual freedom (or ‘freedom of choice’ suitably qualified). This detail should immediately serve to demonstrate that the Kantian conception of agent freedom as final worth is not to be lumped together with the atomism of mutual fear we find in Hobbes, nor is it to be identified with ‘choosing’ geared to arbitrary and idiosyncratic conceptions of ‘happiness’. Kant’s freedom, as Brudner carefully observes, is raised above sensibility in this regard.³⁰ There is, then, a great deal here to work with; so what are the deficiencies within it that have brought us to contemplate major phenomenological revision?

²⁹ Immanuel Kant, *The Metaphysics of Morals* (Gregor M. [Trans.] Cambridge University Press, Cambridge 2008) p.13 [6.213]

³⁰ Brudner, Alan, *Constitutional Goods* (Oxford, Oxford University Press, 2004) pp. 61, 62

Brudner accepts (with qualification) that this ‘self supporting’ Kantian model of freedom and the ego is, if not complete, indispensable. He also admits that we are trying to distil a long and complex tradition of thought about liberty in general. Nevertheless, Kant’s conception he regards as *the* libertarian conception. But he goes on from here to cast Kant’s identification of the final worth of the individual with freedom’s ‘dignity’,³¹ and its concomitant, expression as the sole and innate ‘Right of Humanity’,³² as a “...merely subjective or *soi-disant* claim’ to self worth that generates a ‘...theoretical impulse for the free agent to obtain objective validation for [it]”.³³ Brudner wants to say, rightly, that because the new (Kantian) conception of public reason is grounded in ‘freedom of choice’, and because its essential independence required that we reject the ‘determination of impulse’, it is therefore ‘empty’ of positive determination: “For a content it has nothing but the ends given by sensibility, from whose rule it initially freed itself.” He goes on, however to say that it is thus best described, quoting Kant, as the liberty ‘to act or forbear as one pleases’.³⁴ Employing an earlier Hobbesian figure, Brudner suggests that the agent now stands to the objective world of material things “...as a would-be despot claiming authority over chattels”³⁵ and, as with all claims to authority, Kant’s claim “accordingly”, says Brudner, requires objective validation. Free agency is now the locus not only of a claim of final worth but also of a desire and striving to gain objective confirmation. This is to be realized through acquisition ‘recognized’ by other agents as ‘property’. This claim to property is, allegedly, the specific Kantian principle underlying public reason. Brudner says, “I am calling this conception of public reason the libertarian conception and the constitution it orders the constitution of liberty.”³⁶ In this way, Brudner articulates the Hegelian objection to grounding the prerogatives of the state in an attritional, ‘social contract’ mode of atomized property interests. It is, says Brudner, the ‘false absolutization’ of this principle that debilitates our progress to an ‘inclusive’ conception.³⁷

³¹ See fn.26 *supra*.

³² See fn.27 *supra*.

³³ Brudner op. cit .p.62

³⁴ Ibid p. 62

³⁵ Ibid. p. 63

³⁶ Ibid. p.62

³⁷ Ibid.

But assimilating Kant's views to to this general attritional reading of the liberal constitutional model could lead us awry. When Kant, uses the phrase 'to act or forbear as one pleases' he is not referring to 'freedom of choice' - which he does indeed regard as beyond 'the determination of impulse'. Rather, this is the form of words Kant employs to characterise 'desire', that is, precisely, *concupiscence* invested with a minimum of conceptual content. Desire is but a step on the way to achieving what, when exercised as conscious agency, becomes 'choice' (*Willkür*) that might, under the strictures of the moral law, yet be shaped in accordance with its universal strictures.

We noted above that there is scope for confusion in articulating these distinctions and so this latterly noted example of it should not come as a great surprise. It is of considerable consequence, however; because what Brudner seeks to do is identify *the* libertarian conception of Public Reason with the Kantian conception, and then suggest that the ostensible dignity of the Kantian conception -because of its 'emptiness' - must default to a contractarian logic of arbitrary desire and guaranteed rights to acquisition. Opposition to the abuse of the notion of 'contract' as a theory of the state is, of course, and as noted earlier, centrally and explicitly condemned by Hegel in *The Philosophy of Right*³⁸(PR §75A). Whilst I would suggest that we should not necessarily read this shift from dignity to desire into Kant, we should attend to the understandable concern with what is seen as the 'emptiness' of principle which Kant *does* suggest we adopt as the ground of public reason.

Inward-Looking and Outward-Looking Freedom

"The will itself, strictly speaking, has no determining ground; insofar as it can determine choice, it is instead practical reason itself."³⁹ This, Kant says, is but the *negative* concept of freedom. It does, however, have a positive and practical application: The moral law expressed as a categorical imperative, he says, does not "...contain within it the *matter* of the law", it cannot determine our choices, it can only offer us the form of the universal law against which we might contemplate the "fitness of maxims of choice".⁴⁰ This does mean, however, that our free

³⁸ PR §75A - *Hegel's Philosophy of Right* (T. M Knox [Trans] Oxford, Clarendon Press 1978) p.59

³⁹ Immanuel Kant, *The Metaphysics of Morals* (Gregor M. [Trans.] Cambridge University Press, Cambridge 2008) p.13

⁴⁰ *Ibid.*

choices must, ideally, be seen to be consistent with the freedom of all when seen in the light of the transcendent moral law, and so too our institutional arrangements as far as this is possible in our earthly activities.⁴¹ It is, of course, this formal conception of Right derived from transcendental deduction of the nature of the autonomous will which is the focus of Hegel's well-known denunciations in §§ 134-140 of *The Philosophy of Right* and elsewhere. Hegel says:⁴²

Duty itself in the moral self consciousness is the essence or the universality of that consciousness, the way in which it is inwardly related to itself alone; all that is left to it therefore, is abstract universality, and for its determinate character it has identity without content, or the abstractly positive, the indeterminate.

Kant's conception, says Hegel leads only to an 'empty formalism' and reduces the science of morals to 'the preaching of duty for duty's sake' (PR 135A) .

But might we not consider for a moment that for Kant, as much as Hegel, and however differently it might be *expressed*, the direction of philosophical progress from the formal and abstract concept of freedom points towards an external realisation of reason - albeit that in Kant, our practical strivings are to be constantly referred, inwardly, to a validating principle of duty. There is, then, in a very straightforward sense, little difference in the respective *points of departure* in the philosophical determination of the concept of Right: Kant's resignation to the subject/object divide in the transcendental critique on the one hand, and on the other, the affirmation in Hegel of the primordial unity of Being as Reason itself, appears as a dramatic ontological and epistemological division. But whatever the primordial status of Being, and despite the respective differences in the prognosis for human subjectivity, *both* philosophies begin their critique from the *fact* of the fractured individual phenomenology of the subject/ object divide. It is, after all, Hegel who says that , "...thanks to Kant's philosophy ... the pure unconditioned determination of the will as the root of duty, has won its firm foundation and starting point for the first time owing to the thought of its infinite autonomy." It is thus important to note that neither Kants's point of departure,

⁴¹ See Susan Meld Shell " Kant's Theory of Property" *Political Theory* (Vol. 6 No 1 Feb 1978) pp. 75-90 at p.78

Shell

⁴² See also GWF Hegel *Natural Law* (T.M.Knox [Trans].University of Pennsylvania Press, Philadelphia) pp. 76-81 and Knox's introductory remarks (pp. 24,25)

nor his deduction of the universality of the will, forms the the focus of Hegel's fundamental objection; rather, it is the *inward looking perspective* on the will that, says Hegel, leads only to an 'empty formalism'. (PR §135)

Content, for Hegel, must come with the *transition* from the inward looking formality of 'morality' to the objectification of the human spirit in 'ethical life' (PR §137) Hegel does not, then, dispense with this form of the will or deny that it is capable of acknowledging the notion of duty, rather, he declares that this consciousness of duty is of no practical use - it is empty as pure form, and he seeks to alter its moral introspection to an ethical prospect. Accordingly, in the *Philosophy of Right* the subject of the inwardly focused, unconditioned moral consciousness that Kant presents us with in his account of the autonomous will is rendered by Hegel in essentially identical terms as '...abstract universality'; the self conscious but otherwise contentless and simple relation of itself to itself which is "...only a formal identity whose nature it is to exclude all content and specification.". (PR§35) However, for Hegel, this form of consciousness constitutes a 'person' and this personality conceived as 'abstract freedom' is a still a bearer of abstract rights and duties. The imperative of abstract freedom is, 'Be a person and respect others as persons' (PR §36). In respect of what we are to understand as recognition of persons, we might inquire presently into the 'contentless' content of this principle, but whatever might be the case, in order to project abstract freedom *outward* into an external sphere, the bearer of this freedom, the 'person', must somehow enter into a realm of objects that is "...not mind, not free, not personal, without rights..." A Person begins to overcome the subject/object divide through pursuing as a "...substantive end the right of putting his will into any and every thing and thereby making it his" (PR §44). As free will "I am an object to myself in what I possess and thereby also for the first time an actual will, and this is the aspect which constitutes the category of property, the true and right factor in possession." Hegel makes it abundantly clear that property is intrinsic to freedom: "Since my will, as the will of a person, and so a single will, becomes objective to me in property, property acquires the character of private property."(PR §§45, 46) This, then, is the first step towards mutual recognition.

But it is also a head on collision with the most blatant difficulties of the subject/object divide. The account of the objectification of freedom through Property is a severe test of the notion of recognition in pure praxis. It seems that Hegel must show how a relationship between *a person and a thing* (as opposed to legal or moral relations between persons) can generate a right to

exclusive possession. Kant, as is well known, rejects this possibility. Kant asks, “Could this external rightful relation of my choice be a direct relation to a corporeal thing?” In suggesting that it could *not* he says:⁴³

Someone who thinks that his right is a direct relation to things rather than to persons would have to think that since there corresponds to right on one side a duty on the other, an external thing always remained under obligation to the first possessor even though it has left his hands; that, because it is already under obligation to him, it rejects anyone else who pretends to be the possessor of it. So he would think of my right as if it were a guardian spirit accompanying the thing, always pointing me out to whoever else wanted to take possession of it and protecting it against any incursions by them.

He adds, however,

It is therefore absurd to think of an obligation of a person to things or the reverse, even though it may be permissible, if need be, to make this rightful relation perceptible by picturing it and expressing it this way.

We should bear this generous leeway for expression in mind when considering our eventual interpretation of Hegel’s suggestion, noted above, that to realize my freedom it is both necessary, rightful and possible for a ‘person’ to ‘put [their] will into [a] thing’.

This problem of the ‘person/ thing’ relation differs from the question as to whether property can be acquired *in a state of nature*, and to which Kant proposes a solution in the form of the notion of a ‘provisional’ anticipation of a civil order.⁴⁴ But in relation to the phenomenological issues before us, let us reiterate that for the general intelligibility of the account of external freedom, property cannot be understood as mere possession, it is a right, however derived, as against other *persons*, not to be deprived of a thing or have that thing interfered with. To define property in this way is not to beg the question against Hegel, or in favour of a Kantian (or any other) account that says that the right against other persons can arise only from some form of civil

⁴³ Gregor (op cit) p.P49

⁴⁴ Gregor (op cit.) p,51 [6:264]

(contractual) agreement with other persons. On the contrary, property rights could arise, as Hegel suggests, automatically and unilaterally through the interaction of an individual with a natural thing, and perhaps these rights could be *recognized* automatically by another as such. But whatever the *ground* of the property relation to the *thing*, property implies this right and reciprocal duty between persons, and this is not contested by Hegel. At (PR §50) he declares as valid the principle that a thing belongs to the person who happens to be first to take it into possession. This, (the principle of *occupatio*) he says, is “...immediately self-explanatory and superfluous”. This is not the end of the process, however; in (PR§51) he says that “property is the *embodiment* of personality” and goes on:

...my inward idea and will that something is to be mine is not enough to make it my property; to secure this end occupancy is requisite. The embodiment which my willing thereby attains involves its recognizability by others.

Hegel’s claim that I can and must ‘put my will into a thing’ is identical to the Lockean notion that I can make a thing recognizably mine to others in various ways - by grasping it, forming or shaping it in some way or simply by marking it as mine. (PR §54). And there is no doubt that these seizing and controlling activities reveal one to be a *practical* being -an agent - and insofar as this can be seen as an attempt to objectify oneself as such, might plausibly result in one being recognized (identified) as such. Does, however, ‘recognizing’ a person in this sense entail more than simply identifying their activity as practical? That is, does my identification of their intentions as appropriating, manipulating, and marking out objects as ‘their’ property simultaneously dispose me or oblige me to act in accordance with what we *ordinarily understand* as the rights accruing to property owners, namely, that one ought not to interfere with another’s possession or use of a thing? The answer to this must turn not only on (a), what it means to *recognize* others, but also (b), what it means to recognize others as *persons*. On these points, Andrew Chitty⁴⁵ suggests, we take advantage of some uncontentious continuities between the account of self-consciousness, objectification, and recognition in *The Philosophy of Mind* (PM) and the passages lately examined.

⁴⁵ See Andrew Chitty, “Hegel and Marx” in *A Companion to Hegel* (Hougate and Baur [Eds.] Blackwell Publishing 2011) p.477, also “Recognition and Property in Hegel and Early Marx” forthcoming.

From the nature of the processes of objectification (of one's practical being) described above it is clear - as Chitty reminds us - "that in so far as a person objectifies its freedom in a *thing* in this way, the thing is what Hegel wants to refer to as person's 'property'."⁴⁶ This being said, when Hegel's at (PM 431A says), "It is necessary that two selves opposing each other should, in their existence [*Dasein*] in their *being-for-another* posit themselves and recognize themselves as what they are *in themselves* or according their concept..." we can infer that:⁴⁷

... the existence [*Dasein*] which [the person] gives to its freedom is property' (PM 487 cf. PR 45R) Since for Hegel an essential character of persons is their freedom, he can also say that property is 'the existence [*Dasein*] of personality'.

Insofar as this is a plausible if not unavoidable interpretation of what is implied we have, then the answer to the latter part of our question (b) above: *philosophically* speaking, *persons* are what are *ordinarily* understood as property owners claiming and respecting rights to exclusive possession. As to the first part of the question, (a), namely, what, precisely is meant by *recognition* of persons as such, Chitty points to the passage (PR 71) on "Transition from Property to Contract". Here Hegel explains that property exists as an external thing and in relations with and to other external things, but as the embodiment of the the *will* to announce its outer freedom, the 'other for which it exists can only be the *will* of another person: "This relation of will to will is the true and proper ground in which freedom is existent." (PR 71)

The sphere of contract is made up of this mediation whereby I hold property not merely by means of a thing and my subjective will, but by means of another person's will as well and so hold it in virtue of my participation in a common will.

In the addition to this section Hegel says, crucially:

Contract presupposes that the parties entering it recognize each other as persons *and* property owners.

⁴⁶ Ibid.

⁴⁷ Andrew Chitty "Recognition and Property in Hegel and Early Marx" forthcoming. (page numbers not available - MS p.4)

It is a relationship at the level of mind objective, and so contains and presupposes from the start the moment of recognition. [emphasis added]

Chitty suggests that logically, we need not in this regard specify that we should ‘recognize each other’ as ‘persons *and* property owners’, but simply as ‘property owners.’⁴⁸

In contract, therefore – *at the level of objective mind* – the meeting of wills, is an overt and articulated demonstration of the recognition of property rights which shows that beyond mere identification of both the activity of objectifying freedom, and the subjective claims to exclusive control and use of the objects implicated therein, there is a freely willed disposition to endorse the activity and act in accordance with the claims. This analysis of the layers or stages of recognition as ever more deliberate and concrete expressions of mutual willing offers the opportunity for much clarification. In fact this evidence of duplicated or re-emphasized recognition explains, for example, an apparent dualism in Hegel (between the immediate or natural, and the civil- institutional expressions of recognition) of the *grounds* of property right;⁴⁹ it gives us a more empathetic understanding of Hegel’s problematic concept of ethical freedom mediated by institutional norms than is found, say, in Robert Pippin’s ‘relational critique’,⁵⁰ and importantly, it brings us closer to the normative-methodological and normative-phenomenological *rapprochement* I alluded to in my introduction.

⁴⁸ Ibid. MS p. 9

⁴⁹ See Renato Cristi "Hegel on Property and Recognition" *Laval théologique et philosophique*, (Vol. 51, No 2, 1995), p. 335-343, esp. p. 336. Cristi rejects Avineri’s claim that: "... not an individualistic but a social premise is at the root of Hegel's concept of property, and property will never be able to achieve an independent stature in his system [...]. Property always remains premised on social consensus, on consciousness, not on the mere fact of possession." In response to this Cristi says: "Contractual property involves recognition by others. But this relativization of property is not meant to weaken individual appropriation. On the contrary, Hegel intends its reinforcement. Individual property is duly safeguarded only when social property re-emerges within civil society and a legal system contributes the required institutional context.

⁵⁰ Pippin regards it as terminally problematic that Hegel requires that motives and purposes must potentially be ‘free’ in the sense that they do not spring from arbitrary desires or contingent inclination., yet that must also be "...internalisations of social interactions and mutual commitments among subjects developed over time within a social community." See. Robert B. Pippin "What is the Question for Which Hegel’s Theory of Recognition is the Answer?" *European Journal of Philosophy* (8:2 ISSN 0966-8373 Blackwell 1999) pp. 155-173 at p.155

In what follows I will suggest that this emerging symmetry is emphatically illustrated by Gewirth's account of the mutual rights and duties in his derivation of the *Principle of Generic Consistency* from the concept of agency. Most ironically, although usually received as a development of Kant's ethical rationalism, it is not the theoretical development of the formal model of the autonomous will found in Kant, but Hegel's account of *external freedom* that gives us the clearest insight into the mutual recognition of agent rights to be found in Gewirth.

Universalising the Logic of Agency

Gewirth, in *Reason and Morality*⁵¹ presents his argument to the principle that 'agents must respect the generic rights of the recipients of their actions as well as themselves'. He maintains that a true understanding of what it means to be an agent – one who freely acts for purposes in the world – is thereby to acknowledge the rights claims I logically *must* make as an agent *because I am an agent*. He calls these *dialectically-necessary* claims. I can, of course, claim rights on the basis of less general attributes, but successful recognition of these claims is likely to be patchy and purely contingent. If I can show that there are claims that I (or one) logically cannot avoid making because I possess the attribute of agency, then it seems to follow that anyone who possesses the attribute of agency must make the same claim. Agents, says Gewirth, simply contradict their status *as agents* if they do not adopt a pro-active valuing of the generic wherewithal for agency.

Because agency is always prospective it must look towards a future of action and purpose not yet contemplated. This immediately establishes a hierarchical range of goods and capacities which can be seen as additive, maintaining, or subtractive in relation to the scope of agency. Food and shelter might maintain one's agency at the level it is now, and physical or cerebral injury might damage it, and thereby subtract from it. Nutrition, self-knowledge, deepening of relationships, new skills and so on, plausibly might increase it. This 'wherewithal', therefore, that an agent must seek to secure or relinquish –

⁵¹ Alan Gewirth *Reason and Morality* (Chicago University Press, Chicago) 1978. See particularly pp.78-79 as a parallel to Hegel's account of external freedom, and on Brudner's equality concepts of 'destitution', 'poverty' and 'frustration' as parallels to Gewirth's 'subtractive', 'maintenance' and 'additive', dimensions of the pursuit of purposes see pp. 80-82

whatever their purposes, suggests a spectrum of goods pertinent to circumstances that range from starvation to the zenith of self-actualization. Gewirth is not to be read, then as, arguing primarily for a right to subsistence, nor as a right to property because of need, nor as an argument that all should receive equal shares – although subsistence, need and egalitarian distribution might be implied by it or referred to it. It is an argument that seeks to show how mutual obligations arise from unilateral expressions of the will to act purposively in the world in which we realize that the distinction between inward looking and outward looking freedom is not an exclusive disjunction. Gewirth's argument does not import the content of Kant's categorical imperative into our relations with others, but rather, in exactly the same way that Hegel describes the transition from the 'abstract freedom' of the will into actual practical freedom in the world, it shows that the logic of this transition demands that we recognize ourselves and others as essentially practical beings. I will suggest that, depending upon one's initial predilections, Gewirth's model can help us understand Hegel's logic of recognition, just as Hegel's logic of recognition can do the same for Gewirthians.

For it is not at the level of empirical recognition and practical action that we find, as Hegel says, the "true and proper ground in which freedom is existent", but "...by the Idea of the real existence of free personality, 'real here meaning 'present in the will alone'." (PR §71) Recognition is, let us recall, a relationship at the level of 'mind objective'. Both from an ontological conception of Reason as in Hegel, or from a Cartesian or Kantian model of subjectivity, therefore, it means exactly the same thing to say that mutual recognition is *ideal-typically* presupposed in the exercise of 'free personality'. Recognizable 'free personality' is *agency* - in the simple sense of the external demonstration of a practical will in purposive action in, and upon, the world. It is purposive in the sense of self-conscious appropriation and control of the material world, and it is 'voluntary' in the superficial sense of a self-conscious 'desire' or decision to move from an abstract *potential* for action, to a condition of *actual* purposive activity. It recognizes that to express its freedom (minimally, or optimally as self-actualization, for this is not merely to focus on subsistence, nor confuse the abstract equality of persons with the equality of economic distribution)⁵² it must bring about real conditions in the world. Ideal typically, or 'at the level of objective mind', the Hegelian

⁵² PR49

person knows, in recognizing that its essence and potential lies in its initially *contentless* freedom, “free of all specification”, that this substance is thus equally and identically present in all *others* displaying practical intent. To recognize this formal essence of oneself as present in others is to recognize that all such beings must strive through appropriation (as described) to give content to this form, To recognize the rational ground of the demand for forbearance intrinsic to this appropriation in oneself, is to understand the ground as identical in other free beings. To exist as such a being for *another* is to be assured in all certainty of the *mutual recognition* of the *validity* and necessity of the claims intrinsic to the actualization of freedom. But the *monological* consciousness is entirely capable of performing this ‘dialogical’ check on itself. To illustrate how both a Gewirthian and Hegelian account of external freedom can be seen support this phenomenological result, we might, in approaching a conclusion, consider Brudner’s superb critique of undialectical egalitarianism.

III

Agency, Equality and Community

Let us recall that in rejecting the revelation-based conception of *natural* ends (goods), the atomistic model of autonomy operates on the premise that the sole and necessary source of self-worth is found in *agency* – the capacity for choice – of the ‘self supporting’ agent. This, as we earlier described, renders a ‘pristine’ or formally perfect conception of equality. In what agency *inherits* from the natural and historical condition it finds itself in, however, egalitarianism ‘sees only aimless causality’.⁵³ Thus those who seek to make the egalitarian principle fundamental to the conception of liberalism develop an obsessive distaste for *alterity*, that is, for anything that contingently and externally operates *upon* the attribute of agency. This is the much discussed problem raised by ‘luck egalitarianism’. Here, the focus on agency as final worth, the distaste for alterity, and the incommensurability of goods come as a package: the pristine irrefutability of the condition of human equality created by making the individual agent the source of the good naturally provokes a rejection of accidental differences, and especially differences that militate against the equality of opportunity to exercise agency in pursuit of self-actualisation. The result, says Brudner, is a kind of fundamentalism “...an

⁵³ See Brudner, Alan, *Constitutional Goods* (Oxford, Oxford University Press, 2004) p.255. Brudner is right to point out that Rawls and Dworkin ‘both illustrate this momentum’.

unremitting drive toward the conquest of chance that will also subjugate the individual.”⁵⁴ Insofar as Brudner’s rejection of this fundamentalism is presented as a continuation of his critique against the transcendental ego, our troubles once more are laid at the door of the ‘self supporting’ subject.

Brudner’s proposed solution, which I will briefly reproduce and discuss below, is, however, not only a powerful contribution to the theory of liberalism, but, I suggest, provides further opportunity to exploit the logical symmetries I have tried to establish above. My modest point here is that just as valid ‘dialogical’ simulations of practical recognition can be performed by the monological consciousness, we need not re-design the phenomenological structure of subjectivity to correct the fundamentalist subjugation of the individual by ‘luck egalitarianism’. We need simply reconsider what is centrally valuable to the self, namely, autonomy in agency. In the face of the fundamentalist assault on chance (here, we focus on Rawls’ ‘difference principle’ and, one assumes, *a fortiori* any more intrusive principle), Brudner says,⁵⁵

...no worth-claiming individual could assent to a regime as hostile to individuality as the fundamentalist egalitarian one ...for no worth-claiming individual could assent to a default rule that would annul all expressions of determinate individuality when an alternative (soon to be described) exists that secures the common welfare without such a rule. Because the test of self-impossibility is not met the rule of Law becomes the despotism...of those who envy the good fortune of others.

The sensible notion of equality we are encouraged to adopt springs from the rational acceptance that individuality cannot demand, absurdly, that we were all born of the same parents with the same abilities. Instead, Brudner reproduces an ideal-type: the rationally prudent agent’s perspective identical to that employed in Gewirth’s account of agent rights first articulated comprehensively in *Reason and Morality*. Both acknowledge that certain resources are indispensable to the exercise of agency. Brudner says, “The capacity for free choice is a capacity for being the cause of one’s actions. Since capacity is a capacity *for* something; it is incomplete as mere capacity.”⁵⁶ To find oneself

⁵⁴ Ibid.

⁵⁵Ibid. p.258

⁵⁶ Ibid.p. 262

in a situation where the subsistence requirements to exercise this capacity are unavailable is what Brudner describes as ‘destitution’. Gewirth, referring to the missing resources themselves, refers to ‘subtractive’ goods. The slightly improved position of having only the resources available to preserve life, but little beyond it in terms of framing a wider conception of purpose fulfilment, Brudner refers to as ‘poverty’. Gewirth designates the corresponding resources as ‘maintenance goods’. To secure a level of resource adequate to genuine prospective agency, to frame purposes (choose goals) from this position, yet lack the resources to actualise them, is the condition Brudner calls ‘frustration’; Gewirth refers to the goods required to overcome this frustration, as ‘additive’ goods.⁵⁷ Constitutions, says Brudner, can be distinguished by their postures to this type of resource inadequacy. ‘Libertarianism’ he says responds to the problem of destitution merely as a threat to social order, and that order, of course, is a competitive market-based system of distribution which, despite human failures of aspiration or acquisition is still regarded as *just* system in that it is consistent with respect for free *choice*. But this is not he, says, the same as showing respect for equal *worth* – and *worth* is to be found at the heart of the agent’s capacity for autonomy.⁵⁸

Libertarianism itself tacitly acknowledges the hierarchy of worth to which a regime ordered to its interpretation of equal worth leads. Thus Kant distinguishes between those who, having sufficient property for moral independence, are capable of self governance and those who, being dependent for necessities on others, are ‘underlings of the commonwealth’ unfit for the vote.

He goes on to say, rightly:

No worth-claiming person among the underclass, however, could assent to a constitutional order that perpetuated his inferiority and that did not make concern for autonomy the basic principle of its laws.

⁵⁷ For a straightforward account of the logic of Gewirth’s argument to the PGC and of the notion of ‘additive’, ‘subtractive’ and ‘maintenance’ goods, see Olsen H.P. and Toddington. *S. Architectures of Justice* (Ashgate) 2007 pp. 4-8 Brudner’s equality concepts of ‘destitution’, ‘poverty’ and ‘frustration’ might be considered as parallels. See a detailed account in Beyleveld D. *The Dialectical Necessity of Morality* (Chicago, Chicago University Press) pp. 80-82

⁵⁸ Ibid. p. 262

Let us, finally, look at how this undeniable convergence between Brudner and Gewirth might help us towards an ecumenical reception of a concept of ‘recognition’ between agents, and how this bears on our understanding of authority and community.

Mutual Recognition Between Rational Agents

The Hegelian core of Brudner’s critique has two parts: in respect of *liberty* the suggestion is that once *sensibility* is rejected in favour of *duty*, the claim underpinning self-worth and freedom of choice in Kant becomes merely subjective, and, in addition, ‘empty’, so that an appeal to an authoritative common will of chattels becomes the constitutional imperative. Henceforth, we see an inherently attritional, stunted, and atomistic sociality antithetical to genuine community. The second is that the obsessive focus on a ‘self-supporting’ conception of individual ‘final worth’ produces a conception of equality as impartiality, yet that impartiality is interpreted in the form of a freedom-inhibiting crusade against real, historical, living, ‘alterity’. Of the first part of the objection we can say that libertarian conceptions which *do* appeal to this attritional model of constitutional consensus are rightly condemned. This is indeed the precise failure of the ‘atomistic’ model of the subject. This failure however, should not hastily be attributed to Kant, nor should it be assumed to demonstrate the *general* unserviceability of a transcendental model of the subject. The second objection to Liberal accounts of *equality* though accurate, does not threaten *phenomenological rapprochement*, it is simply a much needed critique of a contingently ‘liberal’ and compatibly with Gewirth, make full use of a model of individual agency and autonomy.

If we see the basis of self worth from the idea of an abstract freedom that knows itself either as duty, or as a ‘person’ externalising its freedom through its practical capacities for framing purposes- the agent must invent its own ‘theory of property’. On laying claim to the world as a prudentially unavoidable implication of action, the agent approaches the real issues of recognition in terms of relations between *persons*. That is, what is one to do when faced with a challenge to one’s exclusive appropriation of the *wherewithal* to exercise freedom through agency? The agent’s warrant for rights claims to the wherewithal of autonomy might well be expressed and endorsed in a stock of accepted communal norms that happen to have achieved institutional prominence, but this institutional expression is not the *ground* of these claims. That is to be discovered in an objectively defensible sequence of dialectically-

necessary reasoning that must, on pain of contradiction, be accepted by all rational agents – or, insofar as agency is the source of self worth – by all worth claiming persons. And yet is this not entirely consistent with what Hegel says of the ground of contract as an institution? It is not from the institution of contract that I derive my right to appropriate the world to objectify my abstract freedom as a practical being – a person – a purposive agent – but rather, in and through this institution that I can affirm, celebrate and demonstrate my equality and as a person. The claim to the moral and constitutional right to relief from destitution, poverty or frustration does not emanate from an agent as an individual character, identity, or personality, it arises *sufficiently* in respect of the generic capacity of agency, and thus the exigencies of agency ground the relevant concepts of validation of the right claim asserted by *all* agents. Because they share this universal attribute of freedom or voluntary agency, *each* agent, as a rational being, must make the claim, and each agent must acknowledge that *all* agents must make the claim and, and that from each agent perspective, they make it validly. This amounts to the fact that all agents must mutually recognise that they are now universally implicated in relations of rights and duties. This achieves two important things.

First it generates a logical necessary justification for our intuitive confidence in rights to equal and inviolable agency in the sense that, with or without Kant, it answers the absolutely fundamental question: *Why should I take into account the interest of others when I act?* From Rousseauian, Kantian or Hegelian perspectives this is looking very much like the principle that one's freedom in agency is objectively bounded by a recognition of the rights to freedom of all other agents.

Secondly, the identical hierarchy of agent need identified by both Brudner and Gewirth offers an opportunity to develop powerful public criteria for the substantive modelling of Constitutional Goods – criteria which are often one-sidedly developed in Brudner in favour of an overly introspective emphasis on 'self-authorship'. The methodological device of the rational agent perspective is employed centrally and plausibly by both Brudner and Gewirth to justify a range of fundamental claims to rights underpinning inter-personal and wider institutional relations. Striving to announce the validity of such relations in community is the essential political expression of that perspective. And for Hegelians, Kantians or Gewirthians action within those institutions that is conscious of the grounds of this deliberate expression of right and consciously in accord with them, is rational action. To experience conscious reciprocation

in this regard is, for all concerned, a mutual recognition of the experience of agent freedom.

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