When Democracy and Human Rights Collide

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Fundamental principles, such as those of democracy and human rights, are sometimes dramatically at odds with each other. It is a mistake to regard these cases as involving only apparent conflicts, which vanish upon closer inspection. One must acknowledge that norms sometimes clash and that opting for one over another may produce a real sense of loss, even if the choice is correct. The community will come to regret not its endorsement of the prevailing principle, but rather its neglect of the alternative. It may have to make amends vis-à-vis the individuals or groups it has let down in the process. Thus, the notion of an irreducible dilemma, which Bernard Williams invokes in his discussions of morality, applies with equal force in the realm of political philosophy.

This kind of predicament may bring about extensive collective suffering, and at times even tragedy. A polity continually confronted by such impasses would be completely dysfunctional and would inevitably disintegrate. Fortunately, intense conflicts occur rather rarely. Political theory should not overstate the frequency of political dilemmas. To treat them as a recurrent theme is to trivialize them and to underestimate the extent to which they put the community to the test.

How might we define the kind of conflict that is at stake? Of course, a dilemma of sorts crops up when the gun-pointing mugger bids “Your money or your life....” Yet the collisions at issue here are of an altogether different nature, if only because they involve principles instead of interests. Moreover, they affect political communities rather than individuals. For the moment, I shall simply state that a political dilemma emerges when two valid norms point a polity in conflicting directions. For example, the democratic principle may require respecting a majority decision that burdens a minority, while equality demands disregarding such a determination. Such a normative clash does not necessarily imply a deadlock. I shall focus on cases in which the political community is able to make a reasonable choice between two competing injunctions. My discussion aims to clarify what these normative collisions involve.

I first examine Jürgen Habermas’s position in order to show the appeal of categorically denying political dilemmas. Such a stance seems to enable communities to hold onto and to live by all their convictions. It thus appears to deliver them from having to act arbitrarily or against their conscience. Moreover, it points to an internal connection between various collective norms and therefore to a coherent communal existence. I shall then make the case for opening up to the possibility of these kinds of conflicts. Situations may arise in which the demands of one principle run counter to those of another. Even if the community knows which of the two principles it should follow and proceeds accordingly, it does not extinguish the claims of the overridden norm. A residue remains. Despite acting as it ought to, the community experiences a bad aftertaste. In addition, it normally has a duty to give
satisfaction to those it has failed.

I maintain that this position does not impinge upon basic deontic logic. Even if carrying out A is incompatible with executing B, having separate obligations to attain A and B does not entail a duty both to do and not to do A. An obligation to perform B carries with it a general commitment to create conditions for B's fulfilment, but not a specific duty to avoid any incongruous act, such as A. By the same token, holding obligations to achieve A and B under these circumstances does not violate the practical requirement that "ought" implies "can." Two independent duties do not aggregate to an obligation to accomplish both A and B simultaneously.

Finally, I shall discuss three instances in which fundamental norms clash. The first example points to the defence of French culture in Quebec. The second case references the decision of British authorities in 1998 to ban the Orange Order's parade through a Catholic neighborhood. The third case addresses the question whether to permit commercial surrogate motherhood agreements. My contention is that in all three contexts one best understands the stakes by acknowledging a normative conflict. The collisions are, respectively, between the democratic will to promote the majority culture and the right of linguistic subgroups, between free speech for extremists and minority rights, and between the notion of fairness to childless parents and that of preventing exploitation of women.

Habermas's Quest for a Seamless System of Principles

I begin by considering Habermas's view of the relationship between democracy and human rights. Habermas goes out of his way to dispel the idea that these two concepts may clash. He makes a powerful attempt to show that at a fundamental level the two principles presuppose and support each other, while maintaining more generally that all political principles must be similarly coherent. Focussing on his position enables us not only to examine a sophisticated effort to exclude the possibility of political dilemmas but to show why this kind of project is so appealing. I argue that any such undertaking is ultimately mistaken. Habermas endeavors to show that democracy, or "popular sovereignty," and human rights only appear to run counter to each other while in actuality the two notions invariably reinforce each other. Human rights never check or restrict popular sovereignty but make possible its genuine exercise. Accordingly, requiring the majority to respect human rights is not a constraint upon, but is rather the principal foundation of, true democracy.

Habermas's political philosophy identifies human rights with the premises underlying the democratic process. "The substance of human rights thus lies in the formal conditions for the legal institutionalization of the discursive formation of opinion and will within which popular sovereignty takes a legal form."2 The democratic process, which discursively shapes the citizenry's opinion and will, requires recognizing participation rights, such as freedom of expression and
assembly, the free vote, and equality. "The principle that all state violence stems from the people," Habermas declares, "must be specified contextually in the form of freedom of opinion, information, assembly, association, belief, conscience, and confession, as well as rights to participate in political elections and other votes and to join political parties and civic movements, etc." (FG, 162). Habermas would undoubtedly agree with Joshua Cohen that "the [basic individual] freedoms are not simply one of the themes of deliberation, but rather help to form the structure that makes deliberation possible."³

Habermas crucially strives to find a middle point between two extremes: the liberal tradition inspired by Immanuel Kant and its republican counterpart based on Jean-Jacques Rousseau. Both Kant and Rousseau set out to make room in their schemes for democracy as well as for human rights. In the words of Habermas: "Rousseau and Kant attempt, through the concept of autonomy, to conceive the union of practical reason and sovereign will in such a way that the idea of human rights and the principle of popular sovereignty are interpreted reciprocally."⁴ Habermas believes that these two philosophers, each in their own way, ultimately fail in this endeavor and that his approach can succeed.

Habermas believes that Kant superimposes a categorical moral system, which includes a set of preeminent human rights, on the practice of democracy. "In this regard, human rights, which are grounded morally, limit the sovereignty of the citizens' 'concurring and unified will'" (FG, 131). Rousseau, by contrast, subordinates human rights to the general will. Consequently, Rousseau embraces the "republican tradition," according to which "human rights acquire their binding character vis-à-vis an essentially political community only as elements of a tradition peculiar to and consciously appropriated by such a community" (FG, 130). "In both Kant and Rousseau," Habermas insists, "there exists implicitly a relationship of competition between human rights, which are grounded morally, and the principle of popular sovereignty" (FG, 123).

Habermas, in contrast, takes the position that democracy and human rights are coequal and co-originating. He therefore looks to establish the "internal connection between popular sovereignty and human rights," which escapes Kant and Rousseau, and contends that this connection "lies in the normative content of a way of exercising political autonomy, which ... is determined by the communicative form of discursive opinion and will formation" (FG, 133). He concludes that "in this way, private and public autonomy are mutually implied, so that neither human rights can claim primacy over popular sovereignty nor vice versa" (EA, 301). Habermas takes democracy and human rights to be expressions, respectively, of the public and private dimensions of the same autonomy principle. He thus accounts for the intimate interrelationship between these two notions. Consequently, he excludes the possibility of real competition, let alone incommensurability, between them.

In Habermas's rendering of the concept of autonomy, no hierarchy exists between public and private autonomy, as occurs in Kant's and Rousseau's accounts. Habermas does not attribute autonomy exclusively to the "individual subject" or to
the “macro-subject of a people or a nation” (FG, 134). The exercise of autonomy takes place instead within “discourses ... and negotiations whose procedures are discursively grounded” (FG, 134). Habermas explains:

As participants in rational discourses, legal consociates must be able to test whether a contested norm can or could obtain the acquiescence of all those who might be affected. Thus, the desired internal connection between popular sovereignty and human rights consists in the fact that the system of rights represents precisely those conditions under which communication forms that are necessary for a politically autonomous legislation can, in turn, be institutionalized (FG, 134).

For Habermas, public autonomy is exercised as political autonomy, that is, in the context of a discursive democratic process, which requires respecting private autonomy as expressed in a set of human rights. To this point, Habermas’s account sounds terribly abstract; it is difficult to see what practical consequences this conceptual elucidation might have. It is helpful therefore to move to a more concrete plane. Let us, then, apply the argument to some specific problems.

In developing his argument, Habermas primarily considers cases in which human rights appear to contradict and displace democracy. One example would be the legal protection of Muslims against the repressive efforts of a predominantly Christian community. Habermas claims that in such a scenario no real clash exists between the principles of private and public autonomy. The hegemonic ambitions of the Christian majority do not have a foundation in, but rather infringe upon, public autonomy, which demands the respect of individual liberties. Popular sovereignty, in other words, is legitimate only if it honors fundamental human rights.

The underlying idea is that genuine democracy requires that all members of the polity be part, in a broad sense, of the collective self-determination effort. Everyone must have not only a right to vote, but also to organize politically and to participate in all relevant debates. More significantly, the political community has to treat all its members with equal respect, if they are to be effective political actors. When it violates any of their civil or social rights, it undermines their political rights, thwarts democracy, and violates public autonomy.

The majority will carries normative weight, within the Habermasian perspective, only insofar as it complies with certain requirements, such as the assurance of basic personal rights. Otherwise, individual dissidents would be morally indifferent to the preferences of the majority, just as they would be to the predilections of a group of complete strangers they happened to encounter. The democratic process commands the allegiance of even those who do not agree with its results, precisely by virtue of the consideration it shows to all. The citizens participating, face to face and as equals, understand that in the end there must be a vote, that it is possible that their point of view may not prevail, and that the majority should carry the day.
Habermas deploys the same reasoning in situations in which it is democracy that seems to prevail over human rights. He denies the existence of a genuine conflict when the twentieth century’s public law demands displace nineteenth-century private law prerogatives. To be sure, public law ultimately reins in the individual freedoms enshrined in the civil codes in the aftermath of the French Revolution. In other words, property or contract rights yield to collective values such as social justice. Habermas obviously recognizes this phenomenon, but insists that there is no collision of principles. “Above all, the restriction of classical fundamental liberties,” Habermas writes, “can in no way be traced back to the interference of other legal principles (such as justice or social responsibility)” (FG, 483). Habermas also declares false the assumption that in these cases “the validity range of the classical notion of private autonomy has been truncated by the politically implemented validity claim of a competing notion” (FG, 482), that is, public autonomy.

Habermas’s theory purports to escape the dilemma by two related but distinguishable routes. In the first place, Habermas clarifies that the principle of private autonomy expressed in civil codification already incorporates the notion of equality. This principle, consequently, “coincides with the general Kantian human right, i.e., the right to the greatest possible amount of equal individual freedom of action” (FG, 481). Habermas insists that “private autonomy in the sense of this general right to liberty implies a general right to equality, precisely the right to equal treatment in accordance with norms that guarantee substantive legal equality” (FG, 483–4). From this point of view, the restrictions on the enjoyment of private property or freedom of contract are based on equality, and therefore do not injure, but rather reinforce, private autonomy. For instance, in invalidating certain types of agreements between management and workers, labor law furthers rather than hinders the objective of achieving a maximum of equal individual freedoms.

Second, Habermas maintains that modifying private law from the perspective of public law ultimately affords individuals the means to exercise fully their private autonomy. Typically, this kind of amendment not only has a redistributive effect, but also tends to provide persons with a minimal prosperity level, permitting them to act autonomously in practice as well as in theory. What is the point of having a right to property, for instance, if one does not possess any? Habermas notes that, the expectation of achieving social justice through private law’s elaboration of the principle of legal freedom indeed depended implicitly on the establishment of non-discriminatory conditions for the factual assertion of the freedoms recognized by the norms of contract, property, inheritance, and association law. These freedoms rest implicitly on certain social theoretic assumptions or factual presuppositions: first and foremost on assumptions about economic balance in production processes organized as markets (with entrepreneurial freedom and consumer sovereignty), as well as on related sociological assumptions about a broad distribution of property and an
approximately equal distribution of social power. These assumptions are supposed to assure equal opportunity in the exercise of private law prerogatives (FG, 484–5).

Habermas resolves that factual equality, which seems to have to do only with public autonomy, is also an integral part of private autonomy and instrumentally advances it.

Habermas describes the internal connection between democracy and human rights persuasively. Nonetheless, his categorical denial of the possibility of conflict appears counterintuitive. Although it would be odd indeed for social aims to be continually at odds with each other, is it not quite natural that ideals, such as democracy and human rights, clash every now and then? Yet Habermas denies conflict not only between democracy and human rights, but also between any two valid political principles. He maintains that admitting the possibility of a clash between such norms would amount to assimilating them to values. Such assimilation would defy the very nature of political principles. Habermas readily concedes that values may clash. “Different values compete for priority; as they attain intersubjective recognition within a culture or life form,” he maintains, “they constitute a configuration that is flexible and prone to tension” (FG, 311). However, “If they are to claim validity for the same circle of addressees, different norms may not contradict each other; they must hang together coherently, i.e., they must constitute a system” (FG, 311). Hence, when Habermas states that democracy and human rights may not come into collision, he is regarding them as norms, not values. This classification, however, seems odd, if not in relation to human rights, at least with respect to democracy. When one speaks of the latter, one is usually thinking of a value, in the sense of a broad aspiration. Rarely does a norm or a concrete principle of action come to mind.

In classifying democracy and human rights as norms, Habermas is not simply making a semantic point against common linguistic usage. He is implicitly asserting that these notions differ in kind from values. In other words, he is assuming that they have a distinct set of characteristics. By the same token, he would insist on distinguishing all political principles from values.

Norms and values differ, first, in that the former refer to obligatory action, while the latter refer to teleological action; second, in that the validity claim of the former has a binary coding, whereas that of the latter has a gradual coding; third, in that the former bind absolutely and the latter relatively; and, fourth, in that the interrelation of a system of norms and that of a system of values must satisfy different criteria (FG, 311).

Insofar as he takes the notions of democracy and human rights to fall under the first category, Habermas must be attributing to them the four corresponding properties. First, these concepts are deontological, i.e., they set forth duties without any
reference to particular ends. For instance, democracy calls for regular elections not because happiness or utility will thereby increase, but because citizens have a right to vote. Even if it thus impaired any or many of the citizenry’s ends, the principle would continue to require universal suffrage.

Second, the Habermasian notions of democracy and human rights single out specific actions as right or wrong, not as more or less desirable. For example, if telephone tapping runs counter to human rights, it is as such unacceptable. Its acceptability, under this viewpoint, is by no means a function of whether and to what extent the polity endorses human rights, as if they were values.

Third, Habermas presumes that the mandate of public and private autonomy “has the absolute sense of an unconditional and universal obligation: the imperative claims to be equally valid for all.” “The attractiveness of values,” in contrast, “has the relative sense of a valuation of goods embedded or adopted within a culture or life form” (FG, 311). The claims of democracy and human rights, accordingly, apply in all societies at all times. Of course, this absoluteness does not preclude the possibility of deploying these concepts contextually, so that the specific policies required may vary from one community to the next.

The fourth attribute is the one upon which this paper focuses, which implies that democracy and human rights may not collide. If these notions were values, they might at times clash and call for a relative ranking. As valid norms, however, they must be in harmony. When one of them entails a certain course of political action, the other may not point in a conflicting direction. Their imperatives must be categorical and consistent. Therefore, democracy and human rights must be part of a coherent system of principles, not a random assortment of aspirations. Habermas believes that all political principles, as norms, must have all of these characteristics. To admit the possibility of collisions is not simply a misunderstanding but a category mistake, amounting to treating these notions as values.

The claim that there can be no collisions between political principles is appealing because it appears to guarantee that societies will always be able to satisfy all such norms simultaneously and excludes absolutely the possibility of having to choose between important principles. It also renders unnecessary the operation of balancing and ranking competing norms. Habermas’s account is particularly attractive because it points to an internal relationship between democracy and human rights, one that grounds the two notions in the principle of autonomy. This interconnection provides a guarantee against collisions while identifying a fundamental unity in society’s main political commitments.

The concept of autonomy does not, however, operate as the ultimate end that resolves conflicts between lower rules. It is not, in other words, the functional equivalent of the principle of utility. Habermas does not subordinate democracy and human rights to the notion of autonomy. He does not maintain that in case of tension, whichever of these two norms maximizes autonomy should prevail. Rather, he holds that apparent conflicts between democracy and human rights are results of misinterpretations of one or both of these notions. In such cases he proposes a more
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careful reading of these norms in order to understand that they ultimately call for the same result. It is the concept of autonomy that provides the guiding light in this process of re-examination and reconciliation.

Opening Up to Political Dilemmas

Habermas's contention that there can be no conflict between democracy and human rights finds support in the writings of his compatriot Robert Alexy, as well as in those of his fellow deliberative democrat Carlos Nino. Analytic political philosophers such as John Rawls and Charles Larmore also concur with Habermas on this point. Even Ronald Dworkin, who originally interpreted individual rights as trumps against the majority will, now agrees with Habermas that the relation between democracy and human rights is one of complementation rather than competition. Kant takes an interesting position on this matter. As indicated, he makes less of an effort than Habermas to find a balance between democracy and human rights, and ultimately subordinates the former to the latter. All the same, Kant rejects the existence of a conflict between the two notions inasmuch as the moral prerogatives of individuals simply extinguish the claims of popular sovereignty. Like Habermas, he denies the reality of dilemmas in this or any other ethical domain.

This wide consensus is not surprising. Philosophers have traditionally sought to explain away principled conflict in the realm of moral and political philosophy, thus implicitly assimilating judgments about morality and politics to those regarding the physical world. A related argument stems from the deployment of the Kantian maxim that “ought” implies “can” in both moral and political philosophy. More specifically, if individuals ought to execute two actions, they must be able to do both. If they cannot do both, they cannot have a duty to do both. Under these circumstances, they can at most have an obligation to do one of the two. The same reasoning would appear to hold in the case of political communities. From this perspective, there may be no real collisions between moral or political principles. If there seems to be a clash, at least one of the norms is not operative. The reason might be, for instance, that an overlooked exception is at play.

Bernard Williams challenges this approach to individual morality. He contends that deliberation does not always allow us to bypass moral dilemmas. Moral reflection, in the best of cases, suggests which duty one should uphold but does not completely extinguish the force of the disregarded commitment. For Williams, it is this moral residue that explains the moral agent’s sense of regret in these situations. Williams has us imagine the following scenario: I promise to meet a friend for lunch, yet on the way I witness a terrible accident. I must come to the victim’s aid even if doing so causes me to miss my appointment. Though the decision to skip my previous engagement is morally correct, my obligation to my friend does not simply disappear. I have broken a promise, albeit for a good reason, and in a sense failed him. I will feel that I owe it to him to try to make it up to him. I may very well
apologize, reschedule, and even offer to pick up the tab next time (see EC).

Peter Railton correctly notes that in this case there is no real dilemma, in spite of the fact that the person in question is sorry “for the inconvenience that, knowingly, he has caused.” The loss has to be much greater if there is to be a profound moral conflict. All the same, the example presents all the indicators of an authentic dilemma. If the neglected obligation were of monumental significance, the case would indeed be morally devastating. For instance, I may have pledged to provide an alibi against the criminal charges facing my friend. I am in a bind, even if there is no doubt in anyone’s mind that I should skip the trial in order to help in the emergency I have encountered.

Williams believes that the tendency to view morality as a closed cognitive system and to equate the conflicts of duties with those of beliefs leads to a mischaracterization of moral conflict. He criticizes philosophers for assuming that if a person thinks a moral problem through, she will arrive at a clear solution, and that if she acts accordingly, she will be entirely beyond reproach. He cautions against treating moral dilemmas as cases in which there only seems to be a collision of duties and specifically rejects the view that, in these cases, one of the competing obligations must ultimately turn out to be a merely apparent, or perhaps prima facie, duty. As Williams remarks, “it is certainly a falsification of moral thought to represent its logic as one that demands that in a conflict situation one of the duties encountered must be totally rejected” (EC, 183).

The eagerness to explain away cases in which norms appear to clash is as problematic in political as it is in moral philosophy. When these situations emerge in political life, it is misleading to say that if the community deliberately and correctly sides with one of the principles, the other either does not apply or is no longer binding. One should rather recognize that the society might have, to some extent, failed to uphold its obligations. The polity may go through internal turmoil and have a duty to make amends, despite having made the right choice. Lawrence Kohlberg emphasizes that it is precisely when they confront dilemmas that individuals demonstrate and develop their moral knowledge. Similarly, it is in facing up to normative conflict that communities demonstrate and enhance their political wisdom.

Of course, classic dilemmas, in which neither of the competing principles prevails, are also possible. They are quandaries in the sense envisaged by Simon Blackburn. In other words, they present “a number of alternatives, of which you must adopt one and only one, but where you do not know which one to adopt.” They are tragic, according to Williams, and most clearly lead to distress, to residue, and to a need for compensation. I have nonetheless chosen to focus on cases with a reasonable solution in order to underscore that dilemmas do not hinge upon the impossibility of a principled decision.

It may seem that political dilemmas defy the logic of obligations. On the one hand, if a community ought to do A, and carrying out B prevents it from realizing A, then it appears to have a duty not to execute B. It therefore seems, necessarily,
not to have an obligation to perform both A and B. On the other hand, if a community has obligations to do A and B, it also appears to have a duty to attain both A and B simultaneously. This latter duty suggests that it must be possible to accomplish A and B simultaneously. Consequently, it seems that a polity may not face a real dilemma with respect to two obligations.12

However, deontic logic is trickier than it appears. A political duty imports a general obligation to undertake actions to make meeting that duty possible. It does not imply a specific obligation to achieve any one of those acts. To say that society should carry out B does not entail that it should not execute A, simply because A is contingently incompatible with B. Hence, to affirm that society should do A and should do B is not equivalent to asserting that it should and should not do A. For instance, a community’s obligation to assist its disabled members does not strictly imply a duty to refrain fromremedying racial discrimination, just because a tight budget requires making a choice between these two aims. Imagine a dramatic and unforeseeable situation in which transferring additional money to the single fund devoted to these two functions is no longer an option. Under these circumstances, this year’s decision to neglect racial oppression in order to accommodate disability may reasonably rest on the fact that for the past ten years the former issue has received considerable financial attention and the latter none. Needless to say, the polity should make broader fiscal adjustments so as to be able to meet these two obligations next year. All the same, it ought to aid the disabled and it ought to combat discrimination now, even though it cannot presently do both.

Moreover, Williams’s “agglomeration principle” is as inappropriate in political as it is in moral philosophy. This notion establishes that a duty to do A plus a duty to do B import a duty to realize A and B. It entails, in conjunction with the previously mentioned possibility requirement, that there cannot be an obligation to do A and an obligation to do B if A and B are not simultaneously attainable. For an obligation to do A and an obligation to do B lead to a duty to perform A and B, which requires that the accomplishment of both A and B be possible.

A duty to do A and a duty to do B do not imply an obligation to undertake both together. To return to the previous example, the duty to fund disability programs and the duty to finance measures against racial discrimination do not import an obligation to achieve both at the same time. The two obligations are realizable independently. They may be impossible to carry out simultaneously, but there is no requirement to bring about this possibility. These conflicts do not necessarily suggest that a community’s political principles are incoherent. It is not the principles themselves that collide, but rather their applications. Therefore, the polity may continue to adhere with equally reasonable conviction to both norms despite these dilemmas.

In contrast, Habermas maintains that conflicts in the application of principles are only apparent, speaking in this regard of a “contest between norms competing, prima facie, for application in a given case” (FG, 268). He implies that the application process will end up rebutting the purported validity of at least one of the
principles for the particular situation at hand. In other words, only one of the principles will retain its binding force. This approach contemplates no regret, moral residue, or need for satisfaction in the end. (Incidentally, Habermas’s phrase “prima facie valid norms” (FG, 267) calls to mind W. D. Ross’s concept of a prima facie duty, which Williams regards as the weapon of choice in denying moral dilemmas in concrete cases.)

Against Habermas, I maintain that the application of norms may give rise to genuine conflicts. The polity in such cases must disregard one of the competing norms, while expressing its continued loyalty to such norms through its regret and its reparatory efforts. Of course, one of the applicable principles mandates undertaking specific action and society is explicitly balking. All the collective regret or compensation in the world will not change this fact. In these cases, the polity has an excuse, though not a justification, for neglecting its obligation. It may therefore reluctantly neglect the requirements of the principle in question due to an extenuating circumstance while holding onto the principle itself. More importantly, the excuse does not extinguish the claims of others. Dissidents may legitimately stand up against the polity and demand satisfaction. They would have no entitlement to either of these options if the collectivity’s breach were justifiable.

John Austin painstakingly distinguishes justification and excuse as defenses. “In the one defence, briefly, we accept responsibility but deny that [what we did] was bad: in the other, we admit that it was bad but don’t accept full, or even any, responsibility.” Crime law explicitly contrasts justification and excuse. George Fletcher articulates the dichotomy as follows:

Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for the concededly wrongful act.

Fletcher contends that Germany’s legal system establishes this dichotomy most clearly. He notes that “the distinction between justification and excuse has never received the kind of attention in Anglo-American law that it has in the German legal tradition.”

A community that disregards one of its duties in the face of a dilemma has no right to proceed thus because it merely has an excuse. Others may legitimately stand up against the breach and demand satisfaction. They may not, however, block the polity in its fulfilment of its other, conflicting, obligation. They may only press it to eliminate the source of the conflict.

My earlier example may help clarify this point. Racial minorities are entitled to remonstrate against and seek compensation for the community’s decision to cut funding for measures to combat racial discrimination. Yet they have no right to require the polity to slash its disability programs. They may only call upon it to
Criminallaw distinguishes justification and excuse in terms of their relationship to an underlying norm. "The nature of a justification," according to Fletcher, "is that the claim is grounded in an implicit exception to the prohibitory norm."

Fletcher contrasts excuses on this point: "Excuses bear a totally different relationship to prohibitory norms. They do not constitute exceptions or modifications of the norm, but rather a judgment in the particular case that an individual cannot be held accountable for violating the norm." Similarly, a political community in the midst of a dilemma must ultimately disregard one of the principles at stake without the protection of an exception. It may only point to mitigating factors in order to excuse its transgression.

Advocates of perfect normative harmony could, of course, concede that in these situations it is difficult to arrive at correct decisions. They could also accept that the solution will require all the qualifications and reparations that I have mentioned. They might assert, for instance, that there is a duty fully to fund agencies that combat racial oppression, except when disability programs have been neglected for several years. They might additionally maintain that when an exception arises the community has an obligation to apologize, compensate, or ensure it has adequate funds for both purposes in future. It is crucial to keep this possibility in mind in order to avoid caricaturing the position of those who believe in a seamless system of political principles. However, it is equally necessary to note that assimilating the vexation in these cases to that generated by a complicated math problem misses the mark. The mathematical question troubles only insofar as it defies a solution. In contrast, the distress associated with political dilemmas does not result from the difficulty of finding the correct answer. The community goes through internal turmoil even if it knows right away what it must do. Moreover, those who reject political dilemmas would have to explain why the community owes an apology or perhaps even satisfaction. Of course, they may contend that the community is to blame for failing to plan in order to be able to meet both its obligations. Yet it might have ended up in a bind unexpectedly and in spite of responsible planning.

On the one hand, the duty to make amends should not hinge on the contingency of being able to establish communal culpability, particularly in light of the complications involved in attributing blame to groups. On the other hand, the feeling of collective regret and the sense that there is an obligation to compensate, despite the absence of guilt, are in no way inappropriate. Nor are they confused manifestations of the sympathy experienced in light of a racial minority's bad luck. In the case at hand, the polity faces a situation different than when it perceives natural adversity afflicting some of its constituents or when it makes one of its subgroups worse off in its ordinary (and fully unproblematic) course of action.

Consequently, the following four scenarios give rise to different communal feelings and obligations. The first community learns that recent storms have caused considerable damages to the property of some of its citizens. A second community suppresses the freedom of expression of its dissidents simply because it does not
take criticism well. A third polity imposes a heavy tax, which will be extremely burdensome on its wealthiest members, in order to rebuild its railways. The fourth polity neglects its promise to build a park in one of its neighborhoods upon realizing that it needs the funds to provide housing for the poor.

Only the last community runs into a political dilemma. It differs from the first because it bears causal responsibility, from the second because it acts legitimately, and from the third because it neglects its duties to the disadvantaged. Those who discard the possibility of conflicting political obligations would perhaps insist on conflating the third and the fourth cases. I am arguing instead for the meaningfulness of the distinction. Furthermore, I contend that in the fourth example, as opposed to the third, the polity appropriately feels regret and has a duty to provide satisfaction. The reason is that the community has failed to keep its word.

The duty to compensate despite the absence of culpability is not as strange at it appears. It is rather commonplace in torts. The law often holds companies liable for the damages their products cause, even if they show that they have conducted themselves impeccably. Obviously, causation does not in itself justify liability, but rather functions in conjunction with the notion that manufacturers should internalize production costs, should have an incentive efficiently to invest in prevention, or should draw on their deep pockets to indemnify victims. By the same token, a political community's obligation to repair does not ride exclusively on its causal responsibility, but also on its violation of a valid principle.

I would like to introduce three caveats to my recognition of the possibility of political dilemmas. First, while one should not altogether dismiss these conflicts, one should not overestimate them either. If a community were in such dire straits all the time, it would be hopelessly (and perhaps culpably) dysfunctional. Just as Hegel dismisses the view that collisions are a pervasive feature of moral experience, one should reject any position that exaggerates the frequency of normative conflict in politics. While they do occur, and deserve serious consideration, principled dilemmas are not part of every question that emerges in political life.

Second, I have ignored the all-important epistemological dimension of this problem. How does a political community know that it faces a dilemma? What if it merely thinks that it is in a predicament because it is not aware of an exception to one of the principles? If it is confronting a real conflict between duties, how does it determine which of them prevails? I have avoided these questions because the matters with which I am preoccupied are preliminarily separable and basic. Needless to say, a complete assessment of the issue would require extensive epistemological analysis.

Finally, my acknowledgement of political dilemmas does not entail a reduction of principles to values. While a distinction between the two categories is valid, we need not draw it as rigidly as Habermas proposes. Nor vest as much in the distinction. We may say, more simply, that norms suggest concrete actions more immediately, and take the form of rules more readily, than values. Freedom of expression, for instance, may be classified as a principle, while patriotism is a value.
I would further agree that norms are deontological, rather than teleological, yet deny that their "validity claim [necessarily] has a binary coding [instead of] a gradual coding" (FG, 311). Democracy is a principle that requires communities to follow certain procedures in arriving at their decisions. Yet one may reasonably assert that a particular society or policy is more democratic than another. Of course, I would reject not only the claim of complete harmony, but also that of absolute universality with respect to political norms.

In sum, political principles, including democracy and human rights, may and do come into collision. Rather than denying the conflict, political philosophy should seek to understand it. Doing so does not preclude suggesting a principled manner of choosing between two norms. What it does suggest is that even after a polity decides what to do, the conflict may not disappear. In particular cases, the option for one norm may take place at the expense of the other and, in the end, there may be an ineluctable sense of loss. The political community, in addition to feeling regret, may make appropriate amends, thus expressing its continued allegiance to the overridden norm.

Political dilemmas do not connote incompatibility or incommensurability between the principles themselves. At stake is simply a conflict in their application. In a particular context, the norms point to two specific duties that cannot be fulfilled simultaneously. Deontic logic in no way precludes this kind of predicament. The fact that the community has an obligation to perform one act and that carrying out a second act prevents it from executing the first does not imply that it may not have a duty to attain or that it has a duty not to achieve the second one. Furthermore, having these two duties does not entail a general obligation to accomplish both simultaneously.

From the Abstract to the Concrete

Let us briefly examine a case in which democracy and human rights clash, specifically one in which a legitimate exercise of democratic will conflicts with the rights of a minority. Such a predicament presents itself when a culturally menaced polity makes its claim to recognition despite the existence of subgroups that do not partake in the national culture. Charles Taylor argues that although a political community should respect all its members's fundamental human rights, it has no obligation to exhibit total neutrality in questions of national culture. Taylor is, of course, thinking of Quebec. His position is that the government has the right to protect and promote French Canadian culture in Quebec, as long as it does not undermine the basic liberties of minorities. Accordingly, the government may require primary education in French for French-Canadians as well as for non-Canadian immigrants. It may similarly compel public corporations to conduct their business in French, outlaw commercial signage in languages other than French, and favor the immigration of Francophones. What it may not do is, for example, force individuals to speak French among themselves or refuse to provide Anglophone
criminal defendants with interpreters.

The political dilemma stems from the fact that cultural partiality, even when legitimate, leaves an ethical residue. Propagating the national culture results in an infringement upon the principle of non-discrimination. To be sure, state officials have a right, perhaps even a duty, to implement their culturally biased policy. Yet they thereby neglect their obligations toward Anglo-Canadians, at least to a degree.

By exempting individuals belonging to the linguistic minority from having to send their children to French schools, the government affords them some compensation. It may provide satisfaction in other ways also. It may endeavor to explain the reasons behind its discriminatory measures, as well as guarantee the superior instruction of English in all schools in order to diminish the social alienation of the Anglophone community.

My second example refers to the 1998 dispute between British authorities and the Orange Order in Northern Ireland. In July, 1998 the Orangemen requested permission to march through the neighborhood of Drumcree along Garvaghy Road, where the population is mostly Catholic. They wanted to walk all the way to the center of Portadown, the town that witnessed the Orange Order’s foundation in 1795. Members of the Order had been parading by this route since 1807, celebrating the triumph of the Protestant William of Orange over his Catholic father-in-law King James II in the 1690 Battle of Boyne. This military victory established Protestant supremacy and British domination in Ireland. In 1998 the British authorities, through the Commission of Parades, prohibited the demonstration. The dispute ended tragically with the burning down of a house in Ballymoney, in the north of Ulster, and the death of three Catholic children. Since then, the showdown between the Order of Orange and the London government has become something of a summer tradition.

There are at least four perspectives from which to view this tragedy. First, one might perceive a conflict between the commitment to peace and the Orangemen’s freedom of expression. Second, one might see a clash between the will of the Protestant majority and the rights of the Catholic minority. A third possibility would be to postulate a collision of human rights: those of the Orangemen and those of Drumcree’s Catholic community. Finally, one might suggest that there were two conflicting expressions of popular sovereignty: one in favor of peace and one committed to honoring North Ireland’s ties with the United Kingdom. The range of possible interpretations demonstrates as much the complexity of social reality as the ineluctable distortion that any kind of philosophical analysis entails. All the same, I shall focus on the clash between the Catholic community’s rights and the Order’s free speech. I shall presume that the prohibition of the demonstration was legitimate, that the demonstration would have constituted an affront and humiliation for the Catholic neighbors, that the Order of Orange possessed less aggressive ways to express its loyalist pride, and that the procession would have had destructive and irremediable consequences for the peace effort. In light of these premises, the supporters of absolute normative harmony would simply recommend proceeding
with the prohibition and would deem irrational any regrets about the decision. They
would insist that, appearances notwithstanding, the Orangemen simply had no right
to march.

This approach, though straightforward, is hardly satisfactory. On the one hand, it
gives the impression that the anguish in this case was merely a product of the
deciding authority’s weakness of will or of the zeal of the proscribed. On the other
hand, it completely disregards the intuition that the British government’s measures,
in spite of their legitimacy, might have undermined the radical Protestants’s
liberties.

Recognizing that the collective trauma stemmed from a principled controversy
and that the adopted policy violated certain fundamental norms would be more
sensible. One should attempt not to discard but rather to explain the feeling that the
official decision infringed upon the Orangemen’s long-established prerogatives,
especially their liberty to express their views. The perceived need to provide
satisfaction explains, to some extent, British Prime Minister Tony Blair’s meeting
with the Orange Order’s representatives, as well as the desperate and ultimately
unsuccessful attempt to find a compromise.

Surrogate motherhood contracts provide still another example of conflicting
collective duties. The defense of these agreements could ride not only on freedom
of contract, but also on moral considerations in the sense that it would be unfair to
deny a couple what may be the only mechanism available for them to have their
own biological child. There are, nevertheless, public norms that condemn these
contracts for exploiting women.

My contention is that it is right to prohibit these contracts for the reason just
mentioned. Those who reject the possibility of collisions between political norms
maintain that once society arrives at this conclusion, there is no room for remorse.
The principles at stake must be consistent. Nonetheless, one understands the
situation more completely if one admits an antagonism between norms. The
community would, accordingly, accept as reasonable an attitude of profound
disappointment on the part of the affected couples. It would also experience regret
and a need to offer explanations and even excuses. Finally, it might have to provide
compensation, perhaps by subsidizing fertility medicines, dedicating more public
funds to scientific investigation aimed at solving infertility problems, or permitting
exceptions in cases in which the carrier of the fetus is a close relative.

Of course, were we to examine this example in more detail we would run into
as many complexities and potential descriptions of the conflict at stake as in the
Orangemen drama. Opening up to the possibility of political dilemmas, hence, does
not lead to a single, comprehensive, and incontestable account of any of these trying
situations. It simply enables communities to grasp more fully some of the
dimensions of their predicament.

What does this argument contribute to the debate on dilemmas? First, it
proposes an extension of the debate from the realm of morality to that of politics.
Second, it offers a way out of apparent logical difficulties by rejecting the duty to
fulfill independent obligations in agglomeration and the duty to refrain from any act incompatible with what ethics requires. Third, it invokes a distinction between justification and excuse in order to explain the continued adherence to a principle despite a violation. Fourth, it cautions against exaggerating the frequency of such conflict.

Just as there is no abstract method of harmonizing conflicting principles, there is no method of systematically generating concrete solutions in instances of conflict. On the contrary, a multiplicity of factors contribute in the most diverse ways to the resolution of these disputes. Sometimes the urgency and timing of a situation impose a particular solution while in other instances a certain principle carries the day. Finally, there are cases where it is equally correct to opt for either of two conflicting norms, or even choosing randomly. In the words of Simon Blackburn, the community “has to plump for one alternative.” Of course, each of these deliberative notions calls for further development. My argument does not offer a complete theoretical account but provides only an initial step toward clarifying this crucial dimension of social life.

Notes


4. See also Habermas, Die Einbeziehung des Anderen (Frankfurt: Suhrkamp, 1996), 89, 293, 299. Hereafter EA.

5. It would seem that this notion of democracy requires respect for the rights of citizens, but not foreigners. Habermas might retort that popular sovereignty must protect the prerogatives of aliens qua potential citizens. In other words, inasmuch as someone may obtain citizenship, an authentically democratic majority must treat him or her with respect.


8. See John Rawls, “Reply to Habermas,” *Journal of Philosophy* 92 (1995); Charles Larmore, “The Foundations of Modern Democracy: Reflections on Jürgen Habermas,” *European Journal of Philosophy* 3 (1995). Though he recognizes that “Habermas is probably right in that typical individual rights work to make democratic self-government possible,” Larmore points out that “this cannot be its only rational support. They also concretely express the most profound human right which is equal respect and that establishes the ideal of democratic self-government by itself” (67). All the same, Larmore agrees with Habermas that there is no tension between human rights and democracy.


13. Analogously to Habermas, Ross views prima facie duties as potential obligations that lose their binding force when a superior duty displaces them.

14. John Austin, *Philosophical Papers* (Oxford: Clarendon Press, 1970), 176. “Hence, if somebody says he blames me for something, I may answer by giving a justification, so that he will cease to disapprove of what I did, or else by giving an excuse, so that he will cease to hold me, at least entirely and in every way, responsible for doing it” (181 n.1).


19. Blackburn insists that “apology and even reparation may be in order when no requirements have been violated, and even when no quandary ever existed” (“Dilemmas: Dithering, Plumping, and Grief,” 127, 132). I would agree with this statement in light of Blackburn’s own definitions. By requirement he means an overriding imperative. “To identify a requirement is then to give an outright verdict” (134). He takes quandaries to represent situations in which the agent does not know which of the alternatives to choose. Under these definitions, the case at hand involves neither a violation of a requirement nor a quandary. All the same, the need for an apology suggests blameworthiness, just as the compensatory duty calls for a special justification.

20. Hegel accuses Kantian moralists of exaggerating the prevalence of conflict in ethics. “The moral reflection can concoct all kinds of collisions and give itself a consciousness of being special and making sacrifices” (G. W. F. Hegel, *Grundlinien der Philosophie des Rechts Oder Naturrecht und Staatswissenschaft im Grundrisse*, Werke, Bd. 7 [Suhrkamp: Frankfurt am Main, 4. Aufl. 1995] § 150A). According to Hegel, in modern society true moral collisions are rare (§§ 137N, 150A). True moral collisions fit morality not against inclination, as Kant would have it, but against morality itself. Hegel believes that in underdeveloped societies true collisions occur more frequently than in modern society. The individual’s virtue is then put to the test. Modern society, in Hegel’s view, has attained an ethical life that is rational and complete. Ethical demands, therefore, rarely clash: “In an existing ethical order, whose relations are fully developed and realized, actual virtue has its place and reality only under extraordinary circumstances when there are collisions between those relations—i.e., true collisions.” In modernity, virtue mostly overlaps with “rectitude,” i.e., “the individual’s simple fulfilment of the duties imposed on her by the relations in which she belongs” (§ 150). Presumably, the obligations imposed by a rational ethical system will collide not because of internal contradictions, but rather due to external circumstances.
21. “This inevitable sense of loss,” explains Peter Railton, “seems to characterize a great part of our thought about moral dilemmas, even when the loss or the decision in question is not, or is not entirely of the type in which obligations cease to be fulfilled” (“The Diversity of Moral Dilemma,” 140).

22. Charles Taylor explains what the notion of recognition implies in this context. “The recognition I am talking about here is the acceptance of ourselves by others in our identity. We may be ‘recognized’ in other senses—for example, as equal citizens, or rights bearers, or as being entitled to this or that service—and still be unrecognized in our identity. In other words, what is important to us in defining who we are may be quite unacknowledged, may even be condemned in the public life of our society, even though all our citizen rights are firmly guaranteed” (Charles Taylor, Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism [Montreal and Kingston: McGill-Queen’s University Press, 1993], 190. Also see Taylor, “The Politics of Recognition,” in Multiculturalism: Examining the Politics of Recognition [Princeton: Princeton University Press, 1992]).