ETHICS IN THE PUBLIC DOMAIN

Essays in the Morality of Law and Politics

REVISED EDITION

JOSEPH RAZ

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PREFACE

One is forever searching for understanding, and the further one travels the further off the goal appears. Most of the essays collected in this book were started with the intention to use them to illustrate the application to one or another political or jurisprudential problem of general views about morality and the law which I have argued for elsewhere. More often than not, in the course of writing I realized that the problems I was addressing gave rise to difficulties that I did not anticipate, and that I had not directly addressed before. Luckily (or was it a delusion?) I felt that the general approach I have been pursuing in previous writings was also suitable for dealing with these, to me new, difficulties. The result is—I hope—that the general position I espoused is enriched and strengthened by these new reflections.

I called the first part of the book 'The Ethics of Well-Being: Political Implications' to indicate that it follows the approach, endorsed by many writers on moral and political theory and adopted by me in *The Morality of Freedom*, according to which political morality is concerned primarily with protecting and promoting the well-being of people. The present volume continues (in essays 3–5) the attempt to defend this approach against some opposing arguments which restrict politics by imposing constraints of so-called 'neutrality among competing conceptions of the good', or which regard rights as constraints on political action whose force derives from considerations which are unrelated to individual well-being. But the emphasis of the book is constructive, rather than polemical. The opening essay explores the notion of well-being and the ways in which one's well-being can and cannot be served by others. The paperback reprint of the book includes an additional essay: "Liberating Duties", previously intended for use in a different—now abandoned—project. This complements the essays immediately preceding and following it in exploring the notion of individual well-being and the relations that has to rights and especially to duties. These essays prepare the ground for the exploration of two important aspects of well-being: the importance of membership in groups—the role of belonging in well-being—and the implication of the active character of well-being, of the fact that it largely consists in successful activities. Both aspects of well-being have far-reaching political implications.

The active aspect of well-being raises vital questions for policies designed to promote people's welfare. If people's well-being can only be achieved through their own activities, what can others do for them? Should people be left to their fate, to prove themselves by overcoming whatever difficulties it throws in their way? If we say that people's lives should be neither devoid of challenges nor full of awesome challenges, are we guided

by any principled understanding of a *via media*, or merely by a wishy-washy desire to compromise? Or perhaps by a desire to have it both ways? The issue of belonging is of vital importance to questions of the limits of toleration, and to our attitudes to diversity and pluralism.

For me the essays of the first part have another crucial implication, which is never openly addressed in it. As I indicated, they explored some aspects of well-being and of its moral and political implications on the assumption that the promotion and protection of well-being is the central task of political action. The more I pursued the implications of this assumption the more I came to doubt whether well-being can play the central role in ethics sometimes assigned to it. It still seems to me that the promotion of well-being is the pivotal ethical precept of public action. But ethics in the wider sense cannot be accounted for in terms of concern for well-being alone. These doubts hover in the background in this book. It is, however, a background which I find full of puzzling issues leading beyond the concerns here discussed.

Another theme which underlies much of the discussion, but emerges into the open only in essays 5 and 14, is doubt about the ability of philosophy, or theory in some wider sense, to provide determinate answers to the questions we face in politics. In doubting whether any theory of justice can provide concrete guidance in the solution of all the problems which arise in politics I am not advocating a retreat from rational debate, or from political theory. But I believe that those often run out at the hardest stage, when we are faced with alternative decisions of which all are reasonable and none is supported by decisive or overriding considerations. In many cases substantive reasons and the theory of justice can rule out some wild non-starters, but can reach no further than establishing which of the possible decisions are reasonable. This conclusion raises a wealth of questions which are only lightly touched upon in this volume.

The essays of the second part contain some of the elements of an account of the nature of law. Essay 9 sets the scene, by sketching the view that law is best understood against a background of a political society which goes through various processes from public debate and factional pressures to concrete actions and decisions which are represented as authoritatively binding on that society. The law is simply the standards which reached a certain stage of maturation and endorsement in this process. This—or so I argue—is our own self-understanding of the law. Or rather, it is an account of it which fastens on the most significant and illuminating elements in our self-understanding and purges it of incoherences, and other extraneous elements.

The other essays in this part articulate some of the consequences of that understanding of the nature of law. Not surprisingly, the central concern is the relation between law and morality. Like other recent writers on

jurisprudence, I try to steer clear of the all-or-nothing approach which characterized much of the debate of previous generations. There are inherent connections between legal concepts and moral concepts, and between law and morality. The question is what are they. Perhaps two of the themes examined in the book should be singled out for special mention. First, in essay 10 I offer an argument for the view that the content of the law is capable of being identified by reference to social facts only. The argument is not conclusive, and the issue requires further consideration. But it is to my mind an argument of crucial importance which has been ignored by both supporters and opponents of the thesis about the social identification of the law. The second theme is an attempt to explain the dynamic aspect of law. Those who regard the law as identifiable on the basis of social facts tend to view it as a set of standards for the guidance of conduct. There is no doubt that the law contains such standards, and in a way it can be said to consist of such standards. But the law also 'regulates its own creation', to use Kelsen's expression. This is often understood—as it was by Kelsen himself—to mean that the law endows people and institutions with powers to make new laws. Again, there is no doubt that the law does that. But it does more. It often sets objectives that future legislation should achieve, objectives which regulate not the procedure of law-making but its content. How can an existing law determine the content of a future law? This problem has been relatively neglected in the jurisprudential writings in English. I try to answer the question in essays 11 and 12 below.

The arguments of the book are tentative and incomplete. But I hope that they help clarify the nature of and the reasons for views which have often been misunderstood by supporters and opponents alike.

J. R.

Balliol College
Oxford
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ABBREVIATIONS

The following books by Joseph Raz will be cited by title only:

The Authority of Law: Essays on Law and Morality (Oxford: Oxford University Press, 1979)
The Concept of a Legal System, 2nd edn. (Oxford: Oxford University Press, 1980)
The Morality of Freedom (Oxford: Clarendon Press, 1986)
Practical Reason and Norms (London: Hutchinson, 1979; 2nd edn., 1990)

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PART I
THE ETHICS OF WELL-BEING
POLITICAL IMPLICATIONS

1

Duties of Well-Being

In this essay I explore some of the implications for the moral duties people owe each other of the fact that well-being has a strong active aspect. Part, but only part, of morality concerns duties to protect and promote the well-being of people. That is the only aspect of morality touched upon here. The discussion proceeds on the assumption that we all owe a duty to protect and promote the well-being of all people. You may say that it explores the nature of that duty on the assumption that morality, or at least this part of it, is universalist and agent-neutral. The conclusions reached do, however, apply—with obvious modifications—even if moral duties regarding people's well-being are not impartial, and if they are agent-relative.

The first section will outline the main ways in which well-being has an active aspect. Its aim is not to justify this view of well-being, but merely to sketch it as a basis for the discussion in the following sections concerning the duties of well-being we owe each other, that is, the duties to protect and promote people's well-being.

I. ASPECTS OF WELL-BEING

Well-being and personality or character are the two most basic (and deeply inter-connected) dimensions by which people understand and judge themselves and others. How good or successful we are depends on who we are (character) and what sort of life we have (well-being). Evaluation of people's well-being involves judgments about their lives, or periods of their lives, and the degree to which they do or did do well, were good or successful. In large measure our well-being consists in the (1) whole-hearted and (2) successful pursuit of (3) valuable (4) activities.[1] To flesh out this way of understanding well-being in two stages I will first sketch the basic idea, and then take up a couple of the many possible objections to it.

To start from the end: the definition of well-being sees life as active. While being alive does not literally imply activity, we recognize non-active life as vegetative. 'X is very much alive' cannot be said of the comatose; it implies being 'alive and kicking'. So the concentration on activity is meant to flow from the very notion of a life.[2] For this to be true of the relation

[1] This issue is discussed in some detail in *The Morality of Freedom*.

[2] I am not suggesting that this concept is scientific rather than normative and culturally dependent. I am only saying that it is the one we have from which we cannot escape. The concept of life which forms our self-consciousness is that of activity.

between life and activity, the latter notion has to be broadly construed. The definition of well-being as successful activity is no endorsement of a hyperactive conception of the good life, consisting of perpetual jogging, climbing, eating, making love, or winning tennis competitions. Activity is to be understood to include the pursuit of a career in medicine, the pursuit of a hobby like chess, attending to one's relations with friends, institutions, or communities, living as befits one's station in life (even if this consists largely in doing very little), relaxing in front of the television, and the like. Activity here is contrasted with passivity, and includes inaction motivated by attitudes and goals which one holds to, as in Christian retreats or Buddhist meditation. The core idea is controlling one's conduct, being in charge.

The definition of well-being itself, while it insists that activity is the key to well-being, does not discriminate between comprehensive activities, i.e. those which encompass many aspects of one's life for long stretches of time (a career in architecture, or parenting) and short-term activities (a holiday in Venice, watching a Louis Malle film). A good life need not be integrated through one or a small number of dominating goals. It can be episodic and varied. However, the nature of comprehensive activities means that their success and the success of activities which are undertaken as part of them are interdependent. Activities with an instrumental value differ from those with an independent intrinsic one. An activity undertaken for its intrinsic value, such as a casual tennis game, can have elements which are independently intrinsically rewarding, e.g., the sense of well-being in physical exercise, or the skillful execution of a particular stroke. Those same elements, and others which are not independently valuable, can also derive value from their contribution to making the game as a whole a good game, assessed by the intrinsic standard of tennis games, but the value of the game as a whole depends of course on its constitution, on its parts even if they are not independently valuable. Things are simpler with instrumentally valuable activities. The instrumental purpose determines whether the comprehensive activity or its component activities set the standard for success. In part (a large part) success as a doctor is success in treating one's patients, and nursing them back to health. To this extent success as a doctor is a function of success—independently defined—in treating patients. On the other hand, treating a patient (an activity which may last a long time) is an activity each element of which is successful if it contributes to the success of the activity, the treatment, as a whole. Here, success in the larger activity is independently defined, and success in its component activities follows from it. Success in such activities often acquires additional intrinsic value for the life of the agent, the value of which derives from doing well something which is (instrumentally or intrinsically) valuable.

Only valuable activities contribute to our well-being. A life is not a good life for being spent in petty vindictive pursuits, or in self-debasing ones, etc. These make it a lousy, despicable, pitiable life—not a good one. Though

they are included under this element of the definition, one need not think primarily of moral highs and lows—of the life of the villain or of the moral hero or saint—nor should one think primarily of great creative talents or, on the other hand, the great debasers of culture. For most people the valuable and that which is devoid of value take more ordinary forms of insensitivity to the feelings of one's loved ones, neglect, and many forms of blinkered obsession. Contrasted with those are the ordinary cases of valuable activities which may be devotion to one's family, conscientious performance of a job, good neighbourliness, weekends spent bird-watching, volunteer work for social or political causes, etc. The value of activities—in which the value of the manner of their pursuit is included—is not exclusively their moral value. Nor is it value which can be judged or elucidated independently of an understanding of the good life, which reveals what forms of life are valuable and what activities contribute to them. Yet again, there is here an interdependence of different elements of the picture: the goodness of a life depends on the value of the activities it comprises, and their value is revealed through understanding what a good life consists of.

Needless to say, failure detracts from and success adds to one's well-being. A person who has set his heart on being a painter, and turns out to be a lousy one has, other things being equal, a lousy life. In this case, perhaps his failure may be due to lack of talent. In others it will be attributable to lack of judgment, mismanaging one's career, weakness of resolve, and other failings of character or action, or to bad luck, which in this context encompasses all factors beyond one's control. A failed speculator or politician may have never put a foot wrong; nevertheless his failure casts a deep shadow on his life. A promising academic may find that a budgetary crisis in the universities forces him out of his chosen career, a blow to his life from which, depending on age and circumstances, it may be impossible for him to recover. Many questions arise as to what counts as success in the present context. Does the fact that a brilliant plan by an architect was abandoned for lack of finance mean that he failed? Or is it the failure of whoever commissioned the plan? All these and others have to remain unexplored here.

Finally, to contribute to one's well-being one's engagement in one's activities has to be whole-hearted. Many activities require certain attitudes, commitment, pure motives, etc., for successful engagement in them. But not all do. All or most allow various forms of estrangement and alienation consistent with success. A brilliant chess-player may hate himself for being a chess-player, or may just hate playing chess. A good and dedicated teacher may hold himself in low esteem for being a teacher. The condition of whole-hearted engagement with one's life is meant to exclude self-hatred, pathological self-doubt, and alienation from one's life as they undermine well-being. It is not meant to exclude rational self-examination, and the attitudes which go with it.

The wholehearted requirement provides the main subjective element in this account of well-being. Some subjective accounts insist on a condition of transparency: they hold that a person cannot have a good life unless he is aware of the fact that he has a good life.[3] Some (relatively extreme) subjectivists would insist that the transparency condition is both necessary and sufficient. The view that the good life consists of the successful pursuit of worthwhile activities rejects both versions of the transparency condition. It is an objectivist account of well-being, but it includes a strong subjectivist component. A life can prosper only through the successful pursuit of activities, and these must be prosecuted willingly, and with the spirit suitable to the activity.[4]

The condition of whole-hearted pursuit presupposes that even where the activity, commitment, or relationship is not one which the agent chose, or could abandon by choice, he is in control of the manner of his engagement in it. He has to direct his conduct in the light of his objectives and commitments, to guide himself towards his goal. Given this, the question can always arise whether the agent is pursuing whatever activity he is engaged in willingly or unwillingly, whole-heartedly or half-heartedly, resentfully or not. But one should not be misled by the parallelism of positive and negative phrases here. In the main, the notions involved are negative; they exclude resentment, pathological self-doubt, lack of self-esteem, self-hate, etc. One is acting whole-heartedly if one is not prey to one of these attitudes. Nothing else is required: no reflective endorsement of one's activity, no second-order desire to continue with it, etc. Such endorsement and desires sometimes exist, and where it is appropriate, or even required, that one should be reflective about one's activities they are important. But there is no general need to be reflective, and in some matters reflection can be inappropriate. The fact that certain alternatives never cross one's mind may be a condition of having an appropriate attitude to people or activities.[5]

[3] Notice that this is weaker than insisting that he must be content or happy with his life. A person may think that he had a good life while feeling unhappy or discontented on the ground, e.g., that he does not deserve his good fortune, that he should have dedicated his life to a moral cause, even though this would have brought much suffering to him. Some people think that such discontent undermines the view that the person had a good life. One cannot believe that one has had a good life if one is discontented with it. I see no reason to accept this position. Similarly a person may believe that he had a good life, even though it was full of suffering, if, for example, he thinks that his life was well spent in the steadfast pursuit of a valuable goal.

[4] With some activities, engaging in them in the spirit they require for success includes enjoying the activity while it lasts. But this is not always the case. On the other, objective, hand, they all tend to include welcoming events which do not originate with the agent (gifts, affection bestowed by friends, etc.). Success may be foiled not only by failure of one's own action but also by the absence of appropriate response from others.

[5] These remarks may contradict the understanding of identification with one's actions and tastes powerfully, and influentially, argued for by H. Frankfurt (see e.g., chs. 5, 7, and 12 of *The Importance of What We Care About* (Cambridge: Cambridge Univ. Press, 1988)). Another

Does this account ignore the value of passive pleasures, such as lying on the beach in the sun? It does not, for a reason which is often overlooked. Not all pleasures contribute to one's well-being. The thought that they do is a result of a belief that, if pleasures are intrinsically good, valuable, *qua* pleasures, then they must contribute, however minutely, to one's well-being. In its simplest form this reflects a simple aggregative view of well-being, made popular by crude versions of utilitarianism. More sophisticated versions will avoid simple aggregation, but will insist that anything good which happens to a person must contribute to that person's well-being. I doubt that that is so. I stretch myself on the beach and enjoy the warmth of the sun, I see a pretty rose, and enjoy the sight. My life is not better or more successful as a result. It is different if I am a beach bum, or a rose-grower (or just a rose- or flower-lover). But in that case the passive pleasure fits in with my activities, I am the sort of person who will make sure that there is room in his life for these pleasures. In that case the occasional pleasure contributes (if it does) to my well-being because it contributes (a tiny bit) towards the success of activities I am set upon. If I have no interest in sun on the beach or in flowers, these pleasures, while being real enough and while being valuable as pleasures, do not contribute to my well-being. They have no bearing on my life as a whole.[6] But is not the smell of a rose the same for a flower lover and for one who takes pleasure in it but is not a flower lover? It is and it is not. The olfactory bodily sensation which is pleasurable is the same, but the pleasure is different for it has a meaning in the life of the flower lover which differs from its meaning in the life of the one who is not. That difference makes it reasonable to regard the pleasure as active in one case and passive in the other. It is active where it meshes with one's general orientation in life.

We need, I am suggesting, a way of relating pleasurable episodes to life as a whole, or else, good as they are, they do not affect people's well-being, which is a matter of how they fared in their life as a whole. Not everything which happens in the course of one's life, not even every good thing,[7] is relevantly connected to how one's life goes. I am not sure how the required connection should be stated. It is reasonable to suppose that the connection obtains if an event temporally dominates one's life, as in the case of a chronic and painful illness. Another connection is when an episode fits in

respect in which the above seems at odds with his view is that I am not assuming that whole-heartedness has one manifestation, say in the form of a second-order desire to have certain tastes or projects. Resentment, self-hate, pathological self-doubt are all different psychological phenomena, any one of which negates whole-heartedness. Moreover, there is no finite and informative list of such phenomena. More can emerge with the development of human pathology.

[6] This does not betray my refusal to endorse the superior value of comprehensive activities as such.

[7] Or bad. I continue to refer exclusively to goods only for reasons of convenient exposition.

with a larger activity which does have a dominant role in one's life. The remarks above assume that that is the normal connection. If so, episodes of passive pleasures normally matter only if they fit in with one's active concerns and plans.[8]

Do we not need certain things—food, warmth, health, absence of pain, etc.—for our survival and physical comfort, and is not the provision of those goods a contribution to our well-being independent of its contribution to any activity we engage in? I think not. The provision of the goods necessary for survival and physical comfort is good instrumentally, in that their absence has a disabling effect. In extremes it makes valuable activities impossible altogether, leaving the possibility of vegetative existence only. In less extreme cases it merely restricts the range of activities one is capable of, perhaps forcing the struggle against one's illness or pain to be one of one's dominant activities. For these reasons these goods are instrumentally invaluable. But are they intrinsically valuable? The answer seems to depend on whether there is value in vegetative existence. I believe that there is none.

Are there any requirements regarding the range, nature, and distribution of the activities which constitute people's lives, beyond the requirement that they be valuable? Should they tax the potential of the person to the limit? Should they balance between the physical, imaginative, and intellectual aspects of life? As will emerge in the sequel, we need not debate these matters here, as they do not affect the argument of this essay. One important point they remind us of: there are more valuable activities than any person can engage in in a lifetime. This means that very often a person can and must choose which of a range of valuable activities to engage in, and that a part of people's life is devoted to such choices, and the preparations for them. People learn what some of the options are, and what they really amount to, and how to choose between them. It also means that sometimes, if people are frustrated in their activities, they can change and try something else. We put it down to experience, we say as we turn our back on our failures, and try again somewhere else. The boundaries between learning experiences and failures are not sharp ones.

II. DUTIES OF WELL-BEING: THREE BASIC FACTS

One obvious consequence of the fact that well-being consists to a considerable degree of successful activities is that no one can make a success of another person's life. Our duty to protect and promote the well-being of all

[8] Though some exceptions to my statement of the connection between episodes and a life as a whole come readily to mind: consider dissipation through frequently succumbing to episodic pleasures and neglecting what one really cares about. On the other hand, what was said in the text about passive pleasures may be true of some cases of sporadic active pleasure.