

Not Taking Analytics Too Seriously - Book Review;

Sean COYLE, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality*, Aldershot, Ashgate, 2007

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I. Introduction

The book under review proposes a vision of the ethical aspects of legality that is an alternative to that of most contemporary legal theorists. It departs from the methodology and postulates of the analytical jurisprudential tradition and attempts to reconnect law with its moral and political essence, as expressed in concrete life experiences.

II. The Gordian knot

The first chapter introduces a general reflection on the nature of law and legal theory. It begins with a criticism of analytical jurisprudence's focus on abstract conceptual issues, of its morally neutral character and of its purely clarifying aim. According to the author, it divorces jurisprudence from practical institutional realities and renders it both sterile and irrelevant to the practitioner. In the wake of this, he challenges Wittgenstein's view of the philosophical enterprise as mostly concerned with the logical elucidation of concepts and categories, and the core tenets of logical positivism. He also claims that the attachment of philosophers like Hart and Raz to the neutrality of the analytical project is misguided, as he does not believe that theorists can attain such a position without first engaging with substantive issues. Allegedly, the underlying drive to dispel misunderstandings or intellectual confusion and establish meaningful distinctions would rest on the entrenchment of axiomatic ideas and considerations about human nature, which are simply assumed to be unproblematic, whereas an adequate assessment of legal practices would be more readily attained by overtly taking into account people's particular viewpoints.

Subsequently, the author argues that the study of law should be grounded in the analysis of social and political traditions and defends a perspective both more moral and historical, centred on the role played by the legal order in the ethical construction of a given

society and of its conception of the good. In this framework, he sees law as a means to deal with societal tensions or conflicts and to consolidate a specific set of values and ideals through their institutionalisation. The rule of law is then conceived as the embodiment of those ideals. From this standpoint, legal positivists would be concerned with the neutrality of the legal order between competing visions of the good, the determinacy of legal norms and the protection of limited spheres of liberty, wherein individuals can pursue their own projects and live their preferred way of life. Contrastingly, so-called ‘idealist’ thinkers would aim at the rational determination -based on a specific view of humanity and justice- of a common set of (shared) values, which are then collectively applied to all people, independent of their personal interests and inclinations.

While contemporary jurisprudence mostly highlights the divergences between legal positivism and ‘idealism’ and the on-going debate between their respective proponents, the two positions share common metaphysical origins. In the sense that they disconnect moral questions from historical circumstances, both approaches are deemed to be manifestations of a ‘protestant’ ethics, modernity’s individualism, and the progressive replacement of Aristotelian by Kantian theses. Morality derives directly from the need to reconcile reason with autonomy; be it through the exercise of free will and individual choice, which leads to pure subjectivism, or (alternatively) the discovery of abstract principles that transcend particular experiences. Namely, it is tightly linked to either voluntarism or rationalist postulates, both of which are upshots of Kant’s theory. In any event, human agency is conceived as ‘unconditioned’ by the concrete context in which it evolves and legal analysis becomes disconnected from historical or practical contingencies.

The second chapter, entitled “reason, will and law”, develops in more details this last point and uncovers the intellectual origins of modern legal thought. To begin with, law is defined as an historical phenomenon, grounded in concrete institutional practices, with the result that competing understandings of legal concepts and categories necessarily mirror changes in social concerns and political beliefs. In this view, conceptual clarification and theoretical coherence are only given a marginal importance in the attempt to uncover the nature of a legal order and leave place to a reflective immersion in contextual applications. Hence, it recommends a return to the classical identification of practical wisdom with knowledge of the good obtained through its realisation in ordinary life. Departure from this Aristotelian approach is explained by developments in the history of ideas.

The religious conflicts characteristic of the early modern age, the progressive decline of the influence of theology over philosophy, and the development of a secular interest for the individual exploded the previously common moral framework. The presence of tensions and disagreements led, first, to the recognition of a plurality of means of reaching the good and, in a second time, to the identification of incommensurable visions of the good itself. As a result, seventeenth century natural lawyers like Grotius started to apply to ethics and legal theory rigorous scientific standards of analysis, which are detached from pragmatic realities and transcend social contingencies. This led, in turn, to the identification of legal rules with universal moral imperatives; to the Humean dichotomy between empirical facts and values or normative judgements; and, ultimately, to the distinction between, on one hand, justice or the right and, on the other hand, ‘virtue’ or the good. In this sense, both legal positivism and ‘idealism’ respond to the perpetuation of a search for social stability in the mist of disputes over what constitutes the good life. And they provide constructivist answers to the challenge posed by the impossibility to attain it by mere cognition.

III. The ‘idealist’ thread

The third chapter on “doctrinal scholarship and the science of right” dwells on the rationalist or ‘idealist’ stem of modern theory. It highlights its attachment to the notion of ‘right’ and its ordering of a patchy and chaotic bunch of rules and precedents into an organised set of subjective rights, reflective of a more general concern for justice. The author does not merely see legal rules as the expression of societal values and conscious decisions. They would also embody implicit -and, sometimes, unintentional- shifts of ideological paradigms. Accordingly, they constitute the end product of a complex historical process, whose examination furthers the understanding of the current system. After criticising once again the analytical attachment to a scientific methodology and optimism about the progressiveness of abstract jurisprudential thought, the author goes into a fuzzy and wholly inconclusive study of the essence of legal rights.

He starts from Hohfeld’s tetra-partite division of rights into claims, liberties, powers, and immunities. Then, he summarises in a sketchy fashion the debate between the ‘benefit’ or ‘interest theory’ and the ‘will’ or ‘choice theory’ of rights. He describes both conceptions as parallel efforts to unify Hohfeld’s four elements into a single coherent concept. And he

stigmatises their common lack of focus on morality, political controversies and concrete legal reality, before refusing to further engage into a discussion of the (dis-)advantages of each. Instead, he lingers at length on the historicity of the notion of subjective right and its emergence under the twofold and rival pressure of positivist and 'idealist' thinkers. After a short digression on Hart's point about the emptiness and formalism of equality and its connection to a rule-based view of justice, that he labels 'utilitarian', he digs into the antique and modern roots of the idea of right and its association with doctrinal scholarship.

IV. The positivist thread

The fourth and fifth chapters deal with the competing jurisprudential outcome of modernity; in a word, legal positivism. From the start, positivism is depicted as a "statist" understanding of law, which conceives it as "a product of human artifice and the expression of deliberately chosen goals and policies" [p. 65]. The confines of the private domains of liberty are determined entirely by state authorities and left at the mercy of their whims and discretion. The impossibility of grounding the rule of law in a set of externally imposed dictates leads inescapably to a split between the validity and legitimacy of legal norms. In this perspective, legal theory purports to reconcile the purely posited character of positive rules with their aspiration to systematic principled organisation. The ensuing concentration on adjudication as *the* forum where issues of legitimacy are discussed seriously narrows the scope of the doctrinal enquiry. Accordingly, Bentham's version of positivism relegates legal doctrine to the secondary position of a merely descriptive exercise. And he only endorses the authority of legislative texts and their re-statement by courts and tribunals as relevant ascertainable sources of law.

The author traces back the origins of this more formalist approach to law to the philosophy of Hobbes. Whereas Grotius and Locke ground law in basic natural rights, Hobbes defines the two concepts in opposition to each other. If one bears in mind his methodological individualism and his (much more voluntarist) perception of the good as what is actually desired, this constitutes an interesting paradox. Subsequently, Hobbes dissociates legal rules from substantive claims grounded in human nature and shared moral concerns. They simply aim at maintaining social peace and order in the face of irreducible conflicts of values, interests and preferences. However, because of their inherent indeterminacy, abstract legal norms fail to provide the certainty required to reach uncontroversial decisions in concrete

instances and build an encompassing social agreement. In the absence of a common language and understanding of the world, conflicts are then simply transposed from the level of rule-making to that of judicial interpretation.

Alternatively, social ordering might evolve from rule-based neutrality and the allocation of spheres of liberty where individuals can bring about their clashing conceptions of the good. Yet, the author also dismisses this solution on account of the alleged impossibility to determine one's own vision of life independently from social and legal rules. In its place, he suggests turning Hobbes' justification of the *Leviathan* up-side-down, as a protection of already existing shared moral ideals against their explosion into subjectivist claims and ensuing chaos. And he further grounds his revisionist reading in the assertion that any system of posited rules -be it statist or not- entails the entrenchment of moral positions in social and political practices. In view of that, the function of law becomes the accomplishment of some specific collective goals. This obviously contradicts Hobbes' epistemology and the formalism of his brand of legal positivism.

In the next chapter, the author tackles "the changing face of positivism" in the period separating Hobbes' *Leviathan* from Hart's analytical masterpiece, *The Concept of Law*, and its growing remoteness from metaphysical questioning. The search for the concrete specification of legal rules is translated in the dichotomy between 'black letter' (common) law and equity. The latter branch appears to be tied to reason, coherence, the elements of justice embedded in posited rules and the historical pedigree of norms. In this regard, the publication of *The Concept of Law* revolutionises the classical understanding of legal positivism. In stark contrast to Hobbes and Bentham, Hart does not consider rules as mere posits but rather as normative practices grounded in reflective social attitudes or shared standards of criticism. As such, he reinstates legal rules in their broader societal context; which the author considers the most important contribution of his particular brand of legal positivism.

The sixth chapter, called "the limits of legal positivism", attempts to give a revisionist account of Hart's theory in line with the author's underlying vision and expectations about jurisprudence. It puts forward that, in order to effectively ground legal norms in actual practice -allegedly the main insight of his theory-, Hart should abandon the idea that the validity of legal rules is conditioned by their respect of a rule of recognition. More specifically, it criticises the distinction between an internal and external viewpoint; the

acknowledgement from the external position of recognition processes, leading to “quite stark and implausible divisions between law and morality” [p. 112]; and the voluntarism implied in the acceptance of rules from the internal standpoint. Instead, it is suggested that the application and corollary interpretation of the law do not depend on a purely logical or formal process since they cannot be detached from moral considerations. Even the existence of a common language needs an explanation from this perspective. Besides, due to positivism and idealism’s shared sweeping divide between cognition and construction, legal positivism is not fully isolable from a form of idealism, where internal coherence is becoming a necessary attribute of the notion of legality. And the legal doctrine will tend to oscillate between the two, depending on the political circumstances prevailing at the time.

These criticisms and reconstruction of Hart’s theory miss altogether the point that moral elements can be part of the rule of recognition, even though it need not necessarily be the case. Hence, legal validity is a question internal to a given legal order, in contrast to its legitimacy -which is to be determined ‘from the outside’ by meta-legal criteria-, and this allows for a determination of what is actually the law independent of its ethical or practical value. However, this does not mean that the determination of legality issues is automatically divorced from ethical considerations or that moral concerns are prevented from playing a significant role in assessing the validity of rules, as long as they are included in the rule of recognition. Besides, Hart accepts that moral values permeate all legal orders and requires valid legal systems to include some elements of natural law.¹

V. Beyond analytics?

The seventh chapter endeavours to go “beyond positivism and idealism”. According to the author, contemporary legal theory is nearly exclusively concerned with the soundness of legal positivism, broadly defined as the descriptive analysis of law’s essence and distinctive features from a neutral (non-moral) standpoint. He charges both positivists and their ‘idealist’ critics with similar shortcomings; namely, their allegedly unwarranted attachment to voluntarism, overall explanations and generalisations. In contrast, he proposes to uncover elements of legal practice that contradict these common suppositions. He contests the mere possibility of liberal neutrality on account of the necessity to ground individual rights in

¹ **H.L.A. HART**, *The Concept of Law*, Oxford, Clarendon, 1961, Chapter 9, especially pp. 189-195; 2nd ed., 1994, pp. 193-200.

shared practices and institutional arrangements, whose preservation cannot be guaranteed by purely neutral interventions. As a result, a publicly determined joint vision of the good would inescapably emerge from rights theories. Moreover, the quest for consistency would lead to privilege some perspectives and override others, at a cost for tolerance. Counter to this approach, the author suggests that legal thought and doctrine stop focusing on abstract unification and interpretation and be rather concerned with the elucidation of a set of principles relative to specific instances.

The penultimate chapter deals with the relationship between “liberal politics and private law”. The author defends that, whereas positivist and ‘idealist’ legal theories mainly exhibit a public law structure, the common law mostly mirrors horizontal transactions and private law values at odds with notions of communal good. Then, he dwells back into the supposed failings of rights theories. He quickly brings up the controversy between proponents of the ‘interest’ and ‘choice’ variants and acknowledges the commitment of most ‘idealist’ legal thinkers to the interest theory of rights; hence, their emphasis on “passive benefit-receipt” rather than active self-direction and autonomy [pp. 148-149]. Accordingly, his criticism of right-based theories elaborates on the core tenets of the interest conception; such as the evaluation of entitlements against the wider background of a general theory of justice, their collective determination through political processes, their balancing, and an inherently paternalistic attachment to an allegedly objective vision of individual well-being. In addition, he refers to the Rawlsian attempt at creating a just or equal society from the hypothetical expectations of faceless actors as a prime example of this brand of self-styled individualism, even though *-pace* the author- Rawls’ ethics clearly are not right-based.

For sure, if such a contestable perspective is adopted, judgements about rights become counterfactual assertions divorced from people’s personal assessment of their own interests, where claims to autonomy are subordinated to considerations of welfare. They further ignore the presence of disagreements and conflicting ethical views in favour of all encompassing theories of the good, with the result that “no aspect of individual lives is in principle off limits to public scrutiny and regulation” [p. 151]. And this precisely undermines the main function of liberal rights; that is, the protection of individuals from intrusive interferences by the state and the preservation of a private sphere of control. Indeed, for classical liberal philosophers, rights are *owned* by their holder and tightly connected to the idea of personal enterprise. Private law, conceived as a type of political association, fits this conception by its

adaptability, its ability to answer the specific peculiarities of each case and its resistance to social engineering. Whereas public regulation regards people as the passive recipients of collectively determined benefits, private law allows a decentralised web of rules to settle individual interactions.

Hence, the author admits that the will theory evades some of the criticisms he levels against right-based philosophies, in the sense (and to the extent) that it considers legal rights as instruments of private law, which can be waived by the right-holder. However, the concession made is disputably limited and passing. Whilst the key characteristics of interest-rights theories obviously undercut the subjectivism, the pluralism and the respect of individual freedom traditionally associated with liberalism, the same cannot be said of choice-rights theories; at least, without a parallel deconstruction of their largely opposite core premises. Yet, the author assumes without any more investigation into the matter that all right-based theories present the same damaging effects and internal contradictions, and that this holds independent of the specific features exhibited by the concept of rights they espouse. His subsequent indiscriminate and across the board dismissal of right theories for their abstraction from people's actual experiences, preferences and desires is even more puzzling. Certainly, it does not apply to theorists for whom the idea of rights lies precisely in individual self-sovereignty and the construction of one's own life and meaning through purely personal projects.

Finally, the last chapter investigates "the moral nature of law" and its connections to governance standards and the principle of legality. While this question is often portrayed to be tied to the appropriate extent of public decision powers, the author links it to the existence of shared social understandings of a more private nature. He opposes the Kantian ideas that the human mind structures and processes experience to attain knowledge and that free will creates moral reality. Instead, he suggests following an Aristotelian approach, where perception of the particulars allows a comprehension of the universal and the formulation of ethical judgements is contextualised. This negates the distinction between objective and subjective moral understandings, as individuals are constructed by their social surroundings at the same time as they construct them. Accordingly, procedural or internal questions of legality cannot be dissociated anymore from the substantive (external) ideals to which law is giving a form. From this standpoint, an 'a-contextual' formulation of legal rules and principles would distort important aspects of life in society. The entrenchment of a set of fundamental rights, against a

background of moral fragmentation and plural visions of the good, is considered to be a delusion. Political philosophy is grounded in metaphysics rather than epistemology. Law is not derived from the individual will but from a common faith in social institutions. And the rule of law is not defined as government *by* law, but *according to* law.

VI. Cutting the knot

The book under review defends a new perspective on jurisprudence, at odds with contemporary legal theories rooted in the analytical tradition. Instead of focusing on the internal discussions and debates among analytic philosophers, the author chooses to underline their commonalities in order to criticise the entire project and offer an alternative reading of the law. He puts forward a form of doctrinal analysis closely tied to the historical development, peculiarities and practical applications of different legal systems. In addition, he emphasises how this novel approach fits particularly well the specificities of the United Kingdom's legal order; above all, its preference for conflict resolution through private law mechanisms, and its attention to the concrete circumstances and idiosyncrasies of the cases it needs to settle. For this purpose, he proposes to return to a pre-modern vision of legality and morality. Accordingly, he substitutes to modern -mostly Kantian- ethics an Aristotelian conception of moral philosophy, whose foundations are metaphysical rather than epistemological.

The originality of this line of attack is merit worthy. It usefully highlights the (often neglected) moral and political dimensions of the rule of law. Besides, it uncovers the tensions, contradictions and inadequacies present in the work of many legal theorists. However, it is not free of shortcomings either. Although the enterprise undertaken is certainly interesting and commendable, the answers to several of the questions raised would benefit from a more in-depth treatment and a greater refinement of the issues and concepts tackled. Aside from the inadequacies already mentioned above, unnecessary repetitions of the same few points -over and over again- across chapters and sections give to the general structure of the book a rather messy and shaky feel. More fundamentally, hurling together the entire analytical jurisprudence tradition under the labels of 'positivism' and 'idealism' or even under the all-encompassing flag of modernism lacks both accuracy and sophistication. It demonstrates a clear absence of insight into the details of the different theories that claim to use an analytical approach and largely neglects the stark oppositions that tell them apart. Surely, they are not

easily blended into such a gross amalgam. In particular, some of the arguments used by the author are simply rehashing criticisms levelled by analytical philosophers between themselves. Hence, their pre-modernist or purely Aristotelian character is at least contentious.

For example, Dworkin who is pigeonholed into the ‘idealist’ camp [p. 14, note 29] sharply criticises what he calls the Archimedean position of Hart and Berlin; that is, their attachment to a purely neutral, external and ‘*meta*’ perspective. His straightforward denial of the mere possibility to adopt a neutral or non-evaluative standpoint and of the logical positivist take on epistemology is undoubtedly reminiscent of the present author’s attacks.² Another unacknowledged borrowing concerns the critique of the Rawlsian vision of the individual as distinct from her personal talents, whose talents are then supposedly becoming the object of society’s ‘legitimate’ appropriation and re-allocation. This objection has been notoriously advanced by Nozick, in order to show the illiberal nature and internal inconsistency of *A Theory of Justice*,³ and later retaken by Sandel with the aim of driving Rawls altogether away from the liberal paradigm.⁴ Incidentally, Sandel’s entire deconstruction of the Kantian deontological project and his characterisation of the liberal individual as a disembodied and unencumbered self resonate along the same general lines as the author’s. More broadly speaking, Sandel and other communitarians also call for a return to an historical, socially contingent and concretely grounded conception of humanity, justice and the law. Yet, communitarianism is not even mentioned once in the book, apart from a passing reference to the work of Walzer [p. 135].

A deeper problem lies in the demarcation line the author draws between positivism and what he calls ‘idealism’, and the underlying epistemological rationale he attributes to each category. Whereas the term ‘idealism’ does not constitute a perfect fit for most rationalist theories, some versions of legal positivism are simply irreconcilable with (individualistic) voluntarist premises. Kelsen and Austin’s theories illustrate perfectly this type of

² **R. DWORKIN**, “Do Values Conflict? A Hedgehog’s Approach”, *Arizona Law Review*, 2001, pp. 251-260.

R. DWORKIN, “Hart’s Postscript and the Character of Political Philosophy”, *Oxford Journal of Legal Studies*, 2004, pp. 1-37.

R. DWORKIN, “Objectivity and Truth: You’d Better Believe It”, *Philosophy and Public Affairs*, 1996, pp. 87-139.

See also: **A. RIPSTEIN**, “Introduction: Anti-Archimedeanism”, in **A. RIPSTEIN**, *Ronald Dworkin*, Cambridge, Cambridge University Press, 2007, pp. 1-21; who considers that his rejection of Archimedean positions is the main unifying thread in his writings.

³ **R. NOZICK**, *Anarchy, State, and Utopia*, New York, Basic, 1974, Chapter 7, Section 2, pp. 183-231.

⁴ **M. SANDEL**, *Liberalism and the Limits of Justice*, Cambridge, Cambridge University Press, 1982; 2nd ed., 1998; pp. 77-79.

incompatibility. On the other hand, some thinkers bridge the gap by identifying rational choice with the requirement of explicit personal consent. James Buchanan's reliance on Pareto optimality and unanimity rule supplies a radical example of such an interconnection.⁵ But most classical liberals link tightly the two. More specifically, the classification of all right-based theories into the rationalist faction is highly problematic. Hart (for one), whose positivism can difficultly be contested, has a largely right-based approach to political controversies, has written more on subjective rights than on any other topic, and is even at the origins of the contemporary version of the 'choice' or 'will theory' of rights. Although the author tries to back up his controversial categorisation in several instances, he neither argues it in depth nor succeed in providing a convincing justification for it.

Typically, in an effort to substantiate his claim and demarcate rule-based from right-based conceptions of law, he suggests that, "whereas it is possible to see a body of imposed rules as the attempt to realise a stable social framework for the pursuit of private interests and goals where no common perspective on social good exist, a legal order constituted by rights is naturally thought of as identifying shared ideals through the articulation of the boundaries between competing rights" [p. 4]. No further insight is offered into how and why subjective rights or their limits would be *naturally* perceived as the expression of *shared ideals*. Libertarian philosophers, who challenge the mere possibility of a universally shared vision of the good and denounce attempts at the superimposition of any such thing on the individual will as a breach of personal autonomy, are more often than not right-based theorists. And they precisely define rights as private 'spheres of liberty'! So, one ends up wondering on which side of Coyle's divide this type of rights theorising would fall.

Besides, whereas the benefit or interest theory of rights is strongly concerned with the weighting and balancing of competing rights, the alternative conception of rights as choices is grounded in the co-possibility of the set of rights it recognises and aims precisely at an absence of conflicts in their enforcement.⁶ In such a view, rights never compete. Evidently,

⁵ **J. M. BUCHANAN**, "Contractarian Presuppositions and Democratic Governance", in **G. BRENNAN and L.E. LOMASKY**, *Politics and Process: New Essays in Democratic Thought*, Cambridge, Cambridge University Press, 1989, pp. 174-182.

J.M. BUCHANAN, *Freedom in Constitutional Contract: Perspectives of a Political Economist*, College Station, Texas A&M University Press, 1977, p. 113.

J.M. BUCHANAN, *The Limits of Liberty: Between Anarchy and Leviathan*, Chicago, University of Chicago Press, 1975, especially pp. 38-41, 82-84 and 151.

⁶ **R. NOZICK**, *Anarchy, State, and Utopia, o.c.*, especially pp. 92, 166 and 238.

the interest theory displays strong rationalist features and assumes a republican view of the polity constructed around shared values. By opposition, the will theory clearly sides with voluntarism, liberal neutrality and positivism. And it portrays rights as the embodiment of a general principle of equal liberty over oneself and portions of the outside world. Hence, the author might have usefully confined his claim on the ‘idealism’ of right-based theories to the interest variant. Alternatively, he might have wanted to explain why the benefit theory reflects better the core of the concept of subjective right for the purpose of his investigation. Yet, far from dismissing choice rights, he contends that both conceptions are equally reflective of a unification of Hohfeld’s four aspects of the term and equally wanting in their tackling of legal reality, before explicitly refusing to dwell more on the matter or side with either of the parties to that debate [pp. 42-44]. Whereas he eventually admits that some of the criticisms raised need to be qualified in relation to the will theory, he remains reluctant to acknowledge the full consequences of this concession [pp. 148-160].

VII. Conclusion

To conclude, by dissociating himself from the largely prevalent analytical project, the author casts some critical light on the common assumptions and axioms on which contemporary jurisprudence is built. He embarks in a totally opposite theoretical enterprise, more akin to a form of applied legal philosophy. While this provides a novel and interesting alternative to most current classics in the field, the book would benefit from a more detailed and in depth analysis of some of the theories under consideration.

N.E. SIMMONDS, “Rights at the Cutting Edge”, in **M.H. KRAMER, N.E. SIMMONDS and H. STEINER**, *A Debate over Rights: Philosophical Enquiries*, Oxford, Clarendon, 1998, pp. 113-232, at pp. 181-182.

H. STEINER, *An Essay on Rights*, Oxford, Blackwell, 1994, pp. 74-101.

H. STEINER, “The Structure of a Set of Compossible Rights”, *Journal of Philosophy*, 1977, pp. 767-775.

H. STEINER, “Working Rights”, in **M.H. KRAMER, N.E. SIMMONDS and H. STEINER**, *A Debate over Rights, o.c.*, pp. 233-301, at pp. 265-274.