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CCBC Legal Studies – Business Law I

An OER Textbook for MNGT 140

B. Rights Theories

Rights

An ethics based on rights is similar to an ethics based on duties, which we will cover later. In both cases specific principles provide ethical guidance for your acts, and those principles are to be obeyed regardless of the consequences further down the line. Unlike duties, however, rights-based ethics concentrate their force in delineating your possibilities. The question isn't so much *What are you morally required to do*; it's more about defining exactly where and when you're free to do whatever you want and then deciding where you need to stop and make room for other people to be free too. Stated slightly differently, *duties tend to be ethics as what you can't do, and rights tend to be about what you can do.*

My Property, My Religion, My Nonprofit Organization, My Health Care, My Grass

Let's look at Eddy Lepp again. Charles Edward "Eddy" Lepp is in jail now, in a prison not too far away from the site of the business that got him in trouble: Eddy's Medicinal Gardens and Ministry. What was Eddy Lepp, the gardener and minister, up to on his twenty-acre property near a lake in California, about a hundred miles north from San Francisco? Here are the highlights:

- **Ministry.** Lepp claims—and there doesn't seem to be anyone who disputes him—that he's an authentic Rastafarian reverend.
- **Rastafarianism.** Developed over the last century in Africa and the Caribbean, the religion works within the basic structure of Christianity but contains important innovations. Haile Selassie I was the emperor of Ethiopia from 1930 to 1974 and, according to the faith, was also the reincarnation of Jesus Christ. Further, marijuana—called *ganja* by believers—accompanies religious meetings and ceremonies; it brings adherents closer to God.
- **Lepp's Medicinal Gardens.** In fact, this wasn't a garden so much as a collective farm. Lepp oversaw the work of volunteers—their numbers totaling about two hundred—and did some harvesting and planting himself. Many of the farm's marijuana leaves were smoked by the 2,500 members of his zonked-out church as part of Rastafarian celebrations and meetings, and the rest was, according to Lepp, distributed to individuals with serious health problems.
- **Marijuana and health care.** Studies indicate that in some patients marijuana may alleviate nausea and vomiting, especially as connected with chemotherapy. There's also a list of further symptoms and maladies the drug could relieve, according to some evidence. It should be noted here that many suspect the persons conducting these studies (not to mention the patients receiving the testing) are favorably predisposed toward marijuana in the first place, and the prejudice may contaminate

conclusions. What's certain is that from a strictly medical perspective, the question about marijuana's utility remains controversial. Among those who are convinced, however, smoking is a good remedy. That's why in California patients have been granted a legal right to possess and use marijuana medicinally, as long as they've got a doctor's approval. Unfortunately for Lepp, California law can't bar federal prosecutions, and it was the US Drug Enforcement Administration from all the way out in Washington, DC, that eventually came after him. (Egelko and Larson)

About retirement age now, Eddy Lepp is one of those guys who never really left Woodstock. Before being incarcerated, he slumped around in tie-dyes and jeans. He liked wearing a hat emblazoned with the marijuana leaf. Out on his semirural farm, he passed the days smoking joints and listening to Bob Marley music.

Everyone seems to like the guy. A longtime activist for the legalization of marijuana, he's even something of a folk hero in Northern California. At his sentencing, the crowd (chanting "free Eddy!") spilled out into the courthouse hallways. The judge didn't seem to mind the spectacle, and she went out of her way to say she didn't want to hit him with ten years of jail time, but federal guidelines gave her no choice. Now there's talk of a pardon.

Like Bernie Madoff, Lepp was touched by cancer. Madoff's son Andrew was stricken and so was Lepp's wife. She died. Also, like Madoff, Lepp was a businessman. Madoff made millions and lived in luxury while robbing investors; Lepp made enough to scrape by from his ministry and farming enterprises.

What's a Right?

One definition of a **right** in ethics is *a justified claim against others*. I have the right to launch a gardening business or a church enterprise or both on my property, and you're not allowed to simply storm in and ruin things. You do have the right, however, to produce *your own* garden company and church on your property. On my side, I have the right to free speech, to say whatever I want no matter how outrageous and you can't stop me. You can, however, say whatever you want, too; you can respond to my words with whatever comes into your head or just ignore me completely. A right, in sum, is something you may do if you wish, and others are morally obligated to permit your action.

Duties tend to be *protective* in nature; they're about assuring that people aren't mistreated. Rights are the flip side; they're *liberating* in nature, they're about assuring that you're as free as possible.

Because rights theory maximizes choices in the name of ethics, it's not surprising that Lepp built his court defense on that ground. Lepp fought the law by maintaining that his medical gardens business and church operations involved *his* land and *his* religion. It wasn't that he had a right to grow pot or pray to a specific God; that had nothing to do with it. The point is he had a right *to do whatever* he wanted on that land, and *believe in whatever* he wanted in his mind. That's what rights are about. As opposed to duties that fix on specific acts, rights ethics declares that there are places (like my land) where the acts don't matter. As long as no one else's rights are being infringed on, I'm free.

Finally, duties tend to be community oriented: they're about how we get along with others. Rights tend to center on the individual and what he or she can do regardless of whether anyone else is around or not.

What Are the Characteristics of Rights?

English philosopher John Locke (1632–1704) maintained that rights are

- **Universal.** The fundamental rights don't transform as you move from place to place or change with the years.
- **Equal.** They're the same for all, men and women, young and old.
- **Inalienable.** They can't be taken, they can't be sold, and they can't be given away. We can't *not* have them. This leads to a curious paradox at the heart of rights theory. Freedom is a bedrock right, but we're *not* free to sell ourselves into slavery. We can't because freedom is the *way* we are; since freedom is part of my essence, it can't go away without me disappearing too.

What Rights Do I Have?

The right to life is just what it sounds like: Lepp, you, and I should be able to go through our days without worrying about someone terminating our existence. This right is so deeply embedded in our culture that it almost seems unnecessary to state, but we don't need to stretch too far away from our time and place to find scenes of the right's trampling. Between the world wars, Ukraine struggled for independence from Joseph Stalin's neighboring Russia. Stalin sealed the borders and sent troops to destroy all food in the country. Millions died from starvation. Less dramatically but more contemporaneously, the right to life is cited as an argument against capital punishment.

The right to freedom guarantees individuals that they may do as they please, assuming their actions don't encroach on the freedom of others. In a business environment, this assures entrepreneurs like Lepp that they may mount whatever business operation they choose. Lepp's garden and ministry were surely unorthodox, but that can't be a reason for its prohibition. Similarly, *within* a company, the right to freedom protects individuals against abuse. No boss can demand more from an employee than what that employee freely agreed—frequently through a signed contract—to provide.

On the other side, however, there are questions about how deeply this basic right extends through day-to-day working life. For example, the freewheeling Lepp probably wasn't too concerned about the clothes his volunteer workers chose to wear out in the garden, but what about clothes in Madoff's investment house? He was serving wealthy, urban clients in suits and ties. What would *their* reaction be to a junior investment advisor just out of college who shows up for a meeting in a tie-dye and jeans? Some clients, it's safe to say, would head for the exit. Now, what recourse does boss Madoff have when the casual employee says, "Look, it's a free country; I can wear whatever I want"? Within a rights theory of ethics, it must be conceded that the employee is correct. *It's also true*, however, that Madoff has rights too—specifically, the freedom to fire the guy. What can be taken from this is that, as a general rule, the *enabling side* of a rights ethics is that you can do whatever you want, but the *limiting and controlling side* is that the same goes for everyone else.

From the right to freedom, other rights seem to derive naturally. The right to free speech is tremendously important in the commercial world. Lepp's messages to his Rasta flock may have provoked skepticism in some listeners, but no one doubts that he had a right to voice his ideas. The same goes for Madoff's exuberant claims concerning his investing strategy. Crucially, the same also goes for those on the other side of Madoff's claims; the same freedom Madoff enjoyed also allowed whistle-blowers to answer back that it's *impossible* to legitimately realize such constant and high profits. In fact, in the case of Madoff's investment company, whistle-blowers *did* say that, repeatedly. No one listened, though. The right of free speech doesn't guarantee a hearing.

The right to religious expression also follows from basic freedom. It guaranteed Lepp the space he needed to pioneer his particular brand of gardening Rastafarianism in Northern California. His is, obviously, a weird case, but the right works in more traditional workplaces, too. Emily Bazar (2008) reported a case

where Muslim workers were fired from their jobs in several meatpacking plants in the Midwest because they left the production line in the middle of the day without authorization to go outside and pray. The workers' response? They filed a lawsuit claiming their right to religious expression had been violated.

No doubt it had been.

But the company's response is also weighty. According to the article, "The problem with the Muslim prayer request is that it's not one day or annual, it's every day and multiple times. Further, those times shift over the course of the year based on the sun's position."

The result, according to the company, is that scheduling becomes very difficult, and those who aren't Muslim find it nearly impossible to keep working when they're getting abandoned so frequently during the day. Here we're confronted with a very basic conflict of rights. While no one doubts that freedom exists to practice a religion, isn't it also true that the company—or the company owners if we want to cast this in personal terms—have a right to set up a business in whatever manner they choose, with breaks scheduled for certain times and worker responsibilities strictly defined? In the end, the question about Muslim workers leaving the work floor to pray isn't about one *kind* of religion or another; it's not Christians against Muslims or something similar. The question is about which right takes precedence: the owners' right to set up and run a company as they wish or the employees' right to express their beliefs how and when they choose.

From an ethical perspective—which doesn't necessarily correlate with a legal one—the resolution to this dilemma and any clash about conflicting rights runs through the question of whether there's a way to protect the basic rights of *both* groups. It runs that way because rights are fundamentally about that, about maximizing freedom. In this case, it seems that firing the workers *does* achieve that goal. The owners' initiative inside their company is protected, and the workers are now able to pray when they desire.

To be sure, other ethical approaches will yield different outcomes, but in the midst of rights theory where individual liberty is the guiding rule and the maximization of freedom is the overriding goal, it's difficult for other concerns to get traction. So it may be that the *community as a whole* is better served by looking for a solution that allows Muslims to maintain their prayer schedule *while also* allowing the plant to continue functioning in a normal way. Even if that's true, however, it's not going to affect a rights-theory resolution very much because this kind of ethics privileges what *you* and *I* can do over what *we* can do together. It's an ethics of individualism.

The right to pursue happiness sits beside the right to life and the right to freedom at the foundation of rights ethics. The pursuit gives final direction and meaning to the broad theory. Here's how: it doesn't do much good to be alive if you're not free, so freedom orients the right to life. It also doesn't do much good to be free if you can't pursue happiness, so the right to pursue happiness orients freedom. That's the organizing reasoning of ethical rights; it's how the theory holds together. This reasoning leaves behind, however, the difficult question as to exactly where the pursuit of happiness leads.

In an economic context, one way of concretizing the pursuit of happiness is quite important: it's our right to possessions and the fruits of our work. What's ours, along with what we make or earn, we have a right to keep and use as we wish. Among rights theorists, this particular right attracts a staunch group of advocates. Called libertarians, they understand liberty as *especially* reflected in the right to dominion over what's ours.

Libertarianism in the Economic World

Lepp wasn't a big-time businessman. His medicinal garden enterprise produced enough income to get him through the day and little more. When he went to court, he needed a public defender (not that it would've made any difference). But the issues he brings forward reverberate through the business world. Here are a few hypothetical scenarios where libertarian ethics comes into play:

- A massive brewery is constructed upstream from farmland and soaks up most of the water to make beer, leaving the downstream farms with almost nothing for irrigation. It's the brewery's land, so can't the owners do what they want with the water running through it? A strong libertarian argument offers a reason to say yes. Even though it's true that others will be severely harmed by the act, an ethics that *begins* with the freedom to have what's mine doesn't buckle before the demands of others. Now, compare this outcome with the guidance offered by Kant's categorical imperative, the idea that any act must be universalized. Within this framework the opposite conclusion is reached because if *everyone* just dammed up the water channeling through his or her land, then the brewer wouldn't even have the choice: no water would be flowing across the land in the first place. So a duty-oriented ethics leads toward a solution that is more favorable for the larger community, where a rights-based perspective leaves more room for individuality but at the cost of the interests of others.
- Bernie Madoff didn't start off rich. His father was a plumber in Queens. Even before launching his Ponzi scheme, he became wealthy by working hard, being smart, and investing wisely. He grew an investment house from scratch to being among the most prominent in New York. His annual income hit the millions even without the Ponzi stuff. Possibly, there was an administrative assistant of some kind there with him from the beginning. She was hired at, say, \$32,000 annually. Years later, Madoff is rich, and she's at \$36,000. She still arrives at work in her beater car while Madoff gets the limousine treatment. Is this fair? A strong libertarian position gives Madoff a reason to say yes. The wealth *did* accumulate from his efforts, not hers. If Madoff hadn't been there the money wouldn't have come in, but, if she'd quit on the first day, he would've hired someone else and the end result probably wouldn't have been much different. The money, in other words, grew because of Madoff's efforts, therefore it's his, and therefore there's no ethical obligation to spread it around. On the other hand, a duty-based orientation would generate concerns about *gratitude* and *respect*. These perennial duties leave room for wealth redistribution. The argument is that Madoff owes the assistant a higher wage not because of her work performance but as a show of gratitude for her contribution over the years. Similarly, the duty of respect for others doesn't demand that everyone be treated equally. It doesn't mean everyone should get the same wage, but it does demand that people be *respected* as equals. This implies taking into account that the assistant's *efforts* were prolonged and significant, just like Madoff's, and therefore she should receive a salary more commensurate with his.

Negative and Positive Rights

The ethics of rights can be categorized as negative rights and positive rights. Negative rights are fundamental. They require others to not interfere with me and whatever I'm doing. The right to life is the requirement that others not harm me, the right to freedom is the requirement that others not interfere with me, the right to speech requires that others not silence me, the right to my possessions and the fruits of my labors requires that others let me keep and use what's mine.

Positive rights, by contrast, are closer to traditional duties. They're obligations others have to help protect and preserve my basic, negative rights. For example, the right to life doesn't only require (negatively) that people not harm me, but it also requires (positively) that they come to my aid in life-threatening situations. If I'm in a car wreck, my right to life requires bystanders to call an ambulance. So if an individual with a rights-based philosophy and an individual with a duty-based philosophy both arrive on a crash scene, they'll do the same thing—just for different reasons. The rights person calls for help to protect the victim's right to life; the duties person calls to fulfill the duty to beneficence, the duty to look out for the welfare of others.

Positive rights can be drawn out to great lengths. For example, the argument is sometimes made that my basic right to freedom is worthless if I don't have my health and basic abilities to operate in the world. This may lead a rights theorist to claim that society owes its members health care, education, housing, and even money in the case of unemployment. Typically, these positive rights are called welfare rights. Welfare, in this context, doesn't mean government handouts but minimal social conditions that allow the members to fully use their intrinsic liberty and pursue happiness with some reasonable hope for success.

The hard question accompanying positive rights is: *where's the line?* At what point does my responsibility to promote the rights of others impinge on *my own* freedom, my own pursuit of happiness, and my own life projects?

Rights in Conflict

The deepest internal problems with rights ethics arise when rights conflict. Abortion is a quick, hot-button example. On one side (pro-life), support comes from the initial principle: a human being, born or not, has a right to life, which may not be breached. On the other side (pro-choice), every person's original freedom over themselves and their bodies ends all discussion. Now, one of the reasons this debate is so intractable is that both sides find equally strong support *within the same basic ethical framework*. There's no way to decide without infringing on one right or the other.

A complementary case arose around Lepp's Rasta religious gatherings. Though many of his neighbors didn't care, there were a few who objected to having what were essentially mini-Woodstocks on the land next door. It was impossible, of course, for Lepp to entirely contain the noise, the smoke from fires, the traffic congestion, and the rest entirely on his property. The question is, when does my right to do what I want on my land need to be curtailed so that your right to dominion over yours isn't soiled?

Broadening further, there's the question about Lepp growing marijuana for medicinal purposes. On one side, a rights theory supports his inclination to grow what he wants on his land and sell the fruits of his labors to other adults for their consenting use. His is a farming business like any other. But on the other side, a theory of rights can extend into the realm of positive requirements. The right to the pursuit of happiness implies a right to health, and this may require government oversight of medical products so that society as a whole may be protected from fraudulent claims or harmful substances. The question of marijuana shoots up right here. What happens when socially sanctioned entities like the US Food and Drug Administration decide that marijuana is harmful and should therefore be prohibited? Which rights trump the others, the negative right to freedom or the positive right to oversee medical substances?

A similar question comes up between Madoff and his investors. A pure libertarian may say that individuals have the unfettered right to do as they choose, so if Bernie Madoff lies about investing strategies and his clients go along with it, well, that's their problem. As long as they weren't *forced*, they're free to do whatever they wish with their money, even if that means turning it over to a charlatan. Again here, however, a broader view of rights theory answers that in the complex world of finance and investment, the right to the pursuit of happiness is also a right to some governmental oversight designed to make sure that everyone involved in the financial industry is playing by a single set of rules, ones prohibiting Ponzi schemes and similar frauds.

Examples multiply easily. I have the right to free speech, but if I falsely yell "fire!" in a crowded theater and set off a life-threatening stampede, what's happening to everyone else's negative right to life and positive right to health? Leaving the specifics aside, the conclusion is that, in general, problems with rights theory occur in one of two places:

1. I have negative rights to life, freedom, and my possessions but they infringe on *your* rights to the same.

2. I have a right to freedom and to do what I want but that right clashes with larger, society-level protections put into place to assure everyone a reasonable shot at pursuing their happiness.

What Justifies a Right?

One justification for an ethics of rights is comparable with the earlier-noted idea about duties being part of the logic of the universe. Both duties and rights exist because that's the way things *are* in the moral world. Just like the laws of physics tell us how far a ball will fly when thrown at a certain speed, so too the rules of rights tell us what ought to happen and not happen in ethical reality. The English philosopher John Locke subscribed to this view when he called our rights "natural." He meant that they're part of who we are and what we do and just by living we incarnate them.

Another justification for an ethics of rights is to derive them from the idea of duties. Kant reappears here, especially his imperative to treat others as ends and not as means to ends. If we *are* ends in ourselves, if we possess basic dignity, then that dignity must be reflected somehow: it must have some content, some meaning, and the case can be made that the content is our possession of certain autonomous rights.

Advantages and Drawbacks of an Ethics Based on Rights

Because of its emphasis on individual liberties, rights theory is very attractive to open-roaders and individualists. One of the central advantages of a rights ethics is that it clears a broad space for you and me and everyone else to be ourselves or make ourselves in any way we choose. On the other side of that strength, however, there's a disadvantage: centering ethics on the individual leaves little space of agreement about how we can live together. An ethics of rights doesn't do a lot to help us resolve our differences, it does little to promote tolerance, and it offers few guarantees that if I do something beneficial for you now, you'll do something beneficial for me later on.

Another strong advantage associated with an ethics of rights is simplicity in the sense that basic rights are fairly easy to understand and apply. The problem, however, with these blunt and comprehensible rights comes when two or more of them conflict. In those circumstances it's hard to know which rights trump the others. In the case of Lepp's business—the Medicinal Gardens—it's hard to be sure when his use of his land infringed on the rights of neighbors to enjoy their land, and it's difficult to know when the health product he offered—marijuana—should be prohibited in the name of the larger right to health for all individuals in a society. Most generally, it's difficult to adjudicate between claims of freedom: where does mine stop and yours begin?

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