This theory offers a convincing and unified account of familiar excusing conditions, such as mistake of fact and duress, and explains our reactions to questions about moral appraisal of very young children, the insane, and victims of hypnosis. It can explain the special critical force which moral judgments seem to have, and it does this without presupposing a form of freedom incompatible with the Causal Thesis. But the theory applies only to what I called earlier the moral version of the free-will problem. A parallel account may, as I will suggest later, have some relevance to the case of criminal punishment, but it does not offer a promising approach to the other problems I have mentioned. The significance of a person’s choices and other subjective responses for questions of economic justice and freedom of thought may have something to do with the fact that these responses reflect what might loosely be called “the quality of the person’s will,” but this is not because what we are doing in these cases is judging this “quality” or expressing attitudes toward it (since this is not what we are doing.) So, in search of an explanation that might cover these other cases, I will look in a different direction.

Lecture 2

1. THE VALUE OF CHOICE

It would have been natural to call these lectures an investigation into the significance of voluntariness. I have spoken of “choice” instead because this term applies not only to something that an agent does — as in “She made a choice” — but also to what an agent is presented with — as in “She was faced with this choice.” It thus encompasses both an action and a situation within which such an action determines what will happen: a set of alternatives, their relative desirabilities, the information available to the agent, and so on. My main concern in these lectures is with the significance of choice in the first of these senses: the moral
significance of the choices people make. In this lecture, however, I will present a theory which exploits the ambiguity just mentioned by seeking to explain one kind of moral significance of the choices people make in terms of the value of the choices they have. I will call this the Value of Choice theory.  

This theory starts from the idea that it is often a good thing for a person to have what will happen depend upon how he or she responds when presented with the alternatives under the right conditions. To take a banal example, when I go to a restaurant, it is generally a good thing from my point of view to have what appears on my plate depend on the way in which I respond when presented with the menu. The most obvious reason why choice has value for me in this situation is simply instrumental: I would like what appears on my plate to conform to my preferences at the time it appears, and I believe that if what appears then is made to depend on my response when faced with the menu then the result is likely to coincide with what I want. This reason for valuing choice is both conditional and relative. It is conditional in that the value of my response as a predictor of future satisfaction depends on the nature of the question and the conditions under which my response is elicited. It is relative in that it depends on the reliability of the available alternative means for selecting the outcomes in question. In the restaurant case this value depends on how much I know about the cuisine in question and on my condition at the time the menu arrives: on whether I am drunk or overeager to impress my companions with my knowledge of French

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22As I have said, the basic idea of this theory was presented by Hart in “Legal Responsibility and Excuses.” Since Hart’s article others have written in a similar vein, although they have been concerned mainly with the theory of punishment. See, for example, John Mackie, “The Grounds of Responsibility,” in P. M. S. Hacker and J. Raz, eds., Law, Morality, and Society: Essays in Honour of H. L. A. Hart, (Oxford: Oxford University Press, 1977), and C. S. Nino, “A Consensual Theory of Punishment,” Philosophy and Public Affairs 12 (1983): 289–306. Like Hart, Nino links the significance of choice (in his terms, consent) as a condition of just punishment with its significance elsewhere in the law, e.g., in contracts and torts. His view of this significance, however, is closer than my own to what I refer to below as the Forfeiture View.
or my ability to swallow highly seasoned food. Thus the same interest which sometimes makes choice valuable — the desire that outcomes should coincide with one’s preferences — can at other times provide reasons for wanting outcomes to be determined in some other way. When I go to an exotic restaurant with my sophisticated friends, the chances of getting a meal that accords with my preferences may be increased if someone else does the ordering.

What I have described so far is what might be called the “predictive” or “instrumental” value of choice. In the example I have given, choice is instrumental to my own future enjoyment, but the class of states which one might seek to advance by making outcomes dependent on choices is of course much broader. Aside from such instrumental values, however, there are other ways in which having outcomes depend on my choice can have positive or negative value for me. One of these, which I will call “demonstrative” value, can be illustrated as follows. On our anniversary, I want not only to have a present for my wife but also to have chosen that present myself. This is not because I think this process is the one best calculated to produce a present she will like (for that, it would be better to let her choose the present herself). The reason, rather, is that the gift will have special meaning if I choose it — if it reflects my feelings about her and my thoughts about the occasion. On other occasions, for reasons similar in character but opposite in sign, I might prefer that outcomes not be dependent on my choices. For example, I might prefer to have the question of who will get a certain job (my friend or a stranger) not depend on how I respond when presented with the choice: I want it to be clear that the outcome need not reflect my judgment of their respective merits or my balancing of the competing claims of merit and loyalty.

The features of oneself which one may desire to demonstrate or see realized in action are highly varied. They may include the value one attaches to various aims and outcomes, one’s knowledge,
awareness, or memory, or one’s imagination and skill. Many of these are involved in the example cited: I want to make the choice myself because the result will then indicate the importance I attach to the occasion (my willingness to devote time to choosing a gift); my memory of, attention to, and concern for what she likes; as well as my imagination and skill in coming up with an unusual and amusing gift. The desire to see such features of oneself manifested in actions and outcomes is of course not limited to cases in which one’s feelings for another person are at issue. I want to choose the furniture for my own apartment, pick out the pictures for the walls, and even write my own lectures despite the fact that these things might be done better by a decorator, art expert, or talented graduate student. For better or worse, I want these things to be produced by and reflect my own taste, imagination, and powers of discrimination and analysis. I feel the same way, even more strongly, about important decisions affecting my life in larger terms: what career to follow, where to work, how to live.

These last examples, however, may involve not only demonstrative but also what I will call “symbolic” value. In a situation in which people are normally expected to determine outcomes of a certain sort through their own choices unless they are not competent to do so, I may value having a choice because my not having it would reflect a judgment on my own or someone else’s part that I fell below the expected standard of competence. Thus, while I might like to have the advantage of my sophisticated friends’ expertise when the menu arrives tonight, I might prefer, all things considered, to order for myself, in order to avoid public acknowledgment of my relative ignorance of food, wine, and foreign cultures.

I make no claim that these three categories of value are mutually exclusive or that, taken together, they exhaust the forms of value that choice can have. My aim in distinguishing them is simply to illustrate the value that choice can have and to make clear that this value is not always merely instrumental: the reasons
people have for wanting outcomes to be (or sometimes not to be) dependent on their choices has to do with the significance that choice itself has for them, not merely with its efficacy in promoting outcomes which are desired on other grounds.

The three forms of value which I have distinguished (predic-tive, demonstrative, and symbolic) would all figure in a full account of the problem of paternalism. Legal restriction of people’s freedom “for their own good” is likely to seem justified where (a) people who make a certain choice are likely to suffer very serious loss; (b) the instrumental value of choice as a way of warding off this loss is, given the circumstances under which that choice would be exercised, seriously undermined; (c) the demonstrative value that would be lost by being deprived of this choice is minimal; and (d) the tendency to “make the wrong choice” under the circumstances in question is widely shared, so that no particular group is being held inferior in the argument for legal regulation. The pejorative ring of “paternalism” and the particular bitterness attaching to it stem from cases in which either the seriousness of the loss in question or the foolishness of the choice leading to it is a matter of controversy. Those who are inclined to make a particular choice may not see it as mistaken and may attach demonstrative value to it. Consequently, they may resent paternalistic legislation, which brands them as less than fully competent when, in their view, they merely differ from the majority in the things they value. But this kind of resentment need not properly extend to other kinds of legislation sometimes called “paternalistic,” such as wage and hour laws. Whether there is any reason at all for such resentment will depend on the reasons supporting a piece of legislation and also on the reasons people actually have for valuing freedom of choice which they would lose.

As controversies about paternalism illustrate, people can disagree sharply about the value of particular choices. They disagree, for example, about how important it is to have whether one wears
a seat belt depend on how one reacts (in the absence of any coercion) when setting off in a car. Some regard it as a significant loss when some form of coercion or even mild duress (the threat of a fine, or even the monitory presence of a brief buzzer) is introduced. Others, like me, regard this loss as trivial, and see the “constrained” choice as significantly more valuable than the unconstrained one. This disagreement reflects differences in the instrumental, demonstrative, and symbolic value we attach to these choices.

The existence of such differences raises the question of what is to count as “the value” of a choice as I have been using this phrase. One possibility is what I will call “fully individualized value.” This is the value of the choice to a particular individual, taking into account the importance that individual attaches to having particular alternatives available, the difference that it makes to that individual which of these alternatives actually occurs, the importance which the individual attaches to having this be determined by his or her reactions, and the skill and discernment with which that individual will choose under the conditions in question. This fully individualized value may not be the same as the value which the individual actually assigns to the choice in question; rather, it is the ex ante value which he or she should assign given his or her values and propensities.

Fully individualized value is not what normally figures in moral argument, however. Appeals to the value of choice arise in moral argument chiefly when we are appraising moral principles or social institutions rather than when we are discussing particular choices by specific individuals. In these contexts we have to answer such general questions as How important is it to have the selection among these alternatives depend on one’s choice? How bad a thing is it to have to choose under these conditions? When we address these questions, fully individualized values are not known. We argue instead in terms of what might be called the “normalized value” of a choice: a rough assignment of values to
categories of choice which we take to be a fair starting point for justification. Thus, for example, we take it as given for purposes of moral argument that it is very important that what one wears and whom one lives with be dependent on one’s choices and much less important that one be able to choose what other people wear, what they eat, and how they live. And we do this despite the fact that there may be some who would not agree with this assignment of values.

This phenomenon — the use in moral argument of nonunanimously held “normalized” standards of value — is familiar and by no means limited to the case of choice. The status and justification of such standards is a difficult problem in moral theory. I will not address the general question here but will mention briefly two points about the case of choice. First, “giving people the choice” — for example, the opportunity to transfer goods through market trading — is one way to deal with the problem of divergent individual preferences. What has just been indicated, however, is that it is at best a partial solution. “Having a choice” among specified alternatives under specified conditions is itself a good which individuals may value differently — as is “having the choice whether to have the choice” and so on.23 Second, differences in individualized valuations of choices result not only from differences in preference but also from differences in the personal characteristics which make a choice valuable: differences in foresight, in self-control, in self-understanding, and so on. Moral argument commonly refers to “normal” levels of these capacities as well as to “normal” valuations of outcomes and of demonstrative and symbolic values.

Let me turn now to the question of how the value of choice is related to the Quality of Will theory, discussed above. Like