Concepts as Property?
On the Use and Abuse of Concepts

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1 Introduction

"Language is a virus from outer space."

William S. Burroughs

In an influential seventies article the criminologist *Nils Christie* gave us the expression "Conflicts as Property".[1] Christie's opinion was, mainly, that the conflict between the parties in the criminal law ("the parties" here seen as victim and defendant) had been "stolen" by the authorities, the state and its functionaries, professionals. Christie found this unsatisfying: the conflict, he argued, ought to be given back to the rightful "owners", the initial parties, victim, defendant and their neighborhood. You might say that conflicts – in at least some relevant sense – can be "owned". "Ownership" often means that you more or less freely can dispose of e.g. an object, and also to some extent exclude others from disposing of it.

In a key scene in the italian movie *Il Postino*, the postman Mario (played by Massimo Troisi) and the Great Poet (Pablo Neruda, played by Philippe Noiret) have an argument about the postman's reciting Nerudas poems to a woman as if they were the postman's own. He tells Neruda that once a poet has written and published a poem, it no more belongs to the poet than to anyone else.[2] It belongs to everyone, is in some sense "owned" by everyone or – depending on how one sees it – by no one. The poet might be able to stop others from printing and selling copies of the poem, but *not* from reading it, interpreting it their own way, etc. It is e.g. possible for Y to claim, that X:s poem about a mole digging tunnels in the ground "really" – correctly interpreted – is nothing but an allegorical glorification of Pinochet's *regíme* in Chile, this also if X, who wrote the poem, says that he *neither* thought of Pinochet while writing it *nor* approves of anything at all that happened during the Pinochet era. Y might of course have difficulties convincing others that his interpretation is correct, but he cannot be stopped from trying.

This essay deals neither with parties to a conflict nor with poetry, but is somehow related to both. The title is, paraphrasing Christie, *concepts* as property. Not concepts *of* property, familiar in the legal world, but instead concepts *as* property. Why is it important to put forward and defend certain more or less far-fetched interpretations of concepts, as if you "owned" them? May one do practically *anything* with a concept already "in use", in terms of defining and re-defining it, or should there be some kind of (self-imposed) limits depending e.g. on your reasons for engaging in the activity?

Let me narrow the scope a bit. Suggesting and debating the correct interpretation of various concepts is a central philosophical activity. The concepts that I will discuss in this essay are connected to debates on one particular, albeit very broad, area: what society ought to look like and strive for, and a bit more specific, the proper relation between state and individual, majority and minority etc.. The passionate way in which a certain type of

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1 Christie, *Conflicts as Property*, British Journal of Criminology, vol 17 (1977) no. 1 p. 1-15.

2 I could not get hold of the film while writing, but hope to remember it more or less correctly.

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concepts – the ones I intend to characterize and discuss – are approached in such debates, political as well as academic, I find interesting: one defends one's own definitions of the concepts, nurtures them and protects them from the enemy, and at the same time puts them forward as were they mighty swords. I will argue that some of these "concept"-related activites go astray and therefore need attention.

So, what "certain type" of concepts am I talking about? The ones that will be dealt with are freedom, democracy, rights, rule of law, equality, harm and moralism. One often comes across them doing law and legal philosophy. They are, though, not at all "legal concepts" in a narrow, dogmatic sense, such as ones found in statutes and court practice, e.g. as requisites for responsibility according to a specific criminal law statute. They are – and now we have reached some of the features characterizing them as a group – much more vague and general. They are also *heavily normatively laden* and have occupied a central position in the last couple of hundred years of political development in the west. Moreover, they are not seldom – and this is central in my discussion – used stipulatively for propagandistic purposes, with the aim to deceive the recipient in a certain manner that in my opinion is not for scientists to engage in. The same usage exists in the field of politics, but there the demands cannot be set as high.

My discussion is broad and lacks many a possible reference. The aim is to sketch and set in question what might be called a specific rhetorical "culture", this from the viewpoint of an outsider and layman when it comes to philosophy (myself being a criminal law scholar). Having had the opportunity to work with *Jes Bjarup* – whose presence at the law faculty in Stockholm in more than one way has been a needed and inspiring injection – has stimulated my interest in legal philosophy, and this essay is part of the "paying back" (no doubt, though, Jes will disagree with some of it). The following section contains some remarks on the hows and whys of concepts, definitions, etc., with some emphasis on so-called persuasive definitions. Section 3 and 4 deal with the usage and mechanisms of the specific concepts mentioned (all but "harm" and "moralism" in section 3), showing e.g. their openness and potential deceptiveness. Finally I add some concluding remarks.

2 Concepts and what one should do with them. Persuasive Definitions

"*Change the import of the old names, and you are in perpetual danger of being misunderstood: introduce an entire new set of names, and you are sure not to be understood at all.*"

Bentham

Broadly speaking, the main reason for using concepts – as well as of having a language – is the possibility to communicate effectively with others, "effectively" meaning among other things that the communication is sufficiently fast but still reasonably precise. Laymen as well as scientists spend a great deal of time, mostly unaware of it, constructing, changing and refining definitions of

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concepts of everyday life. Concepts are used to describe and summarize issues of varying complexity. The object of such a summary can be rather concrete, like “chair”, or more abstract, like feelings, e.g. “happiness”, smaller (like “chair”, again) or huge and complex (“buddhism”). Definitions differ between persons. The degree of difference depends on various factors. Your conception of “happiness” probably differs a lot from mine, but we still will find enough similarities to be able to roughly understand each other when referring to “being happy” (although we might totally disagree on what makes “being happy” come about). When it comes to “chair” our connotations are probably almost identical, at least if we come from the same part of the world. This enables you and me to refer to “a chair” in our communication, without having to spend time explaining to one another what is meant, and it enables you, if asked by me to enter a room you never entered before and fetch a chair, to localize an object matching your abstract concept of “chair” and bring the object back, despite never having encountered *this* “chair” before: you have encountered a lot of *other* “chairs” before.

There might exist difficult – and annoying –disputes concerning the defining of concepts in everyday life. Someone might e.g. gain or lose depending on whether a certain class of objects is deemed to meet the minimum requirements of a “chair”, or maybe of “food”, and this someone might therefore be willing to fight over the definition of the concept. Is it, for the minimum requirements of “food” to be fulfilled, enough that the object in question *can be eaten*? What about dust, then, or a carpet? What to do if you visit a restaurant, order a pizza margharita, get a cheeseburger with strips, complain about this (because you wanted a pizza margharita), and the owner replies something like “well, in *this* restaurant, that is, in *my* restaurant, the pizza margharitas are exactly like *this*” (pointing at your “burger”): does the owner fully “own” the concept of a pizza margharita within the restaurant’s four walls?

Scientists, not least philosophers, approach questions of definition and construction of concepts also as part of their job, often then in a more structured and conscious way. Some by defining specific concepts, others also by reflecting on the activity of defining itself, by e.g. classifying (and indeed defining) different ways of making definitions, different aims for which definitions are used and produced, etc.. In order to approach “our”concepts in a proper way, we will need some help from the second group of scientists, concerning objects, definitions and more.

My view and starting point is that we need the concepts in communication (broadly defined) to describe, define, grasp and summarize reality in its varying aspects, in order to better cope with it. The concepts have a *serving* role, as *tools*. Among what concepts can define are *objects*. These can be concrete (existing in time and space), or abstract (separable only in thought, not in time and space). Examples of abstract objects are qualities, relations, concepts (indeed!), species, classes, numbers.[3] Of the concepts earlier mentioned, “chair” describes a concrete object, “happiness” an abstract one.

3 Jareborg, N., *Begrepp och brottsbeskrivning*, P.A. Norstedt & Söners Förlag, Stockholm 1974 p. 96-97.

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In describing something, making it a concept, *definitions* are used. Definitions can be divided into several and partly overlapping subgroups. Among the commonly used subgroups are ostensive definitions (where what is to be defined is pointed out, “*that* is a chair!”); lexical definitions (the meaning in common, ordinary usage); precising definitions (used to refine the meaning of an established term whose meaning is vague and needs improving); stipulative definitions (one gives the word a specific meaning for a certain purpose, often different from the lexical definition). In the following I will focus on so-called *persuasive* definitions, often seen as a subcategory of stipulative definitions.

The concept of persuasive definitions, as defined by *Stevenson*, builds on the basic assumption that words used in argumentation have both an *emotive* and a *descriptive* meaning.[4] *Ogden and Richards*, inventors of the phrase “emotive meaning”, according to *Walton* “postulated that the ‘descriptive meaning’ is the core factual or descriptive content of a word, while the ‘emotive meaning’ represents the feelings or attitudes (positive or negative) that the use of the word suggests to respondents.” According to Stevenson, again as stated by Walton, a persuasive definition works by

> “redefining the descriptive meaning of the word, while covertly retaining its old familiar emotive meaning. The ambiguity, and potential deception in this technique is that while the word ostensibly appears to have been given an entirely new meaning, it continues to retain its past emotional meaning[5] … But people tend not to realize that they are still being influenced by them, even though they have agreed to change to the new descriptive meaning, which perhaps should not still continue to have positive connotations, at least of the same kind. The technique works because descriptive meaning shift is typically not accompanied by a shift of emotive meaning”.[6]

Another characteristic for persuasive definitions is that they are often preceded by the words “true” or “real”. *Aomi* has, building on Stevenson’s work, stated the four requirements of the effectiveness of a persuasive definition as follows:[7]

1 The word being defined has strong emotive connotations.
2 The descriptive meaning of the word is vague and ambiguous enough to be semantically manipulated.
3 The change of meaning by redefinition is not noticed by naïve listeners.
4 The emotive meaning of the word remains unaltered.

The useful- and correctness of thinking in terms of “emotive meaning” has been questioned.[8] With the concepts that I have chosen for discussion, though, one does not have to think in terms of “emotive meaning”: the point – concerning the

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4 Information and quotations regarding persuasive definitions in this part come, if not otherwise noted, from Walton, *Persuasive Definitions and Public Policy Arguments*, Argumentation and Advocacy 37 (Winter 2001) p. 117-132.

5 Ib. p. 118.

6 Ib. p. 119.

7 Ib. p. 119.

8 *See* e.g. Jareborg, note 4, ch. 6.

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use of the concepts for persuasive aims – can be made also when we think of them as having just something like positive or negative connotations. “Goodwill” and “badwill” may be suitable and undramatic terms.

For whom, then, preliminary and generally, is it appropriate to use persuasive definitions? One might perhaps attempt to make a distinction between politics and science, and advocate the view that persuasive definitions be left to the politicians, from whom one expects propagandistic aims, but that scientists should refrain from using them. As put by *Walton*: “Scientific definitions are supposed to be objective and precise. They are not supposed to subject to manipulation by competing interests, in a way that politicial definitions are.”[9] But can – and if possible, *should* –this distinction be applied to legal and political philosophy, to a great extent concerned not with how things *are* but instead with how they *ought* to be? In this sense they clearly differ from natural sciences, to many the reflected or unreflected ideal when it comes to defining “scientificness” (an ideal that in periods also has had a major impact on political science and legal dogmatics). If we allow mentioned branches of philosophy to engage in “ought”-questions to a high degree, but still want to look upon them as scientific – and this we do! – then should they not also be allowed to use stipulative and indeed persuasive definitions of concepts, define them as they – from some point of view – *ought* to be defined?

I will return to these questions later. Since we are moving at least close to the legal sphere, it could be mentioned that a more explanatory interpreting and defining of concepts – still, though, containing some persuading – is found in the legal dogmatics’ interpretation of legal concepts in a narrow sense. *von Liszt* once wrote, discussing the criminal law scholars’ relation to criminal law politics, that criminal law (as a system, produced by the scholars) should be “die unübersteigbare Schranke der Kriminalpolitik”.[10] The task of legal dogmatics ultimately is to protect the individual, by setting limits to the state’s discretionary powers. Elaborating the system *as a system* fills gaps, improves foreseeability, makes it more “water-proof”. Careful defining is here necessary, concerning specific requisites in statutes as well as the principles and doctrines of the general part (in criminal law e.g. relating to attempts, complicity, intent and negligence, etc., and “bigger” problems, e.g. the act requirement). Rhetorically, the task of legal dogmatics is often described as an explanatory one, sometimes as a mere *describing* one, but the constructing of the system also to some degree consists of recommending how things *should* be interpreted. A difference, though, compared with the broader concepts touched upon in this article, is that the room for manouvre in dogmatics is more *limited*: the rules and sources governing argumentation are – at least in theory – rather strictly defined.

I have spoken of concepts as part of the language, as tools for describing, summarizing and informing about aspects of reality, to promote understanding of it, improve communication about it and also abilities to cope with it. Why would one want to *change the definition* of a certain concept already in use? One obvious reason is to make it “work better” in the mentioned senses. The factual

9 Walton, note 5, p. 123.

10 von Liszt, *Strafrechtliche Aufsätze und Vorträge. Zweiter Band. 1892 bis 1904*. Guttentag, Berlin 1905, p. 80.

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situation might be unaltered, but the definition of the concept deemed to be inadequate, because it lacks relevance or is far from what you might call the "core" of what the concept is meant to describe. If the only existing definition of an elephant is "someone you can have a drink with", the description is surely somehow *correct* (depending on how you define "having a drink with someone", something which at times not necessarily seems to need much interaction between parties), but the definition could still be critizised for being *inadequate*. It would be quite easy to present a more accurate "working" description, that would prepare one better for talking about elephants as well as for encountering them for the first time. New knowledge about an in principle unaltered object often necessitates new descriptions: the first ever news I read about AIDS in a swedish newspaper was a small notice, stating that a new dangerous virus had been discovered and homosexuals, people receiving blood transfusions and puertoricans were the groups vulnerable. Finally, the factual situation to which a concept is thought to apply might change, necessitating changes also in the definition of the concept.

New and alternative definitions of a concept are normally put forward to increase its "working capacity" in summarizing and helping us cope with reality. The concepts have and should have an "observing" and serving role. But with some re-definitions of the concepts chosen for discussion – to which we will turn shortly – the aim is another: to *initiate changes* in the reality that concepts normally should be there to observe and summarize. The method for trying to bring about such changes is the use of persuasive definitions.

3 Freedom and More

3.1 General Remarks

I will now deal with freedom, rights, rule of law-state, democracy and equality. These "grand" concepts share some features, partly similar to persuasive definitions as described in the last section.[11] They

1 occupy a *central position* in discussions about the good society,
2 are almost exclusively *positively laden*, and
3 are vague and ambigous, enabling innumerable interpretations.

These shared features create a strange soil, possibly best described by slightly changing a (swedish) saying: not "beloved child has many names", but instead "beloved *name* gets (in time) many children", that is: many aspirants for the grace of the concept. The concept is attractive and therefore desireable, thus everyone wants to use its power in his or her rhetorics, and no one wants to be

[11] The reader will furthermore notice some similarities between the characterization given here and *Gallie's* "essentially contested concepts" as described in an article with the same title, in Proceedings of the Aristotelian Society, vol 56 (1956) p. 167-198. There are also *differences*, though (mainly concerning (a) that some of his characteristics do not seem to fit all of the concepts here chosen, and (b) the conclusions to draw regarding the usage of such concepts), to some of which I will return later.

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characterized as being “against” the concept, e.g. by having one’s own suggestion referred to as “undemocratic” or as producing “inequality”.[12] If you desire the concept, but its definition as made by other actors does not suit your aims, then you are in a dilemma. The solution of this dilemma is simple: stick to the concept itself (to the *word*, more or less), but change its definition to suit your own aims. This manouvre is at all *possible* because the concepts are vague (to a far bigger extent than e.g. “chair”). An example: A few years ago in Sweden, shortly before an election, the concept “feminism” was deemed profitable by the politicial parties in parliament, and hence seen as necessary to connect themselves to, this also for parties earlier not that interested. Now, each party produced its very own “feminism”, coherent with the political programme of the party. Some productions indeed seemed quick ones.[13]

I will now focus on some features and mechanisms of the usage of the concepts, in political as well as philosophical discussion.

3.2 Freedom and some other “Good” Concepts

Of the concepts picked out, “freedom” is probably the most positively laden *and* the most “open” for interpretation. It might, in discussions concerning the good society, also be seen as a kind of “Überbegriff” (together with “justice”), and it therefore seems a good starting-point. Some well-known distinctions between different “kinds” of freedom (that is: different definitions of it) are positive versus negative and formal versus material freedom. The distinction useful here, close but not similar to the mentioned, can be made between *freedom from intervention* and *freedom through intervention*.

• According to the first position I enjoy “freedom” to the extent that the state (or some other ruler) does not – by prohibitions or similar means – prevent me from doing what I want to do. The core message is that freedom is state non-intervention. Among underlying assumptions are that the state is not necessary “good”, and that its powers therefore should be restricted. The state should also be in some aspects neutral in relation to the individual’s aims, choice of life etc. Though having originated as a reaction to tyrant single rulers, the attitude summarized in the position is of relevance also in a democratic society, as noted by Mill referring to the “tyranny of the majority”. This definition of freedom is clear-cut: individual freedom is non-intervention from the ruler(s). The more intervention, the less “freedom”.

• Freedom through intervention, the other position, is really not *one* position, one definition of what freedom is, but *many* positions and definitions, united by

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12 Many “bad” concepts are mirror images of “good” ones, so the ones in this section. Others are more indepentent, like “moralism” in section 4 below.

13 The ”ethical feminism” of the Christian Democrats’ Women’s Organization (*Kristdemo-kratiska kvinnoförbundet*), emphasizing biological difference between the sexes, is worth mentioning. A recent example concerning a concept seen as “bad” is the debate in October 2004 concerning whether the leader of the Left Party (V) can, may and should call himself a “communist”.

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the view that collective intervention is *necessary* as well as *allowed* to create conditions worthy of the etiquette "freedom". Within the position freedom can be defined in almost any way, as the absense of almost anything that is unwanted. Collective intervention is according to this position not only reconcilable with, but also necessary for, the creating of freedom in a "real" or "relevant" sense: the fight for freedom is to be fought not *against* but (at least partly) *by* the ruler. There is not just one type of freedom, there are many, there is not just one "un-freedom", there are many: economic, social, cultural, to mention some. Release from them might only be possible with an active interventionist politics, including e.g. redistribution of assets or aid to vulnerable groups. With a "real" or "material" concept of freedom, the state's level of ambition has to be set higher: the state is no longer allowed (*obliged*) to view the individual as blank: each person (not least as part of groups and structures) must be examined and evaluated against a specific view about the good and decent life. The view of the state as potentially evil might reverse: it wishes and does good, and limitations on its power might well be seen as unnecessary and irritating disturbances of the quest for "freedom".

Within this position, interventions against the individual's will might rhetorically be legitimized by saying that the prohibitions only seek to protect what the individual "really" wants, or what she would have wanted had she been wiser or more concerned about long-term consequences. The advantage with this definition of the concept of "freedom" is the flexibility: under some conditions (e.g. severe poverty and hunger) using the non-interventionist interpretation of "freedom" seems a mere malicious insult. But flexibility is also – at least in the opponent's view – a disadvantage: it gets difficult to limit and structure the intervention. "Free" and "freely willing" might e.g., when it comes to judging people's lives, boil down to what is considered *normal* or what I myself would prefer, or could imagine, doing. For a large group of western debaters it today seems impossible that a young moslem woman in some relevant sense "freely" wants to carry a veil, whereas it is deemed in some relevant sense "free" when a young woman pays a large sum of money to have silicone implants in her breasts, because she thinks that the breasts ought to be larger or more beautiful.

The use of the concept of "freedom" has changed over time. If we choose early liberalism as our starting point, the aim with the concept was to define, describe or symbolize *restrictions*, *limits*: the main message is that the state must be held short, by formal, negative and non-interventionist shields.[14] Because the concept *an sich* is seen as *attractive* – with a positive emotive meaning, *pace* section 2, or with a large amount of "goodwill" – competing definitions arrive, sometimes turning the challenged definition inside out. In the end the only constant factor might be the *word* and the positive connotations. Let us shortly turn to some other concepts where similar processes have occurred.

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14 The liberal position did by no means supply us with the "first" definition of the concept of "freedom". It conquered the concept of "freedom" in battle with what *Skinner* calls a "neo-roman" concept of liberty, indeed partly substantive and not formal, thus more resembling the definitions that later were to challenge the liberal one. On the neo-roman concept, *see* Skinner, *Liberty before Liberalism*, Cambridge University Press 1998.

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• With a *formal* (and initial) concept of "*democracy*", focus is on *form*, on *procedures* for decision-making. The *contents* of the decisions are from this strict perspective (when the issue is solely to define "democracy") uninteresting. This formal conception has been challenged by a range of *material* definitions of the concept. Common to versions of the latter is the view that we (in various aspects) must look *beyond* the formal, and in the concept itself include e.g. "real" – not just nominal – possibilities to actually actively take part (as a minimum by having the practical means to form an opinion and vote) or minimum requirements regarding the *contents* of the decisions, held as necessary if the state is to be worthy of the etiquette "democratic state" (e.g. rule of law and rights, see below).

• The concept of "*rule of law*", or "Rechtsstaat", shows a similar development, with a similar struggle between (initial) "formalists" and (later) "materialists". Emphasizing formal definitions of the concept, one is concerned mainly with outer *form*, assuring foreseeability, (formal) equal treatment etc. for the individual that has some kind of business with the legal system. Emphasizing material definitions, you might want to open up the concept to let it include contents, e.g by demanding that decisions within the system should be ethically (materially) acceptable or by setting "democracy" as a requisite.

• In the area of "*rights*" a common distinction is made between negative and positive ones. The former are exclusively concerned with the vertical relation between state and individual, the message being the same "keep away" as was described concerning "freedom": the duty of the State is *non-intervention* in the individual's exercise of certain basic rights and freedoms (hence "negative" rights).[15] Another distinction divides the first and the second generation of rights. The first – including citizen- and political rights, whose protection was the initial focus in most catalogues of rights after the French revolution – are mostly negative. "Positive" rights were added at a later stage, enabling a more interventionistic view demanding the state to *act* and actively *create* different sorts of protection. The second generation of rights – economic, cultural, social ones –are mostly positive. Interesting here might also be the development towards "Drittwirkung", seeing basic rights and freedoms as functioning also horizontally between persons. An increased duty of state activity, "Drittwirkung" and later generations of rights together open up for flexibility and intervention also *in* and *through* the constitution: welfare state thinking enters the constitution under the heading of "rights", modifying the "keep away"-character.

• "*Equality*" differs from the other concepts chosen because it defined in a strict sense has a fixed and "scientific" meaning (applying the terminology from section 2 you might say that it has a core factual content that the other concepts lack). In a strict sense it describes the relation between two or more objects, etc.: it compares them to each other. The comparison ends in an evaluation, not in

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15 *See*, also on rights ib. concerning neo-roman "predecessors".

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terms of “good” or “bad” but only “equal” or “unequal”. Turning to political philosophy, the picture changes. Its discussions on equality typically concern *people*, and the concept is no longer neutral but has a strong “goodwill”. One basic difficulty in dealing with “equality” and people is that people are complex: it is impossible to find two single persons equal *in all*. Some features you share with many, others only with a few, and the combination of all of one’s features is unique. Hence, perfect equality among people can never be reached. Hardly no one means, however, that everyone should be equal in all aspects:[16] only in *relevant* aspects, and the main question for political and scholarly debate on these matters is what differences and similarities should be deemed relevant.

In debating equality common distinctions are made between formal and material equality and between equality in treatment and equality in outcome. Historically, in the first phase where the concept systematically was used as rhetorical tool for groups’ emancipatory purposes (starting in the 17th century, with a strong promincence in the French revolution) formal equality and equal treatment on an individual basis were emphasized. Equal right to vote and the ideal of neutrality and facelessness in the court room, symbolized by a blinfolded Lady Justice, are some examples. Group membership should not matter.[17] In a following phase – at different times for different groups – the focus changed and the blindfold was set in question: formal equality did not well enough promote equality, it was said, at least not “real” equality. Instead it hid and partly (falsely) legitimized structural inequalities. Legislator and court therefore needed firstly to realize the existence of the structures, secondly to combat them structurally. This resulted in laws on anti-discrimination and affirmative action, the latter explicitly a tool for reaching “real” or “relevant” equality, meaning equality in outcome. In an even broader and more open sense the idea of “equality”, with *Dworkin*, could be to treat people “as equals” or with

16 ”Even the most convinced social egalitarian does not normally object to the authority wielded by, let us say, the conductor of an orchestra. Yet there is no obvious reason why he should not. And there have been occasions – few and far between – when this has actually happened. Those who maintain that equality is the paramount good may not wish to be fobbed off with the explanation that the purpose of orchestral playing will not be served if every player is allowed equal authority with the conductor in deciding what is to be done. Inequality in the organisation of an orchestra there patently is; the reason for it is the purpose of orchestral playing – the production of certain sounds in certain ways which cannot, in fact, be achieved without a measure of discipline which itself entails some degree of inequality in the distribution of authority. But a fanatical egalitarian could maintain that the inequality of the players in relation to the conductor is a greater evil than a poor performance of a symphonic work, and that it is better that no symphonic music be played at all if a conductorless orchestra is not feasible, that hat such an institution should be allowed to offend against the principle of equality.” Berlin, *Equality*, Proceedings of the Aristotelian Society vol 56 (1956) p. 313-314.

17 This usage of “equality” as something relevant on the level of individuals *exactly and only as individuals*, was, as with “freedom”, a breach with older conceptions, according to which “equality” could signify a kind of balance or harmony between unequal groups in society. For an investigation of “equality” between two persons to be conceptually possible at all, the persons would need to belong to the same group to be “compatible”. *See*, on the historical development of the usage of the concept of “equality”, Brunner, Conze & Koselleck (eds), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*. Band 2. E-G, Klett-Cotta 1979 p. 997-1046.

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"equal consideration". This might in reality mean practically anything. I will return to this conception of "equality" in my concluding remarks.

3.3 Part Conclusion

Historically seen, attractive concepts, originally put forward *either* to protect the vulnerable from unlimited, discriminatory power, most of the concepts then given a formal, non-interventionist, rigid nature, *or* to legitimize a strong ruling power, supporting its needs for e.g. flexibility, intervention and material values, in time – if the specific concept is deemed attractive enough by the opponents – gets accompanied by what one could call "reverse shadows": re-defined, sometimes more or less reversed definitions of the concepts, suiting other aims.

One might from the description of the concepts under 3.2 falsely conclude that scholars and others who demand more far-reaching *limits* on state power almost always defend formal, rigid definitions, and that "the power" rather sees material, interventionist-prone definitions of the concepts. This is not necessarily the case. For one phase – and a central one to the building of today's political and judicial structures of western communities, the one in which the French revolution was a part – this was mostly true: the rigid definitions were at the time seen as the most central, and they were indeed a product of unsatisfaction with the ruler(s). But times and society have, it probably could be agreed upon (staying in the mentioned sphere), politically changed for the better. As a result the older view that the correct way of dealing with the state's potential evil is to cling exclusively to a "keep away"-thinking, is seen as partly outdated: the state also can, should and must *actively* help. The goals, quite naturally, have also been set higher, as in the mentioned second phase of "equality". Hence, having accomplished the goals of the first and "formal" phase, *material* demands as a next step can be claimed necessary to improve the situation further. But material definitions of the concepts (or material components in otherwise formal definitions) can be put forward also as *limits* on state power, the way the formal definitions were used in the first phase. The state's legal system should e.g. not, it might be argued, be able to enjoy the goodwill of the "good" concept of "rule of law" strictly formally defined, if the substantive laws that the system applies are ethically unacceptable.[18]

My aim is not to defend one or the other definition of the concepts discussed, but instead to show that these concepts, occupying a central role in the discussion on fundamental questions concerning the proper relation between state and individual, majority and minority, etc., are fundamentally vague and possible to bend in any which direction you like: in my opinion (but on this issue opinions will surely differ) they all, except for "equality", lack a core factual meaning. What they describe and define is an abstract etiquette, much more similar to "happiness" than to "chair", and even more vague than "happiness". As with happiness we might possibly be able to unite in describing the feeling (the emotional or intuitive connotations of "rule of law-state"), but probably

18 The thought that it partly has to do with "being entitled" to use a concept might e.g. be an underlying view of Peczenik, *See e.g.* his *Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation*, Norstedts Juridik, Stockholm 1995 ch 1, e.g. p. 98.

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with less unity among us than concerning "happiness", and we will definitely have difficulties finding a shared view on what brings "rule of law-state" about (the conditions that make it reasonable or allowed to use the etiquette of the concept).

When a core factual meaning is lacking, there can be no "correct" definition: there can be no one and simple "Fazit". For "equality" exclusively such a definition is possible – in a narrow sense, describing a relation between two objects – but this narrow and reduced sense is of low interest for political debate. The fact that a core meaning or "essence" lacks is no problem for the debating combatans, as long as the audience that is to be convinced *believes* that there is or might be such an "essence" or "right" definition. And this is where the deceptive part enters:

The re-definitions are often *not* meant to improve summaries and descriptions of an existing reality in order to help people cope better with it. Instead they are definitions of a wished-for reality, and the sender wants to use the "goodwill" ("emotive meaning") of the concept as a tool for persuading the recipients to accept the sender's vision as the one worthy of striving for. In order to bring that vision into the definition of the concept, the sender might have to make his definition quite far-fetched. Still, he cannot be critized in terms of the definition being "false": formally he has not done anything wrong, because there is no core factual meaning.[19] Nevertheless, in my opinion, certain rules should govern the argumentation. What is wrong is the intent to deceive, the attempt to use the concept's "goodwill" for this purpose, and the using of a rhetoric of having found the "essence" of the concept, well aware of the fact that if it has such an essence at all, it is an emotive one and nothing more.

When such argumentation comes from a scientist and not from a politician, the listener might easily (at least if not a scholar) get the impression that the claim is somehow "scientific". Riding on the concepts is a way of hiding too naked political claims, normative differences, in the argumentation: instead of telling the opponent "I do not like your vision of society, this is instead my ideal society", you say "your interpretation of the concept of democracy (freedom, rule of law, etc.) is not correct, *this*, instead, is what flows from the concept of democracy" or "… what democracy is/demands". In several discussions on affirmative action, one combatant claims affirmative action not to be compatible with the idea of equality, the other counters that it is. Sometimes they do not get further than that, as if compatibility or incompatibility with a concept *in itself* were sufficient an argument. When this happens, it is because none of the combatants is willing to admit that the difference between them is a *political* one and not one about the one "correct" interpretation of the concept of equality, *and* because none is willing to let go of the rhetorical power of presenting the only "correct" definition of "equality".

There cannot be, indeed should not be, one single "correct" interpretation of "equality", "freedom" or any other concept here discussed. On the contrary: it is perfectly reasonable that there exists a range of structured definitions of each

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[19] I do not want to push the usage of the concepts "wrong" and "false" too far here: the definition of a concept might of course be claimed to be "wrong" or "false" because it is not valid on its own terms, is logically impossible, etc., but this is a slightly different thing.

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"big" and "difficult" concept, enabling us to grasp and discuss a complex reality (an illustrative example indeed is the clear and useful distinction between equality in treatment and equality in outcome). It might be asked reading *Gallie* whether the diversity of opinions on the correct definition of the concepts actually can be something *good*, because it keeps alive a *dialogue*, a kind of competition between opinions.[20] Regarding the concepts that I discuss here, keeping a dialogue alive is indeed one very important societal aim. My criticism actually has similar aims, but wants to improve the *quality* of the dialogue: not just *any* dialogue, but a *good* one. Rhetorically claiming that there is *one correct answer* (and implicitly that the question is one about *finding* it, and that you have seen the light, the others not) not only misleads the listener but also – and worse – not seldom leads you to abstain from more elaborated and transparent argumentation, cornerstones of a good dialogue.

Next I will touch upon some attempts to make political argumentation sound even more "technical" and therefore "scientifical" (and therefore non-political). The concepts chosen are central in the area of legal philosophy, in which the felt need to argue "technical" – to avoid "normative" argumentation – might be stronger than in political philosophy.

4 "Rechtsgut" and not, Harm vs. Moralism

In my doctoral thesis I investigated scholarly constructed limiting principles said to guide, and not seldom also *bind*, the legislator in criminalization matters. Striking in the German and Anglo-saxon theory on these matters is the way the argumentation (at least rhetorically) is built up: the reader gets, here as in last section, almost the impression that something important could be deduced from the concepts *themselves*, that they in fact contain or describe some hidden truth, a fixed, maybe "natural", essence.

• In *Germany* the concept of "Rechtsgut" is at least to scholars central in the discussion of what may be criminalized: "Rechtsgut" is the cloak under which the discussion is held, and so-called "transcendental" "Rechtgut"-scholars claim that the concept supplies us with binding, from the criminal law free-standing criteria for acceptable criminalization. The core message is that the state may only criminalize what harms (or, depending on theorist, to some extent also what endangers) a "Rechtsgut".

What, then, is a "Rechtsgut"? Today it is agreed that it is not a concrete object, but instead a value judgment about something. Still, the used rhetoric – "the legal good" – seducingly promises some kind of "body", which leads the thought astray in a refined way: If I think that something, e.g. a certain condition, is good, I can express this by saying that the condition *is good*. I connect the condition with a positive adjective. But I can also express the same opinion in a different way: by saying that the condition is "*something* good" or even – and this is where it gets interesting – that it is "*a* good". My positive evaluation of the noun (in this case a condition) is itself turned into a noun,

20 *See* Gallie, note 12, p. 169 and 178.

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which gives the impression of me referring to a *thing*. I might thus say "it's good that public places are peaceful", or "peacefulness in public places is good", or "peacefulness in public places is *a* good". The last version tends to be chosen by the Rechtsgut-scholars, probably because of its "technical" twitch, blurring the normative dimension. An example: *Roxin* claims, in stating limiting consequences of the Rechtsgut-concept, that "willkürliche Strafdrohungen schützen keine Rechtsgüter".[21] The message is that such criminalizations do not protect legal goods. A legal good is something that – from some point of view – is deemed to be good, and therefore worthy of protection. Polemically rewritten, then, Roxin's claim is that such criminalizations do not protect something that is good, or, even more frankly put: they do not protect anything worthy of protection. The claim is a trivial and indeed political one, but this is rhetorically hidden by the transformation of the adjective ("X is good") into a noun, a "legal good".

• In the *anglo-saxon tradition*, "harm" is the corresponding concept around which the discussion rotates: once the semantic wrapping has been unfolded, similarities with the "Rechtsgut"-based discussion are many. It semantically would seem that the focus for the "harm"-discussion to some extent would be questions of *magnitude*, but focus is instead on the interests worthy of protection. Two potential steps that could have given more transparence – the interests and the attacks on them – are melted into one: "harm". The anglo-saxon "harm"-based debate of course contains more than one category. Most common today is a distinction between four main ones (as made by e.g. *Feinberg*):[22] harm to others, harm to self, offense to others (it indeed seems difficult to offend oneself), and moralism. The state of the debate: the *emotive* meaning ("goodwill"-status) of each category is quite clear, but their *factual* meaning is very much unclear.

The emotive meaning of "harm" is in this area very *positive* (in the sense that it *allows* or is at least a *good reason for* criminalization). "Harm to others" is the best, encompassed by everyone as a concept generally signalling (at least possibly) "legitimized criminalization". "Harm to self" has for a majority of the scholars in the debate a negative emotive meaning (mostly because a majority of the scholars interested in the discussion seem to be old-school liberals, not that fond of paternalism), whereas "moralism" is almost fully *negative*: very few – but indeed there are a few, *James Fitzjames Stephen* would probably be one of them – would accept the etiquette "moralist".

In the debate the definitions of "harm" and the other categories are vague and elastic. Origin as well as persistence of this unsatisfying situation is largely dependent on the fact that the concepts involved are deeply laden with "goodwill" and "badwill". There is broad agreement on what categories to use ("categories" here understood as merely "etiquettes", merely the *words*), and

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21 Roxin, *Strafrecht. Allgemeiner Teil. Band I. Grundlagen. Der Aufbau der Verbrechenslehre*, 3rd ed., Beck, München 1997 p. 15.

22 *See* Feinberg's four volume work *The Moral Limits of the Criminal Law*, consisting of *Harm to Others*, 1984, *Offense to Others*, 1985, *Harm to Self*, 1986, and *Harmless Wrongdoing*, 1988, all Oxford UP, New York.

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there is mostly also no unclarity concerning which categories are “good” or “bad” in the view of each theorist. Hence, the regular theorist already before embarking has a clear opinion on

a) which of the four *categories* signal (for her or him) legitimized and unlegitimized criminalization, respectively, and
b) what specific acts he or she wants to see criminalized and non-criminalized, respectively.

The remaining work is then only to

c) place each of the specific acts under a concept (*word*) suiting the aim (criminalization or non-criminalization), and
d) – finally – define the concepts in a way that suits the work done under c).

No wonder that the categories are hard to grasp. This approach from the debatants makes the debate not so much of a “debate” in a reasonable sense of the word: the debatants seldom seek “compatible” definitions, something that would threaten the rhetorical message that the concepts, “the way *I* and no one else define them”, signify some kind of essence, “real” contents, maybe “necessary” contents, possible to *discover*. *Schwarz*, in defending criminalization of “morals offenses” if the majority wants them criminalized, implicitly (maybe unaware of it, maybe flirting with the opponents) puts it this way: 1) it is possible that morals offenses cause harm, but it is also possible that they do not, and 2) if we do not know if a specific act causes harm, a democracy should let the people, the majority, decide what to do (in this case criminalize or not).[23] The underlying message becomes that there is a “true” definition of “harm”, but regarding this specific act, at the moment, we cannot grasp it. The truth is, I would say, that there is no such thing as a true essence of “harm”, it is – in the debate as well as ontologically, I guess – all a question of what is to “count as” harm, and this many of the debatants wants us to forget.

With more agreement on basic terms it would be possible at least to *reduce* the component of unspecified “count as” in the debate. This is bound not to happen, though, because the concepts used are not by the debatants meant to be tools for scholarly *communication* about reality: instead they are the swords and shields with which to *shape* reality! At worst, as a consequence, the labeling of a certain criminalization as “moralistic” in reality means no more than “I (for some reason) do not think that this act may be criminalized”. At worst, the labeling of something as causing “harm” only means “I think that this act (for some reason) may be criminalized”. If so, the proposition “act X causes no harm” is *not*, as one would think – and as it indeed is put forward and wished to be understood – an *argument* for accepting the view that criminalization should be undertaken, but instead simply another – albeit more formalized and technical-sounding – way of *expressing the view*. At the lowest, a discussion between two opponents comes no further than X saying “act A causes harm”, Y

23 Schwarz, Louis B., *Morals Offenses and the Model Penal Code*, Columbia Law Review, vol. 63 (1963) p. 669-686.

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answering “no it doesn’t!”, and X replying “yes, it sure does!” (note the resemblance with e.g. earlier mentioned “equality”-based debates).

That some etiquettes must be fled at almost any price, while others must be bent to encompass too much, is visible e.g. in *Hart’s* attempt in *Law, Liberty, and Morality* to a) generally reject moralism as a legitimate ground for criminalization, and b) defend the criminalization of some acts that indeed with reasonable usage of possible categories should fall under “moralism”.[24] And had not “the protection of morals” because of “badwill” been an etiquette *non grata* for the swedish legislator, we would not need to read in preparatory works from 2001 that genetical reasons are the strongest reasons for maintaining the criminalization of consensual incest between adults, a claim that gives the reader the impression that the committee e.g. is unaware of the existence of preservatives.[25]

If the debatants would reach agreement, and the concepts as a result would lose some of their persuasive power, it would be more visible that at the core it is *all* about value judgments. This would push the questions more openly into the realm of politics, something that probably would diminish the philosopher’s, at least the legal philosopher’s, possibility to influence politics.

5 Concluding Remarks

5.1 Concepts as a Theatre Play on Tour

In “the Crowd”, a short story by *Ray Bradbury*, the narrator gradually realizes that whenever a car crash occurs in a certain (but rather big) area, a crowd of onlookers gather unnaturally quickly, just within seconds, and this even if the crash occurs in the middle of the night. He also eventually realizes that every such crowd consists of the *same* people, each of them with his or her role to play, line to say, in a drama repeating itself over and over.

In the end it turns out that the people in the crowd were already dead: they were victims in earlier car crashes. Apart from that, the picture of the car accident crowd has some bearing on the concept-focused activities that I have discussed. When someone comes up with a new concept or a re-definition of a concept which has been resting sufficiently long, and interest is raised among other scholars, it will not be long before these will want to give *their* definition of the concept. As time passes, if the concept is attractive enough, it attracts so many interpretations that it could mean almost anything. If it could mean almost anything it means almost nothing: the concept has been emptied of meaning, we

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24 E.g. concerning bigamy, *see* further Lernestedt, C., *Kriminalisering. Problem och principer*, p. 249. I do not want to claim that there is some “essence” of moralism (or any of the other concepts), only that, in the light of the debate and the categories used, such a category seems reasonable for a group of acts.

25 SOU 2001:14. *Sexualbrotten*. On trying to diminish the category of moralism to zero and why it might not be such a good idea, *See* von Hirsch, A., *Injury and Exasperation. An Examination of Harm to Others and Offense to Others*, Michigan Law Review, vol 84, 1986, p. 713-714 (criticising Feinberg’s distinction between “offense” and “moralism”, which aims at excluding the latter from the proper (possible) scope of criminalization.

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might say it has been drowned and then drained. It resembles the result you get if you use a little bit of *every* spice you have at home in preparing a dish: the spices will more or less neutralize each other. In the end one is able to say that the food is “spiced”, nothing more.

When debatants of legal and political philosophy approach a new concept and define their own version of it, the result will be a reflection of their general theories and political views. Not seldom it is quite obvious in advance how theorist X (or even more so, politician X) will define his or her version of the concept C. If the concept in question is broad and attractive, the discussion, formally and “officially” on its definition, will after a while successively transform into something else: a discussion on general issues concerning what society should look like, more or less a discussion on *everything*. In the end, the discussion about *one* such concepts is almost identical to the discussion about *another* one of them. This impression is only reinforced by the fact that vague and “goodwill”-laden concepts not seldom are defined as consisting of a couple of other concepts of the same kind (preferably defined materially): rule of law-state is defined as consisting of (among other things) democracy and rights, democracy as consisting of rights and rule of law-state, etc. The concepts, hence, can turn into some kind of battlegrounds, or stages, to which debatants arrive: every concept a new venue. Imagine a touring theatre play: the town changes, the venue changes, but the play is the same, a drama repeating itself over and over, in which actors act their roles (who more or less stay the same also with a change of venue).

Theorists and their views being grouped around the same concept might of course also be a *good* thing, particularly if the grouping is made with a personally disinterested intent to clarify the theories, not with a will to surf on the “goodwill” of the concept. The former indeed can *increase* the possibilities of a comparison between different theories of political philosophy. *Kymlicka* takes as a starting point Dworkin’s view that “equal consideration”/”equal respect” is the fundamental value underlying the politicial theories of today. Kymlicka uses this conception of equality as a kind of prism, through which the theories are compared with each other, something which makes them more “compatible”. Such enterprises are necessary when theorists themselves do not want to seek “compatibility”. Kymlicka states that

> “if each theory shares the same ‘egalitarian plateau’ – that is, if each theory is attempting to define the social, economic and political conditions under which the members of the community are treated as equals – then we might be able to show that one of the theories does a better job living up to the standard that they all recognize. Whereas the traditional view tells us that the fundamental argument in political theory is whether to accept equality as a value, this revised view tells us that the fundamental argument is not whether to accept equality, but how best to interpret it. And that means people would be arguing on the same wave-lenth, so to speak.”[26]

How far the vague notion of “equal consideration”/”equal respect” can help in deciding what politics to choose is an open question. But it is obvious that tools

26 Kymlicka, *Contemporary Political Philosophy*, 2nd ed, Oxford UP 2001 p. 4.

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for compatibility, either shared or at least in some sense free-standing, is what needs to be constructed or sought for.

5.2 What to do, then?

"*jolifanto bambla ô falli bambla*
grossiga m'pfa habla horem
égiga goramen
higo bloiko russula huju
hollaka hollala
anlogo bung
blago bung
blago bung
bosso fataka
ü üü ü
schampa wulla wussa ólobo
hej tatta gôrem
eschige zunbada
wulubu ssubudu uluw ssubudu
tumba ba- umf
kusagauma
ba – umf"

Hugo Ball

If no one can "own" attractive concepts such at the ones here at issue – in the sense that "correct" and "uncorrect" definitions are possible – the concepts get emptied and lose much of their usefulness. If a concept is vague enough for *any* position to be connected to it, then it might be time to leave it behind. Had we better, then, *desert* this kind of concepts in the debate? Schematically, there are three alternatives:

- stick to them,
- replace them with new concepts, or
- abandon them without replacing them.

The first alternative has already been discussed. What could be lost or gained with the other two alternatives? They share at least one disadvantage: the communication between us will be slower. When you "invent" and present a new concept, it needs to be explained in every communication, and the risk of misunderstanding (about *what* the concept summarizes, *how* it summarizes it, etc.) is probably quite big, not least when the subject itself is big and complex, summarizing a lot of information (imagine rivalling "buddhism" or "democracy", e.g.). Generally speaking one might also say also that the amount of concepts that one has to know about and distinguish between should be kept

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as low as possible (the capacity of the brain, also a researcher's one, is indeed limited).

What about *abandoning* the "grand" concepts? A starting point: It would be unwise to abandon concepts as fully as *Hugo Ball*, *dada*, did in "Karawane". The drop of precision and understanding would be perilous when dealing with such important questions. Still, the poem of Ball has a point which I deem an important one: it is useful for writer and reader to break free from the well-known concepts, here the "grand" ones, instead formulating and receiving the message in a somewhat fresh or at least less "conceptualized" way. Making distinctions within an existing concept can be a way of saving as *one* concept something that would be more fruitful had it been split into separate parts. In *Gallie's* discussion of what should be seen as (1) competing claims to the same concept and (2) different concepts he means that if there is something like " … an *exemplar*, which might have the form either of one prototype … or of a succession (or tradition) …"[27] this speaks for number (1). If, then, the advocates of competing definitions of a concept e.g. have a starting-point in the same prototype or ideal, but have developed it in different directions (or developed different aspects of it), this would be a vote in favor of (still) seeing it as one concept. This indeed makes some sense, but would hardly be a conclusive reason for sticking to, and *using* in discussions, a concept that for some reason does not work well (if not reverence is meant to be a conclusive reason).

The choice to be made must not be between on the one hand "grand", attractive concepts, be they old or new, on the other hand *dada* or the abandonment of normal language: there is something in between, and a fresh way of approaching the problems here discussed could – maybe somewhat paradoxically – be the use of more *ordinary* language, if it contains words that have meanings precise enough to enable good and nuanced communication, but are low on seductive overtones of "good"- or "badwill". You would lose the possibility of arguing that a grand concept "demands" a lot, and of making your argumentation sound "technical" and therefore "scientifical" (as were you doing natural sciences). This would make it more clear to the listener that the argumentation is *normative*. It would make it more *transparent*, something that ought to be a shared goal when the questions at issue are of such fundamental value (and this is valid even if your *intentions* with deceiving are ever so good).

The general gains of having a language, or concepts, disappear when the intention is *not* to construct a tool for observing, making possible better communication, but *instead* to bend the concepts in propagandistic aims. Instead of the concepts rotating around reality like satellites, as tools for describing, capturing and coping with it, the use of concepts that I have criticized aims at (falsely) putting the concepts in the centre, trying to rotate the world around *them*. The latter is no way to go.

27 Gallie, note 5, p. 176.

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