

GEORGIA LAW REVIEW

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EDITORS' PAGE

In early 1979, Professor Roger Pilon of Stanford University brought to our attention the availability of five articles treating various aspects of modern rights theory. At that time Professor Pilon was himself completing an article for the *Georgia Law Review* concerning the application of rights theory to corporate entities. Having procured this core of articles for publication, the *Review* proceeded to solicit contributions from other leading academicians in the field of jurisprudence. The resulting symposium, *Perspectives On Rights*, forms the articles section of this last issue of Volume 13. *Perspectives On Rights* is the culmination of the efforts of individuals too numerous to thank individually. We can only hope that the symposium will receive the attention we feel it warrants, thereby repaying its contributors for their persistence, their patience, and their determination to provide a unique insight into the myriad questions treated herein.

The *Governance* section of issue number 4, our first student treatment of this nebulous concept, is an attempt to extend staff contributions beyond the usual bounds of student research and reiteration of the law. It is, we believe, an initial step toward more valuable contributions to the field of law on the part of student writers.

Finally, Thomas Morawetz of the University of California at Los Angeles School of Law contributes to the jurisprudential flavor of issue number 4 in his review of George P. Fletcher's *Rethinking Criminal Law*. As Professor Morawetz suggests, this recent effort of Professor Fletcher, whose work appears elsewhere in this issue as well, is far from a conventional classroom text, and promises to affect both the development and the application of criminal law for years to come.

The Editorial Board of Volume 13 wishes to thank its readers, contributors, and other friends for their kind attention and comments, and hopes that Volume 13 has contained something of interest to all.

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PERSPECTIVES ON RIGHTS

WHAT IS A RIGHT?

*Antony Flew**

Perhaps it is not exactly a matter of "a decent respect to the opinions of mankind." Nevertheless, just as it would be uncultivated and indecorous for a symposium on crime and punishment to make no mention of the eponymous masterpiece of Fedor Dostoevski, so we here are bound to begin by taking note of those most famous words of Jeremy Bentham. He, as we all remember, dismissed our present subject with truly Johnsonian finality. It is no more than one of the *Anarchical Fallacies*. Right is the child of law; from real laws come real rights, but from imaginary law, from "laws of nature," come imaginary rights. "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, — nonsense upon stilts."¹

We here have all undertaken to investigate precisely and, indeed, only what Bentham rejected. Our concern, or our direct concern, is not with those rights which are in fact realized or recognized, endorsed or created, by various systems of positive law. It is with rights inasmuch as and insofar as these either do serve or could serve as a basis for criticizing types or tokens of individual conduct, and general principles or particular prescriptions of positive law. Such criticism must result in commending whatever respects, and condemning whatever violates, any (moral as opposed to legal) rights which — the Great Jeremy notwithstanding — there are.

1. *The Objectivity of Rights*: That last two-word phrase is, unequi-

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¹ 2 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 501 (J. Bowring ed. 1843).

vocally and defiantly, both categorical and existential. It thus epitomizes the first conceptual truth about (moral) rights. This is at the same time the reason why so many modern-minded people are inclined to follow Bentham in dismissing the whole business. The point has been well put by one who claims to be himself *Taking Rights Seriously*: "A great many lawyers are wary of talking about moral rights, even though they find it easy to talk about what is right or wrong for government to do, because they suppose that rights, if they exist at all, are spooky sorts of things that men and women have in much the same way as they have non-spooky things like tonsils."²

No doubt there is room for discussion about exactly how far and in what ways having a (moral) right is or would be like having tonsils. But the wary lawyers of whom Dworkin speaks are not wrong in thinking that an affirmation of rights is necessarily an affirmation that certain entitlements possess some kind of objectivity. Take, for instance, what are for us the key words of that most famous and most important of all such declarations: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights . . ." At least for present purposes it is unfortunate that the Founding Fathers spoke of these rights as an endowment from the Creator, thus suggesting that they are, if only under the divine law, also legal. But what does come out with total clarity is that they saw themselves as at this point asserting truths rather than making demands, as reporting revelations of the natural light rather than announcing decisions of revolutionary policy. I conclude, therefore, that it is the first essential of any (moral) right that it must possess some kind of objectivity. If we are going to maintain, against Bentham and so many others, that there are such rights, then we have somehow got to show: both how this can be possible; and that it is the case.

(a) It appears that in the past these were often not seen to be problems or, if they were so seen, they were considered to be soluble — as the Signers thought to solve them — by some reference to the Creator. In the Declaration itself the reference is perfunctory. But in that same year 1776 John Adams was speaking of "Rights antecedent to all earthly government — Rights that cannot be repealed or restrained by human laws — Rights derived from the great Legislator of the universe."³ Our natural and inalienable rights are thus

² R. DWORIN, *TAKING RIGHTS SERIOUSLY* 139 (1977).

³ E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 79 (1955)

endowments from God, and their objectivity is the objectivity of a prime theological fact. That is a kind of fact, or a putative kind of fact, which Dworkin's wary lawyers might perhaps be pardoned for eschewing as "spooky." But here we have to object to this more on a quite different ground: neither maintaining, as atheists, that there are no positive theological facts; not, as agnostics, contending that even if such there be it is impossible for us to know what they are. Our present objection has to be that rights conferred under God's prescriptive law would not be rights of the kind which we are here to discuss. They could not, that is to say, be rights by reference to which all — repeat, all — prescriptions of positive law may be criticized.

The heart of this particular matter of logic was first laid bare by Plato's *Euthyphro*:⁴ if you define a word such as "good" in terms of the will of God, then you thereby disclaim all possibility of praising that will as itself good. So the words "God is good" become on your lips the expression of only the most empty and formal of custom-built necessary truths. It is clear that Grotius too was master of the crucial points. He was writing in general about the law of nature, not particularly about the rights arising either under that law or independently of it. He stresses first the necessary objectivity of that law: its principles,

if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses; and the senses do not err if the organs of perception are properly formed and if the other conditions requisite to perception are present.⁵

He then goes on to insist that this objective law is no sort of function or creature of the will of God:

The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God. The acts in regard to which such a dictate exists are, in themselves, either

(quoting 3 ADAMS, LIFE AND WORKS 448-64).

⁴ The key passage can be found, with some discussion of its importance, in A. FLEW, AN INTRODUCTION TO WESTERN PHILOSOPHY 26-33 (1971).

⁵ H. GROTIUS, THE LAW OF WAR AND PEACE 23 (F. Kelsey trans. 1925).

obligatory or not permissible, and so it is understood that necessarily they are enjoined or forbidden by God.⁶

The last and most emphatic words, insisting both on the objectivity of the law of nature and on its total independence from the will of the Creator, draw a comparison with the truths of logic and pure mathematics: "The law of nature, again, is unchangeable — even in the sense that it cannot be changed by God. . . . Just as even God . . . cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil."⁷

Before leaving both Grotius and the rejected suggestion that moral rights could be creatures of the Creator's will, there are two things to underline. First, both in identifying prescriptive laws of nature as dictates of right reason and in comparing them with the truths of pure mathematics, Grotius can be seen as indicating — a century before Kant was born — a Kantian route towards the solution of our objectivity problem. That, in correspondingly Kantian terms, is to show how rights are possible — how there can be, and that there are, objective entitlements. Second, in insisting that actions have in them "a quality of moral baseness or moral necessity," that they are, in themselves, either not permissible or obligatory, Grotius can be seen as signposting, before the birth of G.E. Moore — this time not one but two and a half centuries before — what we must surely recognize to have been a blind alley. For what are these intrinsic characteristics if not the "simple, non-natural qualities" of *Principia Ethica* — qualities which must as "non-natural" be paradigmatically "spooky?"⁸

(b) The enormous obstacle obstructing any attempt to show how (moral) rights can possess some kind of objectivity, and to show that and what these rights are, is the whole great Humean tradition of philosophy and social science. Epitomized in the proverbial nutshell, it is the glory of Hume to have developed a world-outlook through and through secular, this-worldly, and man-centred. To us the most relevant aspect of all this is Hume's anti-Copernican counter-revolution. Copernicus was said to have knocked man and his Earth from the centre of the Universe, by revealing that what appears to be the diurnal circulation of the heavens above us and around us really is a movement of our own peripheral planet. Hume

⁶ *Id.* at 38-39.

⁷ *Id.* at 40.

⁸ G.E. MOORE, *PRINCIPIA ETHICA* (1903).

took as his model a supposed discovery of the new science of Galileo and Newton, the supposed discovery that secondary qualities are not really qualities of things in themselves, but are instead reactions in our own minds, reactions which, by a false projection, we commonly but mistakenly attribute to those things. Guided or misguided by this seductive model Hume hoped to demonstrate that the same applies to much else which we might uninstructedly have believed to be characteristic of the Cartesian external world; in particular, causal connection, the necessity of descriptive laws of nature, and moral and aesthetic values.⁹

In this Humean perspective it becomes almost impossible to admit as objective anything but straightforward, unspooky matters of fact about that external world; while the norms and values which are somehow projected functions of individual or collective human desire appear as correspondingly subjective. It is easy then to proceed, although Hume himself would never have dreamed of so proceeding, to the demoralizing conclusion that as such they are to be despised and dismissed as *merely* human creations. It is upon philosophical assumptions of this kind, and in the same sort of understanding of the findings of the social sciences, that today so many of the young, and of the not so young, believe that the slightest tincture of anthropology or sociology is enough to expose all value judgements as inherently and essentially arbitrary, relative, and subjective.

If we are to succeed in showing how (moral) rights are possible, by providing for them a kind of objectivity, then we have either to circumvent or to overcome the particular subjective/objective dichotomy which is the form of representation in the previous paragraph. We have to find a way in which something can be objective, in the rather different but sufficient sense of being independent of our self-interested and capricious wills, while at the same time in some way authoritative over those wills; without that something's being just a matter of brute fact about either non-human or human nature. Here it should be encouraging to ponder again the last words quoted earlier from Grotius. For logically necessary truths are objective in precisely the sense just explained, and they neither are nor state facts about either human or non-human nature. It is a matter of individual or collective human choice — though certainly not by

⁹ For a development and defense of this not very controversial interpretation of Hume, see Flew, *Hume*, in D.J. O'CONNOR (ed.), *A CRITICAL HISTORY OF WESTERN PHILOSOPHY* 253 (1964).

that token merely a matter of arbitrary choice — what concepts we use, and what words we employ to express those concepts. But it is not a matter of choice, whether human or Divine, what follows or does not follow from this or that proposition. We have, therefore, a standard here which is in the sense explained objective. If the conclusion drawn does follow, then the inference is correct: and, if not, not.

Of course there may be, and very often are, difficulties and disagreements about the application of this standard. More to the present point, the general claim that there are rights, as well as less general claims about the subsistence of this or that particular right, seem to be far removed from the tautological truths of logic and mathematics. Certainly I have no wish to recommend — much less actually to embark upon — any project of developing the new moral geometry once envisioned by, among others, Locke.¹⁰ (Notice however, parenthetically and in passing, that Kant himself proposed to deduce the categorical imperatives of morality from his concept of an ideally rational being; though without, I think, spelling out a clear reason why we, who are in this context at best potentially rational beings, should strive to become actually and ideally rational.) The point of the reference here to logically necessary truths is simply and solely, by indicating that the Universe does contain something like the sort of objectivity we need, to encourage our investigations. I think of all those — from Plato himself through St. Augustine up to and including, it is said, Elizabeth Anscombe as a schoolgirl — who, having first satisfied themselves of the reality of the Platonic Forms, then sought further species of the exotic and elusive genus *substantia incorporealis* with a fresh surge of confidence.

2. *The Groundedness of Rights*: The first conceptual truth about rights is that they are entitlements which must possess some kind of objectivity. The second is that they are entitlements which have to be grounded in — which is not to say deduced from — some fact or facts about their bearers. Suppose that two bearers of rights are to be said to have different rights. Then this difference has to be justified by reference to some dissimilarity between what each has done, or suffered, or is.

Suppose, on the other hand, that two bearers of rights are to be

¹⁰ J. LOCKE, AN ESSAY CONCERNING HUMANE UNDERSTANDING, Book IV, Ch. iii, §§ 18-19 (1690) [pp. 273-75 in original text].

said to have the same right. Then there is, surely, no parallel necessity requiring that in both cases these be identically grounded.¹¹ Two or more different foundations might conceivably give rise to one and the same right; a particular sum, for instance, might have been promised as the reward for two quite disparate performances; indeed in one or the other case it might have been promised unconditionally.

That all this is so — if indeed it is all so — is a purely formal truth. It places no substantial restriction on the respects in which bearers of rights must themselves either be or have been similar or different if they are to be said to have the same or different rights. Thus it is perfectly proper to say that we all have (moral) rights to the fulfillment of any promises made to us; notwithstanding that the only facts about us on which these particular rights have to be grounded are the facts that we are the people to whom these promises were in fact made; and notwithstanding that the original selection by the promisors of us as the promisees could conceivably have been wholly random and gratuitous. A right, as Stanley Benn nicely puts it, “is a normative resource;”¹² and I may acquire such a resource without any antecedent desert or entitlement to warrant this acquisition. Indeed, since the notion of desert surely presupposes that of entitlement¹³ — entitlement, that is, to whatever personal factors are exercised in the conduct producing that desert — there could be no entitlements at all unless some of these were not themselves so warranted.

It needs to be emphasized also that his grounding of rights upon facts about the bearers of those rights involves no violation of Hume’s Law.¹⁴ Conclusions about what ought to be are not being deduced — nor could they be validly so deduced — from premises

¹¹ Compare Honore, *Social Justice*, 8 MCGILL L.J. 78 (1962), revised and reprinted in R. SUMMERS, *ESSAYS IN LEGAL PHILOSOPHY* 61 (1968). Honore argues that the rule “Treat like cases alike” does not entail “Treat unlike cases unlike.” *Id.* at 68.

¹² Benn, *Human Rights — For Whom and For What?*, in E. KAMENKA & A.E.-S. TAY (eds.), *HUMAN RIGHTS* 59, 64 (1978).

¹³ See my *Who are the Equals?* to appear first in *PHILOSOPHIA* (Ramat-Can, Israel), then, considerably later and drastically revised, in my *THE PROCRUSTEAN IDEAL: PHILOSOPHICAL ESSAYS ON LIBERTY, EQUALITY AND SOCIALISM* (London: Temple Smith, forthcoming).

¹⁴ See D. HUME, *A TREATISE OF HUMAN NATURE*, Book III, part i, § 1 (1754). Hume’s Law should not be confused with Hume’s Fork: the second expression refers to the aggressive employment of his distinction — made most clearly in D. HUME, *AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* § IV, part i (1777) — between propositions stating, or purporting to state, “matters of fact and real existence,” and others stating, or purporting to state, “the relations of ideas.”

themselves purely neutral and detached, premises stating non-committally only what is the case. It may appear that this impossibility is occurring, especially if we continue to attend to the example of promising. Indeed it has so appeared, as a very forceful and confident illumination, to an able philosopher.¹⁵ Can we not, it may be asked, more or less brashly, deduce "Brenda has a right to receive \$100 from Burl" from "Burl promised Brenda to give her \$100?"

Yes, indeed we can. But the premise in this valid deduction is no more purely neutral and detached than the conclusion. Both express commitment to the institution of promising. What would not legitimate the move to "Brenda has a right to receive \$100 from Burl" would be any one of the corresponding reports by some truly non-participant social observer, such as the report: "Burl said to Brenda, 'I promise to give you \$100.'" (Compare, and perhaps contrast too, the way in which the truth of that dull proposition *p* can itself be deduced from the truth of the proposition "Letitia knows *p*;" whereas from the truth of the likes of the very different proposition, "Letitia said, 'I know *p*,'" it cannot.)

(a) This second conceptual truth about rights is one particular case of a much more general truth about all appraisal and valuation. So in making both the particular and the general point we are, as "the implacable Professor" J.L. Austin used to say, "Looking again . . . not *merely* at words . . . but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of . . . the phenomena."¹⁶

The general truth is that in appraising and valuing — as opposed either to stating our likes and dislikes or simply reacting with squeals of delight or howls of anger — we are engaged in an essentially rational activity; albeit an activity which is, as far as the present point is concerned, essentially rational only in the thin sense that in it we necessarily commit ourselves to returning the same verdicts in all other similar cases. Even this is by itself sufficient to rule out all analyses of, for instance, "She is a good woman" in terms simply of anyone's likes or dislikes;¹⁷ to say nothing of the still more implausible suggestion that it means instead something like, "She is a woman: horray!"

¹⁵ Searle, *How to Derive "Ought" from "Is"*, 75 *PHILOSOPHICAL REV.* 43 (1964).

¹⁶ J.L. AUSTIN, *PHILOSOPHICAL PAPERS* 182 (2d ed. 1970).

¹⁷ Notice here Hume's still much under-appreciated comparison between terms which can and cannot be so analyzed, in D. HUME, *AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS* § 9, part ii (1754).

Another corollary is the elimination of Moore's account of value in *Principia Ethica*, at least in its most famous formulation. Whatever we conclude about Hume's contention that value characteristics are really reactions in our minds, falsely projected out into their provocations, we still cannot allow that they are like colours. For two objects may be for all practical purposes identical, save that one is yellow while the other is not: it happens all the time. Yet it cannot happen that two objects are similarly identical, save that one is a good one and the other is not. It must, I conclude, be by the same token incoherent to maintain that, of two people who are the same in respect of whatever may be allowed to constitute the grounds of some right, one is, and the other is not, endowed with that normative resource.

(b) Against at least my next, jumbo-sized, subsection I hope that the final charge pressed by Aelius Aristides will not be sustained. We philosophers, he complained in his *Oration on the Four*, "never write useful articles, organize conventions, honour the Gods, comfort the afflicted, arbitrate in civil disputes, counsel the young (or anyone else), or give any thought in what they write to considerations of the public good."¹⁸

The no doubt modest public good considered is the suggestion that it is scarcely possible to justify the nowadays widely popular identification of the imposition of a universal equality of condition with the enforcement of (a kind of) justice. If this identification is indeed incorrect, then the protagonists of the former ideal — who are today so numerous and so influential among "the clerisy of power"¹⁹ — should in honesty abandon the legitimizing and propaganda advantages of appeals to justice. Let them instead make bold to proclaim in general — as in the particular context of penal policy some of their spiritual kin already do²⁰ — that the whole notion of justice is atavistic, confused, backward-looking, reactionary, gothic: that scientifically enlightened public policy is necessarily directed to quite other ends.

Certainly, if we ignore for the moment all overtones of approval

¹⁸ David Cooper of the University of Guildford showed me this passage, which I take my first chance to share. The Greek text can be found in W. DINDORF, *AEIUS ARISTIDES* (1964).

¹⁹ Nisbet, *The Fatal Ambivalence of an Idea*, *ENCOUNTER*, Dec. 1976, at 10.

²⁰ For a forthright denunciation of justice by the sometime high priest of North American orthopsychiatry — a denunciation couched in very much the terms indicated in the text — see K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968), and compare A. FLEW, *CRIME OR DISEASE?* (1973).

or disapproval, the contrast between the forward-looking and the backward-looking is absolutely right. For any version of this ideal of equalizing future conditions is concerned precisely with achieving and maintaining those conditions of equality; regardless of any differences between what people have or will have been, or done, or suffered. Justice, on the other hand, is essentially backward-looking. It is concerned with deserts and entitlements — which have to be grounded on facts about the deservers and the bearers of entitlements, upon what these have done or not done, upon what they are, and upon what has happened to them.

All these I take to be conceptual matters,²¹ with no immediate implications for what anyone's deserts or entitlements actually and substantially are; (though it is perhaps worth remarking that the first phrase of the traditional definition — *suum cuique tribuere, e minem laedere, honeste vivere* — would sound a trifle awkward if for each their own were always the same and equal). If we are going to say that everyone has some rights which are the same as those of everyone else, then we must find some appropriate common characteristics upon which to ground these basic human rights; and, to ensure that these characteristics really are universal, prudence recommends that they be or be made defining.

Suppose now that someone wants to maintain that it is justice which requires an equality of condition, then they have somehow got to get rid of all inequalities of both desert and entitlement. No doubt there could be more than one way of approaching this objective: one might, for instance, taking a strong line on Original Sin insist that human deserts are equally and irreparably abysmal. But today there is one uniquely popular strategy. This is to try to discredit the whole idea of desert, to discount possibly different individual entitlements, and to assert either a fundamental universal right to equality of condition, or a collection of such fundamental rights in fact summing to equality. Thus, in order to represent the imposing of their ideal as the enforcing of justice, egalitarians of outcome have to maintain that they are thereby securing everyone's deserts and entitlements, or deserts or entitlements.²² But then, in order to en-

²¹ It is, therefore, odd that critics should describe the whole package of views propounded in R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) as "an entitlement theory of justice." Would they call the statement that marriage is essentially concerned with sexual relations a theory of marriage?

²² For some development of the distinction between this and two other very different dimensions of equality, and for the point that to "the clerisy of power" the present egregiously

sure that these are as requisite equal, they have to make out that our basic rights as people, which must of course as such be the same, either include or add up to a right to equality of condition — a conclusion which necessarily excludes any individual, and hence presumably diverse, entitlements or deserts.

Against diverse deserts the obvious line of attack is frontal. If either the concept of desert is incoherent or it can have no application to creatures such as we in fact are, then there can be no question of our having either equal or unequal deserts. This line — as usual without clearly distinguishing between its two versions — has in the present context been taken by, for instance, Lars Ericsson and Stuart Hampshire: the first in a book entitled *Justice in the Distribution of Economic Resources* published in Stockholm; the second in a long rave review of John Rawls' *A Theory of Justice* for *The New York Review of Books*.²³

Ericsson argues on the basis of a general determinism inconsistent with the reality of choice, whereas Hampshire here follows the more particularly Skinnerian line that all human conduct is really the work of the environment.²⁴ But if they were successful in driving their offensive home, then, as Skinner himself is well aware, it would undermine the whole structure of moral thought and activity, and in particular — what is essential to the moral idea of justice — the idea of people as both themselves having entitlements, and being by the same token morally obliged to respect the entitlements of others.²⁵ For, whether or not it is intelligible to ascribe some kind of rights to the brutes or to plants, surely it must be senseless to make an assertion of rights against anything other than rational agents, capable of acting by choice in one way rather than another, and of having their own reasons for so doing?

Rawls himself follows a different line. His enormous book has

bureaucratic vision is always one to be imposed by the compulsions of social engineering, rather than pursued by voluntary effort and their own sacrificial example, see my *The Procrustean Ideal* in *ENCOUNTER* for March 1978 (Vol. L No. 3), pp. 70-79. Contrast the strictly voluntary and self-imposed equalities of the Israeli kibbutz.

²³ L. ERICSSON, *JUSTICE IN THE DISTRIBUTION OF ECONOMIC RESOURCES* (1976); Hampshire, *Book Review*, *N.Y. REV. OF BOOKS*, Feb. 24, 1972, at 34.

²⁴ See B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1972), and compare A. FLEW, *A RATIONAL ANIMAL* 140-50 (1978).

²⁵ Ponder the words of an authentic Great Sage, who may perhaps by now have been rehabilitated in his own country. A pupil once asked Confucius whether his rule of conduct might not perhaps be epitomized in a single word: "The Master replied, 'Is not "reciprocity" the word?'" *THE ANALECTS OF CONFUCIUS*, edited and translated by W.E. Soothill, T'aiyuanfu [Shansi, 1910], XV S.23.

been hailed "as the long-awaited successor to Rousseau's *Social Contract*, and as the rock on which the Church of Equality can properly be founded in our time."²⁶ As we all know, it begins by reviving the idea of a social contract, to be notionally and timelessly negotiated behind a Veil of Ignorance: "It is assumed," Rawls explains

. . . that . . . no one knows his place in society, his class position or social status . . . his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good More than this, I assume that the parties do not know the particular circumstances of their own society The persons in the original position have no information as to which generation they belong.²⁷

(Is there, by the way, any system of positive law under which the courts would allow such wretched zombies — we can scarcely rate them persons — to be minimally competent to make a contract?)

It is usual to discuss this comprehensive blinkering as having been stipulated in order to secure impartiality; which makes the whole exercise — as R.M. Hare, for instance, suggested²⁸ — a dramatization of traditional appeals to the ideally impartial spectator. Certainly Rawls does mention this as one purpose: "We should insure further that particular inclinations and aspirations, and persons' conceptions of their good do not affect the principles adopted."²⁹ But his stated primary purpose is wholly different. The point is that all human particularities are, he thinks, irrelevant:

Once we decide to look for a conception of justice that nullifies the accidents of natural endowment and the contingencies of social circumstance as counters in quest for political and economic advantage, we are led to these principles. *They express*

²⁶ Nisbet, *The Pursuit of Equality*, in *THE PUBLIC INTEREST*, No. 35, Spring 1974, pp. 103-20.

²⁷ J. RAWLS, *A THEORY OF JUSTICE* 137 (1971). Curiously, since the book was compiled in the United States in the sixties, it never seems in so many words to rule out knowledge of either sex or colour. But Dr. Virginia Held has shown me a passage, Rawls, *The Justification of Civil Disobedience*, in H. BEDAU (ed.), *CIVIL DISOBEDIENCE* 240, 242 (1969), where Rawls actually says that "they do not know . . . whether they are . . . man or woman," and so on.

²⁸ See the first part of his cool Critical Study, Hare, *Rawls' Theory of Justice* (pt. 1), 23 *PHILOSOPHICAL Q.* 144 (1973).

²⁹ J. RAWLS, *supra* note 27, at 18.

*the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view.*³⁰

Having, for the two reasons elucidated in our previous paragraph, hung up the Veil of Ignorance, Rawls puts the basic question to his hypothetical contracting parties. After the endearing frankness of his confession that "We want to define the original position so that we get the desired solution,"³¹ it comes as no surprise that they cannot but "acknowledge as the first principle of justice one requiring an equal distribution. Indeed, this principle is so obvious that we would expect it to occur to anyone immediately."³² Given that the zombies have deliberately been rendered ignorant of all those particularities of actual, flesh and blood, historically situated, humanly related, individuals upon which possibly unequal claims might be grounded: to them it must indeed seem obvious.

Notice now that this supposedly so manifest "first principle of justice" is being offered: not as a defeasible methodological presumption, but as a substantive moral commitment; not as a ruling of prudence for those in the original position, but as a — indeed the — fundamental moral judgement. Certainly Rawls is talking prudence in the words immediately preceding those just quoted: "Since it is not reasonable . . . to expect more than an equal share in the division of social goods . . . and . . . not rational . . . to agree to less, the sensible thing . . . to do . . .," and so on. But what they are thus supposed to acknowledge is, equally certainly, a matter of morality; and the primary stated reason for fixing the cognitive blindfolds always was to make the hypothetical contracting parties into sound and reliable moral judges.

Of course it is not exactly with this most radically egalitarian "first principle" that Rawls himself wants to end: I have elsewhere both spelled out some of its unlovely consequences and argued that his own rather less harsh Difference Principle cannot be derived in the way in which he seems to want to derive it;³³ and I hope later

³⁰ *Id.* at 15.

³¹ *Id.* at 141.

³² *Id.* at 150-51.

³³ See Flew, *Equality or Justice?*, 3 *MIDWEST STUDIES IN PHILOSOPHY* 176 (1978).

It is bizarre that, having made this assumption from the beginning, Rawls should believe his system to be neutral on the question of socialism. Rawls should realize that in practice the priority of liberty cannot consist with either the particular allocative system of *A Theory of Justice* or any other requiring similarly monistic economic presuppositions.

Neither for the first nor for the last time I beg all those who, while working for socialism, still claim to be friends of liberty to ponder the burden of such statements as the following

and again elsewhere to develop the point that the differences sanctioned by that Difference Principle cannot be shown to be just (justicized), as opposed to justified (on utilitarian grounds), if the differences of individual endowment which are to be thus exploited for the common good are properly and in the first instance collective rather than individual assets. But what we do need to underline here is the fundamental point that the entire Rawls procedure is set up to presuppose that the grounds of all just claims must be common to all. So these grounds will presumably have to be found in the universal and essential nature of humanity, never in any individual particularities. It is entirely consistent with this presupposition for Rawls "to regard the distribution of natural abilities [and of everything else too — AF] as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out."³⁴ On the other hand, what is incongruous to the point of the bizarre is the unselfcritical innocence which allows Rawls to reproach what he sees as the Utilitarian competition because, as indeed is true, "[i]t does not take seriously the distinction between persons"³⁵ (And, similarly, whatever basis can there be for the individual self-respect which Rawls so rightly allows to be important, if everything which can distinguish one individual from another is a collective asset, or a collective liability, rather than something truly integral to that individual?)

It is precisely his own systematic and explicit insistence that everything by which one person may be distinguished from another is morally irrelevant, which prejudices the claims of *A Theory of Justice* to be what it falsely advertizes itself as being. (It must, however, in fairness and in parenthesis, be allowed: that inside the package Rawls indicates, without actually saying, that the contents have been too broadly described; and that he does introduce a qualifying adjective, though without undertaking to explain how the par-

from the Institute of Marxism-Leninism in Moscow. The Institute was outlining and recommending "Broad Left" or "United Front" tactics — the tactics in fact later to be followed in Chile, France and elsewhere; "Having once acquired political power, the working class implements the liquidation of the private ownership of the means of production. . . . As a result, under socialism, there remains no ground for the existence of any opposition parties counter-balancing the communist party." *THE ECONOMIST*, June 17, 1972, at 18, 23 (quoting Institute of Marxism-Leninism, *The Falsifiers of the Theory of Scientific Communism*). The monopoly socialist party does not, of course, have to be called a communist party; and it may even tolerate the purely nominal existence of other political organizations, so long as these are vestigial, impotent, and paralyzed.

³⁴ J. RAWLS, *supra* note 27, at 179.

³⁵ *Id.* at 27.

ticular kind thus picked out either relates or fails to relate to whatever other kinds are thereby excluded. "Our topic," he says, "is that of *social justice*."³⁶

Nor does Rawls offer much support for his insistence upon excluding from consideration everything by which one person might be distinguished from another. This appears to be one of several principles which — however unfamiliar, or even perverse, they might have appeared to the wise and good of earlier days — "we" find plumb obvious. When Rawls does offer an argument, it is nothing but the brisk erection and demolition of a straw man: "Perhaps some will think that the person with greater natural endowments deserves those assets and the superior character that made their development possible. Because he is more worthy in this sense, he deserves the greater advantages that he could achieve with them. This view, however, is surely incorrect. It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society."³⁷

Yes, certainly: no one deserves his place "in the distribution of native endowments." Who has been maintaining that any do? Yet this does not begin to prove, either that no one person has any deserts different from those of anyone else, or that we ought "to regard the distribution of natural abilities as a collective asset" Those who are so unfashionable as still to employ the concept of desert think of deserts as arising from what people do or fail to do, rather than from their natural constitutions. Nor has Rawls said anything at all to show that there cannot be, and are not, individual entitlements both unearned and undeserved, unless we count the hint here that this "distribution of native endowments" is itself "arbitrary from a moral point of view."

The word "individual" has to go in there because his present claim precisely is a claim to an unearned and undeserved collective

³⁶ *Id.* at 7 (emphasis added). A cynic might say that, if only Rawls had added this adjective to his title, my objection could not have been sustained, on the grounds that everyone must know that social justice has as little to do with justice without prefix or suffix as People's Democracy has with democracy or Bombay duck with duck. But such a cynic would have to be referred to those like A. Honore who do make room for some inequalities of desert. These in his account may override the first principle of social justice; that "all men considered merely as men and apart from their conduct or choice have a claim to an equal share in all those things . . . which are generally desired and are in fact conducive to their well being." Honore, *supra* note 11, at 62-63.

³⁷ J. RAWLS, *supra* note 27, at 104.

entitlement: what ought to be regarded as a collective asset just is, surely, a collective entitlement. From the beginning too the entire Rawls contractual project tacitly presupposes that all tangible or intangible goods — whether already at hand or to be produced or discovered later — all goods of every kind arising within the artificially unknown state borders of the artificially unknown territories being or to be inhabited by his thought-experimental group, everything is collective property, available for distribution or redistribution at the absolute discretion of the group. But of these various goods all those inherited by the present generation must constitute unearned, while all those produced by it will presumably be earned, collective entitlements.

Rawls, like so many others, is inclined to speak as if there had been an active distribution of talents, temperaments, and bodily parts and as if the authorities had in this distribution done a scandalously unfair job. Yet there never was nor could have been any such active distribution. Who are or were the legatees of our genetic inheritances, or of the sums of our bodily parts; and to what antecedently existing persons could the Great Distributor have allocated such things? The truth is that most of the elements which Rawls sees as constituting morally arbitrary individual inheritances — inheritances which ought to be regarded as adding up to a single collective asset — are themselves integral to the various persons composing any actual human collective.

For suppose — with acknowledgments to Nozick³⁸ — a population of which half is born ordinarily two-eyed and half with no eyes at all. Suppose further that it became possible, safe, and easy to effect eye-transplants. Then is Rawls so absolute and so far-gone a collectivist that he would be prepared to maintain that for a two-eyed person to submit to a transplant operation is obedience to an imperative of justice, rather than an expression of supererogatory and overflowing charity? But if it is once allowed that we all have unearned and undeserved entitlements to our own constitutive bodily parts, then how can parallel claims about our talents or our relative lack of them, and about our rights over the possibly productive employment of all these things, be rationally resisted? Yet, if any of these several claims goes through, then it must be goodbye to any contention that the separate sums of the rights of all individuals separately, as opposed to those of their universal

³⁸ R. Nozick, *supra* note 21, at 206.

rights simply as human beings, are the same and equal.

3. *The General Reciprocity and a Particular Non-Reciprocity of Rights*: In a methodological manifesto which is at the same time an exquisite philosophical masterpiece J.L. Austin concluded a paragraph on "the Last Word" with the willing concession: "Certainly, then, ordinary language is *not* the last word: in principle it can everywhere be supplemented and improved upon and superseded. Only remember, it *is* the *first* word."³⁹ The conceptual truths about rights presented in the two previous sections are, I believe, firmly grounded upon established usage of the word "right." But some points in this third section do involve some supplementing, improving and superseding.

(a) This is surely true of the proposal that rights be attributed only to those capable of — or, to allow for infants, capable of becoming capable of — themselves claiming rights for themselves, and in and by that claim undertaking the reciprocal obligation to respect the rights of others.⁴⁰ For some people do in fact speak about the rights of the brutes, and even of trees; and any deficiency which they display in so doing is not one of basic word-training. The United Nations Educational Scientific and Cultural Organization, for instance, recently adopted, with all customary brouhaha, a Universal Declaration of the Rights of Animals. (UNESCO has plenty of time and energy available — time and energy studiously saved by not attending to outrages against humanity in the Democratic Republic of Kampuchea, or in any of those other UN member countries contriving so effectively by their favoured political or racial colour to immunize themselves against international protest.)

This new declaration, supposedly set to become UN law by 1980, begins by asserting "that all animals are born with an equal claim on life and the same rights to existence." It then proceeds to spell out the human duties implied by these brute rights: "No animal shall be exploited for the amusement of man," for one; and, for another, "scenes of violence involving animals shall be banned from cinema and television." To no one's surprise the charter skirts the awkward issue of killing animals for food. Yet it makes up for this with a bold declaration that "any act involving mass killing of wild

³⁹ J.L. AUSTIN, *supra* note 16, at 185.

⁴⁰ I wish to say here that I had to start writing before receiving my copy of Alan Gewirth's *Reason and Morality*. But I hope and expect that my remarks in the present subsection will serve as a kind of "trailer" to his symposium contribution.

animals is genocide."⁴¹

The proposal that rights should be ascribed only to potential claimers and respecters of the same does not, of course, foreclose the possibility of insisting that all cruelty is wrong. Here the question is indeed, as Bentham urged, not "Can they reason? nor, Can they talk? but, Can they suffer?"⁴² It could be — I affirm that it is — that we should treat the brutes with a kindness and restraint which they have no right to demand; just as, as we shall shortly be reminding ourselves, we have some duties to persons which those persons have no right to demand.

(b) The previous subsection suggested that a universal reciprocity should be made essential to the idea of rights: that is, that rights should be ascribed only to those capable of themselves claiming rights for themselves, and in and by that claim undertaking the reciprocal obligation to respect the rights of others. The present subsection brings out that and how it might be a good thing that someone should have something, or should be treated in some way, even that it might be someone's duty to secure these objectives, without its being the case that the beneficiary has a right to be provided with that something, or to be treated in that way. The most obvious, least controversial, yet by itself decisive example is that of me promising you to give that, or to do that, to him. My promise creates your moral rights to its fulfillment, but gives him no new moral rights or duties. Another favourable and scarcely controversial example is the man drowning; it may be my duty as a chance passerby to effect a rescue; but it is not his right that I should. The upshot is that whereas all rights generate some corresponding duties — the duties, namely, of respecting those rights — it is not inconsistent to speak of duties without any corresponding rights. The Chairman of the (anti-voluntary euthanasia) Human Rights Society was not, therefore, formally contradicting himself when he announced recently; "There are no such things as rights. You are not entitled to anything in this Universe. The function of the Human Rights Society is to tell men their duties."⁴³

In our century, but especially since the end of World War II,

⁴¹ *A Sense of Proportion*, WALL ST. J., Oct. 25, 1978, at 26, col. 2. Cicero was in his day no doubt on target when he wrote: "We do not speak of justice in the case of horses or lions." Quoted in H. GROTIUS, *supra* note 5, at 41.

⁴² J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, Ch. XVII, § 4, footnote (1789).

⁴³ The General Practitioner of London for 26/XI/76.

people have become increasingly inclined to affirm that we all have rights to whatever it is thought that it would be good for everyone to have. It is significant that modern declarations of human rights are much longer — as well as being far less well-written — than those adopted in the American and French Revolutions of the eighteenth century. The most notorious, that adopted by the General Assembly of the United Nations in December 1948, covers in my text six printed pages. Among many other things, it tells us: that “everyone, as a member of society, has a right to social security . . .” (Article 22); that “Everyone has the right to . . . periodic holidays with pay” (Article 24); and that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . . and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (Article 25). Oh yes, and be sure not to miss Article 26: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory;” and so on, through a clause specifying that it must “further the activities of the United Nations,” to the slightly incongruous afterthought conclusion that “Parents have a prior right to choose the kind of education that shall be given to their children.”

To someone detecting, and objecting to, a note of reactionary ridicule in the previous paragraph, my reply must be that any formulation of such claims, and any reporting of them, is bound to sound absurd. This is so for the excellent Groucho Marxist reason that they are absurd. The absurdity lies in putting forward as universal human rights demands which it would not be sensible to make except against a modern industrial state. The traditional political rights — such as the famous three specified in the American Declaration of Independence — are rights to non-interference. As such they could be and are rights against all comers, rights which everyone must have a corresponding duty to respect. But the proposed new rights are rights to provision, and there surely cannot be corresponding duties on everyone else to make these provisions. The former may be distinguished as option and the latter as welfare rights.

In 1960 in the United States the Democratic Party promised in its platform that, if elected, its administration would “reaffirm the economic bill of rights which Franklin Roosevelt wrote into our national conscience sixteen years ago.” That platform listed eight great rights of provision, including “(1) The right to a useful and

remunerative job in the industries or shops or farms or mines of the nation[,] (2) The right of every farmer to raise and sell his products at a return which will give him and his family a decent living [, and] (5) The right of every family to a decent home."⁴⁴ The comment of Ayn Rand, in the chapter of *The Virtue of Selfishness* from which I borrow these quotations, strikes to the heart of the matter: "A single question added to each of the above eight clauses would make the issue clear: *At whose expense?*"⁴⁵

One consequence of this enormous extension — and I would say overextension — of the area of supposed universal human rights is a parallel extension — and overextension — of the scope of justice. If all the new legal rights created by late twentieth-century welfare states, as well as such others as they may from time to time in the future decide to create, always were everyone's moral rights also, then almost everything which might conceivably be made a matter of public policy falls within the scope of justice — (social) justice. Morality too becomes, for practical purposes, coextensive with the enforcement of this all-embracing ideal.

Rawls provides a piquant illustration of the consummation of the process. For his milder modification and elaboration of a radical egalitarianism of outcome is by him presented as a proud contemporary rival to classical Utilitarianism. An account of justice-as-fairness takes the field: not against, for instance, J. S. Mill's particular and local struggles in the final Chapter V of *Utilitarianism*;⁴⁶ but against general Utilitarianism as a whole. It is altogether typical of the sheltered parochialism pervading *A Theory of Justice* that Rawls sees nothing at all remarkable in so curious a mismatch.

In the Preface his account of the big fight is a muddle: "During much of modern moral philosophy the predominant systematic theory has been some form of utilitarianism."⁴⁷ This has indeed had well-girded opponents. "But they failed, I believe to construct a workable and systematic moral conception to oppose it What I have attempted to do is . . . to offer an alternative systematic account of justice that is superior, or so I argue, to the dominant utilitarianism of the tradition."⁴⁸ But, if I may refresh our memories, Mill makes it clear from the beginning that he is concerned not with

⁴⁴ A. RAND, *THE VIRTUE OF SELFISHNESS* 128-29 (1961).

⁴⁵ *Id.* at 129.

⁴⁶ J.S. MILL, *UTILITARIANISM* (1897).

⁴⁷ J. RAWLS, *supra* note 27, at vii.

⁴⁸ *Id.* at viii.

any particular part, however important, but with the whole. Thus his very first paragraph puts "the question concerning the *summum bonum*, or, what is the same thing, concerning the foundation of morality."⁴⁹

Perhaps, having said so much, I should also mention the possibility of erring in the opposite direction. Simply to respect other people's rights is not, I would indeed agree, to fulfil the whole duty of man. Maybe Ayn Rand, her few followers, and some others, actually have, by maintaining that it is, erred in this opposite direction. Nevertheless, even if they have, we must not, in our love of seeing ourselves as taking a sensibly Aristotelian middle way between two opposite faults, make the mistake of thinking that such opposite errors are always equally tempting and equally well-patronized.⁵⁰ In fact — in this particular case — the overwhelming weight, both of sheer numbers and of academic prestige, lies on the side of going wrong with Rawls rather than in what is often but perhaps wrongly believed to be Rand's way.

On the relations and differences between the world of rights and the rest of morality I have little to offer; which, this late in my day, is just as well. However, if we are to maintain such a distinction, then the weight of what the old Roman lawyers used to call the *mos majorum*, and what the new Austinians see more particularly as the verbal habits formed and tested through generations of experience, is for accepting that justice and rights are fundamentally concerned with not doing and not suffering actual harm or injury; "to allow to each their own, to harm no one, to live honourably." The key notion appears to be non-interference; and where rights to receive more positive goods arise, these are less fundamental, being derived from promises and contracts. (The rights of children to support by their

⁴⁹ J.S. MILL, *supra* note 46, at 1.

⁵⁰ Perhaps there is no call to make this point before an American audience. But in my own country in its decline and fall it is as common as it is ruinous to see the path of political wisdom as necessarily equidistant between two opposite and always equally matched extremes of left and right. Since, while there are in fact very many totalitarian socialist extremists, often entrenched in powerful positions in the trades unions and their Labour Party, there is not any correspondingly numerous dedicated and influential counterforce of absolute antisocialists, the clients of this inept model have to identify Prime Minister Margaret Thatcher and Sir Keith Joseph as their right-wing extremist bogeypersons. Positioning themselves, therefore, equidistant between such mild conservatives and the mass of authentically Leninist ultras, their middle road is always the road to full Clause IV and 1984 socialism; but taken less fast than the ultras would wish. Compare, on the error of the popular misguiding doctrine that truth is always in the middle, A. FLEW, *THINKING STRAIGHT* §§ 2.30-2.33 (1977).

parents are created by the unspoken promises to this effect made by parents in the process of bringing their children into existence.) The rest of morality is, correspondingly, concerned with doing actual positive goods, goods which, though they no doubt ought to be done, are not owed to anyone as of right.

Distinctions of the kind indicated seem in the last fifty years or so to have dropped out of moral philosophy, or at least receded very much into the background, casualties no doubt of the concurrent, explosive, imperial expansion of the truly neo-colonialist concept of (social) justice. But it is relevant to notice that during the thirties in a book called *The Two Moralities* A.D. Lindsay preached a sermon on the Pauline text: "love is the fulfilling of the law;" the word "fulfilling" involving, of course, in this context supplementation rather than implementation.⁵¹ In older, more regular and mainstream, philosophy we may think of Kant's most characteristic contributions as referring most happily to the particular sphere of justice and rights; while Humean sympathy belongs rather to that other morality of love.

All this provides a second sufficient reason for excluding any peculiarly welfare-state imperatives from all lists of universal human rights. But — especially if we remember that Lindsay's "love" is the *agape* of the Greek *New Testament*, and that in turn the *caritas* of the Latin *Vulgate* — it also raises a familiar frightful bogey: "No charity! Every benefit a right." There are many things which I should like to say about this, and which upon some other occasion I will perhaps say. But here I will simply note without further com-

⁵¹ A. D. LINDSAY, *THE TWO MORALITIES* (1930). At the very beginning of the decade there had of course been W. D. ROSS, *THE RIGHT AND THE GOOD* (1930), while very recently D. D. Raphael noticed that "[t]he gradual extension of the scope of rights means that the concept of justice gradually takes over more of what formerly came under the concept of charity." Raphael, *The Rights of Man and the Rights of the Citizen*, in D. D. RAPHAEL (ed.), *POLITICAL THEORY AND THE RIGHTS OF MAN* 101, 117 (1967).

Nevertheless, or perhaps consequently, Raphael asks in a contribution to a similar volume, Would anyone say that the Welfare State is a *charity* organization, or deny that it is a more *just* . . . society than one in which the relief of basic needs is left to private generosity? Would anyone say that the provision of uneconomic transport services to remote, sparsely populated areas of Britain is charitable rather than fair?

Raphael, *Conservative and Prosthetic Justice*, 12 *POLITICAL STUDIES* 149 (1964), reprinted in A. DE CRESPIGNY & A. WERTHEIMER, *CONTEMPORARY POLITICAL THEORY* 177, 190 (1970).

Well, since he presses me, and in full and rueful awareness that I must by so untrendy and eccentric an answer be forever excluding myself from acceptance as one of "we," I will say that and only that "just" just is not the word. (For the no doubt underprivileged outsider the often underdeprived "we" are they.) But please notice again that a policy can be many more things, even good things, besides either just or charitable.

ment the incongruity of the fact that, at least in my own country, those who habitually describe welfare state provisions as fulfilling the norms of (social) justice, nevertheless attack those wanting to slow or reverse the expansion of the state welfare machine: not as would-be doers of injustice; but rather as lackers of compassion.

4. *Rights and Liberty*: Bernard Mayo maintains, apparently as conceptual theses, both that what I claim as my right must be in my interests, and that claims to rights must be claims against the state or other competent institution.⁵² He offers no support for the second thesis other than the never to be minimized truth that institutions and states in particular constitute the main threats (as well as the main supports) to the rights most usually asserted. It is obvious that this reason by itself is not good enough. Even the fundamental and universal human rights can be, and in fact are, asserted against all comers.

It is more difficult to discover the truth about Mayo's first thesis. But this thesis surely cannot go through unless liberty is always in my interests, which would, I suppose, be perfectly consistent with his sound observation that a claim for something which is in our interests may nevertheless be a claim to something we in fact do not want. I confess, without a trace of shame, to resonating to Herbert Hart's assertion that the notion of a right is "peculiarly . . . connected with the distribution of freedom of choice."⁵³ If I have any light to throw on these issues it will be by raising the question whether it is coherent to proclaim a right while at the same time insisting that its exercise is to be compulsory.

Whether coherently or not, this is very often in fact done. In Britain, for instance, the industrial Trades Union Congress and its political creature the Labour Party never miss any chance of demanding and proclaiming the workers' unalienable rights to form and to join labour unions.⁵⁴ But they also demand and, so far as they can, enforce closed shops. Thus British Rail and other state monopolies have — with the full support of the TUC, the Parliamentary Labour Party, and the Cabinet, indeed at their behest — dismissed many employees with records of long and impeccable service on the

⁵² Mayo, *What are Human Rights?*, in D.D. RAPHAEL (ed.), *supra* note 51, at 68, 74-78.

⁵³ Hart, *Are There Any Natural Rights?*, 64 *PHILOSOPHICAL REV.* 175, 184 (1955).

⁵⁴ Not actually the strict truth: for when recently there were reports from the USSR that some heroes were trying to form a genuine labour union independent of the party and the government, it proved almost impossible to screw out of the General Council of the TUC even the faintest murmur of sympathy or support for these Tolpuddle Martyrs of our own time.

sole grounds that these enemies of the people were so cross-grained, or so principled, as to refuse to join the approved (and, of course, Labour Party affiliated) trades union.

In proclaiming the general right of association both the UN Universal Declaration of Human Rights and the later specifically European version make it quite clear that this right is the right to join or not to join, at will. Carping critics have even suggested that this is one reason why the TUC and the Labour Party are so hostile to every expression of (Western) European supra-nationalism, and certainly it is true that efforts are even now being made to get the related judicial institutions to condemn tyrannical violations of this right by British socialists. The same critics would explain the failure to extend the hostility to the UNO by pointing out that, in its in any case largely disingenuous declaration, while Article 23(4) reads specifically, "Everyone has the right to form and to join trades unions for the protection of his interests," it is only elsewhere in Article 20(2), that the correlative general freedom not to join gets a mention, "No one may be compelled to belong to an association."

Another equally contentious but less party-political illustration is provided by what the Founding Fathers put first, the right to life. Clearly this is at least the right not to be killed by anyone else, unless and until I forfeit that right by, for instance, myself doing murder. But is that minimum itself part of a wider right to go on living, or not, as I choose? More specifically, and crucially, is the right to life necessarily and by the same token the right to death: the right, that is, to suicide, and to the assisted suicide that is voluntary euthanasia?

My own answer is an unhesitating, even passionate, "Yes"; and I am actively engaged in campaigns to give legal effect to the contentious correlates of both the right to join trades unions and the right to life. But I can scarcely deny that the usage which permits the exclusions which I find so repugnant is established, even dominant. So within my own brief as an under-labourer instructed to finish only the preliminary logical geographizing, and short of the development of that theory of rights which I look forward to finding in some later article, I cannot think of any decisive argument to demonstrate that my answer is correct.

So, since allowing for the notes I am already pushing well past the prescribed upper limit for length, I end now by quoting an item from a recent issue of that doughtily libertarian little magazine *Reason*:

Our second Doublespeak Award goes to Mr. James Loucks, President of Crozer Chester Medical Center of Chester, Pennsylvania. Loucks got a court order allowing his hospital to give a Jehovah's Witness a blood transfusion. The woman had requested in writing that the hospital respect her religious beliefs and not give her a transfusion under any circumstances, but Loucks says he ignored her wishes "out of respect for her rights."

THE BASIS AND CONTENT OF HUMAN RIGHTS*

*Alan Gewirth***

Despite the great practical importance of the idea of human rights, some of the most basic questions about them have not yet received adequate answers. We may assume, as true by definition, that human rights are rights which all persons have simply insofar as they are human. But are there any such rights? How, if at all, do we know that there are? What is their scope or content, and how are they related to one another? Are any of them absolute, or may each of them be overridden in certain circumstances?

I.

These questions are primarily substantive or criterial rather than logical or conceptual. Recent moral philosophers, following on the work of legal thinkers,¹ have done much to clarify the concept of a right, but they have devoted considerably less attention to substantive arguments which try to prove or justify that persons have rights other than those grounded in positive law. Such arguments would indicate the criteria for there being human rights, including their scope or content, and would undertake to show why these criteria are correct or justified.

The conceptual and the substantive questions are, of course, related, but still they are distinct. If, for example, we know that for one person A to have a right to something X is for A to be entitled to X and also for some other person or persons to have a correlative duty to provide X for A as his due or to assist A's having X or at least to refrain from interfering with A's having X, still this does not tell us whether or why A is entitled to X and hence whether or why the other person or persons have such a correlative duty to A. Appeal to positive recognition is obviously insufficient for answering these substantive questions. The answer is not given, for example, by pointing out that many governments have signed the United Nations Universal Declaration of Human Rights of 1948 as well as later covenants. For if the existence or having of human rights de-

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¹ See W.N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, AND OTHER ESSAYS* (1919); J. SALMOND, *JURISPRUDENCE* 229-67 (10th ed. 1947).

pending on such recognition, it would follow that there were no human rights prior to or independent of these positive enactments.

The questions, "Are there any human rights?" or "Do persons have any human rights?" may indeed be interpreted as asking whether the rights receive positive recognition and legal enforcement. But in the sense in which it is held that humans have rights (so that such rights exist) even if they are not enforced, the existence in question is normative: it refers to what entitlements legal enactments and social regulations ought to recognize, not or not only to what they in fact recognize. Thus the criterion for answering the question must be not legal or conventional but moral. For human rights to exist is for there to be valid moral criteria or principles which justify that all humans, qua humans, have the rights and hence also the correlative duties. Human rights are rights or entitlements that every human person morally ought to have; thus they are universal moral rights. There may, of course, be other moral rights as well, but only those which morally ought to be universally distributed among all humans are human rights.

This answer, however, seems to get us into more rather than less difficulty. In order to ascertain whether there are legal rights we need only look to the statute books; these, for present purposes, may be held to supply the criteria for the existence of such rights. But if for a moral or human right to exist is for it to satisfy valid moral criteria which justify or ground the right, where do we look for such criteria? What is the moral analogue of the statute books? If there were a single set of universally accepted moral criteria, our task might be somewhat easier, although even in this case we should still have to take account of the distinction indicated above between positive social recognition and moral validity.

In fact, however, the field of moral criteria is full of controversy: consider the competing substantive views epitomized by such thinkers as Kant, Kierkegaard, Nietzsche, Mill, and Marx, who hold, respectively, that the criteria for having rights consist in or are determined by reason, religion, power, utility, and economic class or history. The disagreements among these thinkers do not represent merely different "second-order" analyses of a commonly accepted body of "first-order" moral judgements, in the way philosophers may differ about the analysis of knowledge while recognizing (except for some borderline cases) a commonly accepted body of knowledge. In contrast to these, the divergences among the above moral philosophers are disagreements of basic substantive first-order moral principle about what rights persons have, about how

persons ought to regard and act toward one another, about what interests of which persons are worth pursuing and supporting, and the like. And there is also considerable evidence that many contemporaries, both philosophers and non-philosophers, would share (although perhaps less systematically) one or another of such divergent moral principles.

Nor does the difficulty end there. For in many fields of empirical science and of practice where the "authorities" or ordinary persons disagree, we have some common conception at least of the context or subject-matter to which one must look as a kind of independent variable for testing their divergent assertions. Examples of these subject-matters are natural or experimental phenomena in the case of natural science, physical health in the case of medicine, rates of inflation or unemployment in the case of economics. But it seems that the very context or subject-matter to which one should look to resolve the disagreements of moral principle is itself involved in such disagreements. Obviously we should already be taking sides on this issue of moral principle if we were to urge that religion or economic history or social utility or aesthetic sensibility be appealed to as the independent variable for this purpose. Although Thomas Jefferson, following a long tradition, wrote that "all men . . . are endowed by their Creator with certain inalienable rights," it does not seem true to say that persons are born having rights in the sense in which they are born having legs. At least their having legs is empirically confirmable, but this is not the case with their having rights. And while it is indeed possible to confirm empirically, although in a more complex way, that most persons are born having certain *legal* rights, this, as we have seen, is not sufficient to establish that they have *moral* or *human* rights.

These general difficulties about moral criteria are reinforced when we look at recent attempts of moral philosophers to answer the substantive questions of what are the specific criteria for having moral rights and how it can be known that humans have such rights. For even where the philosophers agree at least in part on the scope or content of the rights, they disagree as to how the existence of these rights can be established or justified. We may distinguish five different recent answers. The intuitionist answer that humans' possession of certain inalienable rights is self-evident, most famously expressed in the Declaration of Independence, is reiterated in Nozick's peremptory assertion that "Individuals have rights, and there are things no person or group may do to them (without violating

their rights).”² Like other intuitionist positions, this one is impotent in the face of conflicting intuitions. The institutionalist answer that rights arise from transactions grounded in formal or informal rules of institutions, such as promising,³ incurs the difficulty that there may be morally wrong institutions, so that an independent moral justification must still be given for the institutional or transactional rules which are held to ground the rights. A third answer is that persons have rights because they have interests.⁴ This, however, indicates at most a necessary condition for having rights, since there would be an enormous and indeed unmanageable proliferation of rights if the having any interest X were sufficient to generate a right to X. Even if “interests” are restricted to basic or primary interests or needs, there still remain both the logical question of how a normative conclusion about rights can be derived from factual premises about empirically ascertainable characteristics such as the having of interests, and also the substantive question of why moral rights are generated by characteristics that all humans have in common rather than by more restrictive, inegalitarian characteristics that pertain only to some persons, or to persons in varying degrees, such as expert knowledge or rationality or will to power or productive ability.

The fourth answer, that persons have moral rights because they have intrinsic worth or dignity or are ends in themselves or children of God,⁵ may be held simply to reduplicate the doctrine to be justified. Such characterizations are directly or ultimately normative, and if one is doubtful about whether persons have moral rights one will be equally doubtful about the characterizations that were invoked to justify it. The fifth answer is Rawls’s doctrine that if persons were to choose the constitutional structure of their society from behind a veil of ignorance of all their particular qualities, they would provide that each person must have certain basic rights.⁶ Insofar, however, as this doctrine is viewed as giving a justificatory answer to the question of whether humans have equal moral rights, it may be convicted of circularity. For the argument attains its

² R. NOZICK, *ANARCHY, STATE AND UTOPIA* ix (1947).

³ Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175 (1955).

⁴ McCloskey, *Rights*, 15 *PHIL. Q.* 115, 126 (1965). Elsewhere, McCloskey holds that persons have a prima facie right to the satisfaction of needs: McCloskey, *Human Needs, Rights and Political Values*, 13 *AM. PHIL. Q.* 1, 9-10 (1976).

⁵ See J. MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* (1943).

⁶ J. RAWLS, *A THEORY OF JUSTICE* chs. 2-3 (1971).

egalitarian conclusion only by putting into its premises the egalitarianism of persons' universal equal ignorance of all their particular qualities. This ignorance has no independent rational justification, since humans are not in fact ignorant of all their particular qualities. Hence, apart from an initial egalitarian moral outlook, why should any actual rational informed persons accept the principle about equal moral rights that stems from such ignorance?

It may be objected that all the above difficulties about moral or human rights arise because I have taken too "cognitive" or "ontological" a view of them. Thus it may be held that moral rights are not something known or existent; the correct analysis of a rights-judgment is not "descriptive" but rather "prescriptive" or of some other noncognitivist sort. Rights-judgments are claims or demands made on other persons; they do not state that certain knowable facts exist; rather, they advocate, urge, or exhort that certain facts be brought into existence. Hence, questions of justification or validity are logically irrelevant to such judgments.

Now the prescriptivist interpretation of rights-judgments is partly true, but this does not remove the point of the justificatory questions I have asked. For one thing, as we have seen, different persons may make conflicting right-claims, so that the question still remains which of these claims is correct. Moreover, ascriptions of correctness or justification are intrinsic to rights-judgments: these consist not only in certain claims or demands but also in the implicit view, on the part of the persons who make them, that the claims have sound reasons in their support. If this were not so, discussion or debate about rights would consist only in vocal ejaculations or attempts at propagandistic manipulation; it would not have even potentially the aspects of rational argument or reflective appraisal which it in fact can and does display. In addition, the logical connections that hold among rights-judgments would be obscured or even left unexplained if the ejaculatory or manipulative interpretation were the sole or the main correct analysis of such judgments.

II.

Let us now begin to develop answers to the above questions about human rights. First, since these rights derive from a valid moral criterion or principle, we must consider what I have referred to as the context or subject-matter of morality. We saw that although in many other fields their subject-matters serve as independent variables for testing the correctness of conflicting judgments made within

them, it was difficult to find such a non-question-begging subject-matter for morality. Nevertheless, it does exist and can be found. To see what it is, we must consider the general concept of a morality. I have so far been using the words "moral" and "morality" without defining them. Amid the various divergent moralities with their conflicting substantive and distributive criteria, a certain core meaning may be elicited. According to this, a morality is a set of categorically obligatory requirements for action that are addressed at least in part to every actual or prospective agent, and that are intended to further the interests, especially the most important interests, of persons or recipients other than or in addition to the agent or the speaker.

As we have seen, moralities differ with regard to what interests of which persons they view as important and deserving of support. But amid these differences, all moralities have it in common that they are concerned with actions. For all moral judgments, including right-claims, consist directly or indirectly in precepts about how persons ought to act toward one another. The specific contents of these judgments, of course, vary widely and often conflict with one another. But despite these variations and conflicts, they have in common the context of the human actions which they variously prescribe or prohibit and hence view as right or wrong. It is thus this context which constitutes the general subject-matter of all morality.

How does the consideration of human action serve to ground or justify the ascription and content of human rights? To answer this question, let us return to the connection indicated above between rights and claims. Rights may be had even when they are not claimed, and claims are also not in general sufficient to establish or justify that their objects are rights. As against such an assertoric approach to the connection between claims and rights, I shall follow a dialectically necessary approach. Even if persons' having rights cannot be logically inferred in general from the fact that they make certain claims, it is possible and indeed logically necessary to infer, from the fact that certain objects are the proximate necessary conditions of human action, that all rational agents logically must hold or claim, at least implicitly, that they have rights to such objects. Although what is thus directly inferred is a statement not about persons' rights but about their implicitly claiming to have them, this provides a sufficient criterion for the existence of human rights, because the claim logically must be made or accepted by every rational human agent on his own behalf, so that it holds universally

within the context of action, which is the context within which all moral rights ultimately have application. The argument is dialectically necessary in that it proceeds from what all agents logically must claim or accept, on pain of contradiction. To see how this is so, we must briefly consider certain central aspects of action. Since I have presented the argument in some detail elsewhere,⁷ I shall here confine myself to outlining the main points.

As we have seen, all moral precepts, regardless of their varying specific contents, are concerned directly or indirectly with how persons ought to act. This is also true of most if not all other practical precepts. Insofar as actions are the possible objects of any such precepts, they are performed by purposive agents. Now every agent regards his purposes as good according to whatever criteria (not necessarily moral ones) are involved in his acting to fulfill them. This is shown, for example, by the endeavor or at least intention with which each agent approaches the achieving of his purposes. Hence, a fortiori, he also, as rational, regards as necessary goods the proximate general necessary conditions of his acting to achieve his purposes. For without these conditions he either would not be able to act for any purposes or goods at all or at least would not be able to act with any chance of succeeding in his purposes. These necessary conditions of his action and successful action are freedom and well-being, where freedom consists in controlling one's behavior by one's unforced choice while having knowledge of relevant circumstances, and well-being consists in having the other substantive general abilities and conditions required for agency. The components of such well-being fall into a hierarchy of three kinds of goods: basic, nonsubtractive, and additive. These will be analyzed more fully below.

In saying that every rational agent regards his freedom and well-being as necessary goods, I am primarily making not a phenomenological descriptive point about the conscious thought-processes of agents, but rather a dialectically necessary point about what is logically involved in the structure of action. Since agents act for purposes they regard as worth pursuing—for otherwise they would not control their behavior by their unforced choice with a view to achieving their purposes—they must, insofar as they are rational, also regard the necessary conditions of such pursuit as necessary goods. Just as the basic goods are generically the same for all agents,

⁷ See A. GEWIRTH, *REASON AND MORALITY* ch. 2 (1978).

so too are the nonsubtractive and additive goods. I shall call freedom and well-being the *generic features* of action, since they characterize all action or at least all successful action in the respect in which action has been delimited above.

It is from the consideration of freedom and well-being as the necessary goods of action that the ascription and contents of human rights follow. The main point is that with certain qualifications to be indicated below, there is a logical connection between necessary goods and rights. Just as we saw before that from "X is an interest of some person A" it cannot be logically inferred that "A has a right to X," so too this cannot be logically inferred from "X is a good of A" or from "X seems good to A." In all these cases the antecedent is too contingent and variable to ground an ascription of rights. The reason for this is that rights involve *normative necessity*. One way to see this is through the correlativity of rights and strict "oughts" or duties. The judgment "A has a right to X" both entails and is entailed by, "All other persons ought at least to refrain from interfering with A's having (or doing) X," where this "ought" includes the idea of something due or owed to A. Under certain circumstances, including those where the subject or right-holder A is unable to have X by his own efforts, the rights-judgment also entails and is entailed by, "Other persons ought to assist A to have X," where again the "ought" includes the idea of something due or owed to A. Now these strict "oughts" involve normative necessity; they state what, as of right, other persons *must* do. Such necessity is also involved in the frequently noted use of "due" and "entitlement" as synonyms or at least as components of the substantive use of "right." A person's rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others. In all these expressions the idea of normative necessity is central.

This necessity is an essential component in the ascription of rights, but it is not sufficient to ground this ascription logically. Let us recur to freedom and well-being as the necessary goods of action. From "X is a necessary good for A" does it logically follow that "A has a right to X"? To understand this question correctly, we must keep in mind that "necessary good" is here used in a rational and invariant sense. It does not refer to the possibly idiosyncratic and unfounded desires of different protagonists, as when someone asserts, "I must have a Florida vacation (or a ten-speed bicycle); it is a necessary good for me." Rather, "necessary good" is here confined to the truly grounded requirements of agency; hence, it correctly

characterizes the indispensable conditions that all agents must accept as needed for their actions.

Now it might be argued that when "necessary good" is understood in this universal and rational way, from "X is a necessary good for A" it does follow that "A has a right to X." For since the idea of a right involves normative necessity, "A has a right to X" is entailed by "It is normatively necessary that A have X," and this seems equivalent to, "X is a necessary good for A." There are three interrelated considerations, however, which show that "X is a necessary good for A" is not sufficient to provide the logical ground for "A has a right to X" as a matter of logical necessity. First, as we have seen, "A has a right to X" entails that other persons, B, C, and so forth, have correlative duties toward A. But how can these duties of other persons be logically derived from "X is a necessary good for A," which refers only to A, not to other persons?

Second, it must be kept in mind that rights involve not only "oughts" or normative necessity but also the idea of entitlement, of something due to the rightholder. There is logical correlativity between "A has a right to X," on the one hand, and "Other persons ought to refrain from interfering with A's having X and ought also, under certain circumstances, to assist A to have X," on the other, only when these "oughts" are viewed as indicating what A is entitled to or ought to have as his due. But in "X is a necessary good for A" this idea of A's entitlement to X, of its being due or owed to him, is not found. Hence, it cannot serve to generate logically the conclusion, "A has a right to X."

A third consideration which shows this is that, as we saw above, a rights-judgment is prescriptive: it advocates or endorses that the subject or right-holder A have the X which is the object of the right. But such advocacy need not be present in "X is a necessary good for A." For this statement, as such, does not necessarily carry with it any advocacy or endorsement on A's behalf by the person who makes the statement, even while he recognizes its truth. Hence, again, "X is a necessary good for A" is not sufficient to logically generate or entail "A has a right to X."

What these considerations indicate is that for the concept of necessary goods logically to generate the concept of rights, both concepts must figure in judgments made by the agent or right-holder himself in accordance with the dialectically necessary method. It will be recalled that this method begins from statements or judgments that are necessarily made or accepted by protagonists or

agents, and the method then traces what these statements or judgments logically imply. Thus, in the present context of action, the method requires that the judgments about necessary goods and rights be viewed as being made by the agent himself from within his own internal, conative standpoint in purposive agency.

When this internal, conative view is taken, the logical gaps indicated above between judgments about necessary goods and ascriptions of rights are closed. The agent is now envisaged as saying, "My freedom and well-being are necessary goods." From this there does logically follow his further judgment, "I have rights to freedom and well-being." For the assertion about necessary goods is now not a mere factual means-end statement; on the contrary, because it is made by the agent himself from within his own conative standpoint in purposive agency, it carries his advocacy or endorsement. In effect, he is saying, "I must have freedom and well-being in order to pursue by my actions any of the purposes I want and intend to pursue." Thus his statement is prescriptive.

By the same token, his statement carries the idea of something that is his due, to which he is entitled. It must be kept in mind that these concepts do not have only moral or legal criteria; they may be used with many different kinds of criteria, including intellectual, aesthetic, and prudential ones. In the present context the agent's criterion is prudential: the entitlement he claims to freedom and well-being is grounded in his own needs as an agent who wants to pursue his purposes. He is saying that he has rights to freedom and well-being because these goods are due to him from within his own standpoint as a prospective purposive agent, since he needs these goods in order to act either at all or with the general possibility of success.

This consideration also shows how, from the agent's judgment "My freedom and well-being are necessary goods," there also logically follows a claim on his part against other persons. For he is saying that because he must have freedom and well-being in order to act, he must have whatever further conditions are required for his fulfilling these needs; and these further conditions include especially that other persons at least refrain from interfering with his having freedom and well-being. Thus the agent's assertion of his necessary needs of agency entails a claim on his part to the non-interference of other persons and also, in certain circumstances, to their help.

There may be further objections against the derivation of the

agent's right-claims from his judgment about necessary goods; I have dealt with these elsewhere.⁸ What I have tried to show is that every agent must claim or accept, at least implicitly, that he has rights to freedom and well-being, because of the logical connection between rights and necessary goods as involving normative necessity, prescriptiveness, and entitlements when these are viewed from the internal, conative standpoint of the agent himself who makes or accepts the respective judgments. The argument may be summed up by saying that if any agent denies that he has rights to freedom and well-being, he can be shown to contradict himself. For, as we have seen, he must accept (1) "My freedom and well-being are necessary goods." Hence, the agent must also accept (2) "I, as an actual or prospective agent, must have freedom and well-being," and hence also (3) "All other persons must at least refrain from removing or interfering with my freedom and well-being." For if other persons remove or interfere with these, then he will not have what he has said he must have in order to be an agent. Now suppose the agent denies (4) "I have rights to freedom and well-being." Then he must also deny (5) "All other persons ought at least to refrain from removing or interfering with my freedom and well-being." By denying (5) he must accept (6) "It is not the case that all other persons ought at least to refrain from removing or interfering with my freedom and well-being," and hence he must also accept (7) "Other persons may (are permitted to) remove or interfere with my freedom and well-being." But (7) contradicts (3). Since, as we have seen, every agent must accept (3), he cannot consistently accept (7). Since (7) is entailed by the denial of (4), "I have rights to freedom and well-being," it follows that any agent who denies that he has rights to freedom and well-being contradicts himself.

III.

Thus far I have shown that rights and right-claims are necessarily connected with action, in that every agent, on pain of self-contradiction, must hold or accept that he has rights to the necessary conditions of action. I shall henceforth call these *generic rights*, since freedom and well-being are the generic features of action. As so far presented, however, they are only prudential rights but not yet moral ones, since their criterion, as we have seen, is the agent's pursuit of his own purposes. In order to establish that they are also

⁸ A. GEWIRTH, *supra* note 7, at 82-103.

moral and human rights, we must show that each agent must admit that all other humans also have these rights. For in this way the agent will be committed to take favorable account of the purposes or interests of other persons besides himself. Let us see why he must take this further step.

This involves the question of the ground or sufficient reason or sufficient condition on the basis of which any agent must hold that he has the generic rights. Now this ground is not subject to his optional or variable decisions. There is one, and only one, ground that every agent logically must accept as the sufficient justifying condition for his having the generic rights, namely, that he is a prospective agent who has purposes he wants to fulfill. Suppose some agent A were to hold that he has these rights only for some more restrictive necessary and sufficient reason R. This would entail that in lacking R he would lack the generic rights. But if A were to accept this conclusion, that he may not have the generic rights, he would contradict himself. For we saw above that it is necessarily true of every agent that he must hold or accept at least implicitly that he has rights to freedom and well-being. Hence, A would be in the position of both affirming and denying that he has the generic rights: affirming it because he is an agent, denying it because he lacks R. To avoid this contradiction, every agent must hold that being a prospective purposive agent is a sufficient reason or condition for having the generic rights.

Because of this sufficient reason, every agent, on pain of self-contradiction, must also accept the generalization that all prospective purposive agents have the generic rights. This generalization is an application of the logical principle of universalizability: if some predicate P belongs to some subject S because S has the quality Q (where the "because" is that of sufficient reason or condition), then it logically follows that every subject that has Q has P. If any agent A were to deny or refuse to accept this generalization in the case of any other prospective purposive agent, A would contradict himself. For he would be in the position of saying that being a prospective purposive agent both is and is not a sufficient justifying condition for having the generic rights. Hence, on pain of self-contradiction, every agent must accept the generalization that all prospective purposive agents have the generic rights.

Thus we have now arrived at the basis of human rights. For the generic rights to freedom and well-being are moral rights, since they require of every agent that he take favorable account of the most

important interests of all other prospective agents, namely, the interests grounded in their needs for the necessary conditions of agency. And these generic rights are also human rights, since every human being is an actual, prospective, or potential agent. I shall discuss the distribution of these rights among humans more fully below. But first I must also establish that the generic rights are human rights in the further respect indicated above, namely, that they are grounded in or justified by a valid moral criterion or principle.

The above argument for the generic rights as moral rights has already provided the full basis for deriving a supreme moral principle. We have seen that every agent, on pain of self-contradiction, must accept the generalization that all prospective purposive agents have the generic rights to freedom and well-being. From this generalization, because of the correlativity of rights and strict "oughts," it logically follows that every person ought to refrain from interfering with the freedom and well-being of all other persons insofar as they are prospective purposive agents. It also follows that under certain circumstances every person ought to assist other persons to have freedom and well-being, when they cannot have these by their own efforts and he can give them such assistance without comparable cost to himself, although more usually such assistance must operate through appropriate institutions. Since to refrain and to assist in these ways is to act in such a way that one's actions are in accord with the generic rights of one's recipients, every agent is logically committed, on pain of self-contradiction, to accept the following precept: *Act in accord with the generic rights of your recipients as well as of yourself.* I shall call this the *Principle of Generic Consistency (PGC)*, since it combines the formal consideration of consistency with the material consideration of the generic features and rights of agency. To act in accord with someone's right to freedom is, in part, to refrain from coercing him; to act in accord with someone's right to well-being is, in part, to refrain from harming him by adversely affecting his basic, nonsubtractive, or additive goods. In addition, to act in accord with these rights may also require positive assistance. These rights, as thus upheld, are now moral ones because they are concerned to further the interests or goods of persons other than or in addition to the agent. The *PGC*'s central moral requirement is the *equality of generic rights*, since it requires of every agent that he accord to his recipients the same rights to freedom and well-being that he necessarily claims for himself.

The above argument has provided the outline of a rational justification of the Principle of Generic Consistency as the supreme principle of morality, both for the formal reason that if any agent denies or violates the principle he contradicts himself and for the material reason that its content, the generic features of action, necessarily imposes itself on every agent. For it is necessarily true of every agent that he at least implicitly attributes to himself the generic rights and that he acts in accord with his own generic rights; hence, he cannot rationally evade the extension of these rights to his recipients. This material necessity stands in contrast to principles centered in the purposes, inclinations, or ideals for which some agent may contingently act and whose requirements he may hence evade by shifting his desires or opinions. The *PGC* is the supreme principle of morality because its interpersonal requirements, derived from the generic features of action, cannot rationally be evaded by any agent. (It must be kept in mind that action is the universal context of morality). The main point may be put succinctly as follows: What for any agent are necessarily goods of action, namely, freedom and well-being, are equally necessary goods for his recipients, and he logically must admit that they have as much right to these goods as he does, since the ground or reason for which he rationally claims them for himself also pertains to his recipients.

We have now seen that every agent must hold, on pain of self-contradiction, that all other persons as well as himself have moral rights grounded in the *PGC* as the principle of morality. It follows from the argument to the *PGC* that the primary criterion for having moral rights is that all persons have certain needs relative to their being actual or prospective agents, namely, needs for freedom and well-being as the necessary conditions of action. Simply by virtue of being actual or prospective agents who have certain needs of agency, persons have moral rights to freedom and well-being. Since all humans are such agents having such needs, the generic moral rights to freedom and well-being are human rights.

This argument for human rights has avoided the problem of how rights can be logically derived from facts. For, in proceeding by the dialectically necessary method, it has remained throughout within the facts of agents' necessary judgments about goods and rights. The argument has established not that persons have rights *tout court* but rather that all agents logically must claim or at least accept that they have certain rights. This relativity to agents and their claims does not, however, remove the absoluteness of rights or

the categoricalness of the *PGC*. For since agency is the proximate general context of all morality and indeed of all practice, whatever is necessarily justified within the context of agency is also necessary for morality, and what logically must be accepted by every agent is necessarily justified within the context of agency. Thus the argument has established that since every agent logically must accept that he has rights to freedom and well-being, the having of these rights is morally necessary. Hence, the requirement indicated above is fulfilled: the rights to freedom and well-being exist as human rights because there is a valid moral criterion, the *PGC*, which justifies that all humans have these rights.

Questions may be raised about the extent to which the generic rights as I have defined them are indeed human rights. To be human rights they must be had by every human being simply as such. The generic rights, however, are rights to the necessary conditions of agency. But may not some humans lack these rights because they are incapable of agency in one degree or another? Examples of such humans include children, mentally deficient persons, paraplegics, persons with brain damage, fetuses, and so forth. From these examples it might seem to follow that the generic rights to the necessary conditions of action are not truly human rights in the sense in which such rights were initially defined.

This question rests in part on a variant of the dictum that "ought" implies "can," for it assumes that for some person A to have a right to something X, A must be capable of having or doing X. Now this assumption is correct, but only if the capability in question is correctly interpreted. All normal adult humans are fully capable of action as this has been interpreted here, as voluntary and purposive behavior, for all such persons have the proximate ability to control their behavior by their unforced choice with a view to attaining their goals while having knowledge of relevant circumstances. This description applies even to paraplegics despite the lesser range of the control of which they are proximately capable, for they can think, choose (although within narrower limits), and plan.

In the other cases mentioned, the capabilities for action are less, and hence their rights too are proportionately less. Children are potential agents in that, with normal maturation, they will develop the full abilities of agency. In their case, as well as in that of mentally deficient persons and persons with brain damage, their possession of the generic rights must be proportional to the degree to which

they have the abilities of agency, and this must be with a view to taking on the fullest degree of the generic rights of which they are capable so long as this does not result in harm to themselves or others. All other adult humans have the generic rights in full. In the case of the human fetus, this possession of generic rights raises problems of the justification of abortion because of possible conflicts with the rights of the mother; I have considered this elsewhere.⁹

The equation of the generic rights with human rights thus does not derogate from the universality of the latter. It enables us to understand the varying degrees to which the rights are had by certain humans, as well as the connection of human rights with action and practice. The derivation of these rights from the argument for the *PGC* also enables us to understand the traditional view that human rights are grounded in reason so that they have a normative necessity or categorical obligatoriness that goes beyond the variable contents of social customs or positive laws.

IV.

There remain two broad questions about human rights as so far delineated. First, the rights to freedom and well-being are very general. What more specific contents do they have, and how are these contents related to one another? Second, human rights are often thought of in terms of political effectuation and legal enforcement. How does this relation operate in the case of the generic rights? Should all of them be legally enforced or only some, and how is this to be determined?

To answer the first question we must analyze the components of well-being and of freedom. It was noted above that well-being, viewed as the abilities and conditions required for agency, comprises three kinds of goods: basic, nonsubtractive, and additive. Basic goods are the essential preconditions of action, such as life, physical integrity, and mental equilibrium. Thus a person's basic rights — his rights to basic goods — are violated when he is killed, starved, physically incapacitated, terrorized, or subjected to mentally deranging drugs. The basic rights are also violated in such cases as where a person is drowning or starving and another person who, at no comparable cost to himself, could rescue him or give him food knowingly fails to do so.

Nonsubtractive goods are the abilities and conditions required for

⁹ *Id.* at 142-44.

maintaining undiminished one's level of purpose-fulfillment and one's capabilities for particular actions. A person's nonsubtractive rights are violated when he is adversely affected in his abilities to plan for the future, to have knowledge of facts relevant to his projected actions, to utilize his resources to fulfill his wants, and so forth. Ways of undergoing such adversities include being lied to, cheated, stolen from, or defamed, suffering broken promises, or being subjected to dangerous, degrading, or excessively debilitating conditions of physical labor or housing or other strategic situations of life when resources are available for improvement.

Additive goods are the abilities and conditions required for increasing one's level of purpose-fulfillment and one's capabilities for particular actions. A person's additive rights are violated when his self-esteem is attacked, when he is denied education to the limits of his capacities, or when he is discriminated against on grounds of race, religion, or nationality. This right is also violated when a person's development of the self-regarding virtues of courage, temperance, and prudence is hindered by actions which promote a climate of fear and oppression, or which encourage the spread of physically or mentally harmful practices such as excessive use of drugs, or which contribute to misinformation, ignorance, and superstition, especially as these bear on persons' ability to act effectively in pursuit of their purposes. When a person's right to basic well-being is violated, I shall say that he undergoes basic harm; when his rights to nonsubtractive or additive well-being are violated, I shall say that he undergoes specific harm.

Besides these three components of the right to well-being, the human rights also include the right to freedom. This consists in a person's controlling his actions and his participation in transactions by his own unforced choice or consent and with knowledge of relevant circumstances, so that his behavior is neither compelled nor prevented by the actions of other persons. Hence a person's right to freedom is violated if he is subjected to violence, coercion, deception, or any other procedures which attack or remove his informed control of his behavior by his own unforced choice. This right includes having a sphere of personal autonomy and privacy whereby one is let alone by others unless and until he unforcedly consents to undergo their action.

In general, whenever a person violates any of these rights to well-being or freedom, his action is morally wrong and he contradicts himself. For he is then in the position of saying or holding that a

right he necessarily claims for himself insofar as he is a prospective purposive agent is not had by some other person even though the latter too is a prospective purposive agent. Hence, all such morally wrong actions are rationally unjustifiable.

It must also be noted, however, that these rights to freedom and well-being may conflict with one another. For example, the right to freedom of one person A may conflict with the right to well-being of another person B when A uses his freedom to kill, rob, or insult B. Here the duty of other persons to refrain from interfering with A's control of his behavior by his unforced choice may conflict with their duty to prevent B from suffering basic or specific harm when they can do so at no comparable cost to themselves. In addition, different persons' rights to well-being may conflict with one another, as when C must lie to D in order to prevent E from being murdered, or when F must break his promise to G in order to save H from drowning. Moreover, a person's right to freedom may conflict with his own right to well-being, as when he commits suicide or ingests harmful drugs. Here the duty of other persons not to interfere with his control of his behavior by his unforced choice may conflict with their duty to prevent his losing basic goods when they can do so at no comparable cost to themselves.

These conflicts show that most human rights are only *prima facie*, not absolute, in that under certain circumstances they may justifiably be overridden. Nothing is gained by saying that what is justifiably overridden is not the right but only its exercise. For since a person's having some right has a justificatory basis, when this basis is removed he no longer has the right. In such a case it is his right itself and not only its exercise that is justifiably removed or overridden.

Another argument for the absoluteness of human rights is that their alleged *prima facie* character stems from their being incompletely described. Thus it is held that the right to life or the right not to be killed, for example, must be specified more fully as the right not to be killed unless one has committed a murder, or as the right of innocent persons not to be killed. Such devices, however, either include in the description of the right the very overriding conditions which are in question, or else they restrict the distribution of the right so that it is not a right of all humans.

But although many human rights may be overridden, this still leaves the Principle of Generic Consistency as an absolute or categorically obligatory moral principle. For the *PGC* sets the criteria

for the justifiable overriding of one moral right by another and hence for the resolution of conflicts among rights. The basis of these criteria is that the *PGC* is both a formal and a material principle concerned with transactional consistency regarding the possession and use of the necessary conditions of action. The criteria stem from the *PGC*'s central requirement that there must be mutual respect for freedom and well-being among all prospective purposive agents. Departures from this mutual respect are justified only where they are required either to prevent or rectify antecedent departures, or to avoid greater departures, or to comply with social rules that themselves reflect such respect in the ways indicated in the procedural and instrumental applications of the *PGC*. Thus the criteria for resolving conflicts of rights or duties fall under three headings of progressively lesser importance.

The first criterion for resolving the conflicts of rights is the prevention or removal of transactional inconsistency. If one person or group violates or is about to violate the generic rights of another and thereby incurs transactional inconsistency, action to prevent or remove the inconsistency may be justified. Whether the action should always be undertaken depends on such circumstances as the feasibility and importance for subsequent action of removing the inconsistency: this may be very slight in the case of some lies and very great in the case of basic harms. Thus, although the *PGC* in general prohibits coercion and basic harm, it authorizes and even requires these as punishment and for prevention and correction of antecedent basic harm.

This criterion of the prevention of transactional inconsistency also sets a limitation on the right to freedom. This right is overridden when a person intends to use his freedom in order to infringe the freedom or well-being of other persons. Such overriding stems from the *PGC*'s general requirement that each person must act in accord with the generic rights of his recipients, since this requirement sets limits on each person's freedom of action. The prohibition against coercion or harm is itself overridden, however, by two considerations, each of which also stems from the *PGC*. First, one person A may coerce or harm another person B in order to prevent B from coercing or harming either A himself or some other person C. Thus if B physically assaults A or C, A may physically assault B in order to resist or prevent the assault. Second, coercion or harm may be justified if it is inflicted in accordance with social rules or institutions that are themselves justified by the *PGC*. I shall discuss this

latter justification below.

A second criterion for resolving conflicts of rights is the degree of their necessity for action. Since every person has rights to the necessary conditions of action, one right takes precedence over another if the good that is the object of the former right is more necessary for the possibility of action, and if that right cannot be protected without violating the latter right. For example, A's right not to be lied to is overridden by B's right not to be murdered or enslaved, where B or C has to lie to A in order to prevent him from committing these crimes against B. A person's right to freedom is also overridden in such ways. It will have been noted that whereas the first criterion for resolving conflicts among rights deals mainly with rights to goods of the same degree of importance, the second criterion deals with goods of different degrees, but within the same general context of preventing transactional inconsistency.

This criterion of degrees of necessity for action also applies to such limiting cases as where a person intends to use his freedom in order to attack his own well-being. As we have seen, there are levels of well-being, such that basic well-being is more necessary for action than nonsubtractive well-being, while the latter in turn is usually more necessary for action than additive well-being. Hence, in general, force may be used at least temporarily to prevent a person from killing or maiming himself, especially so long as there is doubt whether he fulfills the emotional and cognitive conditions of freedom or voluntariness. But such interference with someone's freedom is not justified to prevent him from diminishing his nonsubtractive or additive well-being, because his freedom is itself more necessary for his actions than are these levels of his well-being. The remaining complexities of this issue cannot be dealt with here.¹⁰

V.

The conflicts among rights require further criteria besides the two given so far. To deal with these, we must move from the individual, transactional applications of the *PGC* so far considered to its institutional applications. The latter applications will also bring us to the second general question presented above, concerning the legal enforcement and political effectuation of human rights.

Although this legal, institutional context is perhaps the most familiar area of discussion of human rights, it must be emphasized that these rights also figure centrally in individual interpersonal transactions. A person's human rights to freedom and well-being are

¹⁰ See *id.* at 259-67.

violated just as surely, although perhaps less powerfully and irrevocably, if he is kidnapped and held for ransom as if he is subjected to unjust imprisonment; and torture by a private person is just as much an infringement of one's human rights as torture by an agent of the state. So too, although in lesser degrees, a person's human rights are violated when he is lied to, discriminated against, or made to work for starvation wages when better conditions could be made available. Moreover, a large part, although not the whole, of the human rights that should be legally enforced consist in the legal protection of individuals from suffering violations of their most important human rights to just treatment on the part of individuals or groups other than those representing the state.

To deal with the legal context of the protection of human rights, we must turn to another kind of application of the *PGC* besides the one so far considered. The *PGC* has two different kinds of applications: direct and indirect. In the direct applications, the *PGC*'s requirements are imposed on the actions of individual agents; the actions are morally right and the agents fulfill their moral duties when they act in accord with the generic rights of their recipients as well as of themselves. In the indirect applications, on the other hand, the *PGC*'s requirements are imposed in the first instance on social rules and institutions. These are morally right, and persons acting in accordance with them fulfill their moral duties, when the rules and institutions express or serve to protect or foster the equal freedom and well-being of the persons subject to them. Thus by the indirect applications recipients may even be coerced or harmed, yet this does not violate their human rights to freedom and well-being, because the rules or institutions that require such coercion or harm are themselves justified by the *PGC*. For example, when the umpire in a baseball game calls three strikes, the batter is out and must leave the batter's box even if he does not consent to this. This calling him out operates to coerce the batter so that he is forced to leave the batter's box. Nevertheless, the umpire's action is morally justified and the batter's right to freedom is not violated insofar as he has freely accepted the rules of the game. Or again, a judge who sentences a criminal to prison operates to coerce and harm him, yet this is morally justified and the criminal's rights to freedom and well-being are not violated insofar as the rules of the criminal law serve to protect and restore the mutuality of occurrent non-harm prescribed by the *PGC*.

As these examples may suggest, the indirect, institutional applications of the *PGC* are of two kinds. The *procedural* applications derive from the *PGC*'s freedom component: they provide that social rules and institutions are morally right insofar as the persons subject to them have freely consented to accept them or have certain consensual procedures freely available to them. The *instrumental* applications derive from the *PGC*'s well-being component: they provide that social rules and institutions are morally right insofar as they operate to protect and support the well-being of all persons.

Each of these applications, in turn, is of two sorts. The procedural applications may be either *optional* or *necessary*. They are optional according as persons consent to form or to participate in voluntary associations. The procedural applications are necessary according as the consent they require operates as a general decision-procedure using the civil liberties to provide the authoritative basis, through elections and other consensual methods, of specific laws or governmental officials.

The *PGC*'s instrumental applications may be either *static* or *dynamic*. The static applications, embodied in the minimal state with its criminal law, serve to protect persons from occurrent violations of their rights to basic and other important goods and to punish such violations. The dynamic applications, embodied in the supportive state, serve to provide longer-range protections of basic and other rights where these cannot be obtained by persons through their own efforts.

In the remainder of this paper I want to indicate how these distinctions of the *PGC*'s indirect applications help to clarify the question of the legal enforcement of human rights. As we have noted, the institutions of law and government are instrumentally justified by the *PGC* as means for enforcing its most important requirements. Not all the human rights upheld by the *PGC* should receive legal enforcement. The specific harms done by violations of a person's nonsubtractive rights, such as when he is lied to or when a promise made to him is broken, are ordinarily less important in their impact on their recipient's well-being than are the harms done by violations of basic rights, and hence do not justify the state's coercive legal resources to combat or correct them.

The human rights that should receive legal enforcement are those comprised in the last three of the indirect applications of the *PGC* distinguished above. Each of these applications reflects a certain justification of social rules which set requirements for persons and

for the state. First, there is what I have called the static-instrumental justification of social rules, consisting in the criminal law. This serves to protect basic and other important rights from occurrent attack by other persons, including the rights to life, physical integrity, and reputation. But the *PGC* also sets standards or limits as to how this protection is to operate: only persons who have violated these rights of others are to be punished, there must be equality of all persons before the law, trials must be fair, *habeas corpus* must be guaranteed, punishment must not be cruel, vindictive, or inhuman.

Second, there is the dynamic-instrumental justification of social rules. This recognizes that persons are dispositionally unequal in their actual ability to attain and protect their generic rights, especially their rights to basic well-being, and it provides for social rules that serve to remove or mitigate this inequality. In this way the supportive state serves to protect social and economic rights. Thus, where the static phase (the criminal law) tries to restore an occurrent antecedent status quo of mutual non-harm, the dynamic phase tries to move toward a new situation in which a previously nonexistent dispositional equality is attained or more closely approximated. Social rules supporting the various components of well-being, but especially basic well-being, are justified in this dynamic way.

These supportive rules must have several kinds of contents. First, they must provide for supplying basic goods, such as food and housing, to those persons who cannot obtain them by their own efforts. Second, they must try to rectify inequalities of additive well-being by improving the capabilities for productive work of persons who are deficient in this respect. Education is a prime means of such improvement, but also important is whatever strengthens family life and enables parents to give constructive, intelligent, loving nurture to their children. The wider diffusion of such means is a prime component of increasing equality of opportunity. Third, the rules must provide for various public goods that, while helping all the members of the society, serve to increase the opportunities for productive employment. Fourth, the rules must regulate certain important conditions of well-being by removing dangerous or degrading conditions of work and housing.

A third area of legal enforcement of human rights is found in what I have called the necessary-procedural justification of social rules. This justification is an application of the *PGC*'s freedom component to the constitutional structure of the state. It provides that laws and

state officials must be designated by procedures that use the *method of consent*. This method consists in the availability and use of the civil liberties in the political process. The objects of these liberties include the actions of speaking, publishing, and associating with others, so that, as a matter of constitutional requirement, each person is able, if he chooses, to discuss, criticize, and vote for or against the government and to work actively with other persons or groups of various sizes to further his political objectives, including the redress of his socially based grievances. In this way each person has the right to participate actively in the political process. Thus the constitution with its method of consent must both embody and protect the political and civil rights and liberties.

The civil liberties also extend to contexts of individual and social activity other than the political process. The *PGC's* protection of the right to freedom requires that each person be left free to engage in any action or transaction according to his unforced choice so long as he does not coerce or harm other persons. This requirement sets an important limit on the legitimate powers of the state: it must not interfere with the freedom of the individual except to prevent his coercing or harming others in ways that adversely affect their basic or other important well-being. The criteria of this importance are found in what affects persons' having the abilities and conditions required for purposive action. Thus an immense array of kinds of action must be exempted from governmental control, while at the same time the freedom to perform these actions must be protected by the state.

These freedoms are hence called "civil liberties" for three interconnected reasons, bearing on three different relations the freedoms must have to the state. First, they are passive and negative in that they must not be restricted or interfered with by the state. Second, they are passive and positive in that they must be protected by the state as rights of persons. Third, they are active in that the actions that are their objects function in the political process to help determine who shall govern in the state. In all relations, the *PGC* requires that the civil liberties pertain equally to each prospective purposive agent (except criminals): each person has an equal right to use his freedom non-coercively and non-harmfully (according to the criteria of harm specified above), to participate freely and actively in the political process, and to be protected by the state in that participation and in his other actions using his freedom in the way just indicated. Insofar as there are diverse states, this equal right per-

tains to each citizen, and each person has a right to be a citizen of a state having the civil liberties.

We have now seen that the *PGC*'s indirect applications require that three kinds of rights receive legal enforcement and protection: the personal-security rights protected by the criminal law, the social and economic rights protected by the supportive state, and the political and civil rights and liberties protected by the constitution with its method of consent.

The second of these kinds comprises important phases of the right to well-being, while the third encompasses a large part of the right to freedom. I wish to conclude by considering two opposite extreme views about how the social and economic rights figure in the legal enforcement and protection of human rights.

One view is that these rights, including the right to be given food and the other goods needed for alleviating severe economic handicaps and insecurities, cannot be "human" rights because they do not meet two tests: universality and practicability.¹¹ According to the test of universality, for a moral right to be a human one it must be a right of all persons against all persons: all persons must have the strict duty of acting in accord with the right, and all persons must have the strict right to be treated in the appropriate way. Thus all persons must be both the agents and the recipients of the modes of action required by the right. The rights to life and to freedom of movement pass this test: everyone has the duty to refrain from killing other persons and from interfering with their movements, and everyone has the right to have his life and his freedom of movement respected by other persons. But in the case of the right to be relieved from starvation or severe economic deprivation, it is objected that only some persons have the right: those who are threatened by starvation or deprivation; and only some persons have the duty: those who are able to prevent or relieve this starvation by giving aid.

The answer to this objection need not concede that this right, like other economic and social rights, is universal only in a "weaker" sense in that while all persons have the right to be rescued from starvation or deprivation, only some persons have the correlative

¹¹ See M. CRANSTON, WHAT ARE HUMAN RIGHTS? 66-71 (1973). See his contribution in Cranston, *Human Rights: A Reply to Professor Raphael*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 96-100 (D. Raphael ed. 1967). For the weaker sense of the universality of rights referred to below see Raphael, *Human Rights, Old and New*, in *id.* at 65-67; Raphael, *The Rights of Man and the Rights of the Citizen*, in *id.* at 112.

duty. Within the limits of practicability, all persons have the right and all have the duty. For all persons come under the protection and the requirements of the *PGC* insofar as they are prospective purposive agents. Hence, all the generic rights upheld by the *PGC* have the universality required for being human rights.

It is, indeed, logically impossible that each person be at the same time both the rescuer and the rescued, both the affluent provider and the deprived pauper. Nevertheless, the fact that some prospective purposive agent may not at some time need to be rescued from deprivation or be able to rescue others from deprivation does not remove the facts that he has the right to be rescued when he has the need and that he has the duty to rescue when he has the ability and when other relevant conditions are met. As we have seen, this duty stems, in the way indicated earlier, from the claim he necessarily makes or accepts that he has the generic rights by virtue of being a prospective purposive agent. The universality of a right is not a matter of everyone's actually having the related need, nor is it a matter of everyone's actually fulfilling the correlative duty, let alone of his doing so at all times. Nor is it even a matter of everyone's always being able to fulfill the duty. It is rather a matter of everyone's always having, as a matter of principle, the right to be treated in the appropriate way when he has the need, and the duty to act in accord with the right when the circumstances arise that require such action and when he then has the ability to do so, this ability including consideration of cost to himself.

When it is said that the right to be relieved from economic deprivation and the correlative duty pertain to all persons insofar as they are prospective purposive agents, this does not violate the condition that for human rights to be had one must only be human, as against fulfilling some more restrictive description. As was indicated earlier, all normal humans are prospective purposive agents; the point of introducing this description is only to call attention to the aspect of being human that most directly generates the rights to freedom and well-being. In this regard the right in question differs from rights that pertain to persons not simply by virtue of being prospective purposive agents but only in some more restrictive capacity, such as being teachers as against students, umpires as against batters, or judges as against defendants. The universality of human rights derives from their direct connection with the necessary conditions of action, as against the more restrictive objects with which non-generic rights are connected. And since both the affluent and

the economically deprived are prospective purposive agents, the latter's right to be helped by the former is a human right.

These considerations also apply to the contention that the social and economic rights are not human rights because they do not pass the test of practicability, in that many nations lack the economic means to fulfill these rights. Now it is indeed the case that whereas the political and civil rights may require non-action or non-interference rather than positive action on the part of governments, the economic rights require the positive use of economic resources for their effective implementation. This does not, however, militate against governments' taking steps to provide support, to the extent of their available resources, to persons who cannot attain basic economic goods by their own efforts. There is a considerable distance between the position that the same high levels of economic well-being are not attainable in all countries and the position that a more equitable distribution of goods and of means of producing goods is not feasible for countries at the lower end of the scale.

This point is also relevant to a view that stands at the opposite extreme from the one just considered: that for most persons in many parts of the world the social and economic rights are the only human rights which should be legally implemented. According to this view the political and civil rights, by contrast, are of little importance for persons in the "Third World" with its predominant illiteracy, traditionalism, poverty, non-individualist ethos, and lack of regard for the rule of law. This position is epitomized in the dictum, "Food first, freedom later," where the "freedom" in question consists especially in the political and civil liberties. The contention is that until the economic rights to subsistence, housing, and employment are effectively implemented, persons who lack these have little interest or opportunity or need for the political and civil rights, and that fulfillment of the former rights is a necessary prerequisite for fulfilling the latter.

A distinction may be drawn between such personal-security rights as *habeas corpus* and non-infliction of torture or cruel punishment, and the political rights of the method of consent with its civil liberties of speech, press, and association. Nevertheless, the latter provide important safeguards for the former. Both these kinds of rights, in turn, are far from being antithetical to or needless for the economic and social rights. Indeed, the order of priority may be the reverse of that upheld in the view under consideration. The effective distribution of the civil liberties, far from being a passive effect of

the proper distribution of food, housing, and health care, can strongly facilitate the latter distribution. When governments are not subject to the political process of the method for consent, there is to that extent less assurance that the authorities will be responsive to the material needs of all their citizens. As is shown by sad experience in many of the underdeveloped countries, the lack of effective political participation by the masses of the poor permits a drastic unconcern with their needs for food even when it is locally available.¹²

What I have tried to show in this paper is that all the human rights have a rational foundation in the necessary conditions or needs of human action, so that no human agent can deny or violate them except on pain of self-contradiction. Thus the demands the human rights make on persons are justified by the *PGC* as the supreme principle of morality. It is also through the moral requirements set by this principle that the political and legal order receives its central justification as providing for the protection of human rights. In addition to this instrumental function, possession of the civil liberties together with the effective capacity for participating in the method of consent is required for the dignity and rational autonomy of every prospective purposive agent. Thus the rationally grounded requirements of human action provide the basis and content of all human rights, both those that apply in individual transactions and those that must be protected by social rules and institutions.

¹² See Poleman, *World Food: A Perspective*, 188 *SCIENCE* 510, 515 (1975); Crosson, *Institutional Obstacles to Expansion of World Food Production*, in *id.* at 519, 522-23; Walters, *Difficult Issues Underlying Food Problems*, in *id.* at 524, 530; 2 G. MYRDAL, *ASIAN DRAMA: AN INQUIRY IN THE POVERTY OF NATIONS* 895-900 (1968); S. REUTLINGER & M. SELOWSKY, *MALNUTRITION AND POVERTY* (World Bank Staff Occasional Papers No. 23, 1976). I have discussed this issue more fully in *Starvation and Human Rights*, in *ETHICS AND PROBLEMS OF THE 21ST CENTURY* 139-59 (K. Goodpaster & K. Sayre eds. 1979).

ORDERING RIGHTS CONSISTENTLY: OR WHAT WE DO AND DO NOT HAVE RIGHTS TO*

Roger Pilon**

I. INTRODUCTION

In the last two decades we have seen what at least one commentator has called a “rights explosion,”¹ culminating in the present administration’s concern, at once, with “economic justice and human rights.”² But are all these rights justified? And if they conflict with our older rights—or indeed with each other—how can we say they all exist? For to have a right, on the ordinary view, is to have a clear title; it is not to have that title compromised by a conflicting obligation. If my assets are in fact my own, for example, then I have a right to use them as I please; but that right is diminished by your right to have me contribute to your child’s education, especially if he decides to make that an extensive education. And your right not to be terminated from your employment at age sixty-five may very well conflict with my right to “equal opportunity” from that same employer,³ just as both of these rights conflict most certainly with

* This paper was originally prepared for a conference on “Modern Rights Theory” which was held in San Diego on March 8-10, 1979 under the auspices of the Institute for Humane Studies and the sponsorship of the Liberty Fund. As the director of that conference I invited four additional papers, by Antony Flew, Alan Gewirth, Richard A. Epstein, and Edwin Vieira, Jr., each of which treated a particular segment of the overall theory of rights. (Those other papers will be found elsewhere in this issue of the *Review*.) My own paper, for example, was intended, as its title suggests, to treat the interpretive question—What are there rights to?—and to bridge the gap between Gewirth’s treatment of the normative question—Are there rights?—and Epstein’s treatment of rights and the common law. As originally written, however, the paper contained a long section in Part IV spelling out, at a general level, just what rights we do and do not have. Because that section was itself taken from Part III, section C of my article “Corporations and Rights: On Treating Corporate People Justly,” which also appears in this issue of the *Review*, I have omitted it from the version of the paper that appears here. At Part IV I will simply refer the reader forward to the relevant section of my article on the corporation.

I want to thank the Institute for Humane Studies and the Liberty Fund for their support of the conference. I am grateful too to the editors of the *Georgia Law Review*, in particular Mr. Kevin Buice, Ms. Joan Grafstein, and Mr. Edward Krugman, for their considerable work in putting the entire symposium together.

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¹ Rod McLeash, CBS News “First Line Report,” Jan. 22, 1979.

² President J. E. Carter, *State of the Union Address*, Jan. 23, 1979.

³ See “Sears Sues U.S. Over Job Bias Laws,” N.Y. Times, Jan. 25, 1979, at 1. Sears,

his right to run his business as he chooses.⁴ In each of these cases, I suggest, we see the modern tendency to look to rights alone, the tendency to multiply rights without regard for the correlative obligations they logically entail—the analogue of which in the oratory of political economics is the tendency to look to benefits while ignoring costs. As a result, the whole theory of rights is seriously compromised; for it appears to lead easily, perhaps ineluctably, to internal inconsistency and hence to the “nonsense” about which Bentham so poignantly spoke.

This demise need not be so. For in the broad range of cases the theory of rights, at least the theory of moral rights, describes a principled, consistent, and even elegant structure of human relationships. It is strict, however, for it is grounded in reason, not in the sentiments, not even in the moral sentiments. Thus its conclusions are not always satisfying to those sentiments, and may even be repellent to them. Accordingly, the theory of rights may not be the final word in ethics. But let me save this point till the end.

In the meantime I want to focus upon the third of the basic questions in the logic of rights, What are there rights to? In this symposium I expect that Professor Flew will have ably addressed the analytical question, What are rights?⁵ No doubt he will have drawn too some of the distinctions that hold between the theory of rights and the theory of good or value, to which I have just alluded. I know that Professor Gewirth has more than ably addressed the normative question, Are there rights? For his article before me indicates that he has set forth not only the *basis* but the *content* of rights as well.⁶ Lest it be thought that my task has thereby been rendered superfluous, let me assure the reader that, as the adage roughly has it, there is many a slip between justification and interpretation.⁷ In

Roebuck & Co. “charged that Government laws, regulations, interpretations and policies [on equal-opportunity employment] were so confusing, conflicting, inconsistent and occasionally ‘arbitrary’ and ‘capricious’ that they could not be complied with.”

⁴ This last-mentioned right long ago disappeared, of course. See, e.g., L. E. Birdzell, Jr., Review of R. NADER, et. al., CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS, 32 BUS. LAW., 317 n.1 (1976) (“There are some 40 to 50 significant Federal statutes which may reasonably be viewed as imposing requirements on corporate management in favor of employee, consumer, investor, or environmental interests, ranging all the way to comprehensive regulation of entry, prices and services in much of the transportation, communication, energy, and banking industries.”).

⁵ See title footnote *supra*.

⁶ Gewirth, *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143 (1979).

⁷ Undoubtedly Professor Gewirth has gone beyond his symposium topic in the belief—correct, it turns out—that in my own discussion I would put the normative foundations he

the course of my discussion of the interpretive question I will point to some of those slips, which when corrected will yield a rather different picture of the world of rights than Gewirth has drawn. Nevertheless, in developing this question I shall be building upon much of the justificatory groundwork he has established, for I believe he has located, drawn together, and solved some of the most basic problems in the theory of rights.⁸

As just suggested, then, my purpose in this essay will be to sketch the world of moral rights, at least in outline. This amounts to showing, at a general level, just what rights there are and are not and how those rights are related to each other. I will show that these rights are justified and hence exist by deriving them from a background moral theory that is itself justified. Moreover, I will relate them to each other in such a way that the overall picture is consistent: we do not want to be able to derive a proposition of the form "A does and does not have a right to *x* at the same time and in the same respect." The best way to avoid this is by seeing to it that there are no inconsistencies in the justificatory theory itself.

Finally, before we begin, a word about moral and legal rights. I will be concerned in this essay, as I have said, with moral rights, quite apart from whether those rights are recognized by any legal system and hence exist as legal rights. By "moral rights" I mean to denote those rights that describe both our general and our special relationships with each other and with the various associations and institutions we create. General relationships are those relationships that the common law treats as holding between strangers: the rights and obligations that describe them are sometimes referred to as our natural rights. Special relationships are those relationships that arise from some particular historical event involving the parties to the relationship—most generally, a tort, crime, contract, or the begetting of a child.⁹ I will be working, then, within the tradition of state-of-nature theory: whatever rights and obligations there are are held first by individuals as such; institutions, such as governments,

has developed to ends he would find disquieting. He has directed, more or less firmly, my doctoral dissertation. See R. Pilon, *A Theory of Rights: Toward Limited Government*, Ph.D. Diss., University of Chicago, 1979.

⁸ Gewirth's best discussion of the subject, in my view, is found in *Moral Rationality*, The Lindley Lecture, Univ. of Kansas (1972); I will try to indicate some reasons for this view in Part III, *infra*.

⁹ On general and special relationships see Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 183-88 (1955).

have rights only insofar as they have been given them by individuals—thus they have only those rights that individuals *have* to give them.¹⁰ Since governments, if they can be justified at all, derive their authority from the governed, from some grant of that authority, the relationship between individuals or groups and their government is a special relationship, however difficult it may be to locate the occasion that generates it.¹¹ Although I will have little to say directly about the rights and obligations that describe this relationship, what I say about the other relationships will speak indirectly to this issue. For with Jefferson I will be assuming that governments are instituted among men to secure rights. Just what rights there are to be secured will help to determine what obligations governments have in service of that end and what rights they may exercise in carrying out those obligations.¹² Thus the world of moral rights should be seen as a model for legislators, and in particular for jurists; it is the “higher law” background to the positive law.¹³

II. MORAL COGNITIVISM

Let us begin then with a few normative as well as meta-ethical considerations. The idea of a right is ordinarily thought to be rooted in nonconsequentialist or deontological normative theory:¹⁴ individuals have rights, if they have them at all, because these rights can be derived from certain “self-evident” principles, or because they arise from certain antecedent events, such as contracts or crimes, which themselves reflect the implications of these overarching principles. Thus it is not because a certain distribution of goods will

¹⁰ See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 6 (1974) (“Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.”). This point holds not only for the state, of course, but for all associations and institutions. For the case of the corporation, for example, see Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245 (1979).

¹¹ See, e.g., R. WOLFE, *IN DEFENSE OF ANARCHISM* (1976).

¹² Note well the order the argument for rights of the state must follow. It is not enough, by way of justifying its “rights” of enforcement, that the state point to its *obligation* to enforce rights; for the government cannot violate the rights of some in the name of satisfying its obligation to enforce the rights of others, even if this means that some rights will go unenforced.

¹³ See E. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

¹⁴ There is a vast literature on this point. See, e.g., W. ROSS, *THE RIGHT AND THE GOOD* (1930); R. NOZICK, *supra* note 10; Gewirth, *Ethics*, 6 ENCYCLOPAEDIA BRITANNICA (15th ed. 1974); A. DONAGAN, *THE THEORY OF MORALITY* (1977); C. FRIED, *RIGHT AND WRONG* (1978).

result from their having rights that individuals are thought to have them. Indeed, rights are intended precisely to stand athwart the utilitarian calculus, to brake the democratic engine: they allow for unpopular behavior of all kinds, for experimentation in life, for the various pursuits that will inevitably arise from the manifold world of individual values.¹⁵

In virtue of this deontological grounding, then, the theory of rights has sought to obtain a more secure place in epistemology than the theory of good. The difficulties of value theory in this connection are notorious; for the conclusions that flow from our sentiments are seldom thought to be true or false, at least among those who are given to think about such things. The conclusions that flow from reason, on the other hand, are said to have a better claim to cognitive grounding. Thus it is that the moral rationalism of recent years has sought to extricate us from the vicissitudes to which Hume and his disciples in the Vienna Circle consigned the whole of ethics; they have attempted to show that rather more of ethics than has heretofore been thought is rooted not in the third of A.J. Ayer's famous trichotomy of propositions—evaluative “truths”—nor even in the class of empirical truths, but in reason itself.¹⁶ This, after all, is where Locke, following a long tradition, had grounded his own theory of rights, however uncertainly.¹⁷

Now I understand Gewirth to be in the forefront of these recent developments in moral rationalism, especially in his earlier writings on the subject. Of late, however, he has begun to drift a little, to

¹⁵ To be sure, this view of the nature and foundation of rights is not reflected in the preponderance of modern legal thought, at least since Holmes, and as reflected not only in the schools of pragmatism, legal realism, and legal positivism, but even in the current rebirth, in the legal literature, of natural law thinking. In general, in all of this, rights are thought of simply as *values* or *interests*, which are distinguished from other values by their having “found their way” into positive law: we locate a value we want to protect, as it were, which we do by making it a legal right. Thus privacy, abortion, or the enjoyment of pornography will come and go as rights according as they happen to be valued at any point in our legislative or judicial history. This view, however, not only fails to sufficiently distinguish the legal *creation* of rights from their theoretical *justification*, but it tends to conflate rights and values, when those two concepts come from very different dimensions of morality. On this last point see Hart, *supra* note 9, at 186. For examples of contemporary treatments that conflate rights and values see Grey, *supra* note 13; Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979). For a partial critique of the instrumentalism implicit in this view, especially in its earlier versions, see Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L. F. 15 (1978).

¹⁶ See A. AYER, *LANGUAGE, TRUTH AND LOGIC* (1946), especially ch. 6.

¹⁷ J. LOCKE, *SECOND TREATISE OF GOVERNMENT* §6; the derivation of “ought” from “is” in this passage is direct.

offer a "blending" of rights theory and the theory of good—or so I understand his present argument. If I am correct in this understanding, then the danger may be that the epistemological foundations he has earlier secured will be shaken. Before developing this point, however, let me be clear that I think the moral skepticism of Hume and his followers a healthy antidote to the all-too-human penchant for moral overreaching. Accordingly, it is in this spirit that I will approach certain of Gewirth's claims, not in order to call the whole edifice into question, but in order to better secure those parts that can indeed withstand the probings of the skeptic. For if the battle against the skeptic is to be won—if ethics is to be given *any* cognitive foundation—it will be only by paying heed to what it is he has to say.

III. THE JUSTIFICATION OF RIGHTS

A. *Rights and Action*

I understand a right, then, to be a justified claim to stand in a certain relationship with some other person(s) such that that other has an obligation correlative to the right.¹⁸ The claim is that that person has an obligation to do or not do some particular thing. Thus even rights to property are ultimately claims to the acts or omissions of others: to their provision of the object immediately claimed; to their forbearance from interfering with the claimant's enjoyment of the object immediately claimed. Gewirth is perfectly correct, then, when he locates the theory of rights, and ethics generally, in the theory of action, when he asks "How does the consideration of human action serve to ground or justify the ascription and content of human rights?"¹⁹

He answers this question by following what he calls his "dialectically necessary method," which roots the justification—and, by implication, the disjustification—of these various claims in a theory of necessary acceptance. Thus he argues that individuals, in acting, implicitly though necessarily make claims about themselves, which they must admit or accept, on pain of self-contradiction, apply to all other agents as well.²⁰ It is in virtue of

¹⁸ See, e.g., Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning* 30, 38, 71 (ed. W. W. Cook 1946) (originally published in 23 *YALE L. J.* 16 (1913) and 26 *YALE L. J.* 710 (1917)).

¹⁹ Gewirth, *supra* note 6, at 1148.

²⁰ Gewirth's use of "agent" is not the standard legal usage—one who acts on behalf of a principal—but the philosophical usage—one who acts *tout court*.

this necessary acceptance that statements about the existence of the respective rights and obligations can be said to be true: for if the denial of the conclusion that others have the same rights that one necessarily claims for oneself—which follows itself from application of the principle of universalizability—leads to a contradiction, then by a *reductio ad absurdum* the negation of that denial is true. Hence, the agent *must* accept the implications of the claims he necessarily makes about himself; he must accept that others have the same rights he himself necessarily claims.²¹

Clearly, then, the question what it is we have rights to turns upon what it is we necessarily claim about ourselves, if only implicitly, when we act. And it is here that Gewirth's argument in recent years has shifted ever so slightly—but ever so crucially. In particular, he at one time argued that “justification-statements [as implicitly made by agents] are logically equivalent to attributions of rights only insofar as the latter entail negative obligations on the part of other persons, but not necessarily positive obligations.”²² (I do not know the force of “necessarily” here, especially as it contrasts with “only”; and I will assume Gewirth had in mind only generally related individuals.) The implications of there being no general rights of recipience are far-reaching, of course, and straightforwardly libertarian, for they undercut the normative foundations of the welfare

²¹ Notice that this argument from acceptance places Gewirth in the tradition of consent theory, whether in its legal or in its political applications. We explain and justify ordinary contractual obligations, for example, which at some point in time are brought into being, simply by pointing to the acceptance or consent that serves to generate them. (Much less plausibly, we do the same, *mutatis mutandis*, in social contract theory, whether in its traditional form, e.g., Rousseau, or in its modern version, e.g., Rawls.) The consent that justifies contractual obligations, however, is ordinarily both explicit and contingent (upon the particular wants that generate it). The acceptance that Gewirth locates, on the other hand, is implicit but necessary. Thus the obligations and correlative rights it serves to justify are atemporal, and they do not turn upon arbitrary wants, which has been a crucial desideratum of the whole tradition of moral rationality in general and natural law in particular.

Notice also the similarities between this argument and (a) Hart's recognition theory for the existence of a legal system (H.L.A. HART, *THE CONCEPT OF LAW* 59-60, 109-14 (1961)); (b) Locke's argument, from “the Judicious Hooker,” for the Law of Nature (J. LOCKE, *Second Treatise* §5); (c) Aristotle's argument that a denial of the Law of Contradiction only confirms that Law (IV METAPHYSICS, ch. 4). In drawing upon each of these—or so I understand him to be doing—Gewirth has nevertheless advanced the inquiry considerably; for his explication of the normative structure of action has put necessary content in Kantian universalization (just how much content we are about to consider).

²² Gewirth, *The Normative Structure of Action*, 25 REV. OF METAPHYSICS 238, 253 (1971). *But see* *Obligation: Political, Legal, Moral*, in J. PENNOCK & J. CHAPMAN, *POLITICAL AND LEGAL OBLIGATION: NOMOS XII* 55, 71 (1970). Here Gewirth argues straightforwardly for positive obligations.

state by undercutting our modern "social and economic" or "welfare" rights. As we see, however, Gewirth is now arguing for the full-blown supportive state, complete with measures "to rectify inequalities of additive well-being,"²³ this to bring about, or at least to "move toward, . . . dispositional equality."²⁴ I will argue below that there may be some scenarios in which some aspects of that state may be necessary; but that state cannot be justified from the theory of rights—indeed, it will be effected in *violation* of rights. For the present, however, I want to focus upon the claims we necessarily make as agents, which is the part of his argument that Gewirth has increasingly expanded. In acting, then, do we necessarily claim to have rights of recipience against persons with whom we are only generally related? Or is the right not to be interfered with the only claim that is necessarily entailed by action? (And indeed, is even *this* claim entailed in human action?)²⁵

B. *Necessary Claims and Property*

In an earlier version, this part of Gewirth's argument went, very briefly, as follows. All action is conative: when an agent acts he acts

²³ Gewirth, *supra* note 6, at 1165.

²⁴ *Id.*

²⁵ It may be well, at this juncture, to say a bit more about the distinction I have drawn here between rights of recipience and rights simply to non-interference. The issues that surround this distinction, and the implications of it, are manifold, some of which I will develop later; let me simply mention two points here. The distinction turns, at bottom, upon the further distinction between positive and negative correlative obligations: the obligation to contribute positively to the welfare of a stranger is of an altogether different order than the obligation simply to leave others alone, raising difficult questions about the origin (or justification) of such an obligation, as well as about its consistency with other of our rights. Moreover, if there are no such affirmative obligations toward strangers, as I shall argue, even in the Good Samaritan context, then the warrant for the welfare state (in all of its ramifications), which is the Good Samaritan context writ large, is undercut at its roots. Starting from state-of-nature theory, that is, Good Samaritan obligations have to first be justified if these are to serve in turn as the springboard to the welfare state. Now in his present attempt to derive welfare conclusions from a fundamentally libertarian principle—or so I will argue his Principle of Generic Consistency to be—Gewirth is following a path not unlike that taken recently by John Rawls in *J. RAWLS, A THEORY OF JUSTICE* (1971), and taken concurrently by Charles Fried, *supra* note 14, among many others. In this matter, however, we have the bullet that so many of the modern moral rationalists seem unwilling to bite: they want to have it both ways, that is, liberty *and* equality (of "treatment," or "opportunity," or "outcome"), notwithstanding the theoretical difficulties to which this leads, which the historical evidence serves only to buttress as a *posteriori* argument. For a much more detailed treatment of these issues see R. Pilon, *supra* note 7. See also Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43-53 (D. D. Raphael ed. 1967); Flew, *The Procrustean Ideal: Libertarians v. Egalitarians*, *ENCOUNTER*, March 1978, at 70.

voluntarily, and for purposes which seem to him good (not necessarily morally good). To the agent, at least, these purposes justify his act; hence, from his internal standpoint, he implicitly makes a right-claim to perform it. (Otherwise, the seeming-good for which he acts would not serve to justify the act to him.)²⁶ But this "voluntariness and purposiveness which every agent necessarily has in acting, and which he necessarily claims as rights for himself on the ground that he is a prospective agent who wants to fulfill his purposes, he must also, on pain of self-contradiction, admit to be rights of his recipients."²⁷ From this Gewirth went on to derive rights against coercion and harm, reflecting, respectively, the generic features of action, voluntariness and purposiveness. (Thus there was no mention of the various goods—afforded by affirmative obligations—that we find in the present argument). In sum, because our actions are conative, when we act we cannot avoid implicitly claiming rights to the integral generic features that characterize that action.²⁸

In the present version, however, the agent is said to claim, by his action, not only the right to act voluntarily and purposively, but the right to have "as necessary goods the proximate general necessary conditions of his acting to achieve his purposes."²⁹ These "necessary goods" translate into rights to "freedom and well-being," the latter consisting in having the "general abilities and conditions required for agency."³⁰ Moreover, these goods are the agent's "due," something to which he is "entitled": "the entitlement he claims to freedom and well-being is grounded in his needs as an agent who wants to pursue his purposes."³¹ Thus it is in virtue of these wants and needs that others are obligated not only to not interfere with the agent but, in certain circumstances, to affirmatively assist him in realizing his purposes,³² in having the "general abilities and conditions required for agency."

Now a concern for these subtle shifts may be thought by some to be unduly pedantic. As mentioned above, however, the implications

²⁶ See Gewirth, *The Normative Structure of Action*, *supra* note 22.

²⁷ Gewirth, *Moral Rationality*, *supra* note 8, at 20.

²⁸ This is but the barest summary of the substantive argument (which was sketched formally in the text accompanying notes 20 and 21 *supra*). For a detailed treatment, see the articles at notes 26 and 27 *supra*.

²⁹ Gewirth, *supra* note 6, at 1149.

³⁰ *Id.*

³¹ *Id.* at 1152.

³² *Id.*

are far-reaching, suggesting that we ought, before turning to them, to attend to the foundations from which they spring. What we want to know, then, is what we *necessarily* claim in acting, *i.e.*, what we cannot *but* claim, if only implicitly. Now what agents might *in fact* claim as rights is of course unlimited. In explicating the idea of agency, however, Gewirth is "making not a phenomenological descriptive point about the conscious thought-processes of agents, but rather a dialectically necessary point about what is logically involved in the structure of action."³³ Still, the question of the limits of these claims remains very real. Nowhere does this uncertainty come out more clearly than when our putative claim to having a right to the "general abilities and conditions required for agency" is said to entail a positive obligation from others, provided that obligation can be performed "*without comparable cost*" to these others.³⁴ Quite apart from how these cost considerations enter an otherwise deontological argument, and who is to assess them, I suggest that the idea that a claim such as this is "logically involved in the structure of action" is not a little strained. With perfect consistency, in fact, the agent can deny that in acting he necessarily makes these kinds of claims, while at the same time affirming that his actions necessarily entail claims to act voluntarily and purposively. For even when these generic features are characterized as the "necessary goods" of action—freedom and well-being—and these in turn are claimed as rights, if they are *integral* to our action and thus are claimed *in* behaving conatively, we already *have* these goods, at least to a degree sufficient to be able to act and hence to be able to be claiming them in acting; thus we do not need to claim that others must afford them for us. (I will develop the property issues that are latent here in a moment.) Moreover, we cannot *but* claim them, for these generic features or necessary goods, again, are *integral* to our action: indeed, it would be a performative contradiction to deny claiming what in that very act of denial we are implicitly asserting to be held. For this would amount to voluntarily and purposively denying that we act voluntarily and purposively!³⁵ If we did *not*

³³ *Id.* at 1149.

³⁴ *Id.* at 1155, 1158, 1168.

³⁵ Notice then that even in the act of explicitly asserting his denial of his right to act voluntarily and purposively, the agent is implicitly asserting that right and hence contradicting his denial: his denial, that is, is contradicted by the facts in the matter. In this, the similarity to the argument from Aristotle (*supra* note 21) is striking—and of no small significance. If Gewirth has done for ethics what Aristotle did for logic, then we have come a long way indeed from the darker days of the Vienna Circle!

have these necessary goods, however, we could not be said to be claiming them *in acting*; for we could not even *be* acting since these are “necessary conditions” of action.³⁶ Yet all but decedents act to one degree or other; hence at all times we are at least implicitly claiming the right to act voluntarily and purposively, a right to the freedom and well-being that are functions of our actions.

This much, in brief, is directed primarily to the skeptic, who would deny even these implications of the normative structure of action. There remains, however, the question raised above about the degree or extent of the claims inherent in action, which leads in turn to the latent property issues. To sharpen the question a bit, are agents, in acting, to be seen as claiming some specific degree of freedom and well-being that would extend *beyond* the degree already inherent in their action? Or is the degree of freedom and well-being they necessarily claim in acting limited to just that—to what they in fact necessarily claim in acting *as such*? Clearly, the move from “generic features” to “necessary goods,” if not illicit, is ripe for “content packing” and hence for circularity. In order to avoid that circularity, I submit that we have to limit the claims *necessarily* implicit in action to those that are *inherent* in action—in action *as such*. For again, the issue is what is “logically involved in the structure of action.” It turns out, then, that the “necessary content” Gewirth has given to Kantian universalization is rather more lean than he seems to think in his present work: that content is limited, in fact, simply to the voluntariness and purposiveness that characterize action as such, and hence that characterize any particular action. In order to flesh the content of our rights out further, we have to look beyond these “necessary conditions” of action to what might be called its “material conditions.” In particular, we have to recognize that action does not occur *in vacuo*, as Gewirth’s treatment seems to suggest; rather, we act *in the world*, against some *material* background. In Part IV I will outline how this material or property background serves to flesh out our rights. At this juncture, however, I want to point to the property considerations that are present *already* in Gewirth’s account, if only inchoately. These, in fact, are what help us to see what it is we necessarily claim in acting. For in proceeding from action and the claims implicit *in* action, Gewirth is beginning with some *agent’s* action: it is *his* behavior that is conative, and the generic features, whether

³⁶ Gewirth, *supra* note 6, at 1149, 1150, 1152, 1156.

we call them voluntariness and purposiveness or freedom and well-being, are his property as well. What the agent *necessarily* claims, then, are those generic features of *his* action that are *his* to claim. On one hand he *must* claim these, in virtue of the conative nature of his behavior: for they are logically connected with his action and hence are his to claim and no one else's. But on the other hand he must admit that this is *all* he can rationally claim, based on his action alone. For to claim more would be to claim, based on *his* action, what is not his to claim: it would be to go beyond the foundation from which his claim springs, beyond the property—his action—in which the claim is grounded.³⁷ Intimately bound up with the normative structure of action, then, is the idea of property—the property we possess in our lives and our liberties (*i. e.*, our actions). How these devolve in turn to give property in estates—to afford the further material conditions of action and hence of liberty—I will consider shortly.³⁸ It is enough for the moment to have indicated how deeply rooted is the connection between rights and property, an insight that guided the classical theorists of rights, however rudimentary their understanding of the point.

C. *Causality, Consistency, and the PGC*

I have concentrated on the beginnings of Gewirth's argument because these parts are crucial to establishing that we have rights *at all*. In doing so I have tried to indicate that the core of the argument is sound, but that it has become overextended. This overextension can be shown in other ways too: in particular, by causal interpretations of the Principle of Generic Consistency (PGC), and by considerations of consistency, both of which we will take up next. But these arguments from causality and consistency—relatively more straightforward though they are—would not by themselves serve to justify the rights that *can* be shown to exist. At most, they would demonstrate what rights do and do not flow from the PGC, assuming *it* to be justified, and what rights are inconsistent with what other rights, but not which set is itself justified. Let us turn then to these two areas, which are prolegomena to delineating the world of rights and obligations. Since I

³⁷ For an application of this point see the text accompanying notes 84 and 85 in Pilon, *supra* note 10.

³⁸ I am construing "property" broadly here, and will do so throughout this essay, following Locke and other of the classical theorists: "Lives, Liberties and Estates, which I call by the general Name, *Property*." J. LOCKE, SECOND TREATISE § 123.

have developed these issues at some length elsewhere, I will simply sketch them here.³⁹

A common form of the causal argument for positive obligations between generally related individuals is really quite simple, at least in outline. It begins from the obligation not to cause harm and then argues that to refrain from assisting others is to cause them harm: hence the obligation not to harm entails a positive obligation to render assistance when others need it, the failure in which violates, if not their rights of recipience, at least their rights against harm.⁴⁰

The rejoinder is straightforward enough. It recognizes the obligation not to harm—at least as this obligation is appropriately explicated with respect to positive actions⁴¹—but denies that the various not-doings in question (refrainings, omissions, etc.) are causally efficacious. The conditions complained of—peril, hunger, ignorance, general want—can be accounted for by any number of causal explanations (often involving the “victim” himself); but the not-doings of the putative obligation-holder do not in principle figure in these accounts. For not-doings are not themselves changes in the world and hence do not meet the minimum condition for being a causally efficacious event.⁴² Moreover, whatever *positive* actions the agent performs—*e.g.*, withdrawing from a rescue opportunity—are counted as causally related to the losses in question only on pain, again, of ignoring the straightforward explanation(s)—*e.g.*, the victim fell out of the boat. None of this, to be sure, is to commend the attitude or behavior of the putative obligation-holder (about which I will have something to say at the end); rather, it is simply to say that a causal account will not serve to generate these obligations,

³⁹ See Pilon, *supra* note 7, especially ch. 3.

⁴⁰ See, *e.g.*, Gewirth, *supra* note 6, at 1155, 1158; A. GEWIRTH, *REASON AND MORALITY* 217-30 (1978). Cf. C. FRIED, *supra* note 14, at 17-20, 108-31; Richards, *supra* note 15.

⁴¹ See Pilon, *supra* note 10, at Part III, § C.3.

⁴² A bit more on this complex subject of agent causation is probably called for. In saying that some change in the world is necessary for a causal explanation to be made out, I mean that without such a change we cannot even individuate the causal event in question. (See the example in the next paragraph above.) Let me mention too that I would apply the causal analysis adumbrated here to the case of special relationships as well; in these, that is, we should hold the not-doer liable *not* for causal reasons, but for his failure to perform his obligation, as may be required by the special relationship. (The case of cessations is different; for these are not really not-doings at all.) Finally, it should be noted that ordinary language is not terribly reliable in these various contexts; for a less than satisfactory account of causation that relies substantially on ordinary language, see H.L.A. HART & A. HONORÉ, *CAUSATION IN THE LAW* (1959). For a fuller development of my own account, including its roots in action theory, see Pilon, *supra* note 7, chs. 1, 3.

and hence these rights, for such an account is just not plausible.⁴³

Now the PGC is a causal principle. It is addressed to agents as follows: "Act in accord with the generic rights of your recipients as well as of yourself."⁴⁴ Recipients are those who stand opposite agents, who are "affected by" or "recipients of" their actions. These are very loose idioms, to be sure, which we will tighten up shortly. But here we should note that in order for an agent to come under the prescription of the PGC at all, there must be a recipient of his action, a threshold condition the ordinary not-doing situation does not satisfy. Consider: at time t_1 , A is standing on the shore "doing nothing"; at time t_2 , B falls out of his boat; A could rescue B "without comparable cost," but instead he continues "doing nothing." If B is not a recipient of A 's "act" at t_1 , are we to suppose that he becomes a recipient of that same act at t_2 , in virtue of *his* (B 's) act? (If so, then who is the causal agent here?) We could always change the description of A 's "same act," of course; but that would beg a very important question. I submit, in short, that A 's "agency" here simply does not make B a recipient; thus absent a plausible theory of not-doing causation, the PGC is powerless to impose positive obligations between generally related individuals.

What then does the PGC entail? What actions does it prohibit, permit, or require? The actions it prohibits or requires are obligations, of course, correlative to which are rights; those it permits are rights, correlative to which are obligations. Now the first thing to be noticed is the point just brought out: the PGC does not require anyone to *do* anything. It is addressed to agents, but it does not require anyone to be an agent who has recipients. An individual can "do nothing" if he chooses, spending his life in idle contemplation. Provided there are no recipients of this behavior, he is at perfect liberty to perform it. And if there are recipients, the PGC requires only that he act in accord with the generic rights of those recipients, *i.e.*, that he not coerce or harm them. In sum, and stated most generally, in a world of general relationships, (a) there are no obligations toward others *to* act, (b) there are no obligations *not* to act when doing so involves no recipient, and (c) when there *is* a recipient there is an obligation not to coerce or harm him, *i.e.*, to obtain

⁴³ See, e.g., Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-66, 189-204 (1973).

⁴⁴ Gewirth, *supra* note 6, at 1155. This too has changed; in earlier writings it went: "Apply to your recipient the same generic features of action that you apply to yourself." Cf. Gewirth, *Moral Rationality*, *supra* note 8, at 25.

his consent before involving him in transactions.

Thus the PGC, at bottom, is a principle of equal freedom: by placing the burden of obligation upon those whose actions have recipients, or are about to do so, it implicitly sanctions the state of equal noninterference that precedes those actions. Owing to the voluntariness criterion, which requires that agents secure the consent of their recipients before involving them in transactions, the PGC says that in the absence of that consent the status quo of noninterference must be preserved. Hence the most basic right implied by the PGC—for it is logically prior to all other rights—is the right to noninterference, which may be variously described as the right to be free, the right to be left alone, the right against trespass, and so forth.

Thus far, then, I have tried to show, on two counts, that there are no general rights of recipience. First, these right-claims are not grounded in agency, which is the springboard for all our rights. Second, they cannot be generated from causal considerations, which are central to the descriptions of our general rights against coercion and harm, our rights to noninterference, as captured in Gewirth's ultimate moral principle. A third and final argument, before turning to more specific interpretations, is from considerations of consistency.

By a consistent theory of rights I mean one without conflicting rights, as indicated at the outset. It is surprising how commonplace is the view that rights must conflict. One would suppose it part of "the human condition," which of course it is when right-claims are recognized quite in disregard of the possibility of their all being realized. Yet this impossibility of realization is precisely what happens when two rights conflict: one of the "rights" must go. It is illusory, then, to speak of these conflicting claims as "rights"; for a right that *cannot* exist is no right at all. Either it is an empty claim, or it is a "right" subject to the call of others, which is hardly what we mean by a right.

Nowhere does this conflict come up more clearly than in the case of these general rights of recipience. Take the simplest example. If I have a general right to assistance then you have an obligation to assist me when I need it, even if you should not want to afford that assistance. But you also have a right to freedom. "This consists in a person's controlling his actions and his participation in transactions by his own unforced choice or consent . . . , so that his behavior is neither compelled nor prevented by the actions of other

persons."⁴⁵ Well either your action is going to be compelled, in which case you do not enjoy your right, or it is not, in which case I do not enjoy mine. There are no two ways about it, for the rights are in straightforward conflict. It would be nice, of course, if everyone did what he *ought* to do. But rights describe what we are *entitled* to do, or not do, quite apart from what we ought to do. A theory that generates rights to freedom as well as general rights of recipience is a theory that generates conflicting entitlements, and hence is inconsistent. On the other hand, a world of general relationships described by rights to noninterference alone is entirely consistent. For in such a world each of us can enjoy whichever of his rights to noninterference he chooses while at the same time and in the same respect satisfying his own obligations not to interfere with others. Just what that world looks like we will take up next.

IV THE WORLD OF RIGHTS

As suggested earlier, in taking up the interpretive question concerning what it is we have rights to I have focused upon the foundational theory of Gewirth because I think it is the most sophisticated of the work going on in rational ethics today. At the same time, the arguments I have thus far sketched are perfectly general: they will apply, *mutatis mutandis*, to any theory of rights that attempts to derive affirmative obligations between strangers. For the basic question for any ethical theory that begins with the individual is how to explain association—indeed, whether there ought to be any association at all.⁴⁶ Given that human action is the basic subject matter of ethics, *i.e.*, that ethical rules function to direct action, and that human action is voluntary, in the sense that it proceeds from choice, the freedom entailed by that fact, and the claims to freedom implicit in our action, militate ineluctably against the forced association that “rights of recipience” involve. Voluntary action, in short, precludes the *using* of one individual for the benefit of another. This, after all, is the basic Kantian insight concerning the integrity of the individual (whatever Kant’s own understanding of that insight). Individual integrity is the idea that served as well, more or

⁴⁵ Gewirth, *supra* note 6, at 1159.

⁴⁶ Those moral theories that do not begin with the individual have a much harder time getting off the ground (legitimately). For the various groups or “social entities” that serve as their springboard have rather less of an air of reality about them than does the individual, however burdened he may be with “social baggage.” See, *e.g.*, P. GRIER, *MARXIST ETHICAL THEORY IN THE SOVIET UNION* (1978).

less clearly, as the foundation for the classical theorists of liberty.

We come at last, then, to the task of tracing out the more specific rights and correlative obligations that constitute the world of rights. As stated earlier, I will do this by building upon Gewirth's Principle of Generic Consistency. This amounts to showing what rights there are by showing what rights the PGC entails and hence justifies. (By implication, it also amounts to showing what rights do not exist by showing what claims are inconsistent with the PGC and hence are unjustified.) To outline the world of rights, then, is not simply to draw up a list of rights, as has been done in various political contexts.⁴⁷ Rather, it is to show that the rights there are owe their existence to, *i. e.*, are justified by, some overarching moral principle, which is itself justified by deeper rational criteria; moreover, it is to order those rights into some coherent and consistent scheme of things, taking into account, in particular, the material and historical background against which they are justified by the principle. As noted at the outset, I have undertaken such a task elsewhere in this volume, where I developed arguments to show how our various property, contractual, and familial rights can be thus justified, as well as our rights against torts and crimes, all of which can be reduced to rights to liberty—or better, rights to liberty, defined in terms of property.⁴⁸ What I want to do here is simply summarize that discussion, following which I will raise a few considerations that take us beyond the theory of rights.

If outlining the world of rights involves not only deriving those rights from an overarching principle but ordering them into a coherent picture as well, then the first thing called for is a scheme for classifying the many rights there are, a scheme that goes to the heart of, or closely reflects, both the justificatory theory and the material and historical background against which the justificatory theory operates. Such a scheme was mentioned at the outset. It divides the world into general and special relationships, described, respectively, by general and special rights and obligations.⁴⁹ This taxonomy is fundamental in that it fastens upon the two basic ways in which rights are generated and hence justified—"naturally" (which is ulti-

⁴⁷ I have in mind such lists as the American Bill of Rights (1791), the French Declaration of the Rights of Man and of the Citizen (1789), and the United Nations' Universal Declaration of Human Rights (1948).

⁴⁸ See title footnote, *supra*, and Pilon, *supra* note 10, Part III, §C. See also Pilon, *supra* note 7, ch. 3.

⁴⁹ See note 9 *supra*.

mately an atemporal, spatial notion) and historically (which introduces time into the spatial context). Our general rights, which is what the discussion to this point has concerned, are often called our natural rights; they are logically prior and are justified as direct implications of the PGC. These rights are all variations of the basic right entailed by the PGC, the right to noninterference; hence the correlative obligations are all negative. General rights are held by everyone, against everyone else (unless special relationships have arisen to alter this). And they are delineated by the material or property foundations that enable their exercise (about which more in a moment).

By contrast, special rights and obligations, which arise when individuals make contracts, create associations, or beget children, or when they commit torts or crimes, are logically posterior, for they arise from and hence presuppose the world of general relationships. They are justified, then, as *indirect* implications of the PGC, for their existence is contingent upon their having arisen historically, from the moral world *directly* implied by that principle. Moreover, unlike their general counterparts, special rights and obligations are held only by the parties to the events that create them; and the obligations correlative to special rights may be either negative or positive, according as those events, against the background of the PGC, will dictate. Finally, it is useful to distinguish two broad categories of special relationship—those that arise voluntarily, as permitted by the PGC, and those that arise nonvoluntarily, or by force, as prohibited by the PGC.

With this taxonomy in mind, then, let us turn briefly to the substance of the matter. If the most basic general right we have is the right to noninterference, and if all our other general rights are simply more specifically described exemplifications of this right, then the task of interpretation is one of tracing the connection between these specific rights and the basic right. This process was begun earlier when the basic right was explicated as a right to be left alone (or to do nothing), a right to do whatever does not interfere with others, and a right to associate with others provided they have consented. These are simply three more specific descriptions of the same right, the right to noninterference. But the lines have been drawn in such a way as to be useful for subsequent, more specific explications. For we have here a rough dichotomy, drawn with reference to action, between what might be called our "passive rights" (or rights to be left alone, rights to quiet enjoyment) and our active

rights; moreover, our active rights are divided into those that are exercised with the explicit consent of others and those that are not. Again, the lines that separate these categories are rough; but the categories are nonetheless useful, for they focus upon fundamental issues. Our passive rights, for example, are unproblematically entailed by the PGC, for by definition their exercise cannot involuntarily involve others; hence they enjoy a fundamental place in the moral order. Similarly, those active rights that are exercised with the consent of others raise no justificatory difficulties, at least with respect to those others who consent. The difficulties arise only in the middle category, and in the third category vis-à-vis strangers; for not only can the exercise of our active rights interfere with the exercise by others of *their* active rights, but active rights are notorious for interfering with the enjoyment by others of their passive rights (which is not the case when we are all exercising our passive rights).

If we attempt, however, to clarify these difficulties of interpretation by referring to action and interference alone, as is often done in discussions of the principle of equal freedom, we find ourselves either going in circles or positing arbitrary starting points.⁵⁰ What we have to do instead is give some real content to our rights—or better, as adumbrated at III, B above, we have to flesh out the real content that is already there, the material conditions that enable us to act, the property in terms of which our general rights of action are delineated in fact. Starting with the property we possess in ourselves and our actions, we have to show how the property in the world, against which we perform our actions, arises as private property, and how this serves in turn to distinguish those actions that are performed by right—because the agents own the material conditions of the actions—from those actions that are not performed by right and hence are not instances of our active rights—because their performance entails the taking of what belongs to others.

A brief illustration will help to illuminate these issues, and will bring out as well the ambiguity in the idea of “having” a right, the clarification of which is crucial to understanding the world of rights. As an instance of our right to noninterference, we all “have” a right to freedom of the press, in the sense that no one else has a right to

⁵⁰ This is not surprising since “freedom” is a fundamentally subjective idea, the arguments of those who distinguish “negative” from “positive freedom” notwithstanding. See Pilon, *supra* note 7, ch. 1. For a discussion of ten different attempts to come to grips with the principle of equal freedom, see Gewirth, *Political Justice*, in *SOCIAL JUSTICE* 119, 141-54 (R. Brandt ed. 1962).

interfere with our publishing what we please.⁵¹ But the actual exercise of that right will depend upon whether we own the full material conditions of the right's exercise (a printing press, paper, etc.).⁵² If we do not own those conditions, we cannot exercise our right, which has led many thinkers to conclude that we do not "have" the right. What has to be drawn here, however, is the distinction between the necessary conditions for *having* a right and the necessary conditions for *exercising* that right. Suppose, for example, that someone forcibly took control of another's printing press. Surely he could not justify that act by pointing to his right to freedom of the press. Yet we would still say that he *has* the right to freedom of the press, even though, at the moment, he could exercise the right, *ex hypothesi*, only by taking what belongs to another. And we would say that because there is all the difference in the world between having a *right* and having a *power* (to exercise that right). To have a general right, as here, is not necessarily to have the power to exercise that right; rather, it is to have simply a claim to the noninterference of others, which, in conjunction with the material conditions against which the agent acts, may or may not lead to the actual exercise of the named right at issue, according as the agent does or does not own those material conditions.

In tracing out the world of rights, then, it is imperative that the distinction between rights and powers be kept in mind. In general, the tracing should proceed in small, careful, and systematic steps if inconsistencies are to be avoided. Moreover, what has to be brought out in particular, as above, is how our general rights, though rooted not in temporal but in spatial considerations, *i.e.*, in the property we possess in ourselves and our actions, will nevertheless "unfold" or "develop" in time. We start out, that is, with the complete list of general rights (which are as numerous as we are inventive with definitions), though the actual exercise of those

⁵¹ Just to be clear, let me mention, but not argue for, the conclusions I intend here. The right to freedom of the press is the right to publish anything, provided no rights of others are violated by doing so, *i.e.*, provided doing so does not take what belongs to others. The publication of pornography takes nothing that others hold outright. Nor does defamation; "good names" are not held outright, but only because third parties contribute with their opinions, which they have a right to form, and change, and second parties have a right to influence. Censorship might be justified, however, on a case-by-case basis, when others would be endangered by the published material; for individuals have rights against being endangered (beyond some point) by others. See Pilon, *supra* note 10, at 1277, 1333-35. However complex and difficult this last issue is to make out, it is nonetheless real—and leads, of course, to the closely related issue of censorship for reasons of national defense.

⁵² I ignore here the possibility of owning *access* to a printing press, for this introduces a special relationship, unnecessarily complicating the example.

rights, as just indicated, will depend upon whether we have or have not acquired the necessary conditions of their exercise, which we will ordinarily do only in the course of time. Thus it is that a world of equal *rights* is not necessarily (indeed, is virtually never) a world of equal *opportunity*, a confusion of which can lead only to the most far-reaching of misunderstandings.

In outline, this is the world of general relationships, which again, is the background against which we create special relationships, by various of the acts we perform. We have a general right, for example, to create voluntary associations, such as contracts, partnerships, corporations, marriages, clubs, and so forth. In each of these cases the special rights and obligations created—the rights and obligations there are—are simply those that have been agreed to, or those implicit in the agreed-upon terms; otherwise, the parties to the special relationship stand generally related. When we act, however, we may also create forced associations, either unintentionally, as when we commit torts, or intentionally, as when we commit crimes. Here the special rights and obligations that are created are those that are required to rectify the wrong, to return the wronged party to the prior status quo (in which the parties were generally related), which is the state of affairs prescribed initially by the PGC.⁵³ Notice, then, that in the case of both voluntary and forced associations, the theory remains consistent, *i.e.*, no “conflicting rights” arise.⁵⁴ For in both cases, the agent(s), by his act(s), alienates some of his general rights and obligations, which are replaced by new special rights and obligations; thus no conflicting rights and obligations arise (or remain). Similarly, in the case of tort and criminal victims, the general obligation not to interfere with the wrongdoer or his property is replaced by the special right to do that (to the extent required to rectify the wrong), thus preserving the symmetry of rights and obligations, as the material and historical context may require.

This completes, in summary and very generally, the outline of what might be called our “first-order” moral rights and obligations, by which I mean the rights and obligations we have assuming we

⁵³ For a derivation of the criminal remedies of restitution and punishment, which does not depend upon introducing public law but proceeds instead from state-of-nature tortious considerations, see Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 *ETHICS* 348 (1978).

⁵⁴ Regrettably, this is not entirely correct, or is “correct,” in certain contexts, only at unacceptably high cost. For the case of the pregnant rape victim (assuming fetuses have rights), see Pilon, *supra* note 10, at n. 108.

all satisfy our obligations, or, failing that, that we satisfy our tortious or criminal obligations once having created them. The world of first-order rights, that is, is a world in which the problem of enforcement does not arise, a world in which no one has to be *forced* by others to carry out his obligations, even though he may have failed to carry out all of them at some prior time by having committed a tort or a crime. What I have tried to do, in short, is get clear about what the moral world looks like, about what rights there are *to be enforced*, *before* taking up the problems of enforcement—and in particular, before taking up the complex questions surrounding rights of enforcement, rights of accused persons, and the whole issue of procedural justice. It is important to be clear first about just what our first-order substantive rights are, for these will shed light in turn upon just what our “second-order” rights are, *i.e.*, our enforcement and procedural rights.

This world of first-order rights, then, looks very much like an overview of the common law—at least as that law stood at its theoretical best. And well it should, for the common law, as Edward Corwin has remarked, was thought to be securely grounded in reason: “Indeed, the notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law.”⁵⁵ That “right reason,” however, has often been easier to discern in the particular than ground in general; because of this, moreover, the particular has often proved difficult to order consistently. What I have tried to indicate here is how those particular conclusions can be derived from general moral and, indeed, rational foundations, such that their denial leads one to contradict oneself, and hence, by implication, to affirm them, and how those conclusions can be ordered in turn into a coherent and consistent scheme of things.

When we turn to our second-order rights, however, the issues are immensely more complex.⁵⁶ For here the problems of uncertainty and proof (proof to whom?) often seem intractable, and certainly do not lend themselves easily to rational explication. The problem of enforcement, then, is not simply the problem of the legitimacy of the state, which no one to date, I submit, has satisfactorily resolved.⁵⁷ More deeply, it is the problem of just what our enforcement

⁵⁵ E. CORWIN, *supra* note 13, at 26.

⁵⁶ See, *e.g.*, R. NOZICK, *supra* note 10, Part I.

⁵⁷ The most sophisticated argument to date, by Nozick, *id.*, ends ultimately in a taking. See Pilon, *supra* note 7, ch. 4. Let me be clear, however, that in raising doubts about the

rights and obligations are in the state-of-nature, which in principle should be clarified before we can be clear about the rights of the state in this connection, assuming that the state itself could be shown to be legitimate. We are a very long way, however, from having an adequate theory of state-of-nature procedural justice.

V. BEYOND RIGHTS

Suppose we had a well-worked-out theory of procedural justice. Would we *want* all of our rights enforced, whether by a private instrumentality, as in the state of nature, or by a public agency, justifiably claiming a territorial monopoly on the legitimate use of force? This question is not as odd as it may seem at first blush. For as I mentioned at the outset, and illustrated with some variety elsewhere in this volume,⁵⁸ the theory of rights is strict, generating conclusions that give "reasonable" men discomfort, however grounded in reason those conclusions may be. Our rights are generated from our conative behavior, and in particular from the property foundations of that behavior. In explicating those foundations I have tried to elucidate the classical insight regarding the connection between rights and private property, which more deeply, of course, is the connection between rights and private persons. The theory of rights is intimately bound up with the liberty that is privacy; it depicts a clear, rational framework within which individuals may live their lives free from the interference of others. But those very virtues—clarity, groundedness, surety—do not always blend well with the vicissitudes of life.

What do we do, then, when we run up against the uncomfortable conclusions, when we follow reason to its logical end and realize, for example, that what we have an *obligation* to do is not what we *ought* to do? This is entirely possible because, as H.L.A. Hart has put it,

legitimacy of the state, I am making a theoretical point only. As a *practical* matter, that is, I cannot imagine a world without government, given that Rousellian man has not yet evolved. This theoretical point serves a useful function, however; for the air of illegitimacy that surrounds the state can serve as a brake upon its growth, at least so long as we are mindful of that illegitimacy.

It would be well to note too that if the forced association that is the state could be justified, and if its functions were limited to the enforcement of the rights set forth above, there still would remain immense questions about what means and indeed about what regulatory powers the state might legitimately take on in the name of providing this "service." If these difficult issues arise even in the case of the minimal state, which is called upon to enforce what many would call the parsimonious theory of rights sketched above, they will arise *a fortiori* as the state takes on more functions, or as more rights are "found" to be enforced.

⁵⁸ See Pilon, *supra* note 10.

these two ideas, "ought" and "obligation," at least as used here, come from "different dimensions of morality,"⁵⁹ reflecting respectively, I suggest, the teleological theory of good, rooted in what Hume called "sentiment" or "a fellow feeling with others," and the deontological theory of rights, rooted in reason and hence in foundations admitting of rational demonstration. One side of this matter is easy. The theory of rights sets the strict boundaries of ethics, within which individuals may pursue whatever "higher" morality they wish, whether egoistic or altruistic (in varying degrees), whether grounded in aesthetics or religion or humanism or whatever. Thus when individuals engage in Good Samaritan behavior they can easily say they are doing what they *ought* to do, as decent members of civilized society, quite apart from what they are strictly *obligated* to do (or have a right not to do). Here there is no difficulty because no issue of force arises—and indeed, only because they are *not* forced to perform these acts can genuine virtue arise.

The other side of the matter is more difficult, where we are reluctant to use force to secure the rights and obligations that are clearly demonstrable, or worse, are tempted to use force, in violation of rights, in order to secure some great good. Consider this example: *A* is drowning; *B* wants to rescue him, which of course he has a right to do; but doing so will require that he trespass on *C*'s property and (just to make the example more interesting) cause great harm to *C* by doing so. Now clearly *C* cannot be forced to rescue *A*, anymore than any individual can be used for the benefit of another. But can he forcibly prevent *B* from rescuing *A*, by preventing the trespass? Must *we* support *C* in this? Or can we *prevent* *C* from preventing *B*'s rescue attempt? (Who is the "we"?) If the concept of a right entails a further, second-order right to enforce first-order rights,⁶⁰ then *C* can prevent *B*'s attempt, and we cannot prevent *C*'s defense of his rights. (By what *right* would we do so?) That would be the strict position. A weaker position would prohibit *C* from using force, but would require *B* to compensate *C* for the harm caused him. (*A* would not be required to compensate *C*—though he *ought*

⁵⁹ Hart, *supra* note 9, at 186. In suggesting that "ought" is being used here in a teleological sense, which itself could be explicated more fully, I do not mean to suggest that this term does not also have a deontic usage, as well as prudential, aesthetic, and perhaps other usages.

⁶⁰ Would this lead to an infinite regress of rights—a right to enforce one's rights, an obligation to satisfy one's obligations, *ad infinitum*? Perhaps not; for in the case of rights, at least, these are, after all, different acts, *i.e.*, the right-object of the first-order right is not the same act as the right-object of the second-order right.

to—because gratuitous beneficence does not generate obligations in beneficiaries.) It is difficult, however, to make out a justification for this weaker position, for it amounts to permitting an intentional forced association, notwithstanding the compensation: it permits *B* to use *C*, however noble his motives. If here, why not elsewhere?⁶¹ But if this position is difficult to justify, then the still weaker position, requiring *C* to bear (even part of) the loss, as some “deep-pocket” thesis might argue, is even less defensible; for this amounts to permitting a straightforward use of *C*.

These justificatory difficulties notwithstanding, there remain occasions when we ought to do what we have an obligation not to do, and conversely, which we can say with perfect consistency because, again, these idioms are differently grounded, reflecting plainly the tension that sometimes arises between the theory of good, however uncertain its epistemological foundations, and the theory of rights. Until recently, Anglo-American law has sought, in large measure, to secure the theory of rights, no doubt in part for these epistemological reasons. That emphasis, in my judgment, has been entirely correct, and salutary too; for when individual integrity—and liberty—are compromised to accommodate someone’s or some group’s conception of “the good,” a Pandora’s Box is opened. Nevertheless, we have to admit that there will be times when rights must be overridden, both on a case-by-case basis and as a matter of social policy, which we do, for example, when we find debtors or tortfeasors insolvent and likely to continue so for eternity, or contracts *egregiously* unconscionable as a substantive matter, or when we grant that the indigent have demonstrably no place to turn but the state. In such circumstances, however, we should be clear about what we are doing: it is not *by right* that indigent debtors or tortfeasors are absolved of their obligations, or that the foolish are released from their contractual obligations, or the needy are given assistance by forced redistribution. There is no *obligation* that we do these things; they are done, to use an older idiom, by grace—and indeed, in *violation* of rights. It will do no good, moreover, to “bend” the theory of rights in order that the right and the good come out always the same, thus enabling us to say, as has become the recent fashion, that as a matter of social policy, rights always take precedence over

⁶¹ See Goldstein, *Lawyers Debate a Public Tithe*, N.Y. Times, Oct. 21, 1979 (proposal submitted by a special committee of the New York City Bar, to require lawyers to do compulsory pro bono work, using state licensure as the mechanism of enforcement). Compare Fried, *Fast and Loose in the Welfare State*, AEI REGULATION 13-16 (May/June 1979).

utilitarian calculations. (Perhaps they do, but perhaps not always over *consequentialist* calculations.) That will only clutter the moral world with rights, beclouding the underlying theory—and in time will probably undermine the good name of rights as well. In the broad range of cases the theory of rights directs us in our use of force. Only in extreme and rare cases do we have to forgo principle, not in the name of rights but in the name of shared values, which we should be candid enough to admit we are imposing upon those we are forcing to yield what is rightly theirs. It is unsettling, to be sure, that the lines between these exceptional cases and the broad range of ordinary cases are not more clear. But perhaps that is the way it was intended to be.

THREE TYPES OF RIGHTS*

Lawrence C. Becker**

Philosophers argue about whether rights are claims or entitlements;¹ about whether or not they always entail duties for others;² about whether trees, animals, fetuses, infants, and the permanently comatose (among others) can in principle have rights;³ and about whether rights are always to take priority over other moral considerations—whether they are, in Ronald Dworkin's phrase, deontological trump cards that take any trick constructed from arguments about value or virtue.⁴

Confusion about the general nature of rights causes, in turn, great difficulty for anyone interested in justifying a particular right claim. If rights are constraints on the principle of utility, for example, it is hard to see how they could be given a utilitarian justification; if rights are constraints on the scope of rational agreements, it is hard to see how they could be given a contractarian justification. To the extent that there is some logical bar to animals having rights, it seems difficult to justify the ascription of rights to human infants.

It is not surprising, given this disarray in the theory of rights, that so much current talk about rights begins with a set of references to the author's "intuitions"—and in fact rarely gets beyond an explication (however detailed) of the consequences of those intuitions.⁵ If we are going to continue to put so much emphasis on rights, we need more than the explication of intuitions. We need a general theory

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¹ See, e.g., Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 137-42 (1966). See also R. FLATHMAN, *THE PRACTICE OF RIGHTS* (1976).

² On this point, and many related ones, see Lyons, *Rights, Claimants, and Beneficiaries*, 6 AM. PHIL. Q. 173, 173-85 (1969).

³ See Stone, *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972), referred to in Justice Douglas' dissenting opinion in *Sierra Club v. Morton*, 405 U.S. 727 (1972). See also Feinberg, *The Rights of Animals and Unborn Generations*, in *PHILOSOPHY & ENVIRONMENTAL CRISIS* 43-68 (W. Blackstone ed. 1974).

⁴ See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* xi, 188 (1977).

⁵ The leading example is perhaps Robert Nozick, in *ANARCHY, STATE AND UTOPIA* (1974).

of rights—the outlines of which I shall discuss in a moment.

This Article is a contribution to that project. Its benefits are at least these: it makes a modest advance in understanding the problems involved in the justification of rights; it provides a clarification (if not resolution) of the debate over whether rights are claims or entitlements; and it yields some decisive results on the question of who (or what) can in principle have a right. This is enough to justify the tedium of a piece of distinction-making.

I. RIGHTS PER SE

I begin with a preliminary characterization of the root idea of a right—a caricature, really—designed simply to elicit the elements necessary for a general analysis of rights.⁶

Suppose a right is characterized as follows:

To say that A has a (legal or moral) right against B is to say that A has a (legal or moral) claim on an act or forbearance from B—meaning that, should B fail to so act or to so forbear, it would be (legally or morally) justifiable for A to use coercion to extract either the act or forbearance from B, or compensation in lieu of it.

This characterization suggests all the elements necessary for an analysis of the concept of a right as that concept is currently used. Specifically, it suggests that a complete account of a particular right (for example, a right to life) involves:

1) *The specification of the right holder(s)*—that is, what persons, beings, or things have the “claim.”

2) *The specification of the right regarnder(s)*—that is, what “other(s)” —if any—the right holder has a claim against. (Some reflection on the sorts of rights people are said to have indicates that it is not always clear that the existence of right-regarders is being asserted. Think of the putative right to health care.)

3) *The specification of the act(s) or forbearance(s)*—that is, the thing(s) the right regarnder(s) must do, or must refrain from doing; what they may do, or may not do; or in the case of “regarnderless” rights, the benefits to which the right-holders have a “claim.”

4) *The definition of the nature of the rights-relationship*—that is, the sort of claim the holder has on the regarnder; or the sort of

⁶ In this section I review briefly, and with some modifications, the analysis presented in my PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS ch. 2 (1977).

claim the holder has on some benefit.

5) *The definition of the conditions under which the right may be said to have been violated*—that is, the circumstances—if any—which constitute a right regarnder's culpable "failure" to act or forbear as required. (The "violation" of a right must be distinguished from mere *delay* in doing what is required, and from *non-culpable failure* to do it.)

6) *The definition of the conditions under which a violation of the right (though culpable) is nonetheless excusable.*

7) *The specification of remedies for both excused and unexcused violations of the right.*

8) *The specification of coercive measures for extracting the remedies.*

9) *The specification of the agent(s) who may extract the remedies.*

10) *The justification of the right defined by (1)-(9) above*—that is, the assembly of reasons which warrant the conclusion that the right holder(s) do in fact have such a (legal or moral) claim.

A moment's thought about these elements reveals the inadequacies of the preliminary characterization of the root idea of a right. We cannot say as it does—at least not without begging some important questions—that all rights are claims against others; or that "compensation" is to be understood in its ordinary sense (perhaps in some cases a mere apology will suffice); or that "coercion" is to be given a literal meaning (perhaps sometimes a verbal demand is as far as one may properly go); or that the right holder is the one who may apply the coercion (perhaps only a law enforcement officer may do so). Rights can evidently take a wide variety of forms—from those vague entitlements that apparently point the finger at no one in particular (because no one in particular can be said to be a right-regarnder with respect to the holder), to the full dress legal rights whose violation calls down the power of the state.

Further, reflection on these ten elements shows how misleading it may be to speak of even a full dress legal right as involving a claim on an act or forbearance from another. Hohfeld's analysis of the sorts of rights-relationships recognized in law is instructive here.⁷ One *may* have rights in the strict sense, he said (claim rights, as I refer to them), which entail the existence of correlative duties in others. But one may also have privileges (liberty rights) which sim-

⁷ W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

ply correlate with the *absence* of claim rights *in others*. And one may have powers (such as the right to make a will) which correlate with liabilities in others, or immunities (such as the right to remain silent) which correlate with *disabilities* in others. Each of these relationships is commonly referred to as a right, but it disguises a good deal to characterize all of them as "claims against someone for an act or forbearance."

In short, the ten elements mentioned above provide a convenient device for understanding the complexity of the concept of a right. The failure to understand this complexity—or perhaps, just the failure to understand it systematically—causes at least some of the confusion in the theory of rights.

II. GENERAL THEORY OF RIGHTS

Just as I assume that the definition of a particular right (such as a right to life) requires the filling in of all ten elements mentioned above, so too I assume that a *general theory* of rights requires a general account of how each of the ten elements can *in principle* be filled in for specific sorts of rights. That is, it requires an account of who (or what) can in principle be a right-holder, or a right-regarder; it requires an account of the general nature of the rights-relationship that can obtain between holders and regarders; and so forth.

Hohfeld, as I mentioned above, has given an admirable (if somewhat incomplete) account of the general nature of rights-relationships. That is one part of a general theory of rights. What I shall do here is focus on another element necessary for a general theory: element (10) in the list—the nature of justification. Specifically, I will explore a trichotomy in the way rights are justified (or, as I shall sometimes say, in the way they are "established"). This trichotomy is independent of the "substance" of a justificatory strategy—that is, it is independent of whether one is attempting a utilitarian, contractarian, or some other justification. It is a simple distinction, but one which goes a long way toward clearing away confusion in the theory of rights.

The trichotomy to which I refer is (oversimply) this: (1) Some rights are held only derivatively, by way of the existence of duties (or other Hohfeldian rights-correlatives) in others. (2) Other rights originate, so to speak, in the right holders—and entail duties, or no-rights, or liabilities, or disabilities, in others. (3) Still other rights arise simultaneously, as it were, with their correlatives—as when rights and duties are created together by the making of a contract. I propose to call the first sort of rights *derivative rights*; the second

sort *original rights*; and the third sort *concurrent rights*. (It should be noted that the temporal language here is only a metaphor for matters of *logical* priority. It is not meant to be taken literally—that is, to refer to matters of temporal priority—or to suggest causal relationships.) First, then, derivative rights.

III. DERIVATIVE RIGHTS

Some arguments for the existence of a right proceed by first establishing the existence of a right-correlative of some sort. For example, one may first establish that B has a *duty* to A. It then (apparently) follows that A, as the beneficiary of that duty, must “have” something—in fact, must have a claim right, if “right” is understood as the Hohfeldian correlative of “duty.” Arguments for the existence of such rights do not depend (in principle) on whether the right-holders have conscious interests, or are able to “make” claims on others, or are able to make agreements with others. The arguments depend only on whether a duty toward that (putative) right-holder exists. Such rights are *derivative*—established entirely by derivation from the (logically) prior existence of duties in others. There are analogous arguments which proceed from the prior establishment of no-rights, liabilities, and disabilities.

In principle, derivative rights can be either natural or conventional, depending on whether they come from natural or conventional rights-correlatives. I shall focus here on rights that are derivable from duties. The arguments can easily be modified, however, to deal with the rights derived from no-rights, liabilities, and disabilities.

A. *The Nature and Scope of Derivative Rights*

Derivative rights clearly are entitlements. That is, we would clearly be willing to use that word to describe any such right: a duty toward A entitles A to certain acts or forbearances from B; a no-right with respect to A entitles A to act in certain ways regardless of B's wishes; a liability with respect to A entitles A to alter B's rights, duties, liabilities or disabilities; and a disability with respect to A entitles A to freedom from a liability.

It is difficult to construe derivative rights as claims (of any familiar sort) that are distinct from entitlements. Anyone who has a right may claim acts or forbearances from others, of course. Or such claims may be made on behalf of the right holder. It is clear; however, that the right exists whether the claim is made or not. So the

sense in which derivative rights are claims seems equivalent to the sense in which they are entitlements: namely, in the case of claim rights, their requirement of an act or forbearance from someone (or compensation in lieu of it); in the case of liberty rights, their denial of a contravening claim in others; and so on.

Derivative rights may be held by anyone, or anything, to whom duties (or no-rights, liabilities, or disabilities) are born. The question is whether there are conceptual limits to that sort of relationship; or whether derivative rights may *in principle* be held by any object—for example, by rocks, trees, animals, human fetuses, and the permanently comatose.

1. *Duties toward and duties concerning.*—One step commonly taken toward an answer to that question is to point out that one may have duties *concerning* something or someone without actually having duties *toward* that thing or person.⁸ For example, my duty to help Jones may actually be a duty to Jones' friend rather than Jones. (Consider: "Mr. Jones, because I owe your friend a favor and because she wants me to do this, I feel duty bound to do it—even though I think you're worthless and I certainly don't owe *you* anything.") This is a duty *concerning* Jones, but (apparently) not a duty *to* Jones. We would not want to say, in such a case, that Jones had a right against me at all. It is Jones' friend who has the right—a right that I help Jones.

So to be able to say who (or what) has a derivative right in a given case, we need to be able to say "to" whom—as opposed to "concerning" whom—the duty (or other rights-correlative) is born. Offhand, I see no way of doing this at the level of *formal* analysis. One cannot simply say that the duty is "to" the person whose interests it satisfies, or who is an essential (as opposed to accidental) beneficiary of the duty. These descriptions fit both Jones and his friend. I suspect that in each case the question will have to be settled by an analysis of the substance of the considerations that justify the duty. (For example, in this case, the duty is defined by a relationship between Jones' friend and me, not between Jones and me.)

How to handle particular cases, however, is not the problem here. What is needed is some guidance on the question of the range of *potential* right-holders. And the distinction between duties "to" and

* See the discussion in Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 180 (1955); and Lyons, *supra* note 2.

duties "*concerning*" may yet be of help.

Surely we can say, can we not, that anyone or anything that *could* benefit from another's performance of duty could be someone (or something) "*to*" whom the duty is born? That is, surely the capacity to be a "beneficiary" is sufficient to guarantee one the status of a *potential* holder of derivative rights. It may not be a necessary condition; that is, there may be other ways to become a potential right holder. And it is certainly not sufficient to establish that one *is* a right holder. If one could benefit, however, surely it is logically possible that one could be a derivative right holder. (The only evidence one can give for this assertion is, of course, the absence upon semantic analysis of a contradiction between the two propositions: (1) A could conceivably benefit from the performance of a duty; and (2) the duty could (considering only (1) above) conceivably be "*to*" A. I take it that there is no contradiction between the two.)

2. *Possible beneficiaries of duties.*—As it turns out, this is enough to guarantee the status of potential (derivative) right holder to virtually everything. Certainly it is true that any animate being—whether purposive or not, whether it has conscious interests or not, whether it is sentient or not—could be benefitted by the performance of a duty. The case is not so clear for inanimate objects, but it leans in that same direction. The chain of argument which establishes this proposition runs as follows:

1) People can be benefitted (or harmed) without being aware of it at the time—or indeed without ever being aware of it—in the sense that their interests can be advanced or compromised without their knowing it.

2) This is so (at least in part) because people may not actually be aware of their "true" interests—*e.g.*, those things they would want for themselves if they were perfectly rational and all-knowing; or those things they would want if they were not self-deceiving; or those things they would want if they were more reflective or introspective.

3) If awareness of an interest is not a necessary condition for having an interest, then the notion of having an interest must be connected to an "objective" as well as a "subjective" notion of people's welfare. That is, we must be able to make sense of the notion of an event being "*in*" a person's interest ("*for*" his or her welfare) without essential reference to whether or not that person actually does or ever *could* be aware of that interest.

4) Such an "objective" notion of an individual's wel-

fare—understood perhaps in terms of what the individual *would* want if he or she were aware of the relevant facts—must then be based on the observer's appreciation of what the individual would want under those counterfactual conditions.

5) It is from such an "objective" stance that we can say, as observers, that subjects are harmed or benefitted even if they are not subjectively aware of it.

6) Now: if this is true for humans—that is, if it makes sense to say that they can be benefitted or harmed whenever it is the case that, had they been aware of all the facts, and had they been reflective and rational, they *would* have wanted (or not wanted) the event—then the same must be true of any living being. Trees can be benefitted or harmed in the same way. We have an objective, or observer's, notion of their welfare—their "interests"—which is not dependent on the presence or absence of a subjective awareness of those interests by the trees themselves. We say—no more metaphorically for the tree than for the adult human being—that it can be harmed, helped, injured, damaged, destroyed, or restored to health. In neither case are we making necessary reference to consciousness, purposiveness, sentience, or subjective awareness of any kind. The language of interests may be metaphorical here—both in the case of a person's "true" interests and in the case of a tree's interests—but the language of benefit and harm is not. The language of benefit and harm is what is relevant to the question of who can be a beneficiary of a duty.⁹

7) Thus, any entity for which one can construct such an objective notion of welfare can be the beneficiary of a duty—and hence the holder of a derivative right.

8) I take it that this is decisive in the case of all animate beings—that is, that the construction of an objective notion of their welfare is possible. Thus, human fetuses, neonates, the catastrophically retarded, and the permanently comatose can all in principle be benefitted or harmed and can therefore hold derivative rights. A similar conclusion is true for trees, fish, sponges, carrots, and other animate beings.

9) What I take to be decisive in the case of animate beings I take to be at least suggestive in the case of inanimate entities. Interference with their equilibrium mechanisms looks very much like interference with the growth of a plant, or with the homeostatic mecha-

⁹ My colleague, H. Lamar Crosby, Jr., has explored a similar notion in *Reflections on the Scope of Justice* (in typescript).

nisms of an animal. Bizarre as it sounds, if an objective notion of welfare—constructed by counterfactual speculation—is possible for humans and other living beings, why not for inanimate objects as well? My hesitancy here is due more to the novelty of the proposition than to any argument I can find against it.

In general, then, the conclusion is that the class of potential derivative right-holders includes animals, fetuses, trees, the comatose, and probably even inanimate objects. This is not to say, of course, that each of these objects can hold *any* sort of derivative right. Some rights-relationships (such as powers, or liberties to act) require in principle a potentially “active” right holder—that is, one who can exercise a power or a liberty. It makes no sense to speak of the right of an inert gas to make a will. The situation is the same for some claim rights and immunities; they too may require a potentially active right-holder. (Think of the immunity right to remain silent; or the claim right to an education.) But claim rights and immunity rights *can* be purely passive relationships on the part of the right holders. (Think of the claim right to freedom from deliberate interference with one’s welfare.) This is what makes the class of potential derivative right-holders so large.

B. *Justifying Duties*

Whether there are in fact any duties to inanimate objects (or vegetables, and rudimentary forms of animal life, for that matter) has of course not been settled here. From the fact that these things are potential right-holders, it does not follow that any of them *are* right-holders. It only follows that we cannot rule out, on purely formal grounds, all derivative rights that might be claimed for them.

I noted earlier, however, that derivative rights could in principle be either natural or conventional, depending upon whether the correlates from which they were derived were natural or conventional. I now make a few remarks on this distinction, because it has some bearing on the next sort of right to be considered: original rights.

1. *Natural duties.*—The crux of the distinction between natural and conventional duties (or rights) is clearly in the sort of considerations that justify them or “establish their existence.” That is, I know of no reason in principle why natural duties should have either a special *content* (e.g., concerning the minimum conditions necessary for survival) or a special *form* (e.g., applicability to all). Rather,

it is apparent that what is fundamental to the distinction is the thought that some duties (the natural ones) might "exist" independently of anyone's knowledge of them, or assent to them. It would thus make sense to speak of "discovering" such duties as opposed to creating them. We create duties by convention; we justify them—establish their existence—by appeal to convention. We discover, or "find," natural duties; we justify them—establish their existence—by appeal to something other than convention.

What is that "something other"? The answer is in large measure determined by the initial characterization of the distinction between the natural and the conventional. For present purposes, I shall regard as "natural" any duty that can be justified without reference to an agreement or aim to create *that particular duty*. (This may be a more expansive definition than some would favor, but I think it is a harmless expansion.)

Such natural duties (*i.e.*, justifications for duties) are of at least three sorts. First, a duty is a natural one if its existence is entailed by the existence of duties *per se*. For example:

1) If there are some duties whose existence cannot be disputed (*e.g.*, some conventional duties); and

2) If any such duties, regardless of their content, entail a further duty X; then

3) That further duty X is a natural one. It is natural because it is not itself the product of a specific convention aimed at creating that particular duty, but rather the product of the *form* of all such activity. The existence of such a duty is contingent on the existence of convention, but it is not itself conventional. (H. L. A. Hart has offered an analogous argument for the existence of a natural right to liberty.)¹⁰

Second, the existence of a natural duty may be established by reference to the conditions necessary for the realization of social or individual goals. For example:

(1) If some goal Y is (morally) justifiable; and

(2) If the existence of a duty X is necessary¹¹ for the realization of the goal Y; and

¹⁰ Hart, *supra* note 8.

¹¹ Similar, but weaker, arguments may be constructable from the premise that the imposition of a duty X is simply the *best* (most effective) means for realizing a justifiable goal, but I shall avoid that complication here—and in the next argument below. I assume that if a duty X is only one of several equally effective means, the argument as it stands would not go through.

(3) If there are no (sufficient) reasons for thinking that the existence of the duty X is unjustifiable; then

(4) The existence of duty X is justifiable—in the sense that there are good reasons for having it (its necessity for the realization of a morally justifiable goal), and no countervailing reasons for not having it.

A duty so established may plausibly be called a natural one because it does not arise from an aim to create that particular duty, but rather raises as a consequence of other activities and circumstances. The existence of such duties is contingent on the existence of justifiable goals for whose realization they are necessary, and upon the absence of countervailing reasons. The duties may thus range from impermanence in the extreme to permanence, depending on the universality and/or stability of the goals involved and other relevant circumstances. For example, one supposes that survival goals among normally formed human beings are relatively universal and stable, and that any natural duties derived from such goals (such as the prohibition of murder) would be likely to have similar characteristics. On the other hand, some of the “duties of friendship” may be as fleeting as the whims of one’s friends and/or one’s freedom from something better to do.

The third way in which a natural duty may be justified is by reference to the requirements of justifiable social institutions. Human parents, for example, may be said to have duties to their children in part because the institution of the family requires them. In general:

(1) If an institution is (morally) justifiable as it is defined; and,
 (2) If—although its definition does not itself entail the existence of a duty X—that duty is necessary to the continued viability of the institution; and

(3) If there are no (sufficient) reasons for thinking that the existence of the duty X is unjustifiable; then

(4) The existence of duty X is justifiable in the sense that there are good reasons for having it (its necessity for the viability of a justifiable institution), and no countervailing reasons for not having it.

A duty so established may also be called a natural one. It too does not arise from an aim to create that particular duty. Its existence may be contingent upon the existence of institutions established by convention, but it is not itself a conventional duty.

2. *Conventional duties.*—Given what has been said about natural duties, conventional ones may be defined as duties that are the (justifiable) products of activities aimed specifically at creating those duties.

Some conventional duties emerge gradually from customary behavior by the growth of a consensus that what is customary should be obligatory. Others emerge from a consensus unrelated to existing customs (for example, from a consensus generated by revolutionaries or reformers). Still others arise from regularized legislative or contractual processes.

The justification of particular conventional duties may take roughly the same form as that for natural duties:

- (1) If the consensus exists (or if people have explicitly agreed) that B has a duty X; and
- (2) If there are no reasons sufficient for thinking that that duty for B is unjustifiable; then
- (3) That duty is justifiable in the sense that there is good reason for B's having it (people want B to have it), and no countervailing reasons for B's not having it.

Conventional duties include, but are not limited to, contractual duties.

Similar arguments can be made for other Hohfeldian categories. A no-right, or a liability, or a disability may in principle be regarded as either natural or conventional, and if its existence is established *first*, and used to argue for the existence of the corresponding liberty, power, or immunity, then one has an argument for a different sort of (natural or conventional) derivative right.

IV. ORIGINAL RIGHTS

I turn now to the second sort of right in the trichotomy—the rights I have called *original rights*. The basic idea is simple: Many arguments about rights are not about derivative rights at all. That is, they do not attempt to establish a duty or other correlative first and then derive a right from it. Rather, they attempt to establish the right-holder's claim or entitlement first, and then to derive the appropriate correlative from that.

The motive for finding such rights is not hard to see. There is, after all, something unsatisfying about saying that a child's right to life comes only from the prior existence of duties in others; that there is nothing about a child which "reaches out," as it were, and makes a claim on others—a claim which itself constitutes a right

from which others' duties are then derived. If there are derivative rights (*e.g.*, rights entailed by duties), are there not also derivative duties? Are there not duties whose existence is established by inference from the existence of rights?

The temptation to say "Of course" to such questions is strong. The notion of a right that rests on—is established by reference to—others' duties seems too weak to express the force of a person's right to life, for example. Surely that right must *originate* somehow "with" or "in" the person.

The difficulty of saying just how such an original right could be established, however, is notorious. Some people hold that one must find some "morally relevant characteristics" of the putative right-holder that yield the right.¹² If this is the strategy adopted it is clear that one must find a characteristic that is not dependent upon a right-making "bargain" between the parties. Original rights are not contractual rights.

A. *Conventional Rights*

Some original rights, however, may be conventional. That is, an original right might emerge from a consensus in much the way a conventional duty does. It might emerge from custom, as customary behavior gradually achieves the status of an entitlement for which there is no countervailing moral argument. It may emerge from a consensus about entitlements provoked by reformers or revolutionaries. Or it may come through regularized legislative processes, including the legislative acts of judges and executives. (Again, as in the case of customary behavior, such rights are only established when there is no countervailing moral argument to be found.)

The difference, then, between a conventional *derivative* right and a conventional *original* right is the priority given to the justification of the right rather than its correlative. Of course, this priority *may* be purely "temporal"—in which case the warrant for saying that the right is *either* derivative or original disappears. (The rights and duties thus established are best thought of as concurrent ones, which I discuss below.) The priority may, however, be logical as well. That is, it may be that the concern to establish the right-

¹² See Michael Tooley's discussion in *Abortion and Infanticide*, 2 PHIL. AND PUB. AFF. 37 (1972), amended and expanded in *THE RIGHTS AND WRONGS OF ABORTION* 52-84 (M. Cohen ed. 1974). See also Robert Nozick's remarks on the moral basis of rights in *ANARCHY, STATE AND UTOPIA* 28-35 (1974), criticized by Samuel Scheffler in *Natural Rights, Equality, and the Minimal State*, 6 CAN. J. OF PHIL. 59 (1976).

holder's claims or entitlements is quite independent of the concern to prove the existence of its correlative in any particular individual or class of individuals. Rights established in such circumstances—whether conventional or not—may plausibly be regarded as original ones.

Who, or what, may hold such rights is settled in the same way it is for conventional duties or other rights-correlatives: As long as the possession of such a right is logically possible, trees (or rocks, or infants) have whatever rights the parties to the convention agree that they have (as long as there are no countervailing arguments to be found).

Conventional rights, however, whether original or not, do not reach the strength required to deal with the concerns stated at the outset of this section. What a consensus can give, it can also take away. A person's right to life should have a firmer foundation.

B. *Natural Rights*

What we are looking for is a (non-derivative) *natural* right—and one of a rather special sort. The patterns for the justification of natural duties given earlier can be turned around, of course, to establish natural *rights* first, and then to derive the correlatives. A natural right may be said to arise from the formal requirements of holding the conventional rights whose existence is undisputed. (Think again of Hart's argument for the natural right to liberty.) Or it may arise from the necessities of goal satisfaction or the operation of social institutions. The argument patterns here (with the "no countervailing reasons" clauses) are the same as in the case of natural duties. What I must do now is to make explicit the sense(s) in which rights justified in this way "originate" in the holder.

C. *Interest Rights*

One obvious way to do this is to point out that at least some original rights emerge from the holder's interests (meaning, roughly, the holder's wants, desires, "pro" affective responses, and prospects for increased welfare). The argument form is straightforward.

- (1) If A has an interest in X; and
- (2) If (as a means to realizing that interest) it is necessary or desirable for A to have a right (of some specified sort) to X; and
- (3) If there are no reasons sufficient to show that A's having the right is unjustifiable; then

(4) A's having the right is justifiable in the sense that there are good reasons for A's having it (A's interests in X and the necessity or desirability of the right to X as a means to satisfying that interest), and no countervailing reasons to the contrary.

Such rights are by definition limited to beings which have interests.

D. *Claims of Rights*

A more interesting (because more controversial) sort of original right is one that comes from one person's making a justifiable claim. "Making a claim" here means, for example, asserting entitlement to certain conduct on the part of others—asserting that others have duties, or no-rights, or liabilities, or disabilities, toward one. A "justifiable" claim is one for which some justificatory argument can be given, and against which no countervailing argument can be found. The idea is that the existence of such a justified claim amounts to the existence of a right. The right is an original one because it comes from an act (the "claiming") of the right-holder.

Example: Suppose I want some peace and quiet, and I cannot get it because my neighbors have their stereo turned up very high. Suppose further that these neighbors have no prior natural or conventional duty to keep their stereo turned down for my benefit. (Perhaps the issue has never come up before, so there are no contracts or conventions about it. And perhaps my need for peace and quiet goes far beyond what could be met by a general, natural duty of neighbors to refrain from making noise.) Now suppose I go to them and make a claim for peace and quiet—that is, I assert that I have a right to it and that they consequently have a duty to turn down the volume. And suppose that I can justify my claim; I can show that such an arrangement has utility for me; that there can be no reasonable objection to it; that it is not malicious or frivolous; and that the duty it imposes is neither onerous nor an unjustifiable interference with their liberty. Surely, then, my neighbors have a duty to turn their stereo down. My making of the justifiable claim *creates* the right-duty relationship.

Objection: The actual making of the claim here is superfluous. If the situation is such that the claim *would* be justified, then you already *have* a right—and your neighbors have a conditional duty: the duty to turn down their stereo if you ask them to. So it is not the actual claiming that creates the right, but rather the fact that the claiming would be justifiable. And that situation is indistinguishable (save for the temporal sequence) from the chain of argu-

ment that first establishes a duty in your neighbors—a duty that gives you a *derivative* right to peace and quiet.

Reply: The claiming is crucial here. Without it, my neighbors do not have a duty to turn their stereo down. At most, they have a duty to do so *if I ask them to*.

Objection: But where does that conditional duty come from? Not from your claiming, because the duty is prior to that. From the account you have given, it is clearly a natural duty of the sort that generates derivative rights. You have certain desires, needs, or goals; there are reasons to think that your neighbors' being quiet is necessary for the satisfaction of those things; there are no reasons to think that requiring them to be quiet upon request would be unjustifiable; so they have the duty to do so if you ask them. And your right to ask them is derivative.

Reply: My right to ask them, as you put it, is not the issue. Grant, for the sake of argument, that the conditional duty upon my neighbors is a natural one, and is in no way derivative from a prior right that I hold. Grant further that I hold the derivative right that is the correlative to that natural duty. This derivative right would be, I suppose, the power to impose upon them a duty to turn down their stereo—the “right to ask” as you put it. But note that the correlative of this duty-imposing power of mine is not my neighbors' duty to turn down their stereo; the correlative is their *liability* to having such a duty imposed by me (or, as we put it, their conditional duty to be quiet if asked).

The important point here, however, is that the duty to turn down the stereo is created by my claim of right—by my actual exercise of the power to do so. Analogously, the power (right) to make a will creates no duties—*e.g.*, for the probate judge or a possible executor. Only when I exercise my power to make the will—when I claim a right with respect to them by actually making a valid will—do these people have the duties that I previously had only the power to create. The same is true, then, with the right that I claim. The right is original rather than derivative because a necessary condition of its existence is my act of claiming it.

Objection: Is the actual face to face claiming you have described necessary? It seems a bit unfair to expect your neighbors to guess your intentions if you never say anything to them, and to have the duty to be quiet when you just “think” a claim at them. On the other hand, in the case of writing a will, would we not want to say that the duties had been created at the time the will was made? It

is just that the executor, and probate judge, do not yet know about them, and cannot be expected to carry them out until they do know.

Reply: If we say that the face to face aspect of the stereo example is unnecessary—that the duty exists when I claim it, whether or not my claim is overt and communicated to my neighbors—then in fairness the duty thus created will probably have to be defined conditionally: They must turn down the stereo if my claim of right is made known to them. I suspect that this is the wisest course, though it seems like a distinction without a difference. In any case, there is nothing unusual about saying that people have duties whether they know about them or not. If they *could* know, and *should* know, then the law, for example, will hold them responsible.

Objection: But now let us take things one step further. What constitutes a claim? Must I be conscious that I am making a claim in order to make one? Or will some less explicit behavior on my part do?

Reply: This is analogous to the question of whether contracts in law are “objective” or “subjective”—that is, whether or not their existence necessarily depends on a conscious agreement between the parties. And the answer is the same in both cases. There are sometimes good reasons for adopting the “subjectivity requirement,” and sometimes good reasons for waiving it. If I agree to a friendly wrestling match, I presumably have the power (right) to call it off if I am getting hurt. When I exercise that power, I create a duty in my opponent to stop. Now it would be absurd to hold that, in order to exercise my power (right), I had to be conscious of something like “I am entitled to stop this. Stop it!” Clearly, my exclamation (“Enough”) would suffice. It would not only be pointless to require more, but it would also result in an unjustifiable restriction of the power to make claims. “No emergency claims” is hardly a defensible rule.

Objection: If claims can be “*de facto*” in the way just described, can we not say that the infant (or dog, or cat) who resists pain is making a claim? Claims of right then extend to any entity which can express a preference.

Reply: I think that is essentially correct, though imprecisely stated. Claims of right, as explicated here, depend on the prior existence of powers. Such powers may be either derivative or original, but in any case they require the capacity for purposive activity on the part of the holder. Powers are to be exercised, and an entity which is incapable of doing *anything* that would count as exercising a power obviously cannot be a power-(right)-holder. Now there are

admittedly many things which (given the proper setting) count as exercising a power: for example, the explicit, conscious, overt claiming of a right; or expressions of a preference. It seems clear, however, that, by definition, if an entity is incapable of purposive activity *per se*, it could not exercise a power-right.

To the extent that claims of right (as original rights) rest upon power-rights, then, they require that holders have the capacity for purposive activity. Further, they require that some such activity, which can reasonably be construed as the exercise of a power, be performed by the right-holder. There is reason to think that many animals or human infants can meet these conditions: They can in principle have at least derivative powers, or even conventional, original ones; and they can do things which, were they done by humans in the same context, would unquestionably count as the exercise of a power. The question of whether animals or infants have natural, original rights by way of claiming them is thus reduced to whether they have the corresponding power-rights.

D. *Status Rights*

There is still something unsatisfying in this account. It is often insisted that people's rights to life or liberty, for example, do not depend on their exercise of any power, but come simply from their status as human beings. (The same sort of insistence is then occasionally extended to other species.) This sort of right—a natural, original, *status right*—is difficult to justify, however.

Consider: It is easy enough (in principle) to establish *derivative* status rights, natural or conventional. All one has to do is establish the relevant correlative duties—duties that yield rights to all members of that group. And it is easy enough to establish the relevant correlative duties. It is also easy enough to establish *original* status rights by appeal to convention: If we *agree* that humans have some right simply by virtue of their status as humans, and there are good reasons for so agreeing and no countervailing ones to be found, then surely humans have that right.

What we are looking for here, however, is a status right that does not derive from prior duties in others, and that does not depend on convention. We have to find grounds for an argument of the form:

- (1) There are good reasons for holding that all A's, simply by virtue of their status as A's, have right R (from which the rights-correlatives of others derive).

- (2) The fact (if it is a fact) that people (no matter how many) refuse to agree that A's have right R is irrelevant to whether or not A's have that right.
- (3) There are no countervailing reasons to (1).
- (4) Therefore, A's have right R.

In outline, this is no less concrete than the accounts given above for derivative rights and conventional, original ones. In those earlier cases, however, it was easy to see that the set of rights so defined was not in principle empty. One could imagine the sorts of considerations that would establish such rights.

In the case of the argument form just given, however, it is not easy to see how premises (1) and (2) could be established. What sorts of reasons could there be to support a natural, original, status right? A common suggestion is to explore certain characteristics possessed by "persons" (*i.e.*, individuals who have a self-concept and are purposive).¹³ I shall therefore focus on that suggestion, to illustrate the justification of status rights.

1. *Personal rights.*—Self-consciousness—that is, being conscious of oneself as distinct from other things and other persons—necessarily involves a "sense" of physical and psychological boundaries. If my body is distinguishable from its surroundings, it necessarily has physical boundaries. To the extent I am conscious of it as distinct, I am conscious of boundaries. Further, if my consciousness is normally inaccessible to others except by inference from my behavior (verbal or otherwise), spatial (boundary) metaphors for this fact are appropriate. My consciousness of myself as an entity necessarily includes, then, consciousness of physical boundaries and consciousness of the "separateness" of my consciousness itself. Further, persons invariably "manage" these boundaries—by making a distinction between trespass and visit, as it were, and acting accordingly.

Human persons are also purposive. They have projects that they strive to achieve—even if these projects are not fully self-conscious; even if they are self-annihilating. And they resist interference with these projects.

All the behavior just mentioned—the boundary-keeping, the resistance to interference with projects—can be part of the process of claiming rights, of course. But it is their dispositional aspect—the

¹³ By far the most detailed and systematic attempt to work out such a position is Alan Gewirth's. See his *REASON AND MORALITY* (1978) and his article included in this symposium.

fact that human persons as we know them always stand ready to make such demands—that seems to provide an opening for an argument for status rights. The argument proceeds as follows:

If boundary-keeping and resistance to interference are necessary consequences of becoming a person (*i.e.*, developing a self-concept and becoming consciously purposive), and if such persons exist, and if they want to continue to exist, it is reasonable to place the burden of proof on anyone who proposes to trespass personal boundaries, or interfere with a person's purposive behavior. If such trespassing or interference cannot be justified, the way is open for a further argument to establish personal *rights* to liberty. That argument would have to show that there are good reasons to recognize entitlements in persons to freedom from trespass (of their personal boundaries) and freedom from interference with their purposive conduct.¹⁴

Now the problem with concluding that status rights are original rather than derivative (or concurrent) is just this: While it is true that their justification begins with a reference to the characteristics of the putative right-holder and then shifts the burden of proof to others to show that they do not have the correlative duty (or no-right, liability, or disability), the same logical form can be used to justify duties first. In short, while the justification of such rights depends on characteristics of the right-holder, there is apparently no more reason to think that those characteristics lead (logically) to original rights than to derivative ones. If this is so for personal (status) rights, it would seem to hold for any attempt to argue for a natural, original, status right.

I think this is wrong, for the following reasons. Arguments that make primary reference to the putative duty-bearer's roles, interests, and goals (even though they also involve essential reference to the right-holder's status, interests, or whatever), seem clearly directed—as a matter of logical form—to establishing the duty first. It is not just a matter of indifference which one is established first, for the whole point is to secure the ascription of a duty (or other right-correlative) even if no particular right-holder can be identified with certainty. Similarly in the case of original rights: the point of those arguments is to justify the entitlement of the holder—whether or not a particular class of right-regarders can be specified. Of course it *can* be a matter of (logical) indifference as to which comes

¹⁴ I have argued for the soundness of the general form of such arguments in *ON JUSTIFYING MORAL JUDGMENTS* (1973).

first (and in those cases, I would classify the rights as concurrent ones, as I do below). But it *need* not be a matter of indifference.

This opens the door, *in principle*, for the justification of status rights for virtually anything. Rights requiring the capacity for action (*e.g.*, powers or liberties) are of course restricted to entities with those capacities. "Passive" rights (*e.g.*, some sorts of claim rights and immunities), however, are not so restricted.

E. *Interests*

A final word about interests is in order. Some have urged (either implicitly or explicitly) that a being's capacity to have interests is a necessary condition of its having rights.¹⁵ For reasons which should by now be clear, I think such an assertion is seriously misleading at best.

V. CONCURRENT RIGHTS

I turn now to the final part of the trichotomy—concurrent rights. The basic idea is simple enough: There are times when it is odd to think of either a right or its correlative as being antecedent to the other—when it appears that A's rights and B's corresponding duties (or other correlatives) arise concurrently. *Example*: Suppose a third party drafts a document that, if accepted by A and B, would create a right in A and a duty in B. The document is presented to A and B and they say, simultaneously, "I accept." B now has a duty toward A, and A has a right against B. But the right is neither derived from nor antecedent to the duty. It arises *concurrently* with the duty.

The establishment of such rights can be achieved by a straightforward application of the justificatory strategies outlined in the preceding pages. It seems clear that, in principle, there could be both natural and conventional rights of this sort.

It is, however, sometimes difficult to resist the thought that *all* rights are at bottom concurrent ones. If each right has a correlative—if, in fact, the existence of a right logically *entails* the existence of a correlative duty, or no-right, or liability, or disability—then it may appear that all rights and their correlatives are concurrent ones. The only significant difference between concurrent rights and derivative and original ones seems then to be one of emphasis. Which element in the dyad is the focus of attention?

¹⁵ See text and references in Feinberg, *supra* note 3.

Which element gets the initial justificatory argument (leaving the other to be derived from it)? Couldn't the attention and justificatory strategy always *in principle* be focused concurrently on both elements?

To see that this is not so, consider: In the case of original rights, the focus of attention (and the initial justificatory argument) are *necessarily* on the right holder because the right holder's characteristics are primarily responsible for generating the right-relationship. And in the standard offer and acceptance analysis of the making of a contract, the right-relationship emerges in stages: A has the power (right) to make an offer to B; A makes the offer, creating in B a power to accept and thus create a contract. B's power to accept, when exercised, creates the duties and rights mentioned in the contract. Here we may have all three sorts of rights: A's power-right to make an offer to B may be an original one. A's exercise of the power is what creates B's power (right) to accept. B's power-right is in that sense derivative from A's power-right. And B's acceptance creates concurrent rights and duties in A and B. The distinctions among the three sorts of rights are thus more than merely rhetorical or heuristic.

Of course the distinctions *can* be merely incidental matters of emphasis. In the case of conventional or natural rights where the justificatory arguments rest as much on the character and status of the duty-bearers as it does on the character and status of the right holders (and vice-versa), the focus on one or the other *may* have only a rhetorical or heuristic justification. But that should not be allowed to obscure the fact that there are cases in which the distinctions are formal rather than rhetorical.

VI. CONCLUSIONS

The point of this article has been to clear away some of the confusion about the concept of a right. No normative conclusions have been established directly, but there are some logical consequences of relevance to normative discussions.

A. *Animals' Rights*

For one thing it is clear that there is no formal obstacle to establishing a wide variety of rights for non-human animals. They can, of course, in principle have (both natural and conventional) derivative rights. To the extent that an animal can have interests, or make

claims, or has a self-concept and is purposive, (natural) original rights are possible. In fact, the only serious formal limitation on the whole class of those non-human animals now known to us is the same as one of the limitations on human infants (and some incompetent adults): They cannot have those conventional rights in which the right-holder must make an explicit agreement to accept a specified rights-relationship (*e.g.*, an agreement to the terms of a contract). They cannot have such rights because they cannot make such agreements.

There are, of course, severe formal limitations on the rights that can be held as one goes down the evolutionary ladder. Dogs may be able to make (some sorts of) claims. But can oysters? Chimpanzees may be persons, but are bees? Regardless of the priority to be assigned to human rights, then, there are at least some rights that normal adults of our species can hold which normal adults of other species cannot hold. And at the lowest end of the scale, it is probably fair to say that the only rights those animals (like sponges or clams) actually have are certain sorts of derivative rights.

B. *Trees, Rocks and Fresh Water Streams*

Non-animal elements of the environment probably can have some sorts of derivative and concurrent rights, too. Thus, if there is a legal question as to whether trees can be right-holders, and if derivative rights are enough to give *humans* legal standing, then the burden of proof is surely on anyone who wishes to deny that trees can have standing. But again the range of types of rights available is severely limited. I see no way that it could include natural, original rights, for example.

C. *Zygotes, Embryos, Fetuses and Infants*

The rights available in principle to human beings increase as biological development proceeds. Zygotes do not make claims or have a self-concept. (At least we have no reason to think so, and many reasons to think not.) They can, however, have derivative or concurrent rights of the same sorts available to trees and shellfish.

As development proceeds, the fetus appears to be able to make some of the same sorts of responses which, if made by an adult animal of another species, we would be tempted to call a claim. Natural, original, claims to rights are thus not out of the question at this stage and certainly they are available to the newborn. Personal rights must, of course, wait until later.

D. *The Permanently Comatose*

Whole brain death, as defined by the Harvard panel,¹⁶ entails the loss of personal rights, as the term is used in this Article. It also entails the loss of claim-making capacity and the capacity to make agreements. Claims and agreements made *prior* to brain death, however, may have yielded rights which remain in force. And the comatose may have some sorts of derivative and concurrent rights as well.

No doubt the point need not be belabored any longer. The differences between derivative, original, and concurrent rights are not illusory. And the awareness of this trichotomy is a significant help in clearing away some confusions both about the justification of rights and the range of entities that can be right-holders.

¹⁶ Report of the Harvard Medical School ad hoc Committee on the Definition of Brain Death, *reprinted* in H. BEECHER, *RESEARCH AND THE INDIVIDUAL* 311-19 (1970).

POSSESSION AS THE ROOT OF TITLE

*Richard A. Epstein**

I. THE PROBLEM STATED

A beautiful sea shell is washed ashore after a storm. A man picks it up and puts it in his pocket. A second man comes along and takes it away from him by force. The first man sues to recover the shell, and he is met with the argument that he never owned it at all. How does the legal system respond to this claim? How should it respond?

The same man finds the same shell, only now the state, through its public processes, comes along and insists that the shell belongs to the common fund. It offers the man nothing for it, claiming that the shell was found by luck and coincidence and not by planned and systematic labor. How does the legal system respond to this claim? How should it respond?

The questions just put can recur in a thousand different forms in any organized legal system. The system itself presupposes that there are rights over given things that are vested in certain individuals within that system. And the system knows full well that these property rights in things are defined not against the thing, but over the thing and against the rest of the world; that property rights normally entail (roughly) exclusive possession and use of one thing in question and the right to transfer it voluntarily to another.¹ The exact contours of these rights, however important to basic theory, are not central to the main concern here. The more insistent question is: What principles decide *which* individuals have ownership rights (whatever they precisely entail) over *what* things.

The question must be distinguished from the related issue which simply asks what are the social or public functions of the institution of ownership. It could be decided that ownership is necessary to create effective incentives for the development and improvement of property or to reduce or eliminate conflicts between private persons. Yet even if these points are true, such broad justifications for ownership do not solve the more particular question of how given bits of property are matched with given individuals. It is to this question

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¹ The point is well known in the literature. Indeed its repetition begins the RESTATEMENT OF PROPERTY § 1 (1936).

that the common and civil law (both of which accept the desirability of private ownership) have responded with the proposition that the taking possession of unowned things is the only possible way to acquire ownership of them. As stated, the proposition assumes a central role in the development of any legal system, because it supplies the link between assertions of act and those of right. Yet the importance of the rule making original possession the source of ownership is matched by the absence of any systematic analysis of it. In this Article I hope to explore the strengths and weaknesses of the basic proposition and to give it — in at least more specific institutional contexts — a qualified endorsement. The path of the inquiry will be straightforward enough. I shall begin with an examination of common law cases and common law doctrine, and shade off into a more philosophical and institutional account of the same issues. I have no real hope that his, or any article, can offer a decisive resolution of such a fundamental and troublesome question, but I do hope to show that, however great the embarrassments of the simple common law rule, those of the most plausible alternatives are often greater.

II. THE INSTITUTIONAL FRAMEWORK

In dealing with the rule of first possession, it is vital to keep to the fore several institutional features that bind all common law (here used in the loose sense of case law, comprising both common law and equity) judges. The first of these points is that common law judges have — and traditionally have had — at their disposal only limited remedies to apply to redress a violation of a substantive right. The common law courts could award damages or demand the return of land or of a specific chattel; the courts of equity could enter decrees for specific performance (as in land sale contracts) or injunctions (as in nuisances). In both cases the judges have nothing like the vast administrative powers available to the officials in the modern bureaucratic state.

Now the question of remedy seems at first blush posterior to the more basic matter of right, and as a logical matter it is. As a historical and institutional matter, however, the two questions are very much intertwined. A court with modest remedial powers is not apt to choose, or even stumble upon, property doctrines whose enforcement requires elaborate administrative machinery. The definition of rights is therefore apt to be made along certain “natural lines”; there will be broad general propositions that can apply to all against

all, and there will be no reference to the numbers or formulas (you may build only thirty feet from the street, and you must leave ten percent of your land vacant on either side of your lot) that can be generated by direct administrative controls, such as zoning. The rule that possession lies at the root of title is one that a court can understand and apply; absent a better alternative it becomes therefore an attractive starting point for resolving particular disputes over the ownership of particular things.

Second, the common law court cannot order the docket of cases that come before it. It grows and develops with the society in which it emerges. The question, how does any person obtain rights against the world in any thing, may be first in the philosophical theory of property rights; yet there is no guarantee that this question will be first on the judicial agenda. Should the first case before the court concern the transfer of land by deed, then that is the question that must first be addressed, even if there is no explanation of why *A* has property rights in the land that he wishes to transfer to *B*. The intellectual process takes its toll upon the substantive results. A court will first make rules about the transfer, descent, and protection of property interests even for cases where the original claim of title rests upon first possession. How then can it escape the consequence of its decisions when called upon to adjudicate the force of the original title? The intellectual process forces common law courts to commit themselves on a succession of little points, which in turn denies them the freedom to switch ground when the large issues are formally presented for adjudication.

The judicial concern with its own docket influences the common law treatment of property rights in yet a third fashion. Although property rights are defined as against the entire world, they are fashioned in legal disputes between two (or at least very few) parties. The dispute may be between the plaintiff who found the shell and the defendant who took it from him. Third persons may as a matter of abstract theory have entitlements in the property in question; yet the very form of adjudication tends to postpone their claims until they themselves assert them.² The point is of especial

² The problem is, moreover, one of practical importance. Thus in order to complete a sale of land, the vendor may have to persuade his purchaser that title is clear. Such may be done by actions against known claimants against the land, but it is much more difficult to do so against unknown claimants. To meet this situation the courts have devised so-called actions to "quiet" title, which for the most part allow publication and notice to substitute for the individualized summons and complaint that initiates the usual civil action. It is generally

importance for possible ownership claims by the state, as actions between two private parties will never throw matters of public ownership into high relief. Although it is possible, and indeed correct, to argue that no adjudication between private parties can preclude the claims of the state, the steady stream of private litigation can set up the type of expectations that makes it very difficult for the state to assert its own ownership claims at some later date. The subject of original acquisition thus retains a strong private law character, one that tends to survive even when the question of the state interest is squarely raised in the eminent domain context.

III. FIRST POSSESSION: THE RULE STATED

Law then is not philosophy, and the treatment of its fundamental premises may lack the quest for universals that is the hallmark of much philosophical inquiry. *Pierson v. Post*,³ perhaps the leading case on the subject, is illustrative of the legal reluctance to examine first principles afresh. The case arose out of the following facts: The plaintiff below, Post, was pursuing a fox across an unowned stretch of beach with his hounds when Pierson, almost from nowhere, rode up to capture the fox, which he kept even after Post demanded it be handed over. Post then sued Pierson claiming that Pierson had "indirectly" injured Post by taking the fox into his possession. For the purposes of the argument, it was assumed, but not demonstrated, that the fox was unowned before the incident took place. The question was whether Post could get back "his" fox (or its value) from Pierson.

Such a case seems to present the ideal format for arguing out the essential legal issues. Yet what was done was as follows: Both the court and the dissent assumed that the only proper mode of acquiring ownership of unowned things was taking possession of them. What then followed was a dispute about the outer limits of the basic proposition. The plaintiff argued that the necessary possession was acquired when the plaintiff was in hot pursuit of an animal that, apart from the defendant's interference, he could have captured. The defendant argued that possession required complete capture by

recognized, however, that quiet title actions are inadequate in practice in most, if not all, jurisdictions. See C. DONAHUE, T. KAUPER & P. MARTIN, *CASES AND MATERIALS ON PROPERTY*, 291-92 (1974).

³ 3 Caines 175 (1805), 2 Am. Dec. 264 (N.Y. 1886).

the plaintiff: even the wounding of the animal when in hot pursuit did not amount to possession because of the many events that could have occurred between the original wounding and the eventual capture.⁴ The court in deciding for the defendant Pierson took the middle position, holding that "the mortal wounding of such beast, by one not abandoning his pursuit may, with the utmost propriety, be deemed possession of him."⁵ The dissent, looking more to the customs of sportsmen than the opinions of jurists, adopted the hot pursuit rule. Both the court and the dissent recognized that any common law rule could be superseded by any valid statute or public regulation that established ownership in some other fashion. The little question — what counts as taking first possession — received exhaustive attention. The large question — why is first possession sufficient to support a claim for ownership — received no consideration at all.

IV. THE LABOR THEORY: A RULE DEFENDED?

The treatment of the little question in *Pierson v. Post* does, however, provide some clue as to a possible approach to the larger question. Thus the dissent argued that the hot pursuit rule was necessary in order to protect the pursuer in his labor. The point of the argument is that, as an initial assumption, each person is entitled to ownership and control over his own labor. Where the pursuer by his efforts has worn down the fox, the late capture by the rival in effect amounts to an inadmissible appropriation of labor which the law should prevent. The justification for the hot pursuit rule does now, however, explain all the recurrent features of the law. Some labor goes unrequited when two pursue and one loses. Again, if *A* has given up the chase when confronted with sudden perils, *B* may capture with impunity even though his task was made immeasurably easier by *A*'s prior labors. Conversely, there are some things acquired not through labor but only by chance or good fortune and one who so acquires takes full and indefeasible title even though there was, except in a metaphorical sense, no expenditure of labor in either acquisition or cultivation.

The labor theory is, moreover, subject to difficulties even with respect to those things that are found or improved by extensive

⁴ "It is admitted that a fox is an animal *ferae naturae*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals." *Id.* at 177, 2 Am. Dec. at 266.

⁵ *Id.*

individual labor. Consider the following case, often debated in legal circles. *A* owns a piece of valuable marble; *B*, thinking the marble to be his own, works it in a way that enhances its value by fifty percent. He then learns that ownership was in *A*. *A* now sues to recover the possession of his (improved) marble, and the question is whether *B* is entitled to some setoff for the value that his labor has added to the marble in question.⁶ In this situation, the general tendency is to protect *B* in his labor. In the case just given, he can probably hold the marble as security for the payment of the value added, however measured; in cases in which the work is finished, and the value of the marble increased tenfold, he can probably substitute marble of like quality in its unworked state to discharge his obligation to *A*. In effect the rules seek by approximate means to sort out the joint contributions of *A* and *B*, of capital and labor, to a common enterprise. *A* cannot recover his property without any payment whatsoever, as the law in effect sets itself against the conversion of *B*'s labor by *A*.⁷ These simple examples show that it is possible for individual labor to become the source of entitlement even in the absence of a specific contract. Yet the nature of the relief afforded shows that the labor in question need not give complete ownership to the thing in question. Where the ownership claims of others are apparent, the individual labor may give rise only to a lien for services rendered and not an unchallenged claim to ownership of the thing itself.

The implications of this example, moreover, carry over to the question of original entitlements. Let it be assumed that there were some rule whereby the state (or Mr. *X*) owned all things within the society without taking first possession. *Y*'s labor would avail him not to obtain absolute title of the thing. Even John Locke himself assumes that all things that are not taken by one are still held in

⁶ On this subject, there is for example the early Roman law of *accessio* and *specificatio*, on which see W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW, 208-18 (3d ed. P. Stein 1963); B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW, 133-38 (1962). The same issue can arise in modern contexts. Thus where one of several owners in common develops common property by his own labor, the courts make an effort to give adequate recognition of both labor and property in any dispute that arises between the parties. See, e.g., *White v. Smyth*, 147 Tex. 272, 214 S.W.2d 967 (1948). The case is annotated, with updates, in 5 A.L.R.2d 1348 (1949).

⁷ It is easily understandable why *B* does not receive any legal protection in the event that he makes the improvement with full knowledge of the ownership rights of *A*, for with such knowledge his conduct is little more than an effort to exact payment from *A* for work performed without his consent. Such efforts can only undercut *A*'s claim to be the sole owner of the property in question, and must therefore be rejected.

common by the group. If he is right, then the group stands in the position of *A* in the case of the marble. Any individual who takes from that group acquires at most not the absolute ownership interest but the lien for services rendered. Indeed even this lien is in jeopardy, for if the rule of ownership is clear and determined, then *A*, if he acted with knowledge of the rule, could find himself in the position of the bad faith improver of the marble, unless the rule contained some further condition of uncertain origin and intelligibility which allowed *A* unilaterally to convert the property to his own use.

This last objection leads to another point: Why does labor itself create any rights in a thing? The labor theory rests at least upon the belief that each person owns himself.⁸ Yet that claim, unless it be accepted as bedrock and unquestioningly, must be justified in some way (leaving aside the question of to whom the justification must be made). The obvious line for justification is that each person is in possession of himself, if not by choice or conscious act, then by a kind of natural necessity. Yet if that possession is good enough to establish ownership of self, then why is not possession of external things, unclaimed by others, sufficient as well? The irony of the point should be manifest. The labor theory is called upon to aid the theory that possession is the root of title; yet it depends for its own success upon the proposition that the possession of self is the root of title to self.

The difficulties do not end here. Suppose the proposition that each person is indeed the owner of himself has been demonstrated satisfactorily. How does this ownership allow him, as against all other persons in the world, to appropriate things to himself by the expenditure of labor? The point here is perfectly general and applies whether the theory asserts that labor gives absolute ownership or a lien for improvement as against the (collective) owner. In both cases the point is quite simply that in order for the individual claim for preference to be given effect, there must be established some prior *right* (good against the entire world) to perform the labors upon which the claim for subsequent entitlement rests. Deny that right, and the labor so praised and extolled by some becomes simply a thrusting of one's self upon another without invitation or consent.

⁸ J. LOCKE, TWO TREATISES ON CIVIL GOVERNMENT, Book II, § 27 (3d ed. 1966) [hereinafter cited without cross reference as J. LOCKE, SECOND TREATISE]. "[E]very man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his."

Surely any individual owner can resist such gratuitous encroachments. Why then not the original owners, if any, of the common property?

The objection therefore to the labor theory turns out in the end to be precisely that which is raised against the possession theory. The essence of any property right is a claim to bind the rest of the world; such cannot be obtained, contra Locke, by an unilateral conduct on the part of one person without the consent of the rest of the world whose rights are thereby violated or reduced. First possession runs afoul of this principle; so does the labor theory. Indeed the point is a matter of principle perfectly general, and it applies moreover to *any* and *every* theory that uses individual actions as the source of entitlements against the collectivity at large. Property may look to be an individualistic institution, but the very nature and definition of the right seems to require some collective social institution to lie at its base.⁹ No "natural" act can legitimate a social claim to property.

The uneasy place of social limitations upon the individual theory of acquisition can be well seen by the collective limitations that Locke himself was prepared to place upon his own labor theory of entitlement. Thus in his articulation of the famous Lockean proviso, he insists that individual appropriation does not constitute a violation of the rights of others, at least where there is "enough and as good left in common for others."¹⁰ Yet to make this condition is to undercut utterly the strong individualistic element in the rule of first possession, as the provision if logically applied makes it impossible for anyone *ever* to acquire ownership of anything so long as there are conditions of scarcity. Thus even if the first possessor leaves enough for others to take, it will necessarily be the case that the second, third, or some remote possessor will not be able to take because by doing so he will deprive others of as much again and as good. Since therefore it was only the prior appropriation by the first taker that limited the rights of any given subsequent taker, it follows that the first taker cannot act at all because of the way in which his conduct impinges upon the rights of acquisition of others.¹¹

⁹ See, for recognition of this point, Kelsen, *The Pure Theory of Law*, 50 LAW. Q. REV. 474, 494 (1934).

¹⁰ J. LOCKE, BOOK II, § 27 (3d ed. 1966).

¹¹ See, for the original and forceful statement of the point, R. NOZICK, ANARCHY, STATE AND UTOPIA 174-78 (1974). Nozick later states that an adequate theory of justice in acquisition

A second limitation in Locke's theory reinforces the persistent nature of the residual social control. In the traditional legal accounts of the first possession rule it is always assumed that the thing in question was unowned before some possession was taken of it.¹² Yet in Locke the assumption is quite different, as it is assumed that before possession is taken all things are *held* in common (although he shrinks from saying that they are *owned* in common.) The differences between the two positions — no ownership and ownership in common — are not purely verbal. With the traditional legal view there are no normative constraints about the amount or nature of the things that anyone could reduce to individual ownership by taking first possession. The want of ownership in anyone prevented all persons from complaining about the loss in question; and the opportunity to acquire ownership through first possession made it unnecessary for anyone to complain.

Once things are held originally in common, the claims of nonpossessors are more insistent. In particular they allow, at least in Locke's view, others to complain about acquisition that is made for wasteful or other improper purposes. Such of course is inconsistent with the usual claim of absolute ownership that allows one to destroy (in the acid case) anything he owns if it pleases him, so long as he does not destroy as well the person or property of another.¹³ As a matter of legal history, injunctions against waste by owners have had very little success, precisely because the common law did not encumber any individual claim of ownership with the residual

requires adoption of some version of the Lockean proviso, *id.* at 178, although it is not clear how he would reformulate it. In any event I think that the common law cases had a much better sense of the problem when they avoided any reference whatsoever to such a limitation.

¹² GAIUS, *THE INSTITUTES OF GAIUS, SECOND COMMENTARY*, translated in 1 *THE CIVIL LAW* § 66 (S.P. Scott ed. 1932):

Property which becomes ours by delivery can be acquired by us not by natural law but also by occupancy, and hence we become the owners of the same because it previously belonged to no one else; and in this class are included all animals which are taken in land or in water or in the air.

¹³ Here the limitation of "person or property" is crucial to the case for only it will prevent the complete collapse of the traditional liberty oriented system. Without the requirement that the harm be to person or property, the general presumption in favor of the liberty of action will be engulfed by an exception, as virtually all conduct makes some individual feel worse off than he did before. The traditional injunction therefore against causing harm to another must be transformed into a prohibition against the use of force and fraud against the person or property of another, lest the liberty of action be preserved only in those cases where no one sees fit to object to individual conduct. *See*, for a further exploration of this theme, Epstein, *Intentional Harms*, 4 *J. LEGAL STUD.* 391, 423-41 (1975).

claims of a collectivity that once held a thing in common.¹⁴ Yet even if we disregard the Lockean proviso and the injunction against waste, the essential difficulty is that stated above. There is no way that any individual act can account for a claim of right against the rest of the world.

V. A CONTRACTUAL ESCAPE?

There is then a real sense of inadequacy not only with the first possession rules but with the labor theory of property as well. In an effort to escape this inadequacy, it is instructive to look to various contractual theories of entitlement that might solve the problem of how to bind the world. Dealing with property rights, of course, this theory is always stretched since it is difficult to imagine any explicit, formal arrangements that bind all individuals, including those underage and yet to be born, to a certain view of the legal universe. Yet despite this objection, many judges and commentators have placed constant reliance upon that distant cousin of contract, custom and common practice, as the source of property rights that bind the world.

In *Swift v. Gifford*,¹⁵ a dispute occurred between two fishing crews over the ownership of a whale. The crew of the ship *Rainbow* threw a harpoon that, with its line still attached, remained fast in the side of the whale even though the whale itself escaped. The crew of the ship *Hercules* captured the whale while the *Rainbow* was still in pursuit; the *Rainbow's* master claimed the whale as his own, and in fact the master of the *Hercules* surrendered possession of it. Swift, as owner of the *Hercules*, then sued to recover the value of the whale. If actual possession is required to establish ownership, then the whale belonged to the *Hercules*, and the action was well founded. Yet a universal maritime custom held the opposite and assigned the whale to the *Rainbow* because its harpoon first stuck

¹⁴ See, e.g., *Hague v. Wheeler*, 157 Pa. 324, 27 A. 715 (1893), where the Pennsylvania Supreme Court refused to allow two landowners over a common pool of oil an injunction against waste to shut down the operations of the defendant who was letting the oil escape into the open air. In essence the court's opinion rested upon the proposition that in the absence of malice or negligence the defendant had the same right to exploit the common pool as did the plaintiff, and that this right was not lost by their inability to find a purchaser. *Id.* at 339, 27 A. at 719. The difficulty with waste in oil and gas cases comes from the inability of the common law to specify an absolute owner of oil located under land owned by separate individuals. It is the same incomplete specification of ownership rights that is of course at issue with the first possession principle as well.

¹⁵ 23 F. Cas. 558 (D.C.D. Mass. 1872) (No. 13,696).

in the whale, even though the Hercules first captured it.

The question, then, was whether the positive rule of property law took precedence over the custom of the sea in order to determine the ownership rights. *Swift v. Gifford* opted for the custom. In doing so, it went against the great Justice Story who had long set his face against the "almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law as well as the commercial law" and for whom there was "no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations."¹⁶ It is indeed true that there are some problems about identifying the custom, and there are surely problems about using it to bind third parties. Yet within a close-knit community, such as that bound by maritime law, these risks seem to be pretty much at a minimum, and such was the case on the testimony here. The great attractiveness of common custom is that it purports to place the law of property on a firmer footing by referring it back to something other than the assertions of the judges. And there could be, I suppose, some justification for reversing the decision in *Pierson v. Post* on the strength of an analogous custom, since it appeared from the record that all hunters in the region regarded hot pursuit as giving rights to take an unimpeded first possession.

Yet in one real sense the customary theory without more will not solve the problem. Suppose, for example, that the challenge to possession in *Gifford* or in *Pierson* came not from the disappointed rival, but from a naturalist who argued that the wild life was, to use the current phrase, the "common heritage of mankind," that could not be rightfully captured by *either* of the two rivals to the chase. For this claim, the custom of the rival hunters is of no particular concern for surely it cannot bind the outsider who in no way shares in or approves of it. The demand for universality of property rights thus prevents the conversion of custom and common usage, however secure, into a source of general entitlement. The only way in which the objection could be met is to show that the custom is so universal and so ingrained in all mankind that there are in effect no strangers to the social contract. Efforts of just this sort have been made at common law, but with mixed success.

¹⁶ The Reeside, 20 F. Cas. 458, 459 (C.C.D. Mass. 1837) (No. 11,657).

In this regard the water law cases are very instructive. In the old English case of *Acton v. Blundell*,¹⁷ the plaintiff had for a period of nearly twenty years obtained water for the operation of his cotton mills from an underground well. From time to time the plaintiff had extended the well deeper in order better to obtain his needed supply of water. The defendant then began his mining operations some three-fourths of a mile or more from the plaintiff's well. He diverted the water from the plaintiff who was then forced at some expense to obtain water elsewhere to run his mill. As the period of use by the plaintiff was less than twenty years, there was no way in which the plaintiff could have established a right to the water by prescription (which of course presumes that the original use of the water was wrongful as against this defendant). The case therefore turned upon the appropriate view of the way in which ownership rights are first established in water. The two contending positions were located securely within the tradition of first possession. The difference between them was that the plaintiff argued that his use of particular quantities of underground water entitled him to similar quantities in future time periods. The defendant argued that each quantity of water was subject to a separate application of the rule of first capture: if the defendant could not complain about the prior appropriations of the plaintiff, so too the plaintiff could not complain about the current appropriations of the defendant. The plaintiff only lost that over which he had no rights. If the premise was indeed correct, then the loss was as the court described it, *damnum absque injuria*.

The defendant prevailed in *Acton v. Blundell*. Yet to do so it was necessary for him to overcome one line of argument that cut powerfully in the other direction. The question of rights in flowing water was not novel when presented to the court in *Acton v. Blundell*. A long tradition of English riparianism had established the proposition that ownership in waters flowing in defined surface channels could not be established by first possession of the water. Instead each owner of the riverbank by virtue of that ownership alone, had usufructuary rights in the flow, which prevented its total appropriation by another. The question therefore was why this tradition did not carry over to underground water which flowed in distinct channels. Here the answer of the court was instructive:

¹⁷ 152 Eng. Rep. 1223 (Ex. 1843).

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued — in ordinary cases, indeed, time out of mind — and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law, (which would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice Story, in his judgment in the case of *Tyler v. Wilkinson*, in the courts of the United States (4 Mason's (American) Reports, 401), as "an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law." But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface; no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well; again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the

underground springs or of the well may be unknown to the proprietors of the soil.¹⁸

The decision in *Acton v. Blundell* shows that the legal rules with respect to surface water represent an uneasy amalgam between the older first possession principle of *Pierson v. Post* and the alternative scheme of customary rights. The rules of first possession survive in modified form in that they preclude arguments of common ownership of the water by all the individuals within the state. Indeed the riparian system is best understood as a modification of the simple rules of first possession applicable in cases of wild animals or land, to the more complex subject matter of flowing water. The riparian's ownership claims rest securely upon the ownership of lands at the edge of the river, which in turn can be originally acquired only by first possession. The rules of first possession are therefore extended by a kind of imputation rule (such as that applicable for the minerals under the earth) which says whoever takes first possession of the shore has an undivided interest in the water flowing in the watercourse. The principle is then modified to take into account the further point that many persons are riparians, such that a full specification of rights requires that limitations on use be created in order to respect the correlative rights of others. The importance of custom in this system is that it establishes some of the ground rules for those correlative rights by preventing one party from making all the water his own by taking it into his possession.

Yet here it must be recognized that the power of custom is in itself subject to two limitations. First, even within the original English context, the general customs can do little to determine all the fine details of the system. The strong consensus which says that no one can appropriate all the water in a river by damming it up at its source does not carry over to the host of questions about what can be done with the water in question. The custom does not determine the extent of water that can be removed, the purposes for which it can be put, the transfer and abandonment of water rights, and the terms and conditions under which damages and injunctions may be available. Whereas custom may lend some strength to the legitimacy of the system as a whole, in the end it must be supplemented by a whole set of detailed positive rules — rules that must bind the world, even though they are by no means contractual.

¹⁸ *Id.* at 1233-34.

There is yet a second comment to be made about the use of custom as a source of justification for property rights. The first possession rule purports to be uniform over all times and all circumstances. No custom possesses such uniformity, as very divergent practices have grown up in connection with fishing, hunting, and mining.¹⁹ The point, moreover, is of especial force with respect to water rights, as the climatic conditions which made the system of natural flow riparianism attractive to English courts were not always found in the United States. In the various states of this country the English rules have indeed been rejected or modified, often by an appeal to local custom and usage which is at variance with the English. Thus the "reasonable use" doctrine adopted in many eastern states allows any given riparian to divert some significant flow of water (more than allowable under the English rule) for his own use, even if it works a substantial detriment to some other riparian.²⁰ The doctrine, moreover, contained within its very formulation some (proper) consideration of utilitarian concerns. Thus the system created a rough hierarchy of uses (domestic, agricultural, manufacturing) and explicitly permitted individuals to justify harm (measured in terms, say, of diminished water flow) inflicted upon others by the benefits that they themselves received. The precise contours of the system are, moreover, quite indefinite since no one can integrate the system's dual requirements of "reasonable use" and "fair participation" into an unambiguous legal command. What can be said is that the entire system, with all its internal complications, is not easily regarded as a natural and intuitive system of property rights. Yet it survives in a large portion of the United States, complete with all its infirmities, until this present day. Even with its customary origins, it looks in the end as much like Story's rules of positive law as *Acton v. Blundell*'s implicit social contract.

The interplay between custom and first possession is more dramatically illustrated by the shifts of water law doctrines in the western states where conditions are arid and the need for irrigation water extensive. Here the system that emerged over time was one of first appropriation, which in its crudest form allowed water *flow* to keep it as against the world, including any and all riparian owners who claimed solely by virtue of their possession of the river banks.²¹

¹⁹ On the variation of legal custom in whaling, see O.W. HOLMES, *THE COMMON LAW* 212 (1881), where several rules are set out, some of which require a division of the spoils between the parties.

²⁰ See, e.g., *Dumont v. Kellog*, 29 Mich. 420 (1874), 18 Am. Rep. 102 (1876).

²¹ See, e.g., *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882).

The collision between riparians and appropriators cannot be resolved with any kind of elegance. If the riparians took possession of river-front land before the appropriation of water, then their claims should be secure under either the natural flow or reasonable user doctrines of water law. If they took possession thereafter, they still have a case if they can establish that diversion of water is not recognized within the jurisdiction as a means to acquire rights in the waterflow itself. Nonetheless in most western states the riparians received little comfort when they passed their claims, as the courts, much impressed with the need to place the water to its most beneficial use held that first appropriation was the only principle whereby rights in water flows could be acquired.²² This rule is of course in the broad first possession tradition because it assumes that rights in running water are not held in joint ownership by all the citizens of the state (in which case individual appropriation would, far from being the source of rights, be the subject matter of a tort) but are capable of appropriation by individual actors. The system therefore represents a repudiation of *Pierson v. Post* only insofar as it recognizes that possession creates rights not only in the given thing, but in future flows as well. In addition, it differs from the other system of water rights only in the nature of the individual acts that are necessary to claim ownership over the flow in question. Although the system rests to some extent upon the custom of the West, it, like its alternatives, is in the end a command of positive law that, in the manner of all property rules, binds the entire world. Like contract, custom cannot serve as a satisfactory source of property rights.

VI. A COMMON POOL

The previous arguments and examples demonstrate that we cannot, even with the aid of custom, generate a rigorous analytical theory that demands that the rule of first possession, or any of its analogies, determine the original acquisition of property rights. From this it might be assumed that we must therefore accept some alternative theory that stipulates that in the original position all property rights are held in common whether by individuals themselves or by the state as trustees. The theory as stated can apply not only to the right to external things, but also to natural talents and aptitudes as well, which could, if desired, be treated as "a

²² *Id.* at 451-52, where the appropriators won out on a very tenuous construction of the applicable statute.

collective asset" to be devoted to some conception of the common good.²³ As stated, the theory is designed to circumvent the objections that can be raised against the common law rule of first possession, but it is itself subject to a number of objections.

The first of the arguments against a theory of joint ownership is that it in no way specifies the way in which any property which is owned by the collectivity may become vested exclusively in a single member thereof. It may be said that first possession will achieve this result, but if so, then the theory of joint ownership achieves nothing over its rejected rival.²⁴ It may be said that the state should set up an elaborate system to place the common property out for sale. But such does nothing to protect the individual rights of persons who dissent from the rules so created. Furthermore, there is the real practical problem that common ownership will result in the triumph of negativism. Absent the unanimous agreement of all members of society about how resources are to be deployed, they could well remain unused, for even an agreement over the best course of development does not speak to a distribution of the proceeds therefrom. Lest this be thought a fanciful proposal, one need only consider the valuable resources that now lie untapped upon the ocean floor. Under a regime of first possession, individuals could appropriate some of these things for their own use. Yet as matters sit, such property is said to be the "common heritage of mankind," which means that no one can use it without the consent of all, itself unattainable given the political and technical differences amongst nations.²⁵ The alternative rule of first possession is not of course without its complications. It takes an extensive technology to investigate the ocean floor and to determine the conditions under which exploration is possible. Where property rights attach only to given resources on the ocean floor, there is a clear invitation for some firms to hold back in their own efforts for exploration in order to capitalize

²³ See J. RAWLS, *A THEORY OF JUSTICE* 179 (1971). "[It is possible] to regard the distribution of natural abilities as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out." The pooling of natural talents need not take place only under a regime that respects Rawls' difference principle.

²⁴ Indeed it is the great weakness of Locke's position that he does not specify a way to handle the transition from things held in common to things owned by individuals. See J. LOCKE, *SECOND TREATISE*, at ch. 5.

²⁵ See Sweeney, Tollison & Willett, *Market Failure, The Common-Pool Problem, and Ocean Resource Exploitation*, 17 J. L. & ECON. 179 (1974). See also Eckert, *Exploitation of Deep Ocean Minerals: Regulatory Mechanisms and United States Policy*, 17 J. L. & ECON. 143 (1974).

upon the information acquired by others. A collective system which created and enforced franchises for development and exploration might be for all concerned superior to the first possession rule that it supplants. Yet there is no real certainty that such can emerge from the intense politics that tends to characterize such collect endeavors, especially at the international level.

The second objection to the joint ownership theory is perhaps more powerful. What gives any group of individuals, even those in control of the state, the right to bind others to its conception of property rights? With respect to the rules of first possession, it could at least be said that the individual owner did something to distinguish himself from the common mass, took some action, beyond mere words, to appropriate some particular thing. But what of common ownership? The point is the precise parallel to that raised against the theory of first possession. Property rights bind the world. Assume that people do have the competence to decide the rules that govern the creation of entitlements (a necessity for any theory of property rights); there is nothing which says that those who prefer common ownership should prevail over those who do not. Equality of rights could be achieved by treating each individual as having the equal entitlement to convert unowned things to his ownership, or by treating all as equal co-owners of resources in the common pool. Neither is easily justified, and the latter has no obvious superiority over the former.

VII. FIRST POSSESSION: THE QUALIFIED DEFENSE

At the outset I noted that it was my intention to give a qualified defense of the rule that possession is the root of title. The evidence of the qualifications are everywhere. The structure of the defense is as follows: We begin with the given that some system of property rights is necessary, if only to organize the world in ways that all individuals know the boundaries of their own conduct. The possible systems that might be used seem to number two. There are first those first possession systems (including the analogous rules for water, oil and gas, etc.); and there are systems that create original common ownership in all the citizens of the jurisdiction. Given the original necessity for some system, the real question is *not* how can any system of property rights be justified in the abstract, but *which* of these two systems has, when all is said and done, the better claim for allegiance. On balance the case tilts strongly for the first possession theories, whatever their infirmities.

There is first the question of the kind of state that is required by each of these theories. The rules of first possession, even their complicated water rights variants, require in effect a minimal sort of state which parcels out the rights between the various contenders in accordance with set rules, indifferent as to their personal characteristics, histories, or wealth. True, there will be some question of who took possession first, but the types of issues should not by any stretch of the imagination strain the institutional capacities of the judicial system. The theory of common ownership requires much more extensive public control, for someone must decide how the rights in question are to be packaged and divided amongst individuals. The exact magnitude of the control is of course somewhat hard to determine. The state could, to facilitate market transactions, simply package the resources in question — *e.g.*, do we sell land in big lots or little ones — and then put the packages out to bid, while remaining indifferent as to the way in which they are used in private hands.²⁶ Or the state could assume a much more aggressive role, one which requires it to condition sale, or even lease, upon complicated conditions, or which contemplates the state operation of the system as a whole. Indeed in the current political climate, it is quite possible that state ownership would lead to extensive and continuous state control. And as I tend to fear such control, I am very cautious about a system of original property rights that tends to invite its operation and expansion. Better to begin with a system that places wealth in private hands.

There is of course a related fear. The discussion has thus far been directed to the ways in which individuals acquire rights in external things. Yet there is nothing in principle which says that the theory could not be extended as well to govern the way in which individuals acquire rights in themselves. Here the theory of common ownership clearly seems to lend itself to totalitarian uses and abuses. Each individual person's talents and gifts can be treated as unearned items, much like the shell found by chance along the beach. The state therefore in its plenary capacity can allow to each individual

²⁶ The packaging of rights for sale, which almost by definition is a non-market function, is not always easily done. For a discussion of the packaging of the electromagnetic spectrum, see DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 STAN. L. REV. 1499 (1969); Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J. L. & ECON. 221 (1975). The same problems exist, in more complicated fashion, with respect to water law.

blessed with such talents the right to use them only on terms that it sees fit. Systems of high taxation of individual income or, in more extreme circumstances, forced labor, need not be seen as impermissible exactions from the individuals for the public at large. They can be viewed as the terms on which individual talents are leased back to their natural holders, who by assumption have no original rights in them. One might argue that this extension of basic theory is not fully warranted. There is, for example, no danger of overconsumption of natural talents as there is of natural things. And the argument could be strengthened by the observation that collective ownership of external things is needed in order to prevent one person from cornering the market, while such problems do not arise with individual labor. But surely this contrast is overdrawn. On the one side, certain individuals have unique talents and on the other, it is most unlikely that any individual could claim possession of all unowned things while all others, indifferent to their welfare, sit idly by. The difference between ownership of person and ownership of things is at best a matter of degree. The system that speaks of collective ownership over things provides a less solid bulwark against public control over individual talents than a system which rests upon the first possession rules.

There is a third point which in the end comes closest to being the "ultimate point." The fundamental objection against both theories of first possession and theories of original common ownership is that neither is powerful enough to bind non-consenting individuals. The objection to both theories is analogous therefore to the objection that Hume raised a long time ago to *all* ethical propositions: it is simply not possible to move from a non-ethical premise to an ethical conclusion without there being a logical gap in the argument. Put in the context of the first possession rule, Hume's insight points to an unbridgeable logical gap between the *fact* of possession and the *right* to possession. Yet the power of Hume's general proposition is the source of its very undoing. The proposition is so strong that it undercuts any and all substantive ethical positions because it does not permit the selection of ethical theories on grounds of relative virtue. That same point applies with respect to theories of original ownership. The standard objection is *too* powerful because it destroys all possible theories when one is by necessity required; what is needed is an argument that works less like a club and more like a scalpel, one which permits a ranking amongst theories, while recognizing the imperfection of all rival contenders. Whatever the philosophy of the matter, we need some system of property rights

that does bind the world, even for those who do not share in its substantive premises.

There must be some way to break a philosophical impasse, and it is in this connection that we should return again to both the institutional constraints and past practices that characterize the common law mode of adjudication. It is not that our philosophical inquiry has taken place in an intellectual vacuum. It is that the inquiry has taken place on the assumption that we can begin structuring entitlements as if we wrote upon a blank slate, indifferent to all events and practices that have developed over time. The common law courts, which always began in *medias res* and which always announced principles that governed particular disputes, never had the luxury of philosophical purity in some original position. If we accept these constraints upon the judiciary as unfortunate features of the legal system alone, then perhaps there is no great reason to attach any weight to them. Yet if we regard them as fair reflections of some larger social requirements, as indeed they are, then they can offer some limited criterion of relative virtue that allows us to choose between the two alternative systems of original property entitlements. The point is simply that some weight should be attached to the rules under which a society in the past has organized its property institutions. Where those rules are respected there is no need, at great expense, to reshuffle entitlements amongst different individuals, even in the absence of any clear principle that dictates how that reshuffling should take place. There is no need, moreover, to attack the interests of those who have expended their labor and taken their risks on the expectation, reasonable to all concerned, that the rules under which they entered the game will be the rules under which that game will be played until its conclusion. These rules and these alone have the status of legal rules at all.

Within this viewpoint it is possible to show the unique place of first possession. It enjoyed in all past times the status of a legal rule, not only for the stock examples of wild animals and sea shells, but also for unoccupied land. In essence the first possession rule has been the organizing principle of most social institutions, and the heavy burden of persuasion lies upon those who wish to displace it.

The size of the burden is, moreover, very considerable. A repudiation of the first possession rule as a matter of philosophical principle calls into question all titles. It calls into question those which exist in the hands of the original possessors; it calls into question those of their heirs; it calls into question the rights of those who have

purchased the titles in question for good consideration, and those who have made improvements upon land acquired on the faith of the public representation that they could keep it for their own. It may be an unresolved intellectual mystery of how a mere assertion of right can, if often repeated and acknowledged, be sufficient to generate the right in question. As an institutional matter, however, it is difficult in the extreme to conceive of any other system. As between two systems, both of which are philosophically exposed to the same objection, the choice must go to that which has the sanction of past practices. The first possession rule represents the most general principle of this sort. The particular customs and practices in certain locales represent yet another expression of the same basic point.

The institutional justification shows the limits of the basic position in connection with those things have yet to be exploited by any individuals or nations. With respect to these things the first possession rule has much weaker claims because it cannot draw upon the full strength of this reliance interest. The exploitation of the ocean bed or the Antarctic regions need not rest upon the first possession rules because these have not yet embedded themselves into the institutional fiber of the social system. In these cases we have both the luxury and necessity of beginning at the beginning. First possession rules might in the end be adopted, but it is now quite possible to entertain alternative systems of property rights that depart significantly from the first possession principle.²⁷ It is at this level that we can consider the question of whether all individuals are entitled to, if not the thing, then at least the wealth derived from it, and the question of what institutions and what packages of rights will tend to promote the effective use of the thing in question. For such cases, the arguments will be more congruent with the modern concerns about economic efficiency and distributional equity, and arguments about the nature and desirability of political intervention, always relevant, can assume greater force. Yet with respect to property

²⁷ Here the point with regard to land requires some explanation. Individual claims to land are often based upon direct grants from the state, or in some circumstances upon homesteading, which is in essence a first possession rule within certain ground rules set up by the state for land which it owns. Yet even the use of grants, however important for the security of individual titles, does not undermine the first possession rule; it only pushes the question of individual entitlement back to the state and not of any given individual. Indeed the sway of the first possession rule in international affairs is, if anything, more pronounced than it is in private law contexts.

rights that are already assigned, the first principles of thought are constrained from without, as the past has a power to bind the future. Vested rights have acquired, as it were, a life of their own.

CORPORATIONS AND RIGHTS: ON TREATING CORPORATE PEOPLE JUSTLY*

Roger Pilon**

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The (often heretical) conclusions I reach in this essay are my own, of course, not necessarily those of the Foundation or the individuals to whom I am indebted.

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I. INTRODUCTION

The modern business corporation, which over the past century has grown to be our principal vehicle for economic interaction, has come in for increasing criticism in recent years. In addition to countless articles and commentaries in all manner of forums, witness the 1975 book of Christopher D. Stone, *Where the Law Ends: the Social Control of Corporate Behavior*, and, rather closer to the barricades, the *Taming the Giant Corporation* book of Ralph Nader, Mark Green, and Joel Seligman, which appeared with much fanfare in 1976.¹ Criticism of the corporation has been with us, of course, for almost as long as the corporation itself; but the incidence and intensity of the criticism seem to be related not so much to the incremental growth in corporate presence as to changes in the *Zeitgeist* which have served more or less to support it. This latest wave of criticism, for example, is likely an outgrowth of the "anti-establishment" activism of the sixties, especially as this activism has evolved into the consumer and environmental movements of the seventies. And as with earlier waves of criticism, new and anticipated regulations are already upon the corporation,² pointing once

¹ We learn from its dust jacket, for example, that the Nader book "not only explains in readable detail how our megacorporations abuse their power, but also what we—our government, our citizens—can do about it. It is not a hand-wringing book, but a solutions book." The text does not disappoint. For a review in these pages, altogether uncritical, see Blount, Book Review, 11 GA. L. REV. 445 (1977). Compare the reviews of *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations* (the larger study from which the book was taken): Birdzell, 32 BUS. LAW. 317 (1976), and Hessen, *Creatures of the State? The Case Against Federal Chartering of Corporations*, BARRON'S, May 24, 1976, at 7. The latter is an especially devastating critique of the scholarship behind the Nader study.

² See, e.g., Lieberman, *New Fire in the Drive to Reform Corporation Law*, BUS. WEEK, Nov. 21, 1977, at 98. Birdzell indicates some of those regulations:

Both the bargaining process and the business terms of the relationships among participants in the business organization are extensively regulated by Federal and state laws.

again to the intimacy of the connection between ideas and events.³

It is unfortunate that those who would defend the corporation have so frequently misunderstood this connection—where they have not missed it altogether.⁴ For while rejoinders to the corporation's critics have not been absent, they have come too often from the utilitarian or economic cost-benefit side, not from the more strictly normative point of view that informs so much of the criticism. Thus these defenders seem often not to address the critics squarely, giving rise to the suspicion that the normative case may indeed rest with the critics after all. Many have argued, for example, often with great empirical sophistication, that the corporation does in fact serve the greater good of society, that it does operate in the public interest,⁵

. . . Legislation directed at the bargaining process is illustrated by the disclosure requirements of the Securities Act of 1933, 48 Stat. 74, the Securities Exchange Act of 1934, 48 Stat. 881, and the Truth in Lending Act of 1968, 82 Stat. 146; and by the collective bargaining requirements of the National Labor Relations Act of 1935, 49 Stat. 449, and its successors, the Labor Management Relations Act 1947, 61 Stat. 136, and the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519. Illustrative of legislation limiting or specifying the terms of the bargain are the Fair Labor Standards Act of 1938, 52 Stat. 1060 (minimum wages) the Trust Indenture Act of 1939, 53 Stat. 149; the Social Security Act of 1935, 49 Stat. 620 (establishing participation in a government pension system as a required term of private employment) and the Employee Retirement Income Security Act of 1974, 88 Stat. 829 (regulating many of the terms of private pension plans). There are some 40 to 50 significant Federal statutes which may reasonably be viewed as imposing requirements on corporate management in favor of employee, consumer, investor, or environmental interests, ranging all the way to comprehensive regulation of entry, prices and services in much of the transportation, communication, energy, and banking industries.

Birdzell, *supra* note 1, at 317.

³ See R. WEAVER, *IDEAS HAVE CONSEQUENCES* (1948). Philosophers, both contemporary and classical, have had very little to say directly about the corporation; for a survey see Goedecke, *Corporations and the Philosophy of Law*, 10 J. OF VALUE INQUIRY 81 (1976). Of course, the more general moral, political, and legal issues that do constitute the philosophical literature find their way quite easily into discussions of the corporation by those outside the philosophical profession.

⁴ For an indication that this may be changing see Alsop, *Capitalism 101: Programs to Teach Free Enterprise Sprout On College Campuses*, WALL ST. J., May 10, 1978, at 1, col. 1: "What we see in Washington today is what was the vogue at the universities during the Vietnam-war period," says economist Alan Greenspan. "And what is being taught in the universities today will be the generally accepted concept 10 years from now."

⁵ See, e.g., N. JACOBY, *CORPORATE POWER AND SOCIAL RESPONSIBILITY* 15-16 (1973):

The value-sets of environmental reformers, classical Marxists and violent anarchists, for example, are utterly irreconcilable. The best that can be done in a democratic society is to seek a mean between the extremes, a mean which approximates the standards of the majority. Thus, we propose that the performance of corporate business be judged by the degree to which it has fostered progress toward the consensual goals of the American people. The proper measure of its success as a social institution is its actual contribution to the Good Society, as most Americans envision it

contrary to at least a part of the critical brief. To so argue, however, is to leave the clear impression that if the corporation did not thus operate it would not be legitimate.⁶ Moreover, it is to fail to recognize that even if "the public interest" can in fact be made sense of,⁷ a simple shift in the preference schedule that goes to constitute it—toward which many of these critics are working—can serve to undermine that legitimacy.⁸

What I want to do here, then, is set forth a straightforward defense of the corporation's *rights*: its rights to exist and to operate free from outside interference, independent of whether it does or does not serve some larger public interest.⁹ To many, no doubt, this will seem a very hard line; but only so will the legitimacy of the corporation be secured, at least in the deeper sense of that idea. (The more ephemeral sense of legitimacy, rooted as it is in the vicissitudes of public opinion, will be given and taken as that opin-

See also N. CHAMBERLAIN, *THE LIMITS OF CORPORATE RESPONSIBILITY* (1973), where it is argued that the economic system that business itself has helped to create will prevent corporations from assuming the social responsibilities that critics would place upon them. *But see* Nisbet, *The Dilemma of Conservatives in a Populist Society*, 4 *POLICY REV.* 91, 102-03 (1978), who argues that corporations ought, all the same, to be taking on such responsibilities as support of education, research, and the arts.

⁶ Many legal opinions support this view, of course. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 74 (1906): "[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public."

⁷ See, e.g., *THE PUBLIC INTEREST* (C. Friedrich ed. 1962).

⁸ For arguments in defense of the corporation that do take seriously the normative point of view see R. HESSEN, *IN DEFENSE OF THE CORPORATION*, (forthcoming); Hessen, *supra* note 1; D. Martin, *Corporate Privilege and Corporate Paternity* (1977) (Law and Economics Center Working Paper, University of Miami School of Law).

⁹ Three points should be noted here, each of which will be developed more fully below. (1) To speak of corporate rights, or corporate responsibility, or corporate acts is not necessarily to construe the corporation as an individual or to vivify it. This is a useful way of speaking, though it can and often does lead to confusion. See Dunne, *Justice Story and the Modern Corporation—A Closing Circle?* 17 *AM. J. OF LEGAL HIST.* 262 (1973); Manne, *The Limits and Rationale of Corporate Altruism: An Individualistic Model*, 59 *VA. L. REV.* 708 (1973). (2) I mean indeed to defend the broad rights I have indicated above, unthinkable as that may be at this point in legal history. I will argue, that is, that the corporation, no less than the individual, has a moral right to be free from outside interference (as defined below), extant law notwithstanding. (3) In developing the point, as I do immediately following above, that rights obtain even (and especially) in the face of claims from the public interest, I do not mean to suggest that there is any necessary conflict between the two—though depending upon the definition of "the public interest" there will often be contingent conflicts. On the contrary, I would argue that Adam Smith was right in holding that for the most part the public interest is best served not when individuals aim at it (or are legally coerced to do so) but when they are left free to pursue their own *private* interests, subject to the constraints of the moral law. See F. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 300-01 (1967). It is for heuristic reasons, then, that I draw this contrast as sharply as I do above.

ion variously informs the public interest.)¹⁰ For rights are intended to stand athwart the utilitarian calculus, to brake the democratic engine.¹¹ We have them and we have the capacity to create others (*e.g.*, contractual rights) not because any authority, democratic or otherwise, has bestowed them and this capacity upon us, but simply in virtue of what we are and what we do. It is against this background that the corporation must in the end be judged, against an overarching theory of rights and correlative obligations, which serves more or less to justify the whole of our behavior. For it is against this background that we create corporations in the first place and then go about acting in our various corporate capacities.

The purpose of this Article, then, is to inquire broadly into how that normative background determines what the various corporate people may and may not do. Just what rights and obligations do shareholders, directors, managers, employees, customers, and members of the public have as they act within the corporate mil-

¹⁰ See Kristol, 'Reforming' Corporate Governance, WALL ST. J., May 12, 1978, at 20, col. 3: "Corporations are highly vulnerable to criticism of their governing structure because there is no political theory to legitimate it The only thing to be said in its favor is that, on the whole, it works surprisingly well." Notice that the justificatory reason Kristol cites is of the utilitarian or, better, consequentialist sort mentioned above. But he too finds this kind of justification less than satisfactory; somewhat later in his commentary, in fact, he adds: "to gain the kind of legitimacy sanctioned by tradition rather than theory, an institution must learn how to adapt to changing circumstances and must engage in frequent self-scrutiny." *Id.* Kristol has indeed contrasted two senses of legitimacy here: "theoretical" legitimacy, rooted in economic or consequentialist theory; and the legitimacy that is rooted in tradition, which he goes on to argue is the sense that is imbued with ethical considerations. But unfortunately Kristol has shifted the argument only slightly. He has given the businessman good advice, to be sure, especially for those corporations that depend for their success upon public favor (and many, of course, do not). But his is a practical counsel only, not a moral prescription. For tradition cannot be the final arbiter in questions of moral legitimacy, since tradition itself must be judged against deeper moral and, ultimately, rational criteria, which I will set out in Part III *infra*. Thus the deeper sense of legitimacy I speak of above is rooted neither in tradition nor in economic theory but in rational ethics. (Indeed, both tradition and utilitarian economic theory are strongly imbued with the democratic—*i.e.*, preference or will based—calculus.) When this rational ethics is appropriately explicated, it will turn out that there is a political theory to legitimate the governing structure of the corporation—provided that structure conforms to the theory—*viz.*, the political theory that emerges from the theory of moral rights. Cf. Kristol, *On Corporate Capitalism in America*, 41 PUB. INTEREST 124, 139 (1975) (hereinafter cited as *Corporate Capitalism*).

¹¹ Robert Nozick characterizes rights as "side constraints" (on behavior), R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); Ronald Dworkin as "trumps," R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Less metaphorically, Wesley Newcomb Hohfeld speaks of rights as "claims" and "relations," W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1946). However described, by virtue of their correlative obligations, rights serve to determine how others (*e.g.*, some democratic majority) shall or shall not act, regardless of how they may want (*e.g.*, vote) to act.

ieu, and, more important, why?¹² Thus the emphasis will be rather more upon ethics and the connection between ethics and law than upon economics and business as such. More specifically, however, I want to call into question some of the conceptual and normative assumptions of the corporate critics. It is not that the whole of what they say is without merit: for corporate behavior, no less than that of individuals, comes in various kinds and shades, as I will try to indicate below. Rather it is that many of their criticisms—as with so many attacks, often rooted in populist sentiment, upon the larger forces in a democratic society—are not only overdrawn but fundamentally wrong, from both a conceptual and a normative point of view. Arguments that presume that corporations “act,” for example, or that those whose actions are characterized as “corporate acts” have fewer rights and more extensive obligations than the rest of us, this by virtue of the greater power that attends that action, can only contribute to the confusion that surrounds the corporate debate.

In order to draw these confusions out, then, it will be necessary first to set forth very briefly some of what the critics are saying—their complaints, their proposals, and especially their justifications for enacting those proposals. This I will do in Part II. While the critics do not always speak in the language of rights and obligations, insofar as their proposals are to be realized through law they are implicitly speaking that way. In Part III, then, I will sketch at some length the background of rights and obligations against which these arguments may be judged. Here I will be speaking of *moral* rights and obligations, which serve to guide us—at least ideally—in the creation of their legal counterparts.¹³ Thus the argument will proceed from within the natural law tradition, at least in one mod-

¹² This is a continuation, then, of the debate that Dunne understands Adolf Berle to have opened late in his career, in his *Carpentier Lecture, The Three Faces of Power* (1967):

In concluding that a corporation was not a “person,” Berle also concluded that this was not the end but rather the beginning of debate. In piercing the corporation veil, he found not one but many persons all of whom had constitutional rights—to the enjoyment of property, to the fruits of contract, to the equal protection of the laws—which could be enmeshed in the corporate structure and for which the corporation therefore might most appropriately serve as surrogate.

Dunne, *supra* note 9, at 268-69. I hasten to add, however, that the theory of rights I sketch below would probably be less than well-received by Berle.

¹³ This is the ideal recently set forth by R. DWORKIN, *supra* note 11. Here too I must note that the rights I will sketch below are rather different from Dworkin’s, whose own theory is itself but a sketch. The reader—and Dworkin’s “Herculean judge”—will have to compare the originals (notes 53 & 59 *infra*) to determine where the truth lies.

ern version: it will be assumed, that is, that whatever positive law there is is to be judged against a "higher law" background,¹⁴ and in particular, against a background of the theory of rights, in keeping with the roots of the American tradition.¹⁵ The discussion in Part III will be abstract, and may often appear to be far removed from the controversy that surrounds the corporation; I can only ask the reader's patience, for the connection is very real indeed, as I hope will be made clear in Part IV. There I will apply this theory to the various corporate relationships in order to determine the rights and obligations of the various corporate people. Within this framework, then, the criticisms and proposals set forth in Part II can be assessed. Finally, in Part V I will say a little about "responsibility," which I will interpret as connoting ethical considerations beyond the strict requirements of rights and obligations. Here the wheel may seem to turn, but let me save that till then.

Before beginning let me repeat and make clear that I will be concerned not so much with the "crazy-quilt" that is corporation law—that is any law for that matter—as with the larger normative or jurisprudential theory that stands behind or might stand behind the law. Thus I will treat more the broad overview than the narrow detailed view.¹⁶ Moreover, the theory of rights that has been adumbrated thus far¹⁷ and that will be sketched more fully in Part III will in many respects be a return to an older regime, to a time, for example, when freedom of contract was rather more highly re-

¹⁴ See E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955). Notice that in saying that "whatever positive law there *is* is to be judged against a 'higher law' background" I avoid a problem traditionally faced by natural law theorists concerning the ontological status of bad law. When he says that bad law is no law at all, as he often does, the natural law theorist is left with the question, Then what is it? A perversion of law? But even a perversion of law is still law, is it not? In brief, I would argue (on another occasion) that with perfect consistency one can be a legal positivist in one's capacity as an empirical social scientist, while a natural law theorist in one's capacity as a moral critic (however frequently legal positivists may be utilitarians in this latter capacity). Thus I would clearly separate questions about the existence of law from questions about the obligatoriness of law. Cf. M. GOLDING, *PHILOSOPHY OF LAW* 33, 49 (1975).

¹⁵ See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); C. BECKER, *THE DECLARATION OF INDEPENDENCE* (1922).

¹⁶ For an example of such an undertaking in the area of labor law, though one that treats the extant law more directly than I will be doing here, see Haggard, *The Right to Work—A Constitutional and Natural Law Perspective*, 1 *J. OF SOC. AND POLITICAL AFF.* 215 (1976). See also Vieira, *Of Syndicalism, Slavery and The Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" in Public-Sector Employment*, 12 *WAKE FOREST L. REV.* 515 (1976).

¹⁷ See note 9 *supra*.

garded.¹⁸ I realize, of course, that interpretations of the commerce clause, doctrines of police power and the general welfare, and many other considerations have very much superseded that earlier regime, all in the name of "public policy." But I would argue that if these trends continue, that "unruly horse"¹⁹ may yet take us over.²⁰

This is not to say, however, that a return to respect for basic rights would necessarily be popular—as noted earlier²¹—though in the long run I believe it would. For the theory of rights, making a clear distinction as it does between rights and values, will allow for unpopular speech, unpopular marches, unpopular private behavior, and to be consistent, unpopular economic behavior. It will not always move men, and indeed may on occasion repel them. But the hortatory must be clearly distinguished from the justificatory. It is the latter that concerns me here. It would be fair to say, then, that the argument that follows is aimed more at the courts than at the legislatures, more at the realm of reason than at the realm of will.

II. THE CASE AGAINST THE CORPORATION

What then are the corporate critics saying? The complaints are so varied and endless that a complete account would be quite impossible here.²² Moreover, at least a part of the attack is disingenuous in the sense that the real target is capitalism or the free-market system; as the most conspicuous components of that system²³—serving nicely the populist *Weltanschauung*—corporations take the brunt of the criticism that is more properly directed else-

¹⁸ See Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. OF L. & ECON. 293, 293-94 (1975):

One of the first functions of the law is to guarantee to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties: if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world.

¹⁹ Richardson v. Mellish, 130 Eng. Rep. 294, 303 (1824).

²⁰ See the essays in *THE FUTURE THAT DOESN'T WORK: SOCIAL DEMOCRACY'S FAILURES IN BRITAIN* (R. Tyrrell ed. 1977) (hereinafter cited as R. Tyrrell).

²¹ See note 9 *supra*.

²² For a good taxonomy of these criticisms see N. JACOBY, *supra* note 5, at 3-19. See also J. Mofsky, *Market Constraints on Corporate Behavior* 3-4 (March 1977, Law & Economics Center Monograph, University of Miami School of Law).

²³ Jacoby notes that profit-seeking corporations conduct over four-fifths of the private business of the United States economy. N. JACOBY, *supra* note 5, at 3. Most of these corporations, of course, are not the so-called "giants."

where.²⁴ These critics will not directly concern me here, though what I say in Part III will apply to them as much as to those whose aims are less ambitious. It will serve my purposes simply to give a sampling of the tone and substance of the charges and proposals; after that I will sketch two lines of argument aimed at justifying the proposals: the first simply assumes that we can control the corporation, the second goes to the heart of the justificatory question by challenging the very privacy of the corporation.

A. *Criticism and Proposals*

Beyond question, a fear of size and power dominates the criticism. With corporations, "a vast increase in size transforms the nature of the enterprise."²⁵ Indeed, "the largest corporations [are] more like private governments."²⁶ "It is an exercise in power when an electronics firm in a depressed eastern city shifts production to a newly built Mexican plant; when U.S. Steel decides to raise its price substantially in the face of slackening demand, thereby accelerating inflation."²⁷ Stated generally, "these massive institutions create serious adverse consequences for consumers, workers, shareholders, taxpayers, small businesses, and community residents; they operate without effective internal and external accountabilities [*sic*] to those persons so harmed."²⁸

²⁴ Here I would include J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967), and R. BARNET & R. MÜLLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974). Not to be outdone by the Economics Department, the Business School at Harvard has Professor George Cabot Lodge arguing that

[t]he development of a new consensus in the modern large corporation will require, in my view, giving to each member of the organization a greater "sense of belonging"; each should, to the limit of his ability, contribute to the formulation of decisions that affect the direction and conduct of the collective.

By way of example, Lodge goes on to cite that paragon of egalitarian efficiency, communist China, where "the factory manager must from time to time sweep the floor in order to maintain the comprehensive identity necessary for a sense of individual fulfillment for all." Lodge, *The Collectivist Corporation*, *HARV. TODAY* (March 1972).

²⁵ R. NADER, M. GREEN, & J. SELIGMAN, *TAMING THE GIANT CORPORATION* 17 (1976) (hereinafter cited as R. NADER). See also C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 5-7 (1975).

²⁶ R. NADER, *supra* note 25.

²⁷ *Id.* at 16. Indeed, it is an exercise in power when Ralph Nader decides to write a book! (Notice the theory of inflation implicit in this passage.)

²⁸ *Id.* at 7. It is noteworthy that rarely do these critics take on large proprietorships, partnerships, trusts, or foundations, not to mention labor unions or the many institutions of government itself, the powers of which are categorically different from those of private institutions. Those who would grant the distinction between private and public power (private parties may not use force, much less claim a monopoly over its use) might still argue that at

These fears translate into more specific charges, of course, which are usually directed against the corporation in the names of broadly defined groups or constituencies, as immediately above. Thus it is the rights or interests of shareholders, employees, consumers, and the public in general that the corporation is ignoring. By implication, management becomes "the corporation." This attribution of corporate identity to management raises complex issues, including how to characterize directors.²⁹ I will try to develop these issues somewhat more fully as we proceed. For the moment, however, I want to set the more specific criticisms out with reference to these broadly defined groups. This will help us to see the corporate milieu in terms of the relationships that constitute it. We are interested ultimately, again, in knowing what rights and obligations the various corporate people have. But they have these rights and obligations by virtue of standing in certain relationships; for rights are relationships—between right-holders and obligation-holders.³⁰ In the corporate milieu the various relationships that have come into being have in the process brought about the rights and obligations that go with them and indeed, when viewed normatively, go to constitute them. (These points will be developed more fully at the end of Part III.) Hence it would be useful to sort the critics' charges out with reference to these already-existing corporate relationships.

least we all have a say, through the democratic process, in the use of public power. It is difficult to take that rejoinder seriously, however; for it seeks to equate the single instance of control we exercise infrequently when we vote, along with millions of others, with the countless instances of control we exercise daily when we make choices in the marketplace.

²⁹ To get an indication of these complexities see Dunne, *supra* note 9, who argues that in *SEC v. Texas-Gulf Sulfur Co.*, 401 F.2d 833 (2d Cir. 1968), and *Escott v. Barchris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968), we may be seeing a return to Justice Story's fiduciary or trustee theory of corporate directorship—with directors being held appropriately accountable—as set forth in *Wood v. Dummer*, 30 F. Cas. 435 (C.C.D.Me. 1824) (No. 17,944); the opposing theory, which separates ownership from control and stockholders from management, was set forth critically in 1932 by Adolf Berle and Gardiner Means in *The Modern Corporation and Private Property* but was developed in numerous post-Civil War decisions, the roots of which can be traced, according to Dunne, to *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 345 (1837). In light of *Lanza v. Drexel*, 479 F.2d 1277 (2d Cir. 1973), however, it may be that Dunne's thesis was premature. The most that can be said at the moment is that the legal duties of directors are unclear. See generally Berle, *Economic Functions of the Corporate System*, 62 COLUM. L. REV. 433 (1962); Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962); Note, *Scienter and Injunctive Relief Under Rule 10b-5*, 11 GA. L. REV. 879 (1977); Claxton, Book Review, 10 GA. L. REV. 311 (1975) (A. JACOBS, *THE IMPACT OF RULE 10b-5*).

³⁰ See W. HOHFELD, *supra* note 11; Hart, *Are There Any Natural Rights?*, 64 PHILOSOPHICAL REV. 175, 183-88 (1955).

1. *Shareholders.*—In the case of shareholders, then, most of the criticism stems from the observation that in the modern corporation share ownership is widely dispersed and hence “control” has effectively passed from these nominal “owners” of the corporation to an élite corps of professional managers, a thesis influentially set forth by Berle and Means in 1932.³¹ This amounts to “power without property,” as Berle entitled a 1959 book; and power thus detached is irresponsible. Whereas in theory the shareholders elect the directors of the corporation, whose responsibility it is to direct and approve fundamental corporate actions, including the selection of management (who are thus employees), in reality it is management that has come to select—and serve on—the board. Boards no longer direct; they simply assent. Thus management is free to engage in the kinds of behavior—imprudently speculative, self-dealing, unethical, illegal—that can and sometimes does redound to the detriment of the shareholders. The only effective control these “owners” have over their assets—evidenced by the fact that shareholder meetings are so poorly attended—lies in their right to sell their shares.

The remedies proposed range from more tightly regulating the shareholder-director-management relationships—through new Securities and Exchange Commission directives—to wholly restructuring the corporation. Proposals for new regulations to encourage shareholder participation in the governance of the corporation are common. These “shareholder plebiscites” would require management to obtain shareholder approval on a broad range of issues—acquisitions, sales, mergers, financing, to name but a few. Moreover, greater political competition in the election of directors is called for through relaxed nominating requirements and the elimination of inside directors, with elections to be financed by the corporation. New regulations to make “going private” more difficult, to require greater communication and fuller disclosure between management and shareholders, to assign specific responsibilities to each director—these and many more are among the proposals of the critics.³²

³¹ See note 29 *supra*.

³² See, e.g., R. NADER, *supra* note 25, at 75-131; Stone, *supra* note 25, at 119-248; Kristol, *supra* note 10; Kristol, *Ethics and the Corporation*, WALL ST. J., April 16, 1975, at 18, col. 4. On “going private” see Securities Exchange Act of 1934 Release No. 14185 (Nov. 17, 1977) containing proposed going private regulations; Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974); Brudney & Chirelstein, *A Restatement of Corporate Freeze-Outs*, 87 YALE L. J. 1354 (1978).

2. *Employees.*—The struggle between corporations and labor is of course an old one. In addition to the traditional complaints concerning wages, hours, working conditions, and collective bargaining, there are the more recent criticisms relating to sexual, racial, and other forms of discrimination, to the lack of employee participation in corporate decisionmaking, to the dehumanizing authority structure between management and workers, and to the lack of protection for employees' civil rights. Here too corrective proposals have the flavor of greater "democratization" of the corporation; for decisionmaking would be taken out of the hands of management and put into the hands of either government regulators or workers themselves. Thus proposals include new regulations to prohibit discrimination, to broaden "affirmative action," to restrict a corporation's right to fire employees, to mandate due process procedures for the adjudication of "rights conflicts," and even to encourage "workplace democracy" by permitting employees to determine a broad range of corporate issues.³³

3. *Consumers and the Public.*—The corporation-consumer relationship has received so much attention in recent years that complaints in this regard need only be mentioned: charges concerning defective or dangerous products, deceptive advertising, and collusion and price-fixing are commonplace. Likewise, we need only mention the criticisms of the corporation's behavior vis-à-vis the public in general: corporations pollute the environment, reduce the quality of life by stressing "economic values" over "human values," bribe public officials, "exploit" poor nations, and on and on. In each of these cases reformers call for more public regulation, ranging from a federal consumer protection agency with broad powers of inquiry and enforcement, to stiffer anti-trust regulations and enforcement, to various divestiture proposals, to community sanction for corpo-

³³ Thus Yale political scientist Robert Dahl, in a passage as noteworthy for its precision of thought as for its sentiment:

[W]hy should people who own shares be given the privileges of citizenship in the government of the firm when citizenship is denied to other people who also make vital contributions to the firm? . . . The people I have in mind are, of course, employees and customers, without whom the firm could not exist, and the general public, without whose support for (or acquiescence in) the myriad protections and services of the state the firm would instantly disappear.

R. NADER, *supra* note 25, at 123-24. See also A. CONARD, *CORPORATIONS IN PERSPECTIVE* 348 (1976); D. EWING, *FREEDOM INSIDE THE ORGANIZATION: BRINGING CIVIL LIBERTIES TO THE WORKPLACE* (1977); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).

rate decisions, to a whole host of disclosure requirements. Again, not all of these criticisms are without merit, as we will see in Part IV. But I want now to look at what the critics offer by way of justification for further corporate regulation.

B. *The Justification for Outside Control*

1. *Reasons and Justifications.*—In this brief survey of criticisms and proposals I have set forth various reasons commonly advanced in support of further controlling the corporation. But to have a *reason* for wanting to control someone or something is not the same as having a *warrant* or *justification* for doing so. We may have many reasons for wanting to bring about some change in the world and yet not be justified in doing it. A gunman surely has reasons for taking his victim's wallet, but no justification for doing so. Conversely, there might be a justification for controlling someone or something and yet no reason for doing it. An employer might be entitled to dismiss an employee, for example, and yet have no reason to do so because the employee is performing well.

It is important, then, to distinguish reasons from justifications, although in many respects they are closely related.³⁴ Very briefly, as I am using the idea here, reasons are intimately bound up with our wants, with our conative side: we mention our wants when we give our reasons for acting. Now to be sure, our wants serve as our reasons for acting, and these reasons serve in turn to justify those actions, at least to us: this is one respect in which reasons and justifications are closely related.³⁵ (And of course "reason" may be used more broadly and in different senses than indicated by my limited usage here.) But to have a justification for doing something, especially when others are affected by that action, is ordinarily to have more than a mere reason for doing it. It is to have a warrant or a right to undertake the action. And this warrant or right is not simply an evaluative but a normative notion, rooted not in conation alone but in the *faculty* of reason and hence in the theory of justification. I have indicated, then, various of the reasons the critics advance for controlling the corporation; I want now to try to distinguish their reasons from their justifications, a distinction they often do not draw.

³⁴ The issue I am raising here is quite complex; for a fuller discussion see the considerable and growing literature in the philosophy of action.

³⁵ See, e.g., Gewirth, *The Normative Structure of Action*, 25 REV. OF METAPHYSICS 238 (1971).

2. *Behaviorism and the Function of Law.*—One common line of argument, closely related to the school of sociological jurisprudence, is in truth no argument at all. Rather, the justification for controlling the corporation—and indeed for controlling the individual as well—is simply assumed. It is assumed in the form of a further assumption about the function and purpose of law, *viz.*, to control behavior (usually through a system of rewards and punishments or positive and negative sanctions, the modern impetus for which stems from Bentham³⁶). Thus Christopher Stone argues that corporations—increasingly the “actors” in our society—are more and more responsible for “society’s problems.”³⁷ He takes “the corporate problem” to be the growth of “corporate influence and the dissatisfaction it provokes”; in short, “we cannot control them more to our satisfaction.”³⁸ In its formative years, he argues, the law developed to control individuals. The law eventually came to view corporations as individuals, but the “human-oriented premises” of the law have not been adjusted to treat these “*persona ficta*.”³⁹ If the law is to accomplish its end, Stone continues, the corporation must be viewed “sociologically”; for “[p]eople in concert do things they would not do alone.”⁴⁰ All of which suggests that “the law ought constantly to be searching out and taking into account the special institutional features of business corporations that make the problems of controlling them (and of controlling men-in-them) a problem distinct from that of controlling human beings in ordinary situations.”⁴¹ While Stone goes on to say that one goal of the law is “fundamentally distributive,” by which he seems to mean that its aim is to right wrongs,⁴² he only mentions this and adds immediately that the “primary goal” is to “reduce . . . the incidence of harmful behavior in the first place.”⁴³

Now there are many useful insights in Stone’s book. At the same time, the approach throughout is that of the behavioral sciences: he

³⁶ J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

³⁷ C. STONE, *supra* note 25, at xii.

³⁸ *Id.*

³⁹ *Id.* at 1-2.

⁴⁰ *Id.* at 3-5.

⁴¹ *Id.* at 7.

⁴² *Id.* at 30. I say “seems” because Stone’s discussion of this complex issue is anything but clear, complicated as it is by considerations of “social costs” which are then fit into cost-benefit analyses. It appears, in fact, that Stone is working not with a property-taking theory of wrongful conduct, such as will be developed below, but with a much less precise (*i.e.*, less descriptive) harm-cost theory. Compare *id.* at 31-34 with R. NOZICK, *supra* note 11, at 57-87.

⁴³ C. STONE, *supra* note 25, at 30.

wants to *explain* corporate behavior in order that the law might *control* it, much as the Skinnerian scientist seeks to explain and then control the behavior of the experimental rat. The normative point of view—the *justification* for control—receives virtually no consideration. To be sure, Stone gives us *reasons* to control the corporation; but as brought out above, these do not go to the question, By what *right* do we control it? Stone simply assumes the “we” against “them” posture, the nonegalitarian or authoritarian point of view so common in these discussions about the corporation. If indeed control is the end, there are many measures—not least the Draconian—that might accomplish this: locking up all males between the ages of eighteen and thirty will drastically reduce criminal behavior! We could simply design our laws toward the end of control and ignore considerations of justice; thus we might design our tort remedies toward controlling would-be tortfeasors rather than toward having these tortfeasors compensate their victims.

But clearly we do not ordinarily go about designing our law with the control of behavior foremost in view. At its best, law is designed with an eye toward some theory of justice—and in particular, in the American tradition, toward the theory of rights. Individuals have rights, we all learned in grade school, and governments are instituted among men “to secure these rights.” The Declaration of Independence does not say that governments are instituted “to control individuals” (or groups of individuals such as corporations). I suggest, in short, that the behavioral approach of Stone and others simply confuses a *result* of (most) law—that behavior is controlled—with the *purpose* of law—to secure justice. Now it is true that we satisfy that purpose, in part, by bringing about that result, *i.e.*, we secure justice in part by controlling behavior, which is probably what Stone has in mind when he says that the “primary goal” of the law is to “reduce . . . the incidence of harmful behavior in the first place.” But it is imperative that we get the order right: unless we have the end of justice in view we have no normative guide by which to restrain our control measures. (Indeed, we may very well end up controlling according simply to our “satisfactions,”⁴⁴ as Stone puts it.) I shall argue below, in fact, that we are justified in controlling others, including corporations, only in accordance with the theory of rights. Absent that normative grounding, claims to

⁴⁴ In fact, this appears (for again the text is less than clear) to be precisely what Stone would have: in straightforward legal positivist fashion he characterizes the law as “the expression of popular sentiment.” *Id.* at 93.

control amount to nothing more than claims to exercise power over others.

3. *Private or Public?*—I want to turn now to a second line of argument, which might be seen as designed to get around the justificatory difficulties that arise when corporations and those who own and manage them are thought to be individuals with rights. (Quite likely the argument was not actually designed with this purpose in mind, but it will help us to look at it that way.) If the road to control is blocked by the rights of corporations and various of the people in them, then we simply call into question the existence of those rights. If the corporation has rights in virtue of its being a person, then treat the corporation not as a person, nor even, perhaps, as a *persona ficta*, but as a “creature of the state.” It thus becomes *our* corporation to do with as *we* wish. We (the people) conceived it by way of our corporate charter. It exists at our pleasure. Thus by any reasonable theory of property—for who would want to undermine that notion on the way to taking over the corporation—we may control it. (Calling into question the rights of real people—shareholders and managers—is somewhat more difficult, involving as it does limitations upon freedom of contract, not to mention outright takings. I will treat this subject in Part IV.)

This “concession theory” or “public instrumentality” approach is indeed the route to control taken by the Nader group, though it has a long history in its own right.⁴⁵ To bring out something of the flavor of that argument, let me quote the following passage:

The basis of all political power in the United States, our civics books tell us, is the consent of the governed Our largest corporations also exercise vast power—over workers, shareholders, customers, and other citizens. But with whose consent? And with what legitimacy? In a view as conventional the century before it was uttered as it was in the subsequent century, Henry Carter Adams explained the rationale of corporate fran-

⁴⁵ See note 47 *infra*. In the seminal *Dartmouth College* case Chief Justice Marshall wrote: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creation of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.” *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Cf. note 6 *supra*. Even Irving Kristol, a friendly critic of the corporation, has written that “[t]he large corporation has ceased being a species of private property, and is now a ‘quasi-public’ institution.” *Corporate Capitalism*, *supra* note 10, at 138. (Notice that words like “ceased” and “quasi” indicate a certain reluctance on Kristol’s part to look for theoretically clear and clean lines—a not uncommon characteristic among the so-called neo-conservatives.)

chise in his 1896 presidential address to the American Economic Association:

"Corporations originally were regarded as agencies of the state. They were created for the purpose of enabling the public to realize some social or national end without involving the necessity of direct governmental administration. They were in reality arms of the state, and in order to secure efficient management, a local or private interest was created as a privilege or property of the corporation. A corporation, therefore, may be defined in the light of history as a body created by law for the purpose of attaining public ends through an appeal to private interests." Corporations were therefore granted certain privileges—like limited liability, perpetual life, and the equal protection of the laws in return for their social utility.⁴⁶

There is much in this passage that deserves comment.⁴⁷ I want to focus, however, on the question whether the corporation is indeed a public instrumentality. For clearly, if Nader's approach is sound, if what many consider to be a private contractual entity is in fact a public institution, then further justificatory inquiries are fatuous.⁴⁸ One hardly needs to justify public regulation of public institutions. To clarify this issue, however, it will be necessary to look not at the *actual* history of the corporation but at its *theoretical* genesis. For how the corporation actually evolved to become the institution it is today is irrelevant to the question whether it is legitimate *as* an institution. We will need to know, among other things, whether the state's involvement in the genesis of the corporation is necessary or whether it is gratuitous—and indeed itself in need of justification.

⁴⁶ R. NADER, *supra* note 25, at 62-63.

⁴⁷ Notice, *e.g.*, the initial move from *political* power—which in the classical liberal tradition does require consent to be legitimate—to power *tout court*. Is Ralph Nader's power illegitimate when he exercises it without our consent? Notice too that no distinction is made here between early English and American corporations that arose under *special* charters, as described by Adams above, and the modern corporation chartered under *general* incorporation laws, which evolved from the joint stock associations that existed at common law. As Hessen rightly observes:

[Nader's] concept of the charter—as a promise to serve the state—derives from the 16th and 17th Centuries, when the Tudor and Stuart monarchs reigned in England. Englishmen who wanted to trade overseas had to obtain royal permission; freedom of commerce—to join with others to engage in overseas trade—was regarded as a privilege which only a royal charter could bestow.

Hessen, *supra* note 1, at 2. See also H. SOWARDS, CORPORATION LAW: CASES & MATERIALS §§ 1.01-.02 (1974).

⁴⁸ See Keeler, *Corporations: "Privateness" and Legitimacy*, REASON, Feb. 1977, at 43.

Surely it is through the actions of various individuals that the corporation arises at all. Are these actions legitimate? Do they need to be "authorized"? Or can individuals perform these actions by right?

In order to get to the bottom of these questions, then, we will have to know what it is that individuals may and may not do, *i.e.*, what rights and obligations they have *before* any corporation comes into being. Knowing that—no small undertaking itself—we can then take up the more complex questions before us here. In Part IV, then, we will return to this fundamental problem concerning the privacy of the corporation, which turns, as I have suggested, upon the legitimacy of the corporate birth. With that settled we will then take up the more specific criticisms and proposals set out earlier. But again, all of this requires that we know what rights and obligations belong to individuals as such (and why), before they enter into any corporate relationships—indeed, before they even create such an institution.

III. RIGHTS AND OBLIGATIONS

A. *State-of-Nature Theory*

As these last remarks suggest, the argument will proceed in the tradition of state-of-nature theory, as developed by Hobbes, Locke, Rousseau, and, more recently, Robert Nozick,⁴⁹ to name but a few. Quite apart from the crucial role it played in the creation of the American state—especially through the influence of Locke's *Second Treatise of Government* on the Founding Fathers⁵⁰—this tradition has contributed importantly to our understanding of both the complex moral theory that underpins our political and legal theory and the relationship between these theories. In state-of-nature theory we try to derive a government that is morally legitimate from a state of affairs devoid of any institutions of government; failing that, we try to show how a government *might* arise by a process that violates no one's rights, which is in part what Nozick recently undertook to do. Thus it is political legitimacy—how one man comes to have legitimate power, or authority, over an-

⁴⁹ Note 11 *supra*. In order to appreciate the reasons for doing state-of-nature theory—some of which I will mention above—it is not necessary to believe, as some critics suggest, that anything like the state of nature ever existed (though what was early America?). The state of nature is a theoretical posit, used for *explanatory* purposes. These remarks apply *a fortiori* to the refinement of the state of nature that I will introduce shortly, the "status quo of noninterference among adult individuals," which is a purely theoretical construct.

⁵⁰ See notes 14 & 15 *supra*.

other—that is the fundamental concern of state-of-nature theory.

That concern is not the central issue here, of course;⁵¹ but the fundamental insight of state-of-nature theory does warrant attention. It is that political and legal theory rest upon moral theory and, by implication, that institutions have rights, if they have them at all, only insofar as individuals have given them those rights.⁵² Thus we begin with individuals, with *their* rights and obligations, not with groups or institutions, private or public, such as families, corporations, society, or the state. It is not simply that individuals were historically or anthropologically first; in some cases they were, but in other cases we should imagine they were not. Rather, it is for explanatory reasons that we begin with the simplest state of affairs; when we get clear about what rights and obligations obtain there we can then build up to more complex situations, including those involving corporations.

Against this background, then, let me begin. But let me stress at the outset that what follows is the barest sketch only. I have elsewhere developed this theory in much greater detail,⁵³ to which the reader should turn for a fuller account. What I want to do here is simply outline answers to two basic questions: Are there rights? What are there rights to? With this theory in view I will then return, in Part IV, to the corporate issue. In particular, I will show (1) that the corporation, far from being a “creature of the state,” is a voluntary association that can arise quite independently of the state and,

⁵¹ Nevertheless, the legitimacy of the state is intimately connected with the questions before us: the regulation of the corporation that flows from a state itself morally illegitimate will hardly be thought to be legitimate. Since I will not be taking the issue up directly, this may be a good place to note that in my own judgment the argument against the legitimacy of the state—*any* state—is persuasive, at least from a theoretical point of view. If we take seriously, that is, the right to freedom of association (by which we mean, of course, the right *not* to associate), as I shall argue below we must, then the state, the grandest example of forced association there is, violates this basic right and hence is illegitimate. Nevertheless, with David Hume, I do distinguish my practical from my theoretical life. For the present, that is, and probably for a very long time to come, I can envision no practical alternative to the state. Putting the matter this way serves a useful purpose, however; for if the state is a practical necessity only, if indeed “it is the right of the people to alter or to abolish it,” then the air of illegitimacy that surrounds the state will serve to create a strong presumption against any of its activities. For *all* state activity, by definition, involves forced association and is hence presumed to be illegitimate. On these issues generally see R. WOLFF, *IN DEFENSE OF ANARCHISM* (rev. ed. 1976); R. NOZICK, *supra* note 11.

⁵² Cf. R. NOZICK, *supra* note 11, at 6: “Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.”

⁵³ See my doctoral dissertation, R. Pilon, *A Theory of Rights: Toward Limited Government* (1979) (unpublished thesis, The University of Chicago).

of special importance, can do so without violating the rights of anyone; and (2) that interference with the activities of the corporation is unwarranted when those activities violate no rights of others—indeed, that the corporation has a right *against* such interference, and others, including the state, have a correlative obligation *not* to interfere. I trust that a few of the conclusions I will be drawing—in the area of antitrust interference, for example—will be disquieting even to some of the friends of the corporation. Let me simply invite those friends to reflect upon the rights they would invoke at such uncomfortable junctures. If the requisite justificatory arguments for those would-be rights are not forthcoming, or if indeed they themselves lead to uncomfortable conclusions, then perhaps we should let the difficult cases fall where they will.

B. *Are There Rights?*

1. *The Problem of Justification.*—The question whether individuals have moral rights is probably the most pressing issue before moral and legal philosophy today. For upon its resolution depends the moral legitimacy of the legal rights we find and enforce daily through the state. Jefferson thought that the existence of our rights was “self-evident,” that we were “endowed by [our] Creator” with certain rights. No doubt that “argument” satisfied the better part of the population in the eighteenth century—and in all likelihood it still satisfies, if not the better, at least the larger part of the population. (Those for whom Jefferson’s claim still suffices should probably be advised to turn directly to Part IV, thus to avoid the deep reaches into which we are about to plunge.) Yet to Jeremy Bentham, talk of moral or natural rights was “simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.”⁵⁴ And indeed it was David Hume, who died in the year America was born, who argued that from factual premises one could not derive normative conclusions:⁵⁵ thus from descriptions about the nature of man one could not derive prescriptions about the rights of man, which of course was the strategy at the heart of the natural law and natural rights traditions.

With Hume’s pronouncement, moral philosophers were awakened from their dogmatic slumbers, as Kant put it, and set to the task that has centrally occupied them ever since—how to give cognitive

⁵⁴ Bentham, *Anarchical Fallacies*, in 2 COLLECTED WORKS 501 (Bowring ed. 1843).

⁵⁵ D. HUME, *TREATISE OF HUMAN NATURE*, 469-70 (Selby-Bigge ed. 1888).

force to our moral judgments. By the first third of our own century, however, those philosophers had all but despaired. Thus in 1936 A.J. Ayer, reflecting the view of the dominant school of logical positivism, argued that we could divide the world of propositions into three types—logical, empirical, and evaluative (*e.g.*, normative, aesthetic, theological)—and that it was idle to look for truth among propositions of the third kind, for there was no truth or falsity about them: they were simply expressions of our emotions or sentiments.⁵⁶ As is often the case, however, the wheel seems more recently to have turned; for since Ayer drew his conclusions much has been done to call this moral skepticism into question.⁵⁷ Following often in the Kantian tradition of rational ethics, these recent studies have tried to show that rather more of ethics than many had heretofore thought is rooted not in Ayer's third category, nor even in his second, but in reason itself. Without wanting to overstate the matter, I think it fair to say that we are seeing here something of a return to the natural law tradition—which of course grounded ethics straightforwardly in reason⁵⁸—though as with earlier versions of that tradition, the variations are considerable.

What I want to do, then, is sketch one contemporary version of

⁵⁶ A. AYER, *LANGUAGE, TRUTH AND LOGIC* 102-20 (2d ed. 1946). Indeed, this view has dominated the thought of this century, not least in the social sciences, including economics. Thus we find no less a friend of the free market than Gordon Tullock arguing that

[i]n recent years, "ethical science" has fallen into disrepute, not because we are necessarily less moral now or because we worry about ethical problems less, but because of the obvious flaws in the "scientific" treatises on the subject. From Plato and Aristotle to St. Thomas Aquinas and William James, numerous books of all degrees of profundity have been produced that purport to deduce an ethical system from a few basic postulates. The dearth of current books on the subject reflects neither disrespect for the great minds who have labored in the field nor a belief that they have solved the problem, but is merely an indication of simple skepticism.

G. TULLOCK, *THE LOGIC OF THE LAW* 3 (1971). Moral skepticism is undoubtedly a healthy reaction to moral overreaching. But if correct, we are left in a most uncomfortable position, which perhaps helps to explain why the "dearth" of which Tullock speaks has become a plenitude in this decade, with Rawls and Nozick being only the most conspicuous examples.

⁵⁷ The literature here is extensive; in addition to countless journal articles see, *e.g.*, K. BAIER, *THE MORAL POINT OF VIEW* (1958); A. DONAGAN, *THE THEORY OF MORALITY* (1977); R. HARE, *FREEDOM AND REASON* (1963); R. NOZICK, *supra* note 11; J. RAWLS, *A THEORY OF JUSTICE* (1971); M. SINGER, *GENERALIZATION IN ETHICS: AN ESSAY IN THE LOGIC OF ETHICS, WITH THE RUDIMENTS OF A SYSTEM OF MORAL PHILOSOPHY* (1961); S. TOULMIN, *REASON IN ETHICS* (1950); H. VEATCH, *FOR AN ONTOLOGY OF MORALS* (1971).

⁵⁸ Thus Locke writes: "The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions." J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 6 (P. Laslett ed. 1966). Notice the straightforward move from "is" to "ought" in this passage.

these recent developments in rational ethics, a version that in my judgment goes to the heart of the matter, resolving some of the most basic issues in ethics. I refer to the work of Alan Gewirth at the University of Chicago, who over the past several years has developed arguments in support of his Principle of Generic Consistency (PGC), which he has called "the supreme principle of morality."⁵⁹ From this principle flow certain basic rights, which entail other rights, including the rights with which we will eventually be concerned. In the next section I will take up this work of interpretation. What I want to do here is indicate briefly just what Gewirth is about, just how he justifies this principle and these basic rights, thereby showing them to exist.

2. *Acceptance or Consent Theory.*—Rights do not exist in the way tables and chairs do. Hence we have to first get clear what we mean when we say that a right "exists," or that someone "has" a right. It is useful, in this connection, to begin by looking at contractual rights, for these are *made* to exist—they are "brought into being," as it were, by human agency, and in particular by the phenomenon of *acceptance* or *consent*. (These acts and this process must themselves be justified, as we will see below; nevertheless, in virtue of their simplicity they have heuristic value for the issue at hand.) What happens when contractual rights are created, then, is just this: in agreeing to enter into the relationship, the parties simply "accept" certain obligations; correlative to these obligations are rights that are created in the other party.⁶⁰ These obligations and correlative rights did not exist before this consent was given; now they do. Thus it is in virtue of this phenomenon of *acceptance*—the complexities of which are considerable—that the relevant rights and obligations are brought into being and hence can be said to exist. For this acceptance or consent is both necessary and sufficient for

⁵⁹ See A. GEWIRTH, REASON AND MORALITY (1978). See also the following articles by Gewirth, listed here chronologically: *The Generalization Principle*, 73 PHILOSOPHICAL REV. 229-42 (1964); *Categorical Consistency in Ethics*, 17 PHILOSOPHICAL Q. 289-99 (1967); *Metaethics and Moral Neutrality*, 78 ETHICS 214-25 (1967-68); *The Non-Trivializability of Universalizability*, 47 AUSTRALASIAN J. OF PHILOSOPHY 123-31 (1969); *Must One Play the Moral Language Game?* 7 AM. PHILOSOPHICAL Q. 107-18 (1970); *Obligation: Political, Legal, Moral*, in POLITICAL AND LEGAL OBLIGATION, 55-88 (J. Pennock & J. Chapman eds. 1970); *Some Comments of Categorical Consistency*, 20 PHILOSOPHICAL Q. 380-84 (1970); Gewirth, *supra* note 35; *Some Notes on Moral and Legal Obligation*, in HUMAN RIGHTS 291-96 (E. Pollock ed. 1971); *The Justification of Egalitarian Justice*, 8 AM. PHILOSOPHICAL Q. 331-41 (1971); *Moral Rationality* 3-40 (1972) (The Lindley Lecture, The University of Kansas); *The "Is-Ought" Problem Resolved*, 47 AM. PHILOSOPHICAL A.PROC. AND ADDRESSES 34-61 (1974).

⁶⁰ On correlativity see W. HOHFELD, *supra* note 11.

the existence of these rights and obligations.⁶¹

But while the kind of acceptance (assumption of obligation) indicated here will serve, when adequately explicated, to show that certain kinds of contractual rights exist, it will not suffice to justify the traditional natural rights, those moral rights that are said to exist independently of any explicit acceptance by obligation-holders of the correlative obligations. Nevertheless, here too the idea of acceptance is at the root of the justificatory argument that demonstrates the existence of these rights; for with all rights it is only in virtue of the obligation-holder's acceptance, on some criterion or other, of his obligation that the correlative right can be said to exist. These rights will reflect the deepest sense of "moral," however, only if their acceptance is generated by the appropriate criteria: only if the reasons for acceptance are rational—necessary to the subject of morality and sufficient to compel assent on pain of self-contradiction—will that acceptance not be arbitrary or contingent upon particular wants or preferences (for individuals are said to have these natural rights quite independently of our wants or preferences in the matter). These basic moral rights must be shown to exist, then, for reasons both necessary and sufficient to compel rational acceptance of their existence. It is in this fundamental way that morality is grounded in reason.

To show, then, that these most basic of rights exist we have to distinguish not simply between explicit and implicit acceptance but between contingent and necessary acceptance as well. When acceptance is *contingent*, *i. e.*, when it arises from or is based upon particular wants or preferences, as in the contract example above, it is in this sense arbitrary and therefore will not serve to generate rights that reflect this deepest aspect of morality. Acceptance that is *necessary*, however, is not so generated or based and thus does not have this arbitrary quality about it. We *must* accept the law of contradiction, for example; it is not open to us to reject it, for as Aristotle demonstrated,⁶² to attempt to deny that law it is necessary

⁶¹ In mentioning the complexities associated with the phenomenon of acceptance I mean to include various of the procedural formalities that serve to evidence that acceptance.

The idea of acceptance or recognition is central to H.L.A. Hart's arguments which develop the complex criteria needed to understand what it means to say that a legal system exists in some society. H. HART, *THE CONCEPT OF LAW* 59-60, 109-14 (1961). Similarly, of course, the idea of acceptance or consent is at the heart of our social contract theory of political obligation.

⁶² IV ARISTOTLE, *METAPHYSICS* ch. 4.

to affirm it: in that affirmation we implicitly and necessarily accept the law.

3. *The Principle of Generic Consistency*.—The idea, then, is to develop a similar argument for ethics, which is precisely what Gewirth has done. He has shown that certain rights that individuals implicitly though necessarily claim for themselves apply necessarily to all others as well; to deny this implication about the rights of others amounts to contradicting the claims one necessarily makes, to contradicting oneself. Thus does one arrive at rational justification; for if the denial of the implication that others have the same rights that one necessarily claims for oneself leads to a contradiction, then by a *reductio ad absurdum* the negation of that denial is true, *i.e.*, it is true that it is not the case that others do not have the same rights that one necessarily claims for oneself.⁶³

But let me set forth Gewirth's own summary of the argument. He begins by treating human action as the basic subject of morality, for it is action that moral principles and rules are intended to direct:

The main point is that the voluntariness and purposiveness which every agent necessarily has in acting, and which he necessarily claims as rights for himself on the ground that he is a prospective agent who wants to fulfill his purposes, he must also, on pain of self-contradiction, admit to be rights of his recipients. For they are similar to him in being prospective agents who want to fulfill their purposes. Therefore every agent logically must admit that his recipients have certain basic rights equal to his own rights of voluntary and purposive participation in transactions, which are equivalent, respectively, to rights of freedom and of well-being. The statement of these rights constitutes an egalitarian-universalist moral principle. My argument hence largely takes the form of what I shall call dialectical necessities: dialectical, in that it proceeds through certain claims made by agents; necessities, in that these claims logically must be made by the agents and they also logically must accept the corresponding obligations.⁶⁴

⁶³ What we have here, then, at least in its fully explicated form, is a very sophisticated and much improved version of the argument that Locke cites from "the Judicious Hooker." J. LOCKE, *supra* note 58, § 5. (Hooker's argument is itself a variation of the Golden Rule, and accordingly it suffers from many of the problems that have traditionally attended that formulation; but it is the closest that Locke comes to spelling out the justificatory foundation for the Reason that is the Law of Nature.)

⁶⁴ Gewirth, *Moral Rationality*, *supra* note 59, at 20. Notice that Gewirth's use of "agent"

This egalitarian-universalist moral principle, the PGC, which is the general principle of these rights and obligations, is addressed to every agent as follows: "Apply to your recipient the same generic features of action that you apply to yourself."⁶⁵ Combining the formal consideration of consistency with the material consideration of the generic features of action, the PGC

requires an equal distribution of the most basic rights of action. It says to every agent that just as, in acting, he necessarily applies to himself and claims as rights for himself the generic features of action, voluntariness or freedom and purposiveness at least in the sense of basic well-being, so he ought to apply these same generic features to all the recipients of his actions by allowing them also to have freedom and basic well-being and hence by refraining from coercing them or inflicting basic harm on them.⁶⁶

In sum, and very succinctly, every agent must accept on pain of self-contradiction that the rights he necessarily claims for himself apply to every other prospective agent as well; by virtue of his implicit though necessary acceptance of these claims, and the universality implicit in them, the corresponding rights must be said to exist. Hence it is logically necessary that we accept the existence of these most basic of rights.

C. *What Are There Rights To?*

In the foregoing I have sketched Gewirth's argument and briefly set forth my own interpretation of its place in the tradition of acceptance or consent theory. I want now to trace some of the implications of that argument, to draw very generally the picture of the world of rights and obligations that the PGC implies. It is at this juncture that much of my own work begins,⁶⁷ with arguments that depart in some measure from the very limited interpretations that Gewirth has thus far adumbrated.⁶⁸ I will try to indicate, within

here is the ordinary philosophical usage, to mean someone who acts. The legal usage—one who acts for another—will arise in Part IV.

⁶⁵ Gewirth, *The "Is-Ought" Problem Resolved*, *supra* note 59, at 57.

⁶⁶ *Id.*

⁶⁷ See note 53 *supra*; Pilon, *Criminal Remedies: Restitution, Punishment, or Both?* 88 *ETHICS* 348-57 (1978); Pilon, *Justice and No-Fault Insurance*, 57 *THE PERSONALIST* 82-92 (1976).

⁶⁸ See especially Gewirth, *The "Is-Ought" Problem Resolved*, *supra* note 59, at 57-58. At this writing, Gewirth's *Reason and Morality*, in which he sets forth lengthy interpretations

constraints appropriate to this Article, just why it is that I reach these conclusions, why the world of rights and obligations that emerges from Gewirth's theory is the world of classical liberalism, not the world of the supportive state which he believes his theory implies. I want to make clear, then, that the conclusions I will be drawing below, and especially in Part IV, are not to be attributed to Gewirth. I should add, however, that insofar as he has given us a correct picture of what the foundations of the moral world in fact are, and insofar as my interpretations of that basic work are correct, there is a deeper sense in which the conclusions that I draw are indeed to be attributed to him!

1. *Problems of Interpretation.*—The two basic rights that Gewirth believes are implied by his theory—to freedom and basic well-being—have been described differently in various of his articles. He treats them in the passage above as rights against coercion and harm. In general, they reflect, respectively, the voluntariness and purposiveness that are the generic features of human action. But a less than careful interpretation of these rights can lead quickly to unequal rights and obligations and indeed to inconsistency. If the right to well-being, for example, entails not simply that we not harm others but that we be positively obligated to assist them, then our basic right to freedom is immediately called into question. Indeed, this is precisely the difficulty Gewirth gets into,⁶⁹ as I will indicate shortly.

In order to avoid these difficulties, then, we need to be clear from the start about the context within which interpretation takes place. If that context already contains moral relationships, for example, these may color our attempt to determine what rights and obligations individuals have. What I want to do, then, is posit a theoretic-

of his theory, has not yet been released. But I have seen a part of those interpretations in manuscript; they follow, in much greater detail, the line of argument adumbrated at 57-58 of *The "Is-Ought" Problem Resolved*. Accordingly, despite the greater detail, they do not meet the objections I sketch below, which are developed more fully in my dissertation, note 53 *supra*.

⁶⁹ It should be noted too that this is precisely the issue at the heart of the debate between *laissez-faire* capitalism and socialism. For the more the welfare state, which presumes to stand between these two systems, tries to insure basic well-being, the more it conscripts personal liberty and private property in service of that end. Hence the closer it moves toward all our socialism, a system that promises well-being for all but ends, as it must, by giving liberty to none. See Holm, *Taxation in Paradise*, 28 NAT'L REV. 1065 (the deteriorating situation in Sweden); R. Tyrrell, *supra* note 20. For some of the theoretical issues see Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43-53 (D. Raphael ed. 1967). For the logical structure underpinning these issues see R. Pilon, *supra* note 53.

cal state of affairs, a spatiotemporal starting point which I will call a status quo of noninterference. (In truth, this is a refined state of nature.) We can imagine this as a simplified world in which the moral slate has been wiped clean, a world of adult individuals, unrelated to each other by any historical events. Thus these individuals stand in no special relationships such as arise when people make contracts, commit torts, or beget children. H.L.A. Hart distinguishes these special relationships, and the rights and obligations that constitute them, from general relationships, or the relationships that hold between strangers.⁷⁰ We should imagine the individuals in this status quo to be generally related, then; whatever general rights and obligations there are in this theoretical world are held equally by all. Finally, in keeping with its being a status quo, let us imagine that these individuals do not in the beginning act; as we will see, this provision will help us to understand how it is that property arises. What we want to do, then, is try to determine just what actions the PGC prohibits, permits, or requires (the three deontic modalities); we want to determine what general rights and obligations there are, from which we can then build this world up, in small but clear steps, until we have something rather more recognizable.⁷¹ We will be doing that for the rest of this article.

2. *Action, Inaction, and Freedom.*—Let us begin, then, by look-

⁷⁰ Hart, *supra* note 30. The distinction between general and special relationships is drawn with reference to the justifications that underpin them. Special relationships and the rights and obligations that constitute them arise from special historical events (*e.g.*, contracts), which justify them; they are thus “created.” Special rights and obligations may be distributed unequally, of course, according as the events that bring them into being take place. General relationships, on the other hand, and the rights and obligations that constitute them are not thus created but stand *tout court*; these rights and obligations are held equally by all, for reasons indicated in the previous section: they are the traditional natural rights. Thus the distinction drawn here does not correspond to the traditional distinction between rights *in personam* and rights *in rem*, which seems to be drawn with reference to right-objects (this distinction is often less than clear); nor does it correspond exactly with Hohfeld’s distinction between “paucital” and “multital” rights, which is drawn with reference to obligation-holders. Cf. W. HOHFELD, *supra* note 11, at 67, 72. By going directly to the justificatory foundations of these rights, Hart avoids much of the confusion that surrounds these other distinctions.

⁷¹ Thus I am working with Nozick’s observation that justice is historical: whether a given state of affairs is just depends upon how it came about. Applying that dictum, however, requires that we know what it *means* for a situation to come about justly. It is *that* question that I am pursuing here by building up a just world from little steps, each of which reflects and indicates the content of justice, each of which is an instance of a just process. As a morally clean slate, then, the status quo will serve as a benchmark for subsequent problems of rectification. Making a man whole again just means returning him to some such prior status quo. Cf. R. NOZICK, *supra* note 11, at 153-55.

ing at what the PGC in fact says. It is addressed to all agents as follows: Apply to your recipient the same generic features of action that you apply to yourself. Notice first that the PGC does not require anyone to *do* anything. It is addressed to agents but it does not require anyone to *be* an agent. Moreover, even if someone does act, the PGC is addressed to him only insofar as there is a *recipient* of his action. Acting in a way that involves no recipient would not violate the PGC. Thus of the three basic modes of acting that are relevant to the PGC—not acting, acting with no recipient, and acting with a recipient⁷²—it is in the last case only that the PGC comes into play. Starting from the status quo, then, this means that (a) there is no obligation toward others *to act*, (b) there is no obligation *not* to act when acting involves no recipient, and (c) when there is a recipient there is an obligation not to coerce or harm him, *i.e.*, an obligation to obtain his consent before acting upon him (about which more below).

Thus the PGC, at bottom, is a principle of equal freedom: by placing the burden of obligation upon those whose actions have recipients, or who are about to act toward recipients, it implicitly sanctions the state of equal noninterference that precedes those actions. Owing to the voluntariness criterion, which requires that agents secure the consent of their recipients before involving them in transactions, the PGC says that in the absence of that consent the status quo of noninterference must be preserved. Hence the most basic right implied by the PGC—for it is logically prior to all other rights—is the right to noninterference, which may be variously described as the right to be free, the right to be left alone, the right against trespass, and so forth.

⁷² Those who might wish to substitute some other principle for the PGC should nevertheless note that whatever one's basic moral principle, the three modes of acting set forth here are fundamental. Whatever basic principle is settled upon, that is, the fundamental issue will not be what more specific *kinds* of associations are right or what more specific *kinds* of actions toward others are right but whether there ought to be association with or actions toward others *at all*. In short, whether to associate or not to associate (and why) is the fundamental question of ethics. For the very subject of ethics arises only because there is more than one person in the world and hence the *possibility* of association. (Were there but one person only, "ethics" would be mere prudential counsel. Egoistic or "self-development" theorists, rooted often in the ethics of antiquity, usually reflect this prudential posture, thinking they are nevertheless doing ethics; they seem not to understand, that is, that ethics is not really about leading "the good life"—a matter rather closer to aesthetics—but about how we should act toward others.) This fundamental point about association is what I had in mind when I spoke earlier of the right to freedom of association and the implications of this right for questions of political legitimacy. See note 51 *supra*.

Now these early conclusions—fundamental and far-reaching as a moment's reflection will suggest them to be—should come as no surprise to students of the common law; the right to be free from trespass against person and property—the right to noninterference—was at the very heart of that tradition. And as many have noted, the common law was thought to be securely grounded in reason: "Indeed, the notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law."⁷³ Insofar as Gewirth has plumbed the depths of that reason, drawing from it the very foundations of ethics, this congruence between legal tradition and rational ethics has a certain lovely and inspiring quality about it.

What is surprising, then, is that Gewirth should argue that the PGC generates rights and obligations that the common law would never have countenanced. In particular, he believes that in certain circumstances—those involving limited cost considerations—there are positive or "welfare" obligations even though there is no special relationship between the parties. To fail to act in these circumstances, he argues, is to harm others.⁷⁴ Now setting aside these cost considerations, which are altogether out of place in a deontological argument,⁷⁵ the causal theory Gewirth invokes here is simply counterintuitive, to say the least.⁷⁶ Certainly the common law, with its act requirement for causal liability, would never have tolerated this causal theory. (If it had, it would have opened a veritable Pandora's box.)⁷⁷ Moreover, as suggested earlier, these positive obligations lead directly to inconsistency, for they conflict straightforwardly with the right to freedom or noninterference that *is* implied by the

⁷³ E. CORWIN, *supra* note 14, at 26.

⁷⁴ Gewirth, *The "Is-Ought" Problem Resolved*, *supra* note 59, at 57-58. I have in mind here the Good Samaritan problem in particular; but the extrapolation from this to the welfare state is relatively straightforward. Notice also the difference between saying that one *ought* to assist others and saying that one is *obligated* to do so (a point to be developed in Part V). It is the latter claim that I am arguing cannot be justified.

⁷⁵ Deontological theories are as opposed to consequentialist (*e.g.*, utilitarian) theories. They determine what is right or wrong not by looking at consequences or costs and hence at subjective values but by appealing to moral principles that are inherently correct because derived from reason. See Gewirth, *Ethics*, 6 ENCYCLOPAEDIA BRITANNICA 976, 990 (15th ed. 1974).

⁷⁶ For an excellent discussion of causation in the law see C. GREGORY, H. KALVEN, & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 247-323 (3d ed. 1977) (hereinafter cited as C. GREGORY).

⁷⁷ See Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-66, 189-204 (1973). Even in the case of special relationships it is doubtful that liability for omissions should be rooted in a causal theory rather than straightforwardly in the grounds that generate the affirmative obligation. *But see* H. HART & A. HONORÉ, *CAUSATION IN THE LAW* (1959).

PGC. An individual cannot enjoy his right to noninterference and at the same time be obligated to assist others. Indeed, to so obligate him is to *use* him for the benefit of these others! Thus the whole class of putative moral rights falling roughly under the rubric "welfare rights"—and this includes most of our modern so-called "social and economic rights"⁷⁸—is unjustified in that (a) these rights are not implied by the ineluctable moral theory that is grounded in reason, and (b) *a fortiori*, they are inconsistent with the rights that *are* implied by those moral foundations.⁷⁹

3. *Interference and Property*.—In a world of general relationships, then, no one is obligated to come into association with anyone else: indeed, we have a right *against* such forced association, a right *not* to be thus interfered with. But individuals are also at liberty to act, and so the question immediately arises, as individuals move out of the status quo and start to act, what exactly do we mean by interference, or coercion and harm? The term "harm," of course, is notoriously subjective, having been the ruin of many a philosophical system. What the law has traditionally tried to do—and not without success—is find objective lines in the world, not subjective (harmful) effects in the minds of men. Thus it has sought to define interference with reference to the property in the world and the lines that bound that property more or less clearly. I will follow that tradition, for it has proven, because of its empirical foundation (which avoids subjective and therefore possibly arbitrary wants and preferences), to be the most objective method by which to pursue the difficult task of interpretation, a method that thereby treats all equally.

If interference is to be defined with reference to property, then, we have to get clear (a) what we mean by property and how it serves to define interference, and (b) how property arises or is justified. I will take these issues in order.

(a) In defining property I will follow the classical theorists who spoke of life, liberty, and possessions as the sum of one's property.⁸⁰

⁷⁸ See Cranston, *supra* note 69.

⁷⁹ For a somewhat fuller treatment of these points see Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171, 1178-86 (1979).

Such positive actions as Gewirth is urging—acts of beneficence—can of course be fit under another, a different realm of morality: as noted above (*supra* note 74), there is a distinction between what one *ought* to do and what one has an *obligation* to do. This distinction was at least implicit in classical liberalism, though contemporary liberalism—with its welfare "rights" and correlative welfare "obligations"—has done much to obfuscate it. I will develop this point a bit more fully in Part V below.

⁸⁰ "Lives, Liberties and Estates, which I call by the general Name, *Property*." J. LOCKE, *supra* note 58, § 123. The idea of owning oneself is not at all far-fetched. It arises straightforwardly in the case of medical transplants. See Note, *The Sale of Human Body Parts*, 72 MICH.

Thus an individual owns his person, actions, and holdings—tangible and intangible—however unclear the reference and boundaries of this property may in some cases be (about which more below); and in owning his actions he owns all the uses that he can make of or that go with his person and holdings. Now we interfere with another when we *take* what he owns; for if what he owns is or is an extension of himself (as I will briefly argue below), then to take what is his is to involve him in a transaction without his consent and hence to violate the PGC. For all practical purposes, then, Gewirth's second basic right—against being harmed—collapses into the first. We objectify "harming," that is, by treating it as an upshot of the violation of the right to noninterference or freedom: to harm someone is to involve him in a transaction involuntarily, *i. e.*, to take what he owns.⁸¹ Interference, then, is a *taking*. We determine whether a given event is a taking, and hence a case of interference, by clearly defining the object owned and putatively taken.⁸² Proceeding in this way will help to clear up much of the confusion that surrounds questions of interference; for again, interference is defined with reference to that which admits of empirical description.

This approach will handle straightforward cases of interference

L. Rev. 1182 (1974). (Locke's position on the subject is less than clear. He argues that "every Man has a *Property* in his own Person," J. LOCKE, *supra* note 58, § 27; yet he also argues that we are God's property, *id.* § 6. Perhaps these positions can be reconciled. But whether or not they can, they both have to be justified; and on that score, the latter view is an undertaking of some dimension.)

⁸¹ This approach will help too to clarify some of the harm issues that surround such anomalous cases as Good Samaritan rescue. Quite apart from *requiring* Good Samaritan acts—and the theory of rights does not—it is an unduly rigorous (and even perverse) deontology that *prohibits* benevolent interference when consent is not possible. At the same time, liability attaches to such acts, for the incompetent Good Samaritan, no less than anyone else, must be held responsible for the consequences of his actions. By construing the "interference" involved in such incompetent acts as takings, then, we not only have a more linguistically satisfying approach, but we avoid, in part, going directly to "harms." Nevertheless, in cases such as these we cannot avoid getting into the subjective theory of value; for the consent that would have obviated that is missing. See THE GOOD SAMARITAN AND THE LAW (J. Ratcliffe ed. 1966); Epstein, *supra* note 77, at 189-204.

⁸² A distinction is often drawn between a complete taking and a partial taking, as when we completely take a piece of property or a life, as against taking only a *use* of the property or restricting (taking) only a *liberty* of the person. But the distinction turns entirely upon how broadly or narrowly we define the object taken, for what we own can be parceled in many ways. Those who want to take "only uses" often invoke this distinction—as in land use restrictions—hoping thereby to avoid compensation. But a taking is still a taking, however broadly we define that with which the owner is left. See B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation*, in PLANNING WITHOUT PRICES 63-111 (B. Siegan ed. 1977).

quite easily, of course, cases of injury or damage to person or property, or cases of trespass or theft of property. For each of these broadly defined actions can be defined even more broadly as a taking: what the proscribed act does is take the use and enjoyment of the property in question, to which the owner has an exclusive right (see (b) below). But the reduction of interference to a taking will help especially when we come up against what often pass as difficult cases of "interference," as two brief illustrations will help to bring out.

(1) If I build a fence on my property that blocks your view, do I interfere with you and harm you? On loose interpretations of these terms I do. But of course the same could be said, depending upon your particular wants or preferences, for almost anything I might do with my property. In order to avoid the arbitrary results we get when we start with subjective values, then, we follow the procedure set out above. Notice that "your" view runs over my property; only thus do you "have" it. But my fence-building depends not at all on anything that you own. Were you to prevail, however, it would be *my* use of *my* property that would in fact be taken. My building the fence, then, does not take anything that you *own*. (If you really want "your" view, buy the necessary conditions for it, *viz.*, my property.)⁸³

(2) If I have a business through which I make lower market offers than you make in your business, thereby "driving you out of business," do I interfere with you and harm you? Again, on loose interpretations of these terms I do. Here too, then, we have to look closely to see if in fact anything is taken. I have not taken your trade with third parties (which just *is* your business) any more than I took your view in the example above, for in neither case can you be said to *own* these. Rather, you "enjoy" the view or trade at the pleasure of others, and these others have a perfect right—equal to your own—to use their property or their potential trade as they choose, provided those uses do not take what others own.⁸⁴

We see, then, how useful this procedure is in sorting out—indeed, in objectifying—heretofore difficult cases of interpretation. But other difficult cases will remain, cases that arise not because of any

⁸³ Cf. *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959).

⁸⁴ See Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 423-41 (1975). Cf. *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); *Mogul v. McGregor*, 23 Q.B.D. 598 (1889), *aff'd*, [1892] A.C. 25.

shortcoming in the interpretive procedure but because the objects taken are not easily defined, having a substantial mental basis. Two such kinds of cases involve endangerment and nuisance. All but isolated action is risky to some degree or other and hence has the *potential* for interfering with others, however remote that potential may be. As action becomes increasingly risky there reaches a point—*some* point—after which it “takes” the uses that others can make of their holdings, at least insofar as these others no longer feel safe in exercising those uses.⁸⁵ You do not feel constrained to wait until something happens—some “real taking”—before raising objections to my experiments with dynamite next door. Similarly, all but isolated actions involve *some* invasion by noise, odor, smoke, vibration, or other forms of nuisance. My party upstairs may take your quiet, your sleep, and so forth.⁸⁶ But here the case is slightly different: whereas with endangerment we have potential takings that “shade into” real ones, as others come not to be able to live with the fear the action causes, here we have real takings from the beginning—physical trespass, however trivial. Were we to prohibit all potential or minor takings, however, life in reasonable proximity would cease, for all but isolated action would be prohibited. In cases like these, perhaps, we find a place for public law.⁸⁷

(b) How is it then that we come to own what we do? How do we justify our ownership of our life, liberty, and possessions? Because of its importance to the larger issue before us, let me treat this subject at some length (though again, what follows is barely a sketch).⁸⁸ The idea of presumptions and burdens of proof plays a prominent role here (as it does through so much of the law). One would not think that self-ownership—ownership of one’s person and

⁸⁵ Notice that acts that endanger involve some combination of two variables: the probability that the unwanted causal sequence will occur; the magnitude of losses if it does occur.

⁸⁶ Notice the crucial difference between these holdings and the “holdings” claimed in the earlier examples. Here the quiet, sleep, and “peace of mind” (in the dynamite example) can all be described without bringing in the holdings or actions of others. The view and the trade, on the other hand, were enjoyed only because others contributed with *their* holdings or actions. Thus we in fact have takings here of things held outright.

⁸⁷ See C. GREGORY, *supra* note 76, at 495-546. It is noteworthy, as an indication that this may be a place for public law to enter, that in the more ordinary tortious takings we apply the doctrine, “you take your victim as you find him”; *i.e.*, we tailor the liability (in a regime of strict liability) and the damages to the individual victim and hence invoke no “public” standard. In nuisance and endangerment cases, however, the ordinary-man standard is usually invoked; *i.e.*, the extra-sensitive plaintiff will not ordinarily get relief.

⁸⁸ A good place to start on this difficult subject is L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* (1977).

actions—would require much argument. True, Locke thought that we were possessions of God; I should not want to undertake a defense of that position, however. In fact, the presumption would seem to rest with self-ownership; for anyone who would argue that he owns us would have, not least, the burden of the language to overcome. Indeed, we are punished just because *we* committed the crime; it was *our* action. If we want to argue that someone else is responsible for the action *we* performed, the burden is on us to show it.

This, in brief, is the negative case for self-ownership, aimed at defeating opposing claims. A positive case can also be made along the lines of Gewirth's argument. For the generic claims that we necessarily apply to ourselves, and hence must apply to all who are like us in being prospective agents, include the element of voluntariness. To act voluntarily just is to act as the author and hence as the owner of one's actions. By the principle of universalization the same conclusion applies to all other agents; thus each of us owns his actions and hence the necessary means—the voluntary person—with which he performs those actions. Starting then with the generic claims that agents necessarily make in acting (Gewirth's dialectically necessary method), we can generate self-ownership.⁸⁹

We come then to the ordinary sense of "property"—and in particular to land or resource acquisition—which is where the more difficult issues arise. In general, I follow here Nozick's historical or entitlement theory of justice in holdings,⁹⁰ whereby at any point in time a set of holdings is justly distributed if the process by which the distribution arose was itself just, *i.e.*, if it took place without violating anyone's rights. Holdings justly arise by (1) original acquisition (of unheld things from the state of nature), (2) voluntary transfer, and (3) redistribution in rectification of violations of the rules that apply in (1) and (2). I will treat (2) and (3) in subsection 4 below, since these involve special relationships. Here I want to discuss, very briefly, how original acquisition might be justified, *i.e.*, how things might come to be justly acquired from the state of nature.

It should be noted, before beginning, that there is some question as to how crucial the problem of original acquisition is in the modern world.⁹¹ To be sure, it arises in the case of resource discovery and

⁸⁹ Notice that in beginning with claims that agents make about themselves, Gewirth appears to be side-stepping (obviating?) the free-will issue. Undoubtedly he will address this subject in his *Reason and Morality*.

⁹⁰ R. Nozick, *supra* note 11, at 149-53.

⁹¹ Regarding "the general economic importance of original appropriation," Nozick writes:

acquisition—a not insignificant issue—and in such areas as fishing rights or even sunken treasure findings. But in the contemporary economy most income, wealth, and holdings result from use of or labor upon things *already* held or from the transfer of such things by (2) above (or, increasingly, from redistribution based *not* upon past wrongs but upon “social goals”). Nevertheless, because these things retain a trace of the state of nature about them—a trace that is often exploited by critics of the free market—it is important at least to outline the subject. I regret that the brief discussion that follows will not dispose of the matter, but we have here a subject in need of much more attention than it has received to date.

Here again the idea of presumptions and burdens of proof enters. Recall that in our status quo no one acts in the beginning. But the question arises, by what right are these individuals *where* they are in this theoretical world? They are, *ex hypothesi*, standing at some spot on the earth. Why aren't they trespassing? The answer, I should argue, is that no one *else* has a prior claim to be where any *other* individual is. And indeed, if such a claim should be made, the burden would rest upon the *claimant* to make his case. For there being, *ex hypothesi*, no prior action, and hence no prior act of possession, the claim would appear to be gratuitous. Property arises, then, through some (complex) act of claiming, either explicit or, as in the case at hand, implicit—through occurrent holding in the absence of any prior claim. Thus the presumption rests with the occupant, since others can make out no case why it should be shifted to them.

This argument, then, is a blend of the negative and positive arguments set out above in support of self-ownership, for it combines the absence of any other claim with the presence of an (at least implicit) affirmative claim by the occupant. But the affirmative claim here is rather more problematic than the one above, for it is a claim not simply about oneself but about the world and one's dominion over the world, a claim to have a right not simply to own oneself but to *be* where one is and indeed to *own* where one is. Moreover, it raises

Perhaps this importance can be measured by the percentage of all income that is based upon untransformed raw materials and given resources (rather than upon human actions), mainly rental income representing the unimproved value of land, and the price of raw material *in situ*, and by the percentage of current wealth which represents such income in the past.

He goes on to cite David Friedman, *The Machinery of Freedom* xiv, xv (1973), who “suggests 5 percent of U.S. national income as an upper limit for the first two factors mentioned.” R. Nozick, *supra* note 11, at 177-78.

questions about the *boundaries* and the *limits* of the claim—two closely connected questions that arise *a fortiori* as our individuals start to act, to move out into the world and make further claims. Thus while the claims we make about owning our actions generate a title to those actions, the claims we make to the things *outside* us with which we “mix” our actions do not straightforwardly, at least, generate a title to those things. I allude, of course, to Locke’s idea that property rights in unowned objects originate when we mix our labor with those objects,⁹² when we work the land, pick the apple, catch the fish, mine the ore, and so forth. To be sure, Locke’s idea has an intuitive appeal; and indeed, it served, more or less, to justify original acquisition in America (setting aside the problem of the Indians). But enough embarrassing questions remain to suggest that more work on this subject remains to be done.⁹³

In the absence of a theory that will show precisely how it is that this “claiming” and “mixing” serve to generate property rights in unowned things, let me simply offer a consideration against the alternative, that no private property is possible. If indeed we have a right against interference, then how would we ever realize that right if everything were public? In such a realm we would all be thrown together, as it were; there would be no private places to go to escape interference—we would have a claim on everyone else and everyone else would have a claim on us. For interference, recall, is a taking, even if the property taken includes, as here, only one’s life and liberty. But we live our lives and perform our actions against some *material* background; we do not live *in vacuo*. If that background is not ours to control, if indeed others have as much right to it as we, then we could act only at the pleasure of others. For every claim to move could be cancelled simply by a counterclaim. And we could offer no plausible reply, for there would be no material condition of action over which we would hold any exclusive right. Indeed, we go out and acquire property *just because* it insures us that condition: it is our property that *enables* us to be free.⁹⁴

⁹² J. LOCKE, *supra* note 58, § 27.

⁹³ See R. NOZICK, *supra* note 11, at 174-75.

⁹⁴ Notice that this is precisely the reason there is decreasing freedom in the socialized countries and next to no freedom in the communist countries: the governments in these countries have taken the *material* conditions of freedom. In drawing the connection between freedom and its material conditions, which reflected the lot of much of the working class at the time he was writing, Marx was correct; so he and his followers proceeded to apply this insight to the whole of society!

In the text above I have put the issue starkly in order to draw out the fundamental point.

I want to proceed, then, by simply assuming that just as “*being* there first” seems to generate a property right in the status quo, so “*getting* there first” generates a similar right as individuals move out of the status quo. At the very least one could add that no one *else* has a *better* claim to what has been “staked out” than the person who has made the effort to do that; certainly those who have done nothing have no claim. Let us assume also that boundary problems will work themselves out with reference to economic considerations, economies of scale, and so forth. As our individuals move out of the status quo, then, property will arise, claims will be staked out, and the world will eventually get divided up—all of which can happen, in principle, without anyone’s rights being violated. Or can it? Are there limits to what an individual can claim (or to what he can claim in combination with others), after which any further claiming will violate the rights of others? (Antitrust theorists take note!)

The tradition, at this point, is to invoke some version of Locke’s proviso, that we can acquire provided there is “enough and as good left in common for others.”⁹⁵ Thus Nozick pursues, with some invention, “the crucial point,” which is “whether appropriation of an unowned object worsens the situation of others.”⁹⁶ For Locke, “‘tis very clear, that God, as King *David* says, Psal. CXV, xvi, *has given the Earth to the Children of Men*, given it to Mankind in common.”⁹⁷ The problem before Locke, then, is to show how *private* property arises out of this *common* property. For it would appear that all must give their consent before such acquisitions can occur. At the least, the proviso would seem justified in this setting in that it insures that the situation of others is not “worsened,” as Nozick puts it.

It is at this important juncture, I should argue, that the theory or rights must bite the bullet: the discomfoting conclusions must

In the ordinary world, of course, we get around the difficulty that arises from everyone’s having an equal right to control the public spaces by establishing rules of conduct for such spaces, which we determine according to some decision procedure. But this is a practical expedient only; *i.e.*, the conduct set by these rules cannot be seen as a direct manifestation of our individual wishes—as is possible in our own private spaces—but is rather a reflection, in our society, of majority opinion (*e.g.*, nude bathing prohibited in San Diego, California) or earlier-affirmed rules (*e.g.*, Nazi marching permitted in Skokie, Illinois). The *democratic* device, in short, gives us nothing like the liberty insured by the *private* device. See Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118-72 (1969).

⁹⁵ J. LOCKE, *supra* note 58, § 27.

⁹⁶ R. NOZICK, *supra* note 11, at 175.

⁹⁷ J. LOCKE, *supra* note 58, § 25.

be squarely faced, especially as they surround the so-called right to opportunity. To begin, the idea that God gave the earth to all in common, like the idea that we are God's possessions, is hardly self-evident. Absent arguments rich enough to compel assent to this proposition, the presumption about original ownership must be parsimonious, *viz.*, that in the beginning *no one* owns the earth—which of course is not the same as all owning in common. Original ownership arises, then, through the performance of complex *positive* acts of acquisition, as mentioned above; if these have not been performed, then the earth lies unowned, not unlike the fish in the ocean. But if the presumptions are now correct, then what is the moral basis for the Lockean proviso? What *right* of others do we violate when we acquire as much as he want? Nozick points to scarcity: "if the stock of unowned objects that might be improved [when our labor is mixed in] is limited, . . . an object's coming under one person's ownership changes the situation of all others."⁹⁸ True, but where are the *rights* in the matter? We can certainly understand that others have *interests* here; but where is the property *held* by others that is *taken* by this acquisition? Here Nozick argues that others are made worse off because they no longer are *at liberty*—have *the opportunity*—to acquire or use what once they could.⁹⁹ This argument has an intuitive appeal—indeed we see it in rich variation every day. But if the presumptions above are correct, as an argument from rights it will not withstand scrutiny. For it implies that there is a right to the *conditions* of opportunity, and this cannot be justified.

The status quo is especially helpful in drawing this point out. In this theoretical beginning individuals own themselves, their actions, and the area immediately around them (however bounded). At this point they all have an equal opportunity, provided the world is not yet "full," to go out and make claims over the world, or parts of it, through the complex process mentioned above, an opportunity to *try*, to *compete* in the business of acquisition. But that opportunity is not something individuals have *tout court*. They "have" it simply

⁹⁸ R. Nozick, *supra* note 11, at 175.

⁹⁹ *Id.* at 175-76. Nozick distinguishes two interpretations that the Lockean proviso might be given, one involving others being made worse off by their no longer having the opportunity to *appropriate*, another involving their being made worse off by their no longer having the opportunity to *use* (without appropriation) what previously they could. The discussion that follows, however, is less than clear. Use, after all, is just appropriation for a time; and those excluded are, during that time, every bit as much excluded as if the appropriation were permanent.

because at that point in time the world happens to be the way it is—unowned. Owing to that *condition*, their opportunity exists. The situation here is exactly parallel with the earlier cases on view and trade (except that there the conditions were held by others, not unowned). In none of these cases, that is, is the object which was putatively “taken” held outright but only because of conditions over which the “holder” has no rights (as yet). Now when individuals start to act, to go out into the world, to pursue their opportunities, to compete in the business of acquisition, this condition of nonownership, in a world of scarcity, may disappear—and so may the opportunities for which it was necessary. But nothing was *taken*, for nothing was *owned*. In short, no rights were violated in the process, for we do not have a right to the world’s being the way it is at any particular time in its history. It is irrelevant, then, whether the acquisitions were large or small, for in neither case can anyone show that he has a right that has been violated. Those who do not acquire simply lose “their” opportunities; they lose in the competition, and that is what I meant when I said that it is here that the theory of rights must bite the bullet.¹⁰⁰

It is customary at this point to observe that far from worsening the position of others, acquisition most often *improves* their opportunities. For the owner of the previously unowned object mixes his labor with it, builds a factory, creates jobs and products that heretofore did not exist, adds to the GNP, and so forth. (Thus multinational or giant corporations, by being more efficient, create more opportunities than would be the case were they to divest.) The arguments are familiar and, I should argue, persuasive. In particular, they help to mitigate the complaints of those who have lost in the competition. But strictly speaking they are irrelevant to the point at issue and indeed to the theory of rights. For they take us straightaway to the theory of value, which is a theory grounded not in reason but in the sentiments, in our wants and preferences, in the subjective side of our being. Many, in fact, will not be persuaded by arguments from improved opportunities. They prefer the “unimproved” state of nature to the cultivated, the bucolic to the

¹⁰⁰ Thus when equal opportunity does not arise accidentally (as here) or voluntarily, it is brought about only by taking from some and giving to others. Moreover, once this initial balance is upset—as it inevitably will be if individuals are allowed to express their differing tastes through acquisitive activities—the taking must begin all over again. With repeated applications, this equality of opportunity comes to the same thing as equality of results. See Flew, *The Procrustean Ideal: Libertarians v. Egalitarians*, ENCOUNTER, March 1978, 70, at 73-75.

industrialized, the simple to the complex, the slow-paced to the fast, to draw but a few of the contrasts. And in these disagreements there is, as Ayer correctly observed, no truth or falsity to the matter: they are simply expressions of preference. It is with reference to the theory of rights, then, not with reference to the "goods" we produce, that we must justify our acquisitive actions and disjustify the claims of those who would object. For in doing what we have a right to do we take nothing over which others can show they hold any rights.

The implications of these conclusions, of course, are far-reaching. We come into the world with rights against our parents (about which more below). But outside of these, and rights to our person and actions, we have no rights of recipience against the rest of the world, as brought out in subsection 2 above. Thus we do not have a right "to opportunity" insofar as this entails that others must provide us, through their positive actions, with the conditions of opportunity. Nor do we even have a right "to opportunity" insofar as this entails that others must *refrain* from acting in pursuit of *their* opportunities, the point just developed.¹⁰¹

Thus the theory of rights is strict. It does not appeal to the sentiments. It treats all equally. Some will go out and acquire; they will "improve" what they acquire, or they may "waste" it. Others will stay back, will lose "their" opportunities, and will become dependent upon the sympathies of the "successful." A world that starts out equal may end up very "unequal,"¹⁰² depending upon everything from the natural lottery of abilities, chance, and, perhaps in part, attitudes, to the choices individuals freely make, and the risks they take on or avoid. All of this the theory of rights—which is the theory of freedom—will allow. If we want to mitigate any of these results, then we must go outside the theory of moral rights to do so. To try to do this in the name of these rights is to risk undermining the clear, consistent, and rational picture of the moral world they describe, and the equal freedom they insure. I will have more to say on this issue in Part V.

4. *Special Relationships.*—Thus far our theoretical world con-

¹⁰¹ Clearly, then, the burden of responsibility that the theory of rights places upon those who beget children is considerable. Should it be any other way?

¹⁰² To say this may be misleading; for the "inequality" that arises from a world that starts out equal may simply reflect different preference schedules: the industrious may end up with greater material goods, but at the price of foregone pleasure or recreation. Egalitarians who concentrate on the distribution of material goods at any point in time usually ignore these trade-offs.

tains general relationships only, described by general rights and obligations. I have drawn these in broad terms—involving, at bottom, negative and positive actions—in order to try to bring out the logical structure of the theory of rights: however more specifically these rights, obligations, and actions may be described, as required by various contexts, they will always come under one of these broad categories of negative or positive action. In sum, then, in the world of general relationships we are obligated only to not interfere with others, as specified above; as a corollary, we have a right to do anything that does not interfere with others.

Now as individuals leave the status quo they will do more, of course, than make their property claims in the world: they will come in addition to associate with each other, either forcibly or voluntarily, and thus will special relationships arise. Forced associations include torts, crimes (by which I mean intentional torts), and contractual takings (*i. e.*, takings arising from duress, misrepresentation, and nonperformance). Voluntary associations include the many kinds of contractual relationships, gift giving, and child-begetting (which is a unilateral, quasi-contractual relationship between parents and child). With the exception of the complex special relationships that arise when enforcement becomes a problem—*i. e.*, when obligations are uncertain or are not performed voluntarily¹⁰³—this broad sketch exhausts the class of special relationships as these might arise in the state of nature; and since the class of moral relationships in the state of nature is exhausted by general and special relationships, we now have a complete outline of the moral world that obtains there, at least as this world is described by the theory of rights.¹⁰⁴

¹⁰³ The special relationships generated by the enforcement problem are too complex to treat here, involving as they do the rights and obligations that arise when there are uncertainties and disagreements over fact, law, ethics, and procedure, not to mention the morally uncertain role of the state in providing answers to these questions. (See note 51 *supra*.) Procedural rights have always had an unclear and difficult place in the theory of rights, and not surprisingly; for the epistemological issues that give rise to them are not easily resolved within the confines of the state of nature. (Nor are they easily resolved outside those confines; nevertheless, the forced association that is the state seems to be a necessary ingredient in whatever resolution we are able to give to them.) Cf. R. NOZICK, *supra* note 11, at 96-101.

¹⁰⁴ This outline is complete for our ordinary world as well, with the one exception of the relationship between the individual (or groups of individuals) and the state. Now it should be noticed that in the contemporary state the enforcement relationships excepted above are a sub-set of the individual-state relationship (I ignore anomalous cases of self-enforcement), this because the state claims a monopoly on the use of force. (Adjudication may be private, of course; but then it is a contractual relationship.) Indeed, in the night-watchman state of

Before taking up the justificatory foundations of these special relationships, let me say something more about their broad features, especially as the possibility of conflicting rights and obligations arises. As noted earlier,¹⁰⁵ a special relationship arises because someone *does* something to bring it about, *e.g.*, signs a contract, commits a crime, begets a child, and so forth. Whereas the parties to the relationship stood *generally* related before this event, they now stand *specially* related,¹⁰⁶ at least with respect to the terms of the special relationship. (Those general rights and obligations not reached by the terms remain intact.) Thus the rights and obligations that describe these relationships are "created." And they are limited to the parties to the relationship: If *A* and *B* enter into a relationship that benefits *C*, it is *A* and *B* who hold the special rights and obligations, not *C*.¹⁰⁷ Now in the process of creating these special relationships we may "alienate" some of our general rights and obligations, just as we take on special rights and obligations that heretofore did not exist. If *A* hits *B*, *A* alienates his general right to that amount of his property necessary to make *B* whole again; *B* now has a special right to that property, whereas before this event he had a general obligation not to take it, an obligation alienated by the event. Thus it is in virtue of this "creation" and "alienation"—two sides of the process that brings the special relationship about—that conflicts of rights are avoided: complementary rights and obligations are at once extinguished and brought into being.¹⁰⁸

classical liberal theory these enforcement relationships are the *only* components of the individual-state relationship. But however more numerous the components of this relationship may have become, my reason for setting it and the sub-set of enforcement relationships aside—my reason for not yet leaving the state of nature—is simply this: I want to continue the inquiry into just what rights and obligations there *are*, quite apart from the issues (and further rights and obligations) of enforcement. Whatever the mechanism of enforcement, that is, whether private (as in the state of nature) or public (as in our ordinary world), we will need to know what it is that is to be enforced. These rights and obligations are those that constitute the relationships outlined above.

¹⁰⁵ See note 70 *supra*.

¹⁰⁶ I am assuming here that we are starting from a world of general relationships only, something like our status quo. Individuals can of course take on new special relationships with those with whom they are already specially related; and they can add on special relationships with others as well—all of which can lead not to conflicting rights but to overcommitment. The *theory*, that is, can sort these "conflicting" rights and obligations out, even if for practical reasons the individual cannot satisfy all of his obligations; thus the theory may on occasion require compensation in lieu of specific performance, which is tantamount to recognizing the existence of the relationship and requiring that its obligations be met.

¹⁰⁷ See Hart, *supra* note 30, at 180-81.

¹⁰⁸ A little more should be said about the extremely complicated question of conflicting

It is against the background of general relationships, then, that we go about creating our various special relationships. Thus it is with reference to our general rights and obligations that the justification for these special rights and obligations must begin. Since voluntary associations are somewhat more complicated than forced associations, let me start with the latter, setting aside the special case of contractual takings until after I have discussed voluntary associations. Now as we have seen, each of us has a general right against being interfered with by others. When the correlative obligation is not met, however, we do not leave the situation as it is. Rather, there arises a new, a special obligation resting with the tortfeasor or criminal to make his victim whole again, correlative to which is a special right of the victim to the necessary restitution from the wrongdoer. (Notice that these rights and obligations rest with and against these *special* people, not with or against third parties, as when losses are socialized in order to compensate victims.) What I want to do, then, is indicate how it is that these special rights and obligations are justified and hence come into existence.

There are at least two approaches that will serve to justify this special relationship. The first involves a straightforward implication from the obligation to not interfere. What this obligation clearly entails is that the status quo of holdings not be forcibly disturbed. But we bring about that result either by not interfering in the first place, or, failing that, by returning what was taken when we did interfere. Only so will the status quo be either preserved or restored and hence the general obligation satisfied. Thus the special rights and obligations that arise between tortfeasors or criminals and their victims are simply entailments of the general rights and obligations of these parties; they have been brought into being by the acts of

rights and obligations. The theory of rights can resolve, with little difficulty, what often pass for conflicting-rights situations. Consider, for example, a common pro-abortion argument (and let us assume here that the fetus has rights), that the expectant mother's right to control her own body takes precedence over any right of the fetus. In this case, clearly, the question of precedence of rights should never even arise; for in begetting the child the mother alienated that right in the relevant respects. Hence, there is no conflict of rights to talk about. (For an interesting discussion of some of these issues see Swan, *Abortion on Maternal Demand: Paternal Support Liability Implications*, 9 VAL. U.L. REV. 243 (1975).) But there will remain cases in which the theory of rights will sort out conflicts in a principled way only by requiring what many might think heroic and even dubious means. Thus to require a rape victim to carry the baby to term, while imposing *all* costs upon the rapist, is tantamount to allowing the taking to continue; moreover, this "principled" solution is such only on the view that compensation does in fact satisfy unmet obligations, when of course it is only a practical expedient.

taking that infringed upon the general rights of the victims.

A second and somewhat richer approach appeals to the ideas of responsibility and equality of treatment. As we saw earlier, the PGC is a causal principle; in speaking of agents and recipients it implies that agents are the authors of their actions and are thus, in this sense at least, responsible for the changes those actions bring about in the world—agents *cause* their actions and hence those changes. (If agents were not thus responsible it would make no sense at all to address moral principles to them.) And indeed, nowhere do we see this sense of responsibility more readily acknowledged than when the changes are favorably viewed by their authors, when agents want to keep for themselves the desirable changes they have brought about, or at least those changes over which they can be said to hold a right:¹⁰⁹ with alacrity these agents claim authorship—and liability, which is a different sense of “responsibility.” They go on to claim, moreover, that if they are not allowed to keep those changes to which they have a right, then unequal treatment will be the result: those who have done nothing will end up having or at least sharing what has been created by and hence is owned by these agents. By parity of reasoning, however, the agent must also keep to himself the unfavorable changes he has brought about,¹¹⁰ at least insofar as these involve takings. And this includes not only those changes that have fallen directly upon the agent but those that have fallen upon others as well. For if the agent, in pursuit of his own ends, is allowed to take from others, then here too unequal treatment will be the result: those who have done nothing will end up suffering the upshots of action that properly “belong” to others. Thus the equality of treatment required by the PGC entails that agents rectify the wrongs they have caused: it entails, that is, the special rights and obligations of rectification.

It is irrelevant, then, whether the taking was intentional or acci-

¹⁰⁹ Here enter, *inter alia*, all the difficult questions of copyright, patent, and other forms of discovery retention. In general it is easier to keep agents tied to the destructive than to the constructive consequences of their actions. And not surprisingly, for the definition of property taken is often easier than that of property created, especially as the latter works its way into the market. See, e.g., L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

¹¹⁰ Notice that a consistent behavioral approach to these issues, which seeks to mitigate our traditional idea of responsibility, will attempt to socialize both benefits (through various redistribution schemes) and losses (through various social insurance or “no-fault” schemes), this because in neither case, on this view, can we be said to “own” the upshots of our actions. It is against a view such as this that Gewirth’s dialectically necessary approach, which starts with claims that agents make about themselves, is especially useful and insightful.

dental; or, if accidental, whether it was due to negligence or altogether unforeseen. Moreover, it is irrelevant that the taking reflects the "most efficient" use of resources.¹¹¹ (*Whose* resources?) That the agent acted as a "reasonable man," that he was prudent in taking cost considerations into account, is of no consequence to the victim, whose property has been taken all the same. With respect to considerations of equal rights, then, only a theory of strict civil liability is justified; the negligence standard, which allows losses to be shifted to the wrongdoer only if the action was "unreasonable" (whether by a moral or an economic criterion), simply ignores the *rights* of the victim, preferring instead the *interests* of the wrongdoer.¹¹² The *victim* is not the cause of his losses; it was the agent, in pursuit of his own ends, who brought them about, however innocently. Thus it is the victim who is to be preferred, subject to certain principled defenses, for he is the more innocent of the two.

Now of course there are many ways in which takings can occur and numerous defenses and subsequent pleas that will all be part of a well worked-out theory of civil and criminal liability.¹¹³ That task is quite beyond the scope of this Article. I do want to mention, however, that from the point of view of the victim there is no reason to treat intentional or criminal wrongs any differently than civil wrongs. There is no justification, that is, for leaving the victim uncompensated while the state imposes sanctions, or rehabilitation, or whatever upon the criminal. Criminal wrongs may very well call for punishment of the wrongdoer in addition to compensation of the victim by the wrongdoer; but they call at least for compensation if the general obligations not met are to be rectified.¹¹⁴

¹¹¹ This rationale is central, of course, to the economic analysis or *explanatory* approach to law, which is very different from the *justificatory* approach being taken here. See, e.g., Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). See generally, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

¹¹² For a recent history of the erosion of strict liability in favor of the negligence standard, this to facilitate the "social goal" of economic growth, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

¹¹³ For such a theory, as applied to the law of torts, see the following articles by Epstein, listed here chronologically: *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); *A Theory of Strict Liability*, *supra* note 77; *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); *Intentional Harms*, *supra* note 84. For a review of these essays, placing them against a larger philosophical background, see Pilon, *Richard A. Epstein: Rethinking Torts*, LAW & LIB., Winter 1976, at 1. For more specific applications see Epstein, *Products Liability: The Gathering Storm*, AEI REGULATION 15 (September/October (1977)), Pilon, *Justice and No-Fault Insurance*, *supra* note 67.

¹¹⁴ See Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977), where it is argued that restitution alone is sufficient by way of remedy for criminal wrongs.

Let me turn now to the special rights and obligations that describe voluntary associations, setting aside the special case of child-begetting. Here again the justificatory arguments begin with our general rights and obligations. Recall that the PGC implies that each of us has a general right to associate with others provided we do so with their consent. If *A* and *B* want to associate with each other and want to order that association by creating special rights and obligations between themselves, then they have a general right to do so, a right against third parties; these third parties have a correlative general obligation not to interfere with *A* and *B*, an obligation not to take or prevent those actions of *A* and *B* that will bring about this special relationship. In creating these special rights and obligations, after all, *A* and *B* are taking nothing that these third parties own;¹¹⁵ hence *A* and *B* have a perfect right to go about creating them.

This much justifies bringing these rights and obligations into being—as against the claims that might arise from third parties. But it does not justify the special rights and obligations themselves—as against the parties to the relationship. Here the argument is simply this: these rights and obligations are justified because they are voluntarily accepted and hence created by the parties to the relationship. They are justified, that is, because the respective individuals, in the exercise of—indeed, as an instance of—their right to be free, accept and hence cause their existence. Thus the argument from acceptance or consent is straightforward here, unlike in the case of general rights and obligations.

It is a matter of some discussion just what happens when this acceptance takes place, whether it is a pure act of will or, at the other end, a more material transfer of titles. In truth, contractual agreements, in all their variety, involve both of these elements, at least implicitly. The acceptance itself is clearly an act of will, whatever the signs to evidence it. But there must also be an *object* of acceptance. On this point, however, difficulties arise, for if the object of acceptance is nothing more than subjective expectations, as

But see Pilon, Criminal Remedies: Restitution, Punishment, or Both?, supra note 67, where it is argued that only a combination of restitution and punishment will rectify criminal wrongs. Cf. J. Locke, supra note 58, §§ 7-11.

¹¹⁵ Again, I am starting from a world of general relationships only. In the ordinary world, of course, there may be cases in which third parties have special rights against first or second parties that will have the effect of precluding these parties from entering into particular voluntary associations: if *A* has agreed to sell *x* to *C*, he cannot subsequently sell it to *B*, although in and of itself the agreement between *A* and *B* is unexceptionable.

one line of argument would have it,¹¹⁶ then all the arbitrariness we want to avoid can enter. And indeed, if the object of acceptance is in subsequent disagreement, then the original act of agreement itself is called into question.

In order to avoid these difficulties, then, we have to do what we did in the case of general relationships, *viz.*, look to the property foundations of the agreement. Not only will this give empirical and hence objective content to the interaction, but it will capture the transfer aspect of a contract as well. Expectations fit uncomfortably here at best; while it is true that we create expectations in others when we act, these can hardly be objects of transfer. (In truth, they describe only our views about what has in fact been transferred.) I suggest, therefore, that we treat each contractor as having transferred to the other the title to something he owns, some future act or course of action, some piece of tangible property. What each party accepts, then, is the exchange of titles between the parties, not the subjective expectations that this exchange may have created.

For the transfer to be morally legitimate, however, and hence for the rights and obligations that result from it to be justified, it is imperative that the acceptance that consummates it be voluntary. Thus the process must be free from duress, which occurs when one of the parties uses or threatens to use force in order to extract the agreement, thereby vitiating the act of acceptance itself. With duress we have two distinct takings: the use or threat of force in such a situation is an intentional taking; and the involuntary transfer of the object thus extracted amounts to a further taking. While it is possible, with care, to include "undue influence" under the concept of duress—for here it is arguable that consent is vitiated by the acts of one of the parties—it is *not* possible to include so-called "economic duress." That *A* was "compelled" by his own private necessity to enter into an agreement with *B* is no reason to set that agreement aside. (Necessity of one kind or another is what leads to *all* exchanges.) If *B* has a perfect right to make *no* offer—and of course he does—then he has a right to make the offer that *A* accepts. To be sure, *A* could accept *B*'s offer and then have it adjusted by the court on a finding of "substantive unconscionability"; but in

¹¹⁶ See, e.g., 3 R. POUND, JURISPRUDENCE § 88, at 162-63 (1959). These disagreements in contract theory often relate as much to questions of evidence or proof as to substantive questions about the nature of the contractual agreement. But these are distinct issues, and should be kept so, however closely related they may be.

that case we *would* have duress, for *A* would be using force—that of the state—to get a term he could not get in the marketplace: the state, in short, would underwrite a private taking!¹¹⁷

Voluntary associations may be vitiated by fraud as well as by duress. But the case against fraud—a complex issue I will only touch upon here—is rather more difficult to make out. Let us be clear first, however, about what fraud is. It is *not* the nondisclosure of facts, even where those facts, had they been known, would have precluded the agreement. As we saw earlier, there is no affirmative obligation to act and hence no obligation to speak. Thus there is no obligation to help strangers in making their market decisions. Suppose, for example, that *A* makes a handsome offer to *B* for a painting *B* owns, thinking wrongly that it is a Rembrandt. *B*, having given no representations at all about the painting, accepts, and the exchange is made. Here, one could say, the painting represented itself; and if *A* was so rash as to buy it on this representation alone, then we haven't a case of fraud before us but a simple case of bad judgment. It is at his own risk that *A* makes an offer to *B* for something, *B* having made no representations about the thing.¹¹⁸

If in the process of negotiations, however, *B* does make representations, and he misrepresents the object under consideration, then the issue of fraud arises.¹¹⁹ Yet even here it is by no means clear just what rights and obligations are at issue. While *B* misrepresents the object he wants to exchange, he does not *compel* *A* to accept that object or those representations. *A* may walk away from the offer, or he may check the representations out for himself; thus it is difficult

¹¹⁷ This is precisely what happens, of course, when the court sets aside or adjusts private agreements on grounds of substantive unconscionability, which is very different from the procedural unconscionability being sketched above. For an excellent discussion, see Epstein, *supra* note 18.

Notice too that the necessity that “compels” *A* to the agreement may be brought about even by the actions of *B*, provided *B* has an independent right to perform those actions. Again, the theory of rights is strict; it does not look to the motives behind an action in order to determine whether it may or may not be performed.

¹¹⁸ It should be noted—prudent business practices aside—that the gathering and giving of information is itself not without costs. Just as in the broader case of action, then, the theory of rights does not require one individual to expend himself upon another—though of course he may do so if he chooses. Needless to say, the modern trend toward “full disclosure”—whatever that could possibly mean—is very much at odds with the strictures set by the theory of rights. See, e.g., Landers, *Some Reflections on Truth in Lending*, 1977 U. ILL. L. F. 669.

¹¹⁹ On the related cases of partial disclosure, concealment, and innocent misrepresentation see Epstein, *supra* note 18, at 298-99.

to determine just what is *taken* by *B* when *A* accepts the offer.¹²⁰

It is customary at this point to say that misrepresentation vitiates a contractual agreement because there is in fact no agreement when it is present—there is no “meeting of the minds.”¹²¹ *A* and *B* exchange titles on the basis of their respective representations; had *B*'s representations been accurate, however, *A* would not have accepted (at least to just those terms). Thus the consent that brings about the exchange is spurious. What *B* *takes*, therefore, is the object *A* hands over in exchange, *A* not having given the appropriate consent.

Intuitive as this argument may appear—and perhaps it will suffice in a certain range of cases—it is less than satisfactory. In the first place, *A* and *B* *do* reach an agreement, but that agreement does not cover the transaction that is in fact performed by *B* (I will develop this point below). Moreover, the argument appeals to counterfactual conditionals, which may or may not be true (had the representations been accurate *A* might very well have consented to the identical terms). Finally, the argument does not really draw out the element of compulsion that is there to be drawn out. In order to do that, however, we will have to place a somewhat different interpretation on “misrepresentation” than is ordinarily provided, but one that more satisfactorily brings out the element of fraud involved. In brief, I suggest we treat misrepresentation not simply as a failure to accurately represent the object exchanged, as a narrow

¹²⁰ Surely nothing is taken if *A* does *not* accept, unlike in the case of duress; there the use or threat of force is itself a taking, quite apart from whether it compels acceptance.

Notice that these questions arise in ordinary truth-telling cases as well, not excluding those involving news reporting. It is easy to say, of course, that we have an obligation to tell the truth. But that claim has to be fit within the larger generic framework developed earlier. As we have seen, there is no moral obligation to speak. But even if we do speak it is doubtful that there is any moral obligation to tell the truth, unless it can be shown, along lines developed earlier, that telling falsehoods *takes* something that others own. Moreover, it must be shown precisely how it is that this taking occurs, which is just the problem above. If that were able to be shown in some far-reaching way, then it would seem that our First Amendment speech and press (and religion?) guarantees would have to be justified not with reference to the theory of rights but on consequentialist grounds—say, that in the long run these liberties work for the best. This would be a less than happy result! (J.S. Mill invoked just such consequentialist grounds in his defense of freedom of expression. See J. MILL, *ON LIBERTY*, Ch. II. (1858), reprinted in 43 *GREAT BOOKS OF THE WESTERN WORLD* (R. Hutchins ed. 1952).)

¹²¹ Notice that this cannot be said of the nondisclosure example above. To be sure, at one level there was no meeting of minds: the painting *A* thought he was getting was not the painting *B* thought he was giving. But at the level of description consistent with the example there was a meeting: for *A* offered to buy simply “that painting,” which is precisely what *B* gave him.

interpretation of the idea would have it, but as a withholding of the object in fact represented.

Notice first that in the example before us consent *is* given, but again, not to the transaction that is in fact performed by *B*. *A* and *B* have made an agreement, that is; they have agreed to an exchange of titles. Now a title just is a representation: it relates an owner to the object owned through a representation of that object. Thus when *A* accepts the title to something owned by *B* he accepts both the title and, in time at least, the object that stands behind the title. (He need not accept immediate *receipt* of the object, of course, though he does accept immediate *ownership* of it.) If what he receives, however, is something other than the object the title represents, then either *B*'s transaction is not yet complete or *B* has defrauded him. The compulsion, then, arises from *B*'s retention of the object represented by the transferred title (assuming there is such an object), *i.e.*, from his failure to hand over the object to which *A* now holds the title: *B*, in effect, is taking that object, and thus *A*'s right to the object he now owns is violated. We need look to no mental elements, then, but only to the representations given and accepted—the titles exchanged—and compare these with the objects exchanged. If one of the objects does not match the representations, then either it is being withheld or it does not exist; but in either case the agreement has not been satisfied. In short, in his misrepresentations *B* has in fact represented something, the title to which has been accepted by *A*; *B* now has the obligation to transfer the object represented by or standing behind the title.¹²²

It should be noticed, then, that this interpretation of fraud locates the defect not so much in the process of contract *formation* as in the failure of contract *completion*. Still, the defect is in procedure, not in substance. The contract may be set aside, that is, not because of any finding relating to the "fairness" of the terms—the "substantive unconscionability" mentioned above—but because as a procedural matter its terms have not been satisfied. It is a very different thing to set a contract aside because its *terms* are found unsatisfactory by

¹²² Admittedly, this interpretation of fraud has more the flavor of nonperformance than misrepresentation; accordingly, it works better for those cases in which we want to require specific performance—however broadly understood—than for cases in which prior to the transfer of titles, *B* holds no title to be transferred. A full discussion of these issues would take us into problems of contract formation, evidence, and so forth, all of which are beyond my present scope. My aim has been simply to indicate how it is that fraud may result in a taking and hence in a violation of rights.

the court. When it does that the court is making substantive or value judgments, designed to supersede those that have already been reached by the parties to the agreement.

Now I have said little on this point because in truth it is a point about which the theory of rights has little to say—other than that the court has no moral right to intercede on behalf of one of the parties to obtain for him a term that he could not obtain voluntarily from the other party. If equal rights means anything it means that individuals—regardless of their respective “bargaining power”—shall be equally free from interference to reach whatever agreements they can with each other in the marketplace. This they presumably will do with reference to whatever theory or conception of value they bring with them into the marketplace. Thus the question of whether a particular term (*e.g.*, a price) is fair is for them and them alone to decide. Likewise, given that we are dealing with competent adults, whether a particular exchange is in the best interests of the parties to the exchange is for those parties alone to decide. It is basic to our conception of human dignity that we let individuals decide these questions of value for themselves, that we do not force them (*e.g.*, through the courts) to accept values they did not choose—whether they be poor and weak, or rich and powerful.

In the adjudication of forced exchanges, however, the theory of rights must eventually turn to the theory of value. Once a determination of responsibility and entitlement has been reached, that is, considerations of value will have to be introduced in order to redress particular wrongs. This applies not only to torts and crimes but to most contractual takings as well, including nonperformance. And of course it applies also to the special case of parent-child disputes.¹²³

¹²³ Very briefly, the argument that justifies the obligations of parents to their children borrows from both the tort/crime and the contract models. In performing acts of procreation, just as in performing any other action, the parents are responsible for the consequences should those acts create rights in others (the defense of ignorance will no more avail here than in any other tort case). We are responsible, that is, for the upshots of the actions we voluntarily perform. Of course, in many cases of begetting—one would hope in most—the consequences are not only voluntarily but intentionally brought about as well. Thus the contractual model is more appropriate here. But whether children are willingly or only reluctantly brought into being, the special rights they hold against those responsible for creating them are every bit as real as the special rights of tort victims or contractors. The difficulty here, however, is that there is no status quo, as in the tort case, or no agreed upon terms, as in the contract case, to aid in delineating the content of these rights. As a result, such ideas as “custom” or “community standards” enter, with all their attendant problems, not only of verification but of justification as well.

For in each of these cases the consent that ordinarily brings individuals together in the first place and then enables them to distribute values between themselves is missing. If *A* has hit *B* they are already in association; *B* has a right to be returned to the status quo, but just what that entails, beyond a certain level of description,¹²⁴ is a matter of values, not of rights. To be sure, *A* and *B* might agree about the value of, say, a life or a limb; but if they do not they cannot now simply walk away as if they had been unable to reach an agreement in the marketplace. Here enter the arguments for forced adjudication by third parties—including that performed by government.¹²⁵ This is not the place to develop those arguments. I mean simply to point out one additional and very important area in which the theory of rights and the theory of value come together.¹²⁶ In doing so, however, I want also to indicate just how far reason can go toward resolving moral issues, before we have at least to introduce consideration of value.

This completes, then, the outline of our moral rights and obligations. I have sketched arguments to show that there are such rights; and I have indicated broadly what there are and are not rights to. Again, the reader is encouraged to turn to the cited works for a more complete account of both the justificatory foundations and the details of application. What I want to do now is apply these findings to the corporate issues set forth in Part II. In order to do that, however, it will be useful to add a government to the moral picture thus far developed. In keeping with the classical liberal tradition—and hence with the American tradition—let us allow that the function of that government—its only function—is to secure the rights outlined above.¹²⁷ Thus it will be a government that has the

¹²⁴ For an indication of how far the formal analysis can be pushed, before values have to be brought in, see Pilon, *supra* note 67.

¹²⁵ Anarchists sometimes argue that all of this might be worked out by contract and hence voluntarily, thereby avoiding the need for government. Individuals might, for example, make contractual arrangements for adjudication services *before* they have any forced exchanges. But of course—arguments from prudence aside, for they are not really moral arguments—the purchase of such services may itself have to be forced.

¹²⁶ Recall that public law may have to be introduced to resolve the problems that arise from acts of endangerment and nuisance; in developing “public” or “common” standards of endangerment and nuisance, value considerations will likely be necessary. See note 87 *supra*.

¹²⁷ Thus the enforcement of rights—against domestic and foreign threats—will be the only “service” provided by this government. For lengthy discussions about this service, including the problems of financing it, see R. Nozick, *supra* note 11, pt. I, at 3-146. Notice that such services as fire protection, garbage collection, education, insurance provision, recreation facilities, and even highways and central banking do not arise because of right violations; thus

authority to coerce individuals only when those individuals have violated the rights of others or are threatening to do so. It is difficult enough to justify even this amount of government. A more extensive government most certainly cannot be justified.¹²⁸

IV. CORPORATIONS AND RIGHTS

A. *The Legitimacy of the Corporation*

We are now in a position to take up the fundamental questions raised at the end of Part II about the legitimacy of the corporate birth. Recall that on this issue turns both the legitimacy of the corporation itself—its right to exist—and the further question whether it is a private or a public institution. For if justice is historical, then whether the corporation is legitimate depends upon how it came about; and whether it is private or public depends upon the role of the state in that process. But that process is one of individual actions. Are these legitimate? Do they need to be “authorized”? Or are they performed by right? Answers to these questions have now been adumbrated; in order to develop them more fully, however, we need to be clear about what it is these actions are bringing about. We need to know more precisely, that is, just what the corporation is. Let us try first, then, to clarify this complex subject.

1. *Classifying and Justifying Associations.*—In exercising their rights of voluntary association and organization it is likely that individuals, given the inclination and the liberty to invent, will create as many different kinds or forms of association as necessity, desire, and human imagination will allow—marriages, clubs, partnerships, corporations, to mention only a few. But what constitutes a particular form of association is a matter of linguistic or social or legal convention, not a matter of reason. We can use concepts like

they might more legitimately—and efficiently—be provided by private mechanisms, just like most other services. On the private provision of fire protection in Scottsdale, Arizona see Poole, *Fighting Fires For Profit*, REASON, May 1976, at 6.

¹²⁸ Assuming that this minimal state can be justified (*but see* note 51 *supra*), and that its function is limited to the securing of rights, this still leaves immense questions about what means may be employed in pursuit of that end. I have in mind not only the procedural or enforcement issues noted earlier (note 103 *supra*), but the considerable regulatory powers the state might take on in the name of securing rights. If these difficult questions arise even in the case of the minimal state, however, which is called upon to enforce what many would call the parsimonious theory of rights set forth above (there are none of our contemporary welfare or social and economic rights), they will arise *a fortiori* as the state takes on more functions, or as more rights are “found” to be enforced. It is thus no accident that the more the moral, legal, and political world is expanded, the more uncertain and hence unstable it becomes.

“marriage” or “corporation” to order the associations that have come about; but there is nothing necessary or immutable about either these concepts or those associations—they are not “bound up in reason,” reflecting “natural” or “essential” features of the world. We might use the concept “marriage,” for example, to connote a certain kind of association between two people of the opposite sex; but we could as easily expand the definiens to include polygamous, polyandrous, or homosexual associations under the definiendum. As a matter of rights, in fact, those who want to create these alternative “marriages” have a perfect moral right to do so.¹²⁹ The most we can say is that this is not what *we* mean by “marriage”; and of course we could go on to disapprove of these associations by appealing to some theory of value. But neither linguistic nor social nor legal convention can tell us anything about what forms of association might arise or what forms would be morally legitimate if they did arise.¹³⁰

It is important, then, to distinguish these taxonomic issues, which are rooted in convention, from the justificatory issues that centrally concern us, which are rooted in reason. How we choose to classify the associations that arise, and how we use the terms of classification, are questions altogether separate from the question whether the associations that do come into being are legitimate—whether they have a right to exist. Just as in the case of marriage, then, what a corporation is is a matter of convention: this institution may vary in its features, and of course historically it has.¹³¹ It is the current custom, for example, to say that a corporation is defined (1) by its entity status¹³²—it exists and acts apart or separate from

¹²⁹ Compare Mr. Justice Douglas: “Polygamous practices ‘have long been branded as immoral in the law They have been outlawed in our society.’ They have been called by the Court ‘contrary to the spirit of Christianity and of the civilization which Christianity has produced in the modern world.’”; with Mr. Justice Murphy: “[The form of marriage before the Court was] ‘basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears.’” *Cleveland v. United States*, 329 U.S. 14, 26 (1946) (Murphy, J., dissenting). Cited and discussed in E. LEVI, AN INTRODUCTION TO LEGAL REASONING 52-53 (1949). On variations in the marriage contract see Gillers, *Making Marriage Perfectly Clear*, JURIS DOCTOR, March 1972, at 56.

¹³⁰ Cf. note 10 *supra*.

¹³¹ See, e.g., Mason, *Corporation*, 3 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 396, 396-97 (D. Sills ed. 1968): In defining the corporation “[t]he law is prone to emphasize [certain formal attributes which] tend to compress the corporation as a historical and developing institution into too narrow a mold; . . . the corporation is an evolving entity, and the end of its evolution is by no means in sight.”

¹³² But see *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. 110, 220 N.Y. Supp. 532, 543 (1927): “[A] corporation is more nearly a method than a thing.”

its individual members or owners; (b) by its continuous succession or immortality vis-à-vis its members, with free transferability of investment shares; (3) by its having been "created" by law, either through a special charter of the legislature or, more commonly today, a general permissive statute; (4) by its power to act under a common name—to accept, hold, and convey property, to make and take contracts, to sue and be sued; (5) by the limited liability of shareholders to the amount of their investment; and (6) by the location of authority with a board of directors who in turn delegate authority to corporate managers (a feature less common to the small, closely held corporation). In differing ways these features have come to distinguish the corporation from other forms of association and in particular from other forms of business organization—sole proprietorships, partnerships (general or limited), business trusts, and joint stock associations.¹³³ But again, whether each of these features is necessary for some particular association to be a corporation is a contingent and less than settled matter¹³⁴—and is irrelevant to the question whether that association is legitimate. What we need to know, then, is whether individuals can legitimately bring about an association with features such as these, and in particular, whether they can do so without the aid of the state. If they can then both the legitimacy and the privacy of this "corporate association" will have been secured, the particular histories of actual corporations notwithstanding. Thus it is the theoretical issue that I want to try to clarify here, not the historical question.¹³⁵ Whatever the actual history of the matter, that is, I want to

¹³³ See 18 C.J.S., *Corporations*, §§ 9-13 (1939); H. SOWARDS, *supra* note 47, § 1.01. Note that the Internal Revenue Service excludes items (3) and (4) above from their test of whether an "association" is taxable as a corporation. See Treas. Reg. § 301.7701-2(a)(1)(1960).

¹³⁴ 18 C.J.S. *Corporations* § 12 (1939);

The difference between a corporation and a joint-stock company is more in degree than in kind, and in many cases almost the full measure of corporate attributes has by legislative enactments been bestowed on joint-stock associations, until the difference has become obscure, elusive, and difficult to describe.

¹³⁵ As an historical matter, it seems that corporations were indeed here before governments "created" them. See, e.g., Berle, *Historical Inheritance of American Corporations*, in *SOCIAL MEANING OF LEGAL CONCEPTS* 189, 192 (E. Cahn ed. 1950):

It is a matter of dispute between British scholars whether the British Crown created corporations or found and assumed the control of preexisting collectivities. Most students incline to the latter view, and seem supported by the balance of evidence. Certainly there are in England corporations appearing to originate before the King put seal to charter giving them legal recognition.

Berle is using "corporation" broadly here to include, for example, the University of Oxford, whereas my concern in this essay, as stated at the outset, is with the modern business

show that the corporation *can* legitimately arise and rightfully exist, without the participation or even the sanction of the state.¹³⁶

2. *The Corporate Birth*.—Clearly, it is through complex contractual arrangements that the corporation will arise. The right to associate with others and to organize that association contractually—provided no rights are violated in the process—has already been established. What we need to do now is flesh these rights out with reference to the corporate features listed above.

Feature (3), that the corporation is created by law, must be set aside, of course, for that is a central point at issue. Let us start then with feature (6), relating to the delegation of authority, for this is a relatively uncomplicated matter. Suppose that *A* and *B* want to place a two-dollar minimum bet on a horse, but they have only one dollar each. Surely they have a perfect right to pool their resources in order to be able to make that minimum bet. Moreover, *A* has a right to grant *B* the sole authority to decide which horse to place the bet on; he might even agree, in deference to *B*'s greater "horse

corporation. Yet even this institution, or at least its close precursor, the joint stock association, predated government sanction. See, e.g., the statement of Manne in *Hearings Before the Senate Commerce Committee on Corporate Rights and Responsibilities*, 94th Cong., 2nd sess., 235-36 (1976):

It has been pointed out that there is literally no aspect of "corporateness," with the possible exceptions of suing and being sued in a corporate name, that could not be achieved through private contract rather than through the provisions of general incorporation laws. Indeed, English entrepreneurs, during the greatest period of industrial growth known in the history of the world, managed the organization of large business enterprises with little or no involvement by the state through the use of a business form known as the joint stock association. This form, which was the eighteenth and early nineteenth century English version of the modern American corporation, was constructed almost exclusively from the common law concepts of trust and private contract.

See also Hessen, *supra* note 1, at 7; H. SOWARDS, *supra* note 47, § 1.01.

¹³⁶ Thus Berle continues: "What is clear, and important, is the preoccupation of the English King-state to bring these [corporations] under its own control, and to propagate the doctrine that they could exist only by state creation." Berle, *supra* note 135. It is this authoritarian doctrine, resurrected by the Nader group (though assumed by many others), that I want to explode, not by appealing to the history of the matter but by bringing out the theory of the matter. For although the historians may be correct in claiming that the corporation predated state approval, this institution might still have been illegitimate if the process necessary to its creation was itself illegitimate, if rights were necessarily violated in bringing it about.

Before beginning, an ambiguity in "creature of law" should be clarified. Insofar as a corporation is a creature of contract, as I will argue, it can be construed as a creature of *private* law (assuming that some state would recognize that contract and enforce its provisions). But this is *not* to say that it is a creature of the *state*, i.e., that the corporation is *created* by the state, which is ordinarily what is meant when it is said that the corporation is a "creature of law." It is this ordinary (stronger) claim that I mean to dispel.

sense," to take a smaller share of the proceeds should the investment work out. There is nothing, in short, about this pooling of resources, this delegation of authority over the resources, or this arrangement for subsequent redistribution of the resources thus ventured that takes anything from any third party or from either of the parties to the association. To be sure, the atom of ownership and control has been split here, as Berle would put it. But who is to complain? Certainly not the parties to the arrangement. On the contrary, they would have grounds for complaint only if they were *prevented* from making whatever arrangement they thought best in their circumstances. For to own property, as we saw earlier, is to own all the uses that go with that property—to have the right to control it. But surely one manifestation of control is the delegation of subsequent control. If an individual has the right to alienate his property altogether, he certainly has the right to alienate control of it in whatever more limited respects he chooses. In short, this complaint about the separation of ownership and control, at least as it involves the parties to the relationship, is simply without foundation from a moral point of view; for far from anyone's forcing *A* to delegate authority to *B*, no one has a right to *prevent A* from doing so.

Now this simple example of delegation is no different in principle, of course, than the more complex forms that concern us here. When individuals pool their resources through voting and nonvoting common shares, preferred shares, bonds, future options, and so forth, they are simply entering into agreements to distribute among themselves varying combinations of risk and control with respect to those pooled resources. In doing so they violate no rights of each other, for no one is forced to enter into the agreement; if some elect to accept nonvoting shares, for example, we must assume that this is simply a manifestation of their particular preferences—indeed, most corporate investors do not *want* to be actively involved in the management of their corporation, a point the proponents of "shareholder democracy" altogether ignore.¹³⁷ But neither do these investors violate the rights of third parties when they alienate control over their property or take on control over the property of others. For the general obligations that go with property are functions simply of the control of that property; insofar as that control has been transferred, so also have the obligations—they have not, that is, disappeared.

¹³⁷ See Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

(This subject will be developed a bit more when I take up the limited liability question.) By a simple contractual agreement, then, we can legitimately delegate control over our property. We need no authorization; we do it by right, as an entailment of our general rights to use our property as we wish and to enter into contractual relationships with others.

We need now, however, to bring in other of the features listed above; for this act of delegation alone, of course, as in the case of *A* and *B* above, will not create a corporation. Nevertheless, the germ of the idea behind the corporation is already here; for when individuals come together to pool their resources in some joint venture¹³⁸—however broadly defined—and entrust the control of those resources either to a few among them or to some third party, they are taking the first steps toward creating a corporation. They can go on to divide those pooled assets into different kinds of shares, as suggested above. And they can make these shares transferable, feature (2), thereby giving continuous succession to the association. There is nothing exceptional about this step: for even though subsequent investors are not party to the original agreement, they become party to it through their acceptance of these shares, all of which, including the transfer itself, is legitimate if provided for in that original agreement. Again, these individuals can give to their association a common name under which it might “act,” feature (4), setting aside for the moment the questions that arise about the nature and scope of these various acts. And each of these steps is legitimate, for each is performed by right: the features are brought about contractually, in violation of the rights of no one.

There remain, then, features (1) and (5), entity status and limited liability, along with further specifications about the acts of the association. The idea that the corporation is an entity that exists and acts apart or separate from its individual members¹³⁹—which of course is the heart of the issue before us—has long perplexed legal theorists.¹⁴⁰ To be sure, the courts have “pierced the corporate veil”

¹³⁸ I am using “venture” here more broadly than it is ordinarily used in legal contexts, where it denotes a single transaction or project, usually of short duration. These lines, of course, are vague.

¹³⁹ For clear statements of the point see 18 C.J.S., *Corporations* §§ 1, 3, 4, 10, 11, 13 (1939); cf. note 132 *supra*.

¹⁴⁰ See, e.g., Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947), where it is argued that “the entity commonly known as ‘corporate entity’ takes its being from the reality of the underlying enterprise.” Cf. Conard, *supra* note 33, ch. 10.

when they have had to;¹⁴¹ they have "reached inside" when individuals have attempted to hide behind the corporate entity,¹⁴² thereby implicitly calling into question the existence of this *persona ficta*. At the same time, they have allowed and indeed encouraged this fiction in order, as Chief Justice Marshall put it, to "enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand."¹⁴³ The suggestion here, clearly, is that the corporation-as-entity is a *practical* construct, reified for purposes of convenience only. Much as this view may offend those who would seem to want to vivify the corporation in order better to crucify it, I submit that Justice Marshall's interpretation on the point is essentially correct.¹⁴⁴ We treat the corporation as an entity merely because it helps us to deal with this complex association.¹⁴⁵ In deference to Ockham's razor, it would be a mistake to read more into the entity status than this. When the corporation "acts," after all, it is not really some *persona ficta* that is acting. Only real human beings ever act. What these particular people do, of course, is act "on behalf of" or "in the name of" the corporate association. In so doing it may be that they give a certain "being" to the corporation. But could not the same be said for those who act "on behalf of" a joint stock association, a business trust, or a partnership? Is the corporation any more an entity than these? And when the corporation "holds property" it is but a simple next step to ask, Who holds the corporation?

Now it may be objected that this interpretation, which treats

¹⁴¹ See 18 C.J.S., *Corporations* § 6 (1939); H. SOWARDS, *supra* note 47, § 5.01.

¹⁴² The courts have also reconstructed the corporate entity, when the paper "corporate-entity" has been found not to correspond with the "enterprise-fact." See Berle, *supra* note 140, at 348-50. In doing so, however, the courts in effect are rewriting corporate agreements according to their interpretation of the "enterprise-fact," which Berle generally approves, but which raises questions not unlike those that arise in the more ordinary "substantive unconscionability" cases.

¹⁴³ *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

¹⁴⁴ But the practical reasons that lead to the reification of the corporation do not necessarily entail that the corporation is "the mere creation of law," a conclusion that Justice Marshall also put forth in that opinion (see note 45 *supra*). Here we have to distinguish between the public corporation (e.g., TVA), which *is* created by law, and the private corporation (or so I want to show) that is the subject of this essay, a distinction that Nader and others want to conflate. See note 47 *supra*.

¹⁴⁵ "Courts have long recognized that, despite its long history of entity, a corporation is at bottom but an association of individuals united for a common purpose and permitted by law to use a common name." Berle, *supra* note 140, at 352. I will shortly call into question the justification for this permissive (and hence, by implication, prohibitive) function of the state.

these different "entities" equally as practical constructs, ignores the fact that it is precisely to distinguish the corporation from the others that the state gives it separate entity status. This objection begs the very question at issue, of course. Moreover, it suggests that the state has certain powers and rights that individuals do not first have. Where did these come from? Recall that the legitimate state has only those rights that individuals first had and then gave up to it.¹⁴⁶ If individuals cannot legitimately create a corporation, then how can the state do it? Conversely, if individuals can create a corporation, then the state can do so only if individuals have given it that authority, which is a further point the proponents of state creation have to demonstrate.

But it will help in getting to the bottom of these entity and creation questions if we look at what the state does when it "creates" a corporation; this will enable us to determine whether a similar act cannot be performed by individuals in their private capacities. In his case book on corporations Hugh L. Sowards points out that under general incorporation laws

subscribers execute an agreement regarding the organization of the proposed corporation ("articles of incorporation"). These articles are then sent to the office of the secretary of state for approval, and, upon approval and payment of certain filing fees and taxes, the subscribers receive a "certificate of incorporation." In the literal sense, no "charter" is now issued to a business corporation under the general incorporation laws.¹⁴⁷

Clearly, when the state "creates" a corporation it does nothing more in fact than *recognize* it (as having satisfied certain rules of formation). The corporation itself, that is, has already been created by the private parties who constitute it, through their contractual agreement, their articles of incorporation. Now it is true that the registering of these articles—so often taken to be the corporate creation

¹⁴⁶ See note 52 and the accompanying text *supra*.

¹⁴⁷ H. SOWARDS, *supra* note 47, § 1.02. See also Hessen, *supra* note 1, at 7:

The articles of incorporation (or charter) are a contract solely between the individual founders; the state is not a party to it. The articles contain purely factual information, such as the name and purpose of the business, its intended duration, the number of shares to be issued, and so on. The state does not give life or birth to the corporation. Just as the Registrar of Deeds records every sale of land, and the County Clerk records the birth of every baby, so the Commissioner of Corporations records the formation of every corporation—nothing more.

Cf. R. NADER, *supra* note 25, at 62-63 (quoted at pages 1260-61 of the text).

itself—is necessary for the *legal* legitimacy of the corporation, at least in the present legal context. (I will consider the possible justification for this in a moment.) But that legitimacy should not be confused either with the *moral* legitimacy of the corporation or with its creation. For again, its moral legitimacy depends only upon its having come about by a process that violates no rights; it does not depend upon any “authorization.” Through the recognition or acceptance inherent in the corporate agreement—no different in principle than the acceptance that justifies and brings into being any other contractual relationship—the corporation is morally justified and thus is created. The legal legitimacy that the state adds by its public recognition has nothing to do, then, with the actual creation of the corporation.¹⁴⁸ In sum, the corporation, understood as an entity only in the sense in which any other contractual association may be so understood, can be brought into being by private individuals alone, without the aid of the state. Far from being a “creature of the state,” it is a creature of private contract,¹⁴⁹ and as such is a morally legitimate institution.

But if the corporation is a morally legitimate private institution, then what is the justification for the state’s requirement that it be registered and approved? Registration raises disturbing questions, not unlike those that arise in the case of occupational or other licensure:¹⁵⁰ the power to authorize, after all, is the power to prohibit or otherwise control. (Note the use of internal passports in the Soviet Union.) And indeed, if legal powers such as this receive their justification only by first being the moral rights of individuals, then the existence of this power would seem to suggest that third parties in the state of nature have the right to prevent the corporation from existing until they have first approved of it or authorized it. As we saw in Part III, no such right exists; neither the size nor the form of the corporation will generate such a right. The corporation per se does not endanger, for example. What then will serve to justify this

¹⁴⁸ Indeed, what does the doctrine of “de facto” corporation entail if not that individuals can create a corporation independently of state action. For the court is implicitly saying this when it recognizes an ongoing enterprise that has not been legally incorporated as a corporation in fact. See Berle, *supra* note 140, at 345-47.

¹⁴⁹ Notice that the privacy of the corporation has nothing to do with the breadth of ownership. The point is logical: if everyone in America owned a share of General Motors stock, or worked for General Motors, or drove a General Motors car, the General Motors Corporation would still be a private, not a “quasi-public” institution. Cf. note 45 *supra*.

¹⁵⁰ See, e.g., M. FRIEDMAN, CAPITALISM & FREEDOM ch. IX, at 149-60 (1962), where licensure of the medical profession, a seemingly sacrosanct state function, is thoroughly criticized.

power? Perhaps it is related to the state's enforcement function; the state registers automobiles, for instance, and records the births of babies. But why single corporations and a few other associations out? Why not register partnerships, say, or sole proprietorships? (I set aside local licensing requirements.) The historical explanation—that his power is a carryover from the period when corporations were created by special charter—is of course an explanation only, not a justification. Maybe the state requires registration in order to insure that its rules of corporate formation have been satisfied. But again, this could be said about any contractual formation. I submit, in short, that this registering and authorizing function of the state is of dubious moral legitimacy. At the least, those who would argue for it have the burden of showing that it is justified. Here again, there may be *reasons* for requiring that corporations be registered, but the *justification* for this requirement must be couched in terms of rights.

Now this conclusion is all the more interesting in that registration—"federal chartering" in particular—is the foundation of the recent manifesto of the Nader group. They would impose their sweeping new regulations on the corporation, that is, through a requirement that the seven hundred or so largest American corporations be "chartered" by the federal government. The assumption here, clearly, is that the state has a legitimate right to exercise some exclusive franchising power, that freedom of economic association, of which the corporation is but one manifestation, is a privilege granted by government.¹⁵¹ In return for receipt of this privilege, Nader's regulations would be imposed—otherwise, no such liberty.

¹⁵¹ For a judicial expression of this view see Mr. Justice Brandeis, in dissent, in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-49 (1933):

The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen. . . . Throughout the greater part of our history a different view prevailed . . . [Incorporation for business] was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly . . . There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.

Notice that the fear Justice Brandeis speaks of here cannot be accommodated within the theory of rights set forth in Part III, for it is not generated by any specific acts of endangerment but is rather an unspecified anxiety about size. (It is not a little ironic that a similar or indeed greater anxiety is not expressed about thus increasing the size and power of government—the only institution with a monopoly on the use of force—which history indicates is far more to be feared than private institutions.) Notice too that we have here a good example of the failure to distinguish reasons from justifications.

Now to be sure, there are legitimate reasons to regulate some kinds of corporate behavior, just as there are legitimate reasons to regulate some kinds of individual behavior, as indicated in Part III. But there are also straightforward legislative or judicial routes to implementing those regulations, where presumably they would have to stand or fall on their own merits. To implement them through this antiquated and specious chartering route, however, is to build these ostensibly "moral" regulations upon a bed of moral quicksand, upon the assumption—which we have seen to be false—that the rights of property and association are functions simply of the public interest. Indeed, so thoroughly does the Nader group subscribe to this view as to assert, in as bald an example of legal positivism as one is likely to find this side of the Soviet Union: "The law creates and protects that bundle of rights called property or the corporation, and this same law can rearrange that bundle of rights if it is in the public interest."¹⁵² Private property be damned: you will have it and use it at our pleasure!

Let us turn, then, to the limited liability feature, whereby shareholders are able to shelter their personal assets, limiting their liability for corporate debts to the amount of their investment.¹⁵³ This feature is often thought to be a major reason for incorporation;¹⁵⁴ and indeed, much of the entity status debate has limited liability closely in the background—the personal assets of shareholders are insu-

¹⁵² R. NADER, *supra* note 25, at 258. Those who think the comparison overstated are directed to the new Soviet Constitution (emphasis added). Article 1 establishes the positive foundations of the Constitution: the USSR "is a socialist state of the whole people, expressing the will and interests of the workers, peasants, and intelligentsia . . ." Article 13 limits "personal property" ("private property" is not used) to "articles of everyday use, personal consumption and convenience, the implements and other objects of a small-holding, a house, and earned savings" and then goes on to say that this property "shall not serve as a means of deriving unearned income or be employed to the detriment of the interests of society." To get a feel for what those interests might be, recall the logical connection between private property and our traditional liberties as brought out at note 94 *supra*, and then turn to Article 50: "In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations." In short, the Soviet Constitution has "rearranged" the bundle of property rights in the public interest. *Moscow News*, Supplement to issue no. 42 (2770), Oct. 22-29, 1977, at 4, 5, 10. For an indication of how primitive (and perverse) is the Soviet understanding of the theory of rights (e.g., they simply do not understand that rights make no sense outside a theory of individualism), see the essays translated in 16 (3) *SOVIET STUDIES IN PHILOSOPHY*, Winter 1977-78.

¹⁵³ For a brief but perceptive discussion see Keeler, *Corporations: The Limited Liability Canard*, REASON, August 1977, at 48.

¹⁵⁴ See H. SOWARDS, *supra* note 47, §§ 1.01, 1.02, 2.01.

lated because it is the corporate entity that owes the debts, not the shareholders personally.¹⁵⁵ This "state-created privilege" in particular has been fastened on by corporate critics, for it seems to justify, as a *quid pro quo*, a greater measure of corporate control: if the state thus shelters corporate owners, in order to encourage them to invest, it is only right that corporate activities be regulated, this to protect the creditors and potential victims of the corporation who would otherwise be protected by the liability of its owners.¹⁵⁶ What we need to do, then, is sort these issues out very briefly, first with respect to contractual liability, then with respect to tort and criminal liability. More specifically, we want to determine whether this feature is justified—for on the surface it does not appear to be—and if justified, whether it too can be legitimately brought about by individuals alone, or whether it is indeed a state-created privilege.

Limited liability with respect to contractual obligations is a relatively straightforward matter, both as a feature of the corporation and as a condition under which it does business. Those who create and own the corporation can make it a condition of their corporate agreement that the corporation will contract with outsiders only on the basis of limited liability. This corporate feature can be brought about contractually, that is, in violation of the rights of no one. But to bring the feature about is not the same as to exercise it. Whether outsiders want to contract with the corporation on the basis of limited liability is for them to decide. If they do agree, however, if they contract with "the corporation," agreeing to look only to the corporation's assets for satisfaction of their claims, not to the shareholders or to those with whom they negotiate, then there is really little more to be said from a moral point of view. No one is forced, after all, to do business with the corporation.¹⁵⁷ Consequently, no one is forced to do business on any particular terms: in the case of small corporations, for example, creditors sometimes obtain the personal liability of shareholders over and above that of the corporation, or the right to elect directors, or whatever other condition they think will best protect their investment. Here, as in all contractual arrangements, the variety of conditions is limited only by consent.

¹⁵⁵ In a number of jurisdictions shareholders may be held liable over and above the corporation; see, e.g., 1 Z. CAVITCH, *BUSINESS ORGANIZATIONS* § 3.05 [4] (1978).

¹⁵⁶ See, e.g., R. NADER, *supra* note 25, at 35, 63; C. STONE, *supra* note 25, at 46.

¹⁵⁷ My use of "forced" here is of course strict: it excludes cases in which one is "forced," because of personal circumstances, to accept terms one does not like. (Are the terms of obligation *ever* liked?) See the discussion of so-called "economic duress" at III.C.4.

When brought about by private agreement, then, there is no problem with justifying limited contractual liability, either as a condition under which the corporation will do business—and hence as a feature of the corporation—or as a condition under which the corporation in fact does business.

In the case of torts and crimes, however, limited shareholder liability raises quite different issues.¹⁵⁸ (Recall that I am treating crimes as intentional torts.) A first assessment would hold that no one—including a corporate association—has a right to limit his liability toward strangers. That assessment is correct, but it does not really get to the heart of the matter. For the question is not so much whether shareholders have a right to limit their liability, but whether shareholders should be held liable at all! Shareholders, after all, are not the ones who ordinarily commit “corporate” torts and crimes, for they are not the corporate actors. (The exceptions will involve those corporations in fact controlled and run by the shareholders.) In most cases, that is, they have transferred control of their holdings to directors and then to management, who have in turn delegated authority to other corporate employees, often along a very lengthy and complex chain of command. It is these people who, in varying ways and differing degrees, commit the torts and crimes. In principle, then, it is these people who should be held liable, not “the corporation”—which “acts” only metaphorically—and hence not the shareholders. Thus the issue of *limited* shareholder liability for the torts and crimes of corporate actors should not even arise, for liability from shareholders is not owing.

This conclusion is very much at odds, of course, with both the law of corporations and the relevant underlying law of agency. In essence, on a theory of vicarious liability this law treats the corporate employee as an agent of the corporation principal: thus is the corporate master held liable for the wrongs of its employee servant.¹⁵⁹ Because the corporate entity is treated as the principal, the

¹⁵⁸ Unfortunately I must limit myself to a brief and quite general discussion of the theory that underpins this exceedingly complex subject. As a matter of perspective, however, let me note two points here. (1) It is not often that victims are left inadequately compensated due to the limited liability feature; on the contrary, compensation is usually more than adequate when it is a corporation that is held liable. (2) Although the emphasis of the discussion that follows may suggest otherwise, I am not at all unconcerned about the victims of corporate wrongdoing; but rectifying the injustice done them by doing injustice to someone else is no solution, however well-intended.

¹⁵⁹ The employee servant may be held liable as well; and of course the corporate master has a number of defenses available to it, but one of them is not that its servant rather than

shareholders are indirectly liable—but only to the limit of their corporate investment. One must suppose the corporate critics to be implicitly saying that if they are unable to obtain a greater measure of outside control of the corporation, the corporate entity should be eliminated when torts and crimes are at issue, thus eliminating the source of *limited* liability and enabling the victim to go directly to the shareholders. (At the least, this would encourage shareholders to take a greater interest in their corporations—assuming they would still be inclined to invest in these enterprises.) What I am saying is that even if we eliminate the corporate fiction here—which would be a healthy step if we want to place responsibility where in fact it belongs¹⁶⁰—it does not follow that the shareholders are liable at all: thus the “limited” issue does not arise. I am suggesting, in short, that the difficulty is with the underlying law of agency.

This suggestion is not new, of course. *Respondeat superior* has always been easier to live with than to justify.¹⁶¹ The two most common rationales have been from control and benefit (or profit);¹⁶² but revenge, carefulness and choice, identification, evidence, indulgence, danger, and satisfaction have also been cited as traditional justifications for this doctrine.¹⁶³ It should be clear that the argument from control cannot work here; for again, most shareholders have delegated control to others—as a matter of fact, that is, they do not control the corporate actors. But even if the sharehold-

the corporation performed the act at issue. It is less than controversial to suggest that the law of agency—or, as many would prefer in the case of torts and crimes, the law of vicarious liability—is replete with difficulties, and very much undetermined from a moral point of view. For a good discussion see C. GREGORY, *supra* note 76, ch. 12. See also R. STEFFEN, *AGENCY—PARTNERSHIP IN A NUTSHELL* (1977); for a study comparing the civil law treatment to that of the common law, with special emphasis on the hybrid law of Louisiana, see Müller-Freienfels, *The Law of Agency*, in *CIVIL LAW IN THE MODERN WORLD* 77 (A. Yiannopoulos ed. 1965).

¹⁶⁰ Indeed, if we are genuinely concerned about “the reduced sense of responsibility for one’s own acts that occurs when men are brought together into large institutional frameworks” (C. STONE, *supra* note 25, at 1), if we are serious, that is, about improving corporate behavior, let us look to those who in fact are performing that behavior, not to those who, at some remove, are benefiting from it. “Spreading” the liability to the innocent is not only wrong, as I will argue below, but from a consequentialist point of view it encourages irresponsibility and hence the very wrongs vicarious liability seeks to remedy! The last thing we want to encourage is the kind of “the corporation will pay for it” thinking that vicarious liability generates.

¹⁶¹ See, e.g., Holmes, *Agency*, pt. 1-2, 4 HARV. L. REV. 345 (1891), 5 HARV. L. REV. 1 (1891).

¹⁶² R. STEFFEN, *supra* note 159, § 30, at 73.

¹⁶³ Listed in C. GREGORY, *supra* note 76, at 706, citing from Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 455-56 (1923).

ers did control the corporation, as is sometimes the case, the argument would succeed only on pain of the very odd theory of act ontology that is implied by the maxim *qui facit per alium, facit per se*: rather than individuate the acts of principal and agent, treating them as the discrete act-events that in fact they are, this theory conflates the two into a single act involving a principal who "controls" the act and an agent who "performs" it—a sort of mind-body composite over two (or more) individuals, as it were. Not only does this create a very curious fiction, but it reduces the agent to a mere extension, a property of his principal. (One would suppose, therefore, that as an instrument of his principal the agent could not be held personally liable.) But there are difficulties as well with the argument from benefit or profit, which holds that just as the principal profits from his agent's activities, so he should bear the losses from those same activities. Suppose the principal loses from his agent's activities. Does this negate his liability? (Are not the principal's profits complemented by his possible *business* losses, while his agent's possible tortious losses are complemented by his fee or wages? If the principal performed the activities himself he would assume the tortious risk; but he would also keep the fee or wage he now gives his agent.) Clearly, profit alone will not suffice: there are many in addition to shareholders who profit from the corporation—creditors, customers, taxpayers—beneficiaries we would no more hold liable for corporate wrongdoing than we would depositors for a bank's mismanagement. Thus the emphasis has to be placed on "*his* agent's activities," which brings us back to the control argument with its implicit identity thesis. The benefit test, in short, appears to be little more than a vague appeal to one kind of fairness adage—"you have to take the bad with the good"—designed to make more palatable an argument in fact rooted in other considerations. If that basic argument from control and identity will not serve to show why, to take a stock example, the owner of a business should be held liable for the torts (much less then crimes) of his deliverymen, the argument from benefit will add nothing to it.

One can always turn to variations on the "deep pocket" argument, of course; and indeed, the long but accelerating trend toward shifting losses to those best able to afford them—whether liable or not—or even toward the outright socialization of losses is all too evident.¹⁶⁴ If we are looking for a *justification* of vicarious liability,

¹⁶⁴ See, e.g., Pilon, *Justice and No-Fault Insurance*, *supra* note 67.

however, I suggest it will have to spring more directly from justifiable principles of *individual* liability,¹⁶⁵ which are rooted in specific, identifiable, causal acts, supplemented perhaps by a theory of group undertaking that itself is couched in the language of action, not that of status. This is not the place even to adumbrate such a theory. I do want to note, however, that an approach of this kind would begin with a strong presumption *against* extending liability: this gets the emphasis theoretically right, placing the burden upon those who would extend it to show the justification for doing so. By virtue of its being grounded in action, that justification would not serve to extend liability to the many status cases that are today fitted uncomfortably under the law of vicarious liability.¹⁶⁶ It is not likely, then, that liability would extend all the way back to shareholders, for each step back would have to be independently justified. But if it did, these shareholders would stand *personally* liable, *liable because of what they did*, not indirectly liable as owners of the corporate principal. Hence the "limited" issue would still not arise.

Now one can think of cases—indeed, they are legion—in which a theory of group undertaking, consistent with morally justifiable principles of individual liability, would end by placing liability on some clearly defined "group as a whole."¹⁶⁷ Is this tantamount to

¹⁶⁵ I have in mind the principles developed in the essays at note 113 *supra*.

¹⁶⁶ In general, the only kinds of "control" obligations that can be fit within the theory of rights—other than the obligation of self-control—are those that arise from some specific act of the obligation-holder which serves to justify them and set their course over time—*e.g.*, the obligation to control one's property, children, or animals. (The liability entailed by these obligations is justified along lines developed in Part III.) Notice, however, that the control relationship between employer and employee—varied though it may be—is of a quite different order than these, owing to the very real differences between employees on the one hand and, say, property, children, and animals on the other. Any attempt at analogy that does not take these crucial differences into account is bound to be specious.

¹⁶⁷ See, *e.g.*, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), discussed in C. STONE, *supra* note 25, at 54-56. The evidence in this case indicated that test results on the drug MER/29 had been egregiously falsified, and that "responsible corporate officials, at least up to the level of vice-president, had knowledge of the true test results." C. STONE, *supra* note 25, at 55, citing *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 718, 60 Cal. Rptr. 398, 418 (1967) (denial of rehearing). But the drug was released all the same, causing multiple symptoms in many who took it, including cataracts in about five hundred of those cases. The remarks of Judge Henry Friendly, who on appeal disallowed punitive damages, are instructive in connection with the discussion above: "[A] sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." 378 F.2d at 841. Judge Friendly's cost-benefit approach aside, is there any reason why the *stockholders* should suffer these losses? If they had arranged to accept the risk through contractual or insurance mech-

placing liability on "the enterprise entity"? Notice the leap that is lurking here. Liability is shifting from the individuals collected to the collectivity of individuals—and hence, presumably, to the owners (controllers, beneficiaries, etc.) of that collectivity. Is that metaphysical leap warranted, or analytically (*i. e.*, descriptively) correct? I suggest it is not. It does not capture, that is, what in fact is the case. For again, it is *people* who commit torts and crimes, not corporate entities. The injuries run from the trivial to the horrendous, those who cause them from menial workers to upper-level management, or combinations thereof. Insofar as the law is content, however, whether for reasons of efficiency or from mistaken theory, to concern itself simply with assessing corporate treasuries or with placing sanctions upon (often innocent) top management, we should not be surprised that this behavior continues.¹⁶⁸

I have ignored here the practical problems of "reaching inside" the corporation. They are often considerable, and even more often, I expect, have led to holding the corporate entity itself liable when neither the facts nor a justifiable theory of liability would warrant this finding. (Indeed, as we move along the continuum that runs from the one-man to the giant corporation, all corporate problems—but especially those of liability—become increasingly complex. Short of drawing arbitrary lines, however, the underlying theory remains the same.) I have ignored too the problem of financial responsibility; though intimately related to the liability question, solvency is (or should be) a derivative matter. Given its proximity to limited liability in particular, however, it may be well to broach this issue. Just what are the moral ramifications of financial

anisms—about which more shortly—that is one thing. But absent such arrangements liability rests with those responsible, who in activities such as this should be required to carry very high levels of liability insurance. Admittedly, this would not solve the punitive aspect—nor should it. But victims would be compensated—by the right people—and stockholder investments would be protected as well. *See also* note 168 *infra*.

¹⁶⁸ In order not to be misunderstood here, let me repeat that the fundamental purpose of law is to secure rights (*cf.* II.B.2 *supra*): in this case the rights of victims to compensation from those who have wronged them and the rights of shareholders to the protection of their investments. As brought out earlier, this end is not to be confused with other goods that may result. It is well recognized, for example, that the tort law may also serve to control behavior and even to "punish" wrongdoing, though strictly speaking these are not its functions. (The claim, then, that insurance mechanisms—which I will take up presently—vitiate the "purpose" of the tort law misconstrues that purpose; nor is it clear that these other beneficial results are vitiated by such mechanisms, but that difficult subject is best set aside.) Thus in drawing out these other benefits, as I do above, I do not mean to be understood as abandoning the primary focus.

responsibility? If individuals have an obligation to compensate those they injure, does this entail an obligation to not act—or at least to not put others at risk—if that standing obligation cannot be satisfied? If not, then what is the force of the standing obligation? If it is right that you be required to make whole those you have injured, is it not also right that you be required to *be able* to do that *before* you put them at risk? I submit, in short, that the obligation to not put others at risk unless financially responsible is a direct entailment of our obligation to make whole those we have injured. A denial of the former, that is, is tantamount to denying that we have an obligation to compensate the victims of our actions. Thus the burden of insuring possible losses rests where it should, with those who choose to create the risk, not with those who may suffer from it.¹⁶⁹

As a legal matter, then, it might be required that all group or corporate undertakings be accompanied by appropriate financial responsibility provisions, just as individuals might be required to carry personal liability insurance.¹⁷⁰ In satisfaction of this requirement, any number of intra-corporate contractual and extra-corporate insurance devices might serve to spread the risk, thereby nullifying the concern—however misplaced—behind the limited liability objections. (At the other extreme is a corporation all of whose “employees” are independent contractors unrelated by any risk-sharing scheme, which might be the best arrangement in some industries.) Although it is difficult to generalize over the manifold world of corporations, we should imagine that in many cases indi-

¹⁶⁹ None of this is to suggest, of course, that we may subject others to *any* risk provided only that we are financially responsible. There are two issues here. (1) As brought out earlier (see III.C.3 *supra*), all but isolated action is potentially risky to others. Hence the first step is to determine how much risk we have a right to subject others to, beyond which we violate their rights. (2) Once that complex question is decided, whether as a matter of private or public law (see note 87 *supra*), action within those parameters may *still* put others at risk and so should subject actors to financial responsibility requirements. Even if actions do not violate rights *per se*, that is, the fact that they *may* do so gives rise to the problem of financial responsibility. *But see* note 170 *infra*.

¹⁷⁰ The difficulties that would surround the enforcement of a general obligation to be financially responsible before acting are beyond imagination. The most we can do, it seems, is try to prevent those who are not thus responsible from putting others at risk in certain specified ways, *e.g.*, through the use of automobiles or dynamite. Unfortunately, this piecemeal approach gives the appearance of shifting the grounds for liability from action to property ownership, which many applications of vicarious liability (*e.g.*, so-called “permissive use” statutes) only reinforce. But if liability is indeed grounded in action, then it is individual actors who in theory are ultimately liable and hence should be required to be financially responsible.

vidual employees, or perhaps groups of employees, knowing their liability requirements, would accept employment only on the condition that the corporate entity, and hence the shareholders, underwrite those requirements. We should imagine too that many corporations would simply make this a term of employment, for reasons of efficiency. In that event the practical result would come to the same thing as under our present arrangements.¹⁷¹ It is important, however, that we get that result in the right way, that our legal arrangements reflect the underlying moral theory—in this case, that shareholders be held liable for reasons of contract, not for mistaken reasons of agency; for only so will those results be legitimate.

In sum, corporate entities do not commit torts and crimes; corporate individuals do, and should be held liable for those acts without limits, even though that liability may be spread through the devices mentioned above. The limited liability the state has granted appears to have arisen because the corporate entity is treated as the principal of those corporate individuals; but because the corporate entity is in reality the shareholders, who are not usually liable, it has seemed unfair to hold them personally liable and so the state has limited their liability. In principle, absent any agreement to the

¹⁷¹ Let me try to clarify a tricky issue that is buried here. Appearances to the contrary notwithstanding, involuntary mechanisms for spreading the risk to which we put others—*e.g.*, the compulsory liability insurance that is usually entailed by financial responsibility requirements, “usually” because the sufficiently wealthy need not insure, need not share among others the risk they cause—are *not* the same thing as involuntary mechanisms for spreading the liability for those losses, after the fact, by placing it (in part) upon those who have done no wrong, even when all of those upon whom the losses are placed are members of the relevant class of risky actors. To be sure, in the former case too the involuntary contributions of those who have done no wrong go toward compensating those who have been wronged by others: this is just the respect in which the two arrangements may come to the same thing (“may” because they will do so only under certain specified conditions not likely to be mimicked in the real world). But while the standing obligation to make whole those we have injured entails the obligation to not put others at risk unless we are financially responsible, it does not entail that we compensate those whom *others* have injured, even though the mechanisms we devise to make ourselves financially responsible may have that result. (If we want to avoid that result, *i.e.*, if we want not to contribute toward compensating those whom others have injured, then we have either to become financially responsible—thereby excusing ourselves from compulsory risk-spreading schemes—or to not perform the acts that put others at risk.) These risk-spreading mechanisms are “compulsory,” then, and our contributions to them “involuntary,” only in the sense in which our obligation to compensate those we have injured is compulsory or involuntary: when we choose to put others at risk, while not being financially responsible, we take on the obligation to *be able* to make them whole should that risk materialize, just as we take on the obligation to *make* them whole if it does. Put briefly, all those who put others at risk must be financially responsible; those not financially responsible must become so (*e.g.*, by spreading the risk they cause) or not perform the relevant acts; only those whose acts in fact injure others may be held liable.

contrary, there should be no liability at all from shareholders, except when, by their specific actions, they are personally liable—as might be the case in the small corporation or, paradigmatically, in the one-man corporation—and then the liability should be without limits.¹⁷² Far from being a “state-created privilege,” then, limited liability for the torts and crimes of corporate actors is an unwarranted disability upon shareholders; unless they have arranged otherwise, they and their investments should be immune from such losses.

It should be clear from these many considerations, then, that limited shareholder liability will not serve to justify the kinds of regulations being called for by corporate critics. As a corporate feature, limited liability for contractual debts can be brought about contractually, in violation of the rights of no one. Limited liability for the torts and crimes of corporate actors can also be brought about contractually, as a corporate feature, but here the issue is more complex: liability for these acts is in the first place personal and without limits; but if the corporation agrees to underwrite that liability, to whatever limits, it can do so, in which case we might want to call this limited liability a “corporate feature.” As such, this arrangement would not violate the rights of the parties to the agreement, for it would be brought about contractually. Nor would it violate the rights of potential victims; on the contrary, by satisfying (at least in part) the financial responsibility requirements of corporate actors, this arrangement would amount to explicit recognition of those rights. But whether the corporation did or did not assume this liability, as long as the financial responsibility requirements of corporate actors are adequate and are satisfied—which is a matter for the state to determine—no rights of third parties are violated.¹⁷³

In the next section we will take up various of the problems that

¹⁷² These conclusions should apply equally to partnerships or to any other forms of association in which the law presently treats the associates as agents of each other. Absent any agreement to that effect, why should partners be liable for each other's acts if in fact they themselves perform no acts that would make them liable? Note that modern common law decisions are moving in this direction in nonprofit joint enterprises, holding only active participants liable rather than all members of a club or lodge. See, e.g., *Lyons v. American Legion Post No. 650 Realty Co.*, 172 Ohio St. 331, 175 N.E.2d 733 (1961).

¹⁷³ In a very real sense, the approach I am taking here is a call for adequate capitalization of individuals. But insofar as individuals perform their potentially tortious or criminal behavior within the corporate milieu and satisfy through corporate underwriting the financial responsibility requirements this behavior necessitates, it is derivatively a call for adequate capitalization of corporations.

surround the ordinary entrepreneurial behavior of the corporation, as set forth in Part II.A above. Before doing that, however, I want to consider finally, and very briefly, an aspect of corporate action that was set aside earlier, but one rather more closely related to the question of corporate features—especially as the entity and liability issues are involved—*viz.*, the problem of standing. Can the corporate association, as described above, sue and be sued as an association? (Or, what is for practical purposes the same thing, can it accept, hold, and convey property or make and take contracts in its corporate name?) Is *this* the real reason for “incorporation” through the state? If the state did not register corporations, would corporate owners call for registration, for reasons of efficiency, just to insure standing? Suing and being sued are paradigmatically “state-related” or “state-infused” acts, meaning that state-of-nature theory, at least in its present state of development, cannot tell us a great deal about them.¹⁷⁴ Absent a body of work showing how procedural law might be derived from or at least related to state-of-nature theory, let me simply make two points. First, the law itself is in a state of some development at the moment on the question of standing: unincorporated associations are coming increasingly to be able to sue and be sued as associations.¹⁷⁵ But secondly, these developments aside, there is nothing in the theory above that should raise any serious difficulties in this connection. In the case of contractual obligations, if a contractor has made his arrangements with “the corporation,” then that should be sufficient to settle the matter of standing, whether the corporation does or does not have state recognition.¹⁷⁶ In the case of torts and crimes, because it is the individual wrongdoer(s) and not the corporation who is the defendant, the problem of standing should again be uncomplicated. Moreover, insofar as the defendant’s liability is underwritten by the corporation, the case should develop as it does when any third-party insurer is involved. In such a case, in fact, the plaintiff’s burden of proof would be considerably less onerous than it presently is when he is attempting to reach the assets of an unincorporated association; for in so attempting the plaintiff must now show that the association is in some appropriate sense an entity.¹⁷⁷

¹⁷⁴ See note 103 *supra* where the problem of deriving procedural rights is raised.

¹⁷⁵ See R. STEFFEN, *supra* note 159, § 78.

¹⁷⁶ When the corporation does not have state recognition, the result would be exactly as with “de facto” corporations; see note 148 *supra*.

¹⁷⁷ See R. STEFFEN, *supra* note 159, § 71.

On the theory suggested above, the defendant himself, in his own self-interest, will be compelled to give evidence of his insurance arrangements, thereby yielding the same result as a successful suit against an unincorporated association, but perhaps more often—and more correctly. It would appear, in short, that the problem of standing arises only if more is made of the entity status feature than is justified, especially as this feature plays its role in disputes over liability. When the parties to the suit have previously agreed to the construction of this fiction—as in the contract example above—then it should be recognized by the court as well. Otherwise, the court should not itself construct fictions but work instead with the facts of the case.

This completes, then, our inquiry into the legitimacy of the corporate birth. We have canvassed the features that are generally thought to describe the modern business corporation and have found that individuals, in exercise of their rights of property, association, and contract, can bring into being an association having entity status (as qualified above), continuous succession, with free transferability of shares, limited liability, delegated and centralized authority, and the power to act under a common name, and they can do this without violating the rights of anyone. Far from being a “creature of the state,” then, this corporate association can arise quite independently of the state: it is a creature of private agreement alone and is thus entirely private. In that it *can* arise through a just process, it is legitimate *as* an institution; insofar as actual corporations have arisen through such a process, they are themselves legitimate. (As a corollary, those corporations that have arisen through or have been assisted by an unjust process—*e.g.*, a private taking, perhaps with government sanction, or a monopoly grant, “technical monopolies” aside¹⁷⁸—are to that extent illegitimate.)

In short, the corporation has a right to exist, just as the individuals who bring it into being have a right to make it exist. If it did not have this right, or if its right to exist were limited, then to that extent the rights of individuals to property, association, and contract would also be limited. For in the end, the rights of the corpora-

¹⁷⁸ The “technical monopoly” issue is often much abused. There is no reason why telephone service, for example, should include a monopoly on the manufacture of telephone equipment (fortunately it no longer does). Nor under present technology do we need to “enfranchise” the electronic media; it is one thing if the oligopoly that presently obtains in that industry were to arise naturally, quite another when it arises through government licensure.

tion *just are* the rights of the corporate owners. (I will develop this point more fully below.) The right of the corporation to exist is nothing more—nor less—than an entailment of the right of individuals to make it exist, an entailment of their rights of property, association, and contract. In this fundamental way are the rights of the corporation bound up with the rights of the individual.¹⁷⁹ Those who challenge this basic right of the corporation do nothing less than challenge those basic rights of individuals.

Clearly, then, the “public instrumentality” thesis of Nader and others is without theoretical foundation: quite simply, it is not “our” corporation to do with as “we” wish, anymore than the individual acts from which the corporation is created are our collective property, to be treated as public instruments. To treat the corporation as a public instrument is to treat those who create or own it as public instruments, to *use* them for public purposes, and so to demean the rights of every individual. The corporation has been created by private individuals in pursuit of their own private ends; and of course others may subsequently have joined the association for the same reason. Unless individuals have an obligation to serve “the public interest”—and they do not—then the corporation has no such obligation either. As noted earlier,¹⁸⁰ in pursuing their private interests it is more than likely that these corporate owners will pursue “the public interest” as well; but even if that issue can be made sense of, it is irrelevant to the question of corporate legitimacy, to the question whether the corporation has a right to exist. It does. What we need to do now is take up the further question just how these owners may legitimately pursue their private interests through the corporation they have created, just what rights and obligations they have as they act through this institution—just what rights and obligations their corporation can be said to have beyond this fundamental right it has to exist.

B. *The Legitimacy of Corporate Behavior*

It is one thing to bring the corporation into being, another to set it in motion. Having established the fundamental right of the corporation to exist, and having located that right in the individual rights of the corporate owners, we now have to inquire about its further

¹⁷⁹ Corporate management should note well this point: insofar as corporate behavior undermines individual rights—cost-benefit analyses notwithstanding—it undermines the very foundation of the corporation, for corporate legitimacy is grounded in those individual rights.

¹⁸⁰ Note 9 *supra*.

rights, and in particular about its rights of property and action. When the corporation begins to "act" the problems set forth in Part II.A will arise; hence it is in this section that we will take up at last those frequently heard criticisms and proposals. In doing so, however, it will be convenient to speak of "corporate rights" and "corporate action," except where confusion would otherwise result. Let us begin, then, by clarifying some of the conceptual issues that stand behind these idiomatic expressions, and in particular, by coming to grips with just what it means to say that *the corporation* has rights.

1. *Individual and Corporate Rights.*—As we have seen, "the acts of the corporation" are in fact the acts of various of the corporate people who act under its authority, *i.e.*, under the authority, ultimately, of the corporate owners, as manifest in their articles of incorporation; included among these actors are not only the corporate employees but the corporate owners themselves—acting under their own authority—insofar as these various individuals may be permitted to act under the articles and the rules of delegation therein contained.¹⁸¹ Similarly, "the rights of the corporation" are the various rights of the corporate people as specified, however broadly, under the articles of incorporation as these articles manifest, in turn, the rights of the corporate owners,¹⁸² in exercising these institutional rights—which will usually be their institutional obligations as well¹⁸³—these people will be exercising the rights of the

¹⁸¹ Notice then that "corporate acts" are by definition acts performed under corporate authority. Thus only certain of the acts of the corporate agent are to be construed as corporate acts; his "frolic and detour," for example, is an individual, not a corporate act. (A full explication of these points would involve drawing the complex relations between "acting under authority" and the "action-under-a-description" approach found in the theory of action; for a start on the latter see Davidson, *Actions, Reasons, and Causes*, 60 *J. OF PHILOSOPHY* 685 (1963); Davidson, *The Logical Form of Action Sentences*, in *THE LOGIC OF DECISION AND ACTION* 81 (N. Rescher ed. 1966).)

¹⁸² To explain "corporate rights" it is not enough, of course, to point to the authorizations specified in the articles of incorporation, for those powers are *rights* only insofar as they first are rights of the corporate owners. (See *below* and note 52 and accompanying text *supra*.) Otherwise, in the articles they draw up the owners could grant their corporation any powers they desired—rightful or not—and simply call them rights.

¹⁸³ I say "usually" in order to allow for the "permitted" modality: an employee may be given discretion as to a certain course of action, in which case he would have a right but not an obligation to perform it. Notice that with respect to the performance of many actions we can be said to hold both a right and an obligation: *A* may have a contractual *obligation* to *B* to perform *x*, correlative to which is *B*'s right to *A*'s performance of *x*; but *A*'s *right* to perform *x* has correlative to it the obligation of third parties not to interfere; with respect to the same act *x*, that is, *A* has both a special *obligation* (to *B*) to perform *x* and a general *right* (against third parties) to perform *x*.

corporation. Thus while the rights of the corporation may rest in or be exercised by these various corporate people, they can be traced ultimately to the articles of incorporation and hence to the corporate owners. In this way are the rights of the corporation bound up with the rights of the corporate owners: when we speak of "the rights of the corporation," that is, we are speaking, at bottom, of the rights of the corporate owners; just as the right of the corporation's owners to bring their corporation into being enables us to say that *the corporation* has a right to exist, so their right to own and act through this institution enables us to say that *the corporation* has these rights of ownership and action, delegated though the rights of action may be to the various corporate employees. The corporation's rights of property and action, then, are ultimately the rights of the corporate owners to own and act through the medium of their corporation, in exercise of their individual rights of property and action.¹⁸⁴

To ground the rights of the corporation in the individual rights of its owners is not, however, to treat those two sets of rights as coextensive. The corporation's rights cannot be *more* extensive than those of its owners, of course, for as we saw earlier,¹⁸⁵ institutions have only those rights that individuals have given them and hence only those rights that individuals *have* to give them. Thus the rights of the corporation are limited in the first instance to the rights of the corporate owners: an owner cannot do through his corporation what he has no independent right *himself* to do. This is an important limitation, as we will see shortly. But it is only a first assessment of the extent and limit of corporate rights. For in truth, the corporation's rights are *less* extensive than those of its owners, this because the owner can do through his corporation only what it is *possible* to do through such an institution. Thus the rights of the corporation are limited in the second instance to the rights that the corporate owners are *able* to exercise through this vehicle. Through

¹⁸⁴ Notice that this explication of what it means to say that the corporation has rights avoids treating the corporation as a "person"—artificial or otherwise—to which rights are then ascribed or denied *ab extra*. The reification of a corporate entity has led to much confusion concerning the source, justification, and content of corporate rights. Moreover, it has led to many of the same conceptual difficulties that arise when we speak, for example, of "society's rights," which usually turn out upon inspection to refer to the rights claimed by some members of society against other members. Of special interest, in this connection, is the grounding of corporate rights in the rights of the owners *through the articles of incorporation*, which are rather more real than the "social contract." This point will be developed more fully below.

¹⁸⁵ See note 52 and accompanying text *supra*.

their corporation they cannot exercise their right to marry, for example, or their right to vote, or to have children. But they can certainly buy and sell through this association, or exercise their rights of speech, or give to charity, or perform through it whatever other activity such an institution lends itself to, provided that they as individuals have a right to perform that activity. Yet this is not the whole story either, for the rights of the corporation are limited finally to those rights the corporate owners *in fact* have given it. If the corporate owners have included in their articles of incorporation certain limitations upon the activities of their corporation, then the corporation has no right to perform activities inconsistent with those limitations. In sum, then, the rights of the corporation are limited to the rights the corporate owners *have* to give to it (or to exercise through it), to the rights they *can* give to it, and to the rights they *do* give to it.

This much, in brief, explains what it means to say that the corporation has rights, by locating those rights ultimately in the corporation's owners, as entailments of the individual rights of those owners. (In subsection 3 below, when we turn to the internal relationships of the corporation, we will have to refine this picture somewhat.) Moreover, in thus locating and deriving the corporation's rights, this explication goes far, in conjunction with the theory developed in Part III, toward justifying them. Yet as we saw at the outset of Part II, it is not uncommon to find reservations about this idea that there is a right of individuals to collective ownership and action—expressed most often as a fear of the attendant power.¹⁸⁶ To this we need simply ask how it could be otherwise. If an individual has a certain body of rights against the rest of the world—including the rights of ownership and action—does he lose some of those rights when he acts in concert with others? Do two people, when acting together, have fewer rights (or more obligations) than one person acting alone?¹⁸⁷ Surely, power (the additional power that attends joint action) has no place in this analysis: if it did then powerful *individuals* could be said to have fewer rights than weak ones! Rights simply do not work that way: they go with individuals as such—powerful or weak—even when those individuals act in association with others. (Is there any relevant difference between an individual's right to speak and a group's right to speak?) As we saw

¹⁸⁶ See also note 151 *supra*.

¹⁸⁷ See note 18 *supra*.

in Part III, individuals have, among their rights, the right to combine and act with others, however variously; for joint action, as such, takes nothing to which any third party can be said to have a right. It is these *individual* rights, then, that underpin and ultimately justify the rights of the associations that arise through their exercise. And as a corollary, it is these individual rights that are ultimately violated when the rights of associations such as the corporation are denied.¹⁸⁸

Given that corporate rights find both their source and their justification in the individual rights of the corporate owners, it will be useful, in order better to fill in the content of those rights, to review quickly the content of individual rights as outlined in Part III. There we saw that the individual has a general right against the rest of the world to noninterference, a right to be secure in his life, liberty, and property against the takings of others; thus he has a right not only to be left alone but to do whatever he wishes that does not infringe this same right to noninterference as held by others. Correlative to this right of others, he has an obligation not to interfere with or take the life, liberty, or property of these others; but he has no general positive obligations toward the rest of the world, for even if these could be justified they would conflict with his own basic right to noninterference. This much, in brief, is the world of general relationships. In exercise of his liberty, however, the individual—intentionally or not—may change the world of general relationships, creating special relationships and special rights and obligations between the parties to the relationship,

¹⁸⁸ Here again the entity issue is not germane: there is no significant difference between acting *with another* and acting *through the association that you and another have created*. You and another can exercise your individual rights of speech, for example, by jointly authoring an article, by editorializing in the newspaper you own together (which is probably incorporated), or by making a campaign contribution through the business corporation you jointly own. (And what are The New York Times and CBS if not *business* corporations?) Is there any material difference among these three cases? Notice that as much—or as little—can be made of the “entity-association” in the first case as the “entity-corporation” in the third. And where are the *rights* (not the interests) of others that are violated in any of these cases? (See *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978); *Burger’s Blast: Free-speech ruling stirs a row*, *TIME*, May 8, 1978, at 68.) Illustrative of the confusion that arises when too much is made of the entity issue are various legal prohibitions on corporate campaign spending. The underlying reality in these cases, as in each of the above examples, is one of people using their resources as they have a right to, however complex the authority structure from which flows the ultimate decision about that use. (If some of the corporation’s owners do not support the uses to which their corporation is being put they can always dissociate themselves from it, of course, just as individuals or groups can *join* the corporation in order to try to *change* its behavior.)

either by entering into voluntary associations with others—*e.g.*, contractual relationships—or by involving them involuntarily in transactions—*e.g.*, by committing torts or crimes. The form and content of contractual rights and obligations are limited only by consent; the rights and obligations that arise from involuntary transactions are determined by their function, to rectify the wrong done, to reestablish the prior world of general relationships, the prior distribution of holdings. Apart from the requirements of procedural justice,¹⁸⁹ this broad taxonomy exhausts the world of individual rights and obligations; more specifically described rights and obligations are subsumed deductively under this broad outline or else they cannot be justified and hence do not exist as moral rights and obligations. (Those “rights” and “obligations” that cannot be thus derived can be *made* to exist, of course, as positive legal rights and obligations, in which case they will conflict with the moral rights and obligations with which they are inconsistent.)

These, generally and in brief, are the rights and obligations of the individual and hence of the corporation as well, subject to the limitations indicated above (about which more in a moment). What we need to do now is flesh these individual rights and obligations out as they are exercised through and by the corporation, and in particular as they address the issues raised in Part II.A. In keeping with the moral theory developed in Part III, we will do this in two steps, first by considering certain of the general relationships in which the corporation stands, then by considering certain of its special relationships. It will be useful, however, in order to avoid the confusion that may arise from generalizing over the manifold world of corporations, to have a clear corporate model in view as we proceed. More precisely, we should work with a model rich enough to be theoretically interesting yet no more complex than is necessary for elucidating the issues at hand. In the case of general relationships that model can be quite simple: we can think of the corporation as a single entrepreneurial unit, in fact. Thus at the outset it will not be necessary to distinguish the groups that constitute the more complex corporation—shareholders, directors, management, employees—for the issues will be the same whether we are dealing with a one-man or with a giant corporation. (When we take up the special relationships that constitute the larger corporation, however, this model and the foregoing analysis will have to be refined.)

¹⁸⁹ See notes 103 & 104 *supra*.

In order to elucidate its general rights and obligations, then, we will treat the corporation as an entrepreneurial unit that reflects and exercises its owners' rights and obligations. Thus it will have whatever rights and obligations its owners *have* to exercise through it, *can* exercise through it, and have stipulated in their articles of incorporation *are to be* exercised through it. With respect to this last factor, let us give our corporate model a charter allowing it the widest possible range of activities—*e.g.*, “to engage in any lawful undertaking”¹⁰⁰—for this constraint is a contingent matter in any particular case and hence, as such, is of little theoretical interest. Let us also take a liberal view of what *can* be done through the corporation, for this factor too is of limited interest for moral theory. (In most cases it will be able to be determined as a matter of *fact* whether a given individual right or obligation can be exercised through the corporate vehicle; hence no normative issue will be at stake.) What remains, then, is the further specification, in the corporate context, of the rights and obligations reviewed above and outlined more fully in Part III. We need to translate the rights of the individual, that is, to the corporate milieu. And in particular, we need to consider the question of corporate regulation as this

¹⁰⁰ For our purposes “lawful” should be read as “moral,” of course, for what is lawful is to be determined by what moral rights and obligations there are.

Let me clarify a point here that may be a source of some confusion. To grant our corporate model this wide range of activities is *not* to say that any given corporate owner may exercise any given right of his through his corporation, provided only that that right *can* be exercised through such an institution: a corporate charter enabling *the corporation* to engage in so wide a range of activities, that is, is not the same as a charter enabling *every individual owner* to exercise his full range of rights through his corporation *subject to no internal procedural restraints*. In all but the one-man corporation there are bound to be conflicting interests among the corporate owners, not all of which will be able to be realized *through* the corporation. Ideally, then, the articles of incorporation, to which each owner will (in principle) have given his individual consent, will contain rules for determining how these conflicts are to be resolved such that the corporation can then proceed to act as a unit, as a “person,” exercising the rights of the owners as thus resolved. It is in this sense, then, that our corporate model will have the full range of rights and obligations that the owners can exercise through such an institution. (*Cf. Dodge v. Ford Motor Co.*, 24 Mich. 459, 170 N.W. 668 (1919).)

It should be noticed, then, that this third factor that limits corporate rights—the limits placed in the articles of incorporation—relates not to outsiders but to the internal relationships between the corporate owners; thus it serves to justify rights as between the owners, not as against the outside world. (Accordingly, it will be treated again in subsection 3 below.) Notice too how prior consent serves here to legitimate, as between the corporate owners, the corporate activities that flow from the exercise of corporate procedural rules; unlike with social contract theory (*cf. note 184 supra*), consent to these rules in fact is given, at least in principle, and thus can serve to legitimate (as between the owners) corporate policies as well as changes in corporate policies (*cf. note 188 supra*), even though not all of the owners agree with the specific policies or with the specific changes in those policies.

arises in the various forms set out in Part II.A above. We have already seen that the "public instrumentality" thesis will not serve to justify regulating the corporation; we can no more regulate private corporations as such than we can private individuals. But we *are* justified in interfering with and regulating individuals when they violate rights or threaten to do so (*see* II.B.2); insofar as corporations do the same, interference and regulation may be called for here as well. In order to determine this, let us look at various of the corporation's entrepreneurial activities. This overview can consider only a sampling of those activities, of course; as stated at the outset, however, my aim is not to canvass the issues that constitute the corporate debate but simply to place that debate within the general structure set forth by the basic and systematic approach that is the theory of rights. The conclusions that follow from doing so—in such areas, for example, as discrimination, or disclosure, or bribery, or antitrust—will not always be pleasing, a point also noted at the outset; but what we have a *right* to do is not always what it would be "good" to do, a distinction I urge the reader to keep in mind as these conclusions unfold. Unless we want our law to enforce some theory of good—with all the subjectivity and illegitimacy that that entails—and hence in principle to reach into and regulate every corner of human activity, we simply have to learn to live with the uses that some people and indeed some corporations may make of their rights.

2. *General Relationships.*—Recall that the corporation stands in a general relationship, described by general rights and obligations, with all those individuals and groups not specially related to it; included among these "strangers" are not only members of the public generally but prospective employees, customers, sellers, and shareholders. Moreover, even those who are specially related to the corporation stand generally related to it with respect to such rights and obligations as are not specified, either explicitly or implicitly, by the terms of the special relationship. Toward these individuals and groups, then, the corporation (a) has no positive obligations, *i.e.*, has a right to be left alone, to not be compelled (by them or their surrogates) to enter into special relationships with them or to bestow benefits upon them; (b) has a negative obligation to not interfere with them; and (c) has a right (is at liberty) to do whatever does not interfere with them. Let us develop and illustrate these points in order.

(a) The first thing to be noticed is that absent any special obligation to that effect, the corporation is not obligated to *do* anything

for anyone. It is not a service organization. If the individual owners from whom the rights and obligations of the corporation are derived are not *themselves* thus obligated, then their corporation cannot be either. For where would those obligations have come from if not from the owners? The corporation, then, is not an anti-poverty agency, or a job-training center, or a patron of the arts, or a general vehicle for community service. To be sure, if the corporate owners want to employ their corporation for such purposes they have a perfect right to do so, just as they have a right to be of service to others in their individual capacities. But as a matter of right the corporation cannot be *bound* or *used* by outsiders for these ends, however desirable they might be; for not only is there no *obligation*—individual or corporate—to do these things, but the corporation and its owners have a *right* against being thus used for the benefit of others.

Now there are many ways, as the examples above should indicate, in which the American corporation is currently being used by the state for public purposes. Most generally, of course, it is being used in the same way that taxpaying individuals are being used—as a source of funding for the government's many schemes for economic redistribution.¹⁹¹ In the case of corporate owners, however, this taking is especially onerous because of our current "double taxation" policy. (If uses there must be of people, they ought at least to be equal uses, especially when they are done in the name of egalitarianism!) We have already noted the difficulty of justifying the forced association that is even the limited state;¹⁹² when the state goes beyond the narrow function of securing rights to take on the business of transferring assets from some to others, it does nothing less than use those from whom it takes the assets, however noble its ends. If individuals do not have the right to take from some to give to others, then neither does the state.

But of the many more direct ways in which the corporation is currently being used for public purposes, perhaps none has generated more tension—and theoretical confusion—than the requirement that the (corporate) employer be a vehicle for insuring "equal opportunity."¹⁹³ The result is often forced association—not only be-

¹⁹¹ I set aside until Part V the question whether many of these same corporations are not themselves recipients of certain forms of public largesse.

¹⁹² See notes 51, 127, & 128 *supra*.

¹⁹³ I have in mind here in particular the results that have flowed from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1974).

tween employer and employee but between employee and employee as well—imposed in the name of a right! As we have already seen, there is no “right to opportunity,” either in the sense in which others must provide the conditions of opportunity or even in the sense in which others must forego pursuing their own opportunities in order that those conditions be insured. Nevertheless, such a “right” is *made* to exist when the employer is obligated not only to ignore certain factors that *he* may think relevant when he makes hiring decisions but even to affirmatively seek individuals (some of whom he must also train) who fall into predetermined classes.¹⁹⁴ “Obligations” such as these compel the employer to associate with others for reasons not necessarily his own, and hence to use his business for reasons not necessarily his own, in direct violation of his own rights of association and property.¹⁹⁵

It would be well to develop this discrimination issue somewhat more fully, so ubiquitous is the misunderstanding that surrounds it.¹⁹⁶ Before beginning, however, I want to make two points by way of background. First, let it be quite clear that the brief remarks that follow are aimed at defending the *right* to discriminate, not discrimination itself, or what ordinarily passes for such (*i.e.*, “unreasonable” discrimination). To paraphrase Patrick Henry, there is all the difference in the world between defending the right to speak and defending the speech that flows from the exercise of that right. Secondly, as with all rights, the right to discriminate is rooted in and hence is a function of private property—most fundamentally, the private property in oneself—a point I will develop below. Accordingly, these remarks do not apply to *public* institutions; because they are the property of *all* the people, these institutions may not discriminate except as may be required for executing

¹⁹⁴ Those classes, as with all taxonomies, admit *in principle* of infinite variety; thus the employer can no longer discriminate against the handicapped, which HEW has recently interpreted to include even *unreformed* drug addicts and alcoholics who are “otherwise qualified.” See 42 Fed. Reg. 22675-22702 (May 4, 1977), 45 C.F.R. 84.

¹⁹⁵ I qualify this point with “necessarily” because there are many employers who will not discriminate, whether or not discrimination is proscribed. In such cases the employer’s reasons for hiring as he does might well be the “preferred” reasons, *i.e.*, the reasons implicitly preferred in some reading of the legislative or judicial intent.

¹⁹⁶ Most people are against “unreasonable” discrimination in hiring, for example, but they are also against quotas, which of course are necessitated by the fact that discrimination is ordinarily a mental phenomenon (it is the *reasons* that make discrimination what it is), the disproving of which requires such empirical evidence as is entailed by “guidelines,” “goals,” or “quotas.” (I ignore the outrageous burden of proof issue that is buried here.) Notice too the ambivalence we are currently showing toward discrimination based on sexual orientation; or the implications for the hiring of clergy by tax-exempt churches.

the functions set for them by public policy. To draw this distinction between private and public, however, is to raise an issue precisely at the center of so much of our current anti-discrimination/affirmative action debate: many who would like to see discrimination eliminated as a private right have fastened upon (encouraged?) the immense growth of the state in this century, concluding that the remotest of connections with the state (which is all but unavoidable, given its ubiquity) ought to be construed as rendering an otherwise private institution subject to public institution rules. Thus if students who attend assiduously private colleges obtain loans from private banks, but repayment of those loans is guaranteed *to the bank* by the government, the *college* is to be construed as the indirect recipient of federal financial assistance! So strained an interpretation as this all but obliterates the distinction between private and public.¹⁹⁷ In what follows, then, I will be speaking of private institutions only, by which I will mean institutions that are privately owned and operated. Surely these are the criteria for determining whether or not an institution is private, not the mere fact that it does business with some public institution.¹⁹⁸

Turning to the substance of the matter, then, when used descriptively, "to discriminate" means simply to distinguish and then to choose between alternatives: we discriminate in countless ways every day when we decide to associate or not to associate with people, products, what have you.¹⁹⁹ But when we choose we do so for *reasons*, which others may disapprove of or otherwise think "unreasonable." When they go on to charge us with "discrimination," however, they are using the idea not in a descriptive but in an evaluative sense, to indicate their disapproval not so much of our choice but of our *reasons* for having chosen as we did. In its evaluative sense, then, which is the sense that has found its way into so much of our law, discrimination is very much bound up with the reasons that lie behind our choices and hence with a theory

¹⁹⁷ For an indication that this trend may be reversing—though the issue is less than clear—see *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976).

¹⁹⁸ Notice that if there is no right against discrimination and indeed a right to discriminate—as I am about to argue—then the state cannot enforce an anti-discrimination policy even by the "carrot" approach of withholding business from those private firms that do discriminate. For to do so would be to discriminate against those firms—which is prohibited to the state—when what they are doing is simply exercising their rights. In what follows, however, my principal concern will be with the "stick" approach to enforcement, whereby some "right to nondiscrimination" (or "equal opportunity") is invoked in order to directly compel the employer to ignore certain factors when making employment decisions.

¹⁹⁹ Thus it is sheer nonsense to pretend that discriminating *for* does not entail discriminating *against*; to do one is logically to do the other.

of value that determines these reasons to be "good" or "bad."

As a matter of rights, however, it is altogether gratuitous to enter into this evaluative sense of "discrimination," into the subjective reasons that lie behind our choices. For our choices and indeed our right to choose are simply a function of our property: we have that right *whatever* our reasons for exercising it. In the employment context, the employer chooses to whom he will delegate a certain control over his property in his business; the employee chooses to whom he will delegate a certain control over his property in his labor. The reasons behind these choices are, strictly speaking, no one's business but the individual doing the choosing; for to own property *just is* to have the right to use that property for *whatever* reason, provided that nothing is taken from others in the process. If making choices about those uses does not *as such* violate rights, then how could the reasons behind the choices make a difference? Are we really to suppose that choosing a particular use for the "right" reasons does not violate rights but making the identical choice for the "wrong" reasons does?²⁰⁰

It should be noticed that when we ground this right to choose in the property over which the choice is made, the parties to the relationship are treated as equals. That balance is upset, however, when the state limits the conditions of choice of one of the parties while allowing free association to the other. Indeed, the state *discriminates* against that party, and not privately but with the force that is the state! By denying him his right to use his property for his own reasons the state takes that use while imposing no such restriction on the other party. In no way can this inequality of treatment be better appreciated than by simply turning the tables: we would surely think it an outrageous affront to privacy and to the right to freedom of association if the government said to the employee (employer) that he need not work (be in business) but that if he does hold himself out as seeking work (if he does seek employees), only certain reasons will justify his rejection of an offer (application), this in order to insure the right of employers (employees) to equal opportunity. Yet the inequality indicated by the parenthetical substitutions here is precisely what we are imposing upon the employer. When we add the burden of affirmatively seeking employees of certain kinds—imagine if the employee were required to af-

²⁰⁰ The parallel between the right to discriminate and the right to "impose" so-called "economic harms" by merely going into business is exact. What difference does it make

firmatively seek employers of certain kinds—the inequality of treatment becomes ineluctable.

Now there is no question that “invidious” discrimination—whether in its ordinary or in its “reverse” form—is an affront to dignity, as anyone who has experienced it will attest. And let me repeat that as a matter of personal values I loathe such discrimination. But unless those who are discriminated against can point to a right of theirs that such discrimination violates—and I believe I have set forth compelling reasons why they cannot—then like much else that is offensive, we simply have to tolerate it when it occurs. It is the price of freedom of association.

As a final example of the many ways in which the corporation is presently being compelled to expend itself for the benefit of outsiders, consider the problem of disclosure. Although there is some difficulty in treating so varied a subject broadly—disclosure takes on different aspects as it arises in the buyer, seller, shareholder, employee, or governmental contexts²⁰¹—here too the general rule applies: except in the case of products or conditions that endanger, about which more below, toward outsiders the corporation has no positive obligations of disclosure. For the failure to disclose violates no rights; there is no general right to information, no right to the assistance of others in making our market decisions. As noted in Part III,²⁰² information is not cost-free, especially if the standard is “full disclosure.” Accordingly, there is no reason to suppose that it might not be provided for a fee by others—*e.g.*, private consumer or investor groups—and in a form more usable than that afforded by corporate advertising. Here, as in so many such cases, the absence of compulsion, where none can be justified, does not mean that the benefit compelled will not be provided by the market.

Now as a practical matter, the case of complete nondisclosure is likely to be rare. Simply out of good business the corporation will ordinarily provide information about itself through advertising or

whether I go into business in competition with you and *as a result* you are “driven out of business” or I go into business *in order to* “drive you out of business” (if successful)? If I have a right to go into business *tout court*, then I have a right to do it for *whatever* reason. For if my act is not actionable *per se* (because it takes nothing you own), then it is not actionable simply because done from a bad motive. See Epstein, *supra* note 84.

²⁰¹ On some of the problems that disclosure requirements have led to in the consumer credit area, see Landers, *supra* note 118.

²⁰² See note 118 *supra*.

related means; if the prospective customer, seller, shareholder, or employee is not satisfied with these disclosures he can take his business elsewhere. Moreover, we ordinarily enter into special relationships with the corporation only after negotiations and hence after *some* disclosure—on both sides. As brought out in Part III, that information must be accurate, the determination of which in particular cases will often involve fine points of logic and language.²⁰³ But disclosure need not be “full”—a standard impossible *in principle* to satisfy—for if there is no obligation to disclose *anything* there could hardly be an obligation to disclose *everything*. When such an impossible standard is imposed from without, however, the way is paved for subsequent second guessing and for the guilty findings necessitated by the standard. And even if the standard is weakened so as to impose a duty to disclose only “material facts,” the same theoretical difficulty remains; for the focus of the second guessing now shifts from “full disclosure” to “material facts.” In sum, given that there is no obligation to disclose anything, the parties themselves will have to judge how much is enough information.

(b) As with individuals, then, the corporation has no positive obligations toward outsiders; if it is not obligated to do anything at all, then it cannot be obligated to do any more specific kind of thing, such as give of itself for the benefit of others. Once the corporation does begin to act, however, to pursue its various entrepreneurial activities, it must respect in turn this same right of others to be left alone. It cannot engage in any acts of private eminent domain, for example, even if it can show that these would be “justified” by some

²⁰³ Notice that once disclosure of some kind occurs the “full disclosure” problem will often disappear, provided the analysis of the information in fact disclosed is correct. To say that you are selling an Oldsmobile, for example, is to imply that you are selling a car with an Oldsmobile engine, not an engine from your Chevrolet division. (Ignore whether in fact there is any difference between an Oldsmobile and a Chevrolet engine and concentrate instead upon the manufacturer’s representations.) The point here is one of logical entailment: to say the former *just is* to say the latter. Nondisclosure, that is, is not really the issue in this case since disclosure of the relevant fact has *already* been given, if only implicitly; what has *not* been given or handed over is the object in fact represented by the title that has been transferred, as brought out in the analysis in Part III. (Notice how this example differs from the Rembrandt example discussed there, which involved no disclosure at all.)

In other cases, however, certain information not explicitly disclosed cannot possibly be inferred from the information that in fact is disclosed: absent any such representations, for example, the selling of “an insurance policy” entails no information at all about how the premiums for that policy compare with the premiums of competitors. Nor, of course, do sellers have any obligation to reveal such information: it is not the duty of sellers to do comparison shopping for buyers!

“public good” criterion.²⁰⁴ If governments are not justified in using individuals for the public good, then certainly private corporations are not.

Such straightforward examples of forced association are too obvious to require elaboration here. What I want to do instead is touch briefly upon the two more subtle forms of interference (or potential interference) that have generated so much discussion in recent years, endangerment and nuisance, especially as this last involves environmental issues. Once again, these are large subjects; my purpose here is simply to draw the general outline that is prescribed by the theory of rights, which might then serve as background for more detailed legal analysis.

As we saw earlier,²⁰⁵ the problem of endangerment arises in principle whenever individuals perform positive acts in the proximity of others. (I will use “endangerment” and “risk” rather than the more subjective “fear” in order to suggest that I am talking here about a phenomenon with some real basis in fact.) In the corporate context, the acts that endanger often do so by creating conditions or products that endanger, conditions affecting workers, say, or homeowners living near industrial complexes, or products that may harm consumers. Thus the causal sequence is often complex, involving an intervening act of the victim, or of some third party, or of nature (which may or may not serve to negative liability, depending upon the complex rules of liability in such cases). Yet we allow a good many of these individual and corporate acts and the risky conditions they create; otherwise, life in reasonable proximity with each other would cease. What we want to know, then, at least in general outline, is how the theory of rights orders this problem. Just what rights and obligations are there in the matter?

What is required in general, recall, is that acts or conditions not take what others own. As the acts of one person increasingly involve risk for others, these others are to some corresponding degree unable to make peaceful use of what they own, even if the risk does not in fact materialize. But there is a large subjective element in all of this; moreover, the issues are context-specific, varying greatly from, say, nuclear power plant risks to products liability cases (and greatly in turn within this last category). We are faced, then, with a very difficult and complex line-drawing problem: in principle there are

²⁰⁴ Cf. *Eldridge v. Smith*, 34 Vt. 484, 492-93 (1861).

²⁰⁵ See notes 85 & 86 and accompanying text *supra*.

lines there to be drawn; but by the very nature of the problem, there are no universal principles by which to draw them. To take a stock analogy, just as we know night from day, but not precisely where to draw the line between them, so too we know acts that do from those that do not endanger (much), but not precisely where to draw the line between them.

Owing to the peculiar factors involved here, then, we have to turn to "public" or "common" criteria; otherwise, as noted earlier, the extrasensitive plaintiff could quite literally shut down the world.²⁰⁶ When we do so, there enter such (admittedly vague) common law concepts as "reasonable man," "open and obvious risk," and "normal and proper use." I suggest, however, that these lead in turn to the drawing of not one but two lines, separating three categories of acts or conditions. There is first that class of acts or conditions that involve a very low degree of risk to others.²⁰⁷ These, individuals and corporations have a perfect right to bring about, without permission from or notice to others. A second category of acts or conditions, however, includes those involving a higher degree of risk. Here the acts may be performed or the conditions created by right, *i.e.*, without the consent of others, but only after a "duty to warn" has been satisfied. Since risk is often reduced substantially when we know of it, the obligation to disclose to others the risk to them that attends our acts or the conditions we create amounts simply to making that risk "open and obvious"—which might not be the case in the absence of that knowledge²⁰⁸—and hence to reducing the risk to a level below that which would otherwise violate their rights.²⁰⁹

²⁰⁶ See note 87 *supra*. I remain open to the possibility that private mechanisms can solve these problems, though I know of no satisfactory arguments to that effect.

²⁰⁷ On "degree of risk" see note 85 *supra*.

²⁰⁸ Thus the duty to warn is a function not simply of the degree of risk to others but also of the obscurity of the knowledge, the absence of which makes the activity or condition risky to others; for the degree of risk is often itself a function of the absence of the relevant knowledge. What we are seeing today, however, is an *ex post facto* extension of the scope of the duty to warn to cases in which the risk is manifest to the most ignorant of individuals, thus enabling plaintiffs to recover when the cause of their harm often is their own negligence. From a consequentialist perspective, moreover, it should be noted that a spate of such decisions will tend to produce a surfeit of warnings, with the result that the really important ones will likely go unheeded. See, *e.g.*, Epstein, *Products Liability: The Gathering Storm*, *supra* note 113.

²⁰⁹ A certain problem of theoretical inelegance may be thought to arise here. Have I not argued all along that there are no affirmative obligations to strangers? Yet is not this "duty to warn" (and the earlier duty to be financially responsible before putting others at risk, *supra* notes 169 and 170) just such an affirmative obligation? Not really. For those acts and conditions which require that warnings be given are such that without the warning they would be prohibited, this because they would then put others at a high degree of risk and hence would

Finally, there is a third category of acts and conditions which are so risky that they violate the rights of others even when warning has been given. Nevertheless, even these may be performed with the consent of those others. On a case-by-case basis, that is, crossings of the public line that separates these acts from those in the second category may be permitted—in either direction. For individuals have a perfect right to enter into voluntary special relationships such that one of the parties, in exchange for whatever, exposes the other to more (or less) danger than would otherwise be permitted. Thus, for example, workers, or consumers, or adjacent homeowners might elect to expose themselves to risks caused by some corporate activity or product, risks that exceeded those delineated by the public line, this in exchange, respectively, for higher wages, say, or lower prices, or some form of compensation. There is nothing that violates rights in this; on the contrary, rights of association would be violated if such interactions were prohibited.

Notice, then, that this outline of the endangerment problem fits squarely within the moral theory developed in Part III. There it was shown that it is forced association that is prohibited, while noninterfering acts are permitted. Acts that endanger others to too high a degree and hence force an association upon them are prohibited by the above analysis. Yet some of those acts—those which drop below the interference threshold when warning is given—are permitted when the appropriate disclosure reduces the risk, making of them noninterfering acts. And low risk acts are permitted without warning, for they do not interfere. Of course, a much more detailed, context-specific analysis of acts and their effects upon the property of others is required before particular acts or conditions can be placed within one of these three categories of risk and before it can be determined whether a warning is not required, or is required to make an act or condition permissible, or will not suffice, even if given, to permit the act or condition, absent the consent of those endangered.

Turning now to the closely related nuisance cases and the implicit environmental issues, here too the corporation has no more right to

fall into the third category I am about to discuss above. In effect, then, the affirmative "duty" to warn is simply a means by which to make permissible what would otherwise be a prohibited act. In short, if the actor does not wish to disclose the risk then he has no right to perform the act, for *as such* (i.e., under that description) it would violate the rights of others by putting them at too great a risk. (The same argument applies, *mutatis mutandis*, to the duty-to-insure issue.)

pollute than does the individual, whatever the "social" cost-benefit analysis may indicate. As with "the public good," talk of social costs and benefits too often obscures the point that it is individuals and their rights that count. If individuals cannot be used for the noblest of reasons, then surely they cannot be used for ordinary economic reasons, even if those reasons are couched in terms of "social good."

Here again the outline of the issue will be brief and general; we want to know how the theory of rights broadly orders the manifold nuisance and environmental problems, especially as these involve the corporation.²¹⁰ The point of departure is the analysis of Part III, where we saw that individuals, and hence corporations, have a right to do what they wish with themselves and their property provided they do not interfere with others. Thus, corporations whose activities must pollute have a perfect right to do so provided they keep the pollution on their own property. In order not to violate the rights of adjacent landowners, then, or users of the environment generally, industrial concerns have to conduct their affairs in such a way as to keep the resultant smoke, noise, odors, vibrations, etc., to themselves, whatever the means for accomplishing this, including simply buying the necessary land. But merely to mention the invasions that ordinarily count as nuisances is to point to the impossibility of such an ideal solution; hence it is accepted by nearly all that a pristine environment, especially in an industrialized society, must give way to some degree to considerations of cost.²¹¹ As in the case of endangerment, then, what is called for is some public line which defines, in quanta of particulate matter, or decibels, or whatever, just how much of these "externalities" will be allowed.²¹² But here, perhaps unlike in the case of low- and middle-level endangerment, the line must be closer to zero; for nuisances *are* invasions, however minor, upon the property of others, not simply *potential* trespasses. That line, moreover, cannot itself be a function of some *social* cost-benefit

²¹⁰ A vast literature has arisen on the environmental issue in recent years. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW*, ch. 2 (1972); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Coase, *The Problem of Social Cost*, 3 J. OF LAW & ECON. 1 (1960); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Kretzmer, *Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case*, 13 ISRAEL L. REV. 298 (1978); Michelman, Book Review, 80 YALE L.J. 647 (1971).

²¹¹ In focusing upon nuisances, I ignore the more subtle ecological changes that civilization brings about. If we allow at least some level of nuisance to obtain, in deference to human life on the planet, then *a fortiori* that same justification will permit certain ecological changes.

²¹² Again, I remain open to the possibility that private mechanisms may be able to solve some of these problems.

analysis, for once again, individuals get ignored in that averaging process. Rather, it must reflect a level beyond which no individual has a right to impose the nuisance costs of his activities upon *any* other individual, regardless of the benefit that may accrue to third parties (*i.e.*, "society") or to himself from his doing so.

Now a common objection at this point takes the form of the so-called "coming to the nuisance" defense.²¹³ If some industrial use was first in time and is of long standing, the argument runs, then at a later date some plaintiff—an adjacent landowner, say, who might be a recent purchaser, absent any relevant covenant running with the land—cannot now obtain injunctive relief, perhaps shutting the industry down.²¹⁴ His earlier silence, in effect, establishes an easement on behalf of the defendant industry, reflected often in depressed property values. Thus granting an injunction would not only destroy defendant's sunk investment, made upon the reasonable expectations generated by the silence, but will likely amount as well to unjust enrichment of the plaintiff.

Compelling as this argument may seem, it amounts nevertheless to sanctioning a taking. Given some public line defining the nuisance (about which more in a moment), the defendant here wants to construe the plaintiff's earlier silence as a tacit agreement to the invasion. Quite apart from the absence of consideration, however, these litigants remain strangers: except with regard to the nuisance complained of, that is, there is no special relationship between them, for "tacit consent" is no consent at all, at least as a point of strict theory. Moreover, even if plaintiff's silence were to be thus construed, how could subsequent owners be bound? This would amount to the defendant's placing a covenant in his neighbor's title by unilateral prescription, as it were. Rights run with the land; they do not come and go as "active uses" come to preclude "passive uses" on neighboring land which is already owned—whatever the economic value of these various cases.²¹⁵ The economic losses (and

²¹³ For a good discussion of this issue see C. GREGORY, *supra* note 76, at 532-36; Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, *supra* note 113, at 197-201.

²¹⁴ *Cf.* *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972), allowing such an injunction but requiring the plaintiff to indemnify defendant for the costs of moving or shutting down.

²¹⁵ See *Sturges v. Bridgman*, 11 Ch. D. 852 (1879). A special problem arises when the land over which the defendant is polluting is unowned, coming only later to be claimed by the plaintiff on a rule of first possession. Here defendant might prevail on a broad theory of prescription, aimed at defeating plaintiff's title and establishing his own. More narrowly, he might succeed in claiming that plaintiff's initial title contained an easement, that first pos-

gains) complained of above are unfortunate, but they are neither here nor there to the principle of the matter. In crossing the nuisance line defendant proceeded at his own risk; he now has no ground for complaint when he is asked to cease that wrong.

Given, then, that we have to tolerate to some degree the nuisances that arise from our living in reasonable proximity with each other, the foregoing is the morally optimal solution to the problem. Those who want more insulation than the public line affords will simply have to buy it, just as those who want to pollute beyond the line are at liberty to purchase that right from those who are willing to sell their immunity. To be sure, all of this assumes some public line, which of course has often not been established. Here enters the general common law problem of *ex post facto* legislation; it is especially onerous in the case of nuisance, however, for the line to be drawn, once *any* interference is allowed, is arbitrary. At this point locality rules often come into play, thus allowing for differing public lines. And at the time of remedy there enter such further practical considerations as transaction costs and the considerable cost disparities that often attend pleas for injunctive relief.²¹⁶ With respect to this last item, however, if the cost to the defendant of ceasing his activity is indeed so much greater than the cost to the plaintiff of the nuisance, then there is no reason why, if a permanent injunction is not to be given, this disparity ought not to be reflected in the compensation that is owing to the plaintiff. The remedy, that is, ought really to reflect the private taking that in fact is being sanctioned here, whatever the practical rationale behind it. For it is not by right but by reason of expediency that this remedy is settled upon at all: let those for whom the proper remedy would be too costly bear the full cost (to others) of the second-best solution.

Absent clear public lines, then, a private taking—with ample damages, perhaps even allowing the plaintiff to choose among those remedies that fall short of a permanent injunction—may be the only practicable solution when the cost of a permanent injunction would be too high. This is an uneasy solution, however, “justified” only because of the uncertainty of the line that defines precisely the right and wrong in the matter. But where public lines do exist, whether through case law or, more commonly today, through statute, there

session by others was subject to the constraints established by his own prior use of unowned land.

²¹⁶ See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

is no reason to withhold an injunction when those lines are crossed subsequent to their declaration. Assume, for example, that in order to stay competitive an industry wants to introduce a new technology which will increase the nuisance beyond the line.²¹⁷ Then that industry simply has to buy the conditions necessary for keeping that nuisance within the line. It has no right, for instance, to effect those changes and then attempt to force a taking upon adjacent homeowners when the latter subsequently bring suit. In this case, the industry's sunk investment in a wrongful activity should in fact be sunk. On the other hand, when public lines do exist, industries have a right to be secure within them. Having set the standards by which industries have invested in plant and equipment, we cannot now, as a society, come along and change the rules. If we do, then we should bear the costs our rule changes impose upon those industries.²¹⁸

(c) Just as the corporation cannot be forced to serve outsiders, then, so it may not, in pursuing its own entrepreneurial ends, interfere with those strangers, even when some "public interest" calculation suggests otherwise. But in pursuing its ends, the corporation is at perfect liberty to do whatever does *not* violate the rights of others. Thus it may do anything that does not take what outsiders own, as brought out in Part III. Stated somewhat differently, the corporation has no obligation to be mindful of the mere *interests* of others; it is enough that it respect their *rights*, however much the law of this century may be undercutting this crucial distinction between rights

²¹⁷ Cf. Kretzmer, *supra* note 210, for a case something like this.

²¹⁸ When we do change the rules in this manner, it may be because we come to realize that we got them wrong the first time, as with antebellum slavery laws, for example. Ought *we*, then, to have compensated the slaveowners when we extinguished their investments by changing the rules? No; for the cases of slavery and nuisance are altogether different. As a matter of natural law, slavery was always wrong, whatever the positive law on the matter; hence those who invested in the institution did so at their own risk. With nuisance, however, we are in a peculiar line-drawing domain; here, the natural law cannot tell us *where* the lines are, as with slavery, but only that there *are* lines to be drawn. At this specific level, then, *i.e.*, within the domain, right and wrong just are what the positive law says they are. Hence, individuals must be protected when they invest in accord with those lines, only to find them subsequently "fine-tuned" to their detriment.

When we draw this distinction, then, between the general and the specific aspects of the nuisance problem, we can see that egregious cases of nuisance and pollution are to be treated differently than minor cases. Permanent injunctions are easier to justify in the case of egregious nuisance, because this behavior violates even the broad natural law conclusion; on the other hand, compensation for capital losses brought about by our fine-tuning is easier to justify in the case of minor nuisances, because this is an arbitrary matter, where we as a society have decided to redraw the line.

and interests. Let me illustrate this general conclusion with a few straightforward, followed by a few less obvious examples, briefly indicating in the process how far the current law has strayed from this normative ideal.²¹⁹

Most fundamentally, perhaps, for it is a business undertaking, the corporation has a perfect right to make offers of whatever kind to the public (subject to the endangerment considerations discussed above, about which more in a moment). The variations upon this basic right are manifold, of course, many of which have fared less than well since the end of the last century. Either from paternalism or, more commonly, from "public interest" reasons, rooted in considerations of "unequal bargaining power" or "fair competition" or "promoting capitalism," the corporation lives today with a surfeit of legal restrictions upon its right to make offers.²²⁰

Consider, for example, the offers corporations make to prospective employees. Ideally, the corporation should be able to offer any terms it wishes, for the mere making of offers takes nothing that offerees or third parties *own*, nothing over which they hold any *rights*. To be sure, the terms of offer may not be in the *interests* of these outsiders—*e.g.*, offers of lower future wages, or higher wage offers that lure employees away from other employers—just as the counterterms of offerees may not in turn be in the interests of the corporation. But if no one has a right to force an association of *any* kind upon another, then there can hardly be a right to force any particular *terms* of association.²²¹ Thus the state has no right to

²¹⁹ The issues and examples to be discussed here should not be confused with those raised at (a) above, however closely related they may appear to be. The emphasis there was upon permitted *omissions*, upon what the corporation need *not* do, while here the emphasis is upon permitted *commissions*, upon what the corporation *may* do. Although in both cases the states of affairs that "result" from these omissions or commissions can be characterized in terms of the "effects" upon outsiders—and this is just the way in which the issues in (a) and here appear to be alike—doing so obfuscates and indeed ultimately begs the crucial question of omission-causality. Moreover, it shifts the discussion ever so subtly from the theory of rights to the theory of value, from an objective consideration of acts and omissions to a subjective consideration of desirable or undesirable states of affairs, as in fact the legal conflation of rights and interests is increasingly doing. This is to be expected, of course, in a thoroughgoing positivist regime, where "rights" are seen simply as values—or interests—that have "found their way" into law. (Thus do interests "rise to the level of" rights.) We should not be surprised, however, that the ensuing law becomes increasingly uncertain—at least as uncertain as the theory of value upon which in fact it rests.

²²⁰ See note 2 *supra*.

²²¹ Thus the absurdity of our current labor law which says that neither the employer nor the employee union is required to "agree to a proposal [or to make] a concession," 29 U.S.C. § 158 (d) (1976), but at the same time imposes a duty on each to bargain in "good faith,"

dictate or in any way delimit such terms as minimum (or, more recently, maximum) wage offers, or conditions of employment (subject to the endangerment warnings discussed above), or fringe benefits such as retirement programs (and in particular, public retirement programs), or even the conditions under which such substantive terms are negotiated (excluding force, of course, or breach of contract).²²² Rather, our rights in these matters rest simply in our right to walk away from such offers, if we are offerees, or in our right to be left alone, if we are nonofferee third parties; our rights, that is, rest in the absence of a right in the offeror to force an association upon us, to take what belongs to us.²²³

Similarly, offers of sale made to the general public call for no government interference (subject again to the endangerment warnings discussed above), for here too the terms of offer are no one's business but the offeror. This applies in particular to pricing decisions. If private property means anything it means the right to dispose of or exchange that property in any way that does not violate the rights of others. Charging "exorbitant prices" (in order to garner "unconscionable profits") hardly violates rights. Better that no offer be made at all (which the owner has a perfect right to do)? Such pricing violates rights only if those paying the prices have some right to have the goods at issue at a lower price—which calls into question, of course, the privacy of the property. Thus wage and price controls of any kind are simply an indirect method of socializing property—property in the ordinary sense as well as (more ominously) our property in our labor. (Indeed, such controls are fascist in the basic sense of that term, for they allow nominal private own-

with all that that has come to imply (see, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (employer required to give reasons for refusing a wage increase and to provide records supporting those reasons); *NLRB v. Katz*, 369 U.S. 736 (1962) (unilateral action of employer to increase wages and benefits, without prior discussion with union, construed as a refusal to negotiate)). This is tantamount to saying that as a condition of enjoying his right to be in business, the employer must negotiate with prospective employees under legally prescribed conditions, which is precisely what the Court implied when it found that in lieu of satisfying this requirement the employer had a right to go completely (but *only* completely) out of business! See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

²²² See, e.g., T. HAGGARD, *COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS* (1978); Haggard, *supra* note 16; Vieira, *supra* note 16.

²²³ Once again, I am using "force" here strictly. It does not refer to the conditions of existence under which we are all "forced" to live our lives, but only to the taking of what belongs to others; for again, private necessity is no justification for forcing others to associate with us. See note 117 and accompanying text *supra*.

ership, while control is in public hands.)²²⁴ But if charging *high* prices for one's goods or services violates no rights, neither does charging *low* prices, or indeed gift-giving. To be sure, competitors may have an *interest* in a corporation's charging only "fair" prices, just as customers have an interest in "fairness" in the opposite direction; but neither competitors nor customers have any *rights* in this matter, for neither owns the object offered and hence has any ground for setting the conditions of offer.

These last-mentioned conclusions bring us straightaway, of course, to the antitrust law that has variously plagued and benefited the corporation for nearly a century now. I will not go into the minutiae—infinite in principle—of this area of our law because, quite simply, the theory behind antitrust enjoys absolutely no foundation in the theory of rights.²²⁵ Quite apart, that is, from whether modern antitrust law has had the effect of protecting competitors rather than consumers, as has recently been argued,²²⁶ the basic normative question is whether this body of law is justified *at all*. It will be justified only if there are rights that the proscribed acts violate. We have just seen that pricing decisions violate no rights. Neither then does "predatory pricing," or the market concentration that may (but only may) result, or the possible decline of competitors. For once again, if an act is not actionable *per se*, if it takes nothing to which others have a right, then it is not actionable even when done from a bad motive. Consumers have no more right to "fair prices" than competitors to "equal opportunity," as brought out in Part III. Likewise, price *fixing* violates no rights; nor do

²²⁴ Wage and price controls do not, of course, amount to complete external control of market behavior—or the uses that can be made of private property—as might be expected under a thoroughgoing fascistic regime. They do not, for example, reach out to the supply side of behavior. Accordingly, suppliers invariably respond to such controls by reducing their efforts (or directing them elsewhere), which gives rise, of course, to shortages. To have any hope of avoiding these shortages, then, wage and price controls have to be accompanied (at least) by forced supply—which moves the regime closer to thoroughgoing fascism, to the slavery that forced supply just is. (Alternatively, confiscation would enable the regime to move past fascism to socialism, thus eliminating the nominally private property altogether, though not the forced supply or slavery.) See R. SCHUETTINGER & E. BUTLER, *FORTY CENTURIES OF WAGE-PRICE CONTROLS: HOW NOT TO FIGHT INFLATION* (1979).

²²⁵ For an excellent treatment see D. ARMENTANO, *THE MYTHS OF ANTITRUST* (1972). See also R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978), which unfortunately is vitiated by Bork's (implicitly positivist) assumption—no doubt historically correct, for all its theoretical difficulties—that the "purpose" of our antitrust law is to increase consumer welfare. That rationale, of course, could "justify" the violation of an endless number of rights. See II.B.1 *supra*.

²²⁶ See R. BORK, *supra* note 225.

cartels, or tying agreements, or any other "combinations in restraint of trade." For these are simply contractual arrangements, which individuals and corporations alike have a perfect right to enter into:²²⁷ if individuals have a right to perform the acts now performed by the combination (e.g., setting prices, withholding products, etc.) then the combination does too; for rights do not get lost simply because they are exercised jointly (just as groups cannot *gain* rights that individuals do not first have). Further, the entry of a corporation into new lines of trade can hardly violate rights. This is true whether the entry is direct or by way of takeover or merger.²²⁸ (Are we really to suppose that the Ford Motor Company has no right to produce kitchen stoves? Is it any different when Mobil Oil buys Montgomery Ward?) Conversely, then, divestiture is not obligatory and cannot legitimately be forced. In each of these cases the same principle applies: however the *interests* of others may be affected by the activities antitrust proscribes—concerning which the historical evidence seems to be very much against antitrust²²⁹—these others can point to no *rights* of theirs that these activities violate. Again, we do not have a right to force a weighting of the competition in order to make it "fair," even assuming we knew *how* to do this and would do it impartially (two *very* large assumptions). Indeed, each of us has a right *against* such forced interference.

There of course are many other corporate activities that critics have sought to restrict or prohibit, ranging from corporate speech²³⁰ to corporate gift-giving²³¹ to corporate relocation (without community approval),²³² all of which can be analyzed along the lines developed above. I want finally, however, to apply this analysis to one of the more difficult but recurring issues in the corporate debate, the problem of bribes and kickbacks. This issue is especially important to American corporations doing business abroad, for in most parts of the world—market and "nonmarket" economies alike—these payoffs are simply a normal part of doing business. With the passage of the Corrupt Practices Act of 1977, however,

²²⁷ See note 84 and accompanying text *supra*.

²²⁸ If our concern with reducing the concentration that results from takeovers and mergers is serious we will change the tax policy that encourages this. See M. FRIEDMAN, *supra* note 150, at 130; Jacoby, *The Conglomerate Corporation*, 2 CENTER MAGAZINE 41, at 46-47 (July 1969).

²²⁹ See D. ARMENTANO, *supra* note 225; R. BORK, *supra* note 225.

²³⁰ See note 188 *supra*; Deer, *State Law*, 2 CORPORATION L. REV. 56 (1979).

²³¹ See R. EELLS, *CORPORATE GIFT GIVING IN A FREE SOCIETY* (1956); Manne, *supra* note 9.

²³² See McKenzie, *Business on the Run?*, WALL ST. J., March 19, 1979, at 24.

American companies have frequently had to forego such business—unlike their foreign competitors—or try to fit these payoffs within the often inscrutable language of the Act.²³³ Once again, then, I want to go to the heart of the matter and ask what is wrong, if anything, with bribes and kickbacks. In particular, do corporations have a right to offer these payoffs? Or, what comes practically to the same thing, do they have a right to make such payoffs when the request is initiated by others, *i.e.*, when the corporation is the offeree?

A conventional approach to this issue might attempt first to define “bribe,” “kickback,” “payoff,” and so forth, which would move the argument very quickly to assumptions about “profit,” “commission,” and other such notions—as though the latter were in some sense “fixed,” such that we could tell the difference between, say, a corporate kickback and a reduction in expected corporate profit. What I want to do instead is begin by describing the payoff model, in its simplest form, as involving (at least) three individuals and, more importantly, two relationships: that between, let us assume, the buyer-principal and his agent, the latter being the recipient of the payoff (call him the agent-payee); that between the corporation-payor and the just-mentioned agent-payee. Now if the corporation-payor wants to reduce its expected profit, however measured, on the transaction before it (or if its salesman wants to reduce his commission) by kicking part of it back to the agent-payee, that, in and of itself, violates no one’s rights—not, that is, as long as corporations (or their salesmen) have a right to work at whatever rate they choose, including at a loss. For both payor and payee voluntarily consent to this arrangement and hence themselves have no basis for complaint.

The problem arises, if one arises at all, in the relationship between the agent-payee and his principal. If anything is *taken*, that is, it is taken not from the payor or payee but from the principal, and not by the corporation-payor, who has no direct relation with the principal-buyer, but by the agent-payee. For we assume here (but see below) that the agent is commissioned by his principal to get the “best deal” he can for the principal. If the agent “sweetens” his commission, however, by accepting a payoff from the corporation (regardless of who initiates the offer), *and does not pass that payoff on to his principal*, then he has failed to get the “best deal.”

²³³ See *Business without Bribes*, NEWSWEEK, Feb. 19, 1979, at 63-64.

By not passing on the corporation's lowest offer—original offer less kickback—he has failed to satisfy his contractual obligation and hence has taken (kept for himself) what belongs to his principal.

Now of course many agent-principal agreements will be looser than in this example. Moreover, they may simply assume, as part of the background custom in these matters, that “payoffs” are part of the agent's fee. All of which will raise doubts not about who the wrongdoer is but about whether there is any wrongdoing at all.²³⁴ If, however, there is a firm agreement between principal and agent, as depicted above, it is not the *corporation* that violates this agreement, either by paying a requested kickback or by itself initiating the kickback offer. For the corporation is not a party to the principal-agent agreement. Moreover, the corporation has simply made an offer, or met a request, which we saw above it has a perfect right to do. (Are we really to suppose that the corporation has a supererogatory duty to inquire into the relationship between the agent and his principal, to be solicitous of the principal's well-being, especially when it is likely that the parties wish to be dealing at arm's length?) Rather, it is the *agent*, who *is* a party to the agreement with the principal, who violates the rights of the latter as contained in that agreement. These rights, that is, are held not against the corporation but against the agent. Accordingly, legislation and sanctions directed at those who *give* payoffs, rather than at those who *accept* them, are simply misdirected. They single out the wrong party. Corporations, then, have a perfect right to accept requests for payoffs and indeed to offer them. Here again we have to distinguish between what it might be *good* for them to do, according to some idealized theory of value, and what they have a *right* to do.²³⁵

²³⁴ Those uneasy about “payoffs” are often the same people who are uneasy about profits and commissions—and indeed about bargaining in the marketplace. The implicit assumptions—that there are “fair prices,” which happen to be just the prices actually asked—are all but unthought-of in many parts of the world.

²³⁵ Notice that the theory of rights finds the wrong not in the tempting (assuming the offer is initiated by the corporation), but in the yielding to the temptation. Thus, inducement—to alienate a contract, or affections, or whatever—is in itself not prohibited. Similarly, pornography may be a temptation to criminal behavior (but only may, for here the evidence indicates no real correlation); it is permitted, however, unlike the yielding to that temptation. The theory of rights, in short, is rooted in act morality, not in agent morality; it places great stock in—indeed is grounded in—the free will of the agent, in the view that human behavior is more than mere stimulus and response. (Would behaviorism enable us to hold liable those stimulating the response? But why? What stimulates *their* stimulating behavior? *Would anyone* be liable? Or responsible?)

3. *Special Relationships*.—We turn now to the special relationships in which the corporation stands. Here, however, we have to be careful about the reference of “the corporation”—whether it denotes shareholders, or directors, or includes (only) management or even ordinary employees.²³⁶ Let us work toward these issues slowly, then, by raising a few general points first, and by continuing for the moment to view the corporation as a single entrepreneurial unit. In a short while we will go inside this unit, gradually refining the picture as it becomes necessary.

Recall that the corporation stands specially related to all those with whom it has contracts and to those whom “it” has injured, either tortiously or criminally, or who have injured it.²³⁷ I will concentrate here upon the contractual relationships, since forced associations were treated earlier under the limited liability question. The corporation stands contractually related, then, toward those consumers, creditors, suppliers, employees (including managers), directors, and shareholders who have entered into contractual relationships with it. Since there is an order of increasing complexity

Cannot this argument zip all the way back to haunt us, however? By logical extension, that is, it would seem that the employer of a hired murderer has violated no right: he, after all, has simply made a contractual offer, which the murderer, the real wrongdoer, has accepted. That extension can be stopped, I believe, by citing our rights against endangerment. Such a contract, that is, amounts to an assault: indeed, the mere making of such an offer amounts to a threat upon the would-be victim's life and hence is a violation of his right against endangerment. For under such a threat—just like living next door to a dynamite factory—he cannot exercise *his* rights as he might otherwise. On the other hand, inducements such as those above, though they “threaten” to violate rights, do so without giving rise to the relevant kind of fear, the fear that is generated by the threats that *are* violations of our rights against endangerment; for if the acts induced are carried out, there are remedies that can rectify the wrongs, unlike the compensatory “remedies” for murder, physical harm, and so forth. There are threats, that is, which if carried out can be fully rectified and hence give rise to no fear: other threats, however, cannot really be rectified if carried out and hence give rise to fear, to incapacitation, to the inability to exercise the rights we might otherwise enjoy. See R. NOZICK, *supra* note 11, at 65-71.

²³⁶ See note 29 and accompanying text *supra*.

²³⁷ Here I have put “the corporation's” tortious and criminal acts in the ordinary idiom for ease of statement. Recall, however, the analysis at A.2 above: it is not “the corporation” that commits torts and crimes but various of the corporate actors, who stand personally liable; when their acts make the corporation itself liable it is through contract, not through vicarious liability. Nevertheless, in the case of dangerous conditions, including products liability, corporate tortious liability may be constructed insofar as the corporation, through its representations, holds itself out as the author of the conditions and hence as liable for them and for any untoward consequences resulting from them. (Liability for such consequences may be waived or limited, of course, either through an assumption-of-risk defense in tort, as adumbrated in the discussion of endangerment above, or through explicit contractual devices that are sufficient to accomplish this purpose.)

here, let me take up each of these relationships in the order just listed. But first let me note that a delineation of the rights and obligations that constitute these relationships is not a terribly complicated matter: put most plainly, the individuals thus related hold only those special rights and obligations they have agreed upon, a point I will make repeatedly below; otherwise they remain generally related to each other. Beyond this there is not much that the theory of rights has to say. Accordingly, the discussion here will be more brief than in the previous section; I want simply to set forth a few issues and examples, taking each as far as that theory will allow.

Most of the complaints set out in Part II under "Consumers and the Public" have now been treated, for they arise, in large measure, between parties only generally related. When consumers and members of the public become specially related to particular corporations, however, either through consumer contracts or through "corporate" (or their own) torts and crimes, then the special rights and obligations outlined earlier come into play.²³⁸ Let me simply add here that in the case of consumer contracts, the analysis can ordinarily proceed by treating the corporation as a single entrepreneurial unit, for these contracts are usually made with "the corporation." (These same general points apply equally, of course, to those creditors and suppliers who may be contractually related to particular corporations.)

When we turn to employee issues, however, at least as they relate to actual and not just to prospective employees, we are then talking not about outsiders but about members of the corporation.²³⁹ Nevertheless, here too we can ordinarily speak of the relationship between "the corporation" and these employees, for by "the corporation" we will usually be understood as referring to management—or at least to some part of management—acting for shareholders and hence for the corporation. (Thus the analysis leads back, again, to shareholders, who ultimately just are "the corporation.") Taking up these employee issues, then, here also many of the complaints listed in Part II under "Employees" have now been treated, for these pertain

²³⁸ For a more detailed treatment of consumer contracts, which is consistent with the background theory of this Article, see Epstein, *supra* note 18, at 305-15, discussing "add-on" clauses, "waiver-of-defense" clauses, clauses that exclude liability for consequential damages, "due-on-sale" clauses, and "termination-at-will" clauses as these operate in the franchising context. For a delineation of tortious and criminal rights and obligations which is consistent with this Article see note 113 *supra* and Pilon, *supra* note 114.

²³⁹ For an overstatement of this point see the quotation from Lodge, *supra* note 24.

likewise to individuals only generally related to the corporation, *viz.*, to prospective employees. When these individuals become actual employees, however, the special rights and obligations they now hold vis-à-vis their particular employer are defined, once again, by the terms that have been agreed to (or that are logically entailed by those agreed-upon rights and obligations). To be sure, the relationship here ordinarily exhibits greater intimacy and duration than the one-time interaction between a consumer and a corporate producer, or even the ongoing relationships that often arise between corporations and their regular customers or suppliers. Nevertheless, the underlying principle in each of these cases is the same: individuals stand generally related except insofar as their actions—contractual or tortious or criminal—have served to create special rights and obligations between them. (Hence my concentration on general relationships.)

Nowhere perhaps does this principle come more clearly into focus than in cases involving the “terminable-at-will” doctrine, where either employer or employee may terminate their association “at will,” *i.e.*, without cause, “just” or otherwise. Typically, in these cases, the employer dismisses the employee, and he gives reasons for the dismissal; but those reasons are often unrelated to job performance or even to larger economic considerations. Indeed, they sometimes are reprehensible, as when employees are dismissed for their off-the-job political or literary activities,²⁴⁰ or for refusing the sexual advances of their superiors,²⁴¹ or for “blowing the whistle” on defective products,²⁴² or even to enable the employer to cut off a salesman’s commissions where the employment contract expressly permits this.²⁴³ All of which gives rise to charges that the employee’s civil, or political, or privacy, or some other rights have been violated.

Many of these cases are indeed odious. (And by no means are they limited to the world of commerce and industry, as only a glimpse of the academic world will affirm.) But here again we have to distinguish between what it would be *good* for the employer to do and what he has a *right* to do. The employee enjoys no general right to a job because there is no right to forced association. Accordingly,

²⁴⁰ *McIntire v. E.I. DuPont de Nemours & Co.*, 165th Judicial Dist. Ct., Harris County, Texas, No. 954,904.

²⁴¹ *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

²⁴² *Geary v. United States Steel Corp.*, 319 A. 2d 174 (Pa. 1974).

²⁴³ *Fortune v. National Cash Register*, 364 N.E. 2d 1251 (Mass. 1977).

when employer and employee come together they do so only insofar as the agreed-upon terms of association specify. If these terms include the option to terminate the association without cause, then there really is nothing more to say on the matter. However unenlightened the employer's reasons—or indeed shortsighted, as when “whistle-blowers” are simply doing their job—these reasons are irrelevant to the employer's right, as the employee himself has expressly granted. He cannot now come back, through the courts, to force new terms of association upon the employer, anymore than the employer can force the employee who has quit his job, for whatever reason, to continue working for him. In short, if the employer can terminate the association for no reason, then he can terminate it for the reasons he cites.

Now I readily grant that these cases usually involve individuals with unequal bargaining power, and that employees thus fired are often greatly disadvantaged as a result.²⁴⁴ But as we have seen earlier, these considerations do not serve to generate rights. (If they did, the first consideration would take us away from contract, back to status; the second would ground rights in murky consequentialist reasons, ultimately undermining the whole idea of rights.) Similarly, it will not avail to argue that corporations should be prohibited from firing employees without cause—or indeed, from entering into at-will contracts—“because they [these corporations] affect the public interest.”²⁴⁵ For there is virtually nothing that does not

²⁴⁴ See, e.g., Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COL. L. REV. 1404 (1967); Ewing, *Winning Freedom on the Job: From Assembly Line to Executive Suite*, CIVIL LIB. REV. 10-11, (July-August 1977); Holloway, *Fired Employees Challenging Terminable-at-Will Doctrine*, NATIONAL L. J. 22, 26 (Feb. 19, 1979).

²⁴⁵ Ewing, *supra* note 244, at 11. See also Berle, *supra* note 33, at 942-43, for both “public interest” and “public creature” arguments for limiting the rights of corporations:

The Bill of Rights and the Fourteenth and Fifteenth Amendments would thus have direct application to and also throughout any corporation whose position gave it power. The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree Under this theory certain human values are protected by the American Constitution; any fraction of the governmental system, economic as well as legal, is prohibited from invading or violating them. The principle is logical because, as has been seen, the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists.

Berle's approach here, of course, especially his treatment of private corporations as “fractions of government,” is variously called state capitalism, fascistic syndicalism, or social democ-

in some way or other affect "the public interest," a consideration, once again, that is irrelevant to questions of rights. Rather, the right of the employee against being thus dismissed, if he has one, must be found in the employment contract itself; for otherwise he holds only general rights against his employer (as against anyone else), among which this right is not included.

It is noteworthy, in this connection, that recent courts have tried to find such a right not in general public interest considerations but through just this contractual route.²⁴⁶ They have attempted, for example, to locate consideration the employee may have given in addition to his services, from which they have inferred "agreements implied in fact allowing discharge only for just cause."²⁴⁷ As examples of such consideration they have pointed to the employee's having given up one job and relocated at the employer's request,²⁴⁸ or even to his past service of long duration.²⁴⁹ Clearly, however, unless these inferences do indeed follow from the actual language of the contract, or perhaps from the background negotiations, they have all the marks of a retreat from contract and a return to status—which amounts, of course, to treating the parties as unequal before the law.²⁵⁰ Again, in the important *Monge* case,²⁵¹ in which a woman was fired because she refused the sexual advances of her

racism. It is a very long way from the regime envisioned in the American Constitution. So thoroughly has that document been democratized, however, as to have enabled Berle to add, with no apparent linguistic qualms, that "[i]nstead of nationalizing the enterprise, this doctrine 'constitutionalizes' the operation." This from the man who decried power without property!

²⁴⁶ Courts have not been reluctant to find for the employee when the reasons for dismissal contravened public policy, as when termination was for accepting jury duty, *Nees v. Hocks*, 536 P. 2d 512 (Or. 1975); or was intended to dissuade other employees from claiming workers' compensation benefits, *Frampton v. Central Indiana Gas Co.*, 297 N.E. 2d 425 (Ind. 1973). Notice then how "public policy" intrudes upon private relationships. In a legal regime consistent with the background moral theory of this Article, there would be no state-imposed workers' compensation insurance, which of course was an early form of no-fault insurance; rather there might be private risk-spreading devices. Nor would there be jury "duty"; rather, all trial costs, including compensation for voluntary jurors, would be borne by the losing party, which would reduce substantially the overcrowding of courts and the delays in justice that result when the guilty demand trials. There of course is much more to be said on these subjects; I raise them here simply to suggest that "public policy" need not intrude upon private relationships as much as we have come to believe in light of the breadth of current public policy.

²⁴⁷ Holloway, *supra* note 244, at 22.

²⁴⁸ *Brawthen v. H & R Block, Inc.*, 52 Cal. App. 3d 139, 124 Cal. Rptr. 845 (1975).

²⁴⁹ *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974).

²⁵⁰ Notice that here again (*e.g.*, as in *Foley*, *supra* note 249) the theory of rights is strict; gratuitous beneficence does not serve to generate obligations in beneficiaries.

²⁵¹ Note 241 *supra*.

superior, the court found the employer had breached an "implied duty of good faith and fair dealing which is implied in every contract."²⁵² Here too, I suggest, we appear to have a case of judicial overreaching, however reprehensible the employer's behavior; for whatever the "duty of good faith and fair dealing" might entail, a by no means insignificant question, unless such a duty were in fact implicit in some encompassing contractual language, serving to negate any at-will aspect, there is no warrant to infer it *as a feature of contracts per se*, especially when its effect is to negate explicit contractual language. We must assume, that is, that if the at-will provision is an explicit part of the contract, it is there for a reason—perhaps to give maximum flexibility—and that each party, knowing it is there, and knowing the implications of it, agrees to it all the same. Otherwise we are back at status, with all the paternalism and inequality implicit in that doctrine.

But suppose the at-will provision is not explicitly a part of the contract. Are courts then at liberty to impose a "just-cause" doctrine? The answer is no, not if that means imposing value judgments about whether the employer's—or indeed the employee's—reasons for termination are "good" reasons. Nevertheless, when at-will is not specified, just-cause may be discovered *formally*—if it is contained implicitly in the contract. At bottom, employment contracts relate three terms: service, a rate of pay, and some period of time. If all three terms are specified, the employer can dismiss the employee before the expiration of the time term only if the service term has not been satisfied. Determining whether that term has in fact been satisfied, of course, will often involve the court in a close analysis, for the language describing the service required will be more or less precise.²⁵³ Nevertheless, one can easily imagine language narrow enough to preclude the employer from terminating the employee for reasons other than those relevantly related to the services performed. In that case, termination for irrelevant reasons, or for no reason, would amount to a breach of the employment contract. In effect, the contract already contains a "just-cause" provision; the courts do not have to impose one *ab extra*, invoking extra-contractual considerations. (Indeed, such considerations are no different in principle than the policy judgments courts try to

²⁵² Holloway, *supra* note 244, at 22.

²⁵³ Cf. note 203 *supra*, where an analysis of language in the advertising/disclosure context might yield the "good" result, though by right-respecting means.

eschew as "legislative.") A contract thus drawn, then, will bind the employer. But with equal force it will bind the employee as well. Unless otherwise specified, that is, he is not at liberty to accept employment elsewhere, at least as long as the time term is in effect, for that too would amount to a breach of the contract.

Where the language of the service term is more broadly drawn, however, the court is less likely to be able to find the employer's reasons "irrelevant." Moreover, when the *time* term is left open, then by implication the contract is at-will. The alternative view, that the employer is required to keep the employee as long as the service term is satisfied, is simply not a plausible reading of the original exchange between the parties; for it would mean that the employer could dismiss such an employee only by going out of business, making the employee, in effect, something like a civil servant. (I assume here, wrongly, that civil servants may be summarily dismissed for failing to perform the services for which they are hired.) Moreover, by parity of reasoning it would mean that the *employee* could terminate the association only if the employer failed to satisfy the pay term. Absent an explicit at-will term, then, or, on the other hand, terms delimiting the conditions of dismissal (if only by logical entailment), the background presumption in employment contracts must be at-will. For this presumption alone preserves the general rights and obligations that describe the relationship between the parties, save for those special rights and obligations they have agreed upon. To replace it with some other presumption is to undermine those general rights and obligations, replacing them with others, which only the parties themselves can do.

Corporations and their employees stand generally related, then, except insofar as they have specified otherwise; hence the terms thus specified, *i.e.*, the special rights and obligations thus created, are what constitute the special relationship, and what alone constitute it. This analysis applies not only to the conditions under which the employer-employee association may be terminated, but to all aspects of the association, such as control of the workplace, or participation in corporate decisionmaking. It should hardly surprise that the corporation is not a democracy—it was never intended to be. It is a business, not a political association. It is owned not by all of its "members" but by the shareholders, who conceived it and set it in motion with their capital, or subsequently joined it in the same way. Because it is *their* corporation, shareholders have the right to organize and direct it, just as anyone else has the right to control what is his. In the larger corporation, of course, that control

is ordinarily delegated to directors and then to management, whose right to control the workplace and direct the company is legitimate in virtue of that delegation. When thus delegated, however, management's rights of control are exclusive, even when others are seriously affected by the conditions controlled,²⁵⁴ as when workplace conditions endanger employees. (Indeed, how else could management subsequently be held liable?) As was brought out earlier, employees have rights against such endangerment, and a right to be warned of it, which enables them to assume the risk if that is what they choose.²⁵⁵ But they do not have a right to have their particular jobs without the risk, *i.e.*, to control the conditions of employment—not, that is, if they are unable to obtain that control, *i.e.*, to obtain those terms (those particular jobs without the risk), through negotiation. If management, having disclosed the risk, is unable to find employees willing to assume it, then those jobs will remain unfilled (and the company will suffer accordingly), or working conditions will have to be improved until they are acceptable to prospective employees. In short, management is obligated to disclose the risks, but not to yield control of the workplace. For the right of control, as with all rights, is rooted ultimately in ownership. Shareholders own the workplace, not employees.

With these last considerations, it should be noticed, we have moved more deeply into the corporation, which was necessary in order to show the legitimacy of management control of the corporation vis-à-vis nonmanagement employees. But of course managers themselves are employees, at least in their managerial capacity;²⁵⁶ accordingly, the conclusions just developed for nonmanagement employees will apply to them as well. In these cases, however, at least with respect to the larger corporation, "the corporation,"

²⁵⁴ See note 190 *supra*. In a moment I will develop this point a bit more fully, not as it applies to employees but to shareholders.

²⁵⁵ Critics of this arrangement will object that it permits employers to "take advantage" of the private necessity of employees. That is true, but again, the same could be said for virtually any market transaction. The test for legitimacy, as throughout the theory of rights, is found in consent. If employees agree to work at great heights, or with toxic substances, or to expose themselves to whatever kind of employment danger, in exchange for whatever kind of consideration, then what more can outsiders say? Are we to *prevent* such mutually agreeable arrangements? By right? And over the objections of the employees themselves? Or is it simply that we are to restrict the endangerment terms the employee may offer? That comes, of course, to the same thing, for it prohibits individuals from negotiating arrangements that go beyond those restrictions, if that is what they wish.

²⁵⁶ When managers are also directors or shareholders, the issues are more complex, but the background principles remain the same, as we will see in a moment.

which holds the corresponding rights and obligations, will denote either higher levels of management, representing shareholders, or, in the case of the highest levels of management, will denote the directors, again representing or speaking for the shareholders. Inevitably, then, the analysis moves back to shareholders, to their rights and obligations as owners of the entity with which management contracts.

But is this analysis of "the corporation" right? Does this term, that is, inevitably denote shareholders? We continue to reach this conclusion by tracing back, by following the immediate corporate actor back to the wellspring of his commission, the corporate owner, who with his fellow shareholders has set the whole undertaking in motion. But does this tracing back not reverse itself when it is the *shareholder* who is disadvantaged by "the corporation," as in corporate freezeouts, for example? Indeed, critics of "corporate" behavior vis-à-vis shareholders seem in general to presume that *managers*, and not the shareholders, are "the corporation."²⁵⁷

The ultimate untangling of this issue takes us, of course, not to any body of SEC rules aimed at structuring the shareholder-director-management relationships from outside, much less to any considerations of fairness between the parties, but to the articles of incorporation, as brought out in section A.2, above. For setting aside the SEC rules that have intruded upon the matter, "the corporation" *just is* the complex contractual entity brought into being by the founders, as described in these articles of incorporation, and as owned by these founders or by others who have subsequently bought into the arrangement in the prescribed way. Now in these articles, along with whatever amendments may have been attached, the complex web of special relationships that hold between shareholders, directors, and managers will be set forth, in more or less detail. In general, as we saw in subsection 1 above, the founding shareholders are at perfect liberty to internally structure their corporation in any way they desire; and subsequently the shareholders are at liberty to amend that structure by methods that are consistent with the rules set forth in the original agreement, yielding results that do not violate rights of outsiders. Thus if they elect to settle corporate issues by a rule of unanimity, or by a majority rule, or by selecting a manager with plenipotentiary powers and no fiduciary responsibilities, that is their business and their business alone. For again, if

²⁵⁷ See text at II.A.1 *supra*.

an individual has a right to order his own affairs in any way he chooses, provided he violates no rights of outsiders, then he has a right to order his affairs with others in ways that are mutually acceptable, provided again that no rights of outsiders are violated.²⁵⁸ The latter is simply a logical entailment of the former. In sum, then, these articles constitute "the corporation," and point to the shareholders who stand behind them, however complex the line from these shareholders to the various corporate actors.

Now this explication of the analytical and normative underpinnings of the corporation, general though it is, yields a broad range of immunities for the corporate owners; for their right to structure their corporation in any way they choose renders them immune from outside interference in these matters. Outsiders, for example, have no right to determine who shall sit on the board; if the owners want a board composed entirely of insiders, in the technical sense, *i.e.*, employee directors (despite the conflicts of interest to which this may give rise), or if they want a board composed of a number of "constituency directors," or whatever, that is their right. It *is*, after all, *their* corporation.²⁵⁹ Similarly, provisions for internal accounting or for the transmission of information between the various corporate people are matters for the shareholders alone to decide, even if they decide on minimal provisions in this connection. Again, the shareholders are at perfect liberty to establish mechanisms to insure their involvement in corporate governance at every turn, or to remove themselves entirely from the governance of their corporation. In all such matters, in short, it is the shareholders, and not outsiders, who have the right to do the internal structuring of their corporation.

It will be objected, of course, that the ideal depicted here is very far from reality in most cases, especially in the large, publicly-owned corporation—which prompted Berle and Means to their thesis. This objection, however, misses the point. It is not the measure of corporate control that the average shareholder *in fact* exercises, or even is *able* to exercise, that is the basic normative question. Nor is the question whether "the corporation" acts in the interest of the

²⁵⁸ Cf. note 18 *supra*.

²⁵⁹ By no means is it clear that so-called "independent" directors will be more likely to act in the interests of the shareholders than inside directors with a greater stake in the corporation. Nor is it clear that outside directors who depend upon their fee will be more independent than shareholder directors. See Bialkin, *Exaggerating the Moral Decline in Governance of Corporations*, NATIONAL L. J. 26-27 (Dec. 25, 1978). Such considerations, however, are irrelevant to the rights in the matter.

shareholders—the fiduciary question—unless this is specified as a substantive right of shareholders vis-à-vis directors, managers, or, indeed, other shareholders (which is ordinarily the case, more or less, and hence will be taken up below). Rather, the question is whether those who in fact are the corporate actors—directors or, more often, managers—are violating any *rights* of the shareholders. That depends upon just what rights the shareholders have, of course, which in turn is a function of the rights they have specified for themselves in the articles of incorporation they have drawn up or subsequently become a party to.²⁶⁰

We come, then, to the other side of the coin. Just as our explication of the analytical and normative underpinnings of the corporation reveals the immunities the corporate owners enjoy vis-à-vis outsiders, so too it reveals the disabilities these shareholders may have instituted vis-à-vis each other and vis-à-vis those directors and managers to whom they have delegated control over their assets. In pooling their assets, that is, and delegating a measure of control over those assets to their fellow shareholders and then to directors and managers—which they do in all but a regime of unanimity which permits the withdrawal of individual assets on an individual basis—these shareholders will necessarily expose those assets to possible uses about which they may be displeased—indeed, to uses that may diminish the value of those assets. This, after all, is the risk that goes with the delegation of control. Having made that delegation, however, the shareholders cannot now come back to complain when “the corporation”—*i.e.*, when those to whom control has been delegated—goes on to exercise that control in ways that are detrimental to them, or, more commonly, to some of them, not, that is, when these corporate acts conform to rules to which the shareholders themselves have given their consent, either explicitly, in founding the corporation, or implicitly, in subsequently joining the corporation and hence consenting to the articles of incorporation that constitute it.

To return then to the question whether “the corporation” does inevitably denote the shareholders, we see that indeed it does, even when (some) shareholders are disadvantaged by “the corporation,” *i.e.*, by themselves. I realize, of course, that it may seem odd to conclude that shareholders can victimize themselves. Our inclination, in these cases, is to pierce the corporate veil, to try to locate

²⁶⁰ See note 190 *supra*.

the *real* people—the directors or managers (or majority shareholders) who are acting to the disadvantage of the (minority) shareholders. But the issue at bottom here is really quite simple: when a body of procedural or substantive rules, such as may be contained in articles of incorporation, is agreed to, then those who thus give their consent must abide by the results yielded by subsequent applications of those rules, advantageous or not. This applies whether it is umpires calling batters out, teachers (in private schools) giving failing grades, or, in some cases, corporate managers deciding to “go private.”²⁶¹ For in each of these we have an individual being disadvantaged by someone else who is acting under a rule to which the former has given his consent, if only implicitly.

In order to illustrate these points let us look briefly at the issue of corporate freezeouts—of which this last example, going private, is a part—especially as this subject has been treated in the most recent work of Victor Brudney and Marvin A. Chirelstein.²⁶² “The essence of a freezeout,” these authors write,

is the displacement of public investors by those who own a controlling block of stock of a corporation, whether individuals or a parent company, for cash or senior securities. The public investors are thus required to give up their equity in the enterprise, while the controllers retain theirs. Freezeouts most commonly take the form of a merger of a corporation into its existing parent or into a shell corporation newly formed for the purpose by those who control the merged entity.²⁶³

Freezeouts fall, however, into three analytically distinct categories: (a) two-step, or integrated, mergers; (b) pure going-private transactions; and (c) mergers of long-held affiliates. Two-step mergers ordinarily occur through tender offers, especially when the target company’s management opposes the sale of the firm: the first step oc-

²⁶¹ It does *not* ordinarily apply, however, to the relationship between the individual and the state, where the consent of the individual to be thus ruled is at best “tacit,” not implicit (as when an individual deliberately buys shares in a company and hence implicitly consents to its article of incorporation), much less explicit (as when an individual is a founder of a corporation). See note 51 *supra*; R. Wolfe, *In Defense of Anarchism*, *loc. cit.*; note 277 and accompanying text *infra*.

²⁶² Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, *supra* note 32.

²⁶³ *Id.* at 1357. “Majority” (or controlling shareholders), the authors note, “is not meant to be confined to a person or persons owning a majority of the voting stock. It includes those whose control of the enterprise through stock ownership and domination of the proxy apparatus effectively enables them to determine the terms of the merger.” *Id.* at 1358 n.10.

curs when a majority of the shareholders of the target company accept the offer of an unrelated acquiring company; the second when the acquiring company, now the majority in the target company, acts "to eliminate the untendered shares by merging the target company with itself or with a wholly owned subsidiary created for that purpose."²⁶⁴ Brudney and Chirelstein contend that this two-step process should be viewed as an "integrated plan," analogous to a unitary purchase of assets by an acquiring company (the purchase having been approved by the target company's board):

Tender by majority is the equivalent of a conventional majority vote; the subsequent merger merely gives effect to the majority's decision to accept the terms of the acquisition. The requisite "vote" has already been cast by the time the tender offer is completed, and the acquiring company is not really a voter in the original constituency at all.²⁶⁵

Thus there is no transaction between related parties and no self-dealing. Moreover, because the unrelated acquiring company is a stranger, no issues of fiduciary duty arise. Nevertheless, "to protect shareholders from being stampeded into accepting the tender price by the prospect of being forced to accept a lower offer on merger if the tender succeeds," the authors "think it appropriate that the price paid in the merger for the shares then outstanding be the same as the price offered on the initial tender."²⁶⁶

With pure going-private transactions, however, as well as with mergers of long-held affiliates, the parties are not strangers; hence the fiduciary duty comes to the fore. When a company goes private,

controlling stockholders who are responsible for the company's management, having determined that its shares are undervalued by the market relative to its prospects and expectations, seek to terminate the public stockownership and return the firm to the status of a closely held entity. Typically, the insiders [*i.e.*, controlling stockholders responsible for management] create a holding company, to which they transfer their controlling shares, and then propose a merger of the operating company into the holding company. The plan is that public stockholders of the operating company receive cash (borrowed by the operating company or drawn from its working capital)

²⁶⁴ *Id.* at 1360.

²⁶⁵ *Id.* at 1360-61.

²⁶⁶ *Id.* at 1361-62 (footnote omitted).

equal to the current market value of their shares plus a premium, while the insiders emerge as sole owners of the equity.²⁶⁷

Although the rationale the insiders advance for going private is ordinarily one of efficiency, Brudney and Chirelstein find little merit in these claims, arguing instead that the aim of the insiders is "simply to increase their investment from a controlling fraction of the company's stock to one hundred percent."²⁶⁸

In the third kind of case, however, involving mergers of affiliates, the authors believe the efficiency claims are more persuasive. These cases ordinarily involve a merger between a parent company and a subsidiary corporation that the parent has controlled for a more or less extended period of time. Unlike the two-step merger between unrelated companies, then, these transactions are not at arm's length: "both companies are managed, ultimately, by a single board of directors, whose obligations of loyalty and care run equally and concurrently to *both* sets of public stockholders."²⁶⁹ Hence, the parent must deal "fairly" with the subsidiary's stockholders, the criteria for which the authors go on to explore. They conclude that fairness will be achieved

either by restricting the permissible consideration to a proper proportion of the parent's common stock, or by assuring that the subsidiary's stockholders are placed in a position, through the receipt of cash or debt, to reacquire an equivalent proportionate stock interest in the surviving entity.²⁷⁰

By way of policy, then, Brudney and Chirelstein would prohibit pure going-private transactions, but would permit two-step takeovers and mergers of long-held affiliates, provided the relevant "fairness" criteria were satisfied (which I have barely mentioned here). The justification they offer for these conclusions comes down, it seems, to three points: "the social value of the objective served by the elimination of the minority interest,"²⁷¹ which is a measure of both private and public efficiency; considerations of majority rule, which the authors view as reflecting both fairness and efficiency (about which more in a moment); and the implications of

²⁶⁷ *Id.* at 1365 (footnote omitted).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 1370.

²⁷⁰ *Id.* at 1376.

²⁷¹ *Id.* at 1359.

fiduciary considerations. Since the two-step takeovers do not involve a fiduciary duty, are generally regarded as efficient, and are accepted by a majority of the target's shareholders, they would be permitted. Pure going-private transactions, however, have no social value, and violate the fiduciary duty; hence, despite majority approval, they would be prohibited. Affiliate mergers, on the other hand, do have social value, are approved by a majority, and hence are permitted provided the fiduciary duty is satisfied through satisfaction of the fairness criteria.

This much, in summary, is the Brudney-Chirelstein thesis on corporate freezeouts, which comes down, as they say, to never permitting a "true" freezeout.²⁷² Our concern in this Article, however, is not with whatever policy implications might flow from some view of "social value," *i.e.*, with what "we" should do through law to bring about some set of "social ends,"²⁷³ but with the rights and obligations of the respective parties. Accordingly, we need to look more closely at the second and third of the justificatory reasons just listed, which will help to shed light on this issue. In particular, we want to know whether these majorities have a right to displace the respective minorities, or do the minorities have rights against this.

Now the view of Brudney and Chirelstein on majority rule is instructive:

Freezeouts, by definition, are coercive: minority stockholders are bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they may receive is less than the value they assign to those shares. But this alone does not render freezeouts objectionable. Majority rule always entails coercion. It is, nonetheless, an acceptable rule of governance if all members of the voting constituency share a common goal and if all will be identically affected by the outcome of the vote.²⁷⁴

In addition to these "fairness" considerations, however, the authors later raise a matter of efficiency:

The [sic] alternative—to permit a single nay-voter to bar the merger—is well-nigh unthinkable, for, by compelling or en-

²⁷² *Id.* at 1376.

²⁷³ For a useful critique of this "social engineering" approach to law, see Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L. FORUM 15 (1978).

²⁷⁴ Brudney & Chirelstein, *supra* note 32, at 1357.

couraging stockholders to engage in hold-up behavior, it would, in effect, make mergers and sales of assets a practical impossibility.²⁷⁵

Whether unanimity and majority rule exhaust the category is not the issue, of course; nor are efficiency criteria even relevant to the question whether majority rule is justified. But neither will we discover the rights in the matter of majority rule by considerations of fairness; for even if we can get clear about a "common goal" and demonstrate that all members of the voting constituency share it, and show as well that all will be identically affected by the outcome of the vote,²⁷⁶ we still will not know whether the majority has a *right* to exercise its will over the minority. Rights simply are not generated by considerations such as these, especially a right of this kind. Rather, a right to force someone to give up what is his can be justified only if that someone has done something to create that right in the right-holder—either violated some right of the latter, or, as in the case at hand, has given his consent. What justifies majority rule, then, and what alone justifies it, is prior consent, not considerations of fairness or efficiency.²⁷⁷ It is not the case, then, that majority rule always entails coercion, as Brudney and Chirelstein seem to believe. For as brought out above, those who consent to be ruled by the will of the majority (or by *any* fraction of the whole) have no ground for complaint when subsequent applications of that procedural rule go against their immediate wishes, no more, that is, than anyone else who is bound by his promises can claim he is being coerced when those promises are called in. Coercion involves the violation of a *right*—which consent can alienate—not the mere frus-

²⁷⁵ *Id.* at 1359.

²⁷⁶ It is no doubt useful, and for the most part accurate, to assume that shareholders have "a common interest in maximizing the returns on their stocks, whether through periodic dividends or through sale or liquidation of the firm." *Id.* at 1357. But by no means does this purely economic consideration capture the whole range of shareholder interests, which includes any variety of noneconomic values. Moreover, at only the first level of analysis—at which "equal treatment" is translatable into some uniform measure—is it true that all shareholders are "identically affected by the outcome of the vote." Different investment histories will point to a profit on the merger transaction for some shareholders, a loss for others, which undoubtedly is reflected in there being a majority and a minority. Indeed, that the vote yields winners and losers is itself a factor arguing that all are not "identically affected." Here again, the problem of the incommensurability of interpersonal comparisons of utility (or value), which prompts us to limit our attention to rights.

²⁷⁷ Thus majority rule is not *intrinsically* rightful, as is often supposed. Prior consent justifies it, but it as easily justifies rule by unanimity, or by two-thirds, or by an elected monarch.

tration of a want or interest.

Ordinarily, however, prudent individuals do not consent to majority (or any) rule in its bare form. When they enter into associations, and agree to have the affairs of the association directed by the will of the majority of the members of the association, they rope that will in with various provisos, which serve to create positive rights, delimiting the scope of the majority's will. One could say that what they give by consenting to majority rule, they take back by positing these restrictions. This brings us to the third of Brudney and Chirelstein's justificatory reasons; for in the corporate context, these restraints on the will of the majority are often lumped under the fiduciary category: deference is given to the majority will, just as executive or operating powers are delegated to directors or managers, *provided* that will or those powers are exercised in the interest of the shareholders who grant it. When the fiduciary duty is stipulated, majorities or directors or managers have a right to exercise their will only if it satisfies the fiduciary criterion.

Let us leave the fiduciary issue in this broad form for the moment and return to the Brudney-Chirelstein thesis, as well as to our basic normative question. As brought out earlier, whether the majority shareholders have a right to displace the minority, again setting SEC rules aside, will depend simply upon the prior agreement between the parties. Thus even with pure going-private transactions, which may appear to be the clearest case, there is no way to determine *a priori* whether the majority shareholders have a right to engage in these; they may, if the articles of incorporation permit it. In a regime of bare majority rule, in fact, one with no fiduciary provisos, it is difficult to see what would prevent the majority from having a right to go private. Self-dealing is not the issue. Prior consent—its absence or presence—is.²⁷⁸ For prior consent to major-

²⁷⁸ Here again, the theory of rights is not concerned with the motive behind the act, but only with whether the act itself is performed by right, whatever the motive. Brudney and Chirelstein rightly criticize recent Delaware courts for thinking that the presence or absence of a "business purpose" will enable them to distinguish "good" from "bad" freezeouts, Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, *supra* note 32, at 1356, focusing on *Singer v. Magnavox Co.*, 380 A. 2d 969 (Del. 1977) and *Tanzer v. International General Indus.*, 379 A. 2d 1121 (Del. 1977). But their own argument against going-private transactions points strongly to the absence of a "business purpose" as the basic reason for prohibition: "since their only aim is to enrich the insiders, they would be flatly prohibited in all cases." These transactions exhibit, that is, no "social value." Moreover, though they are approved by a majority, "[n]o fairness test can save them," *i.e.*, no payout that would satisfy the fiduciary duty will save them. That exhausts the authors' justificatory criteria, leaving the

ity rule, in its bare form, will serve to justify the submission of the minority to the will of the majority, whatever the content of that will.

When we assume, however, that a fiduciary duty between the shareholders has been included in the original agreement, thereby making it more complex (and realistic), an interesting thing happens to the Brudney-Chirelstein thesis. In the first place, it should be noted, their analysis of fiduciary duty in the two-step merger appears to be misdirected. What we want to know is not whether the unrelated *acquiring* company has a fiduciary duty to the shareholders of the target company: no one, I expect, would seriously argue that, for reasons cited by Brudney and Chirelstein themselves.²⁷⁹ Rather, the fiduciary duty, if there is one in the original articles, rests with the *target* company's shareholders *vis-à-vis each other*. But given such a duty, why is the majority decision to sell to outsiders *not* a breach of that duty to the minority—certainly the minority thinks the sale not in its interest—while selling to oneself, which is what a pure going-private transaction comes to,²⁸⁰ *is* a breach of the fiduciary duty? If the majority can “force” a sale to an outsider, why cannot it do so to an insider (*i.e.*, when the majority *is* the insider)? In both cases the minority thinks its interests, protection of which has been made a *right* in the original agreement, are being violated. Given a fiduciary duty as part of the original agreement, then, not only going private but two-step takeovers and affiliate mergers should be prohibited. In effect, a fiduciary duty, drawn as above, will serve to negate majority rule, to allow rule by unanimity only.

We return, then, to the notorious fiduciary issue, which as an externally applied standard has exercised the courts for so long. It is notorious in fact because, while clear in general, as above, its application in particular is notorious in principle. This is so because it entails our asking what particular values the parties *would* have chosen for themselves, before the fact, which only the parties themselves, in principle, could have decided. Moreover, the fiduciary

“social value” criterion as the deciding one, which for all practical purposes is a “business purpose” test. *Id.* at 1376.

²⁷⁹ *Id.* at 1361.

²⁸⁰ The use by the insiders of a holding company, which enables them to sell the operating company to themselves, will generate no justifiable objection. For unless prohibited by the arrangements drawn up in the operating company's articles of incorporation, these steps are legitimate, violating the rights of no one.

issue in the corporate context is complicated by the fact that the possibilities for self-dealing are inherent in the very normative structure of the corporation. Shareholders have a right, as we have seen, to name some among them as directors and managers; if they exercise that right, then some may be granting powers to themselves that they otherwise would not have, but which are nevertheless legitimate. Any attempt to prevent this from without runs up against the objection that the individuals in question are simply exercising their rights. Shareholders have a right to draw up agreements that will work to their advantage—or that will lead ultimately to their having victimized themselves.

The justifiable solution, then, will not rest in the construction by outsiders of fiduciary standards to be forced upon the corporate participants, for the benefit of those who have gotten themselves in trouble. Rather, if the impasse of rule by unanimity is to be avoided, and yet majority rule constrained by fiduciary considerations, then the parties to the original agreement will have themselves to draw those fiduciary standards more narrowly. They might, for example, flatly prohibit going private, except under specified circumstances, while allowing sales to outsiders to be decided by simple majority, or by two-thirds. Or they might permit all freezeouts provided fairness considerations—perhaps like those put forth by Brudney and Chirelstein—were satisfied. The possibilities are many. But in all cases “fiduciary duty” would not be constructed and applied from without; rather, it would be a function of, *i. e.*, defined by, the terms of the agreement, as drawn up by the parties themselves. As in the earlier discussion of employment contracts, these terms would describe the special relationship between the parties, would denote the special rights and obligations held by the parties vis-à-vis each other; otherwise the parties would remain generally related.²⁸¹

I realize, of course, that individuals, especially public shareholders, do not think of, much less investigate, every possibility before entering into corporate relationships. As with contractual relationships generally, however, this does not justify governmental imposition of standardized arrangements, especially when these serve to frustrate experimentation in different forms. As a practical matter, moreover, there is no reason to suppose that independent advisory and policing institutions might not arise under a regime such as is

²⁸¹ For a related treatment of these issues, see W. CARNEY, FUNDAMENTAL CORPORATE CHANGES, MINORITY SHAREHOLDERS, AND BUSINESS PURPOSES, forthcoming.

envisioned here, which would serve the same function as the vast and often inscrutable SEC regulations, but better.

V. RESPONSIBILITY

Throughout this discussion I have taken the strict position required by the theory of rights, as I believe that theory must be understood—a theory rooted in reason, standing in contrast to the theory of good. This has led me to defend a number of unpopular positions, some of which do not give comfort. It would be well, then, to restate briefly some of my reasons for following this rigorous course. It is not that there is some intrinsic enjoyment in defending what many would consider indefensible—though there may be. Rather, it is that the problems that ultimately concern me, particularly when the force of law is lurking in the background, are problems of justification—and hence of moral epistemology. We need to know, that is, just which of our moral claims can be justified, particularly when they are to be realized by force.

These concerns take us, then, to moral theory, which has always swung between two extremes, but in this century has done so especially. On one hand, moral skepticism casts doubts upon our ability to justify anything, often resulting in the exercise of force to gratify immediate or dominant interests. Moral dogmatism, on the other hand, asserts our ability to justify manifold moral conclusions, resulting often in moral overreaching, in the exercise of force to bring about utopian visions. What I have tried to do here is chart a course between these two extremes, though one closer to the skeptical pole. For justification *is* a difficult and precarious undertaking. Accordingly, I have sketched, by way of background for the central concerns of this Article, a very lean theory of rights, but one that I believe can withstand the probings of the moral skeptic. *This* much, at least, can be justified. More ambitious claims cannot, and indeed would undermine those conclusions that can be justified.

But there is a realm of morality that lies beyond this basic theory of rights.²⁸² It is the realm in which the theory of good or value enjoys its place. Here the conclusions are rather less sure, for they are rooted not in reason, in considerations we must admit to be true on pain of self-contradiction, but in the sentiments, in what Hume called our “humanity or a fellow feeling with others.” There is no

²⁸² I have developed these issues more fully in *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979), at Pt. V.

rational demonstration, for example, of the conclusion that we ought to behave as Good Samaritans when the occasions present themselves, as there is a demonstration of our right not to become thus involved. Nevertheless, most of us would be favorably inclined toward the former conclusion, whatever we thought of the latter, this because we share a certain community of values. We would say, for example, that responsible people behave as they *ought* to, not simply as they are *obligated* to. And there is no contradiction in saying this, because "ought" and "obligation" are differently grounded, reflecting these different dimensions of morality.²⁸³

Responsibility, then, at least as I have just used it, is an idea that goes beyond the strict lines drawn by rights and obligations. It draws upon the realm of the good, to connote individuals and institutions that do more than they are strictly required to do, this because they are members of civilized society, sharing in a community of values. Not least among those values, however, is a respect for reason, for the limits of moral truth, and hence for the distinction I have sketched between these two dimensions of morality. While going beyond the strict requirements of morality in their personal behavior, then, responsible individuals will nevertheless seek to preserve the distinction before us.

Corporations, no less than individuals, can behave as they are obligated only; or they can exhibit that more civilized behavior that is the mark of a deeper, more enlightened perspective, the mark of a more responsible member of society. Here, however, we have to be careful. We have to be clear, in the first place, about what is obligatory and what we only ought to do. I have tried to show, for example, that polluting and endangering others beyond a certain level are not things that corporations merely *ought* to refrain from doing, as responsible members of society; rather, these are matters of *obligation*. On the other hand, corporations have a *right* to discriminate in employment, or to dismiss employees for irrelevant reasons, though responsible corporations will not do this. But we have to be careful too not to press these moral prescriptions too far, for corporations, like individuals, must survive. Corporate directors and managers are ultimately accountable to shareholders, who are ordinarily driven by less enlightened, by more pecuniary interests. Economic reality, then, will serve to limit supererogatory behavior, in individuals as well as in corporations, as undoubtedly it should

²⁸³ For variations on this theme see Hart, *supra* note 30, at 177-78.

in the natural order of things. It is worth noting too, in this connection, that history demonstrates that behavior beyond the minimum set by the theory of rights is best not forced, that it is wise to leave it to individuals and institutions to decide how far beyond they can go, before they are up against the truths of economics. When left free to make these decisions for themselves, moreover, individuals and institutions will be motivated as they should be, not by the threat of force but by the deeper concerns that make for civility—and indeed for a humane society.

But these further considerations can be brought to bear upon our behavior not simply out of respect for others. There is also, perhaps ultimately, the matter of *self-respect*, which the Greeks seem to have understood better than we do today. Included in this idea are such fundamentally aesthetic notions as self-development, running over the course of a lifetime, central to which is the development of the rational faculties—in particular, the development of an understanding of the world about one. There are great forces at work in the world today, which have been building since the middle of the last century, undermining not only the free-enterprise system but freedom itself. I regret to say, however, that these forces are too little understood or appreciated by members of the corporate community. When a corporate executive apologizes for making profits, or offers economic rejoinders to what are fundamentally moral criticisms, he indicates his profound misunderstanding of the issues at stake. When he goes to Washington for protections and subsidies, he undermines the very system by which he lives. When he rushes to offer his latest technology to the Soviet Union, which they will pay for with taxpayer-subsidized loans from us, he makes his contribution toward the fulfillment of Lenin's prophecy, that capitalists would sell their enemies the rope with which to hang them—and loan them the money to pay for it.²⁸⁴

²⁸⁴ While I have put this last point as a matter of moral responsibility only, it is, I believe, a matter of moral *obligation*, the argument for which I would develop, in a fuller account, along lines adumbrated in note 235 *supra*. The conclusion I am urging here has been forcefully stated by the 19th century libertarian theorist Lysander Spooner:

This business of lending blood money is one of the most thoroughly sordid, cold blooded, and criminal that was ever carried on, to any considerable extent, amongst human beings. It is like lending money to slave traders, or to common robbers and pirates, to be repaid out of their plunder. And the men who loan money to governments, so called, for the purpose of enabling the latter to rob, and enslave and murder their people, are among the greatest villains that the world has ever seen.

L. SPOONER, *NO TREASON* (1870); *quoted in* A. SUTTON, *NATIONAL SUICIDE: MILITARY AID TO*

If members of the corporate community are to be respected—indeed, if they are to survive—they must come to the defense of the free-enterprise system. And they must defend that system not simply because it works but because it is *right*.²⁸⁵ Moreover, they must behave in such a way as to indicate that they understand the forces at work in the world about them. The self-development necessary to be able to do this is part of what it means to be a responsible member of a civilized community. On these issues generally, it may be well simply to close by quoting a man who has been close to them, former Secretary of the Treasury, William E. Simon:

From my own experience, as reported in this book, I conclude that most businessmen today, at least until very recently, have been more concerned with short-range respectability than with long-range survival. Most appear to be mortally afraid of antagonizing the egalitarian gurus of our society. They do indeed seek to protect their enterprises, *but with little understanding of the philosophy that justifies their actions*. Consequently, they do so secretively, and often guiltily, in the form of lobbying, financing politicians, and, not infrequently, bribing them. Even more disturbing, they also seek to protect their enter-

THE SOVIET UNION 5 (1973). Compare the recent statement on this subject by The Business Roundtable (a group of 180 persons, each of whom is the chief executive officer of a major corporation, most of which are "Fortune 500" companies): "Corporations, corporate boards and corporate shareowners, are not the right bodies to resolve on their own, for example, issues involving relations with other countries or U.S. military policy." *The Role and Composition of the Board of Directors of the Large Publically Owned Corporation*, 33 BUS. LAWYER 2083, 2100 (1978). Whatever The Roundtable may mean by "resolving" these issues on their own, its statement suggests that its member corporations will do whatever the law does not prohibit, considerations of moral obligation, moral responsibility, or, indeed, long-range self-interest notwithstanding.

²⁸⁵ Compare the statement of The Business Roundtable, *id.* at 2089-90, which is instructive on the business community's understanding of "legitimacy": "Corporate legitimacy derives in the first instance from the fact that in the context of the democratic system, the corporation has proved the most effective instrument for creating the products, services, jobs and earnings by which the members of society can improve their lives." What is the force of "in the context of the democratic system"? Does this mean that if a majority of the electorate decides that the corporation is not "the most effective instrument" toward these ends, it will cease to be legitimate? Or is the operative word here "derives"? *I.e.*, corporate efficiency, though not *necessary* for corporate legitimacy, is a *sufficient* condition of that legitimacy. That would make the efficient corporation legitimate, no matter how it achieved that efficiency. Whatever the correct interpretation of their statement, it is indicative of how far the corporate community has bought the Nader line, that the legitimacy of the corporation is a function of its serving "the public interest."

prises by endorsing the very values of their worst enemies and financing their causes. If American business consciously wished to devise a formula for self-destruction, it could not do better than this. This is appeasement on a breathtaking scale. The only saving element, in fact, lies in that growing nucleus in the business world which has come to understand the devastating futility of this kind of appeasement.²⁸⁶

VI. CONCLUSION

I have argued in this Article that much of the criticism that has been directed at the corporation in recent years, especially that which is aimed at undercutting the legitimacy of this institution, is fundamentally mistaken. The modern business corporation, I argued affirmatively, is a legitimate institution, existing by right; and most of what it does is done by right. As a corollary, the extensive governmental interference and regulation that surrounds the corporation today is largely illegitimate. In support of these conclusions I sketched the outline of a theory of rights, building upon recent work in moral philosophy that is aimed at showing what it means to say that individuals have rights, that they do have them, and just what those rights are and are not rights to. Against this background moral theory I demonstrated how a corporation might arise as a result of individuals exercising their individual rights. This demonstration involved showing how each of the basic features that characterize the modern corporation, from entity status to limited liability for torts, might arise by right, *i.e.*, in violation of the rights of no one. Quite apart, then, from how actual corporations have arisen historically, the modern corporation, as an institution, is a creature of private agreement, not a creature of the state. I then explicated what it meant to say that this institution had rights, following which I set forth many of the rights and obligations it has, especially as these are at issue in the current debate, moral and legal, that surrounds the corporation. This part of the discussion covered a wide range of subjects, from taxation to discrimination to pollution and endangerment, disclosure, antitrust, corporate freeze-outs, and many more. Finally, I raised a few points about corpo-

²⁸⁶ W. SIMON, A TIME FOR TRUTH 229 (1978) (emphasis added). It is more than noteworthy that the "growing nucleus" Simon refers to has recently organized to form the Washington-based Council for a Competitive Economy, an organization of businessmen dedicated to reducing not only government interference with business but government subsidies of and special protections for business.

rate responsibility, which I took as connoting ethical considerations that take us beyond the theory of rights. Here I looked into some of what it means to be a responsible member of a civilized society, especially as this involves understanding the forces that are at work in the world—always, but especially today.

THE RIGHT TO LIFE*

George P. Fletcher**

In the theory of rights we repeatedly encounter the problem of reconciling someone's having a right with his properly suffering damage to the interest protected by the right. In the case of right to life, we have to assess numerous cases in which individuals are killed or allowed to die, and we wish nonetheless to affirm their right to life. These cases include killing an aggressor in self-defense, accidental homicide, terminating life-sustaining therapy, and capital punishment.

Two fashionable ways of reconciling acceptable killing with the right to life will no longer do. One approach is to claim that the right to life is merely a *prima facie* right; it is subject to being overridden by competing considerations.¹ Even when stripped of confusing associations with principles of proof, the notion of a *prima facie* right cannot withstand criticism. If someone's right to life prevails over the wishes of those who wish to kill him or her, we hardly would say that the right is merely *prima facie*. And if the victim's right of defense permits the killing of an aggressor, we are hard pressed to say that the aggressor's right to life is somehow overridden and thus "lost" in the collision with a higher value. It seems that the right remains the same, whether overridden or not.²

Another fashionable argument builds on a theory of forfeiture.³ Aggressors and criminals supposedly forfeit their right to life; that they have no right to life explains why murderers are properly subject to the death penalty and why some aggressors are subject to being killed in response to their aggression. This argument has already encountered considerable scepticism,⁴ and yet it is so tempting a solution that it continually reasserts itself.⁵ One item on our agenda is to develop a more thorough refutation of this theory.

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¹ The doctrine originates in W. ROSS, *THE RIGHT AND THE GOOD* 55-56 (1930).

² See A. MELDEN, *RIGHTS AND PERSONS* 12-15 (1977).

³ E.g., J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 23 (1690); 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 133 (1765).

⁴ See Bedau, *The Right to Life*, 1968 *THE MONIST* 550.

⁵ Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 *PHIL. & PUB. AFF.* 93, 111-12 (1978).

My program in this Article is to provide an account of how it is that those with a right to life may nonetheless be properly subject to an untimely death. Among the advantages of this account, it avoids the shortcomings of theories that stress either the *prima facie* nature of rights or the forfeiture of rights through conduct.

In discussing fundamental human rights, such as the rights to life, liberty, private property and privacy, we often encounter the protagonist who wants to know: What is the definition of the right? What precisely is the right-holder entitled to claim of other people? Yet no straightforward answer emerges from the quest for definition. The reason is that an adequate analysis of the "right to life" requires attention to three distinct questions:

1. Who holds the right? Is it possessed by members of tribes other than our own, by slaves, by fetuses?
2. What are the norms, both positive and negative for protecting life?
3. What are the criteria for justifying a violation of these norms?

Each of these components requires some comment. Distinguishing the first question from the second is critical. For knowing who bears the right to life does not inform us about the scope of the right's protection. We might agree that intentionally killing a person endowed with the right to life would be wrong, but there are more subtle problems in deciding (1) what constitutes a killing, (2) when a killing is intentional, (3) when we may create a risk of death, and (4) when we may permissibly let someone die. Different answers to these four questions generate a range of possible normative systems for protecting life. For this reason, we should address ourselves to the first question independently of the equally difficult task of working out the norms protecting life.

I. THE INTEREST IN LIFE

If the protective norms are reserved for the second stage of analysis, then we would do well to use the expression "interest in life" rather than "right to life." We should add that the interest that one has in life is particularly worthy. Individuals often have unworthy interests, such as the guilty man's interest in avoiding criminal conviction, and the rapist's interest in consummating his unlawful attack.⁶

⁶ For a suggestive account of "interests" see H. GROSS, A THEORY OF CRIMINAL JUSTICE 116-17; the difficulty of reducing rights to interests is noted in Benn, *Rights*, 7 THE ENCYCLOPEDIA OF PHILOSOPHY 195, 196 (1967). Benn concludes that rights are not always to our advantage, but interests are.

Stressing the interest that the living have in life enables us to describe the impact on their lives of dangerous actions by others. Drunk driving and reckless shooting endanger life itself, but not the right to life. We can aptly describe this danger to life itself as endangering the interest in life. Yet the right to life remains intact. Though interests may be affected by physical risks, rights are not so easily abridged. The government might endanger or truncate the right to life, but only by progressively cutting back the class of beings protected under the law. And even a shift in the legal norms has no effect upon the moral right to life.

Interests and rights run on different tracks. Interests are connected with the notion of harm and the risk of harm. When a worthy interest is violated, the interest-bearer suffers harm. But rights are not connected in this way with the occurrence of harm. To lose a right is not necessarily to suffer harm. For example, if fetuses are stripped of their legal right to life, they are not necessarily aborted. Similarly the violation of a right does not always entail harm. I may have a right to your contractual performance, but if the market has shifted and my performance is now worth more than yours, your breach of contract (which releases me from my performance) does not harm me. Indeed your violating my rights under the contract benefits me by enabling me to avoid the more costly counter-performance.

This connection between harm and interests explains why in the law of contracts we are drawn to the idiom of interests in explaining why a breaching obligor must pay damages. In some cases, the damages compensate for harm to the "reliance interest"; in other cases, for harm to the "expectation interest." In no case, so far as I can tell, do we ground the duty to make amends simply on the breach of duty or the failure to honor a right. To speak of harm and amends, we need to think as well of damaging interests.

If we begin our analysis with the interest in life rather than the right to life, we avoid confusions that arise from assuming that all rights fall into one of the eight Hohfeldian categories. The Hohfeldian scheme presupposes that the violation of a right correlates with the breach of a duty, the violation of privilege with the breach of a "no-right." Yet an individual can suffer violation of his interest in life without anyone's violating a norm protecting life or otherwise breaching a duty to protect life. Suppose that the Skylab debris had fallen in Delhi and killed an Indian peasant. Or suppose the peasant is merely injured and while recuperating in the hospital, he dies in an unexpected epidemic that sweeps across the country. There is no

doubt that the victim is harmed, but it is not clear that the agents of NASA violated a duty or a norm protecting life. Norms protecting life are directed against acts of killing (either intentionally or negligently) or perhaps against the failure to rescue others in immediate need. For there to be the breach of a duty under one of these norms, there must first of all be an instance of killing or of letting die.⁷ The agents of NASA put into motion a sequence of events that issued in the peasant's death, but we are hard pressed to say that they "killed" him. The notion of killing is linked with "causing death." In these versions of Skylab's end, the causal link between orbiting the craft and the death of the man might be too tenuous to constitute a causal tie. If so, we cannot describe the harm to the decedent as a "killing." And without a "killing" there is no violation of duty, no violation of a norm protecting life. In cases like this, though the death falls outside the norms protecting life, the fact of harm remains. Thus we can see that the perception of harm is logically independent of the analysis of the norms protecting life.

It is important to note that not every loss of an interest constitutes the type of harm inflicted by Skylab's falling on an Indian peasant. A natural death obviously reflects loss of the interest in life, but death in the fullness of years does not invite description as a "harm." If a falling object causes death, the victim is "harmed," but as we already noted, not every death caused by an external source — not every harm — constitutes the violation of a norm or of a duty to protect life.

Now we could design a norm that would cover the case of Skylab's falling and killing an innocent observer. It might read like this: Do not do anything that might someday issue in the death of another. The agents of NASA violated this norm, but they might nonetheless escape charges of culpable conduct. They did something that issued in the death of another, but the social value of the Skylab project appeared clearly to outweigh the risks of human life. A balancing of these costs and benefits indicates that the violation of the norm was free from negligence. If our norms protecting life are overly broad, we can take in the slack under the rubrics of negligence and culpability. The end result may be the same — there is neither

⁷ I do not address myself in this Article to the problem of failing to avert death, but see G. FLETCHER, *RETHINKING CRIMINAL LAW* 581-634 (1978) [hereinafter cited as *RETHINKING*].

moral nor legal liability for the consequences of orbiting Skylab. But it is of some importance whether the issue of accountability is resolved at the threshold state of construing the norm protecting life or whether we concede the violation of norm and invest our analytic efforts in assessing culpability. If the accent falls on the issue of culpability, we concede that there is some untoward event that requires an explanation. Not every event issuing in death is untoward. But this entire matter is hardly free from doubt. At first blush, the hypothetical death of the Indian peasant would seem to fall beyond the range of the norms protecting life. But suppose we have reason to believe that the NASA designers knew that Skylab would crash over a densely populated area. Suddenly the case takes on different proportions. If the risk is greater than it appeared and the designers knew it, then perhaps we have the culpable violation of norm. This latter example suggests that it is not so easy to distinguish cleanly between applying the norm and the question of culpability.

This introductory discussion, including the latter qualifications, seeks to vindicate our separation of the issue of death as harm from the analysis of norms designed to prevent this harm. This notion of harm, as I have argued, leads us to speak of an interest in life rather than a right to life. Yet if the term "interest" is preferable, why do we gravitate in daily discourse to the notion of a right to life? What does the term "right" offer that "interest" fails to convey? For one, the notion of right makes it clear that the interest is particularly worthy; an unworthy interest, such as the guilty man's interest in avoiding conviction, would never be addressed as a right. Further, the term "right to life" invites us to respect the interest, whether the law does or not. Of course, there are rights that derive solely from legislation; consider the right not to be sued after the prescribed period of limitation. But our asserting a right to a basic interest, such as life, does not always presuppose legal recognition of the right. The language of rights permits us to transcend the supposed gap between the law as it is and the law as it ought to be. The less ambiguous idiom of interests lacks this virtue. The ideal term might be something like "interest-of-right" analogous to the German concept of *Rechtsgut*. A single notion that combined the qualities of interests and the moral stature of rights would serve us well. But rather than encumber the discussion with an artificial language, we shall make do with the term "interest" in life. We should remember, however, that the interest of which we speak has a moral stature akin to that of a right.

II. INTENTIONAL KILLING AND SELF-DEFENSE

Let us begin with the norm against intentional killing. If there is any core area of agreement about protecting human life, it is our disapproval of intentional killing, particularly of killing conscious persons capable of independent existence (fetuses, of course, represent a more subtle problem). But even this norm admits of exceptions. It is sometimes right, or at least permissible to kill another intentionally. Some people assert that it is permissible to kill another when necessary to save the lives of a greater number of persons. Others claim that it is permissible to kill whenever the victim desires to end a life of suffering and consents to euthanasia. Anglo-American law rejects both of these possible exceptions. But one exception that we, and indeed all Western legal systems recognize, is killing in self-defense. We shall sift the details of self-defense in an effort to understand the logical structure of justifiably infringing the interest in life.

Consider a relatively noncontroversial case of aggression generating a right of self-defense. A man tries to rape a woman and she resists forcibly; under the circumstances the only way she can ward off the rape is to choke the aggressor and thereby endanger his life. If the woman kills the rapist, most people would regard the killing as justified. Self-defense is occasionally treated as an excuse, and we shall consider this variation of the problem later. For now, we shall assume that the woman has a right to ward off the rapist's attack, even if she kills him. To say that the killing is justified is not merely to recognize the woman's predicament and her need to save herself, but to condone her action as right, or at least permissible under the circumstances.

We need at this point to qualify our initial statement that self-defense represents an exception to the prohibition against intentional killing. If this prohibition is limited to cases where the actor's objective or purpose is to kill the aggressor, then self-defense does not qualify as an exception; for self-defense, as we understand it — either morally or legally — is limited to cases of defensive killing where the defender's objective is not the death of the aggressor, but merely the warding off of the attack. The death occurs as a side-effect, perhaps an inevitable side-effect of successfully defending against the attack. Thus if the prohibition does not encompass oblique intentions — *i.e.*, knowledge that death is highly likely to result from one's conduct — then acceptable self-defense falls beyond (and fails to violate) the prohibition. But if the norm against intentional killing is interpreted to prohibit obliquely intentional

killing, then knowingly causing death in warding off an unlawful attack nominally violates the norm. The doctrine of self-defense then functions to explain why the nominal violation of the norm is permissible.

In order to develop a rationale for the right of self-defense, we need to distinguish among three matters that might be called interests or rights:

1. The interest of the woman in maintaining her sexual integrity (*i.e.*, avoiding involuntary intercourse).
2. The interest of the aggressor in his life.
3. The right of the woman to ward off the attack.

The first two are properly called interests. The third falls squarely within the Hohfeldian taxonomy of rights. Self-defense is a privilege; other persons — the aggressor as well as third parties — are under a “no right” to resist or interfere with the defensive conduct. To corroborate our earlier analysis of rights, interests and the concept of harm, we should note that violating the woman’s right of defense does not necessarily harm her. Suppose, for example, that someone restrained the woman and prevented her from responding to the threatened rape. This forcible restraint would violate her right to defend herself, but the violation would harm her only if the rapist proceeded with his aggressive attack. If the rapist repented and abandoned the attack, the woman would remain unharmed.

One further point is important in understanding the difference between the two conflicting interests and the right of defense. The interests at stake are concrete and personal to the woman and the rapist. But the right to repel the aggressive attack lends itself to universalization. If repelling the attack is the right and proper thing to do, then any third person should be able to intervene on behalf of the threatened woman. And indeed, Western legal systems now recognize this right of third-party intervention as a matter of course.⁸

In the present context, the important question is: How do the conflicting interests (in sexual integrity and in life) bear on the privilege of self-defense? They must have some bearing, for the privilege to use force arises to protect one interest at the expense of another. If the protected interest is trivial, we might balk at recog-

⁸ For some doubts about the rationale for this universalization, see *RETHINKING*, *supra* note 7, at 868-69.

nizing a privilege to protect it. And if the privilege permits the defender to kill the aggressor, we might be doubly concerned about the interest the defender seeks to protect.

Two strategies emerge in working with the interests in jeopardy in order to vindicate a right of defensive force. One strategy focuses exclusively on the interest to be protected; it yields an *absolute* privilege of defensive force to protect all interests regarded as personal rights. The alternative strategy looks to both interests — that of the aggressor as well as of the defender — and generates a *relative* right of defensive force geared to the particular interests at stake. It is worth pausing and considering these diverse strategies for justifying defensive force. Upon considering the promise and limits of both strategies, we will return to the investigation of how criteria of justification relate to protecting the rightful interest in life.⁹

The *absolute* theory of self-defense generates the privilege regardless of the cost to the aggressor's interest. Killing an aggressor is permissible if it is the only means available to prevent the invasion of even a minor interest. Shooting an apple thief is rightful and proper if there is no other way to stop her. The rationale of this theory is that those in the right should never yield to wrongdoers.¹⁰ The only question is: who is in the Right and who in the Wrong. The competing interests are irrelevant.

The *relative* theory of self-defense stresses the privileged sacrifice of one interest for the sake of averting harm to another. It may be permissible to kill in some cases, but only to protect particularly worthy interests, such as life, limb and sexual integrity. It is highly debatable whether life — even the life of an aggressor — should be sacrificed for the sake of protecting property. In the absolute theory, the defender may use all the force necessary under the circumstances. In the relative theory, this outer limit of permissible force is qualified by the requirement that the intended harm be reasonable as well as necessary.

Where deadly force is necessary to avert a rape, the absolute and relative theories overlap. Most people regard the woman's interest in sexual integrity as sufficiently important to vindicate a high risk of death to the aggressor. But let us suppose that the sexual aggressor merely wants to massage her breasts and he makes his purpose clear as he commences his assault. If we held to the first rationale

⁹ These two approaches to self-defense receive greater clarification in *RETHINKING*, *supra* note 7, at 857-64.

¹⁰ The German maxim is: *Das Recht braucht dem Unrecht nicht zu weichen.*

of self-defense, the woman could use all the force necessary to repel the sexual assault. If under the circumstances that meant she had to kill him, so be it. But many people would regard this as an injustice, even as to a malicious and perverse aggressor. The woman should surely have the right to hit him, perhaps to wound him, but killing him would seem to be excessive. If she had no effective option short of killing the aggressor, the alternative rationale would require a weighing of the competing interests and presumably would issue in the requirement that she suffer the invasion of her breasts rather than kill the aggressor. If deadly force seems justified even in this context, we could further enlarge the disparity between the conflicting interests. What if the victim had merely to suffer repeated pats on the head or the aggressor's searching through her purse? Should she be permitted to kill to prevent these assaults to her person and privacy? People might judge the competing interests differently, but for most people there would be a breaking point, a point after which the victim's interest seemed so minor that it would be "unreasonable" to kill the aggressor rather than suffer the invasion.

The woman's interest in avoiding rape presumably is strong enough so that she may use whatever force is necessary to thwart the aggression, but there are some puzzles in relying on the relative theory to justify her privilege to use deadly force. As a general matter, the interest in life surely counts for more than the interest in sexual integrity. The weighing of the conflicting interests is obviously skewed against the aggressor. But the problem is how much should the scales be tipped against him? It all depends, I suppose, on how serious an evil we take his aggression to be. His interests are, as it were, discounted by some factor that is a function of his blameworthiness in attacking another.

But suppose the aggressor is psychotic or involuntarily intoxicated. We would still be inclined to say that the woman threatened with rape enjoys a full right of defense. Yet if the aggressor is not to blame for the aggression, how can we "discount" his right to life? But if his right to life is not discounted, how can the woman assert that her interests are more compelling? Puzzles of this sort lead one back to the problematic view that the woman's interest itself — without comparison with the competing interests of the aggressor — entails a full right of defense. Yet the absolute theory properly troubles us. Any theory that would justify killing a petty thief requires careful scrutiny. The more one reflects on one of these alternative

rationales for self-defense, the more one is driven to consider the other.¹¹

III. FORFEITURE AND JUSTIFICATION

Let us suppose that we can surmount these preliminary problems and justify the right of the woman to defend against rape, even if the objectively minimal defense results in the aggressor's death.¹² Let us fit this datum into the matrix of (1) the interest in life, (2) violation of a protective norm, and (3) criteria of justification. The interest in life is protected by a norm prohibiting intentional killing. We interpret the prohibition to prohibit obliquely as well as directly intentional killings. Self-defense comes into the analysis as an exception to the prohibitory norm. Now let us take a case of killing in legitimate self-defense. The aggressor is killed; his interest in life is sacrificed. But what do we say about his right to life? When the aggressor's life is put into jeopardy, does he not have a right to life? If so, how can he be rightfully killed? And how do we properly describe the justified violation of the norm protecting life? Is the norm violated? Merely infringed? Or is there neither infringement nor violation, but rather an action in conformity with the norm? These are some conceptual points about which we should get clear; and we shall begin by coming to grips with the theory of forfeiture. This is a fashionable mode of reconciling the aggressor's right to life with the defender's right to use deadly force in self-defense.

Joel Feinberg wrote recently: "[A]t the moment a homicidal aggressor puts another's life in jeopardy, his own life is forfeit to his threatened victim."¹³ In the context of Feinberg's argument, he clearly means that the aggressor forfeits not only his life, but his right to life. It is not clear why this is so tempting a move in analyzing the right to life. Whatever the reason for its popularity, the argument of forfeiture is an inadequate account of the use of deadly force in self-defense.

The notion of forfeiture is closely connected with the idea of ownership, and ownership has its core application in the law of real and

¹¹ Note Nozick's interesting proposal for uniting diverse criteria in one formula for permissible defense force. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 62-63 (1974). The difficulty with his proposal is that he sets no limits to f(H), namely to the component of defensive force that finds its justification solely in the harm threatened.

¹² The problem of mistaken perceptions of necessary force need not detain us. Some misperceptions will excuse the mistaken defender. See *RETHINKING*, *supra* note 7, at 762-69.

¹³ Feinberg, *supra* note 5, at 111.

personal property. Sometimes forfeiture requires an administrative proceeding as, for example, when persons forfeit their cars or other vehicles for using them to transport narcotics. In these cases, the forfeiture must be officially declared; but in other cases, the owner's losing his rights is automatic. At common law, the owner lost his rights in goods stolen and then abandoned by the thief; as "waif" these goods were forfeit to the Crown.¹⁴ The idea that the state or the Crown takes the place of the owner seems to run through these cases of forfeiture. But we can readily use the notion more broadly to refer to all cases of involuntarily losing one's rights in land or chattels.

The notion of forfeiture lends itself as well to the loss of rights in incorporeal interests. It used to be the law, for example, that writers forfeited their copyright interests by publishing their works without a copyright notice, or that native-born citizens forfeited their citizenship by fighting in a foreign army or voting in a foreign election. To forfeit one's rights in these cases means simply that one is no longer the owner of the incorporeal interest.

Now it should be possible to think of someone's forfeiting his right to life. Indeed the original conception of the outlaw, as I understand it, was that of a person who had forfeited his right to life. Outlaws live at the mercy of others. There is no wrong — no violation of a norm protecting life — in killing an outlaw. Killing an outlaw is like killing a wolf or a fly. These creatures may have an interest in living, but the interest is not recognized as a matter of right, and therefore there is no wrong, no harm in the moral and legal order, when we kill them.

Is there a plausible analogy between aggressors and outlaws? I should think not. By explicating two features of outlawry, we can bring the disanalogy into proper focus. A person who forfeits particular rights, forfeits them with regard to persons who do not know that he has forfeited them. If I had forfeited my citizenship under the prior law by fighting in a foreign war, I would not have been entitled to be treated as a citizen — even if I still had a passport and even if my fighting in that war were a closely guarded secret. If I had lost my copyright under the prior law by publishing my book without the proper notice, I would not have been entitled to sue someone who published my book in ignorance of my forfeiting my rights. The loss of citizenship or of copyright precludes my asserting

¹⁴ 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 296-97 (1765-69).

a claim that my rights have been violated, and it does not matter whether the putative violator knows of my loss of status. Similarly, an outlaw cannot complain of being hunted down, even if those tracking the outlaw are ignorant of their prey's status as an outlaw. The idea underlying these cases is the same: if you lose your rights — by forfeiture or even by waiver — the intentions of a putative violator are irrelevant.

But not in the case of justified killing. A justified killing is one that nominally violates a norm protecting life. To justify the nominal violation, we need to act with the proper intention, with knowledge of the circumstances that justify our conduct. Suppose that a physician is about to kill a patient by injecting air into his veins; the patient does not know this, but as the physician bends over him, the patient decides to attack the physician to avenge a grudge. He punches the physician, which causes her to fall back and drop the needle. The patient has unwittingly saved his life, but I do not think we can say that the physician's assault justified the patient's response. If he had known of the physician's design, he surely would have had good reason for repelling the aggression. But he did not have this reason. It might have been just for the physician to meet with physical harm, but the patient's conduct is not justified.¹⁵

This is a critical feature of justified conduct, and one that further elicits the implausibility of the physician's "forfeiting" her right to life by committing an aggressive act. If the physician had forfeited her right to physical integrity, there would be no need to justify the patient's *de facto* defense by appealing to her reason for acting.

To make the point clear, let us return to the case of the rapist. The legal concept of rape includes cases of intercourse by fraud or intimidation. Let us suppose the rapist holds a knife at the woman's side as she submits and the two engage in intercourse. The woman's covivant comes upon the scene and without seeing the knife, takes the intercourse to be a betrayal. In fury he kills the rapist. Is his conduct justified as a defense of the woman? The right of defense is enjoyed by third parties acting on behalf of the victim as well as by the victim herself. But in this case the third party did not have the right reason for killing the rapist. His conduct is no more justified than is the assault of the patient on the physician. This case demonstrates further why it is thoroughly misleading to speak of the

¹⁵ Feinberg astutely recognizes this point, even though it is inconsistent with his theory of forfeiture in cases of self-defense. See J. FEINBERG, *DOING AND DESERVING* 44-46 (1970).

aggressor's forfeiting his or her right to life. Arguments of forfeiture are directed to the question: Does the aggressive act violate a protected interest. Arguments of justification concede both the violation of the interest, and the nominal violation of a norm protecting that interest and yet seek to explain why the nominal violation is proper. If an outlaw has the same status as a wolf, then killing him requires little, if any, justification. Virtually any reason will do. An aggressor, however, has the same right to life as the rest of us, and therefore, a justified killing requires that the defender have the right reasons for trespassing against the norm protecting human life.

On Feinberg's behalf, we might try to salvage the theory of forfeiture by rendering its presuppositions equivalent to those of justified killing. An aggressor "forfeits" his life only in the sense that someone who kills him must have the right reasons for doing so. This would work, but at the price of disassociating this special case of forfeiture from all the instances in the law in which we speak of forfeiting rights to tangible things and incorporeal interests. In these standard cases, the victim no longer has a protectible interest. He cannot complain against those who seek to injure him in ignorance of the forfeiture. In the case of defensive killing, however, the victim still has a right to life. The retention of this basic right is reflected in the practice of analyzing self-defense as justified killing, rather than as a case akin to killing an outlaw.¹⁶

IV. COLLAPSING THE CRITERIA OF JUSTIFICATION IN THE NORM AGAINST KILLING

Let us turn to one recurrent objection to breaking down the analysis of wrongful killing into (1) the interest in life, (2) the prohibitory norm and (3) the criteria of justification. The objection holds that the distinction between prohibition and justification is purely formal. Nothing of substance is gained by adding this third category rather than treating the criteria of justification as negative elements of a prohibitory norm. If the two dimensions of analysis were collapsed, the norm might read: "It is wrong to kill another intentionally unless X, Y or Z," where X, Y and Z stand for the particular

¹⁶ There is something slightly dogmatic about the argument of the text. I do not mean to exclude the *logical* possibility that the doctrine of forfeiture could account for self-defense, but forfeiture does conflict with the premise that we must have the right reasons in cases of self-defense. If Robinson were right in analysis of justificatory claims, see Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 U.C.L.A. L. REV. 266 (1975), the theory of forfeiture would be more plausible.

circumstances that justify killing another. This is the move that Judith Thomson calls "factual specification."¹⁷ One fills out the norm to cover the possible exceptions. Thomson has doubts about this strategy, but for weak reasons. She objects that the justificatory circumstances do not lend themselves to a limited and manageable factual catalogue. Even in the field of self-defense there is an endless set of subtly different circumstances that would justify a killing. This is true, but the point holds as well against the clarification of the norm against killing. As we have seen, one does not violate the norm against killing unless one's conduct causes the death of the victim. If Skylab had hit and killed an Indian, the employees of NASA would not have "killed" him. The problems implicit in finding a "killing" are surely just as great as those that confound the analysis of self-defense. The reason we use norms and moral categories, I take it, is that we can never fully specify the range of factual variation that we are concerned about.

The more compelling objection to stating the criteria of justification as negative elements of the prohibitory norm is that doing so obscures the logic of justification. Let the norm read: "It is wrong intentionally to kill another unless X, Y or Z." As to the element of "intentionally killing another," it is sufficient to preclude a claim of violating the norm that in fact the actor does not kill another. His designing Skylab may ultimately issue in the death of another, but the act of designing-cum-death is presumably not an act of killing. If the creature killed does not have a right to life, that also is sufficient to preclude a violation of the norm.

The important point is that objective circumstances alone are sufficient to find that the actor does not violate the norm; his reasons and his intentions are irrelevant. Suppose that the actor shoots a tree stump in the mistaken belief that he is shooting at his boss. He hits the stump and he acts with an intent to kill, but by no stretch of fancy does he violate the norm against intentionally killing another. That it is a stump and not a human being is sufficient.¹⁸

But as we noted earlier, the objective circumstances are not enough to support a claim of justification; the actor must act with

¹⁷ J. THOMSON, *SELF-DEFENSE AND RIGHTS* 7-9 (1976).

¹⁸ These problems are explored in greater detail in *RETHINKING*, *supra* note 7, at 552-69, and Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 U.C.L.A. L. REV. 293 (1975).

the right reasons. That we require good reasons follows from his act's being a violation of the norm. This critical point is obscured if we lump the criteria of justification together with the criteria for violating the norm.

It would be possible to gerrymander the norm to read: "It is wrong intentionally to kill another unless one acts with the right reasons in cases X, Y, Z," where X, Y, Z stand for categories of justified killing. Even this version would be unsatisfactory, for it would obscure an important point about a protectible interest in life. A justified killing in self-defense would fall outside this omnibus norm in the same way that killing a fly would fall outside it. Both claims would simply be denials that the act violated the norm. But it is important to see that the justification does not eliminate the harm to the aggressor. His interest in life is invaded, even if the invasion is justified. Admittedly, as we noted earlier, the notion of harm does not presuppose a killing incompatible with a norm protecting life. Nonetheless we might wish to avoid the implication that a justified harm is the same as one that falls outside the norm protecting life.

Thomson captures the concept of justified harm by distinguishing between infringing the right to life and violating it.¹⁹ A justified killing merely infringes the right; an unjustified killing violates it. Difficulties arise, however, in cases of killing in justifiable self-defense. Thomson develops the distinction between infringement and violation in order to explain why compensation is due to someone whose property is justifiably damaged in a situation of lesser evils; the actor takes the property of one person in order to save the life of another; compensation is appropriately due to the person who suffers the loss.²⁰ Cases of strict liability in tort lend themselves to the same analysis. The blasting company acts justifiably in dynamiting a tunnel for the new subway, but the rocks unavoidably fall on people in the vicinity. Compensation is due to the injured parties, and the best explanation is that their right to be free from harm is infringed. If they had no right not to be injured, it would be difficult to explain why compensation is due; but if their rights were violated, it would be difficult to explain why they could not exercise self-help or secure an injunction against the blasting. They must tolerate the blasting, but if injured, they may recover for their loss. Distinguishing between infringement and violation captures this complex legal and moral position of the victim.

¹⁹ See J. THOMSON, *supra* note 17.

²⁰ Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45 (1977).

The obligation to compensate accounts for cases of infringement where the justification is a variation of the principle of lesser evils, *i.e.*, where the lesser interest is intentionally sacrificed for the greater. But the criterion of compensation is of no avail in cases of justifiable self-defense. So far as I know, no legal system in the Western world accords compensation to the aggressor who is injured by another's reasonable effort to ward off the aggressive attack. This consensus presumably exposes a deeply felt moral judgment that aggressors do not deserve compensation. Yet it nonetheless seems appropriate to distinguish between infringements and violation of the aggressor's rights.

One might argue that the distinction between infringement and violation accounts for the appropriate sense of regret we feel in some cases of injuring and disabling an aggressor. Regret might be appropriate in some cases — if, for example, the aggressor is insane or otherwise acts without personal fault. But in the standard case of disabling a rapist, why should one feel regret, remorse or any related sentiment? There are indeed cases in which people do bring harm on themselves, and if that is the way we feel about culpable aggressors I see no cause for regret.²¹

The distinction between infringements and violation makes little sense in cases of self-defense, unless we have a clearly worked out distinction between violating a norm and justifying the violation. The specific case of self-defense does not lend itself to this analysis unless we see that in many cases of justified conduct (but not self-defense) compensation is due to the victim and a sense of regret is appropriate. And in all cases of justifiable conduct, including self-defense, the actor must act for the right reason. The distinction between infringement and violation of the victim's interests is illuminating, but only if we link the distinction to the general theory of norms and their justifiable violation.

To summarize the discussion to this point, let us classify the types of issues that arise in analyzing whether someone wrongfully kills another.

1. *No infringement of the right to life.* This case arises in several variations:

²¹ Note that we would also feel no regret in the case of the physician who is unwittingly repulsed by the patient. Though her suffering the injury is not justified, it is just. It is worth noting that the physician would be able to recover in tort. In contrast, we might feel regret about injuring a psychotic aggressor, but the defense would be justified and therefore there would be no liability in tort.

A. No being with a worthy interest in life is affected, *e.g.*, the cases of killing a wolf, a fly, and arguably an embryo.

B. The being once had a right to life, but has since forfeited the right, *e.g.*, the special case of the outlaw.

C. A being with such an interest is affected, but the defendant's act does not constitute killing the victim, *e.g.*, the skylab case.

2. *Infringing the right to life.* This is the standard case of justifiable killing.

3. *Violating the right to life.* This is the case of wrongfully (unjustifiably and intentionally) killing another.

Two other categories of killing bear mentioning. First, there are many instances of excusably violating the right to life. These cases are exemplified by killings under duress, killings by the insane, killings where the actor is unavoidably and excusably mistaken about whether the victim is aggressing against him.²² We should also include some intentional killings that are, in my opinion, excusable on grounds of personal necessity. In *Regina v. Dudley & Stephens*²³ the shipwrecked sailors violated the right to life of the weakened cabin boy; they were convicted and their sentences later commuted to a short term. In my view, their killing should have been excused on grounds of personal necessity.²⁴ They did the wrong thing, but they responded as most people would to the situation of starvation and despair. Thomson poses a case of self-defense that seems more appropriately classified as a case of personal necessity excusing wrongful conduct. Suppose, she writes, that an aggressor "is driving his tank at you. He has taken care to arrange that a baby is strapped to the front of the tank, so that if you use your anti-tank gun, you not only kill [this] aggressor, you will kill the baby."²⁵

Thomson concludes that you "can presumably go ahead and use the gun, even though this involves killing the baby. . . ."²⁶ Well, I suppose you can, but this conclusion fails to specify whether killing the baby is justified or excused. Is there a right to kill the baby or is it merely inappropriate to blame someone who kills to save her own life? The way to elicit our intuitions is to look at the case from

²² See generally RETHINKING, *supra* note 7, at 817-55.

²³ 14 Q.B.D. 273 (1884).

²⁴ RETHINKING, *supra* note 7, at 818-29.

²⁵ J. THOMSON, *supra* note 17, at 8.

²⁶ *Id.* Nozick similarly fails to distinguish between the justifiable and excusable variations of self-defense. He treats the killing of innocent shields as "not prohibited." R. Nozick, *supra* note 11, at 34.

the perspective of a third-party stranger who comes on the scene and sees exactly what is going on. The stranger has a right to defend you against the tank, but does he have a right to kill the innocent baby? The case is admittedly a close one, but I find it difficult to justify favoring one innocent party over another. The baby's rights are not, as it were, swept away by his being used as an "innocent shield." The threatened victim's killing an innocent nonaggressor may well be excusable, as should have been the case in *Dudley & Stephens*, but it does not follow that a third party has the right to intervene and choose the person who will survive the unfortunate conflict.

The second problem we should underscore before moving on to another set of cases is that the (moral or legal) duty to pay compensation does not map neatly onto this set of distinctions. As I have argued elsewhere, the actor does not owe compensation for unjustified but excused violations, for in these cases, the actor is not personally accountable for the harm.²⁷ Yet there are some cases of excused conduct where the actor does choose (in a limited sense) to violate the rights of another, *e.g.*, the threatened victim's choice to kill the baby strapped to a tank in order to save himself. This choice arguably would support a duty to render compensation.

The problem of compensation in cases of justified killing is equally unruly. There is no duty to compensate in cases of justifiable self-defense; but there might be a duty to compensate if we permitted people to sacrifice nonaggressing individuals for the sake of the greater good. For example, if we admitted a justification of lesser evils in cases such as *Dudley & Stephens*,²⁸ the duty to compensate for the deprivation of life might be sound. This duty is recognized where one person's property is sacrificed for the sake of another.²⁹ If the same theory of justification applied in homicide cases, compensation to the victim's heirs and legatees might well be appropriate. The problem is that whether the killing is justified or excused carries no necessary implications about liability in tort.

V. JUSTIFYING UNINTENTIONAL KILLINGS

Killings in self-defense raise difficult questions about the right to life, but we could resolve those issues, by and large, by analyzing them as bearing on the interest in life, the norm against intentional

²⁷ Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 551-56 (1972).

²⁸ The Model Penal Code § 3.02 proposes to solve the problem of *Dudley & Stephens* by extending the justification of lesser evils. See RETHINKING, *supra* note 7, at 827.

²⁹ *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910). •

killing, and the criteria of justification. Accidental killings expose other knots in the complex grain of respecting life as a particularly worthy interest. By an accidental killing, I mean to include the full range of nonintentional killings. Some of these are negligent or reckless and others occur without fault on the part of the actor.

Let us start with a case of negligent killing and try to assess whether, in Thomson's terms, the right to life is infringed or violated. Suppose a driver fails to turn on his headlights and thereby causes an accident, killing another driver. The conduct is negligent, for he should have noticed that his lights were off. He had no excuse for not noticing and thus he was at fault for causing death. He would be liable in tort, and in most legal systems he would be criminally liable for negligent homicide. It seems fairly clear as well that the negligent killing violates the victim's right to life. But let us focus on the moment that the driver is cruising down the street happily indifferent to the danger he poses to others. The victim is now 100 feet away. What do we wish to say at this moment about the victim's right to life? Surely, it is neither violated nor infringed, but the driver is negligently creating a risk of the victim's death. We are drawn toward saying that the victim's life is negligently endangered, but note that it is his interest, not his right to life, that is endangered.

Now consider a case in which someone faultlessly endangers the life of another. A few years after nitroglycerine is introduced into commerce, Wells-Fargo receives a crate oozing a substance resembling sweet oil. The agents open the crate with a hammer and chisel, thus detonating the nitroglycerine and instantly killing everyone nearby. In view of the commercial world's inexperience with nitroglycerine, we could not have expected the Wells-Fargo agents to realize how dangerous it was to open the crate with a hammer and chisel. Their creating a risk of explosion and death was excusable under the circumstances. Let us conclude that they were not at fault, not negligent, in causing the victims' deaths.³⁰ There would be no basis for criminal or civil liability. What do we say now about the victims' right to life? Was it violated as in the case of the negligent driver, merely infringed as in the case of justifiable self-defense, or, perhaps, because there would be no liability, the right to life stands unaffected. Is it possible for someone to be killed

³⁰ This was the conclusion of the Court in *Parrott v. Wells Fargo & Co.*, 82 U.S. (15 Wall.) 524 (1872).

without his right to life being affected? I confess that my linguistic intuitions are not up to the test. I am not sure whether to say the right is "violated," "infringed," or "unaffected."

One could argue by analogy to the case of excusable, intentional killing that if the right to life is violated by a psychotic assailant, it is violated as well by the excusable behavior of the Wells-Fargo agents. But excusable risk-taking may well be different from excusable, intentional homicide. And, frankly, one wonders why we need to find the right word to describe what happens to the right to life as the explosion takes its victims. Once we realize that the critical problems lie in working out the norms against killing and the criteria for justifiable killing, we need not fret so much about describing the impact on the right to life. We can obviously talk about persons having a protectable interest in life, about their being killed justifiably or excusably, about their untimely deaths as a harm — these are the concepts that we should invoke in evaluating unfortunate accidents like the explosion at the Wells-Fargo freight office.

The contemporary legal approach to dangerous conduct focuses on the risk of harm apart from the materialization of the harm. Thus lawyers would say that risk in the nitroglycerine case was objectively "unreasonable" but nonetheless not the fault of the unwitting Wells-Fargo agents. A risk might be thought unreasonable on different grounds: because its costs exceed its benefits, because it is simply excessive under the circumstances or, as I have argued elsewhere, because it poses a nonreciprocal threat to people nearby.³¹ The idea that risks lend themselves to abstraction from what in fact happens in the concrete case leads to a variety of possible cases:

1. The risk might be objectively unreasonable, and the risk materializes into harm. There are two further possibilities:

- A. The risk-taking might be excused on grounds of unavoidable ignorance, *e.g.*, the nitroglycerine case.

- B. The risk-taking might be unexcused, *e.g.*, the case of driving with one's lights off.

2. The risk might be objectively unreasonable, and no harm occurs. Suppose, for example, that there were no persons nearby and the agent threw the crate onto a concrete platform. The separation of risk from outcome suggests that the risk can be objectively unreasonable, even if under the concrete circumstances no one is injured.

3. The risk might be objectively reasonable if, for example,

³¹ See Fletcher, *supra* note 27.

its benefits outweigh its costs. Again, there are two possibilities:

A. No harm occurs.

B. Harm does occur.

Of all of these cases posed by abstracting risks from results, the most troubling is 3-B: The risk is deemed reasonable, and yet it issues in the death of an innocent person. Would we say that the unintended death is justified? Let us think about this problem in the context of the following troubling case. A police officer comes on the scene of a robbery and shoots, as he may under the law, at the robber seeking to escape. There are few people nearby, but nonetheless one of the bullets misses its target and fatally strikes an innocent bystander. What do we wish to say about the unintended death of the innocent bystander? In a famous felony-murder case, the Pennsylvania Supreme Court said that in this situation the policeman's killing the robber would have been justified, but his killing the innocent bystander was merely excused.³² Yet our analysis of permissible risk-taking suggests that killing the bystander might have been justified.

If we stipulate that a quantifiable risk of injury crystallizes between the shooting and the unintended hit, then we might well be able to justify the risk on the basis, say, of cost-benefit analysis. Over the long run — although surely not in this case — it might be preferable for the police to shoot at escaping felons even if a stray bullet might injure bystanders. Though this mode of thinking has become commonplace, a number of conceptual oddities attend the claim that unintended killings of innocent people are justifiable.

First, when we speak of justifying a risk, we do not employ the concept of justification as we do in justifying the infringement of norms against intentional wrongdoing. Recall that the justified infringement of norms requires that one have the right reason for acting. The same requirement does not so clearly hold in the case of justified risk-taking. If the benefits of operating the DC-10 outweigh the dangers to the public, then operating the DC-10 is a justified, reasonable risk. Yet those who do so need not have a clear conception of the benefits and burdens, and surely they need not act on the belief that it is in the public interest to operate the DC-10.

³² *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958). The point of the distinction in this context is that, according to the principles of complicity, a co-felon in the robbery could be held accountable for a wrongful but excused killing by the policeman, but the co-felon could not be held liable for a lawful, justified killing. See *RETHINKING*, *supra* note 7, at 668.

The assumption seems to be that if the risk is reasonable, then it represents no social harm; and if there is no harm there is no need to have the right reasons in creating the risk.³³

A second related point is that a justified risk of death does not constitute even the infringement of a norm protecting life. The norm presumably reads: do not create an unreasonable risk of death. A reasonable risk is one that conforms to the norm. We need good reasons for infringing norms, not for conforming to them. Thus we can explain why one does not need good reasons for creating a reasonable risk of death.

If it be true that a reasonable risk of death constitutes a social benefit rather than a social harm, then we confront a serious paradox. Is a bystander not harmed by the policeman's stray bullet? Of course he is; but if the risk of shooting is not harmful, how does a death issuing from the shooting become a harm? The problem here strikes me as more serious than our noting earlier that some deaths count as harms even though there is no killing incompatible with a protective norm. The shift from the result to the risk softens our focus in perceiving the harms that occur in individual cases. Across a range of cases, the risk appears desirable; the actual materialization of the risk in particular cases becomes almost incidental.

We might try to avoid this absorption of harms into one abstract beneficial risk by redefining the relevant norm protecting life. Instead of focusing on the reasonableness of the risk, the norm should read: do not expose others to a high risk of death. Shooting at a fleeing felon with bystanders present would be a clear violation of the norm. The appeal to social utility would enter to justify the violation. The justification would resemble lesser evils. If intentionally harming another is justified by the greater good, then intentionally exposing to a high risk of death can also be justified by the expected utility of the risk. The problem with this argument is that the premise does not hold. We accept the principle of lesser evils in cases of harm to property, but not in cases of intentional killing.³⁴ If Kantian principles persuade us that a killing cannot be justified solely to serve our own ends, we would be hard-pressed to justify exposing another person to the risk of death solely for our own ends.

Whether we think of reasonableness as a factor in the prohibition

³³ This is the argument that led Robinson to deny the requirement of right reasons in all cases of justification. See Robinson, *supra* note 16, at 284-91.

³⁴ It is true that Model Penal Code § 3.02 appears to permit killing to save a greater number of lives. So far as I know, no court has ever recognized this principle in a homicide case.

("do not create an unreasonable risk of death") or a justification for infringing a broader norm ("do not expose others to a high risk of death"), we encounter great difficulties in justifying unintended deaths. Perhaps we should take the suggestion of the Pennsylvania Supreme Court seriously: the killing of the bystander is wrongful, but nonetheless excused. The argument would be that, even if unintentional, the killing of an innocent, nonaggressing person is categorically wrong. But a wrongful killing might be excused, as it was historically, on the ground of unavoidable ignorance.³⁵ The police officer could not be expected to know that his shooting would kill a bystander and therefore the killing is excused.

This theory of excusable killing sounds plausible, but is it possible to ignore the factor of risk in assessing the excusability of the killing? How can we decide whether the officer can be excused for killing the bystander without inquiring into (1) the danger of shooting under the specific circumstances and (2) whether an ordinary police officer should be able to appreciate this degree of danger? Danger bespeaks risk, and thus we are invariably drawn back into an inquiry about the gravity of the risk.

There is an important difference, however, between assessing the risk in the abstract and assessing the risk as it bears on what the actor should be able to expect under the circumstances. The former view is the perspective of justification, and the latter, of excuse. In order to justify a dangerous, risk-taking act, we have to isolate the risk as the first step in adjudging it socially beneficial. In order to excuse unintended harm, we need only focus on the actor and the difficulties of gauging the incidental dangers implicit in shooting at an escaping felon. The perspective of justification is *ex ante* in the sense that it attaches to a risk that crystallizes prior to the harm. The perspective of excuse is *ex post* in the sense that it attaches to the specific concrete harm and inquires, retrospectively, whether the actor is at fault for not having appreciated the risk.

The question remains whether unintended killings can ever be justified. It seems clear that any theory of justified unintended killings would turn on a thesis about justified risk-taking, and we have shown that antinomies arise from a range of efforts to justify individual harms by justifying risks.

In analyzing the right to life, difficult issues inhere at all three stages of the analysis. We encounter problems in determining who

³⁵ See RETHINKING, *supra* note 7, at 235-41.

has an interest in life that we ought to acknowledge and protect. We face new difficulties in deciding which norms should serve to protect the interest in life. And finally, we confront the subtle problems of justifying both intended and unintended killings.

That we perceive new difficulties in analyzing the right to life indicates that we have advanced the inquiry. We can now relate some problems to theory of interests enjoyed as a matter of right; some problems, to the framing of norms to protect life; and others, to the theory of justification. If we have refuted the theory of forfeiture, if we see the full complexity of the issues, then we might be on the way to a more adequate explanation of how we can all enjoy a right to life and yet accept a world in which permissible killing and permissibly risking death pervade our lives.

HUMAN RIGHTS AND THE MORAL FOUNDATIONS OF THE SUBSTANTIVE CRIMINAL LAW*

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We are in the midst of a major jurisprudential paradigm shift from the legal realist-legal positivist paradigm of the legal official as a managerial technocrat ideally seeking the utilitarian goal of the greatest happiness of the greatest number, to a natural law paradigm of rights. This shift, dramatically apparent in legal theory in works of Ronald Dworkin,¹ Richard Epstein,² George Fletcher,³ Charles Fried,⁴ and Frank Michelman,⁵ has not yet been fully and

* This Article profited from discussions with my colleague, Graham Hughes.

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¹ See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

² See Epstein, *Pleading and Presumptions*, 40 U. CHI. L. REV. 556 (1973); *A Theory of Strict Liability*, 2 J. LEG. STUDIES 151 (1973); *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEG. STUDIES 165 (1974); *Intentional Harms*, 4 J. LEG. STUDIES 391 (1975).

³ See G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

⁴ See C. FRIED, *AN ANATOMY OF VALUES* (1970); *RIGHT AND WRONG* (1978).

⁵ See Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); *The Su-*

fairly articulated; therefore, one cannot be certain of the final form the paradigm will take or of the extent of its influence on thought about and the practice of the law. This paradigm shift clearly has been made possible by the most serious and profound attack on utilitarianism since Kant, namely, John Rawls's *A Theory of Justice*⁶ and the subsequent works of Robert Nozick⁷ and Alan Gewirth⁸ which develop the neo-Kantian, deontological, anti-utilitarian trust of Rawls's theory, but in ways expressly critical of various aspects of Rawls's pathbreaking book. Legal theorists, who are attempting to introduce these ideas into the analysis of legal doctrines and institutions, correspondingly reflect these tensions among the deontological theories of Rawls, Nozick, and Gewirth, which unite in their opposition to utilitarianism, but in different ways. Although the natural law paradigm of rights, correctly interpreted in line with the neo-Kantian theories of Rawls and Gewirth, is of quite general significance for rethinking the normative foundations of legal doctrines and institutions, I will here address its relevance, in light of George Fletcher's important recent book,⁹ to rethinking criminal law and its connections, in the United States, to certain constitutional law doctrines relating to the substantive criminal law. The jurisprudence of rights transforms and illuminates our critical understanding of the moral foundations of the substantive criminal law in a way in which American legal realist utilitarianism does not and cannot.

This discussion must begin with some clear thought about the objectives of a normative theory of the substantive criminal law, so that we may set ourselves and judge our performance in terms of some determinate criteria of theoretical adequacy. The tasks of criminal law theory, as is often the case in legal theory, appear to be both explanatory and normative, concerned with both understanding and recommendations for change. With respect to understanding, an adequate normative theory of the substantive criminal law is needed to illuminate the salient structural features of criminal liability—for example, the concurrence of *mens rea* and *actus reus*, the disfavor in the criminal law of strict liability, the place

preme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969).

⁶ J. RAWLS, *A THEORY OF JUSTICE* (1971). For an assessment of defects in the paradigm shift which Rawls's book initiated (notably, of the theories of rights of Nozick and Dworkin), see H.L.A. Hart, *Between Utility and Rights*, in *THE IDEA OF FREEDOM* (A. Ryan ed. 1979) at 77-98.

⁷ R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

⁸ A. GEWIRTH, *REASON AND MORALITY* (1978).

⁹ G. FLETCHER, *supra* note 3.

and form of excuses in rebutting criminal culpability (for example, the insanity defense), the place and form of justifications in rebutting criminal liability (for example, the proper scope of self-defense or the necessity defense), the form of mitigation doctrines, the nature and proper scope of inchoate offenses, and the place of general requirements of legality and proportionality. Many of these features of the substantive criminal law overlap in the United States with constitutional law doctrines of due process under the Fifth and Fourteenth Amendments or proportionality requirements under the Eighth Amendment. An adequate normative theory should explain why criminal law and constitutional law principles converge in such ways.

Many of these doctrines of criminal law are, in fact, much disputed today. Accordingly, one justly expects an adequate normative theory of the criminal law to clarify such controversies and indicate the reasonable direction of reform. To what extent, if at all, should traditional *mens rea* requirements or specific excuses (for example, insanity) be removed to facilitate aims of therapeutic care and cure in place of improper retributive impulses?¹⁰ Should new excuses be recognized—for example, a defense of socio-economic deprivation?¹¹ Should proportionality requirements be more aggressively developed to invalidate various forms of criminal sanction—for example, the death penalty?¹² One central area of contemporary controversy is decriminalization.

A remarkable fact, though one not usually perceived as such, is that the often eloquent literature calling for the decriminalization of "victimless crimes"¹³ exclusively focusses on efficiency-based arguments of ending either the pointless or positively counterproductive waste of valuable and scarce police resources expended in the enforcement of these laws. The pattern of argument and litany

¹⁰ Cf. B. WOOTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* (1959), especially Chapter VIII, and *CRIME AND THE CRIMINAL LAW* (1963), with H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968), especially chs. II, VII, VIII.

¹¹ See Bazelon, *The Morality of the Criminal Law*, 49 S.C.L. REV. 385 (1976); and Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S.C.L. REV. 1247 (1976).

¹² See D. RICHARDS, *THE MORAL CRITICISM OF LAW* ch. VI (1977).

¹³ Examples of illegal conduct sometimes described as "victimless crimes" are drug and alcohol abuse, gambling, prostitution, homosexuality, and the like. See N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 5 (1970); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 266-67 (1968); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157, 159 (1967). See also MODEL PENAL CODE, §§ 207.1-.6 Comments (Tent. Draft No. 4, 1955); HOME OFFICE, SCOTTISH HOME DEPARTMENT, *REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION*, Cmnd. No. 247 (1957); MODEL PENAL CODE § 207.5(1), Comment (Tent. Draft No. 4, 1955).

of evils are familiar. One begins dismissively with H.L.A. Hart's tactical concession,¹⁴ in his defense of the Wolfenden Report,¹⁵ that the acts in question are immoral, and then discusses in detail the countervailing and excessive costs of enforcing in this area the ends of legal moralism. In the United States commentators stress implicitly utilitarian pragmatist arguments, identifying tangible evils which intangible moralism appears quixotically and impractically to incur.¹⁶ The core of these enforcement evils is that these crimes typically are consensual and private. In consequence, the absence of either a complaining victim or witness requires special forms of enforcement costs, including forms of police work (for example, entrapment) that are colorably unconstitutional, often clearly unethical, and eventually corruptive of police morals.¹⁷ Such high enforcement costs are contrasted with the special difficulties in this area of securing sufficient evidence of conviction, of deterring the strong and ineradicable motives that often explain these acts, and of the opportunity costs thus foregone in terms of the more serious crimes on which police resources could have been expended.¹⁸ The utilitarian balance sheet, in conclusion, condemns the criminalization of such acts as simply too costly.

Such arguments proselytize the already converted and, remarkably, do not seriously engage the kind of justification to which proponents of "victimless crimes" traditionally appeal. Such proponents may reply: the mere consensual and private character of certain acts, and the consequent higher enforcement costs, should not suffice for decriminalization, for many such acts clearly are properly criminal (for example, duelling) and many other acts are also correctly criminal though enforcement costs are comparable (many homicides, for example, are intrafamilial, thus involving high enforcement costs in intrusion into privacy and intimate relations).¹⁹ If there is good moral reason for criminalizing certain conduct, quite extraordinary enforcement costs will justly be borne. Accordingly,

¹⁴ See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 45, 52, 67-68 (1963).

¹⁵ See HOME OFFICE, SCOTTISH HOME DEPARTMENT, *REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION*, Cmnd. No. 247 (1957); see the similar view taken in MODEL PENAL CODE § 207.5(1), Comment (Tent. Draft No. 4, 1955).

¹⁶ See N. MORRIS & G. HAWKINS, H. PACKER, and Kadish, cited note 13 *supra*.

¹⁷ See generally J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966).

¹⁸ See note 16 *supra*.

¹⁹ For one statement of this form of criticism, see Junker, *Criminalization and Criminogenesis*, 19 U.C.L.A. L. REV. 697 (1972). See also Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 U.C.L.A. L. REV. 719 (1972).

efficiency-based arguments for decriminalization, of the kind just described, appear to be deeply question begging. They have weight only if the acts in question are not independently shown to be immoral or not seriously immoral, but the decriminalization literature dismissively concedes the immorality of such acts, and then elaborates efficiency costs that, in the absence of cognate moral analysis of the morality of these acts, may properly be regarded as of little decisive weight.²⁰

This remarkable absence of critical discussion of the focal issue that divides proponents and opponents of "victimless crimes" has made decriminalization arguments much less powerful than they can and should be. Indeed, arguments of such kinds have not been decisive in the retreat of the scope of "victimless crimes" whether by legislative penal code revision or by judicial invocation of the constitutional right to privacy. In those areas where there has been wholesale or gradual decriminalization (for example, contraception,²¹ abortion,²² consensual non-commercial sexual relations between or among adults),²³ the basis of change has crucially been one of moral judgments to the effect that these acts, traditionally believed to be morally wrong *per se*, are not morally wrong.²⁴ In order to complete and perfect decriminalization arguments so that they have the full force that they should have, one must supplement such arguments with moral analysis of a kind that they, in fact, presuppose. The absence of such analysis has blinded us to the kinds of

²⁰ H.L.A. Hart, in this connection, draws a distinction between conventional and critical morality, but does not explicate the latter concept. See H.L.A. HART, *supra* note 14, at 17-24. For general purposes of his argument, he assumes the immorality of the acts in question, and then makes various points about the costs that strict enforcement of these moral judgments would inflict.

²¹ See *Carey v. Population Services International*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²² See *Roe v. Wade*, 410 U.S. 113 (1973).

²³ The Supreme Court recently upheld the refusal to extend the constitutional right to privacy to consensual adult homosexuality. *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976), *aff'g mem.* 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge court). However, there has been a gradual movement to decriminalization of consensual sodomy by legislative repeal. At least twenty-one states have decriminalized sodomy. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 950-51 (1979).

²⁴ I have tried to explain the nature of these changes in moral judgments in Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979) [hereinafter cited as *Sexual Autonomy*]. See also Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979) [hereinafter cited as *Commercial Sex*].

moral needs and interests that decriminalization in fact serves. To this extent, legal theory has not responsibly brought to critical self-consciousness the nature of an important and humane legal development.²⁵

This glaring lacuna in legal theory derives from deeper philosophical presuppositions that the decriminalization literature appears often to assume—namely, the utilitarian pragmatism associated with America's indigenous jurisprudence, legal realism.²⁶ From the publication of Holmes's *The Common Law* in 1881, American legal theory has been schizoid about the proper analysis of moral values in the law. Traditional moral values underlying existing legal institutions are washed in cynical acid so that the legal institution may be analyzed without begging any questions about its moral propriety;²⁷ on the other hand, the enlightened moral criticism of legal institutions is conducted in terms of implicitly utilitarian calculations of maximizing the greatest happiness of the greatest number.²⁸ In discussions propounding the virtues of decriminalization, this pattern of schizoid moral analysis is shown—first, by the dismissive concession of the traditional immorality of the acts in question, and second, by conducting the discussion of critical moral reform exclusively in terms of efficiency-based considerations that lend themselves to implicit calculations of utility maximization. There is not, because there cannot be, any serious, non-utilitarian critical analysis of the moral values supposed to underlie "victimless crimes," because such values, being non-utilitarian, cannot be accommodated by the only enlightened criminal morality that there is, namely, utilitarianism.²⁹

²⁵ This is most evident in the area of commercial sex where the absence of critical moral thought about the putative immorality of prostitution has disabled reformers from identifying the best arguments in support of decriminalization in this area and has resulted in largely abortive attempts to achieve decriminalization. For an attempt to correct this defect, see Richards, *Commercial Sex*, *supra* note 24.

²⁶ See, e.g., G. JACOBSON, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT (1977). It would be a mistake to regard legal realists as doctrinaire utilitarians when, in fact, they were antagonistic to Bentham's ahistorical approach to jurisprudence. See, e.g., White, *The Revolt Against Formalism in American Social Thought of the Twentieth Century*, in PRAGMATISM AND THE AMERICAN MIND 41-67 (1973); see generally W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973). But, the appeal to social policy considerations was, for them, implicitly utilitarian. See Richards, Book Review, 24 N.Y.L. SCHOOL L. REV. 310 (1978).

²⁷ The famous appeal to wash the law in cynical acid derives from Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167-202 (1952).

²⁸ See generally O.W. HOLMES, THE COMMON LAW (M. Howe ed. 1963).

²⁹ H.L.A. Hart appears to acknowledge the existence of a critical morality that is not necessarily utilitarian; see note 14 *supra*. But, he does not explore the content of the morality

Correlative to the familiar structure of analysis of the decriminalization literature, general Anglo-American criminal law theory has focussed on certain pervasive structural features of the substantive criminal law,³⁰ but has not considered in any depth, at least until George Fletcher's recent book,³¹ the underlying question that is at the heart of much continental European criminal law theory³²—namely, the role of moral wrongdoing in the definition of criminal offenses. Of course, general concessions are made that the criminal penalty properly applies to morally wrong acts,³³ but little critical attention is given to how moral wrongdoing should be interpreted as the necessary limiting predicate for the proper scope of the criminal sanction. Instead, advocates of decriminalization tend bizarrely to concede to opponents a conventionalistic definition of moral wrongdoing (in Lord Devlin's striking formulation, what is morally wrong is what an ordinary man randomly chosen from the Clapham omnibus would intuitively dub disgustingly immoral),³⁴ and then to present, as we have seen, utilitarian arguments about special enforcement costs. To concede what decriminalization advocates deem a mere tactical victory to opponents is unconditionally to surrender the war. A mark of the unhappy separation of legal and moral theory is that legal theorists have thus accepted a definition of morality which, for a moral theorist, is transparently inadequate.³⁵ The recent reintegration of anti-utilitarian moral concepts into legal theory enables one to reconsider these questions in a new

in his discussions of decriminalization. *But see* H.L.A. HART, *supra* note 10, where Hart repeatedly insists that principles of fairness and equal liberty, independent of utilitarian considerations, are needed to account, for example, for the principles of punishment, *id.* at 72-73, and the forms of excuse in the criminal law, *id.* at 17-24. For a striking attempt by Hart to construct a nonutilitarian theory of natural rights from Kantian premises, see Hart, *Are There Any Natural Rights?*, in *SOCIETY, LAW, AND MORALITY* 173 (F. Olafson ed. 1961).

³⁰ The classic text is G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (2d ed. 1961). *See also* J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960); W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* (1972); H. GROSS, *A THEORY OF CRIMINAL JUSTICE* (1979).

³¹ G. FLETCHER *supra* note 3.

³² For a comparison of continental and Anglo-American approaches to criminal law theory, with a focus on the role of Kantian natural law moral theory in the former and legal positivist utilitarianism in the latter, see *id.*, at 406-08, 467, 503-04, 512, 577, 695-97, 768-69, 780-81, 790.

³³ *See, e.g.*, J. HALL, *supra* note 30, at 385: "It is pertinent to recall here that the criminal law represents an objective ethics which must sometimes oppose individual convictions of right."

³⁴ *See generally* P. DEVLIN, *THE ENFORCEMENT OF MORALS* 9-13 (1965).

³⁵ *See* note 24 *supra*. *See also* Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORDHAM L. REV.* 1281 (1977).

and inspiring way. One may now critically ask and investigate what should be the central issue in a sound theory of the substantive criminal law: the concept of moral wrongdoing and its role in the just imposition of the criminal sanction.

This Article will address this general question directly in a way in which even recent legal theorists of rights have not yet done so. George Fletcher, for example, whose work has stimulated many of the reflections herein, does not analytically explore the underlying concept of moral wrongdoing which he believes to be the foundation of criminal liability; rather he appeals to norms, defined in terms of "the mores of the relevant society at the time of the deed," that "contain a sufficient number of elements to state a coherent moral imperative."³⁶ Fletcher, thus, appeals to a conventionalistic definition of moral wrongdoing, which belies the tenor of many of his specific discussions of the moral foundations of particular criminal law doctrines (turning, as they do, on Kantian ideas of respect for personal autonomy). In this Article, I shall suggest ways in which analysts of the substantive criminal law, like Fletcher, may deepen their self-critical understanding of the moral premises of their own analytic undertakings in ways which may indicate that certain of their analyses rest on insufficiently probing moral theory.

Because criminal law and constitutional principles in various ways overlap, such a moral theory also casts light on the ways in which the jurisprudence of rights may clarify moral principles that underlie various kinds of legal institutions. It is quite clear, for example, that the jurisprudence of rights directly challenges the existing state of constitutional theory and practice in the United States. It sharply repudiates the concessive majoritarianism of James B. Thayer's classic article,³⁷ the value skepticism of Learned Hand,³⁸ the jaundiced historicism of Alexander Bickel's later writings,³⁹ and Herbert Wechsler's appeal to the apolitical and amoral ultimacy of neutral principles.⁴⁰ In its place, the jurisprudence of rights takes seriously fundamental normative concepts of human

³⁶ G. FLETCHER, *supra* note 3, at 568.

³⁷ Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

³⁸ L. HAND, *THE BILL OF RIGHTS* (1958).

³⁹ A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); *THE MORALITY OF CONSENT* (1975). These later works contrast sharply with Bickel's important earlier work, *THE LEAST DANGEROUS BRANCH* (1962).

⁴⁰ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

rights, in terms of which the founders thought and the Constitution was designed, in a way in which later constitutional theory, based on utilitarian legal realist premises, does not and cannot.⁴¹ Not all human rights, however, are constitutional rights. The catalogue of human rights is extensive, including not only certain constitutional rights, and the correlative human rights for which international protection is justly sought,⁴² but the garden variety rights of personal safety and security at the heart of the criminal law and the civil law of torts, the rights of promisees enforced, to some extent, under the civil law of contracts and even, sometimes, by the criminal law,⁴³ the rights of truth telling enforced by the civil and criminal law of fraud. On the other hand, certain human rights are convergently enforced by several legal institutions—for example, various rights enforced concurrently by the civil and criminal law, or the striking convergence, to some notable extent, of fundamental principles of criminal and constitutional law. One of the foci of our present analytic inquiry is to understand the common moral argument that explains this latter striking convergence— why it is that we perceive certain basic principles of criminal liability as of constitutional dimensions, for example, legality, the concurrence of *mens rea* and *actus reus*, proportionality, and privacy. I believe that this convergence rests on common moral principles of human rights which require that the criminal law must be compatible with and express respect for basic human rights.

This perspective on the criminal law challenges the validity of certain traditional antagonisms among students of the criminal law—for example, the opposition of liberal political theorists like John Stuart Mill⁴⁴ and H.L.A. Hart⁴⁵ to conservative lawyers like Stephen⁴⁶ and Devlin⁴⁷ drawn in terms of the former's appeal to human interests and the latter's retributive moralism. The account here proposed challenges such dichotomies, for it is liberal and rooted in concern for certain dignitary consequences (giving principled expression to the quite valid moral argument underlying Mill's

⁴¹ See generally D. RICHARDS, *supra* note 12.

⁴² See, e.g., L.B. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973).

⁴³ I have in mind larceny by false promises. See *People v. Ashley*, 42 Cal. 2d 246, 267 P.2d 271 (1954); *NEW YORK PENAL LAW* § 155.05 (2) (d) (McKinney 1975).

⁴⁴ J.S. MILL, *ON LIBERTY* (A. Castell ed. 1947).

⁴⁵ H.L.A. HART, *supra* note 14.

⁴⁶ J. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (J. Burrow ed. 1969).

⁴⁷ P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

On Liberty), and yet also rests on a deontological⁴⁸ view of the non-utilitarian, ethical foundations of the substantive criminal law.

I. THE CONCEPT OF HUMAN RIGHTS

In order to understand the ethical foundations of the substantive criminal law and its connections to constitutional principles, one must take seriously the radical vision of human rights that underlies the Constitution and its view of the criminal law. One must begin with the idea of human rights as a major departure in civilized moral thought. When Locke,⁴⁹ Rousseau,⁵⁰ and Kant⁵¹ progressively gave the idea of human rights its most articulate and profound theoretical statement, they defined a way of thinking about the moral implications of human personality that was, in certain ways,⁵² radically new. The practical political implications of this way of thinking are a matter of history. The idea of human rights was one among the central moral concepts in terms of which a number of great political revolutions conceived and justified their demands.⁵³ Once introduced, the idea of human rights could not be cabined. In American institutional history, the idea of human rights lay behind the American innovation of judicial review—the idea that an enforceable charter of human rights required a special set of governing

⁴⁸ A conventional philosophical distinction drawn between types of normative theories of ethics is that drawn between teleological and deontological theories. Teleological theories are of the form that the concept of morality or ethics is analyzed in terms of principles that maximize some good (pleasure, utility, talent, perfection, or the like); non-teleological theories are deontological: they do not define the right in terms of maximizing the good. A classic form of teleological theory is utilitarianism, which defines moral right in terms of principles which maximize the balance of pleasure over pain of all sentient beings. Kant's theory, in contrast, is deontological, since it does not define the right in terms of maximizing any good (pleasure or otherwise). See J. RAWLS, *supra* note 6, at 30, 40.

⁴⁹ Locke, *Second Treatise*, in *TWO TREATISES OF GOVERNMENT* 285-446 (2d ed. P. Laslett ed. 1967).

⁵⁰ Rousseau, *The Social Contract*, in *THE SOCIAL CONTRACT AND DISCOURSES* (G.D.H. Cole trans. 1950).

⁵¹ I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (L.W. Beck trans. 1959) [hereinafter cited as *FOUNDATIONS*]; *Concerning the Common Saying: This May Be True in Theory, But Does Not Apply in Practice*, in *SOCIETY, LAW, AND MORALITY* 159-72 (F. Clafson ed. 1961); *THE METAPHYSICAL ELEMENTS OF JUSTICE* (J. Ladd ed. 1965).

⁵² Cf. Richards, *Sexual Autonomy*, *supra* note 24, at 964-72.

⁵³ The political revolutions of the seventeenth and eighteenth centuries witnessed such landmarks as the English Petition of Rights (1627), the Habeas Corpus Act (1679), the American Declaration of Independence (1776), the United States Constitution (1787), the American Bill of Rights (1791), and the French Declaration of the Rights of Man and Citizen (1789).

institutions that would, in principle, protect these rights from the incursions of the governing institutions based on majority rule.⁵⁴ In our own time, the language and thought of human rights has been extended beyond the original civil and political rights to include a number of economic and social rights,⁵⁵ and has, in the international sphere, been the central idea in terms of which colonial independence and post-colonial interdependence has been conceived and discussed.⁵⁶ Obviously, the philosophical analysis of human rights is of central normative importance. Recent deontological moral theory, in particular, that of Rawls⁵⁷ and Gewirth,⁵⁸ has enabled us to understand and defend the concept of human rights against the familiar Benthamite criticisms.⁵⁹ To be specific, these neo-Kantian moral theories focus on the explication of the concept of human rights in terms of two features: the capacities of personhood, sometimes called rational autonomy, and equality.

A. *Autonomy*

Autonomy, in the sense fundamental to the idea of human rights, is an empirical assumption about the capacities, developed or undeveloped, of persons *as such*—namely, that persons *as such* have a range of capacities that enables them to develop, want to act on, and in fact act on higher order plans of action that take as their object one's life and the way it is lived.⁶⁰ Harry Frankfurt made this

⁵⁴ Although the idea of judicial review is American in origin, it did have European antecedents. See Cappelletti & Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207 (1966). For contrasts in different forms of judicial review, see M. CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971).

⁵⁵ See, e.g., the Universal Declaration of Human Rights, Article 22 (right to social security); Article 23 (rights to work); Article 24 (right to leisure); Article 25 (rights to adequate standard of living and child care); Article 26 (rights to education); Article 27 (rights to participate in cultural life), in *BASIC DOCUMENTS IN INTERNATIONAL LAW* (2d ed. 1972). For a further elaboration of rights of these kinds, see International Covenant on Economic, Social and Cultural Rights, *id.* at 151-61. For a critique of viewing these kinds of claims as human rights, see M. CRANSTON, *WHAT ARE HUMAN RIGHTS?* (1973); C. FRANKEL, *HUMAN RIGHTS AND FOREIGN POLICY* (1978).

⁵⁶ For a useful discussion of the force and currency of the idea of national self-determination in international law, see Franck & Hoffman, *The Right of Self-Determination in Very Small Places*, 8 INT'L L. & POL. 331 (1976). Cf. Franck, *The Stealing of the Sahara*, 70 AM. J. INT. L. 694 (1976).

⁵⁷ J. RAWLS, *supra* note 6.

⁵⁸ A. GEWIRTH, *supra* note 8.

⁵⁹ See Bentham, *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution* in 2 WORKS OF JEREMY BENTHAM 448 (J. Bowring ed. 1962).

⁶⁰ See D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 65-68 (1971).

point when he argued that the "essential difference between persons and other creatures is to be found in the structure of a person's will."⁶¹ Frankfurt correctly argued that contemporary discussions of personal identity are not properly discussions of the concept of a person at all, for many animals of lower species can have both predicates ascribing corporeal characteristics and states of consciousness whose unity is the problem of personal identity. Such animals are not, however, persons. The difference between persons, who happen to be also human, and animals is, Frankfurt argued, neither having desires or motives, nor engaging in deliberation and making decisions based on prior thought, for certain lower animals may have these properties. Rather, besides wanting and choosing and being moved to do this or that, persons, as such, also may want to have or not to have certain desires. As Frankfurt put it, persons

are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for . . . "first-order desires" or "desires of the first order," which are simply desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires.⁶²

The second-order desires and plans of action, constitutive of autonomy, mark the capacity of a person, *as such*, to develop, want to act on, and to act on plans of action that take as their object changes in the way one lives one's life. For example, persons establish various kinds of priorities and schedules for the satisfaction of first-order desires. The satisfaction of certain wants (for example, hunger) is regularized; the satisfaction of others is sometimes postponed (for example, delays in sexual gratification in order to develop and educate certain competences). Indeed, persons sometimes gradually eliminate certain self-criticized desires (smoking) or over time encourage the development of others (cultivating one's still undeveloped capacities for love and tender mutual response).⁶³ Sometimes, the exercise of such capacities of autonomy is irrational

⁶¹ Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. OF PHIL. 5, 6 (1971). For a related account, see Dworkin, *Autonomy and Behavior Control*, THE HASTINGS CENTER REPORT, vol. 6, no. 1, at 23-28; *Acting Freely*, 4 NOUS 367 (1970).

⁶² Frankfurt, *supra* note 61, at 7.

⁶³ On the relation of the person to rational choice, including choices of these kinds, see D. RICHARDS, *supra* note 60, ch. 3.

or a failure of competence or morally wrong, while in others it is rational or competent or morally desirable. Accordingly, the fact of autonomy explains the uniquely *personal* emotions which rest on the capacity of persons to take critical attitudes toward their lives (regret or shame or guilt, or, on the other hand, self-respect or pride or a sense of integrity).

In educating the exercise of autonomy against mistake or failure, humans call upon complex human capacities for language and self-consciousness, memory, logical relations, empirical reasoning about beliefs and their validity (human intelligence), and the capacity to use normative principles in terms of which plans of action can be assessed, including principles of rational choice in terms of which ends may be more effectively and coherently realized. The consequence of autonomy and these capacities is that humans have the capacity to make independent decisions regarding what their life shall be, self-critically reflecting, as a separate being, which of one's first-order desires will be developed and which disowned, which capacities cultivated and which left barren, with what or with whom in one's life history one will or will not identify, or what one will define and pursue as ends or strive toward as an aspiration. In brief, autonomy gives to persons the capacity to call their life their own. The development of these capacities for separation and individuation is, from the earliest life of the infant, the central developmental task of becoming a person.⁶⁴

The idea of human rights crucially takes a normative attitude expressing respect for the capacity of persons, *as such*, for rational autonomy—to be, in Kant's memorable phrase, free and rational sovereigns in the kingdom of ends,⁶⁵ viz., to take ultimate, self-critical responsibility for one's ends and the way they cohere in a life. Kant characterized this ultimate respect for the choice of ends as the dignity of autonomy,⁶⁶ in contrast to the heteronomous, lower-order ends (pleasure, talent) among which the person may choose. Kant thus expressed the fundamental liberal imperative of moral neutrality among many disparate visions of the good life: the concern is not with maximizing the agent's pursuit of any particular lower-order end, but rather with respecting the higher-order capac-

⁶⁴ See M. MAHLER *et al.*, *THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT: SYMBIOSIS AND INDIVIDUATION* (1975). Cf. L. KAPLAN, *ONENESS AND SEPARATENESS: FROM INFANT TO INDIVIDUAL* (1978).

⁶⁵ See I. KANT, *FOUNDATIONS* 51-52.

⁶⁶ *Id.* at 53.

ity of the agent to exercise rational autonomy in choosing one's ends, whatever they are. The contemporary neo-Kantians, Rawls and Gewirth, have formulated this idea in different though equivalent ways. Rawls has deployed the idea of the veil of ignorance⁶⁷ which has the consequence that the rational choices of persons, by which Rawls has defined the concept of morality, cannot take account of their particular ends, but must, rather, ask what things will enable rational persons, as such, to choose their ends, whatever they are. Gewirth has followed Kant more literally in arguing that the central normative concept is that of human action *in general*,⁶⁸ versus any particular ends of human actions, which, on analysis, turns out to be rational autonomy. Rawls and Gewirth have both expressed in these different ways the same Kantian intuition: that the central focus of ethics is respect not for what people currently are or for particular ends, but for an idealized capacity which people, if appropriately treated, can realize, namely, the capacity to take responsibility as a free and rational agent for one's system of ends, in short, personhood.

If Rawls and Gewirth in these ways correctly give expression to the fundamental idea of personhood, Nozick clearly does not.⁶⁹ For Nozick, the interpretation of autonomy is not in terms of higher-order, self-critical capacities, but *ad hoc* and impressionistic ideas of natural property in one's body, sentiments, and labor.⁷⁰ Such ideas lack the focal explicatory significance of the Kantian interpretation of autonomy, confusing moral personality with privatized egoism. For purposes of fundamental ethical theory, one wants—in the mode of Kant, Rawls, and Gewirth—an explication of the most general features of personhood, *as such*, which is supplied correctly by these theorists in the form of an idealized description of capacities for self-critical choice of one's ends, as a free and rational being; Nozick, in contrast, has supplied a question-begging identification of the person with certain inalienable assets, which, in fact, are neither necessarily nor naturally associated with the morally fundamental idea of free and rational choice of one's ends.

The similar association of personhood with causation through ac-

⁶⁷ See J. RAWLS, *supra* note 6, at 136-42.

⁶⁸ A. GEWIRTH, *supra* note 8, at 48-128.

⁶⁹ R. NOZICK, *supra* note 7.

⁷⁰ Cf. R. DWORKIN, TAKING RIGHTS SERIOUSLY 259 (1978) (*Liberty and Liberalism*, ch. 11); Nagel, *Libertarianism Without Foundations*, 85 YALE L.J. 136 (1975); Richards, Book Review, 1976 DET. COL. L. REV. 675 (1976); H.L.A. Hart, *Between Utility and Rights*, in THE IDEA OF FREEDOM (A. Ryan ed. 1979), at 77-98, especially 80-86.

tion, as by Epstein⁷¹ and Pilon,⁷² is no more defensible. Undoubtedly, the analysis of human action, as by Gewirth, may stimulate philosophical insight into the idea of personhood, but the morally fundamental idea is not action, but personhood—the capacity of persons self-critically to reflect on, organize, and take responsibility for their ends and life. From this latter, morally fundamental point of view, there is no ethical distinction in principle between moral imperatives forbidding actions or failures to act,⁷³ both equally may fail to treat persons as equals in the ethically fundamental sense.

B. *Treating People as Equals*

As regards equality, the idea of human rights expresses a normative point of view that puts an equal weight on each person's capacity for autonomy. Recent neo-Kantian moral theory alternatively has articulated the idea of equality in one of three ways: (i) equal concern and respect,⁷⁴ (ii) universalizability,⁷⁵ and (iii) equal parties to the social contract.⁷⁶ These three alternative approaches are intended to articulate the same underlying concept: that the basic principles of political right must treat all persons as equals.

The notion of treating persons as equals is, of course, ambiguous. A fundamental way to distinguish among moral theories is to focus on how they differently resolve this ambiguity. For example, John Stuart Mill, following Bentham, argued that utilitarianism importantly treated people as equals in the sense that everyone's pleasures and pains were impartially registered by the utilitarian calculus; thus, utilitarianism satisfies, Mill argues,⁷⁷ the fundamental moral imperative of treating persons as equals, where the criterion of equality is pleasure and pain. The great attraction to humane liberal reformers like Mill of utilitarianism was precisely its capacity sensibly to interpret the basic moral imperative of treating people as equals in a way that enabled reformers concretely to assess

⁷¹ See Epstein, *supra* note 2.

⁷² See Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979).

⁷³ For the claim that failures to act cannot, in general, give rise to violations of rights, see Epstein, *A Theory of Strict Liability*, 2 J. LEG. STUD. 151, 160-66, 189-204 (1973); Pilon, *supra* note 72.

⁷⁴ See R. DWORKIN, *supra* note 1, at 150 (*Justice and Rights*, ch. 6).

⁷⁵ See A. GEWIRTH, *supra* note 8.

⁷⁶ See J. RAWLS, *supra* note 6.

⁷⁷ See J.S. MILL, *UTILITARIANISM* 76-79 (O. Piest ed. 1957).

institutions in the world in terms of human interests.⁷⁸ Any alternative to utilitarianism must provide a coherent interpretation of treating people as equals which also enables critical moral intelligence concretely to assess institutions in terms of relevant consequences. The great challenge to anti-utilitarian moral theory is to explain why it better explicates the moral imperative of treating persons as equals in a way that also supplies coherent substantive principles of humane moral criticism of existing institutions.

From the perspective of neo-Kantian deontological moral theory, utilitarianism fails to treat persons as equals in the morally significant sense. To treat persons in the way utilitarianism requires is to focus obsessively on pleasure alone as the *only* ethically significant fact, and aggregating it as such. Pleasure is treated as a kind of impersonal fact and no weight is given to the separateness of the creatures who experience it. But, this flatly ignores that the only *ethically* crucial fact can be that *persons* experience pleasure, and that pleasure has moral significance only in the context of the life that a person chooses to lead.⁷⁹ Utilitarianism, thus, fails to treat persons as equals in that it literally dissolves moral personality into utilitarian aggregates. In contrast, neo-Kantian deontological moral theory interprets treating *persons* as equals not in terms of lower-order ends persons may pursue (pleasure or pain, or talent), but in terms of personhood, the capacity of each person self-critically to evaluate and give order and personal integrity to one's system of ends in the form of one's life. The fundamental and ethically prior fact is not pleasure and the maximum impersonal aggregations thereof, but so expressing equal respect for the capacities of personhood that people may equally develop the capacities to take ultimate responsibility, as free and rationally self-critical beings, for how they live their lives. It is no accident that from Kant⁸⁰ to Rawls⁸¹ and Gewirth⁸² this perspective has been supposed to justify human rights that are not merely non-utilitarian, but anti-utilitarian. Thus to express equal respect for personal autonomy is to guarantee the minimum conditions requisite for autonomy; ethical principles of obligation and duty rest upon and insure that this is so, and correla-

⁷⁸ See generally J.S. MILL, *supra* note 77, where Mill makes this argument quite clearly.

⁷⁹ See Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* 77 (1973).

⁸⁰ I. KANT, *FOUNDATIONS*, *supra* note 51, at 59-64.

⁸¹ J. RAWLS, *supra* note 6, at 22-27.

⁸² A. GEWIRTH, *supra* note 8, at 200-01.

tively define human rights. Without such rights, human beings would lack, *inter alia*, the basic opportunity to develop a secure sense of an independent self, instead simply being the locus of impersonal pleasures which may be manipulated and rearranged in *whatever* ways would aggregate maximum utility over-all, for all individual projects must, in principle, give way before utilitarian aggregates. Rights insure that this not be so, a point Dworkin has made by defining rights as trumps over countervailing utilitarian calculations.⁸³

It is important to see that this deontological moral perspective, while it rejects as an ultimate moral principle the utilitarian maximization of the aggregate of pleasure over pain, is not incompatible with the relevant assessment of consequences in thinking ethically.⁸⁴ The assumption that the Kantian interpretation of treating persons as equals is incompatible with assessing consequences is a blundering mistake.⁸⁵ Consider, for example, how the neo-Kantian theories of Rawls and Gewirth mediate the relation between the moral imperative of treating persons as equals and the substantive critical moral standards in terms of which conduct and institutions should be assessed. Both Rawls and Gewirth have given expression to treating persons as equals in terms of variant interpretations of Kantian universalizability. Gewirth has followed Kant more literally: he has argued that ethical reasoning, as such, is marked by a certain phenomenology—namely, in reasoning ethically, an agent abstracts from her or his particular ends, and thinks in terms of what general requirements for rational autonomy the agent would demand for the self (so idealized) on the condition that the requirements be consistently extended to all other agents alike.⁸⁶ Rawls's argument is more abstract but to similar effect: we start not from the particular agent, but from the concept of rational persons who must unanimously agree upon, while under a veil of ignorance

⁸³ See R. DWORKIN, *supra* note 1, at 90-94, 188-92.

⁸⁴ It is crucial to distinguish the idea of teleological and consequentialist moral theories, Kantian moral theory is deontological, which means that it is non-teleological. See note 48 *supra*. Both teleological and deontological moral theories may be consequentialist, however, in the sense that the assessment of what conduct conforms to ethical principles crucially turns on the assessment of the consequences of acting on the principle. Teleological and deontological theories differ in terms of their criteria for assessing consequences, but not necessarily in the important relevance of consequences, as such.

⁸⁵ See, e.g., Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEG. STUD. 103, 104 n.4 (1979); cf. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 71-72 (1977).

⁸⁶ A. GEWIRTH, *supra* note 8, chs. 2-3.

as to who they are, the general critical standards in terms of which their personal relations will be governed.⁸⁷ For Rawls, the veil of ignorance performs the same function as Gewirth's abstraction of the agent from her or his ends (in thinking ethically, one respects higher-order capacities of personhood, not lower-ends which happen to be pursued); and, the contractual agreement is the functional equivalent of Gewirth's universalization (what all persons would agree to comes to the same thing as what any person, suitably idealized, would demand for one's self on the condition that it be extended to all alike). Now, importantly, both these theories appeal to consequences in arguing that certain substantive principles would be universalized (Gewirth) or agreed to (Rawls). Thus, Gewirth has argued that the universalizing agent would assess the necessary substantive or material conditions for rational autonomy and would universalize those conditions; the consequences of universalization thus importantly determine what would be universalized. Correspondingly, Rawls's contractors consider the consequences of agreeing to certain standards of conduct as part of their deliberations.

If Rawls and Gewirth are in such fundamental agreement, wherein do they differ? The main difference comes in Rawls's argument that the contractors of the original position, in the conditions of uncertainty (not knowing who they are, and thus how they will be affected by agreeing to certain principles), would find it rational to maximin, viz., agree to that set of principles which would make the worst off best off.⁸⁸ Gewirth has resisted the thoroughgoing application of this strategy, on the ground that it too radically treats as morally arbitrary (through the veil of ignorance) differences between people not all of which can easily be regarded as ethically fortuitous⁸⁹ and thus properly regulated by a principle like maximin which, in making the worst off best off, tends to be equalizing (since, in many cases, the way rationally to make the worst off best off is to abolish the worst off class altogether by mandating equality). Gewirth's objection to maximin appears to rest on his phenomenological procedure; he objects to the generality of Rawls's idea of ethically fortuitous circumstances of situation and nature because agents, in reasoning ethically in any particular context, find it unnaturally straining imaginatively to abstract from their situation in the radical way Rawls's procedure requires. But, Gewirth's

⁸⁷ J. RAWLS, *supra* note 6, ch. III. See also D. RICHARDS, *supra* note 60, ch. 6.

⁸⁸ J. RAWLS, *supra* note 6, at 150-61.

⁸⁹ A. GEWIRTH, *supra* note 8, at 108-09. Cf. *id.* at 331.

own procedure of abstracting from particular ends to the conditions of rational personhood, as such, is not, however, any less straining. Consistently carried out in its moving purity of principle, the Kantian interpretation of treating persons as equals requires that we acknowledge that the only *ethically* fundamental fact is persons' equality in having the capacity for sovereignty in the kingdom of ends; and any other difference among persons has moral weight only to the extent that the difference is accorded weight by principles that persons would accept as expressing basic respect for such equality. Rawls's procedure, while undoubtedly more abstract than Gewirth's, is to be preferred as the more adequate interpretation of the Kantian premises shared by both theories in that, for Rawls, following Kant, everything is fortuitous ethically except those aspects of character and action that are given significance by the free and rational and equal consent of persons. At best, Gewirth's procedure, whereby persons abstract from their situation by thinking of themselves in terms of their rational autonomy, may be viewed as a first approximation, by phenomenological description of an individual's ethical reasoning, of the procedure more completely and consistently realized by Rawls's method.⁹⁰

Despite such differences between Rawls and Gewirth, it is important to keep in mind the broad common ground they share. Even as regards their differences over maximin, it seems clear that Gewirth's insistence, over a wide range of cases, that each person, idealized in terms of rational autonomy, should demand for herself or himself whatever can be universalized to other persons converges with maximin, viz., insuring that each person equally has access to certain minimal conditions of well-being and self-respect.⁹¹ With respect to human rights, the consequence of both approaches would be a set of general principles of critical morality, some of which

⁹⁰ Cf. D. RICHARDS, *supra* note 60, at 83-85, where I once made a similar contrast between R.M. Hare's universalistic prescriptivism and contractarian theory. See R.M. HARE, *FREEDOM AND REASON* (1963); *THE LANGUAGE OF MORALS* (1952). Hare has recently argued that his procedure would yield a form of utilitarianism. See Hare, *Ethical Theory and Utilitarianism*, 4 *CONTEMP. BRITISH PHIL.* 113-31 (H.D. Lewis ed. 1976). The divergence between Hare's Kantian inspired theory, tending to utilitarianism, and Rawls's and Gewirth's, which are anti-utilitarian, appears to derive from the greater weight that Rawls and Gewirth give to Kant's concept of rational autonomy. In terms of my earlier claim of the relation of Hare's theory to ideal contractarianism, it seems to me that Gewirth's phenomenological procedure is even a closer approximation to contractarian theory, presumably because Gewirth starts from an idealized conception of rational autonomy close to the idea of moral personality on which Rawls's theory builds.

⁹¹ See A. GEWIRTH, *supra* note 8, chs. 4-5; *The Basis and Content of Human Rights*, 13 *GA. L. REV.* 1143 (1979).

⁹² For a contractarian derivation of such rights, see D. RICHARDS, *supra* note 60, chs. 7-10.

would involve such fundamental interests that coercion would be justified in enforcing them.⁹² These principles, which we can naturally denominate the principles of obligation and duty, would define correlative rights.⁹³ Consider the relevance of this account of human rights to the analysis of the moral foundation of the criminal law and related constitutional principles.

II. THE MORAL FOUNDATIONS OF THE SUBSTANTIVE CRIMINAL LAW

It is an uncontroversial truth that the criminal law rests on the enforcement of public morality, viz., that criminal penalties, *inter alia*, identify and stigmatize certain moral wrongs which society at large justifiably condemns as violations of the moral decency whose observance defines the minimum boundary conditions of civilized social life.⁹⁴ As we noted earlier, however, little critical attention has yet been given in Anglo-American law to the proper explication of the public morality in light of considerations of human rights to which constitutional democracy is in general committed. Rather, legal theory and practice has tended to acquiesce in a quite questionable identification of the public morality with social convention.⁹⁵ We are now in a position to articulate an alternative account of the moral foundations of the substantive criminal law, which can illuminate various criminal law and related constitutional law doctrines and the proper direction of criminal law reform.

The substantive criminal law and cognate principles of constitutional law rest on the same ethical foundations: the fundamental ethical imperative that each person should extend to others the same respect and concern that one demands for one's self, as a free and rational being with the higher-order capacities to take responsibility for the form of one's life. Whether one uses Rawls's maximin contractarian hypothesis or Gewirth's universalization of rationally autonomous people, the consequence is, for purposes of the criminal law, the same. Certain basic principles are agreed to or universalized, as basic principles of critical morality, because they secure, at little comparable cost to agents acting on them, forms of action or forbearance from action that rational persons would

⁹² See *id.* at 95-106.

⁹⁴ See, e.g., Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958); Feinberg, *The Expressive Function of Punishment*, in DOING AND DESERVING 95-118 (1970); Butler, *Upon Resentment*, in FIFTEEN SERMONS AT THE ROLLS CHAPEL 102 (1913); Stephen, *Punishment and Public Morality*, from 2 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 30-37, 90-93 (1885).

⁹⁵ See Richards, *Unnatural Acts and the Constitutional Right to Privacy*, 45 FORDHAM L. REV. 1281, 1334-46 (1977). See also note 24 *supra*.

want guaranteed as minimal conditions of advancing the responsible pursuit of their ends, whatever they are; furthermore, these principles will be so fundamental in securing either a higher lowest (Rawls)⁹⁶ or the conditions of rational autonomy (Gewirth)⁹⁷ that, in general, coercion will be viewed as justified, as a last resort, in getting people to conform their conduct to these principles. Accordingly, these principles are commonly referred to as the ethical principles of obligation and duty, which define correlative rights.⁹⁸

One fundamental distinction between these principles of obligation and duty is that some apply in a state of nature whether or not people are in institutional relations to one another, whereas others arise because of the special benefits that life in institutions and communities makes possible; I shall refer to the former as natural duties,⁹⁹ the latter as institutional duties and obligations.¹⁰⁰ With respect to natural duties, the principles include, at a minimum, a principle of nonmaleficence¹⁰¹ (not killing, inflicting harm or gratuitous cruelty), mutual aid¹⁰² (securing a great good, like saving life, at little cost to the agent), consideration¹⁰³ (not annoying or gratuitously violating the privacy of others), and paternalism¹⁰⁴ (saving a person from impaired or undeveloped rationality likely to result in death or severe and irreparable harm). With respect to institutional duties and obligations, the principles include basic principles of justice¹⁰⁵ which regulate such institutions (legal and economic systems, conventions of promise-keeping and truth-telling, family and educational structure) and in appropriate circumstances require compliance with the requirements of such institutions¹⁰⁶ (for example, respecting certain property rights). Now, all these principles of obligation and duty—natural and institutional—are formulated in quite complex terms; and priority relations are established among them to determine how, in general, conflicting obligations should be resolved and what the relative moral seriousness of offenses would

⁹⁶ See note 92 *supra*.

⁹⁷ See note 91 *supra*.

⁹⁸ See note 93 *supra*.

⁹⁹ Cf. D. RICHARDS, *supra* note 60, at 92-95; also at ch. 10.

¹⁰⁰ *Id.* at chs. 3-9; also at 92-95.

¹⁰¹ *Id.* at 176.

¹⁰² *Id.* at 185.

¹⁰³ *Id.* at 189.

¹⁰⁴ *Id.* at 192.

¹⁰⁵ *Id.* at ch. 8; cf. J. RAWLS, *supra* note 6.

¹⁰⁶ D. RICHARDS, *supra* note 60, ch. 9.

be (the infliction of death, for example, is a graver violation of integrity than a minor battery).¹⁰⁷ I shall touch on some of these complexities in the discussion below of particular criminal law doctrines. The general nature of such principles and their derivation from the moral imperative of treating persons as equals, however, seem clear: Such principles secure to all persons on fair terms basic forms of action and forbearance from action which rational persons would want enforceably guaranteed as conditions and ingredients of living a life of self-critical integrity and self-respect; correlatively, such principles define human or moral rights, whose weight as grounds for enforceable demands rests on the underlying moral principles of obligation and duty which justify such enforceable demands. Other moral principles are also agreed to or universalized, but they fall in an area, supererogation,¹⁰⁸ which is not our present concern.

Because all the moral principles of obligation and duty are the proper objects of the use of force or coercion (an evil), ethical principles are agreed to or universalized that govern the distribution of this evil. Enforcement of such principles in the law takes place through the criminal law and the private remedies of the civil law (contracts, torts). While both the criminal and civil law rest on the moral foundations of the moral principles of obligation and duty, the grounds of enforcement differ in both cases: the criminal law rests on the punitive upholding of basic standards of moral decency, the civil law on moral principles of compensation. While some moral principles are enforced under both bodies of law (for example, the criminal and civil law of assault), others are enforced only under one body of law (for example, American law tends to prefer the civil law to remedy breaches of contract, where the promisee has the moral and legal right to extinguish or enforce the obligation).¹⁰⁹ The concern here is only with the ethical principles relevant to the just

¹⁰⁷ For attempts to formulate such complex principles which appear broadly convergent in substantive requirements, see *id.* at chs. 8-19; A. GEWIRTH, *supra* note 8, at chs. 4-5.

¹⁰⁸ D. RICHARDS, *supra* note 60, at ch. 11.

¹⁰⁹ The moral analysis of why some of the principles of obligation and duty are enforced by the criminal law and others are not would require, I think, investigation of the costs of publicly enforceable sanctions versus the kind of gain to be obtained in greater regulation of conduct by the relevant principles. In general, public sanctions are expensive and draconian and would, accordingly, be reserved for the more serious moral offenses; others would be left to private law remedies and to informal forms of moral blame and criticism. For present purposes, it suffices that is a necessary, though not a sufficient, condition of criminal punishment that there be a violation of underlying moral principles of obligation and duty. *Cf. id.* at chs. 7-10.

imposition of criminal sanctions, viz., the principles of punishment. Generally, at least four relevant principles regulate the use of criminal sanctions to enforce moral obligations and duties.

First, the Kantian interpretation of treating persons as equals importantly puts special constraints on the imposition of criminal penalties for violations of moral duties and obligations, namely, that sanctions be applied only to persons who broke a reasonably specific law, who had the full capacity and opportunity to obey the law, and who could reasonably have been expected to know that such a law existed.¹¹⁰ In this way, each person is guaranteed a greatest liberty, capacity, and opportunity of controlling and predicting the consequences of one's actions, compatible with a like liberty, capacity, and opportunity for all. Such a principle can be agreed to or universalized because it is a rational way to secure general respect for and compliance with moral principles at a tolerable cost. Because criminal sanctions are a form of humiliating stigma, persons in Rawls's original position or Gewirth's equivalent would limit the application of such sanctions in order to secure a higher lowest than that allowed by alternative principles; for, these conditions provide the fullest possible opportunity for people to avoid these sanctions if they so choose, or, at least, the fullest possible opportunity within the constraint that some system of coercive enforcement is justified to insure compliance with moral principles of obligation and duty. This principle forbids the application of criminal sanctions to an innocent who has not broken the law or to persons lacking the liberty (the severely coerced), the capacity (the insane, infants, involuntary acts) or full opportunity (those not reasonably apprised of the law) to regulate conduct by the relevant principles, even where the application of sanctions might have some deterrent effect in better enforcing moral principles; it also tends to render immune from criminal sanctions those unintentional actions that result from quite unforeseeable and unavoidable accident, which there was no fair opportunity to avoid. In general, forms of mental state (intent, knowledge, and an individualized standard of negligence)¹¹¹ are required as necessary moral conditions of just punishment because the presence of these mental states insures that the person may fairly be said to have the capacity and opportunity to conform con-

¹¹⁰ See *id.* at 128-29; H.L.A. HART, *supra* note 10, at chs. I-II.

¹¹¹ See H.L.A. HART, *supra* note 10, at ch. VI; D. RICHARDS, *THE MORAL CRITICISM OF LAW* 207-08 (1977).

duct to law; to the extent that intentional as opposed to unintentionally negligent actions involve easier or fuller opportunities to regulate conduct by principles, a higher gradation of sanction would, on this view, justly be applied to the former than the latter, other things being equal.

Secondly, given that the application of criminal sanctions is regulated by the principle of equal liberty, capacity, and opportunity, such sanctions must also observe two ethical principles of proportionality. The first principle rests on the purpose of the criminal law to enforce moral principles of obligation and duty: levels of sanctions must reflect the relative moral gravity of underlying moral wrongs. For example, since murder is morally graver than a minor battery, the level of sanction for murder must be greater than that for battery. This proportionality principle says nothing about the level at which sanctions should be set; it requires only that whatever sanctions may be justified on other grounds must reflect relative gravities of underlying moral wrongs. The second moral principle of proportionality is more substantive. Since, from the ethical point of view of treating persons as equals, persons agree to or universalize principles of just punishment whether they were on the giving or receiving end, rational persons so situated are concerned to place substantive upper limits on the level of sanction that could be applied for moral wrongs in general or certain moral wrongs in particular. For example, certain forms of torture, that are incompatible with respecting human dignity, are ruled out, absent very extreme circumstances.¹¹² In addition, rational contractors or universalizers place upper limits on sanctions for certain wrongs: death, for example, is never acceptable as an appropriate sanction for a minor battery or theft; such an extreme sanction can not be rationally acceptable to persons who might be on the giving or receiving end, for the gains in moral conformity are incommensurate to the risks in punishment.

Thirdly, within the constraints of all the above principles, criminal sanctions must satisfy the underlying purpose of affording an effective symbolic statement of minimal moral standards of decency. Effectiveness in this context should be measured by many factors—general deterrence (whether the public example of punishment for a certain crime tends to deter people in general from committing that crime), special deterrence (whether the punishment makes the offender less likely to commit the crime again), atone-

¹¹² Cf. Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978).

ment and moral reform (whether the punishment leads the criminal to repent the wrongdoing and develop moral character). While theories of punishment commonly distinguish retributive and deterrence aims of criminal justice, I believe that these considerations are, within the constraints of the principles of equal liberty and proportionality, one: the justifying aim of criminal sanctions is to make a symbolic public statement about the importance of respecting certain basic human rights defined by moral principles of obligation and duty.¹¹³ There is, *pace* Kant,¹¹⁴ no necessary connection between this aim and any particular form or level of criminal sanctions, including prisons. From the point of view of treating persons as equals in which rational persons must agree to or universalize principles acceptable whether on the giving or receiving end, certain constraints are placed on criminal sanctions (including upper limits), but, from this point of view, there is no reason to accept intuitionistic notions of the intrinsic goodness of evil plus pain,¹¹⁵ or Kant's concept of the abstract obligation to punish evil in the exactly same kind.¹¹⁶ Rather, the central rational aim of criminal sanctions, from this point of view, is to make the required effective public statement justified by the special moral force of the underlying moral principles of obligation and duty and correlative moral rights. Which sanctions make this statement most effectively is a matter of humane empirical research among alternative forms of sanction to identify which ones best communicate respect for the underlying values of human dignity,¹¹⁷ including, of course, forms of sanction that respect the moral personality of offenders themselves. One corollary of this approach is that levels of sanctions must be rigorously scrutinized to insure that the same level of effectiveness is not achievable with less severe sanctions, or less severe sanctions more certainly imposed.¹¹⁸ Any surplusage of sanctions, above the level necessary for their effectiveness, is a morally gratuitous cruelty, because it is the infliction of pain not necessary to a purpose which rational persons would reciprocally agree to or universalize.

¹¹³ Cf. the similar argument in D. RICHARDS, *supra* note 12, at ch. VI; H.L.A. HART, *supra* note 10, at ch. I.

¹¹⁴ See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 99-108 (J. Ladd ed. 1965).

¹¹⁵ See, e.g., G.E. MOORE, *PRINCIPIA ETHICA* 214-16 (1960); W.D. ROSS, *THE RIGHT AND THE GOOD* 57-58 (1930).

¹¹⁶ See note 114 *supra*.

¹¹⁷ Cf. Feinberg, *supra* note 94.

¹¹⁸ Elsewhere, I have called this the principle of effectiveness and economy in sanctions. D. RICHARDS, *supra* note 12, at 244-45.

Fourthly, on the assumption that a generally just legal system exists, rational persons must agree or universalize that the use of coercion in enforcing moral principles of obligation and duty, justified in an institutional state of nature, must be restricted to the legal system, except for certain special cases discussed below (for example, self-defense).¹¹⁹ The reason for this has been a prominent point made by the contractarian tradition, especially Locke¹²⁰ and Kant:¹²¹ viz., when each individual person, in an institutional state of nature, himself acts as an enforcer of moral duties, he is judge, jury, and executioner in each case, including his own, and this judgment will often be distorted by personal interest and bias, selfish envy, and vindictiveness. The great virtue of a just legal system, where the final appeal in the exercise of coercive power is to a group of impartial interpreters and executors of the law, is that the distortions of judgment and execution, found with an individual in the state of nature, are significantly reduced. This is simply to say that such legal institutions tend to be more just in their distribution of punishment: the persons who violate moral duties and obligation, which the law enforces, are more likely to be punished than in the state of nature, where distortions of judgment lead to applying coercion to the innocent, or applying coercion to the guilty to a degree that is out of all relation to the requirements of effective deterrence. For this reason, when a just legal system exists, coercion is justified in enforcing moral duties and obligations, in general, only when these requirements can be effectively enforced by law;¹²² those duties and obligations which cannot be effectively enforced by law must be, at best, left to informal forms of criticism and blame.

¹¹⁹ Cf. D. RICHARDS, *supra* note 60, at 130-31.

¹²⁰ See especially J. LOCKE, *supra* note 49, at chs. I-III.

¹²¹ On the grounds of the injustices of the state of nature, Kant supposed there to be a moral obligation for persons to leave the state of nature and enter civil society. See I. KANT, *supra* note 114, at 69-72.

¹²² For this purpose, I view both the criminal law and the remedies of the civil law as means of enforcement. Certain moral rights, for example, relating to keeping informal promises and the like, may not be appropriately enforced either by the criminal or civil law, on the ground that they relate to forms of personal relationship that are more effectively regulated, given the interests involved, by informal forms of blame and criticism. Cf. Hart & Sacks, *The Invitation to Dinner Case*, in *THE LEGAL PROCESS* 477-78 (Tent. ed. 1958). Many times, the moral interests thus protected will be of acute human significance, for example, personal interests against the betrayals of friends or lovers. The underlying quality of informal and spontaneous attachment of such relationships, however, is not compatible with the forms of coercive enforcement by law.

III. THE MORAL THEORY OF THE SUBSTANTIVE CRIMINAL LAW

Theories should be judged by their explicatory fruits. Therefore, I will examine how the proposed account of the moral foundations of the criminal law may be deployed in clarifying the substantive criminal law and cognate constitutional law doctrines. I shall discuss *seriatim* the contribution this theory can make to understanding (a) decriminalization and the limits of the criminal sanction, (b) *actus reus* and the distinction between actions and omissions, (c) *mens rea* and excuses, including the novel idea of an excuse of socioeconomic deprivation, (d) legality, (e) the nature and place of justification, notably self-defense and necessity, (f) vexed issues relating to inchoate crimes, in particular, attempts, and (g) proportionality and the death penalty.

A. *Decriminalization and the Limits of the Criminal Sanction*

Our perspective on the moral foundations of the criminal law enables one to reinterpret contemporary debates over decriminalization and the limits of the criminal sanction in a striking way that confirms the main conclusions of liberal reformers like John Stuart Mill¹²³ but does so on the basis of a deontological, anti-utilitarian moral theory deriving from Kant; this examination will demonstrate how the arguments for decriminalization naturally converge with arguments in support of the constitutional right to privacy.

There is an important converging strain in the moral theories of Kant and Mill, namely, the central role in ethics of equal concern and respect for autonomy. Liberalism rests on a certain view of the *person*, namely, that persons, as such, have the capacities I earlier described as the higher-order capacities self-critically to evaluate and order their first-order desires.¹²⁴ Thus, Kant, who is the most profound philosophical theorist of liberalism, identifies personhood in the capacity of persons to be sovereigns in the kingdom of ends, to be *ends in themselves*,¹²⁵ viz., to think self-critically about their ends and to take, as the central task of personhood, how to live their lives. When John Stuart Mill sought to explicate similar values as at the core of liberal political theory, he wrote of the central importance of people choosing plans of life for themselves, identifying per-

¹²³ See J.S. MILL, *supra* note 44.

¹²⁴ See Richards, *Human Rights and Moral Ideals: An Essay on the Moral Theory of Liberalism*, in SOCIAL THEORY AND PRACTICE (forthcoming).

¹²⁵ See I. KANT, *supra* note 66.

sons' relation to their lives as the highest creative task of humans: "Among the works of man, which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself."¹²⁶ Mill's interpretation of autonomy supplements Kant's with a special concern with facilitating independence from custom and convention by which a person is enabled, in Mill's memorable phrase, "to fit him with a life"¹²⁷ with concern for personal individuality.

As earlier suggested, we should interpret Kant's autonomy-based theory of ethics not in terms of his mysterious ideas of noumenal independence of casual law¹²⁸ but in terms of a capacity for independence of domination by others and for self-critical control over our lower-order desires. The solid core of truth in Kant's theory, which Mill elaborates with his idea of independence of convention, is that persons, as such, have a natural capacity for self-critical rationality about their lives and how they are lived. Autonomy, so far from being miraculous evidence of our independence of casual law, is very much a natural capacity which we may, depending on our purposes, fulfill or frustrate in various ways. Despite their opposing deontological and utilitarian metaethics, Kant and Mill unite in their focal emphasis on giving weight to respecting and fostering this natural capacity. Kant's theory of ethics is deeper than Mill's in explicating the ethical requirement of treating persons as equals in terms of this capacity, whereas Mill, a utilitarian in his metaethics, ultimately interprets equality in terms of the capacity for pleasure or pain.¹²⁹ For Kant, ethics is the point of view which requires that we regulate our conduct by principles which respect the equal dignity of each person in exercising this capacity.

The idea of human rights is¹³⁰ a corollary of the Kantian interpretation of treating persons as equals in virtue of their autonomy. An

¹²⁶ See J.S. MILL, *supra* note 44, at 59.

¹²⁷ *Id.* at 68.

¹²⁸ See I. KANT, FOUNDATIONS *supra* note 51, at 64-83.

¹²⁹ See note 77 *supra*. Mill appears to regard his analysis of autonomy as identifying an interest which a person would rationally give a higher weight than other forms of desire satisfaction, and thus the higher weight of this form of desire satisfaction accounts for the greater normative weight which the utilitarian principle would give to the cultivation of this interest. For his distinction between higher and lower pleasures, see *id.* ch. II. For Mill's statement about the rational attractions of autonomy, see J.S. MILL, *supra* note 44, at ch. III.

¹³⁰ See part I of this article *supra*.

important feature of this perspective, as Dworkin has noted,¹³¹ is a neutral theory of the good: the ethical principles which define rights assure to persons, on fair terms to all, their dignified independence in designing a life as free and rational creatures, which is, accordingly, broadly neutral on the question of what is good for any particular person. To say that these principles entertain a neutral theory of the good, however, is not to say that they are blankly non-consequentialist.¹³² Clearly, the Kantian interpretation of treating persons as equals presupposes a certain view of human nature (for example, the natural capacity for autonomy); and, the content of ethical principles in general takes into account the kinds of interests rational persons tend to have (for example, not being killed or harmed; or, needs for food and shelter; or, the ingredients of the development of critical rationality). Such considerations, however, are compatible with many disparate visions of the good life. The idea of human rights, without begging the question of what is the good for any particular person, secures the minimum conditions which enable persons, with the dignity of freedom and rationality, to design their lives. Once rights are secured, persons are, to pursue Mill's aesthetic metaphor, to face the highest creative task of human life—to make a life. To this extent, rights embody a deontological concept: rights are defined independently of the good, and define the boundary constraints within which people on fair terms are free to define their own good.

This autonomy-based interpretation of treating persons as equals enables one to understand and defend, in terms of Kantian, deontological ethics, Mill's general right "of framing the plan of our life to suit our own character . . . without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong."¹³³ Mill's right of personal autonomy, expressed in American constitutional law in the constitutional right to privacy,¹³⁴ assumes as its background the moral principles of obligation and duty discussed earlier. Certainly, Mill does not argue that the right of personal autonomy legitimates a general right of amoralism or immoralism, *i.e.*, not treating persons as equals. Indeed, the whole point of liberalism,

¹³¹ See R. DWORKIN, *LIBERALISM, PUBLIC AND PRIVATE MORALITY* 113-43 (S. Hampshire ed. 1978).

¹³² See notes 84-87 and accompanying text *supra*.

¹³³ See J.S. MILL, *supra* note 44, at 6.

¹³⁴ See note 24 *supra*.

correctly interpreted, is to make treating persons as equals the central tenet of political and constitutional morality. Mill's argument, rather, is that ethical principles, correctly understood, allow circumscription of personal autonomy only when the person's actions harm palpable interests of others; in particular, there is no appropriate ethical ground for interfering with personal autonomy on the paternalistic ground of advancing the interests of the agent alone. The background of Mill's argument is, of course, Victorian moralism which Mill perceived as, without any reasonable ethical justification, interfering in people's personal lives, in effect, creating a tyranny of majoritarian convention which Mill believed to erode the foundations of autonomous personhood. Mill's argument against any legitimate ethical interference on paternalistic grounds is overstated; his own argument shows that he believed in a just scope for paternalism in the cases of children and "backward states of society"¹³⁵ and even in certain cases of imminent harm to an unwary adult.¹³⁶ Clearly, a principle of paternalism, circumscribed to cases of extreme irrationality or non-rationality likely to harm irreparably serious human interests (for example, life), is ethically justified.¹³⁷ Mill has refused to formulate any such general principle, though he has invoked several specific applications of it, because he took seriously the extreme abuses of paternalistic (applied, for example, to women)¹³⁸ as well as moralistic arguments of his period.¹³⁹ Most forms of majoritarian incursion into people's personal lives could not, Mill believed, be justified by any ethical principle (including paternalism) which treats persons as equals. Accordingly, Mill desired to formulate a simple and not easily abused principle which roughly articulates that, outside the scope of principles which treat persons as equals, there is a general right to personal autonomy. Because paternalistic arguments may have appeared to him intrinsically prone to abuse, he has formulated his principle of noninterference overbroadly but with dramatic and cogent simplicity: The *only* warrant for interference with an agent is that the agent's actions

¹³⁵ See J.S. MILL, *supra* note 44, at 10.

¹³⁶ *Id.* at 97-98.

¹³⁷ See D. RICHARDS, *supra* note 60, at 192-95.

¹³⁸ See generally Mill, *The Subjection of Women*, in J.S. MILL & H.T. MILL, *ESSAYS ON SEX EQUALITY* (A.S. Rossi ed. 1970).

¹³⁹ For an attempt to reconstruct the spirit of Mill's argument, reflecting his objections to the abuse of moralistic and paternalistic arguments, see Richards, *Sexual Autonomy*, *supra* note 24.

harm the palpable interests of others.¹⁴⁰

The general intention of Mill's argument is correct and is clarified by the autonomy-based interpretation of treating persons as equals. A certain class of background ethical principles (namely, the principles of obligation and duty), which express the idea of treating persons as equals, does limit the scope of the right of personal autonomy. These principles, as suggested earlier, define minimal moral rights of social decency, which are the necessary moral conditions for the proper application of the criminal sanction. Accordingly, these principles, as Mill has clearly acknowledged, limit personal autonomy wherever countervailing rights are involved; but, once such rights are not involved, persons have a general right of personal autonomy. The source of this general right is the fundamental value of liberalism (shared by Mill and Kant), a focal concern with the capacity of each person, compatible with a like capacity for all, to address with dignity the central problem of personhood—how to live one's life. The neutrality of this right, among a wide number of visions of the good life, arises from its source in the value of autonomy—with the capacity of persons for sovereignty in the kingdom of ends, not with any particular heteronomous end which may be adopted. The right of personal autonomy grounds a general prohibition on forms of coercive interference with this right, for, as Mill has clearly suggested,¹⁴¹ only by allowing people themselves to assume final normative responsibility in making these choices over the range of cases to which the right properly applies, where they bear the ultimate responsibility for the risks of success or failure, can one secure the desired respect for the basic higher-order capacities of the person to accept with dignity the responsibility for her or his life as a free and rational being. Such an affirmative right is clearly required by the autonomy-based interpretation of treating persons as equals. Autonomy is a natural capacity which may be encouraged or frustrated in various ways depending on one's normative purpose. An autonomy-based ethics takes the normative attitude that the capacity is not only to be encouraged, but to be affirmatively defended—on the ground that in this way people better realize their capacities for free and dignified personhood. Mill's fundamentally valid argument is that constitutional democracy, committed to the liberal interpretation of treating persons as equals, must affirmatively extend such a right in defense of those persons whose moral

¹⁴⁰ See J.S. MILL, *supra* note 44, at 6.

¹⁴¹ *Id.* at ch. III.

freedom is illegitimately denied by forms of social convention which are not grounded in the ethical imperative of treating persons as equals. Mill is acutely sensitive, unlike Kant, to the degree to which social convention tyrannously blinds people to the moral freedom they in fact possess, disfiguring and distorting their capacity to take an attitude toward their lives which Mill likens to that of the creative artist with a willingness to explore, to try experiments in living, to take risks with one's talents, to be open and vulnerable to the impulses of creative design.¹⁴² Accordingly, an autonomy-based theory of ethics *requires* an affirmative moral right that people be protected from social conventions that are not grounded in treating persons as equals, so that people are encouraged to realize their moral freedom. For Mill, the gravamen of tyrannous convention was Victorian moralism, which he took systematically to violate the right to personal autonomy by its excessive criminalization and social condemnation of acts which, in fact, do not violate the moral rights of others; Mill took women to be a central class of persons whose moral freedom had, by unjust social convention, been disfigured.¹⁴³

While Mill has made his argument in support of a general right of liberal political theory, in the United States one can perceive this moral right as the ground for the legal right gradually developed, albeit inconsistently,¹⁴⁴ by the Supreme Court as the constitutional right to privacy. The fundamental imperative of treating persons as equals, which explicates the ideas of human rights enshrined in the Constitution, requires that the scope of the criminal law must, in fact, rest on human rights expressive of the fundamental imperative, and that criminalization outside this proper scope must be invalidated on the ground of a right to personal autonomy. Accordingly, the Supreme Court has naturally appealed to underlying ideas of human rights as the unwritten Constitution¹⁴⁵ to develop a constitutional right to privacy which affirmatively defends the moral right to personal autonomy.

Consistent with the clarification this account affords of constitutional rights, one may note, in conclusion, that it illuminates the

¹⁴² See note 126 and accompanying text *supra*. For "experiments in living," see Mill, *supra* note 123, at 56.

¹⁴³ See note 138 *supra*.

¹⁴⁴ See Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORD. L. REV.* 1281 (1977); *Sexual Autonomy*, *supra* note 24.

¹⁴⁵ See Richards, *supra* note 144.

general nature of arguments for decriminalization in a way efficiency-based arguments for decriminalization cannot. The gravamen of arguments for decriminalization is that the acts in question, on critical examination, are not immoral, and that they do not, in principle, fail to treat persons as equals in the ethically fundamental sense. A fundamental mistake of advocates of decriminalization is to concede the immorality of certain acts (for example, consensual homosexuality or prostitution), and then to argue for decriminalization on the grounds of enforcement costs. There is no defensible criterion for the immorality of acts or persons other than treating persons as equals. Consensual homosexuality, for example, does not violate this imperative; the criminal and social condemnation of it clearly does.¹⁴⁶ Accordingly, criminal statutes, that prohibit consensual homosexual relations, unethically distort the moral freedom people in fact possess; such statutes are justly condemned as violations of the right to personal autonomy, and should be condemned as violations of the constitutional right to privacy.

In general, students of the criminal law, like George Fletcher, who otherwise urge the relevance of moral theory in understanding the substantive criminal law, err in not applying moral theory to the question of the proper scope of the criminal law.¹⁴⁷ It is certainly true that not all unethical acts are criminal; even some acts violative of moral principles of obligation and duty are not criminalized.¹⁴⁸ It is true, however, that no act is properly the subject of criminal penalties that is not, on critical examination, morally wrong;¹⁴⁹ to the extent the criminal law does criminalize such acts, it is justly the subject of moral criticism and constitutional attack. Theorists of the criminal law, who lavish such theoretical concern for understanding the moral foundations of *mens rea* or the excuses and who justly criticize failures to conform to these foundations,¹⁵⁰ should bring comparable energy to bear on the substantive scope of proper criminal liability. It is a mistake to argue that a state has no moral right to abolish *mens rea*, notwithstanding social consensus to the contrary, and yet also supinely accept the propriety of social convention as a measure of the morality that the criminal law may enforce.

¹⁴⁶ See note 144 *supra*. For prostitution, see Richards, *Commercial Sex*, *supra* note 24.

¹⁴⁷ See note 36 and accompanying text *supra*.

¹⁴⁸ See notes 109 & 122 *supra*.

¹⁴⁹ Cf. Hart, *supra* note 94.

¹⁵⁰ See FLETCHER, *RETHINKING CRIMINAL LAW* (1978); cf. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968), at chs. I, II, IV, V, VI, VII, VIII.

There is no such distinction; we do not, as judges or lawyers or persons, at any point abdicate our moral responsibility for applying to ethical questions the kind of reasoning, treating persons as equals, that is alone properly ethical.

B. *Actus Reus: Of Acts and Omissions*

The moral theory of the substantive criminal law here proposed is in two parts: the moral principles of obligation and duty, and the four principles of justice that regulate the use of coercion in enforcing the former class of principles. The principles of justice play a role in clarifying the place of the *actus reus* requirement as a predicate of criminal liability, and the principles of moral obligation and duty explicate the proper interpretation of the action-omission distinction as a feature of this requirement.

The criminal law traditionally requires the presence of a voluntary act, or *actus reus*, as a necessary condition of criminal liability;¹⁵¹ and, constitutional principles appear to require it, in some form, as a necessary condition of constitutionally just punishment.¹⁵² The first principle of justice previously discussed—a greatest equal liberty, capacity, and opportunity—explains the moral foundations of this requirement of criminal liability and why, correlatively, it is constitutionally mandated. On the view here proposed, the criminal law is the way in which basic rights of moral decency, defined by ethical principles of obligation and duty, are enforced; since the values underlying these rights are of equal concern and respect for autonomy, people are only justly subject to such sanctions when each, compatible with like treatment for all, has been given a fair chance to avoid such sanctions. In short, persons may only justly be used as an example to others of the moral importance of observing basic decency to others when they can fairly be regarded as having been accorded the basic respect for their autonomy shown by the application of criminal sanctions only after a showing of the exercise or failure of exercise of capacities of choice and deliberation that could fairly have obviated the sanctions. The requirement of a voluntary act, as a principle of criminal law and of constitutional justice in punishment, is a minimal aspect of this requirement, for, without it, people would be subject to criminal sanctions

¹⁵¹ See W. LAFAYE & A. SCOTT, CRIMINAL LAW 177-82 (1972).

¹⁵² See *Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968). For commentary, see D. RICHARDS, THE MORAL CRITICISM OF LAW 199-202 (1977).

for statuses or involuntary fits which bear no marks of personal responsibility.¹⁵³

The derivation of the moral principles of obligation and duty clarifies the proper interpretation of the action-omission distinction in the interpretation of *actus reus*. In general, Anglo-American criminal law attaches criminal liability for omissions only in the presence of special circumstances of status (parent-child), contract, assumption of risk by having caused the danger or having begun to render aid, and the like;¹⁵⁴ and recent moral theorists, like Epstein¹⁵⁵ and Pilon,¹⁵⁶ have suggested that this narrow limitation on criminal liability rests on a moral value, namely, that we bear responsibility only for what we cause by our actions, not, in general, for our failures to act. Both Anglo-American law and the moral theorists are wrong. From this point of view of treating people as equals, there is no morally fundamental distinction between actions and omissions;¹⁵⁷ in both cases, the morally relevant feature, which would be recognized as such by rational persons or universalizers whether on the giving or receiving end, is the small cost of compliance and the fundamental goods thus secured to others.¹⁵⁸ When the costs of compliance, even with moral imperatives forbidding actions, are disproportionately large compared with gains to others, either a defense by way of excuse (duress) or justification (self-defense) is recognized. Omissions, in moral principle, should be no differently regarded. In particular, as Kant well recognized,¹⁵⁹ a general moral duty of mutual aid, requiring supplying a great need to another (for example, saving life) when at minimal cost to the agent, would be universalized as a moral principle of obligation and duty. Accordingly, there is no argument of moral principle to support the general failure of Anglo-American law to recognize good samaritan duties in contexts to which the underlying moral duty of mutual aid applies.¹⁶⁰

Surely, the technical objection regarding the difficulty of framing appropriate standards of criminal liability in this area is not ethi-

¹⁵³ Cf. Richards, *supra* note 152.

¹⁵⁴ See W. LAFAVE & A. SCOTT, *supra* note 151, at 182-91. Cf. Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958).

¹⁵⁵ See Epstein, *supra* note 73.

¹⁵⁶ See Pilon, *supra* note 73.

¹⁵⁷ Cf. C. FRIED, *RIGHT AND WRONG* 17-20, 108-31 (1978); A. GEWIRTH, *REASON AND MORALITY* 217-30 (1978).

¹⁵⁸ See D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 185-89 (1971).

¹⁵⁹ See I. KANT, *FOUNDATIONS*, *supra* note 51, at 41.

¹⁶⁰ Cf. D. RICHARDS, *THE MORAL CRITICISM OF LAW* 221-24 (1977).

cally decisive.¹⁶¹ The difficulties are, often, no greater in the area of actions. Yet, relevant moral distinctions, in the form of mitigation doctrines and forms of excuse and justification, have been gradually worked out to cover these difficulties in the definition of criminally acts. There is no good reason to believe that such doctrines could not appropriately be worked out for omissions. The failure to do so results in the failure of the criminal law to capture and express an important moral duty, and sometimes absurdly to go to the length of criminalizing reasonable and good faith conduct of heroic beneficence arguably beyond mutual aid.¹⁶²

The attempt to rest this error on moral foundations (autonomy as causal efficacy)¹⁶³ rests on a confusion of respect for personal integrity with privatized egoism. The range of our moral obligations, however, is larger than our actions; it extends as well to those failures to act which fail to treat persons in the way we would want reciprocally to be treated were we in their position and they in ours. To limit the range of our moral duties to actions is a failure of moral reasoning and imagination. It has no *moral* basis, though it has, in our society, the force of a reigning ideology.¹⁶⁴

C. *Mens Rea and Excuses*

The defenses to criminal liability are naturally divided into defenses of justification and excuse.¹⁶⁵ Defenses of justification are those which show that certain conduct, that is, *prima facie*, criminally wrong (for example, killing intentionally), is, in fact, justified (for example, on the ground of reasonable self-defense). Defenses of excuse, on the other hand, are based not on the claim that the conduct is justified, but on the claim that the conduct, albeit unjustified, is not blameworthy or culpable. The nature of the excuses ties up with

¹⁶¹ See e.g., G. FLETCHER, *RETHINKING CRIMINAL LAW* 602-06 (1978), where the difficulty is picking out which of a number of persons, aware of the need to help another at small personal cost, should be under the obligation to help. See also *id.* at 633-34. Surely, this special context of causal ambiguity would not debar specifying clear legal duties in other cases where such multiple liability does not obtain. Even in such cases of multiple possible aidors, legal rules could plausibly be worked out to allocate liability, for example, physical proximity, and the like.

¹⁶² See *People v. Young*, 210 N.Y.S.2d 338 (1961), *rev'd*, *People v. Young*, 229 N.Y.S.2d 1 (1962). The result in *Young* was reversed by statute. See *NEW YORK PENAL LAW* § 110.10 (McKinney 1975). For commentary see D. RICHARDS, *supra* note 160.

¹⁶³ See note 73 and accompanying text *supra*.

¹⁶⁴ See sources at note 70 *supra*.

¹⁶⁵ See generally Austin, *A Plea for Excuses*, 57 *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 1 (1956-1957).

the general place of *mens rea* as a predicate of criminal liability, because one of the forms of excuse is to negative the culpable mental state (*mens rea*) associated with a particular *actus reus*. The moral theory of the criminal law here proposed clarifies both the place of *mens rea* and the excuses, and suggests how morally to analyze proposals to recognize novel excuses, like that of socioeconomic deprivation. Eventually, this discussion shall turn to the analysis of defenses by way of justification.

In general, the first principle of just punishment—equal liberty, capacity, and opportunity—justifies the general *mens rea* requirement as a predicate of criminal liability. As we earlier observed, forms of mental state (intent, knowledge, and an individualized standard of negligence)¹⁶⁶ would be required as necessary moral conditions of just punishment because the presence of these mental states (*mens rea*) insures that the person may fairly be said to have the capacity and opportunity to conform conduct to law. Accordingly, forms of strict liability are disfavored in the criminal law: residual pockets of strict liability are contracting;¹⁶⁷ and arguably, those that remain should be regarded as constitutionally suspect.¹⁶⁸

Similar considerations justify the place of the excuses as defenses to criminal liability—for example, the insanity defense and duress. If persons lack normal capacities to conform conduct to law as the product of mental disease or defect, they are not justly the subject of criminal penalties whose propriety rests, *inter alia*, on respect for the presence of capacities of autonomous choice and deliberation.¹⁶⁹ Persons under extreme duress are justly afforded a defense on the ground that their action is not free (as the principle of equal liberty requires) and, concurrently, on the ground that conformity to law here requires an extreme sacrifice of basic interests (for example, a

¹⁶⁶ See note 111 *supra*.

¹⁶⁷ See *e.g.*, *People v. Hernandez*, 61 Cal. 2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1974) (good faith belief that consenting party was not underage held to constitute defense to statutory rape charge); *Director of Public Prosecutions v. Morgan* [1975] 2 W.L.R. 913 (House of Lords allows that belief in consent of rape victim, even though unreasonable, is defense to rape charge). On felony murder, see G. FLETCHER, *RETHINKING CRIMINAL LAW* 274-321 (1978).

¹⁶⁸ See D. RICHARDS, *THE MORAL CRITICISM OF LAW* 203-09 (1977). A vexing contemporary problem is the use of strict liability standards as a way of developing corporate responsibility which, otherwise, will be avoided by techniques of bureaucratic impersonality. See, *e.g.*, *United States v. Park*, 421 U.S. 658 (1975). Arguably, the use of strict liability on the terms specified in cases like *Park* is, in effect, a standard of negligence *sub silentio*, applied in order to ease the prosecution's burden of proof in cases where negligence, in the circumstances, seems patent.

¹⁶⁹ See D. RICHARDS, *THE MORAL CRITICISM OF LAW* 209-16 (1977).

realistic threat of death). This latter justifying element for duress introduces a nuance of defense by way of justification into the rationale of this excuse.

This view of the moral bases of excuses suggests that the recognition of novel excuses, *qua* excuses, should turn on relevant knowledge about capacities to conform conduct to law. For example, if one proposes, following Judge Bazelon,¹⁷⁰ a novel excuse of socioeconomic deprivation, the moral analysis must turn on whether sociological theory justifies claims that, in general, persons with certain socioeconomic backgrounds lack capacity to conform conduct to law. In fact, given the significant numbers of people from such backgrounds who do conform conduct to law, it is very difficult to sustain, as an empirical proposition, the claim of incapacity.¹⁷¹

Sometimes, it is suggested one must reject Judge Bazelon's argument not on the ground of lack of evidence of incapacity of the claimed kind, but on the more general ground that such arguments rest on causal determinism, which is, in principle, inconsistent with traditional criminal law notions of personal responsibility, *i.e.*, with autonomy.¹⁷² This argument wrongly supposes that the autonomy-based interpretation of treating persons as equals requires the untruth of causal determinism. On the view here proposed, autonomy is a natural capacity which may be fostered or frustrated in various ways; an autonomy-based ethics fosters it, for example, by requiring the presence of capacities of autonomous choice and deliberation as a predicate of just punishment. This connection would be unintelligible if autonomy were incompatible with casual determinism. It is precisely because autonomy is a natural capacity subject to causal explanations that autonomy is justly made a predicate of criminal punishment, for there exist good empirical reasons of a causal kind for believing that the presence of criminal sanctions, when predicated on the presence of capacities of autonomy, better enables people to develop and exercise choice—to choose lives free of criminal sanctions, if they so choose, or to live criminal lives, if that is their design. Indeed, the very rationality of a system of criminal sanction requires that it be the case that the presence of such sanctions exercises some causal influence on the exercise of autonomy.¹⁷³ Autonomy, then, is not inconsistent, in principle, with

¹⁷⁰ See Bazelon, *supra* note 11.

¹⁷¹ See Morse, *supra* note 11.

¹⁷² See G. FLETCHER, *supra* note 167, at 801-02.

¹⁷³ Cf. the comparable criticism of philosophers who have adopted substantially the same

causal explanation in general, or with socioeconomic causal explanations in particular. There may be socioeconomic explanations of why certain people engage in criminal conduct, but it may also be true that the presence of autonomous capacities of choice and deliberation are part of the explanation (the trade-off between the fruits and risks of crime having been rationally undertaken).

There is another form of argument that can sustain socioeconomic deprivation at least as a doctrine of mitigation, if not excuse. The above consideration of the principles of just punishment assumed, in general, that the background socioeconomic institutions were themselves just. In Rawls's terms, this would require that all persons have been guaranteed equal opportunity, and that wealth and status are distributed in a way that maximizes the long-term prospects of the worst-off class.¹⁷⁴ Now, clearly, these principles would apply to the assessment of what T.H. Green dubbed "the question whether the social organization in which a criminal has lived and acted is one that has given him a fair chance of not being a criminal."¹⁷⁵ To the extent that background socioeconomic institutions are not just and certain classes of persons have not been guaranteed a fair chance of not being a criminal (crime, as a way of life, being for them all too rational), it appears not unreasonable that the background injustice from which they suffer should entitle them to some countervailing mitigation of punishment, at least as compared to a criminal from a class not subject to such an injustice. In the imperfectly just world in which we live, injustices in one institution may call for injustices in others so as better to realize justice overall, in this case, to compensate unjustly treated worst-off classes for making criminality a more sensible path for them than for others.¹⁷⁶

D. *Legality*

The principle of legality, requiring that a reasonably specific criminal law must exist making certain conduct criminal prior to the act, is, in the United States, a general constitutional principle of just punishment guaranteed by the *ex post facto* clauses¹⁷⁷ and

position as that here criticized in D. RICHARDS, A THEORY OF REASONS FOR ACTION 54-59 (1971).

¹⁷⁴ See J. RAWLS, A THEORY OF JUSTICE ch. II (1971).

¹⁷⁵ T.H. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 190 (1901).

¹⁷⁶ For the important distinction between ideal and non-ideal theories of justice, see J. RAWLS, *supra* note 174, at 8f., 245f., 351.

¹⁷⁷ U.S. CONST. art. I, § 9; art. I, § 10.

general requirements of due process.¹⁷⁸ This requirement is the last aspect of the substantive criminal law that is clearly justified by the principle of greatest equal liberty, capacity, and opportunity, frequently invoked above. In complying with legality, the application of criminal sanctions guarantees an aspect of specific, advance warning of criminality which allows maximum opportunity to avoid or incur sanctions, as the agent wishes.¹⁷⁹

Clearly, the principle of legality does not go the whole way of supplying advance warning; it is possible for a reasonably specific criminal law to preexist a criminal act of whose criminality the agent has no reasonable notice.¹⁸⁰ The invocation of the maxim, ignorance of law is no defense, does not meet the injustice of punishment in such cases. In certain of these cases involving egregiously unjust instances of omission liability, the Supreme Court has invoked due process to invalidate criminal liability,¹⁸¹ on the valid ground that underlying autonomy-based values of fair warning forbid the application of the ignorance of law maxim. American law has recognized, however, nothing comparable to German law's general exculpatory doctrine covering all cases of lack of fair notice.¹⁸²

E. *Justifications*

The moral analysis of defenses of justification turns upon the deeper examination of the content of the moral principles of obligation and duty that lie at the foundation of the substantive criminal law. These defenses, in contrast to excuses, turn not on the lack of personal culpability associated with the equal liberty principle of justice, but on the relevant further specification of the underlying

¹⁷⁸ See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (holding a vagrancy statute unconstitutionally vague); *Bouie v. Columbia*, 378 U.S. 347 (1964) (holding unconstitutional the application of a narrowly drawn trespass statute to conduct not fairly construed as within its terms).

¹⁷⁹ See D. RICHARDS, *supra* note 169, at 195-99.

¹⁸⁰ See, e.g., *Hopkins v. State*, 193 Md. 489, 69 A.2d 456 (1950) (criminal charge upheld against defendant though he had reasonably relied in good faith on advice by the State's Attorney that his conduct was legal). Some states, following parts of the Model Penal Code recommendations in this area, would allow a special defense in cases of official advice by government officials. See N.Y. PENAL LAW § 15.20(2) (McKinney 1975). But, New York, for example, does not go so far as to recognize a defense in all cases of lack of reasonable notice of the legality of one's conduct.

¹⁸¹ *Lambert v. California*, 355 U.S. 225 (1957) (holding unconstitutional a criminal statute forbidding the omission to register that one has a criminal record within five days of residence in Los Angeles, on the ground that there was no fair warning thereof).

¹⁸² See G. FLETCHER, *supra* note 167, at 737-55.

moral principles of obligation and duty which indicate that the conduct *prima facie* wrongful is, in fact, justified. It is here of interest to examine two such defenses, self-defense and necessity, since the interpretation of them has been supposed, often wrongly, to pose intractable problems for an autonomy-based view of moral, and thus criminal, wrongdoing.

In contemporary Anglo-American law, a successful self-defense justification typically observes requirements of necessity and proportionality between harm threatened and the force used to resist, and often observes, within limits, a duty of retreat.¹⁸³ Sanford Kadish¹⁸⁴ and George Fletcher¹⁸⁵ have recently argued that these requirements deviate from the autonomy-based view of self-defense under German law, which, focussing on the moral value of resisting a wrongful or unprivileged invasion of personal integrity, ignores giving significant normative weight to the interest of the invader, whether culpable or not. Anglo-American law, in qualifying the defense by doctrines which weight the interests of the agent against those of the unjust invader, qualifies, it is argued, the value of autonomy with some independent idea of proportionality or quasi-utilitarian interest balancing. This attempt, by Kadish and Fletcher, to distinguish two irreconcilable elements in the Anglo-American interpretation of self-defense appears to rest on defective moral analysis of self-defense as a justification; for, all the elements of the Anglo-American conception can be seen to express the underlying moral imperative of equal concern and respect for autonomy.

Let us remind ourselves of the kind of argument that earlier led us from the Kantian interpretation of treating persons as equals to the moral principles of obligation and duty. From the point of view of an original position which expresses the idea of treating persons as equals, rational people would agree to or universalize certain coercively enforceable standards of conduct which, at little comparable cost to the agent, secure substantial interests of others, for example, a principle of nonmaleficence (not killing, harming, or inflicting gratuitous cruelty). For reasons of justice, once a centralized legal system exists, the use of coercion to enforce these principles would be monopolized by the state. A principle of justified self-

¹⁸³ See generally W. LAFAVE & A. SCOTT, *supra* note 151, at 391-97.

¹⁸⁴ Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 881 (1976).

¹⁸⁵ See G. FLETCHER, *supra* note 167, at 860-74; see also Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367 (1973).

defense would be agreed to or universalized, however, as an exception to non-maleficence and the prohibition of private coercion, in circumstances where such coercive force is necessary to preserve the substantial interests of an agent from an attack which he has not occasioned and where the use of force is both necessary and proportional to the harm inflicted; the duty of retreat might, within limits,¹⁸⁶ be an application of necessity and proportionality (the agent can reasonably avoid the need for deadly force, for example). The requirements of necessity and proportionality appear to be reasonable qualifications on the scope of legitimate self-defense for they assure to rational persons, who may be on the giving or receiving end, the fair balance of interests of both parties: the substantial interests of the unjustly attacked to repel the attack by necessary force, and the interests of the aggressor by requiring necessity and a degree of proportionality which assures that the gain in protecting the substantial interests of the agent are not incommensurate with the risks to the aggressor.

It is undoubtedly true, as Fletcher's study amply shows, that German criminal law theory has profited from a self-conscious deployment of Kantian autonomy-based ethics. But, its interpretation of self-defense fails to give proper weight to the additional requirement of equality or universalizability, of designing and acting on principles one would reciprocally accept whether on the giving or receiving end. From this point of view, an unqualified right of self-defense fails to accord to aggressors the modicum of respect that is, despite possibly wrongful or unprivileged aggression, their fair due.

That principles of self-defense, which violate proportionality, accordingly violate the residual moral rights of aggressors, is correctly reflected in constitutional attacks on cognate statutes that fail to incorporate such requirements—for example, arrest statutes that privilege the use of deadly force in apprehending a fleeing felon who did not use deadly force in his felony and who does not threaten to use deadly force.¹⁸⁷ In upholding such constitutional attacks on the ground of the fundamental right to life of the felon, courts depend on the moral arguments here made, namely, that while wrongdoing justifies necessary and proportional steps of apprehension, wrongdoers retain their rights to security and integrity outside these limits.

¹⁸⁶ The retreat rule standardly does not apply when one is in one's home. See W. LAFAVE & A. SCOTT, *supra* note 151, at 396.

¹⁸⁷ See, e.g., *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976).

The defense of necessity, or balance of evils, may be taken to be the most general of all justifications, of which other justificatory defenses are concrete specifications. The defense requires, in general, justification for *prima facie* criminal conduct when more evil is avoided than is done in so acting;¹⁸⁸ self-defense, for example, may be regarded as a concrete specification of this principle, since the *prima facie* criminal wrong is here taken to be less evil than the evil (aggression) thus combatted. A classic case, in which the necessity defense was raised and rejected, is *Regina v. Dudley and Stephens*¹⁸⁹ in which a prostrate cabin boy in a stranded boat in midsea was killed and eaten by his three companions, arguably resulting in saving three from starvation at a cost of one life, thus striking a favorable balance of evils. The lack of consent of the cabin boy, his vulnerable health and youth, the absence of a fair lottery, and the unclear likelihood of starvation of others—are all adduced as factors which complicate the moral ambiguity of the balance of evils in *Dudley*.¹⁹⁰ Absent these factors, some claim exists that a necessity defense should be recognized even in such an extreme case.¹⁹¹

The correct interpretation of the necessity defense has classically been taken to require the rejection of the relevance of Kantian ethics to understanding the criminal law, in favor of utilitarianism. A seminal statement of this position appears in Holmes's influential work, *The Common Law*.¹⁹² There, in discussing the origins of the criminal law, Holmes considered the utility of Kantian ideas in accounting for penal liability. Many, he observed, suppose the preventive theory of punishment to be immoral because it gives no weight to moral desert: "In the language of Kant, it [the preventive theory] treats man as a thing, not as a person; as a means, not as an end in himself."¹⁹³ But, Holmes answered, "most English-speaking lawyers would accept the preventive theory without hesitation."¹⁹⁴ Society necessarily sacrifices individuals for the sake of

¹⁸⁸ See W. LAFAVE & A. SCOTT, *supra* note 151, at 381-88.

¹⁸⁹ 14 Q.B.D. 273 (1884).

¹⁹⁰ Cf. *United States v. Holmes*, 26 F. Cas. 360 (3d Cir. 1842), in which, in order to save a life boat adrift in high seas from capsizing from overcrowding, Holmes assisted in ejecting passengers into the sea, who drowned. While Holmes was convicted of manslaughter, the court in instructing the jury indicated that the balance of evils may have justified the jettisoning if the choice had been done by lot.

¹⁹¹ See, e.g., Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 620-26 (1949).

¹⁹² O.W. HOLMES, *THE COMMON LAW* 37 (M. Howe ed. 1963).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

the community, in Holmes's view, and the Kantian theory fails because it ignores these sacrifices. Holmes admitted that a person's "degree of civilization" is marked by how far one's life is guided by Kantian precepts, but he argued that full appreciation of these precepts is in excess of current human capacity.¹⁹⁵ They would require of two strangers afloat at sea with a plank able to sustain only one floating between them, that the moral person not thrust the other off. And yet ordinary morality, Holmes pointed out, justifies self-preference. Kantian morality accordingly must be rejected as the moral measure of legal liability in favor of "a morality which is generally accepted," for "no rule founded on a theory of absolute unselfishness can be laid down without a breach between law and working beliefs."¹⁹⁶ The preferred morality, for Holmes, is utilitarianism, requiring individual sacrifices for the community good that formed the basis, Holmes supposed, for the criminal law.¹⁹⁷

Does the acceptance of a necessity defense require the rejection of a Kantian analysis of the morality of the criminal law in favor of utilitarianism? Certainly, German legal theory builds on Kant's principled objections ever to killing the innocent in denying a justification in necessity cases like *Dudley* even with the removal of the complicating moral features of that particular case,¹⁹⁸ but, strikingly, such continental, neo-Kantian theory¹⁹⁹ affords a form of excuse of coercive circumstances, unfamiliar in Anglo-American law (which limits duress to coercion by other persons),²⁰⁰ which would excuse in necessity contexts where a reasonable person would find it impossible to resist the pressure or circumstances (for example, likely starvation of many). On the ground of the autonomy-based theory of ethics here developed, however, it is difficult to see why, in principle, a form of necessity defense, suitably circumscribed, is not an appropriate justification.

Certainly, from the point of view of an autonomy-based interpretation of treating persons as equals, the mere utilitarian balance of lives (saving, in *Dudley*, three lives at the expense of one) would not suffice to justify *prima facie* immoral conduct (intentional killing): rational persons from an original position would not agree to or

¹⁹⁵ *Id.* at 38.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See G. FLETCHER, *supra* note 167, at 819.

¹⁹⁹ *Id.* at 818-35.

²⁰⁰ See W. LAFAVE & A. SCOTT, *supra* note 151, at 374-81.

universalize a principle which, on such grounds alone, without any attempt at obtaining consent or a fair allocation of the risk of death, legitimated the sacrifice of possibly their basic interests, if they are on the receiving end. The rejection as a proper basis for justification of such utilitarian balances *alone*, however, is *in toto caelo* different from the acceptance of some justifying balance of evils in such a case where some fair procedure consensually allocates the risk of death, to the extent feasible. In extreme cases where such procedures are infeasible, the lack of such procedures and the exigency of the circumstances (for example, a car careening out of control which, turned in one direction, would kill one, and, in the other, three) justify the lesser evil.

Holmes's critique of Kantian ideas is, accordingly, mistaken. It is not at all obvious that Kantian ideas may not be reasonably developed to justify a form of necessity defense. In general, Holmes's defense of the prevention principle, like his general defense of objective liability in the criminal and civil law, is notoriously inadequate. It does not take seriously the previously discussed constitutionally mandated requirements for just punishment, which cannot be accounted for by utilitarian considerations of deterrence and prevention.²⁰¹ Further, it is not at all clear, and was not even when Holmes wrote, that "most English-speaking lawyers" would accept prevention as the sole ground for criminal liability.²⁰² Finally, the Holmesian critique of Kantian ideas as "a theory of absolute unselfishness" crudely confuses the idea of moral impartiality, which Kant tried to articulate, with notions of benevolence. In fact, utilitarianism is more closely allied with ideals of "absolute unselfishness" than is Kantian theory, for utilitarian principles readily allow, in a way which autonomy-based ethics does not, sacrifices of the individual for the common good. In general, as this article should indicate, autonomy-based ethics much more powerfully explicates the moral foundations of the criminal law than utilitarianism.

F. *Inchoate Crimes: Of Attempts*

The law of attempts, like that of conspiracy, defines an inchoate crime in the sense that one may be guilty of an attempt when the

²⁰¹ Cf. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968), at ch. I. For an excellent critique of Holmes, see G. FLETCHER, *supra* note 167, at 504-14.

²⁰² See, e.g., 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80-83 (London 1883).

target crime has not been consummated. A specially controversial feature of the law of attempts is that criminal attempt liability is possible when the consummated crime is, in fact, impossible.²⁰³

Consider the controversial case of *People v. Jaffe*,²⁰⁴ in which the police had recovered stolen cloth and sold it to the defendant, a suspected "fence." The defendant clearly could not be convicted for the consummated crime of receiving stolen goods, for the goods were not at that time stolen (the consummated crime was impossible to commit). The issue in *Jaffe* was whether, nonetheless, he could be guilty of an attempt to receive stolen goods, for the same reason that the pickpocket of a pocket in fact empty could be guilty of an attempt to commit a larceny which he could not possibly have committed: namely, that the agent intended to do something which was, in fact, a crime, and did everything possible to achieve that end (thus satisfying the *mens rea*-intent-and *actus reus*-proximity-requirements for attempt liability). The New York Court of Appeals reversed the conviction for attempt to receive stolen property, on the ground that *Jaffe* involved legal impossibility. The California Supreme Court on similar facts reached an opposite result,²⁰⁵ and the New York criminal statute, consistent with the recommendations of the Model Penal Code, reversed the result in *Jaffe*.²⁰⁶ On the Model Penal Code view, *Jaffe* is, properly construed, a case of factual, not legal, impossibility. Under the facts as the agent believed them to be, he viewed himself to be receiving stolen goods and took steps believed appropriate to that end. In fact, he was not receiving stolen goods, so that the consummated crime could not be committed for the same reason that the pickpocket could not commit larceny (a crucial element of the *actus reus* of the consummated offense—property to be stolen, in one case, stolen property, in the other—is lacking). In neither case does the agent act on the mistaken belief that what he intends to do is a crime (larceny and receiving stolen goods are crimes), so that there is no proper issue in either case of legal impossibility. No one contests that one cannot properly be guilty of an attempt to commit an act on the mistaken ground that the act is criminally condemned: neurotic or self-righteous beliefs as to one's criminality do not suffice for criminal liability in any

²⁰³ See W. LAFAVE & A. SCOTT, *supra* note 151, at 438-46. See also Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967).

²⁰⁴ 185 N.Y. 497, 78 N.E. 169 (1906).

²⁰⁵ *People v. Rojas*, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

²⁰⁶ N.Y. PENAL LAW § 110.10 (McKinney 1975).

form, for, otherwise, the basic principle of legality—that a reasonably specific criminal law must pre-exist the commission of a criminal wrong—would be undermined.

The above construction of *Jaffe* and related cases, as just forms of attempt liability, has recently been contested by two deep theorists of the substantive criminal law, George Fletcher²⁰⁷ and Hyman Gross.²⁰⁸ Fletcher argues that a fact situation like *Jaffe* would not properly be regarded as an attempt in ordinary language (since the stolen status of the goods would make no difference to his acquisition)²⁰⁹ and should not be punishable criminally because its punishment erodes the foundations of criminal liability in an objective *actus reus* and principle of legality, confusing a properly legalist prohibition of acts with an administrative concern with the dangerousness of agents.²¹⁰ Hyman Gross in not dissimilar fashion argues that criminal liability should turn on the reasonable likelihood of harm and contests liability in cases like *Jaffe* on the ground that no harm appears likely to occur.²¹¹ Both theorists point up the anomaly that defender of attempt liability in cases like *Jaffe* hesitate to extend the doctrine, as they consistently should, to cases in which the agent intends to commit a wrong and does all possible to achieve the end, but by causally eccentric means (for example, use of voodoo).²¹²

The moral analysis of why we properly punish attempts clarifies why attempt liability justly attaches in contexts like *Jaffe* and related physical impossibility cases. I have argued that the general ground for criminal liability is, within the constraints of the principles of justice, to uphold the minimal standards of conduct defined by the moral principles of obligation and duty. Attempt liability is a natural way to effectuate this aim, assuring that appropriate moral stigma and punishment extends to forms of conduct which are intended to violate standards of decency and which are acted on to or near the point of believed consummation. It is wholly irrelevant to this moral aim whether or not the crime could have been, in the circumstances, consummated, for the moral aim is symboli-

²⁰⁷ G. FLETCHER, *supra* note 167, at 131-97.

²⁰⁸ H. GROSS, *A THEORY OF CRIMINAL JUSTICE* 196-232 (1979).

²⁰⁹ G. FLETCHER, *supra* note 167, at 157-66.

²¹⁰ *Id.* at 170-84.

²¹¹ See note 208 *supra*.

²¹² See G. FLETCHER, *supra* note 167, at 165-66; H. GROSS, *supra* note 208, at 218-23.

cally to uphold standards of decency which have here culpably been violated.

It is a mistake, I think, to suppose that such liability violates legality or objective *actus reus*, for there is no suggestion that the attempt is here to do something mistakenly believed to be wrong or that the intended act is not, in fact, wrong. In all cases of proper attempt liability, there is the requisite intent to violate minimal standards of moral decency and the agent has done everything he could do to achieve that end. The standard of proper criminal liability is here grounded in standards of moral accountability. In a case like *Jaffe*, it suffices for us to regard his conduct as an attempt that his belief that the goods were stolen is a relevant, even if not causally decisive feature, of his context; and we morally blame such conduct because it violates appropriate standards of decent respect for property rights. The ground of our concern is the culpable violation of objective norms of conduct, which the criminal law here appropriately reflects.

Causally eccentric cases of attempt liability should, on this analysis, be subject to *prima facie* attempt liability, for in this case, as in the others, appropriate standards of decency are violated; certainly, persons punished in such cases would have no moral right or reason to complain: They are being held to standards of decency culpably violated in which the impossibility of actual harm is as ethically fortuitous as any other attempt case. Undoubtedly, in some such cases, there may be available excuses (for example, insanity or mental deficiency). Certainly, the absence of dangerousness might justify, given compelling other claims on resources, the exercise of prosecutorial discretion not to target them to the extent one might attempt, where dangerousness converges with the other aims of criminal punishment. Punishment of them even in this case would not, however, assuming some showing of effective deterrence, violate anyone's rights. Certainly, in some cases, such attempts are properly punished. For example, in a religious community that believed in voodoo and the exercise of which had perceptible harmful effects on believers, abortive attempts might be properly punished to the full extent of other attempts.²¹³

G. *Proportionality and the Death Penalty*

The considerations of just punishment earlier advanced suggested

²¹³ Cf. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 652 (2d ed. 1961).

two aspects of proportionality rooted in treating persons as equals: first, that the gradations among criminal sanctions reflect the relative gravities of underlying moral wrongs; and second, that upper limits be placed on the kind of sanctions in general or in particular associated with certain moral wrongs. Both these aspects of proportionality have been invoked in the interpretation of constitutional principles of just punishment under the Eighth Amendment.²¹⁴ I turn here, however, to a case that is not resolved by such principles, namely, the propriety of the death penalty. Various arguments are made against the justice of the death penalty, for example, discrimination against racial and economic minorities, intrinsic lack of proportionality, violations of human dignity, and the like. While the discrimination arguments appear to be powerful, the proportionality arguments appear less so: the death penalty does not, in principle, violate the relative gravities principle; nor, does it contravene the upper limits constraint, so long as it can only be imposed for an equivalently grave kind of wrong (for example forms of intentional killing).²¹⁵ I wish, however, to support a form of proportionality argument against the justice of the death penalty, though not one predicated on either of the principles so far discussed.

Let us begin with an implication of the earlier discussed principle of just punishment, namely, the four principles do not decide in the abstract the merits of particular sanctions, like the death penalty. The matter appears to depend on circumstances like whether it is required to secure effective conformity to the underlying moral principles of obligation and duty and whether it conforms to background principles of social and economic justice, like the difference principle. This result is to be contrasted with the opposing views of the implication of the contractarian conception in Beccaria and Kant. Beccaria supposed that the contractors would generally exclude the death penalty as a sanction,²¹⁶ whereas Kant argued, to the contrary, that the death penalty would be imposed by moral persons

²¹⁴ For examples of the application of a relative gravities principle, see *Weems v. United States*, 217 U.S. 349 (1910); *In re Lynch*, 3 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (possible life imprisonment for recidivist indecent exposure held unconstitutional). For a recent example of the upper limit principle, see *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty for rape held unconstitutional).

²¹⁵ See *Coker v. Georgia*, 433 U.S. 584 (1977), which violated this requirement.

²¹⁶ Beccaria made an exception to his prohibition of the death penalty for cases of treason leading to unjustifiable anarchy, civil war, and revolution. See C. BECCARIA, *ON CRIMES AND PUNISHMENTS* 45-52 (H. Paolucci trans. 1963).

as the just and obligatory sanction in certain cases.²¹⁷ It may be supposed that the maximising contractarian conception earlier deployed would lead to adoption of the Beccaria adoption, because institutions without the death penalty permit a higher lowest than one without it. This view represents a misinterpretation of the point of view of the original position. The contractors are concerned with the highest lowest position in an institution and the rational expectations of desire satisfaction over life of the person in that position. There is nothing in this conception which renders it incompatible with the death penalty's raising the expectations of such persons, however, perhaps because they tend to be the victims of violent crime and the death penalty is required to lower the incidence of such crime.

Nonetheless, in contemporary circumstances, the death penalty appears to be an unjustly inappropriate criminal sanction. First, the general purpose of the criminal law is to secure general observance of moral norms of decency by the use of public sanctions which are effective and necessary. From the point of view of treating persons as equals, no one would agree to levels of sanction, especially the death penalty, that were not shown to be necessary to secure the moral desideratum. But, in fact, the evidence that the death penalty marginally deters better than less severe penalties appears to be weak, certainly not satisfying the kind of effectiveness evidence that is morally demanded.²¹⁸ Second, given the classes of criminals against whom the death penalty tends to be imposed, there is reason to believe that it is precisely the worst-off classes who disproportionately bear the risk of the death penalty. In itself, this would not be conclusive against the justice of the death penalty: it still might be the case that the penalty is necessary and that victims of violent

²¹⁷ See I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 101-02, 104-07 (J. Ladd trans. 1965). Kant argues against Beccaria that his distaste for the death penalty is mistakenly moved by a "sympathetic sentimentality and an affectation of humanitarianism." *Id.* at 105.

²¹⁸ The consistent line of evidence has been to the effect that the death penalty has no measurable deterrent effect beyond that of life imprisonment. See, e.g., T. SELLIN, *THE DEATH PENALTY* (1959); Sellin, *Capital Punishment*, 25 *FED. PROBATION* 3 (1961); Sellin, *Homicides in Retentionist and Abolitionist States*, *CAPITAL PUNISHMENT* 135 (T. Sellin ed. 1967). For other studies confirming these findings, see W. BOWERS, *EXECUTIONS IN AMERICA* 19-20 (1974). Only one recent study by an economist has been to the contrary. See Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 *AM. ECON. REV.* 397 (1975). The Ehrlich study has been severely criticized. See 85 *YALE L.J.* 164-227, 359-69 (1975-1976). Even those sympathetic to Ehrlich's methodology have failed to confirm his finding when using a comparable analytic technique. See Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 *STAN. L. REV.* 61 (1975).

crime tend themselves to be from the worst-off class. There is, however, as we have seen, no good deterrence evidence of such kinds. Further, in view of background social and economic injustices, it appears that precisely the classes against whom the death penalty is disproportionately imposed tend to be those to whom, in T.H. Green's phrase, we have not given a fair chance of not being a criminal.²¹⁹ Such injustice does not, I have suggested, entitle such deprived people to exculpation, but—in order to balance institutional injustices within the society—it certainly justifies mitigation. On this independent ground, the death penalty would be unjust, at least when used against these classes of people.

The argument against the death penalty, however, is more general and turns on the penalty itself: Namely, there is lacking the kind of evidence which alone could justify the moral rationality of such a sanction. In the absence of such evidence, there is no good argument to sustain it. The death penalty is in excess of appropriate moral principles of just punishment; it is, therefore, disproportionate to the criminal law's just moral aims and should, like any gratuitous cruelty, be morally and constitutionally condemned as a cruel and unusual punishment.²²⁰

IV. CONCLUDING REMARKS

The substantive criminal law rests, I have argued, on a structure of moral principles that express ideas of human and moral rights rooted in an autonomy-based interpretation of treating persons as equals. Because these principles fundamentally define our conception of just punishment, they are often concurrently reflected in criminal law and cognate constitutional law doctrines. I have tried to explain how moral theory may both better explain these doctrines and also enable us to refine our critical moral intelligence regarding the proper normative direction of reform.

In conclusion, it is important to keep in mind the more general jurisprudential and theoretical significance of the kind of account here proposed. For example, despite many disagreements of detail with George Fletcher's important book, my approach here is broadly at one with his spirited and often profound opposition to the baneful effects of American positivist legal realism in understanding the

²¹⁹ See note 175 and accompanying text *supra*.

²²⁰ For a criticism of recent Supreme Court death penalty decisions on these grounds, see D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977), at ch. VI.

foundations of the substantive criminal law.²²¹ Fletcher argues, and I agree, that we must bring to bear on understanding and criticizing legal doctrines convergent tools of theoretical analysis (comparative law, moral theory, legal history, and the like) that enable us perspicuously to represent the fundamental moral structures that underlie legal doctrines, their development over time, and the critical ethical standards on the basis of which we can take principled positions regarding the humane reform of legal doctrines and institutions. Fletcher further argues,²²² and I agree, that investigation of these issues of principle is and should be theoretically prior to the common legal realist obsession with institutional competence.²²³ The principles underlying the substantive criminal law are enforced, for example, by legislators in defining criminal liability by statute, by judges in assessing the constitutionality of such statutes or in imposing sentences under them, by prosecutors in exercising prosecutorial discretion, by police in their investigative and other work, by administrative boards in exercising parole discretion, and the like. Before one can rationally assess issues of institutional competence relating to which principles are best enforced by what institution, one must get clear about the prior question of what the underlying principles are which these institutions have a common responsibility to enforce. If Fletcher and I are correct about the prior importance of the theory of substance over procedure, it has general relevance throughout the investigation of substantive doctrine in many areas of the law.

Such investigations are not idle. The account here proposed, for example, frontally challenges dichotomous distinctions among theories of the criminal law, in particular, liberal utilitarian reform (associated with John Stuart Mill and H.L.A. Hart) and Kantian, deontological moralism. I have argued that, correctly understood, the burgeoning jurisprudence of rights enables us to transcend such sterile divisions—to acknowledge the moral foundations of the substantive criminal law and yet, consistent with the best traditions of humane liberal reform, to develop and deploy sharper tools of ethical criticism in terms of the values through which we realize and express, on fair terms to all, our moral and rational dignity.

²²¹ See G. FLETCHER, *supra* note 167, at 406-08, 467, 503-04, 512-13, 577, 695-97, 768-69, 780-81, 790.

²²² *Id.* at 551-52.

²²³ The most glorious product of this obsession is Hart & Sacks, *supra* note 122.

RIGHTS AND THE UNITED STATES CONSTITUTION: THE DECLENSION FROM NATURAL LAW TO LEGAL POSITIVISM

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Other participants in this Symposium have dealt with the issues^{*} of defining rights, describing their source, and delimiting their content. This article addresses the question: "What role do rights play in the United States Constitution?" For this purpose, it is unnecessary to prove, or even to presume, that those people who adopted

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the Constitution¹ correctly assessed the relationship between rights and positive law, or even that they stated the best case for their position. Their science of politics may have been incomplete—perhaps, naive. From the perspective of contemporary thought, it may not justify their conclusions. That, however, is an issue separate from whether, in historical fact, the Constitution rests upon the principles of “natural law” or “legal positivism.”²

I. THE UNITED STATES CONSTITUTION AND NATURAL LAW: THE ORIGINAL UNDERSTANDING

History shows that the Constitution embodies the principles of natural law.

A. *Natural Law in the Political Philosophy of the Founders*

That the Founders based their political philosophy on natural law is not seriously disputable.³ None the less, reconsideration of their basic perceptions of man, society, and government is not amiss.

1. *Natural Rights as a Check on Power.*—The Founders' socio-political presuppositions embody a realistic, if not pessimistic, appreciation of human weakness and fallibility. In their estimation, history chronicled the “depravity of human nature,”⁴ and how passion causes men to disregard the general welfare. The Founders identified three passions particularly threatening to the society they desired: avarice, ambition, and the love of power. The tendency to succumb to avarice, though, nearly all men share; and ambition,

¹ Described herein as “the Founders.” Although not of one mind on many matters relating to the Constitution—as witnessed by the often acrimonious debate between the Federalists and Anti-federalists—they all more or less agreed on the basic principles discussed here.

² According to “natural law,” rights exist as aspects of reality in and of themselves, deriving directly from the ultimate structure of the natural world, and belonging to individual men as part of their intrinsic characters. Governments may enunciate, codify, and enforce rights in law. This, however, amounts only to recognition of their existence, not to their creation. Conversely, according to “legal positivism,” rights exist only in such laws as governments enact. Only through embodiment in law, following the peculiar procedures of a legal system, can rights have a substantive content. For a general discussion, comparison, and contrast of natural law and legal positivism, see A. D'ENTREVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* (2d rev. ed. 1970). Also useful is C. FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963).

³ E.g., G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

⁴ Remarks of Patrick Henry, in the Virginia Convention, reported in 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787*, at 327 (2d ed. 1836).

although a potential pitfall, is also a well-spring of social progress if properly channelled. Conversely, the love of power arises in a minority of men,⁵ but infrequently serves the general welfare (if at all), and therefore posed the greatest danger.

Nature, the Founders opined, had implanted "a fondness for power" in men.⁶ And just as "the Nature of Power [is] to be even encroaching . . . nor does it ever part willingly with any Advantage," so too does human nature "never part from power. Look for an example of a voluntary relinquishment of power, from one end of the globe to another; you will find none."⁷ Moreover, "[c]onstant experience" proved that "every man invested with power is apt to abuse it, and to carry his authority as far as it will go."⁸ Therefore, the Founders concluded that "no Man ought to be trusted with what no Man is equal to."⁹

Yet they believed that political power is at once necessary for, as well as antagonistic to, individual liberty.¹⁰ The conflict between power and liberty emerges in a dichotomy between the governors and the governed. Power inheres in government and those who control it; whereas, liberty inheres in people generally. Liberty is not the concern of those invested with power, who neither speak for nor serve it, but is the peculiar possession of society. The governors seek to acquire and exploit power, society to preserve and enjoy liberty under the protection of, but not the direction of, power. Power and liberty, then, exist in an uneasy balance in which the one always threatens to extinguish the other.

The Founders' problem was how to arrange institutions based

⁵ Cf. N. MACHIAVELLI, *THE PRINCE* c, ix (T. Bergin trans.).

⁶ 1 *THE WORKS OF ALEXANDER HAMILTON* 114 (H. Lodge ed. 1885).

⁷ Trenchard & Gordon, *Cato's Letters* No. 115, in *THE ENGLISH LIBERTARIAN HERITAGE* 257 (D. Jacobson ed. 1965); remarks of Patrick Henry, in the Virginia Convention, reported in 3 J. ELLIOT, *supra* note 4, at 174.

⁸ Montesquieu, *THE SPIRIT OF THE LAWS* bk. XI, c. 4 (T. Nugent trans. 1949). Cf. *THE FEDERALIST* No. 51 (J. Madison).

⁹ *Cato's Letters* No. 33, in *THE ENGLISH LIBERTARIAN HERITAGE*, *supra* note 7, at 87.

¹⁰ . . . Power is naturally active, vigilant, and distrustful; which Qualities in it push it upon all Means and Expedients to fortify itself, and upon destroying all Opposition, and even all Seeds of Opposition, and make it restless as long as any Thing stands in its Way. It would do what it pleases, and have no Check. Now, because Liberty chastises and shortens Power, therefore Power would extinguish Liberty; and consequently Liberty has too much Cause to be exceeding jealous, and always upon her Defence. . . . And whereas Power can, and for the most part does, subsist where Liberty is not, Liberty cannot subsist without Power; so that she has, as it were, the Enemy always at her Gates.

Id. at 85-86.

upon power yet consistent with liberty. "It may be a reflection on human nature," wrote *The Federalist*,

that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external or internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹¹

These precautions took into account four principles: First, that "when the dangers that might arise from the *abuse* are greater than the benefits that may arise from the use, the power ought to be withheld."¹² Second, that the control of governmental authority should not depend upon the self-restraint of the governors themselves, or upon "the probable virtue of our representatives,"¹³ but instead "ought to have such checks and limitations as to prevent bad men from abusing it. It ought to be granted on a supposition that men will be bad; for it may be eventually so."¹⁴ Third, that democracy offered as many opportunities for the corrupting influences of power as did any other system of government.¹⁵ And fourth, that, whatever system of government prevailed, natural law and

¹¹ THE FEDERALIST No. 51 (J. Madison).

¹² Remarks of George Mason, in the Virginia Convention, reported in 3 J. ELLIOT, *supra* note 4, at 432.

¹³ Remarks of Patrick Henry, in the Virginia Convention, reported in 3 *id.* at 327.

¹⁴ Remarks of William Grayson, in the Virginia Convention, reported in 3 *id.* at 563.

¹⁵ "It is of great importance in a republic," noted THE FEDERALIST No. 51 (J. Madison), not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

For, as history taught,

turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have, more frequently than any other cause, produced despotism.

Remarks of James Madison, in the Virginia Convention, reported in 3 J. ELLIOT, *supra* note 4, at 87.

natural rights circumscribed its power.¹⁶

Natural law underlay the Founders' socio-political conceptions in four ways: First, it provided moral standards to govern private conduct among virtuous men in a free and prosperous commonwealth.¹⁷ Second, natural law provided ethical criteria to which positive law should conform. The Founders realized that no double-standard insulated political activity from moral criticism. Third, natural law established limits beyond which governments acted at the peril of resistance or revolution. In natural law, the Founders saw a moral justification for arguably extra-legal acts of people against governments that oppressed them. And fourth, natural law was the source of natural (or individual) rights, antecedent and superior to government. For the Founders, natural rights were the legal embodiment of moral principles, the means to subordinate to morality the positive law governments enacted.

"[A]ll men," ran a typical summation of the Founders' theories of law and politics, "are by nature free and independent, and have certain rights, of which, when they enter into society, they cannot by any compact deprive or divest their posterity."¹⁸ By "natural rights" the Founders meant rights that belong to individuals simply because of their humanity, and that ethics and law should recognize for that reason alone. These rights were *natural* because they derived from the plan "of Nature and of Nature's God."¹⁹ They were *essential* because they were necessary to the existence of free men. They were *absolute* because they inhered in individuals without regard to the commands or prohibitions of governments. And they were *unalienable* because they constituted an element of each man's individuality itself. Natural rights differed from "civil" or "political rights" because they were antecedent to the peculiar laws of any particular society or government. Natural rights came with individuals into society, and were the primary rationale for government

¹⁶ The founders recognized a natural limitation on the magistrate's authority: He ought not to take what no Man ought to give; nor exact what no Man ought to perform. . . .

So that the Nature of Government does not alter the natural right of Men to Liberty, which in all political Societies is alike their due. . . .

Cato's Letters No. 60, in *THE ENGLISH LIBERTARIAN HERITAGE*, *supra* note 7, at 118.

¹⁷ C. LE BOUTILLIER, *AMERICAN DEMOCRACY AND NATURAL LAW* c. iii (1950).

¹⁸ Remarks of Patrick Henry, in the Virginia Convention, *reported in* 3 J. ELLIOT, *supra* note 4, at 137.

¹⁹ *DECLARATION OF INDEPENDENCE* (1776).

and against one that acted contrary to their precepts.²⁰

The Founders knew that individuals are not equal in talents, prestige, income, wealth, or social position; neither did they conceive of any "natural right" to equality in respect of these things, enforceable by government. The equality they recognized was, as Locke defined it,

the *Equality*, which all Men are in, in respect of Jurisdiction or Dominion one over another . . . being that *equal Right* that every man hath, to *his Natural Freedom*, without being subjected to the Will or Authority of any other Man.²¹

To the Founders, equality in this sense was the fundamental principle of politics.

"Property" and "liberty" were also central principles of their political theory. That men have a natural right to the fruits of their labors as private property, free from the predation of other men in private station or acting under color of governmental authority, was a common-place among eighteenth-century Americans. In his influential *Second Treatise*, Locke had often used the term "property" to include whatever of value a man has, including his "liberty."²² Perhaps more correctly, the Founders saw property as part of liberty.²³

The Founders' conceptions of liberty, property, and equality correlated perfectly. Equality in liberty, the freedom of each individual

²⁰ "We hold these truths to be self-evident," wrote Jefferson, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Id.

²¹ J. LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT § 54 (P. Laslett ed. 1960).

²² *E.g.*, *id.* § 123 ("their Lives, Liberties and Estates, which I call by the general name, Property").

²³ Necessity alone makes Men the Servants, Followers, and Creatures of one Another. And therefore all Men are animated by the Passion of acquiring and defending Property, because Property is the best Support of that Independency, so passionately desired by all Men. . . . And as Happiness is the Effect of Independency, and Independency the Effect of Property; so certain Property is the Effect of Liberty alone, and can only be secured by the Laws of Liberty. . . .

Cato's Letters No. 68, in THE ENGLISH LIBERTARIAN HERITAGE, *supra* note 7, at 177-78.

from the arbitrary wills of other men, government could attain. Indeed, liberty could exist only in so far as all members of society possessed it equally. Property, though, was the product of liberty exercised by individuals dissimilar in talents, intelligence, or circumstances. And therefore, equality in property was impossible, unless government denied equality in liberty, in disregard of the very reason for its existence. The Founders, in short, foresaw a society in which men earn different incomes, enjoy different amounts of wealth, and occupy different social positions, yet remain equal in the one thing that properly concerns government, their "Natural Freedom."

2. *Government as the Guarantor of Natural Rights.*—The Founders presumed that protection of natural rights is the only justification for government. Relying on Locke's principle that the "great and chief end . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property,"²⁴ the Founders conjoined "government, and liberty, its object" in their discourse.²⁵ To them, government had no purpose except to protect the liberty, security, and property of those individuals who institute it. Indeed, the "allegiance of freedom to government will ever be a consequence of protection . . . in their sacred rights and privileges".²⁶ Their goal was what Locke called

Freedom of Men Under Government, . . . to have a standing Rule to live by, common to every one of that Society . . . ; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, unknown, Arbitrary Will of another Man.²⁷

The Founders did not assume, however, that a government fit for free men would spontaneously arise from "the people's will," without a carefully wrought structure based upon the principles of natural law.²⁸ The people, too, had to accept "that the minority have

²⁴ J. LOCKE, *supra* note 21, § 124.

²⁵ Remarks of Edmund Pendleton, in the Virginia Convention, reported in 3 J. ELLIOT, *supra* note 4, at 294.

²⁶ The Letters of "Philadelphiensis" No. X, in the Independent Gazetteer (Philadelphia), 21 Feb. 1788, p. 2, col. 1.

²⁷ J. LOCKE, *supra* note 21, § 22.

²⁸ To say . . . that our security is to depend upon the spirit of the people, who will be watchful of their liberties, and not suffer them to be infringed, is absurd. It would equally prove that we might adopt any form of government. . . . Government operates upon the spirit of the people, as well as the spirit of the people operates upon it, and

indisputable and inalienable rights; that the majority are not everything, and the minority nothing; that the people may not do what they please."²⁹

Limitations upon the popular will the Founders embodied in the principle that government was justifiable only in so far as its powers reflect what reasoning men would freely choose, and compact among themselves, to give it.³⁰ Consent was the legitimating principle of government, and the "social compact" the mechanism of popular consent. Consent explained why men should submit to governmental compulsion, how positive laws could legitimately control them, and wherefore they remained free while accepting a concentration of political power that restricted their actions, took their goods, and conscripted their lives for the general welfare: Men obey government in exchange for protection of their natural rights.

The Founders often spoke of how the "social contract" removed men from the "state of nature" and created political institutions. To them, the state of nature was simply a community without gov-

if they are not conformable to each other, the one or the other will prevail. In a less time than twenty-five years, the government will receive its tone. What the spirit of the country may be at the end of that period, it is impossible to foretell. Our duty is to frame a government friendly to liberty and the rights of mankind, which will tend to cherish and cultivate a love of liberty among our citizens.

Remarks of Melancton Smith, in the New York Convention, reported in 2 J. ELLIOT, *supra* note 4, at 249-50.

²⁹ Joseph Story, quoted in "Political Causes of the American Revolution," *ESSAYS ON CHURCH AND STATE* BY LORD ACTON 302-03 (D. Woodruff ed. 1953).

³⁰ The idea that American political institutions rest upon consent and compact appears again and again in the literature of the period. "[F]rom the first settlement of the country," wrote one pamphleteer, "the necessity of civil associations, founded upon equality, consent, and proportionate justice have ever been universally acknowledged." See, e.g., To the Free Citizens of the Commonwealth of Massachusetts (Letters of "John De Witt" No. 1), in *The American Herald* (Boston), 22 Oct. 1787. And again: "in the constitution of government . . . Consent . . . is the spring. The form is the mode in which the people choose to direct their affairs, and the magistrates are but trustees to put the mode in force. . . . [T]his people . . . have a right of living under a government of their own choosing." To the Free Citizens of the Commonwealth of Massachusetts (Letters of "John De Witt" No. 3), in *The American Herald* (Boston), 5 Nov. 1787. "No people on earth are, at this day, so free as the people of America," declared one of the Founders. "All other nations are, more or less, in a state of slavery. They owe their constitutions partly to chance, and partly to the sword; but that of America is the offspring of their choice. . . ." Remarks of James Lincoln, in the South Carolina Legislature, reported in 4 J. ELLIOT, *supra* note 4, at 313. "It is an idea favorable to the interest of mankind at large," wrote another, "that government is founded in compact. Several instances may be produced of it, but none is more remarkable than our own." The Letters of "Agrippa" No. XVIII, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 115 (P.L. Ford ed. 1892).

ernment.³¹ Whether it ever existed was unimportant. It provided political theorists with a paradigm emphasizing man's nature; identifying the rights that emanate from that nature, and not from society or government; establishing the priority of these natural rights to positive law; demonstrating the necessity of government to secure natural liberty; and explaining how free men could construct political institutions favorable to their continued freedom.

Both society and government derive naturally from man's needs. With government, however, men can choose who should govern, for what purposes, and by what methods. To the Founders, the social contract was the agreement among free and equal individuals, already existing in a society, to institute such government as they found satisfactory.³² Logic does not limit the substance of a social compact among consenting individuals. The Founders, however, believed that no individual needed to, or would rationally, surrender to government any portion of his natural liberty other than the privileges to judge and execute sentence in his own case.³³ Where governments had arisen from supposed compacts between the people and their rulers, theorists had concluded that the people must have ceded all their liberties in exchange for governmental protection. But where (as in America) the people entered into a social compact among themselves, and themselves constituted the government, no such conclusion followed, thought the Founders. According to their political science, no individual had to yield to government any liberty compatible with the rational functioning of society where the sole end of government was to protect individuals' liberties.³⁴ To them, natural liberty and government were mutual com-

³¹ See J. LOCKE, *supra* note 21, § 19: "Want of a common Judge with Authority, puts all Men in a State of Nature."

³² For such a compact, their own history provided numerous precedents. *E.g.*, the pledge of King Canute to govern by the laws of England, Charter of Canute, in SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST 75-76 (W. Stubbs, 8th ed., 1895); the promise of William the Conqueror to continue Anglo-Saxon customs, Section 7, The Laws of William the Conqueror, in SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 7-8 (E. Henderson ed. 1896); the coronation charter of Henry I., The Coronation Charter of Henry I. (5 August 1100), in 2 ENGLISH HISTORICAL DOCUMENTS 1042-1189, at 400-02 (D. Douglas & G. Greenway eds. 1953); the several versions of Magna Carta, Magna Carta (1215), in SELECT HISTORICAL DOCUMENTS, *supra*, at 135-48; the execution of Charles I., C.W. WEDGWOOD, THE TRIAL OF CHARLES I. (1964); and the malfeasances of James II., Letter from the Massachusetts House of Representatives to Agent Dennys de Berdt, 12 Jan. 1768, in 1 THE WRITINGS OF SAMUEL ADAMS 140 (H. Cushing ed. 1904).

³³ See J. LOCKE, *supra* note 21, §§ 123-31.

³⁴ The privileges to judge in one's own case and to execute the law of nature are not compatible with the rational functioning of society, except where exercised in self-defense.

plements: the protection of liberty the reason for government, and government the guarantor of liberty. To say that one was somehow inconsistent with the other, the Founders considered self-contradictory.

The social compact as the Founders understood it, however, did imply that governmental powers are limited. Then as now, the general rule of English common law was that the authority of any body formed by contract among its members extends only to the objects of their contract. Moreover, inherent in common-law contract is definiteness: the parties know what they agree to do. Individuals who unite for a specified object cannot contemplate all the unspecified purposes for which a group might coalesce; and therefore their contract cannot extend to any of those unspecified purposes. The social compact of the Framers empowered government only to protect each citizen's natural rights, according to certain defined procedures for the enactment and enforcement of positive laws, and—by its very contractual nature—disabled government from any other actions.

Perhaps nothing was more obvious to the Founders than that for people to agree to an unlimited government over their liberty and property was ridiculous.³⁵ A wise people, the Founders urged, should suspect governments and governors.³⁶ To be sure, the American people as a whole were "sovereign". But this description did not imply unlimited powers in their government. Whatever the abuses perpetrated in its name, sovereignty was a legal conception that, in the context of natural law, implied limitation in its very statement. And

³⁵ The end of design of government is, or ought to be, the safety, peace, and welfare of the governed. Unwise, therefore, and absurd in the highest degree, would be the conduct of that people, who, in forming a government, should give to their rulers power to destroy them and their property, and thereby defeat the very purpose of the institutions; or, in other words, should give unlimited power to their rulers, and not retain in their own hands the means of their own preservation.

Remarks of Thomas Tredwell, in the New York Convention, reported in 2 J. ELLIOT, *supra* note 4, at 397.

³⁶ As History had illustrated so often, "rulers in all governments will erect an interest separate from the ruled, which will have a tendency to enslave them. There is, therefore, no other way of . . . warding off the evil as long as possible, than by establishing principles of distrust . . . and cultivating the sentiment . . ." G. Clinton, *The Letters of "Cato" No. 8* (3 Jan. 1788). Indeed, even "the most strenuous assertors of liberty, in all ages, after having successfully triumphed over tyranny, have themselves become tyrants, when intrusted by the people with unlimited and uncontrollable powers." A Manifesto of a Number of Gentlemen from Albany County, in *The New York Journal and Weekly Register* (New York City), 26 Apr. 1788.

the Founders knew that popular sovereignty itself derives from the natural-law postulate that individuals may choose their own governing institutions because they may defend themselves against aggression.³⁷ Governmental power, then, is inherently limited because natural law recognizes only *defensive* powers in individual men, from whose voluntary consent governments arise.³⁸ Certainly government can gain no more power than individuals have originally.³⁹ And the exercise of even such power as government has must always satisfy the test of reasonableness.⁴⁰

³⁷ "The Right of the Magistrate arises only from the Right of private Men to defend themselves, to repel Injuries, and to punish those who commit them." Cato's Letters No. 59, in *THE ENGLISH LIBERTARIAN HERITAGE*, *supra* note 7, at 108.

³⁸ As Locke explained,

that all men may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, . . . the *Execution* of the Law of Nature is in that State, put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation. . . .

And thus in the State of Nature, *one Man comes by a Power over another*; but yet no Absolute or Arbitrary Power, . . . but only to retribute to him . . . what is proportionate to his Transgression, which is so much as may serve for *Reparation* and *Restraint*. For these are the two only reasons, why one Man may lawfully do harm to another, which is that we call *punishment*. In transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of *reason* and common Equity. . . .

J. LOCKE, *supra* note 21, §§ 7-8.

³⁹ A Man, . . . having in the State of Nature no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Commonwealth, and by it to the *Legislative Power*, so that the Legislative can have no more than this. Their power in the utmost Bounds of it, is *limited to the publick good* of the Society. It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects.

[T]he *end measure of this Power*, when in every Man's hands in the state of Nature, being the preservation of all of his Society . . . , it can have no other *end or measure*, when in the hands of the Magistrate, but to preserve the Members of that Society in their Lives, Liberties, and Possessions; and so cannot be an Absolute, Arbitrary Power over their Lives and Fortunes, which are as much possible to be preserved; but a *Power to make Laws*, and annex such *Penalties* to them, as may tend to the preservation of the whole, by cutting off those Parts, and those only, which are so corrupt, that they threaten the sound and healthy, without which no severity is lawful.

Id. §§ 135, 171.

⁴⁰ The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions.

Id. § 6.

In short, the Founders saw government as a repository of powers, permanently limited by the principles of natural law, that the magistrates may exercise solely to protect each individual's enjoyment of his liberties within a community of citizens equal before the law.

3. *The Constitution as a Limit on Government.*—To define the proper sphere of governmental authority according to the principles of natural law is easier than to confine it to that sphere. To achieve this end, the Founders employed a written constitution.

Here, they parted with British tradition. The (unwritten) British constitution embodied only those principles the nation's institutions and their development implied.⁴¹ Under this conception, however, a governmental act contrary to custom was not an exercise of power without right, only an act of bad government.⁴²

In their struggle with Parliament, the Founders learned to rely on principles of justice rather than legal institutions. They saw the paradox in expecting a "constitution" that embodied the acts of a legislature to limit the power of that legislature; and they realized that its solution required separating principles of law from acts of government, and conceiving of those principles as bounds beyond which government could not act. Experience taught them the difference between a constitution and a government: A constitution is an act, not of government, but of the people constituting a government; and its violation is not simply an error of judgment, but an affront to popular right.⁴³ A constitution antecedes the government it defines; it establishes the authority the people have committed to

⁴¹ As Lord Bolingbroke had said,

[b]y constitution we mean . . . that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed. . . . We call this a good government, when . . . the whole administration of public affairs is wisely pursued, and with a strict conformity to the principles and objects of the constitution.

A Dissertation upon Parties, in 2 THE WORKS OF LORD BOLINGBROKE 88 (1841).

⁴² Although Britons may have believed that their "laws . . . derived from certain fixed principles of reasons," they also knew that this derivation in no way limited the powers of Parliament. Few and far between were decisions of British courts invalidating legislative acts because of their contrariety to reason.

⁴³ In a Lockean system, where rights exist independently of government, if governmental action is unconstitutional, it affronts individual rights even though it may be the product of the magistrate's good-faith mistake. Conversely, in a non-Lockean system, where government defines all rights, governmental action may be inexpedient, unwise, or even harmful; but it cannot be wrongful.

their governors; and its very existence voids any acts of government outside its grants of power.

To achieve their goal, the Founders provided the Constitution with three types of provisions limiting governmental authority: First, the Constitution contains statements of the purposes of government. Second, it prescribes the framework of government and circumscribes the authority of its various branches and levels. And third, it guarantees to individuals certain named and other unenumerated liberties.

The Preamble, for instance, describes the purposes of the people of the United States in ordaining their Constitution in terms of the very ends for which Locke argued that men form political societies: to enact laws for the reparation and restraint of criminals; to defend themselves against domestic and foreign enemies; to advance the common good by legislation that preserves the members of society in their lives and possessions; and to guarantee the natural freedom of all men who follow the rule of reason and common equity.⁴⁴

To "establish Justice," "promote the general Welfare," and "secure the Blessings of Liberty" are three essential purposes of the Constitution. The Founders knew, however, that government could not be left free to declare whatever it did as in service of these ends. Under the Founders' plan, there could never be a "living Constitution," the fundamental principles of which change coloration, chameleon-like, with the political caprices of the times.⁴⁵ Instead, they limited the actions of government by explicit reference to precepts of natural law. "Justice," "the general Welfare," and "the Blessings of Liberty" enunciate a law higher than what governments enact, negate arbitrary sovereignty, and affirm that all men have certain unalienable rights to secure which they institute governments in the first place.

The body of the Constitution, in describing the framework of

⁴⁴ *I.e.*, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . ." U.S. CONST. preamble. On the importance of the preamble for resolving doubts as to or ambiguities in the limitations on governmental power, see 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 365-67, 374-79 (1953); 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 462, at 351-52 (5th ed. 1891).

⁴⁵ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 448-53 (1934) (Sutherland, J., dissenting).

government, circumscribes the authority of each of its levels and branches. For example, the Constitution empowers Congress "To coin Money, [and] regulate the value thereof," and disables the States from "coin[ing] Money; emit[ting] Bills of Credit; [and] mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts."⁴⁶ The Founders had had long and dolorous experience with paper-money and legal-tender laws, recognized that these devices frustrate honesty among men, and therefore resolved to eliminate them as instruments of governmental policy.⁴⁷ The monetary provisions accomplish this goal by complementary grants and withdrawals of power.

First, the Founders disabled the States from enacting laws making paper-money legal tender. Second, they empowered Congress to coin money. Together, these provisions guarantee a monetary system based on specie. Since the States cannot make anything but gold and silver coin a tender in payment of debts, even if Congress unconstitutionally attempted to "coin Money" not redeemable in specie, State courts could not force its "coinage" upon unwilling recipients. Thus, under the operation of Gresham's Law, creation of legal-tender paper-money at the national level would generate a political crisis in the United States leading to demands for repeal of, and removal of the federal politicians who enacted, *fiat*-money legal-tender laws.⁴⁸

Finally, the various Amendments to the Constitution refer to individual rights reserved against governmental encroachment. Some rights are explicitly named, such as "the freedom of speech, or of

⁴⁶ U.S. CONST. art. I, § 8, cl. 5; § 10, cl. 1.

⁴⁷ *E.g.*, 1 J. STORY, *supra* note 44, §§ 1358-62, 1364, 1366-67, 1371.

⁴⁸ The mills of the gods grind slowly, but the beginnings of this political crisis, which almost surely will end with the disestablishment of the so-called "Federal Reserve System," the demonitization of "federal-reserve" notes, and the return to a national currency fully backed by gold and silver, are already evident in the wide-spread public outcry against "inflation" and the growing realization among common people that a "dollar" of constantly decreasing purchasing-power is inconsistent with the fundamental principle that men are entitled to the full product of their labors, and to a monetary system that accurately reflects and adequately preserves that product. Interestingly enough, the Supreme Court has not yet ruled on the constitutionality of *fiat* legal-tender paper-money issued under the auspices of Congress. Compare *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935); *Perry v. United States*, 294 U.S. 330 (1935); and *Nortz v. United States*, 194 U.S. 317 (1935), with *Julliard v. Greenman*, 110 U.S. 421 (1884); *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870); and *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869).

the press”; “the right . . . to keep and bear Arms”; “[t]he right . . . to be secure . . . against unreasonable searches and seizures”; “the right to a speedy and public trial, by an impartial jury”; and so on.⁴⁹ Others are unenumerated.⁵⁰ All of these references, though, presume that individual rights owe nothing to governments, written constitutions, or the will of the people for their recognition—indeed, that a government, a constitution, or even a society that refuses or neglects to recognize them is therefore defective and unjust, and that such a deficiency and injustice permits those aggrieved to seek redress by appeal to principles that transcend positive laws, and by recourse to actions extra-legal in character.⁵¹

The Second Amendment, guaranteeing “the right of the people to keep and bear Arms,” is a prime example of this presumption. Under the Constitution governmental authority flows from principles upon the enforcement of which society depends for its existence and proper functioning. Now, what distinguishes society from a mere agglomeration of men is that its members cooperate among themselves for their general benefit, rather than dividing into mutually hostile groups of aggressors and victims. Therefore, since government is meant to serve the needs of men in society, it must at a minimum protect individuals against criminal attacks. To suggest that the magistrates could, consistently with natural law, themselves aggress under color of positive law, tolerate criminal behavior by any class of citizens, or prohibit individuals from defending themselves against the depredations of others, is self-contradictory. By definition, criminal acts destroy the social order; and no social institution can logically be competent to perform, countenance, or render effective such acts. Indeed, a government that aids or abets aggression against its own citizens thereby forfeits its legitimacy, and ceases to be a government. The Second Amendment therefore embodies perhaps the most important principle of political science under natural law: that individuals owe no allegiance to, and may rightfully resist and destroy, any government that does not protect them against their enemies.

The Second Amendment is an instrumental restatement of the natural privilege of self-defense. Social cooperation, of course, im-

⁴⁹ U.S. CONST. amends. I, II, IV, VI.

⁵⁰ U.S. CONST. amends. IX, X.

⁵¹ See, e.g., J. LOCKE, *supra* note 21, §§ 168, 199-210.

poses a duty on all individuals to refrain from violence as much as possible. In political society, however, this duty presupposes that government will protect everyone from aggression. The duty of non-violence, therefore, is contingent, not absolute; it applies only if government provides adequate protection. Otherwise, individuals have an absolute privilege to defend themselves—as, for instance, where the suddenness of aggression precludes governmental intervention; or, where the magistrates themselves are the aggressors.⁵² In each of these cases, the privilege of self-defense would be meaningless unless individuals possessed the arms necessary to repel criminals or tyrants, and therefore, unless government were powerless to disarm them.⁵³ Where police-protection is inadequate, to disarm honest citizens is to aid and abet criminals. Moreover, where governmental officials are themselves the aggressors, arguments for disarming the citizenry are particularly ludicrous and obnoxious. No Lockean government may command its citizens to surrender peaceably to tyranny. Indeed, as the American War of Independence teaches, attempting to disarm the people in order to perpetrate tyranny is itself an act of war against them, justifying armed resistance of every kind.

The Constitution, of course, contemplates the protection of individual rights short of armed resistance. Perhaps the most characteristically American device for securing individual rights is “judicial review,” the concept that, in enforcing all positive laws arguably trenching on personal liberty, courts must be shown that the letter and spirit of the Constitution permits the government’s action.⁵⁴

⁵² See *id.* § 207.

⁵³ This exposes the basic fallacy of the so-called “gun-control” argument for limiting the availability of purely defensive arms (such as the undefinable “Saturday Night Special”) that supposedly “have no legitimate sporting use.” It also emphasizes the weakness in the position of many sportsmen who oppose “gun-control” because it threatens recreational activities with handguns or long-guns. The “right . . . to keep and bear arms” is not fundamentally concerned with target-shooting or hunting wildlife (although a correct construction of the Second Amendment would protect these activities, too). Rather, it guarantees each individual access to whatever arms are reasonably necessary for effective defense in light of the perceived threat.

⁵⁴ The peculiar visibility of the Supreme Court has tended to make *judicial* review of the constitutionality of statutes or executive actions appear exclusive. But on the same theory that commends *judicial* review, there are equal grounds for *legislative* review of judicial and executive decisions, and *executive* review of legislative and judicial decisions. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803), with U.S. CONST. art. II, § 1, cl. 8 (presidential oath); art. VI, cl. 3 (oaths of Senators and Representatives). Indeed, the explicit power of the President to “take Care that the Laws be faithfully executed,” appears to sanction executive review (above and beyond the veto power) even more strongly than any

During the late eighteenth century, apologists had argued that the British Parliament enjoyed a supreme, absolute, and unlimited authority to control the acts of individuals. From this perspective, judicial review based on “common right and reason,” or on natural-law principles, was an impertinence.⁵⁵ Conversely, from the perspective of the Founders—who saw the supreme law neither in the acts of legislatures, nor in the texts of constitutions, nor even in the demands of majorities, but instead in tenets of natural justice that limit governmental activity, that constitutional provisions embody, and that majorities are bound to respect—judicial review appeared in another, more favorable, light.⁵⁶

From its earliest beginnings, as well, judicial review judged the actions of governments and secured the liberties of individuals according to principles superior to positive laws. And thereafter, Supreme Court opinions over a century repeatedly recognized that legislatures are not absolute, even though their “authority should not be expressly restrained by the constitution, or fundamental law of the state”; that “certain vital principles . . . will determine and overrule . . . abuses of legislative power”; that “the nature of society and of government . . . prescribe[s] some limits to the legislative power”; that the dissolution and re-establishment of governments do not involve “the dissolution of civil rights, or an abolition of the common law”; that the “fundamental maxims of a free government . . . require . . . the rights of personal liberty and private property should be held sacred”; that there are “rights in every free government beyond the control of the State,” and “limitations on . . . power which grow out of the essential nature of all free governments”—and that these limitations, in large measure, find their source in “common right,” the unalienable rights of freemen to which the Declaration of Independence refers.⁵⁷

provision of the Constitution sanctions judicial review. U.S. CONST. art. II, § 3; art. I, § 7, cls. 2 and 3.

⁵⁵ *E.g.*, 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 46, 91 (Am. ed. 1771).

⁵⁶ See THE FEDERALIST No. 78.

⁵⁷ *Lochner v. New York*, 198 U.S. 45, 53 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578, 589-90 (1897); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring); *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 662-64 (1874); *License Tax Cases*, 72 U.S. (5 Wall.) 462, 469 (1866); *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 656-58 (1829); *Terret v. Taylor*, 13 U.S. (9 Cranch) 43, 49-51 (1815); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135-38 (1810); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-88 (1798). See also *Ham v. McClaws*, 1 Bay 93, 96 (S.C. 1789).

B. *Natural Law in the Reconstruction Amendments*

The prevalence for natural-law thinking with respect to the Constitution was not unique to the Founders, or to Justices of the Supreme Court. Throughout the first half of the nineteenth century, a moral, political, and (ultimately) constitutional debate grew in intensity among Americans over negro chattel-slavery. In the area of constitutional law, a struggle ensued between natural law and totalitarian positivism. The Civil War and the Reconstruction Amendments ratified in its wake settled the conflict in favor of natural law.

1. *The Debate Between Natural Law and Totalitarian Positivism on the Slavery Question.*—The opponents of slavery did not turn to natural-law arguments to support their position only when the issue became politically critical. Even before the American War of Independence, exponents of natural rights referred to slavery in their defense of free Americans' right to govern themselves.⁵⁸ Jefferson used natural-rights arguments in his indictments of George III with regard to the slavery-question, in both the Virginia Convention of 1774 and the Declaration of Independence. And literature of the revolutionary period reflected the same sentiment.⁵⁹

By the 1840's, opponents of slavery realized that the issue concerned not simply slavery for the black man, but also liberty for the white.⁶⁰ Confronted by militants praising slavery as a "positive good," and by mobs and lynch-law, the supporters of law and order saw that "some organized, systematic effort was absolutely necessary to save their own liberties from the ruthless hands of unprincipled men".⁶¹ Slavery and liberty, they concluded, were incompatible. Later, Seward would speak of an "irrepressible conflict," and Lincoln of a "house divided." But already the opponents of slavery were predicting that, "[i]f slavery live at the South, liberty must die at the North. . . . There is no middle ground."⁶² They saw "the elements of conflict and repulsion in fearful operation in this land of liberty. Slavery and freedom cannot long co-exist—one must de-

⁵⁸ E.g., J. OTIS, *THE RIGHTS OF BRITISH COLONIES* (1764); A. LEE, *ESSAY IN VINDICATION OF THE CONTINENTAL COLONIES OF AMERICA* (1764).

⁵⁹ Conway, *Antislavery Sentiment in American Literature*, 14 J. NEGRO HIST. 371, 380-84 (1929).

⁶⁰ The point was elaborated fully in the later works of W. GOODELL, *SLAVERY AND ANTISLAVERY* (1852), and *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* (1853).

⁶¹ Edward Beecher, *quoted in* 1 H. WILSON, *THE HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA* 362 (1872).

⁶² J. Birney, in *The Cincinnati Philanthropist*, 30 Dec. 1836.

stroy the other."⁶³

The evolution of the controversy revealed that libertarians and their pro-slavery opponents subscribed to two social and political theories so radically at odds that the protagonists differed even on the meanings of such central terms as "liberty" and "equality." Moreover, their disagreement extended as well to the construction and application of the Declaration of Independence and the Constitution. To one group, the Declaration was an instrument of government, with practical force. To the other, it was merely an abstract political statement, with no pragmatic application. To one group, the Constitution embodied natural rights, and therefore discountenanced, if it did not outlaw, slavery. To the other, the Constitution established and protected slavery, thereby denying natural rights. This conflict forced libertarians to re-evaluate what they meant by "liberty," "equality," and "natural rights," and what role these concepts play in the Declaration and the Constitution.

The Slave Power had its own ideas. After the death of Jefferson, a new political philosophy arose at the South that discarded natural-law precepts for the positivistic thesis that rights are nothing more than what "society" acknowledges.⁶⁴ In addition, with Jacksonian democracy, the "common man" increasingly assumed political power in the Southern States—bringing with that assumption the majority's traditional intolerance for minority opinion. These two forces, positivism and democracy, coalesced on the slavery-question: The democrats supported the vast complex of "property" rights established in the slave-system; and apologists for the slave-holders encouraged the masses' racial bigotry and their suppression of anti-slavery sentiment throughout Southern society. Both intended to keep the South a "white-man's country."⁶⁵

Unable to reconcile the "peculiar institution" with natural rights, pro-slavery intellectuals abandoned natural law entirely. After about 1830, Southern literature championed the notions that men have no unalienable rights, and that slavery is the natural state of mankind and freedom an artificial and unworkable form of social organization. Similarly, Southern spokesmen denied the concept of equality stated in the Declaration of Independence, or re-interpreted it to assert that slavery alone guarantees "true" equal-

⁶³ Rev. A. Granger, *A Sermon Preached in Meriden, Connecticut* 5 (1853).

⁶⁴ See W. DODD, *THE COTTON KINGDOM: A CHRONICLE OF THE OLD SOUTH* c. iii (1919).

⁶⁵ Phillips, *The Central Theme of Southern History*, 34 *AM. HIST. REV.* 30 (1928).

ity. One argued that men are born unequal, that society violates their unalienable rights every day for its own safety and welfare, and that it has no duty to recognize such rights in any case. Therefore, to enslave negroes for society's benefit is no violation of a right to equality that negroes never possessed.⁶⁶ Others employed "science" to prove blacks racially inferior to whites. Then, they reasoned, since "equality" means an equality among equals, and since negroes constitute an inferior race, to invoke the Declaration of Independence to mandate racial equality does an injustice to whites and blacks alike.⁶⁷ According to these authorities, "the perfect equality of the superior race, and the legal subordination of the inferior race, are the foundation on which we have erected our republican system."⁶⁸ And its apologists did not stop here, but argued further that slavery applies to all men, black or white.⁶⁹

Perhaps the most complete jurisprudential defense of slavery appears in the antebellum writings of George Fitzhugh. Fitzhugh realized that, to "vindicat[e] the institution of Slavery in the abstract," he "should be compelled to make a general assault on the prevalent political and moral philosophy."⁷⁰ That moral philosophy, he explained, "is deduced from the existing relations of men to each other in free society, and attempts to explain, to justify, to generalize and regulate those relations." Therefore, he predicted,

[n]o successful defence of slavery can be made, till we succeed in refuting or invalidating the principles on which free society rests for support or defence. The world, however, is sick of its philosophy; and the Socialists have left it not a leg to stand on. In fact, it is . . . a mere expansion and application of . . . the phrase, "Laissez Faire," or "Let Alone."⁷¹

⁶⁶ W. SIEBERT, VERMONT'S ANTISLAVERY AND UNDERGROUND RAILROAD RECORD 20 (1837).

⁶⁷ W. JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 193-94 (1935).

⁶⁸ Robert Toombs, *quoted in id.* at 194.

⁶⁹ "[T]he South now maintains," said one pro-slavery newspaper, "that slavery is right, natural, and necessary, and does not depend upon difference of complexion. The laws of the slave states justify the holding of white men in bondage Difference of race, of lineage, of language, of habits and customs, all tend to render the institution more durable" *Quoted in The National Anti-Slavery Standard*, 11 Oct. 1856, p. 1, col. 3. And another Southern newspaper reported that "the defense of slavery is not to be confined to mere Negro slavery While it is far more obvious that negroes should be slaves than whites, . . . yet the principle of slavery is itself right" *Quoted in The Radical Abolitionist*, Oct. 1857.

⁷⁰ G. FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS 5 (C. Vann Woodward ed. 1960).

⁷¹ *Id.* at 52.

Fitzhugh impugned the natural-law concept that the legitimacy of government depends upon the consent of the governed. "All governments," he opined, "originated in force, and have been continued by force. The very term, government, implies that it is carried on against the consent of the governed. . . . Masters dare not take the vote of slaves as to their government."⁷² Moreover, he said, "[a]ll government proceeds *ab extra*," by force of social necessity. "Neither individuals nor societies can govern themselves The South is governed by the necessity of keeping its negroes in order"⁷³

This being true, thought Fitzhugh, permanent constitutions are inexpedient, and recourse to "fundamental principles" of government even worse:

Men and societies . . . cannot foresee or provide for the future, nor lay down rules for other peoples' conduct. All platforms, resolutions, bills of rights, and constitutions, are true in the particular, false in the general. Hence all legislation should be repealable, and those instruments are but laws. Fundamental principles, or the higher law, are secrets of nature The vain attempt of "frequent recurrence to them" is but the act of the child Recurrence to fundamental principles and appeals to the higher law are but the tocsin of revolution that may upset everything but which will establish nothing, because no two men are agreed as to what the higher law . . . is.⁷⁴

Besides, the principle of individual human freedom is false in fact. "There is no such thing as *natural human* liberty, because it is unnatural for man to live . . . without the pale and government of society."⁷⁵ "Government," he wrote, "presupposes that liberty is surrendered as the price of security. . . . There can be no liberty where there is government" In society, "there is no liberty for the masses. Liberty has been exchanged by nature for security."⁷⁶

This exchange, however, Fitzhugh felt theory and practice justified. For,

"[i]t is the duty of society to protect the weak"; but protection cannot be efficient without the power of control; therefore, "It

⁷² *Id.* at 243.

⁷³ *Id.* at 133.

⁷⁴ *Id.* at 134.

⁷⁵ *Id.* at 71.

⁷⁶ *Id.* at 72, 78.

is the duty of society to enslave the weak." And it is a duty which no organized and civilized society ever failed to perform. . . .

. . . [T]here can be no efficient protection without enslavement of some sort. In England, it has often been remarked, that all the legislation for the poor is borrowed from the system of domestic slavery.

. . . .
Those who give should have the power to control . . . the conduct and expenditure of the objects of their charity. Not till then can they be sure that their gifts will be promotive of good. But such power of control would be slavery.⁷⁷

Therefore, he concluded, "'Slavery is the natural and normal condition of society.' The situation of the North is abnormal and anomalous."⁷⁸

To Fitzhugh, the problem society faced was in recognizing individual rights at all. "The right of Private Judgment," he wrote,

led to the doctrine of Human Individuality, . . . [and] the doctrines of Laissez Faire, free competition, human equality, freedom of religion, of speech and of the press, and universal liberty. The right of Private Judgment . . . leads . . . to the supreme sovereignty of the individual, and the abnegation of all government. . . . [I]t is . . . the excessive applications of that philosophy, to which we object. Man . . . is born a part and member of society, born and lives a slave of society. . . . What are his obligations to society . . . depend upon . . . the necessities and well-being of the society to which he belongs.⁷⁹

The philosophy of individualism, he opined, forgets that "[t]he social body is of itself a thinking, acting, sentient being"—a being that is "infallible," and the "infallibility of [which] is suggested . . . in the maxim—*Salus populi, est suprema lex.*"

Liberty of the press, liberty of speech, . . . and the unlimited right of private judgment have borne no good fruits, and many bad ones. . . . Society has the right, and is in duty bound, to take care of itself; and when public opinion becomes powerless,

⁷⁷ *Id.* at 187-88.

⁷⁸ *Id.* at 40.

⁷⁹ *Id.* at 53-54.

law should intervene and punish all acts, words, or opinions which have become criminal by becoming dangerous or injurious.⁸⁰

Fitzhugh did not, however, recommend slavery for all men; for “some are formed for higher, others for lower stations—the few to command, the many to obey.”

[N]ineteen out of every twenty individuals have “a natural and inalienable right” to be taken care of and protected, to have guardians, trustees, . . . or masters; in other words, they have a natural and inalienable right to be slaves. The one in twenty are as clearly born or educated or some way fitted for command and liberty. Not to make them rulers or masters is as great a violation of natural rights as not to make slaves of the mass.

“Imitation, grammar, and slavery,” he concluded, “suit the masses. Liberty and Laissez Faire, the men of genius, and the men born to command. . . . To secure true progress, we must unfetter genius, and chain down mediocrity. Liberty for the few—Slavery, in every form, for the mass!”⁸¹

Here, then, was the authentic voice of elitist, positivistic totalitarianism, garbed as always in the cloak of “social necessity,” but at base advocating nothing more than the unlimited power of a few self-appointed dictators over the mass of their fellow-men.

2. *The Thirteenth Amendment as a Restatement of the Fundamental Principles of Natural Law.*—The Framers of the Reconstruction Amendments⁸²—of which the Thirteenth Amendment is most important—were conversant with the “positive-good” theory of slavery. Indeed, Chief Justice Taney’s notorious opinion in *Scott v. Sandford* had encapsulated the essential rationale for slavery in the statement that slaves are “regarded as . . . of an inferior order, and altogether unfit to associate with the [master-class], either in social or political relations; and so far inferior, that they ha[ve] no rights which the [master-class is] bound to respect”⁸³ Not surprisingly, therefore, equality of liberty was a major topic of congressional debate prior to ratification of the Thirteenth Amend-

⁸⁰ *Id.* at 131, 132.

⁸¹ *Id.* at 63, 69.

⁸² U.S. CONST. amends. XIII, XIV, XV.

⁸³ 60 U.S. (19 How.) 393, 407 (1856).

ment. "[E]quality of rights," "equal before the law," "personal freedom without distinction," and like phrases recur repetitively in the legislative history.⁸⁴ That "all men [are] free and equal," said one representative, is "the corner-stone of [the United States], and . . . above all constitutions and all laws."⁸⁵ Another argued that "[t]he effect of [the Thirteenth A]mendment will be . . . a practical application of the self-evident truth, 'that all men are created equal.'"⁸⁶

Congress also recognized that legal equality did not apply to blacks alone. As one representative noted, slavery "had its origin in force. It claims no natural sanction for its existence, nor is it confined to any race."⁸⁷ Another interpreted the phrase "all men are created equal" to mean that every individual is entitled to legal rights and protection "without regard to race, color, or any other accidental circumstances by which he may be surrounded."⁸⁸ And still another emphasized that the Thirteenth Amendment would eradicate the institution that "[t]ake[s] away . . . fundamental rights from any large class of human beings."⁸⁹ Moreover, opponents repeatedly denounced the Amendment because it would confer legal equality on all men,⁹⁰ and deny Chief Justice Taney's theory that "[e]very State has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory."⁹¹

Equality before the law was also a dominant theme in debates on federal civil-rights statutes enacted pursuant to the Thirteenth Amendment and intended to serve as "a power enforcing the language of the Constitution, guarantying all the rights which the amendment gives."⁹² As one senator explained, "any [State law] which is not equal to all, and which deprives any citizen of civil rights which are secured to other citizens, is an unjust encroachment upon his liberty; and is, in fact, a badge of servitude . . ."⁹³ Con-

⁸⁴ Cong. Globe, 38th Cong., 1st Sess. 2614 (1864); *id.*, 38th Cong., 2d Sess. 155, 143 (1865).

⁸⁵ *Id.*, 38th Cong., 2d Sess.. 199 (1865).

⁸⁶ *Id.* at 142.

⁸⁷ *Id.* at 216.

⁸⁸ *Id.* at 260.

⁸⁹ *Id.* at 193.

⁹⁰ *E.g.*, *id.* at 179, 216.

⁹¹ *Strader v. Graham*, 51 U.S. (10 How.) 82, 93 (1850). *E.g.*, Cong. Globe, 38th Cong., 1st Sess. 2616 (1864).

⁹² Cong. Globe, 39th Cong., 1st Sess. 1805 (1866).

⁹³ *Id.* at 474.

gressional intervention was necessary to “destroy all these discriminations in civil rights”—since otherwise the Amendment would “amoun[t] to nothing.”⁹⁴ “[W]e demand,” concurred another senator, “that by irreversible guarantees no portion of the population of the country shall be degraded,” but all receive “protection by equal laws.”⁹⁵ “[T]he citizen must be endowed with all the rights which other men possess,” agreed one representative;⁹⁶ while another urged Congress to “make all the citizens of the country equal before the law,” “to break down all walls of caste,” and “to offer equal opportunities to all men.”⁹⁷ A third described congressional legislation as necessary “to secure the fundamental rights of citizenship; those rights which constitute the essence of freedom, and . . . make all men equal before the law.”⁹⁸ And one of the most characteristic arguments presented in the debates explained that the Thirteenth Amendment both promises legal equality and guarantees certain immutable civil rights and immunities that government must recognize and protect.⁹⁹

⁹⁴ *Id.* at 322.

⁹⁵ *Id.* at 340, 343.

⁹⁶ *Id.* at 513.

⁹⁷ *Id.* at 589.

⁹⁸ *Id.* at 1832-33.

⁹⁹ *Id.* The Amendment, said Representative William Lawrence, imposes upon every legislature

the limitation that there are some inherent and inalienable rights, pertaining to every citizen, which cannot be abolished by State . . . laws.

. . . .
There is in this country no such thing as “legislative omnipotence.” [State constitutions do not confer authority] to destroy all that is valuable in citizenship. Legislative powers exist in our system to protect, not to destroy, the inalienable rights of men This has been the common understanding in our whole history, and upon which governments have been created.

. . . .
It has never been deemed necessary to enact in any constitution or law that citizens should have the right to life or liberty or the right to acquire property. These rights are recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.

. . . [T]here are certain absolute rights which pertain to every citizen, which are inherent, and of which a State cannot constitutionally deprive him. But not only are these rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so.

. . . .
Now, there are two ways in which a State may undertake to deprive citizens of these absolute, inherent, and inalienable rights: either by prohibitory laws, or by failure to protect any one of them.

If the people of a State should become hostile to a large class of . . . citizens and

Congress understood that the very legitimacy of government turns upon fulfillment of its duty to protect all men's freedom equally. "[T]here are characteristics of Governments," said another representative, "that belong to them as such, without which they would cease to be governments"—first among these being recognition that "[t]he rights and duties of allegiance and protection are corresponding rights and duties."¹⁰⁰ A colleague concurred: "The highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights."¹⁰¹ Thus Congress concluded that, if government owes all citizens protection for their natural liberty; and if slavery can arise or be suffered only by positive law—then slavery can never coexist with government, rightly understood. For in creating, regulating, or even tolerating the slave-system, any political body must "cease to be governmen[t]."¹⁰² To Congress, the simultaneous existence of government and slavery within the same jurisdiction was self-contradictory and absurd.

The Thirteenth Amendment, then, was no departure from American libertarian tradition. Yet it holds a special place in this tradition because its framers designed it to incorporate into the Constitution the basic postulate that "all men are created equal" and "endowed . . . with certain unalienable Rights." One senator, for example, described himself and his colleagues as committed "champions" of the Declaration of Independence, who "mean that just and equal laws shall pervade every rood of this nation."¹⁰³ Congress was "determined," said a representative among the majority, "to build into a law the doctrines of the Declaration of Independence."¹⁰⁴

should enact laws to prohibit them and no other citizens from making contracts, from suing, . . . from holding . . . property, . . . that would be prohibitory legislation. If the State should . . . enact laws for [one class of citizens] and provide no law under which [another class of] citizens could enjoy any one of these rights, and should deny them all protection by civil process, . . . that would be a denial of justice.

¹⁰⁰ *Id.* at 1263.

¹⁰¹ *Id.* at 1295.

¹⁰² *Id.* at 1263.

¹⁰³ *Id.* at 344.

¹⁰⁴ *Id.* at 1839. The Thirteenth Amendment, these men intended, was to serve as a testament to the principle that no government rightfully can legalize the enslavement of man. . . . [A]nd that which a Government cannot rightfully do it cannot rightfully or legally authorize or even permit its subjects to do. . . . A majority in a republic cannot rightfully enslave the minority, nor can the

In short, the Thirteenth Amendment reaffirmed those principles that form “the corner-stone of [American government]” and guaranteed anew those “rights . . . recognized by the Constitution as existing anterior to and independently of all laws and all constitutions.”¹⁰⁵ Its framers knew that the Constitution

is not the beginning of a community, nor the origin of private rights; . . . it is not the cause, but [the] consequence of personal and political freedom; it grants no rights to the people, but is the creature of their power Designed for their protection in the enjoyment of rights and powers which they possessed before the [C]onstitution was made [I]t is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thoughts. . . . It presupposes an organized society; law; order; property; personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny.¹⁰⁶

They knew as well from then-recent experience that, unless the constitutional presuppositions of “an organized society, law, order, property, [and] personal freedom” are adequately protected in the fundamental charter of government, those without “a love of political liberty” or “enough of cultivated intelligence to know how to guard it against the encroachments of tyranny” may betray freedom. Informed by such reasoning, they codified in one guarantee the basic constitutional presuppositions that inspire American government.

From the Declaration of Independence, the framers of the Thirteenth Amendment drew the principle that “all men are created equal” and “endowed . . . with certain unalienable Rights.” Congress, indeed, had no higher goal for the Amendment than “to build into law the doctrines of the Declaration.”¹⁰⁷ From the Preamble to the Constitution, they drew the principle of equal protection of the laws embodied in the phrase “to . . . establish Justice.” For they knew that “[i]f the State should enact laws for [one class of

accumulated decrees of courts or the musty precedents of Government make oppression just.

Id., 38th Cong., 2d Sess. 138 (1865).

¹⁰⁵ *Id.* at 199; *id.*, 39th Cong., 1st Sess. 1833 (1866).

¹⁰⁶ *Hamilton v. County Court*, 15 Mo. 13, 14 (1851).

¹⁰⁷ *Cong. Globe*, 39th Cong., 1st Sess. 1839 (1866).

citizens] and provide no law under which [another class of] citizens could enjoy any one of these rights, and should deny them all protection by civil process, . . . that would be a denial of justice."¹⁰⁸ Similarly, they sought "to . . . promote the general Welfare" by "offer[ing] equal opportunities to all men;" and "to . . . secure the Blessings of Liberty to ourselves and our Posterity" by guaranteeing "to all people in the United States," "irrespective of class," those "fundamental rights of citizenship . . . which constitute the essence of freedom"—those "inherent and inalienable rights, pertaining to every citizen, which cannot be abolished" by any rightful law.¹⁰⁹ From the express prohibitions in the body of the Constitution, they drew the principle of limited government that subordinates democracy to freedom under the rule of law. For they knew that neither the demands of majorities nor "the accumulated decrees of courts or the musty precedents of Government [can] make oppression just."¹¹⁰ From the Amendments to the Constitution, they drew the specific rights that constitute the "civil rights, fundamental rights belonging to every man as a free man" and are the "necessary incidents" of the "right to live" in any nation that fancies itself "a land of liberty and law."¹¹¹ And from the plan and structure of the Constitution as a whole, they drew the principle that the American political system establishes government to secure the context for a free society—and therefore presupposes both popular and individual sovereignty, both democratic decision and personal self-determination. In short, they knew that "the surest and safest way" to guarantee a republican government "is to provide proper guards and checks for the protection of individual and social rights."¹¹² For a republican government supports a free and independent society, rather than submerging private relations in totalitarian controls.

The Thirteenth Amendment, therefore, is the ultimate statement that ours is a limited government—under which majorities decide issues within an ambit defined by rules of law not subject to majority-votes. Beyond the reach of sovereigns popular or unpopular, it creates a preserve of individual autonomy, independence, and equal protection of the laws where each man balances his own inter-

¹⁰⁸ *Id.* at 1833.

¹⁰⁹ *Id.* at 589.

¹¹⁰ *Id.*, 38th Cong., 2d Sess. 138 (1865).

¹¹¹ *Id.*, 39th Cong., 1st Sess. 476, 1833 (1866).

¹¹² *Id.*, 38th Cong., 2d Sess. 143 (1865).

ests, weighs his own values, and makes his own choices—where, indeed, each man governs himself.

In the two great constitutional crises in American history, then, the same jurisprudential theme has sounded: the theme of natural law, equality of right, government by consent of the governed, and limitations on political power in favor of individual liberty. The original understanding of the United States Constitution, in its birth in revolution and its re-birth in civil war, is consistent and compelling. The protection of individual rights is the purpose of government, the basis of its legitimacy, and the true test of the ambit of its authority.

II. THE UNITED STATES CONSTITUTION AND POSITIVISM: THE NEW LEGALITY

If those who framed and interpreted the Constitution during its first century saw that document as a repository of and protection for individual freedoms drawn from natural law, its more-recent expositors have applied it according to the quite different tenets of legal positivism. As a result, a new category of “social” and “economic rights” has displaced traditional individual liberties as the law’s primary concern. Furthermore, under theories of judicial review denominated the “rational-basis” and “balancing tests,” the courts have denied meaningful protection to both the unenumerated and the enumerated liberties embodied in the Constitution.

A. *The Precedence of “Social” and “Economic Rights” Over Individual Freedom*

Since the turn of this century, legislatures and courts have increasingly created new “social” and “economic rights”: particular *material* benefits to which every person is presumably entitled, and for the provision of which government is responsible. The peculiar character of these rights arises from their origin as an attempted reconciliation of traditional “inherent individual rights,” on the one hand, and “Marxist principles,” on the other.¹¹³

“Inherent individual rights,” drawn from natural law, and “Marxist principles” are mutually inconsistent, however. If there are Marxian rights to material benefits that the spontaneous action

¹¹³ This is the explanation given in the Report of the UNESCO Committee on the Theoretical Bases of Human Rights, *in* Human Rights, Comments and Interpretation (UNESCO, 1949).

of society, through the market, does not satisfy, then government must in some measure suppress, re-direct, or supersede that action. Social and economic rights have full meaning only as the economic system tends towards complete centralization, and as individuals act according to principles of distributive justice enforced by a superior authority, rather than according to the principles of market-freedom. Because the spontaneous operation of the market does not, and presumably will not, provide certain benefits to some people, government cannot permit participants in the market to act for themselves, but instead must more or less "plan" their activities so as to guarantee a particular distribution of goods. The fulfillment of social and economic rights is therefore incompatible with continued protection of traditional individual freedoms. Government cannot direct individuals to perform according to its "plans" without at the same time denying those individuals the right to plan their own lives according to, for example, the natural-law principles of freedom of contract, or the right to property.

Moreover, once an attempt is made to reconcile Marxian principles with traditional individual rights, the transition from a free to a command system becomes autocatalytic. The more individuals and groups perceive their social and economic positions to depend upon governmental intervention, the more they will welcome, if not insist upon, such intervention in aid of this or that notion of distributive justice. In addition, under a system of majority-rule, government will respond to the claims of special-interest constituencies to the extent they organize for political action—thereby encouraging the mobilization of pressure-groups. And the more government tries to affect the substantive outcome of the market-process in favor of one or another group, the closer it will approach a totalitarian system.

Strangely, no coherent legal theory explains the ferment on behalf of social and economic rights. If government may assumedly enforce such claims, then which groups should receive what benefits, and which other groups should provide them, involve "rights" and "duties" in a formal sense. But the assumption begs the underlying question of whether there *are* rights to particular social positions and economic rewards that justify governmental favoritism (in contravention of equality before the law) and coercion (in contravention of fundamental individual liberties).

To explain the development of social and economic rights as a perversion of traditional rights-theory is possible, though. Locke

maintained that political institutions are justifiable only in so far as they protect individuals' liberty and property. The classical economists contributed the further concept of the "invisible hand," regulating private interactions so as to generate a spontaneous social order. The "invisible hand" explained how a community structures itself through the peaceful pursuit of private interests, and further encouraged limiting governmental activity to those areas in which the market-mechanism was inoperative. The Founders of the United States, however, did not adequately provide for the likelihood that special-interest groups within and outside government would redefine the purpose of political institutions; or that these groups would excoriate the unhampered market-economy, and demand that government assume management of the "invisible hand." The Founders understood that a system of individual rights reinterpreted to include rights to particular social and economic results (as opposed to rights *against* governmental interference with liberty) promotes the rapid development of a political order of unlimited pervasiveness. But they were unable to devise sufficient institutional checks to prevent this from happening.¹¹⁴ Certainly the Founders did not foresee what Benda described as *la trahison des clercs*¹¹⁵ and what best explains the key role intellectuals have played in the evolution of "Marxist principles" in this country over the last hundred years.¹¹⁶

The emergence of social and economic rights and the gradual insinuation of legal positivism into constitutional law have gone hand-in-hand, because legal positivism is simply the jurisprudential rationalization for the claim that legislative power is omnipotent. The characteristic demand of positivists that "law" and "rights" are what the political process decrees (and, indeed, are otherwise meaningless) unfetters government from the natural-law stricture that there are "*Bounds which the trust that is put in them by the Society, and the Law of . . . Nature, have set to the Legislative Power of every Commonwealth.*"¹¹⁷ And the positivistic conception

¹¹⁴ Perhaps because the only effective institutional check in a democracy is the political self-restraint of the common man—about which the Founders harbored few illusions and therefore in which they placed little long-term reliance.

¹¹⁵ J. BENDA, *LA TRAHISON DES CLERCS* 131-32, 141-42, 143 (1928).

¹¹⁶ Vieira, "The Syndicalism of the Intellectuals: A Commentary On The Role and Purpose of the American *Intelligentsia* In Promoting Socialism in the United States" (unpublished manuscript, 1978).

¹¹⁷ J. LOCKE, *supra* note 21, § 142.

of sovereignty as unlimited power removes all checks from, and even all possibility of appeal from the decisions of, "the people"—or, more precisely, those politicians and *fonctionnaires* who claim to speak for "the people." Under legal positivism, "freedom" reduces to the collective freedom of the political community: the power to legislate. And "law" becomes a process of identifying conflicts of "interests" among various groups, ascertaining the will of the majority (or its spokesmen) as to which interests should be recognized at the expense of others, and enforcing that judgment by various coercive techniques.

Legal positivism and American constitutionalism are irreconcilable. For example, positivism finds the basis for law in the will of a sovereign, in principle absolute, that promulgates rules to its subjects. Positivism does not identify the warrant for the absolute and unchallengeable supremacy of the law-givers over everyone else. American constitutionalism, *per contra*, rejects absolute sovereignty, placing fundamental principles of government, ascertainable by reason, above the will of any man or group.

Similarly, legal positivism defines law as a rule of conduct prescribed by the supreme power of a state, commanding action or forbearance by its subjects. In positivistic theory, "law" and "rights" are merely the adventitious combination of will and physical force sufficient to compel obedience. To be sure, the efficacy of law may often depend upon force. But positivism ultimately identifies law *as* force, and denies any necessary relationship between law and rights not themselves the creatures of force. Yet, if mere will and force suffice to establish law, then wherever they continue united to the successful accomplishment of some object, they constitute law.¹¹⁸ So, in a society divided into militant factions struggling for political supremacy through direct action or subversion of government, with none of the factions capable of enforcing its demands for any significant period of time, law could not exist.¹¹⁹ American constitutionalism, conversely, presumes that law and rights are permanent aspects of the natural order of things; that,

¹¹⁸ See, e.g., the neat *reductio ad absurdum* of the classical formulation of positivistic sovereignty in L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 11-14 (1860).

¹¹⁹ For instance, where militant unions are so physically or politically powerful that the state cannot suppress their violent conduct, but not powerful enough to supersede the state and establish a syndicalistic or labor-socialistic regime, legal positivism would have to conclude that "law" and "rights" are in abeyance. On that theory, Britain and its population are perhaps on the verge of lawlessness and rightlessness.

whereas force may be necessary to secure them, they differ essentially from force alone; and that they exist even where physical power is insufficient to enforce them.

Again, legal positivism claims that government fulfills its function by creating rights it then confers on individuals. Although perhaps consistent if governments received their authority through divine inspiration, where popular sovereignty is the basis for the political order the claim merely generates a paradox: According to positivism, the sovereign-people select certain agents as their government; these agents then create law and confer rights on various segments of the people. Where the sovereign-people derive the right to create rights; or why, if they have the right to create the intermediary, government, they do not have the right to create rights directly; legal positivism does not explain. Apparently, positivists believe the sovereign-people originally maintain all power in an undivided whole. Government receives this power by delegation, and then identifies which individuals and groups will enjoy what portion of the sovereign's authority to act according to their own wills. Following this line of reasoning, each person has a "private capacity," in which he is the subject of government, and a "public capacity," in which he is part of the sovereign-people who appoint and control government. In his private capacity, each individual receives rights; and in his public capacity, grants them. Thus, each individual has an equal joint-interest in all rights in his public capacity, but either no interest or a complete personal interest in particular rights in his private capacity. Therefore, unless positivistic government performs the nugatory operation of "creating" for all citizens *all* the rights the sovereign-people can bestow on anyone, government must either: (i) leave all individuals with fewer rights than they had without its intervention; or (ii) leave some people with fewer, some with more, rights, thereby creating a class-structure of super- and subordination among individuals who started as equals. So, from the perspective of any rational individual who could not guarantee his ultimate legal position, the institution of positivistic government would be either valueless or dangerous. American constitutionalism posits a different result. The purpose of political institutions being to secure natural rights that antedate their formation, no non-aggressive individual loses by the creation and operation of government.

These inconsistencies between legal positivism and American constitutionalism, however, have not prevented the courts from in-

corporating into constitutional law positivistic doctrines at war with individual liberty. Two of these doctrines, the "rational-basis" and the "balancing tests," exemplify the courts' commitment to the central premisses of positivism that: (i) legislatures have unlimited power to "experiment" in "social" and "economic" matters, notwithstanding their experiments' inconsistency with individuals' unenumerated constitutional liberties; and (ii) the courts must recognize "conflicts of interest" between government and individuals that justify abridgment of the latter's enumerated freedoms.

B. *Destruction of Unenumerated Liberties Through the "Rational-Basis Test"*

The exertion of any governmental power to some degree infringes "liberty" in the lexicographical sense. The legally relevant question is whether it infringes "liberty" in the constitutional sense. To answer this question, the Supreme Court has employed three tests, two consistent with natural-law principles and the third not. First, in a few cases, the Court invoked the doctrine that a purported exercise of governmental power is unconstitutional, regardless of any purpose it may serve, if it infringes individual liberty or equality before the law (the *per se* test). For example, in *Truax v. Raich*, the Court held that arguably promoting the public welfare does not justify a State in denying some individuals "the right to work for a living in the common occupations of the community," because "reasonable classification implies action consistent with the legitimate interests of the state."¹²⁰ Similarly, in *Coppage v. Kansas*, the Court ruled that arguably promoting the "bargaining power" of some wage-earners does not justify a State in denying freedom of contract to others.¹²¹ These cases taught that no "social" or

¹²⁰ 239 U.S. 33, 41-42 (1915).

¹²¹ [W]herever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But [the Constitution], in declaring that [government] shall not "deprive any person of life, liberty, or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as coexistent human rights. . . .

And since [government] may not strike them down directly, . . . it may not do so indirectly, as by declaring in effect that the public good requires the removal of those

“economic facts” entitled a legislature to interfere with the exercise of constitutionally protected liberties.

Second, in a few cases, the Court invoked the doctrine that a purported exercise of governmental power arguably infringing a protected liberty is unconstitutional unless the state proves with clear and convincing evidence that the end it seeks to achieve is legitimate, and the means it intends to use has a demonstrably rational relation to that end, according to an accepted economic theory (the rationality test).¹²² For instance, in *Nebbia v. New York*, Justice McReynolds characteristically criticized the Court for failing to inquire into the reasonableness of an “economic regulation.”¹²³ In other instances, the Court judicially noticed the absence of a reasonable means-ends nexus in support of some statute challenged as infringing constitutionally protected liberty or property.¹²⁴ These

inequalities that are but the normal and inevitable result of their exercise . . . , without in effect nullifying the constitutional guaranty.

236 U.S. 1, 17-18 (1915).

¹²² This approach complemented the *per se* test applied in *Truax* and *Coppage*: If a governmental goal was not legitimate, the state’s exertion of power was void, no matter how plausible the economic theory advanced in its support. On the other hand, if the end was legitimate, the state still had to show that it was reasonable. The overall result of these two tests perfectly fitted the Lockean theory that individuals, through the social compact, had (i) retained certain liberties for themselves, and (ii) alienated others to government, provided that it acted reasonably for the common good of society.

¹²³ Here, we find direct interference with guaranteed rights defended on the ground that the purpose was to promote the public welfare by increasing milk prices at the farm. Unless we can affirm that the end proposed is proper and the means adopted have reasonable relation to it this action is unjustifiable.

The court below has not definitely affirmed this necessary relation; it has not attempted to indicate how higher charges at stores to impoverished customers when the output is excessive and sale prices by producers are unrestrained, can possibly increase receipts at the farm. . . . Demand at low prices being wholly insufficient, the proposed plan is to raise and fix higher minimum prices at stores and thereby aid the producer whose output and prices remain unrestrained!

291 U.S. 502, 556-57 (1934) (McReynolds, J., dissenting).

¹²⁴ *E.g.*, *Ribnik v. McBride*, 277 U.S. 350, 356-57 (1928); *Tyson & Bro. v. Banton*, 273 U.S. 418, 439-42 (1927); *Burn Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924). Contrast the typically positivistic utterance of Justice Stone, dissenting, in *Ribnik*:

[R]egulation is within a state’s power whenever any combination of circumstances seriously curtails the regulative forces of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole. . . . The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient . . . to justify the regulation of contracts with its members.

277 U.S. at 360. Also characteristic is the comment of Justice Holmes, dissenting, in *Tyson*: “[A] state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution. . . . The truth seems to me to be that . . . the legislature

cases taught that, even where liberty is only arguably threatened, government must demonstrate the rationality of its regulations.

Third, in the vast majority of cases decided during this century that dealt with social or economic rights, the Court invoked the doctrine that a purported exercise of governmental power admittedly infringing a protected liberty or taking property without compensation is constitutional unless the challenger can prove there is no conceivable set of facts that might support the exercise of power (the rational-basis test).¹²⁵

These decisions repeat the theme that courts must allow legislatures "[c]onsiderable latitude . . . for differences of view," "[o]therwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held *semper ubique et ab omnibus*."¹²⁶ Such comments also reflect a peculiar forgetfulness that a major reason for the American War of

may forbid or restrict any business when it has a sufficient force of public opinion behind it." 273 U.S. at 446.

¹²⁵ "There was a time," said Justice Black for the Court in *Ferguson v. Skrupa*, when the Due Process Clause was used . . . to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy

The doctrine . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems. . . .

372 U.S. 726, 729-30 (1963). Similarly, in *Williamson v. Lee Optical Co.*, Justice Douglas opined that

the law need not be in every respect logically consistent with its aim to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause . . . to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

348 U.S. 483, 488 (1955). *Ferguson* and *Williamson* represent the distillate of years of such statements by the Supreme Court or its members. Interestingly enough, both Justices Black and Douglas gained reputations as libertarians as far as certain individual rights, such as freedom of speech, were concerned. They never seemed to understand, though, that freedom of speech means little in a country where the government controls all social and economic relations. *But see* *International Ass'n of Machinists v. Street*, 367 U.S. 740, 784-91 (1967) (Black, J., dissenting), and *compare with* *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 233-35 (1956) (Douglas, J.).

¹²⁶ *Otis v. Parker*, 187 U.S. 606, 608-09 (1903) (Holmes, J.).

Independence was precisely that the British Parliament did not recognize certain "fundamental rules of right," including limitations on legislative power in favor of individual freedom. None the less, the Supreme Court has faithfully followed the notion that, where "social" and "economic regulation" is involved,

judges should be slow to read into the [Constitution] a "nolumus mutare" as against the law-making power.

. . . [T]he police power . . . may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.¹²⁷

In the Court's present view, that "prevailing morality or strong and preponderant opinion" may be vicious or wrong, does not affect the existence of legislative power to enforce that morality or opinion against dissenters. The Constitution, admonished Justice Holmes, does not "prevent the making of social experiments that an important part of the community desires . . . even though the experiments may seem futile or even noxious. . . ."¹²⁸ "Whether the enactment is wise or unwise," Justice Hughes opined, "whether it is based on sound economic theory, . . . are matters for the judgment of the legislature."¹²⁹ "In present conditions," Justice Holmes suggested,

a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, . . . it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, . . . there is nothing in the Constitution of the United States to prevent it¹³⁰

¹²⁷ *Noble State Bank v. Haskell*, 219 U.S. 104, 110-11 (1911) (Holmes, J.).

¹²⁸ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

¹²⁹ *Chicago, B. & Q.R.R. v. McGuire*, 219 U.S. 549, 569 (1911).

¹³⁰ *Coppage v. Kansas*, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting). The same view appears in *Adair v. United States*, 108 U.S. 161, 191-92 (1908) (Holmes, J., dissenting).

Several of Holmes' assumptions in *Coppage* are revealing: First, that "liberty of contract begins" in an "equality of [material-] position between the [contracting] parties." According to this reasoning, "liberty" in law depends upon "equality" in income, wealth, or social

When the "solution" of what some people consider a social or economic injustice "turns upon considerations of economics about which there may be reasonable differences of opinion," advised Justice Stone, "[c]hoice between these views takes us from the judicial to the legislative field."¹³¹

But perhaps the classical statement of the doctrine is Justice Holmes' dissent in *Lochner v. New York*,¹³² a dissent as long and widely praised as the majority opinion in that case has been vilified. In *Lochner*, the Court held unconstitutional a statute limiting hours of labor for bakers, on the ground that such limitation arbitrarily denied liberty of contract.¹³³ "This case," retorted Holmes,

is decided upon an economic theory which a large part of the country does not entertain. . . . [M]y agreement or disagreement has nothing to do with the right of a majority to embody

position—precisely reversing the relationship understood by the Founders, and articulated by the Court's majority in *Coppage*, that "liberty" in law would lead naturally to inequality in material-position. Second, that "working-men [may] enact legislation." Here is the basic presumption of syndicalism and fascist-syndicalism taken as a premiss of constitutional law—with no thought whatever to the consequences of its adoption with regard to the *general welfare* or the *common good*, the touchstones of legitimate legislation in a Lockean system. Third, that "there is nothing in the Constitution . . . to prevent it." Holmes, of course, was a foe of "liberty of contract." He failed to understand that "liberty" and "contract" are, in many respects, two ways of saying the same thing. But even more fundamentally, he never saw that the essence of the antithesis of liberty—that is, slavery—was its denial of the right of common workers to make employment contracts without the intermediation of "masters," be those "masters" plantation-owners, legislators, or unions of their fellow-wage-earners. See Vieira, *Of Syndicalism, Slavery and the Thirteenth Amendment: the Unconstitutionality of "Exclusive Representation" in Public-Sector Employment*, 12 WAKE FOREST L. REV. 515 (1976).

¹³¹ *Tyson & Bro. v. Banton*, 273 U.S. 418, 454 (1927) (Stone, J., dissenting). Admittedly, stated the Court in *Muller v. Oregon*,

[c]onstitutional questions . . . are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration.

208 U.S. 412, 420-21 (1908). In *Muller*, Louis Brandeis initiated the tactic of submitting "social" and "economic data" (the so-called "Brandeis brief") to provide the court with a basis in popular opinion for finding a particular legislative judgment "reasonable."

¹³² 198 U.S. 45 (1905).

¹³³ The statute, said the Court, "involves neither the safety, the morals nor the welfare of the public, and . . . the interest of the public is not in the slightest degree affected. . . . The law . . . does not affect any other portion of the public than those who are engaged in that occupation." *Id.* at 57.

their opinions in law. . . . State [c]onstitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical as this and which equally with this, interfere with the liberty to contract. . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by [many laws]. The [Constitution] does not enact Mr. Herbert Spencer's Social Statics. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel or even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

. . . [T]he word liberty is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.¹³⁴

What those "fundamental principles" are, and how one determines whether they "have been understood by the traditions of our people and our law," Justice Holmes did not explain.

No one has ever satisfactorily explained why the rational-basis test is incumbent on the courts. To be sure, Justice Black talked of "return[ing] to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies."¹³⁵ But whence arose this "original constitutional proposition," he did not say. Certainly it is not a product of the Constitution itself.¹³⁶ Indeed, the first decision of the Supreme

¹³⁴ *Id.* at 75-76 (Holmes, J., dissenting).

¹³⁵ *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

¹³⁶ As a matter of pleading, a party claiming a right under the Constitution must establish a *prima facie* case to avoid dismissal. Allegations sufficient to make out such a case need not rise to the level of definitive proof, however. And, in any event, the sufficiency of such allegations is itself a question of law that a trial court—and certainly the challenged statute

Court invalidating an act of Congress makes no allusion to any presumption that legislation is constitutional if a reasonable doubt could possibly exist as to its invalidity. Rather, *Marbury v. Madison* conveys the characteristic view of Chief Justice Marshall that the unconstitutionality of a statute is an objective quality discoverable by reference to fixed principles, not to evanescent popular notions of what the "facts" are.¹³⁷ Moreover, in *Gibbons v. Ogden*, Marshall explicitly rejected any operative presumption of the constitutionality of statutes absent proof beyond a reasonable doubt.¹³⁸ And other leading decisions declaring laws unconstitutional are equally devoid of references to a rational-basis test, until after the Civil War.¹³⁹

Apparently, the presumption arises from nothing more than "a decent respect due to the . . . legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."¹⁴⁰ Such a self-imposed respect, however, is inconsistent with the courts' assump-

itself—cannot conclude against the aggrieved party on the basis of any vague presumption. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 204, 209-13 (1934); *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 595-96 (1896).

On the other hand, even under the rational-basis test, the party relying on the statute should have to make a *prima facie* defense of the law's real and substantial relation in reason to a legitimate governmental goal. Compare *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 347-48 n.5 (1935), and *Nebbia v. New York*, 291 U.S. 502, 525 (1934), with *Mayflower Farms, Inc. v. Ten. Eyck*, 297 U.S. 266, 274 (1936). See also *Rinaldi v. Yeager*, 384 U.S. 305, 308-10 (1966).

¹³⁷ 5 U.S. (1 Cranch) 137 (1803). Marshall's view had supporters in this century, also. E.g., *United States v. Butler*, 297 U.S. 1, 62 (1936).

¹³⁸ "The state of New York," he began,

maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. . . . No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

22 U.S. (9 Wheat.) 1, 186-87 (1824).

¹³⁹ *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869), is the first opinion in which the Court's majority discusses the doctrine. Within a few years, though, the Court was applying the rational-basis test even to acts of state legislatures challenged under the explicit prohibitions of Article I, § 10. *Antoni v. Greenhow*, 107 U.S. 769, 774-75 (1882); *Houston & T.C.R.R. v. Texas*, 177 U.S. 66, 89-90 (1900).

¹⁴⁰ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 269 (1827) (Washington, J.).

tion of the authority to declare laws unconstitutional in the first place. Judicial review rests on the propositions that the Constitution is the supreme law of the land; that it is the essence of judicial duty to determine what the law is in all cases and controversies presented for decision; and that, to perform this duty, judges must refuse to enforce those legislative and executive acts they find in conflict with the Constitution. If, however, judges do not decide for themselves whether a conflict exists, but attempt instead to determine the opinions of other reasoning men, they have not declared the law, but only what someone else might find it to be. If this be enough to perform their offices, it should also suffice for courts to eschew constitutional analysis altogether, and simply defer to the executive and legislative branches in all things. Indeed, a rigorous application of the reasonable-doubt doctrine would lead to the invalidity of no law ever being established, because *some* legislator, executive, administrator, or law-professor could always be found to assert this or that reason in its defense.

The rational-basis test, though, is hardly susceptible of rigorous application. Rather, it is a web of fallacies and self-contradictions. Holmes' dissent in *Lochner* is a prime example. Besides forgetting the Biblical injunction that "[t]hou shalt not follow the multitude to do evil, neither shalt thou yield in judgment to the opinion of the most part, to stray from the Truth[,]"¹⁴¹ Holmes neglected as well the very document he was supposed to be interpreting: the United States Constitution. "[A] Constitution is not intended," he explained in *Lochner*, "to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views"¹⁴² Note the several elements of confusion here: First, Holmes' reference to what "*a* Constitution" in the abstract "is intended" to do *according to Holmes*, without concern for what the *United States* Constitution specifically imports *according to its explicit language and history*. Second, Holmes' implicit definition of "paternalism and the organic relation of the citizen to the state" as an *economic*, rather than a *political*, theory. Apparently Holmes never considered that, if special-interest groups inside and outside government could invoke the rational-basis test to support mislabelled "economic" theories, they could radically transform Ameri-

¹⁴¹ *Exodus* 23:2.

¹⁴² 198 U.S. at 75-76 (Holmes, J., dissenting).

can politics, without meaningful judicial scrutiny.¹⁴³ Third, Holmes' assumption that the Constitution, far from embodying a consensus on fundamental principles, merely establishes a procedure whereby conflicting interest-groups struggle to enact their arbitrary opinions into law. Apparently Holmes was not conversant with the view of the Founders that unalienable individual rights

should be made the basis of every constitution; and if a people be so situated, or have such different opinions that they cannot agree in ascertaining and fixing them, it is a very strong argument against their attempting to form one entire society to live under one system of laws only.¹⁴⁴

Apparently he was equally unconversant with the Founders' desire to forefend the socially destructive machinations of factions,¹⁴⁵ or with the experiences they had had with majorities, heedless of the general welfare, enacting their aberrant economic opinions into law.¹⁴⁶

Again, in *Lochner* Holmes quipped that

a Constitution is not intended to embody a particular economic theory . . . the word liberty . . . is perverted when it is held to prevent the natural outcome of a dominant opinion, unless . . . a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles¹⁴⁷

But Holmes' supposed "rational and fair man" (lacking any social, economic, or political philosophy) and his "constitution" (equally devoid of any such preconceptions) are fantasies. And revealingly, Holmes, Brandeis, Stone, Hughes, Frankfurter, and others of the

¹⁴³ For an example of this process going on today in the area of public employment, see Vieira, "To Break and Control the Violence of Faction:" *the Challenge to Representative Government from Compulsory Public-Sector Collective Bargaining* (Foundation for Advancement of the Public Trust 1980).

The court has not been unmindful of the problem. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). But, never having understood the intimate interrelation between "economic" and "political" rights, it has taken only inconsistent action at best.

¹⁴⁴ R. Lee, Letters from the Federal Farmer No. 2, 9 Oct. 1787.

¹⁴⁵ E.g., THE FEDERALIST No. 10 (J. Madison).

¹⁴⁶ See, e.g., A. McLAUGHLIN, THE CONFEDERATION AND THE CONSTITUTION ch. ix-x (1905), for a discussion of how, prior to the Constitutional Convention in 1787, state legislatures controlled by farmer-debtors had enacted numerous anti-creditor measures; and how the prevalence of such class-based legislation influenced the movement for constitutional reform.

¹⁴⁷ 198 U.S. at 75-76 (Holmes, J., dissenting).

anti-*Lochner* school never applied their theory of constitutional "neutrality" with regard to social and economic theories to disallow the use of the "Brandeis brief" as an argument against the existence of constitutional limitations on legislative action.¹⁴⁸ Their "neutrality" was one-sided.¹⁴⁹

Moreover, their claim that the Constitution is neutral with regard to "social" and "economic theories" cannot withstand analysis. Now, whether there are natural rights, or whether their defense by Locke or other libertarians in the seventeenth and eighteenth centuries is cogent, is debatable. But that the Constitution, rightly or wrongly, guarantees such rights is beyond dispute. That being so, there must also be "social" and "economic rights" in so far as traditional natural rights guarantee freedom in those areas of human endeavor that the Holmesian school would label "social" and "economic."¹⁵⁰ To say, with Holmes, that there are *no* social or economic rights guaranteed against governmental abridgment is to say either: (i) that there are no natural individual rights that gov-

¹⁴⁸ Contrast *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 287, 294-95, 295 (1911):

The . . . report of the Commission . . . is based upon a most voluminous array of statistical tables, extracts from the works of philosophical writers and the industrial laws of many countries, all of which are designed to show that our own system of dealing with industrial accidents is economically, morally and legally unsound. Under our form of government, however, courts must regard all economic, philosophical and moral theories, attractive and desirable though they may be, as subordinate to the primary question whether they can be moulded into statutes without infringing upon the letter or spirit of our written constitutions.

In a government like ours theories of public good or necessity are often so plausible or sound as to command popular approval, but courts are not permitted to forget that law is the only chart by which the ship of state is to be guided.

¹⁴⁹ The exposure of Frankfurter as an activist for syndicalism, for example, has already begun. See Petro, *Injunctions and Labor Disputes: 1880-1932* (pt. 1), 14 WAKE FOREST L. REV. 341 (1978).

¹⁵⁰ One of the difficulties of the Holmes-Brandeis-Stone-Hughes-Frankfurter argument is its imprecise definitions of "social" and "economic rights," "theories," and "regulations." Throughout, the argument suggests that "economic" matters implicate only such market-phenomena as prices (including wage-rates), commercial contracts, and so on. But Holmes and his fellow-Justices certainly were aware that economic activities of this kind are not ends in themselves, but merely preconditions for or means to other ends. They are not somehow separate from other kinds of human action, but integral to it all, as Professors Gewirth and Pilon have shown earlier in this Symposium. And therefore, Holmes and his confreres must have understood that there is no category of merely economic activity that political institutions can control without affecting individual liberty in other areas. From this perspective, the Holmesian argument collapses to a panegyric for totalitarianism—against which, of course, there are no natural-law defenses by hypothesis.

ernment is bound to respect¹⁵¹—a position the history of the Constitution refutes; or (ii) that natural rights have no relation to social or economic interactions among men—a position self-evidently ridiculous. It may be that scrupulous enforcement of the natural rights the Founders recognized in the Constitution leads to a society not unlike that the champions of *laissez faire* envisioned. If so, it is a product of *political*, not economic, arrangements.

Other aspects of the rational-basis test are as defective as those upon which Holmes relied in *Lochner*. To Holmes and Brandeis, one of the great virtues of the rational-basis approach to social and economic regulations was that it permitted legislative "experimentation." Holmes adamantly opposed invoking the Constitution "to prevent the making of social experiments that an important part of the community desires . . . even though the experiments may seem futile or even noxious."¹⁵² And Brandeis warned that "[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. . . . [W]e must let our minds be bold."¹⁵³ Comments such as these suggest disquieting things about the psychological and political proclivities of the Justices.¹⁵⁴ Moreover, they expose a certain insensitivity to history. The very purpose of the Constitution, after all, was to free the American people from being "perpetually tormented with new experiments" in government.¹⁵⁵ And the Supreme Court has recognized that "[t]he principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."¹⁵⁶ "The Constitution was intended . . . to prevent experimentation with the fundamental rights of the individual."¹⁵⁷

And wisely so. "Experimentation," in the natural-scientific sense, is impossible in the field of social and economic action. The natural

¹⁵¹ Compare *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856), with *G. FITZHUGH, CANNIBALS ALL! OR, SLAVES WITHOUT MASTERS* (1856), quoted at note 70 and accompanying text *supra*.

¹⁵² *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

¹⁵³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁵⁴ See *Vieira*, *supra* note 130, at 593 & n.315.

¹⁵⁵ The Letters of "Agrippa" No. XVII, *supra* note 30.

¹⁵⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932).

¹⁵⁷ *Truax v. Corrigan*, 257 U.S. 312, 338 (1921). *Accord*, *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldbert, J., concurring).

sciences can experiment because they are able to "control" the subject-matter of their inquiries, to observe in the laboratory the consequences of changing a single, isolated element in the system under investigation. Every meaningful experimental observation refers to these isolated elements. "Facts" in the natural sciences are the causal relations discovered through controlled experiments. But in the field of social and economic activity, things are different.

Human experience is complex and historical in nature, the result of joint efforts by many individuals acting over time, together with the effects of natural circumstances beyond their knowledge and control. No one can manipulate the conditions of social interaction, isolate one causal factor from another, or observe the consequences of changing one factor *ceteris paribus*. For this reason, the interpretation of social and economic events depends, not upon experimentation, but upon theories independent of so-called "data." No one can explain complex, historical phenomena except by reference to abstract principles, logically antecedent to the facts that require analysis. Mere compilation of data cannot answer any question in the social and economic field, because (i) what constitutes relevant data is itself an issue soluble only by reference to pre-existent theories; and (ii) the selfsame data often appear to support contradictory explanations. Indeed, those who reject deductive reasoning in favor of what they believe is empiricism usually succeed only in enmeshing themselves in superstitions and myths that seem to fit the facts, but (in reality) are the products of logical fallacies.¹⁵⁸

The enthusiasm of Holmes and Brandeis for governmental "experimentation" in the social and economic field, then, was misplaced. Carried to its extreme, their thesis denies individuals any right to refute by discursive reasoning whatever scheme the political authorities put forward, no matter how "futile or . . . noxious,"¹⁵⁹ unsound in economic theory,¹⁶⁰ or logically inconsistent.¹⁶¹ Political "reformers" need only suggest what appears desirable to them, and everyone else is bound to submit himself to the reorganization of society according to the reformers' plan. Because the experiments can never prove the reformers correct, however, the process is scientifically nugatory; and dissenters lose their liberty and property in

¹⁵⁸ Various popular explanations for economic depressions are typical of the genre. See, e.g., M. ROTHBARD, *AMERICA'S GREAT DEPRESSION* chs. 1-3 (1963).

¹⁵⁹ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

¹⁶⁰ *Chicago, B. & Q.R.R. v. McGuire*, 219 U.S. 549, 569 (1911).

¹⁶¹ *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

exchange for nothing. In addition, futile, noxious, economically unsound, and logically inconsistent experimentation may irreversibly destroy our social, economic, and political systems. So, in sum, the Holmes-Brandeis thesis simply concedes to legislatures—controlled as experience teaches they often are by factions oblivious to the common good—sweeping powers to rearrange all social institutions by blindly and ignorantly interfering, now here, now there, in individuals' lives.

The point of the experimentation-doctrine is not difficult to grasp. If courts carefully analyzed legislative programs to determine whether a clear and convincing case exists in economic science for the rationality of those programs, and for their consistency with the public interest, few would pass muster.¹⁶² Therefore, if the judiciary is to cooperate in advancing social and economic rights, it has to drain legal analysis of economic science as much as possible, and to employ a positivistic theory of legislative power and judicial (non-) review that permits government to act on the basis of popular myths, superstitions, and beliefs. "Experimentation," as a name, does not signify the provisional nature of this or that particular act of governmental intervention. Rather, it connotes the limitless nature of governmental intentions in general: the willingness to tinker with anything and everything in social and economic life in order to "make things better" according to the value-judgments of politicians, *fonctionnaires*, and their special-interest constituencies.¹⁶³

The Holmes-Brandeis school also extolled the rational-basis approach to social and economic regulation because it supposedly takes cognizance of the "facts" underlying legislation.¹⁶⁴ Unfortunately, neither Brandeis nor Holmes apparently understood how facts relate to constitutional law.

Facts are elements of agreement that constitute the foundation for further argument. Therefore, prior to identifying facts, one must

¹⁶² For a classical case, compare the majority and dissenting opinions in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), in the light of R. POSNER, *ECONOMIC ANALYSIS OF LAW* 267-70 (1972).

¹⁶³ Cf., e.g., Summers, *Pragmatic Instrumentalism, America's Leading Theory of Law*, 5 CORNELL L. FORUM 15 (1978).

¹⁶⁴ "The determination of [constitutional] questions," wrote Brandeis in *Burns Baking Co. v. Bryan*, "involves an enquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot decide whether they were (or whether their measures are) unreasonable, arbitrary, or capricious. Knowledge is essential to understanding; and understanding should precede judging." 264 U.S. 504, 519-20 (1924) (Brandeis & Holmes, JJ., dissenting).

understand the dispute to which they are relevant. This casts in sharp relief one of the most serious problems with the analytical approach of the Holmes-Brandeis school: Was *Lochner*, for instance, a case that dealt with *social*, or *political*, facts—with whether some amount of daily labor above the legal maximum is arguably detrimental to the bakers' health, or whether denying bakers the freedom to work beyond the legal maximum is inconsistent with a constitutional concept of individual autonomy? If, as Holmes suggested, *Lochner* dealt only with such biological facts as the relationship between work and health,¹⁶⁵ and if legislatures may protect individuals against their own improvidence,¹⁶⁶ then perhaps the Court incorrectly questioned the legislative judgment that a maximum-hours law is a health-measure.¹⁶⁷ But if, contrary to Holmes, *Lochner* involved the political judgment that the Constitution denies legislatures the authority to interfere in certain ways with individuals' lives, no matter what the biological facts are, then Holmes' much-publicized dissent was irrelevant.

Under the rational-basis test, a social or economic regulation is constitutional if any state of facts that supports the regulation is conceivable. A fact, however, is not what one disputant might conceive—for some people are capable of conceiving anything—but instead what an honest individual, in possession of the knowledge extant at a particular time in history, cannot reasonably deny.

In almost all the rational-basis-test cases, however, the social facts *were* in issue, *not* undisputed, *not* incapable of rational denial. They were, therefore, not facts at all. But if they were not facts, what weight did they add, in the judicial scales, to the mere existence of the challenged regulation? What consequence of constitutional law can rationally flow from the existence of mere conjecture on the part of various individuals in regard to the effect of some legislative enactment? Indeed, if a legislature has power to act on the basis of unprovable conjecture, why need courts consider that

¹⁶⁵ Interestingly enough, in *Lochner* as in most of the other rational-basis-test cases, even the biological "facts" were not facts at all, but rather disputes between the parties. The Holmes-Brandeis school side-stepped this inconvenience by adopting the doctrine that legislatures may act on the basis of *beliefs* (mis-labelled "facts"), so long as those beliefs are not "unreasonable."

¹⁶⁶ Suggested by Holmes' reference in *Lochner* to the theory of "paternalism and the organic relation of the citizen to the state." 198 U.S. at 75 (Holmes, J., dissenting).

¹⁶⁷ The doctrine of "constitutional fact," however, suggests otherwise. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50-52 (1936); *Crowell v. Benson*, 285 U.S. 22, 54-60 (1932).

conjecture at all? Evidently, the facts to which the rational-basis test refers are really *artifacts*—rhetorical props and make-weights to rationalize the invocation of arbitrary power.

In sum, the rational-basis test is a compilation of positivistic fallacies that sets constitutional adjudication on its head. Instead of the judiciary demanding that government establish the rationality of those acts arguably infringing individual liberty, it requires the individual to prove the non- or irrationality of those acts: a hopeless task where the criterion of rationality is what a "reasonable man" *might* believe. Thus, in the area of social and economic regulation—which in principle embraces every activity of man in society—there is nothing government cannot do for politically influential groups, and to their political opponents. In short, the rational-basis test excises from the Constitution the Preamble's concern for the general welfare, eviscerates the Thirteenth and Fourteenth Amendments' implicit guarantees of freedom of contract, and extinguishes all private property. As long as it continues as a guiding doctrine of judicial review, unenumerated individual liberties are, for all practical purposes, non-existent in this country.

C. *Destruction of Enumerated Liberties Through the "Balancing Test"*

That the rational-basis test has destroyed the general constitutional guarantees of individual liberty and private property many self-styled "liberals" will concede. In defense, though, they argue that: (i) these guarantees, developed prior to the evolution of modern industrial society, are of little relevance today; (ii) to recognize them would preclude government from creating new social and economic rights necessary to the welfare of "workers," the "poor," "minorities," and other groups particularly needful of special political privileges; and (iii) in any event, the Supreme Court continues to protect "fundamental" enumerated rights, such as freedom of speech or immunity from invidious discrimination, that are more important than freedom of contract and kindred liberties. The problem with this line of reasoning is that, even if its first two branches were true, the third is not. For, under the "balancing test," the Court has largely eradicated even the enumerated rights that everyone takes for granted as the *sine qua non* of American constitutionalism.

The balancing test arose supposedly because the exercise of First Amendment freedoms of speech and association often involves con-

duct otherwise subject to governmental control.¹⁶⁸ Instead of developing principled definitions carefully distinguishing constitutionally protected from nonprotected conduct, however, the Supreme Court chose instead to fashion *ad hoc* “workable accommodations” between the exercise of governmental power and individuals’ constitutional immunities. Thus, the Court today sustains “incidental” impingements upon fundamental personal liberty if the challenged statute furthers a legitimate and “compelling” state aim;¹⁶⁹ if the governmental action in question has a demonstrably substantial rational relationship to that aim;¹⁷⁰ and if the regulation constitutes the least-restrictive means essential to attain the government’s interest.¹⁷¹

Particularly ominous in the balancing test is its recognition that, where the government employs the means least-restrictive of individual freedom to accomplish its end, it may abridge a fundamental liberty if the interest it seeks to achieve is “compelling”—in short, may do precisely what the Constitution explicitly forbids if its spokesmen adduce a reason that satisfies a majority of the Supreme Court. The balancing test, then, sets up as a fundamental premise of constitutional law the radically positivistic notion that the ephemeral decisions of society’s legislative and judicial agents are superior to society’s own long-term judgment as expressed in the nation’s organic law.

But then, with the steady infiltration of positivism into constitutional jurisprudence, courts have increasingly turned away from

¹⁶⁸ *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

¹⁶⁹ *E.g.*, *Shelton v. Tucker*, 364 U.S. 479, 486-87 & n. 7, 490 (1960) (public exposure of private associations an impermissible purpose); *Bates v. City of Little Rock*, 361 U.S. 516, 523, 526-27 & n.11 (1960) (impermissible to apply disclosure provisions of statute for purposes of harassment of legitimate private association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464-65 (1958) (disclosure of membership lists of private association not warranted where association offers to comply with corporate registration law); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963); *Craig v. Harney*, 331 U.S. 367, 376 (1947).

¹⁷⁰ *E.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne County*, 393 U.S. 175, 181 (1968); *Freedman v. Maryland*, 389 U.S. 51, 57 (1965); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546, 551 (1963); *NAACP v. Button*, 371 U.S. 415, 439-44 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27 (1960).

¹⁷¹ *E.g.*, *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Compare and contrast *United States v. Robel*, 369 U.S. 258, 267-68 (1967).

earlier theories of adjudication based on historical analysis and deductive legal reasoning and adopted "interest-balancing" instead. They have never explained, however, how this technique is consistent with constitutionalism. To be sure, individuals and groups have different, often conflicting interests; and law necessarily recognizes some interests rather than others. Yet this does not support interest-balancing as the basis for judicial review. To say that various interests compete for legal recognition is not to concede that all of these interests are legitimate, or (even if legitimate) are properly enforceable by law against dissenters. Moreover, some interests may be, as the framers of the Constitution evidently believed, *absolute*, in the sense that they are beyond "balancing" or other forms of compromise.

More specifically, modern interest-balancing purports to weigh governmental interests against supposedly conflicting individual interests. Inherent in this process, though, are certain question-begging assumptions about the thing called "government," and what its interests properly may be. Correctly to identify the interests of government requires definition of its nature. Government cannot properly have an interest, and especially a "compelling" interest, in *X* unless *X* is something that is in the nature of government to pursue under the United States Constitution. For example, government cannot have any interest in disarming law-abiding citizens, because its primary purpose is to protect those citizens from criminal aggression, whereas disarming them denies them self-protection in situations where the police cannot repel aggression. In short, balancing the purported interests of government against individuals' interests in constitutionally guaranteed liberties is premature—until the character, and limitations on the actions, of government have received constitutional definition.

Now, the process of constitutional definition leads immediately to a paradox. Where government is concerned, a "compelling" interest is one that "drive[s] or urge[s] with force, or irresistibly; . . . constrain[s]; oblige[s]; necessitate[s] . . . by . . . moral force."¹⁷² And the prime purpose of the Constitution is to oblige governmental officials, by the moral force of its provisions, to respect individual liberty. Yet the balancing test assumes that these officials can point to "compelling" reasons for doing exactly the opposite: or, that government may be driven to do what the funda-

¹⁷² WEBSTER'S NEW INTERNATIONAL DICTIONARY 544 (2d ed. unabrdg. 1934).

mental law constrains it not to do. The Supreme Court's balancing-test decisions, then, articulate the self-evident absurdity that our political institutions may rightfully pursue goals contradictory of the purpose of and sole justification for political institutions in the first instance.

Beside this, the balancing test is also legally and logically absurd. First, it asserts that an individual must acquiesce, in his private capacity, in the violation of his fundamental rights in order to exercise, in his public capacity, the power to achieve a "compelling" governmental interest. The test thus assumes that government must violate the law in some cases in order to function in others. It does not explain, though, how the sacrifice of any individual's liberty has any rational connexion with the protection or advancement of other people's freedom. Second, it assumes that courts must weigh the relative value of governmental interests and individual rights whenever the magistrates decide the two conflict. Yet, as a matter of constitutional logic, no such conflict can exist. If government exercises only its delegated powers, it cannot infringe individuals' rights; and if it purports to exercise powers not delegated, it necessarily exceeds its own authority, rendering its acts void. Governmental action can be rightful, in short, only if it consists with individual liberty. Therefore, balancing of governmental power versus individual liberty can never be appropriate in the American constitutional system, by hypothesis.¹⁷³

One need not be overly cynical to conclude that the real motivation for the balancing test finds its source, not in the Constitution, but rather in the desire of modern judges to promote the creation and expansion of social and economic rights they know cannot coexist with traditional conceptions of individual liberty. Judges, of course, are immune neither to the prejudices of our time nor to the apparent law of human action that every body of men invested with office are tenacious of power, and ever seek to extend it. What the Founders perhaps did not fully anticipate is that every extension of the powers of legislators and executives *vis-a-vis* individual citizens also extends the powers of courts, and the dignity and importance

¹⁷³ This, indeed, should be self-evident, since in each case the true balancing process cannot logically weigh the magistrates' interest in some statute or regulation against the individual's interest in exercising his guaranteed liberty, but instead should weigh the magistrates' interest, as agents for society, against society's interest in personal freedom. And, as Justice Black correctly noted, "the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Konigsberg v. State Bar*, 266 U.S. 36, 61 (1961) (Black, J., dissenting).

of judges. The more social and economic rights proliferate, the more judges will be importuned to exercise, or take upon themselves *sua sponte*, the power to intervene in conflicts between special-interest groups squabbling for political or economic privileges at society's expense. The balancing test is simply one of the devices they have invented to frustrate constitutional limitations on governmental action, including their own. It is a means by which judges can themselves exercise, or permit others to exercise, powers the Constitution withholds from political institutions, while at the same time appearing to perform their traditional judicial duties on behalf of individual liberty.¹⁷⁴

Originally, the test applied only to incidental infringements supported by a "compelling" interest achieved through the means least-restrictive of personal liberty. Piercing the veil of rhetoric, however, Justice Black warned of the "unlimited breadth and danger of the 'balancing test' as it is currently being applied."¹⁷⁵ Today, his foresight has been vindicated. For already we find courts prepared to balance abridgments of individual liberty against governmental interests that, far from being "compelling," are arguably illegitimate on their face.¹⁷⁶ And it is only a matter of time until the more "progressive" judges begin to argue that the balancing should be left entirely to the political process. Indeed, in *Dennis v. United States*, Justice Frankfurter provided them with a ready-made ra-

¹⁷⁴ [A]s a practical matter, . . . those who support the balancing test are the very same people who almost invariably find freedom to be outweighed in the balance. A test . . . the authority of which is almost never invoked except as justification for the suppression of freedom, would seem to be more of an excuse for a result already determined, than a meaningful tool to determine the result in the first place.

McAlister, *Labor, Liberalism and Majoritarian Democracy*, 31 *FORDHAM L. REV.* 661, 686 (1963) (footnote omitted).

¹⁷⁵ For him the question the court asked in every balancing case is not whether there has been an abridgment of [an individual's] right, not whether the abridgment of that right was intentional on the part of the Government, and not whether there is any other way in which the Government could accomplish a lawful aim without an invasion of the constitutionally guaranteed rights of the people. It is, rather, simply whether the Government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, in the opinion of a majority of th[e] Court, to justify the Government's action in doing so. This doctrine, to say the very least, is capable of being used to justify almost any action Government may wish to take to suppress [constitutional] freedom.

Scales v. United States, 367 U.S. 203, 262 (1961) (Black, J., dissenting).

¹⁷⁶ Contrast *Abood v. Board of Educ.*, 431 U.S. 209 (1977), with *Petro, Sovereignty and Compulsory Public-Sector Bargaining*, 10 *WAKE FOREST L. REV.* 25 (1974), and *Vieira, Are Public-Sector Unions Special Interest Political Parties?*, 27 *DEPAUL L. REV.* 293 (1978).

tionale.¹⁷⁷ Under this approach, of course, the Constitution as a check on political power would be no more, and radical majoritarianism would emerge triumphant—its only limitation being the impotent rational-basis test under which courts defer to legislative “findings” whenever “it might be thought that the particular legislative measure [is] a rational way to correct [some purported evil].”¹⁷⁸

In any event, continued employment of the balancing test is incompatible with the survival of our constitutional system: Long ago, wiser justices brusquely rejected the suggestion that, when “the infraction of the Constitution is slight,” “the courts may be trusted to see that the reduction [of guaranteed freedom] shall not be duly extended.” A constitutional question, they explained, cannot be decided “by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar but more serious infractions which might be conceived.” Any reduction in constitutional protections for individual freedom “is not to interpret that instrument but to disregard it.”¹⁷⁹

III. THE ASYLUM OF AVARICE AND AMBITION

A commonplace of political history is that democratic institutions have foundered, time and again, soon after special-interest groups learned to manipulate government so as to enrich themselves from the public treasury at their fellow-citizens’ expense. In the Constitution, the Founders sought to provide against this contingency through a system of checks and balances anchored in what they hoped would be a permanent popular respect for the principles of natural law. Yet they recognized that the new seat of the national government, “the ten mile square,” “would be the asylum of the base, idle, avaricious and ambitious.”¹⁸⁰ Their knowledge of history

¹⁷⁷ 341 U.S. 494, 517, 542, 525, 539-40 (1951) (Frankfurter, J., concurring). He argued that, in the “careful weighing of conflicting interests,” “[f]ull responsibility for the choice [of which interest is to prevail] cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.” Rather, “[p]rimary responsibility for adjusting the interests which compete . . . of necessity belongs to the [legislature].” “How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced . . . , but to be respected unless outside the pale of fair judgment.”

¹⁷⁸ *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

¹⁷⁹ *Patton v. United States*, 281 U.S. 276, 292 (1930).

¹⁸⁰ G. Clinton, *The Letters of “Cato,”* in *ESSAYS ON THE CONSTITUTION*, *supra* note 30, at 265.

and human nature led them to fear what might arise from

this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover¹⁸¹

Time has proven that their concerns were amply justified.

The denizens of the "ten mile square" perhaps always knew that special-interest groups are ever-ready to parasitize the community through state-action of one kind or another, when not thwarted by constitutional limitations. But in the last century they also discovered that a majority of ordinary people seem willing to trade their own and their fellow-citizens' liberties for the false security of governmental privileges, subsidies, and other political hand-outs—even though accompanied (as such gratuities from an absolute sovereign are always accompanied) by heavy regulatory "strings."¹⁸² Aided by the courts, and particularly by the intellectual and academic communities, they turned this knowledge to good account, gradually elaborating a system of positive law, centrally directed from the "political hive" of Washington, D.C., that in principle claims the power to control every aspect of human existence in the United States whenever the political process deems such control expedient.

To speak, then, of the United States Constitution *and* rights is misleading unless the statement emphasizes the disjointness between the two. For the Constitution, founded in natural law as an embodiment of and protection for individual rights, has been transformed into an instrument for the subordination of rights to an effectively unlimited government ruled—or, perhaps, *driven* is more descriptive—by the very passions the Founders most feared: avarice, ambition, and the love of power. Where these passions will carry this society, no one can foretell accurately—except that, if History teaches any lesson, it will not be to the fulfillment of those objects of government the Preamble to the Constitution catalogues.

¹⁸¹ Remarks of Thomas Tredwell, in the New York Convention, reported in 2 J. ELLIOT, *supra* note 4, at 402.

¹⁸² Compare G. GARRETT, *THE PEOPLE'S POTTAGE* (1953), with *Wickard v. Filburn*, 317 U.S. 111, 131 (1942) ("It is hardly lack of due process for the Government to regulate that which it subsidizes.").

IDEOLOGY AND HISTORY

David F. Forte*

Philosophical argument runs certain unavoidable risks in language, definition, logic, and presumptions. The practicing philosopher constantly struggles with these risks. Understandably, one may seek alternatives. One gambit often employed to avoid the pitfalls of philosophy is to pursue one's argument by means of history (presuming, of course, that history carries its imperatives into the present). Finding the prescriptive in the descriptive is, however, an even riskier business, for if the actuality and the ideology do not mesh, one or the other must give way. Such is the occurrence in the article by Dr. Edwin Vieira, Jr.

I do not dispute the philosophical validity of the theory of natural rights. Indeed, I support much, if not most, of the principles embodied in that theory. What I wish to discuss is that to which Dr. Vieira claims to have limited his discussion, *viz.*, the belief that history, specifically American constitutional history, provides a sufficient base to support a natural rights theory. His attempt to find historical support is an instructive example of how ideology can distort the data of history and cause it to be portrayed in a strange and unreal light. Beyond that, Vieira's historical method also weakens the logical framework of his argument.

In his introductory paragraph, Vieira eschews a defense of natural law on philosophical grounds: "[I]t is unnecessary to prove that those people who adopted the Constitution correctly assessed the relationship between rights and positive law" ¹ All Vieira shows in his article is that "in historical fact, the Constitution rests upon the principles of 'natural law,' " rather than legal positivism. ² Vieira seeks only to tell us what the framers believed and not whether their belief was justifiable. He excoriates Holmes and other justices whose opinions, he asserts, do not uphold the true content of the Constitution. For Vieira, because the Constitution is a law that contains principles of natural law, the Supreme Court justices

* Associate Professor of Law, Cleveland State University. I am grateful to Richard M. Lorenzo, Teaching Associate, Columbia School of Law, whose research paper, *Natural Law, Natural Rights and the United States Constitution* (unpublished, 1979) provided me with some valuable insights and data.

¹ Vieira, *Rights and the United States Constitution: The Declension from Natural Law to Legal Positivism*, 13 GA. L. REV. 1447 (1979).

² *Id.*

are bound to apply those principles. Clearly then, Vieira asserts the legitimacy of natural law, not based on a philosophical argument, but because it is found in the Constitution. That is to say, natural law is binding in America because it has been enacted into positive law, not because it is independently valid.³

There is always a danger in seeking to justify natural law solely by history. It should be remembered that the school of historicism in legal thought first began as an alternative to natural law. Indeed, the originators of the historical school had a dedicated antipathy to the natural law tradition.⁴ To use their tools in defending natural law is to risk self-contradiction in one's argument. In the case of Vieira's article, the author demands that the country observe the dictates of natural law not because they are valid and above all positive law, but because they have been enacted in the supreme positive law, *i.e.*, the Constitution. Thus, the legal validity of the norms of natural law rests, in the American case, on the positivistic theory of law, a theory which Vieira himself finds unacceptable. The basis on which the author asks us to accept the controlling authority of natural law is the very basis which he asserts is unauthoritative.⁵

There are further logical difficulties. Even if the author had not disparaged the positive law tradition, his attempt to co-opt positivism in the legitimization of natural law would remain self-defeating. If it turns out, upon historical investigation, that the framers did not enact the particular forms of natural law that Dr. Vieira suggests they did, then there is no justification for denying the validity of current, American positive legislation, no matter how much it may offend the imperatives of natural law. If, on the other hand, natural law has a transcendent authority, then the question of whether the framers emplaced natural law norms in the Constitution is irrelevant. A positive law gains no more authority by being in the Constitution. A natural law norm is no less valid because it is outside of the Constitution.

Dr. Vieira's argument could work only if he adopted the following structure: 1) the Constitution is a supreme law because it is the positivistic ground norm; 2) the ground norm, by reference, includes substantive norms drawn from the natural rights tradition; 3) sub-

³ This point was initially voiced at the symposium by Professor Lawrence Alexander of the University of San Diego School of Law.

⁴ C. Szladits, *European Legal Systems*, 54-57 (1972) (unpublished: Parker School of Foreign and Comparative Law, Columbia University).

⁵ Vieira, *supra* note 1, at 1469, 1493-94.

sequently enacted positive laws in contradiction to the above substantive norms are invalid, not because the later positive laws are at variance with natural law but because they are at variance with the formally higher positive law of the Constitution. Because Vieira rejects any legitimizing role for positive law, however, even this schema becomes unavailable to him.

I do not wish to suggest that history is unrelated to natural law. Natural lawyers frequently enlist history in their cause, despite the difficulties in bridging the descriptive-prescriptive gap. There are many ways in which history has been used to justify natural law: 1) natural law is a function of history; 2) natural law progressively works its way into existence through history; 3) history provides evidence of the universally felt injustices that occur when natural law is rejected; 4) conversely, history shows that societies are good when they follow natural law; or 5) history is a data source, giving evidence that certain similar fundamental values arise "naturally" in nearly all societies.

Vieira uses history for a different purpose. In his article, history becomes an argumentative tactic. Failing to convince positivists that natural law has an independent validity, one can try to trap the positivists using their own premises. By asserting that natural law is a fundamental positive law, the positivists are forced to accept the enacted precepts of natural law. That much makes sense. But then to suggest that the positivist must therefore accept the independent validity of natural law and *a fortiori* the invalidity of the theory of positive law is to play a logical shell game.

There are additional difficulties beyond the structure of such an argument. Vieira's search for an historical justification for the theory of natural rights becomes so single-minded that he excludes parallel values which also may be historically justifiable.

Vieira begins by arguing that natural law lay at the very base of the founders' view of the legitimacy of government and of law in general.⁶ This comment cannot review the rich and lengthy debate over whether natural law was merely a rhetorical device the revolutionaries used to unseat the establishment, or whether it was the substantive basis of their legal and political beliefs.⁷ Although still vigorously debated, it is fair to say that the evidence Vieira and others have marshalled makes a plausible, and for many, a

⁶ *Id.* at 1448-53.

⁷ Compare B. WRIGHT, *AMERICAN INTERPRETATION OF NATURAL LAW* (1931), with Ely, *Forward: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 22-25 (1978).

convincing case that natural law norms carried beyond the Revolution into the formation of the constitutional system in 1787-1791.⁸

Admittedly, the question still remains — what was the content and the extent of the natural law norms in the Constitution? It is a question of great difficulty. In the late 1780's, a number of intellectual movements began to modify the continuing concern with natural rights. For example, by 1787 Blackstone was in competition with Coke as the authoritative expositor of English law in America. Though most of the founders continued to prefer Coke, Blackstone was gaining in influence.⁹ Even though Blackstone nods to natural law as his legitimizing source, he finds in it no mechanism of limitation on the legislature, save its own conscience, and no right of disobedience to statutes contrary to natural law.¹⁰ Something of the Blackstonian influence is evident even in the limited Constitution of 1787. Although the framers granted only limited powers to the new central government, they explicitly declared that government supreme in its allotted sphere.¹¹

Nevertheless, it is incontestable that the framers sought to protect liberty and property by the structure of the Constitution, by its prohibitions, and later, by its list of rights. That, however, is not all that they were doing. There were other objectives, even other natural law norms, they sought to accomplish. When Vieira reaches the point in his argument where he must define the content of the constitutional natural law framework, he relies more heavily on the words of John Locke and somewhat less so on the specific definitions of contemporaneous observers.¹² Vieira limits his normative sources even further by focusing on that part of Locke that recognizes "only *defensive* powers in individual men."¹³ Vieira is partially correct, but at this point, a partially correct but limited reading of history skews our perspective of the Constitution.

First, Locke was not the sole natural law authority for the founding fathers. They also relied upon writers such as Grotius and Pufen-

⁸ See Henkin, *Constitutional Fathers—Constitutional Sons*, 60 MINN. L. REV. 1113 (1976).

⁹ McDonald, *A Founding Father's Library*, LITERATURE OF LIBERTY, Jan.-March 1978, at 11.

¹⁰ 1 W. BLACKSTONE, COMMENTARIES 42, 91 (1765).

¹¹ U.S. CONST., art. VI, c1.2. Blackstone was influential enough for a Supreme Court Justice to take his views far beyond the intention of the framers. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 398 (1798) (opinion by Iredell). Justice Chase in *obiter dictum* in the same case also went beyond the intention of the framers when he suggested that the federal judicial power could nullify state laws on the basis of natural law (though in his holding, he pulled back to the more solid ground of textual interpretation). *Id.* at 386.

¹² Vieira, *supra* note 1, at 1457.

¹³ *Id.*

dorf whose views of natural law envisaged not only immunities and rights but collective and enforceable obligations to the common weal.¹⁴ Vieira suggests the same when he writes: "Now, what distinguishes society from a mere agglomeration of men is that its members cooperate among themselves for their general benefit, rather than dividing into mutually hostile groups of aggressors and victims."¹⁵ Yet he neglects the communitarian factor that was prevalent in the minds of the framers and the ratifiers. The primary objective of the framers was to establish a government with enough powers to operate as the expression of the nation, but with sufficient limitations to prevent the government from becoming a threat to those that make up the nation. They did not perceive themselves as creating a civil society out of a collection of separated individuals, but as constructing a nation out of already existing groups and communities with often conflicting loyalties. Edmund Randolph wrote: "[W]e are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and *interwoven with* what we call the rights of states."¹⁶ Nearly all the internal compromises of the convention were motivated by the need to bring disparate regions and groups together in a setting where both tyranny was frustrated and cooperation could ensue. The framers thought they were operating on something more than a bare social contract. Even the desire to have men of property elected as representatives in the halls of Congress was motivated by the belief not merely of obvious self-interest, but also because such men were thought to be able to transcend sectionalism and operate in the interests of the larger community. In short, natural law not only imparted a basis of fundamental human rights and liberties that the new government was bound to observe, but it also informed the government of its communitarian nature and its obligations to individuals in their larger relational capacity. From that successful synthesis grew our sense of nationhood, once the flush of victory in the Revolution had passed. An important fact to remember is that the ratification debates centered over whether the quest for nationhood in the Constitution would restrict unduly the states and invade

¹⁴ McDonald, *supra* note 9, at 10-11. See, e.g. H. GROTIUS, *THE LAW OF WAR AND PEACE*, Prolegomena §§ 8-23 (1625). Locke himself emphasized the cooperative and social nature of man living under the rule of reason, though civil government was not a necessary mechanism to engender sociability. J. LOCKE, *OF CIVIL GOVERNMENT: SECOND TREATISE* §§ 15, 19 (1960).

¹⁵ Vieira, *supra* note 1, at 1461.

¹⁶ Quoted in B. WRIGHT, *supra* note 7, at 127 (emphasis in original).

the rights of the citizens. Once the federalists prevailed in the ratification battles, the nation as a whole rallied to the Constitution as a symbol of legitimacy and unity.¹⁷

Having asserted that the Constitution is solely a Lockean social compact designed to protect men in the defensive exercise of their rights, Vieira posits a most active enforcing role by the Supreme Court.¹⁸ He does not review the historical research of judicial review — that in itself would require an unwieldy digression — but the issue remains complex and controversial. Whether the framers or ratifiers intended the Supreme Court to have a negative over unconstitutional legislation today remains a matter of debate. Nearly all observers, however, have accepted judicial review either as compelled by history or by the logic of our constitutional structure.¹⁹ A more difficult issue is whether the Supreme Court has the power to strike down substantive Congressional legislation on the basis of a general rights theory rather than solely on the basis of the specific text of the Constitution.²⁰ Once again, however, a body of evidence supports Vieira's viewpoint, and it is unnecessary for him to reargue the entire controversy.

A far more difficult presumption that the author seems to embrace is that the Supreme Court had authority under the original Constitution to negative *state* legislation that regulated the state's own citizens and that violated their natural rights.²¹ Such a proposition flies against the very structure of the federal union. The only hints of such a power occur in cases brought on diversity of citizenship grounds where one state allegedly violated the rights of citizens of another state.²² In other words, the courts were concerned with the integrity of the federal structure rather than undermining it by interposing its power between state governments and the people who made up those governments. Even if we concede that the federal government was created as a narrow Lockean compact, there remain the vast residual powers left to the states. The colonies and the states had lived for a century and a half under charters that

¹⁷ See G. WOOD, *CONSENSUS AND CONTINUITY: 1776-1787*, at vii-xv (1958).

¹⁸ Vieira, *supra* note 1, at 1462-63.

¹⁹ See L. HAND, *THE BILL OF RIGHTS* (1958).

²⁰ Compare Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975), with Berger, *"Law of the Land" Reconsidered*, 74 *Nw. U. L. REV.* 1 (1979).

²¹ Vieira, *supra* note 1, at 1463.

²² L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 431-32 (1978).

granted their respective governments enormous substantive power.²³ Of course, the newly independent states also had constitutions imbued with many natural rights precepts, but this was a choice the people of the states had a right to make or to modify. Perhaps the founders expected the states to monitor their own citizens' enjoyment of natural rights. In any event, the founders left it to the people of the states to decide what kinds of limitations or what kinds of powers to vest in their respective governments.²⁴

We must not mistake Locke for history. The people of the United States were not living in a state of nature in 1787. The people had already organized into existing states and had at their pleasure vested these states with various powers. In the Constitution of 1787, the people did not take their rights and powers in an unorganized state of nature and grant a few enforcement powers to the central government. They merely took some powers *already in the states* (such as the power to control incoming and outgoing commerce) and gave those powers to the central government. A few powers were denied across the board to the states, but outside of that, all remaining powers, including the power to legislate for the general welfare, were left with the states. The eighteenth century values of natural rights never totally supplanted the seventeenth century American belief in a community held together by substantive values reflected in moral legislation. All the prohibitions against state action in the 1787 Constitution, even if given their most broad interpretation, do not turn pre-existing polities into Lockean compacts supervised by the federal Supreme Court. All of the state legislation restricting interstate commerce may have fallen of its own weight after the Constitution went into effect,²⁵ but virtually none of its police or moral legislation did so. In his attack on the Alien and Sedition Acts, Jefferson illustrated the sense of residual state power felt by most observers of the day.

Nor does the opinion of the unconstitutionality & consequent nullity of that remove all restraint from the overwhelming torrent of slander, which is confounding all vice and virtue. The power to do that is fully possessed by the several state legislatures While we deny that Congress have a right to con-

²³ See, e.g., The Mayflower Compact, in W. BRADFORD, PLYMOUTH PLANTATION 69 (Wish ed. 1967).

²⁴ U.S. CONST., amend. X.

²⁵ Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 226 (1824).

trol the freedom of the press, we have ever asserted the right of the states, and their exclusive right, to do so²⁶

It may be that residual police powers in the states and the Lockean theory of natural rights are mutually contradictory. It may be that the framers were inconsistent when they sought to protect liberty and property while still giving the central government enough power to act for the nation. But if we rely on history to define our legal values, however, we have to accept all of it, and not just the part we may like.

The Bill of Rights is of course an additional factor. Most scholarly opinion backs Chief Justice Marshall's view that the Bill of Rights was enforceable only against the federal government and not against the states.²⁷ Of course, the problem could be solved by an expansive reading of the privileges and immunities clause (or less justifiably, the due process clause) of the Fourteenth Amendment. That is the most hotly disputed issue in American legal scholarship today.²⁸ But Vieira mentions in his article neither the Fourteenth Amendment nor the historians that could support his cause. He confines himself to a discussion of the Thirteenth Amendment, which he terms the "most important."²⁹ The author suggests that the Amendment was designed to make enforceable against the states the entire gamut of Lockean natural rights, and attaches a number of statements by Congressmen at the time of its enactment (as well as a few non-contemporaneous statements) in support.³⁰ This becomes simply an issue of persuasion on the evidence. I find nothing in the text of the Thirteenth Amendment nor in Vieira's history of it to suggest that it was doing more than constitutionally correcting what had been a constitutional wrong, *viz.*, the reduction of human beings to chattels. The Amendment made freedom from being possessed as property an absolute right, but the evidence does not show that it and its enforcement legislation were designed to keep the states from regulating property or other relationships so long as the regulation was applied equally to all races.³¹ The objective of the Amendment

²⁶ VIII THE WRITINGS OF THOMAS JEFFERSON 310 (Ford ed. 1897), quoted in N. DOWLING & G. GUNTHER, CONSTITUTIONAL LAW 24 (8th ed. 1970).

²⁷ *Barton v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

²⁸ See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY (1977); C. FAIRMAN, RECONSTRUCTION AND REUNION (1972).

²⁹ Vieira, *supra* note 1, at 1469.

³⁰ *Id.* at 1469-74.

³¹ See The Civil Rights Act of 1866, 14 Stat. 27.

was to secure the freedman in the equal enjoyment of common law privileges, which was no mean accomplishment. To suggest that it was a vehicle for reducing the states into bare Lockean social compacts, however, seems to be unjustifiable.

According to Vieira, George Fitzhugh's intellectual defense of slavery represented slaveholding opinion best in the late antebellum period.³² That position is well-supported in the field.³³ Vieira's categorization of the late abolitionist debate as one of natural rights versus positivism hits the mark. The guarantee of emancipation of the Thirteenth Amendment is unquestionably a natural rights victory that no person should ever legally be the property of another. The earlier debate over slavery, however, was phrased more in terms of contending theories of natural rights. The Constitution which Vieira claims was designed for the protection of natural rights itself recognized and protected slavery.³⁴ Even James Madison believed that the abolition of slavery would deprive slaveowners of their natural right to property, something government was powerless to do.³⁵ This illustrates that the original Constitution was not unambiguous on the issue of natural rights. Even if we define the Constitution as a natural rights document, we find that the framers were unclear as to what were fundamental rights, such as whether one man could possess another as chattel.

Finally, Vieira does not shirk from applying his perception of American legal history to the Supreme Court. He heaps praise on the pre-1937 Court and rejects both the reasonable basis test used by the modern Court in judging economic legislation as well as the balancing test used in a large area of First Amendment adjudication.³⁶ If I understand the implications of his criticism, Vieira would have all economic legislation, by necessity both state and federal, subjected to strict scrutiny to determine whether the legislation furthered or hindered the defensive natural rights of individuals in our society. Similarly, it seems he would have the Supreme Court void even "incidental" restrictions on free speech. Not even the pre-1937 Court went as far as that. He leaves us with a vision of the Supreme Court rigorously enforcing an ideology of natural rights

³² Vieira, *supra* note 1, at 1466.

³³ See E. GENOVESE, *THE WORLD THE SLAVEHOLDERS MADE* (1969); W. JENKINS, *PRO-SLAVERY THOUGHT IN THE OLD SOUTH* (1935, 1960); B. WRIGHT, *supra* note 7, at 210-41.

³⁴ U.S. CONST., art. I, §§ 2, 9; art. IV, § 2; art. V.

³⁵ Lorenzo, *Natural Law, Natural Rights, and the United States Constitution* 29 n.182 (1979) (unpublished).

³⁶ Vieira, *supra* note 1, at 1480-99.

against all the political units of our federated and separated governmental structure. Obviously, when we see the massive amount of legislation that would require judicial annihilation, we have to conclude that, in practical effect, the political checks in the legislative and executive branches have failed and that the judicial arm must take on the prime responsibility for keeping us free.

Thus, Vieira gives us a picture of a governmental structure as far removed from the intentions of the framers as one can imagine. The independence of the states is gone. The political checks are unreliable. The ability to pass moral legislation is removed, and the nation is denied the option of developing economic and social mechanisms to contend with the problems of a modern technological society. We are brought to this impasse when we fail to see that this nation in 1789 and even in 1866 was a mix of values and structures. In the mix were some natural rights, some procedural rights inherited from the English, others developed in opposition to the English, residual state police powers, other natural law values of the communitarian sort, the ability of the federal government to act in a national capacity in many ways, and a healthy respect for a free people to govern themselves individually and corporately within a protective structure.

An ideological approach to history, even in pursuit of commendable values, is rarely ever successful. What is outside the ideology becomes by definition outside of reality, and such definitions cannot stand the test of experience. Since the Constitution remains quasi-sacred in our system, all of us are tempted to read into it our own theories of substantive law. Activist judges are often asked to emplace their deeply believed social theories into the Constitution and upon the shoulders of us all. We do ourselves no favor by adopting the same tactic for our own beliefs.

The Constitution goes a long way in protecting the procedural rights of the individual, and some substantive rights as well. The primary mechanism we have for removing the substantive excesses of government, however, is what it always has been: the political process. The founders placed most of their trust in the limiting structure of the political process and far less on external substantive prohibitions. To the extent that we can revivify the structures of separation of powers, delegated powers, and federalism, most of the problem of governmental excess can be undone. As for the rest, we shall simply have to rely on the wisdom and experience of a free people in the exercise of their democratic prerogatives.

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