

ON MORAL AND LEGAL JUSTIFICATION

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I. INTRODUCTION

I want to talk to you today about justification—as this process occurs in both moral and legal contexts. This is a large subject,¹ of course, so it may be well to begin by taking a few minutes to outline the course of the discussion. That done, I want then to say a few words about the connection between the moral and legal justificatory processes, which are more closely connected than the practicing lawyer is often given to believe. The lawyer quite understandably wants results; but law exists, and legal decisions are reached, for reasons (at least ordinarily), and reasons are justifications—sometimes legal, sometimes moral, which if accepted become legal. The connection between the legal and the moral and some of its ramifications need to be explicated, then, in order to give point to the more abstract discussion that follows. The third thing I want to do today is to try to indicate briefly just how difficult the justificatory undertaking is. Socrates was tried and convicted for corrupting the morals of the Athenian youth—that is, for helping them to see how little they knew, especially in matters ethical. I hope when I am through today that no one will pass me the hemlock, but at this point I probably should confess that in my substantive, as opposed to procedural, comments I will be urging a quite

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1. For useful discussions of moral justification, see L. BECKER, ON JUSTIFYING MORAL JUDGMENTS (1973); A. GEWIRTH, REASON AND MORALITY 1-47 (1978). On the legal side, see Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

substantial degree of moral skepticism. My primary focus today, however, will be upon procedural or methodological issues, upon such questions as "What would count as a satisfactory justification and why?" quite apart from what the justification may be serving to justify. Accordingly, it will be well to indicate fourthly my view about just what kind of an argument would ultimately justify moral and, in turn, legal conclusions, which I will set forth very briefly—in order to give focus to the critical remarks that follow—and then take up again toward the end, a bit more fully. Against this sketch, then, of what I will take to be necessary to an ultimately satisfactory justificatory argument, I will consider fifthly several approaches to justification that in my judgment have *not* been satisfactory. Coming under critical review here will be classical natural law, both in its theological and in its teleological variants; utilitarianism, whether classically formulated, or in its American garb of pragmatic instrumentalism; contemporary economic analysis of law, or "wealth maximization," especially in its Posnerian version, to which I will devote somewhat more attention; and finally, Rawlsian neo-Kantianism, which is a revival of social-contract theory. Finding each of these unsatisfactory, I will return sixthly to the procedural outline sketched in Part IV, which I will flesh out substantively. That substantive account, however, will be a mere skeleton, an outline of a theory of rights that I have developed elsewhere in greater detail. Finally, I will say a few words about the central place of such a theory in law, but also about the need to supplement it, on occasion, with other moral principles, principles taken from the theory of good, however illusive their justificatory foundations may be.

So much, in outline, for the course of the discussion. By now, I trust, you will see why an initial overview is helpful. The subject of justification has many parts, each of which is a treatise in itself, but all of which should be assembled in order to give an adequate view of the whole. I regret that we will not have time today for some of the more interesting detail. At times, in fact, this discussion may seem a little like a trip through the Louvre on roller skates.

II. LAW AND MORALITY

Let me turn, then, to the connection between law and ethics—and indeed, to the question whether there is any such connection. At least since the 19th century work of John Austin, a large part of Anglo-American jurisprudential thought has discerned little connection at all between law and morality. "The existence of law is one thing," intoned

Austin, "its merit or demerit is another."² As a point of strict empiricism, the legal positivists, I suggest, have been largely correct. For the distinction between what the law is and whether that law is good or right is as sound and useful as the distinction between science and ethics—the preservation of which, incidentally, served as a substantial impetus to the positivist undertaking. Nevertheless, the edges of the thesis are rough, and the core of the issue is richer than the more primitive positivist accounts have admitted. There is the recurrent problem, for example, of unclarity in the law. Do corporate lawyers owe their duty to the officers, to the directors, to the shareholders, or to the public in the form of the SEC?³ More than one lawyer who has looked Rule 10b-5 in the eye has come away wondering whether there might be a surer way to ply his trade. But if the question of uncertain law, and indeed uncertain legal ethics, requires our turning to extra-legal considerations by way of clarification, so too does the larger question of judge-made law, which in being thus "found" raises a whole host of complex issues resting at the intersection of law and ethics. Again, there are antiquated laws, or legal interpretations in flux, and even, on occasion, uprisings, revolutions, and other such fundamental shifts in law, all of which bring us to the core issue that positivism sometimes elides, namely, that while a social scientist wants, to be sure, to separate his science from his ethics, there is nevertheless a connection between law and ethics insofar as law is ordinarily the encoding, with sanctions, of some ethical system. Law, or at least a substantial part of law, is command, but command for some purpose or with some reason standing behind it, which serves to give it point, and indeed purports to justify it. Whether up against the uncertainty of law, then, or when reflecting more broadly upon the point of law in general, and indeed of his activities, the lawyer has reason to be interested in the question of justification.

By his training, however, and perhaps even more by the constraints and history of his discipline, the lawyer, I suggest, is too little encouraged to reflect upon these deeper issues. The authority of precedent looms large in his vision—and well it should, for in the age-old struggle between certainty and justice, there is much to be said for the former. Nevertheless, to the philosopher, the argument from authority is of little moment, so much so that it has by long tradition been dubbed the fallacy of *argumentum ad vericundium*. That something has

2. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (Library of Ideas ed. 1954) (1st ed. n.p. 1832).

3. See Solomon, *The Corporate Lawyer's Dilemma*, FORTUNE, Nov. 5, 1979, at 138, 138-40.

always been the case—which of course is not the case, for all precedent originated at some point or other—is neither here nor there to the question whether it should continue to be the case. This applies not only to statutes but to case law as well; and it applies even to grand documents of long-standing, such as constitutions. To be sure, such documents tend more to capture the wisdom of the ages than do the statutes of the moment. But constitutional positivism, no less than the more ordinary appeals to authority, is to be eschewed as an ultimate justificatory appeal. Thus it is that Edward Corwin could entitle a book *The "Higher Law" Background of American Constitutional Law*, indicating by this that his reverence for that document, which I share in substantial measure, was not per se but was rooted instead in its reflection of deeper, more determinate matters of principle.

III. SOME JUSTIFICATORY PROBLEMS

The justification of a particular law or decision, then, will have to appeal to increasingly broader or deeper considerations if it is to be ultimately satisfying as a justification. This brings us, however, to my third concern, to indicate how difficult the justificatory undertaking is, and to the first of the substantive points I want to make on that subject, namely, that a justificatory argument, though it must go to the heart of the matter to be adequate, must also stop somewhere. An argument that leads to an infinite regress of reason-giving is little better than one that stops too soon, as most justificatory arguments do. But where to stop? Appeals to facts, which may be incontrovertibly true, are tempting, and accordingly are common; but it was David Hume who advised us over two centuries ago that all the facts in the world will not serve to generate a normative conclusion, that the gap between what *is* the case and what *ought* to be the case is logically unbridgeable. Not that philosophers since, starting with Kant, have not made mighty efforts to do so; but they have ended ordinarily by assuming—covertly, to be sure—the normative conclusions they wanted to prove, and hence have ended in circularity. This points, then, to a third difficulty the justificatory enterprise confronts: when it begins not with facts but by appealing to normative considerations, such as values, it can end with an argument no more sound than the argument for the normative considerations with which it begins. The argument for the normative conclusion, that is, turns ultimately upon the argument for the normative premises. And ultimate appeals to values, for example, are notorious: those who share your values of necessity must share the conclusions they logically

entail; those who do not share your values are immune to your conclusions.

The problems confronting moral cognitivism, then, are very real. The question, that is, whether our moral judgments are true or false, or even *capable* of being true or false, has vexed the best minds in ethics for over two centuries now, leading many to moral skepticism—whose roots are in antiquity—and to the emotivist and prescriptivist doctrines that emerged from the Vienna Circle in the twenties and thirties of our own century.⁴ Those doctrines held, in brief, that the function of ethical judgments was to express our emotions, and to encourage others, or prescribe what they should do, but not to express truths about the world. Thus the justificatory enterprise was cut off at its roots: at best we could hope to show others that our views were “correct,” but the force of “correct” was merely hortatory or persuasive, not determinative in any deeper sense.

Let me suggest, however, that these conclusions, unsatisfactory as they seemed to many at the time, and continue to seem to many today, are nevertheless pointing in a fruitful direction. On one hand, we have to admit that the “truths” of ethics, if there are such, are not at all like the truths of science, testable in the world, rooted in the real, intersubjectively verifiable phenomena of the world—which are “kickable,” to put the point in Johnsonian finality. But on the other hand, these skeptical arguments have pointed to the persuasive character of ethical judgments, where will be found, I submit, the seeds for an ultimately more satisfying account of justification. This brings me, then, to my fourth concern, to sketch briefly just what such an account would look like, at least in its formal structure, which will serve as background for the critical remarks I will launch into in a moment.

IV. THE FORMAL CHARACTER OF JUSTIFICATION

The sketch of a more satisfying account must begin, I believe, by noting two senses of “persuade,” or better, two foundations for the persuasive—one seated in the sentiments, the other in reason. The appeal to values mentioned earlier, for example, is an attempt to persuade one’s interlocutor of the rightness of one’s judgment based upon his sharing with you a set of common values. Again, if those values are in fact shared, then the persuasion will likely succeed. When they are not, however, then the discussion will end, as so many ethical discussions

4. See, e.g., A. AYER, *LANGUAGE, TRUTH AND LOGIC* (2d ed. 1948); R. HARE, *THE LANGUAGE OF MORALS* (1952); C. STEVENSON, *ETHICS AND LANGUAGE* (1944).

do, in disagreement, in a failure to persuade. It is no accident that liberals, conservatives, marxists, religious believers, atheists, elitists, egalitarians, and on and on so often fail to agree, for they subscribe so often to such different sets of values, whether as ends or as means. Persuasion rooted in reason, however, is on a rather different, and better footing. I refer here not to the "reason" that is a disguised form of sentiment or value, as in "reasonable" ends or means—that is, ends or means I think "good"—or as in general descriptions of "reasonableness" or "reasonable men," which are appeals to practices or qualities thought valuable. Nor do I refer really to "reason" in its empirical usage—to the careful discernment and assemblage of the data of the senses. Rather, I have in mind the reason of logic, where certain conclusions are true or false quite independent of our arbitrary wants or preferences in the matter. Whatever we may feel about it, " p or q " follows from " p and q " more surely even than night follows from day. And as Aristotle demonstrated in Book IV, chapter 4 of the *Metaphysics*, those who attempt to deny the law of contradiction end only by affirming that law; if their denial is to be at all meaningful, that is, they must assert that denial and not the contradictory—hence it only affirms the law of contradiction. In order to be rational, then, in the sense of coherent, it is not possible to reject these conclusions; whatever one feels about these arguments it is not possible not to accept them, not to be rationally persuaded by them, on pain of self-contradiction.

Can a similar kind of argument be developed for ethics, or at least for a realm of ethical judgments? I believe it can; in particular, I believe that the theory of rights can be given the kind of rational support I have adumbrated here, such that those who deny the existence of certain rights can be shown to contradict themselves. Thus by a *reductio ad absurdum* their denial will be shown to be false, and hence its negation true. Let me restate that: if one's interlocutor denies that certain rights exist, and it can be shown that in doing so he contradicts himself, then by a *reductio ad absurdum* form of argument, his denial is false, its negation is true, hence it is not the case that these rights do not exist. This, in brief, is the *form* an ultimately satisfying justificatory argument must take. As I said at the outset, I will sketch the barest outline of such an argument shortly; it is enough for the moment to have indicated its form, and the problems it must overcome.

To summarize, if a justification is to be ultimately satisfying it must persuade—that is, others must accept it—from canons of reason; for these, unlike the various values to which we may or may not subscribe, will force our acceptance, making it thus necessary, making the

justification ineluctable. This does not mean the argument will necessarily persuade in the hortatory sense, that men will be moved to action by it: indeed, it has often been remarked that reason is among the faintest of men's passions. But the justificatory in the deep sense I have indicated here has to be clearly distinguished from the hortatory. In the courtroom in particular, the reason that underpins what is right has to be kept distinct from the reasons that move men's passions.

V. TRADITIONAL ARGUMENTS

Against this background, then, how do various of the justificatory approaches that are common to the law fare? I shall argue, again, that none of them—from natural law, to utilitarianism, to pragmatism, to economic analysis, to contractarianism—has ultimately succeeded. In the time that I have today, however, my arguments will be less than complete—more suggestive than dispositive.

Natural law, for example, has had two principal versions, though many variations upon these. The argument from theological considerations—for example, that law is the command of God, or that individual rights are endowed by God—will succeed only insofar as the background argument succeeds. This version of natural law has the unfortunate result, that is, that the argument for ethical conclusions is made to depend upon considerations that in general have generated less agreement than the ethical conclusions themselves. The believer and nonbeliever alike may agree about the wrongness of murder; but that agreement will not be a function of their further agreement about matters theological. The second line of argument common to natural law thinkers stems from antiquity, from the teleological view that man has certain natural ends the realization of which it is the function of law to enhance. St. Thomas Aquinas argued, for example, that man is a social animal who desires to live in common with other men in order to satisfy his needs and wants and so he ought to cooperate with these others for his own, their, and hence the common good. This kind of argument has been persuasive to many, of course, for it appeals to certain general features of the human condition. But it depends, again, upon our sharing the values at issue, and not all do; moreover, even if "the ends of man" can be made sense of and those ends are widely shared—and the more ambitious this conception becomes the less it is accepted—from these facts there logically follow no normative conclusions. The argument from "is" to "ought" was straightforward above, as it is in the natural rights version of natural law as set forth by Locke, to wit: "And Reason, which is [the Law of Nature], teaches all Man-

kind, who will but consult it, that *being* all equal and independent, no one *ought* to harm another in his Life, Health, Liberty, or Possessions."⁵ However much we may subscribe to those conclusions—and a look at contemporary law will indicate that we do not entirely do so—they will not follow from that premise of equality.

But if natural law, at least in its traditional form, does not fare well as a justificatory argument, utilitarianism fares even worse, notwithstanding the hold it has had on the Anglo-American legal and philosophical mind over the past two centuries. Perhaps this doctrine, which holds that an act, or decision, or law, or policy is justified insofar as it produces or tends to produce the greatest good for the greatest number, owes its success to its having arisen at the same time that democracy was gaining currency, for to many the two views are closely connected. The majority, through the popular franchise and hence the machinery of the state, will will its own good, and thus will the measures it wills be justified. Although this view never withstood serious scrutiny, it continued nonetheless to survive, and even prosper. In the past decade, however, it has come under increasing attack, especially since the appearance of Rawls' *A Theory of Justice*, so much so that a simple mention of its problems should suffice here. There is first the question how the values of some, albeit a majority, serve to warrant the imposition of those values upon the rest, who do not share them, or may share them but may not wish to have them imposed upon others. The individual, that is, seems to drop out, or get lost, in the utilitarian calculus. Some people seem to think that individuals, in their separateness, count for something per se; they may be wrong, of course, but the burden of justification would seem to rest with those imposing the policies, not with those upon whom they are imposed. Moreover, even if some argument could be put forth to show why the will of the majority must prevail, especially in areas in which a *public* will is dubiously asserted at all, there seems to be no method by which to determine what will in fact bring about the greatest good, or happiness, or pleasure, or whatever—unless we assume, of course, that the preferences themselves provide that calculus. Again, if such a calculation could be arrived at, the most monstrous acts would seem to be justified, as has often been noted: why not dispose of a few well-to-do people and disperse their assets if this would indeed increase the general welfare?

The list of objections goes on and on, and applies with equal force, *mutatis mutandis*, to the uniquely American version of utilitarianism,

5. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT § 6, at 289 (Laslett ed. 1960) (emphasis added).

which Professor Robert Summers has dubbed "pragmatic instrumentalism."⁶ This is the social engineering approach to law, as captured, with variations, in the works of Holmes, Dewey, Llewellyn, and Pound, to name but a few. Increasingly influenced in this century by the social sciences, this is a view that treats law as an instrument to bring about social ends. Their pragmatic interest in getting things done, however, has tended to keep these lawyers from rising to the theoretical heights of their English and continental counterparts—the engineer, after all, is not the theoretical physicist. And their goals, accordingly, have tended to be more directed—from minimum wage, to TVA, to no-fault insurance, and so on.

Once again, however, the justifications, when made explicit, take their force from the goals sought. This is policy science; if you do not agree with the policy or the goals, if your homestead, for example, happens to be in the flood plain of the Tellico-Dam project, then you have simply found yourself on the wrong side of progress. Society is a collective actor, seeking to realize "its" goals.

Not unexpectedly, pragmatic instrumentalism, or at least a strain of that orientation, taking its cue increasingly from the social sciences, has reached its fruition in the most sophisticated of those sciences, modern economics, though with results often quite different from those originally envisioned. I refer, of course, to the emergence over the past twenty years of the economic analysis of law, emanating in large measure from my alma mater, Chicago, but carried on extensively as well at such places as Rochester, V.P.I., Miami, and U.C.L.A. In its descriptive aspect, this research has done much to illuminate our understanding of human behavior in various legal and economic contexts. It has shown us a great deal, that is, about what will happen when we do various things with law. In this capacity, the economic analysis of law has contributed significantly toward debunking the assumptions of the earlier instrumentalists, who seemed at times to believe that the ends the law might serve were without limit. People are rational maximizers, the economists have shown us; impede that drive in one dimension and they will find others in which to exercise it, producing effects unintended, and often worse than the original source of malaise. Thus the limits of instrumentalism, and the observation that those governments that have sought to secure liberty rather than equality have invariably done better by equality than those governments that have sought the reverse.

6. Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L. F. 15 (1978).

But the economic analysis of law has a normative side as well, which has been explicated most prolifically, perhaps, by Richard Posner, most recently and most philosophically in an article entitled "Utilitarianism, Economics, and Legal Theory," which appeared in *The Journal of Legal Studies* of January last. Posner is at some pains in this essay to distance his theory, which he calls "wealth maximization," from utilitarianism, which in his earlier work he had failed to do.⁷ Utilitarianism and economics are *not* the same thing, he now argues; moreover, "the economic norm I call 'wealth maximization' provides a firmer basis for a normative theory of law than does utilitarianism,"⁸ and indeed, he continues, "economic analysis has some claim to being regarded as a coherent and attractive basis for ethical judgments."⁹ On what does Posner found these claims? In truth, he believes that no ethical theory can really be validated, but that a theory can be rejected on any of three grounds: formal inadequacy; its yielding of "precepts sharply contrary to widely shared ethical intuitions"; and what might be called a "success" criterion, namely, that "a society which adopted the theory would not survive in competition with societies following competing theories."¹⁰ Only the second of these criteria is treated in his discussion, however, and even here Posner grants that the ethical intuitions test "may seem subjective and circular."¹¹ Nevertheless, he concludes, "a system of rights or entitlements can be deduced from the goal of wealth maximization itself,"¹² which Posner believes is and ought to be the goal of the legal system. Stated less cautiously, perhaps, though more revealingly, that goal is "to maximize the society's wealth."¹³

I have struggled here to piece together from Posner's discussion a coherent justificatory argument. In truth, I sense no real grasp in Posner's work of what it means to *justify* a conclusion, other than to appeal to shared ethical intuitions. But even if that criterion *did* serve to justify, it is hardly met by the examples of wealth maximization he often adduces. He is critical of utilitarianism, for example, and rightly so, for its inability, in seeking to maximize happiness or pleasure, to distin-

7. Indeed, he had earlier argued that "we [he and his colleagues in the economic analysis of law] will eventually develop a utilitarian theory of justice." Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).

8. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

9. *Id.* at 110.

10. *Id.*

11. *Id.* at 111.

12. *Id.* at 135.

13. *Id.*

guish between, say, human pleasure and the pleasure of sheep. Thus he criticizes the utilitarian philosopher J.J.C. Smart, who would hold, Posner believes, that "a driver who swerved to avoid two sheep and deliberately killed a child could not be considered a bad man, since his action may have increased the amount of happiness in the world."¹⁴ Posner's approach is not plagued by these difficulties because wealth, presumably, is nothing to a sheep, whereas pleasure might be. The goal of maximizing wealth, however, leads Posner to the following argument:

[L]et there be 100,000 sheep worth in the aggregate more than any money value that can reasonably be ascribed to the child; must not the economist regard the driver as a good man, or at least not a bad man, when he decides to sacrifice the child? My answer is yes. . . .¹⁵

Now to my mind, at least, that is not the answer that reflects our "shared ethical intuitions" on the matter. This conclusion follows, however, from the goal of wealth maximization.

Consider also the wealth maximization treatment of nuisance, which is where this view has achieved perhaps its greatest notoriety. If a polluting factory causes residential property values to drop by \$2 million, but it would cost the factory \$3 million to relocate (the only way to eliminate the pollution), then Posner contends that wealth maximization requires the factory to prevail in a nuisance action brought by the homeowners. Never mind that the factory is causing the harm to the homeowners, not the other way around—which surely is *a* if not *the* common-sense intuition on the matter. Buttressed by a Coasean theory of "reciprocal causation,"¹⁶ which purports to dispose of the common-sense view, wealth maximization is the determining premise. Wealth maximization does, then, determine the distribution of rights: those who value the property most, measured economically, have the right to it. Indeed, if the homeowners had been wealthier, Posner notes, thus making *their* losses greater, *they* should prevail over the factory.

In this, and in many other areas, such as the hypothetical-market

14. *Id.* at 112.

15. *Id.* at 133. Posner continues by arguing that "the same answer is given all the time in our (and every other) society. Dangerous activities are regularly permitted on the basis of a judgment that the costs of avoiding the danger exceed the costs to the victims. Only the fanatic refuses to trade off lives for property. . . ." *Id.* What Posner is doing here, clearly, is equating acts with a low probability of harm to others, which we permit, with acts with a probability approaching one that others will be harmed, which are never permitted simply on grounds of wealth maximization. There is all the difference in the world, that is, between *accidentally* harming another and *intentionally* doing so, which is what Posner is defending in his example; the economists' tools, however, do not lend themselves well to drawing this distinction.

16. See, e.g., Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 164 (1973).

approach to tort liability, where the costs of accident *prevention* are used to determine the rules of *liability*,¹⁷ the economic analysis of law leaves much to be desired, especially insofar as it views itself as a normative system. For it is plagued, in the end, by the same difficulties that plague any consequentialist theory, of which it and utilitarianism are the two principal examples current today. Rooted in value theory, consequentialism requires, at bottom, that the values at issue be shared by all; otherwise it will not be universally acceptable and hence ultimately satisfying as a justificatory theory. What do the homeowners or the child in the above examples care about the maximization of the wealth of society—when that goal is achieved at their expense?

Let me turn finally to contract theory, which comes closer to the justificatory ideal set forth earlier than any of the theories thus far discussed. In the micro context, in fact, contract theory *does* serve to justify rights and obligations and hence a normative relationship between the parties to a contract. For the acceptance of the parties *just is* the sufficient justificatory argument: indeed, it is what creates the respective rights and obligations, which before the acceptance did not exist.

Social-contract theory, then, which is contract theory writ large, aims not simply at developing a set of rules by which society might be governed; more fundamentally, its aim has been to lend *legitimacy* to the rules by pointing to the consent that can do this. The legitimacy of the rules, that is, is rooted not in their content but simply in the fact that they have been agreed to, just as in ordinary contract theory—before the rise, that is, of doctrines of substantive unconscionability. Nevertheless, a connection between consent and content has not been altogether lacking; for in the absence of actual, bona fide consent, the kind that in the ordinary contractual case would be enforceable in a court of law, which the social-contract theorists cannot of course point to, the trick has been to devise rules that *would* be agreed to, unanimously, if we had all met in some grand primordial field to cast our ballots. This, in fact, was part of the Rawlsian insight, and part of his

17. Thus Posner argues, by way of evidence that the economic approach conforms to our ethical intuitions, that

[t]he careless accident is sharply distinguished by the ordinary man, as by the judge applying the negligence rule and the economist explicating it, from the "unavoidable accident" which could not have been *prevented* at a cost less than the expected accident cost. This important moral distinction is obscured in the jurisprudence of Kantians like Richard Epstein and George Fletcher, who think the *prima facie liability* for *carelessly* and *unavoidably* inflicting injury should be the same.

Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 133 (1979) (emphasis added). In other words, when the accident was "unavoidable" (read: too costly for the actor to prevent), let the victim bear the losses. Thus, our ethical intuitions!

reason for having us vote behind a veil of ignorance with respect to our draw in the natural lottery of life.

The merit of this approach, then, is that it aims to be purely deontological. Unlike with consequentialist theories, that is, there purport to be no fundamental appeals to values; the rules defining the rights and obligations of individuals are justified *not* because of their content but purely and simply because they have been agreed to. Moreover, no benevolent and hence question-begging sentiments need be appealed to. Rational maximizers, pursuing their own ends, would agree to these rules; if they would, then that consent will serve to justify the rules. The *difficulty* with this approach, however, is that no one has yet been able to make a convincing case about what rules *would* be agreed upon. The Rawlsian individual, for example, is highly risk-averse, preferring to trade a good deal of liberty for greater security. Even behind a veil of ignorance, many of us might prefer to take our chances, believing that the fun and point of life is in the struggle, not in having the goods distributed to us. To put the point in the earlier terminology, Rawls has given no argument to show that we *must* accept his conclusions; he has shown only that we would be *prudent* to accept them, which is to introduce a value consideration into his otherwise deontological approach, a conception of "prudence" that we may not all share.

VI. THE THEORY OF RIGHTS

Are we left then with skepticism? Can we say nothing to the murderer, the rapist, or the robber, other than that his values seem to be different from our own, but who are we to judge? Moral skepticism and moral relativism are as unappealing as moral overreaching, but can they be countered? I believe they can, with substantive arguments that flesh out the formal approach outlined earlier. Quite simply, what we can say to the murderer, the rapist, and the robber is that in involving us involuntarily in a transaction with him, he himself is acting voluntarily and for purposes which seem to him good, which he is claiming implicitly as rights for himself in that his purposes justify his acts to him. In acting conatively, that is, he is implicitly claiming to have rights to act voluntarily and purposively, which are the generic features that characterize action as such and hence that *necessarily* characterize it. Because he necessarily accepts these right-claims which are rooted in action for himself, he must accept the implication that every other actor and hence everyone else has these same rights, or else he will contradict the claims he necessarily makes for himself. Thus he must accept that others have the same rights he necessarily claims, to

act voluntarily and purposively and hence not to be coerced by others by being involuntarily involved in transactions with them.

In the barest of summaries, this is a substantive argument that will satisfy the formal requirements that were outlined earlier for an adequate justification. The argument appeals to the normative claims implicitly but necessarily contained in action itself, which the actor must accept in his own case, and to the logical implications of those claims as those implications apply to others, which the actor will deny only on pain of self-contradiction. It is an argument that has been developed in great detail in recent years by my teacher at Chicago, Alan Gewirth—in particular, in his recently published *Reason and Morality*.

In applying or interpreting his argument to particular contexts, however, I believe that Gewirth has very much overextended it, generating conclusions that cannot be justified, which is where my own work comes in.¹⁸ Again very briefly, rights are generated from human action, which is the basic subject of ethics in the sense that ethical rules function to direct action; they are generated from the conative and normative structure of action, from the generic features that necessarily and inescapably characterize our action. But the actions from which rights are generated are *our* actions, and the generic features are *ours* as well: property claims, that is, are already inherent, if only inchoately, in our action—in particular, the property we possess in our person and our actions, which distinguish us from others and their actions.¹⁹ What these right-claims amount to, then, is a right to that separateness, and in particular to that freedom from coercion or interference that forced association involves. Our basic right, then, is a right to our separate lives, to the noninterference that characterizes our voluntary actions. This right characterizes, in fact, the whole realm of general relationships, which are the relationships the common law treats as holding between strangers. The right to noninterference, then, entails the right to be left alone or the right to quiet enjoyment, the right to act provided those acts do not interfere with others, and the right to interact with others provided they have consented. Exercising these rights, which are property claims in themselves, individuals can generate property claims in the world, and can enter into the many voluntary associations that constitute special relationships—contracts, associations, marriages,

18. See, e.g., Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245 (1979); R. Pilon, *A Theory of Rights: Toward Limited Government* (1979) (Ph.D. diss., University of Chicago).

19. I have developed the property foundations of rights in Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979).

and so forth. The special rights and obligations that define these special relationships are simply those rights and obligations that have been agreed to. But in acting, individuals may also create forced associations, by committing torts or crimes; here the special rights and obligations created are simply those required to rectify the wrong, to return the victim to the prior state of noninterference that defined the rightful relationship.

In barest outline, then, this is the world of moral rights, which can be justified by being derived from certain necessary but normative features of human action: rights to noninterference, defined with reference to the property foundations of our action and the taking of that property; rights to voluntary association, those associations defined by the terms agreed upon; and rights to rectification if involuntarily involved in an association. Notice that there are none of the modern "social and economic" or "welfare rights" here, for these cannot be generated—and indeed conflict with the rights that *can* be justified. Thus it is a strict world, rooted in reason, not in sentiment. These conclusions may not always be pleasing to our sentiments, but at least they *can* be justified, against the claims of the skeptic—and indeed, against those who would use this skepticism to violate our rights.

VII. JUSTIFICATION AND THE THEORY OF GOOD

In adumbrating the foundations that generate our rights, I have pointed to 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. We come, then, to my final concern, a concern for what we do 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, these two ideas, "ought" and "obligation," at least as used here, come from "different dimensions of morality,"²⁰ reflecting respectively, I suggest, the teleological theory of good, rooted in

20. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 186 (1955). 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 deontic, as well as prudential, aesthetic, and perhaps other usages.

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,²¹ 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* 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?²² But if this position is difficult to justify, then the

21. Would this lead to an infinite regression 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.

22. See Goldstein, *Lawyers Debate a Public Tithe*, N.Y. Times, Oct. 21, 1979, § 4, at 8, col. 1 (proposal submitted by a special committee of the New York City Bar to require lawyers to do

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 forcible 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 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, and hence in our use of law. Only in extreme and rare cases do we have to forego 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

compulsory *pro bono* work, using state licensure as the mechanism of enforcement). Cf. Fried, *Fast and Loose in the Welfare State*, AEI REGULATION (May/June 1979), at 13-16.

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.