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JEALOUSY AND CONFIDENCE:
AN ESSAY ON THE LIMITS OF AUTHORITY

A DISSERTATION

SUBMITTED TO THE DEPARTMENT OF PHILOSOPHY

AND THE COMMITTEE ON GRADUATE STUDIES

OF STANFORD UNIVERSITY

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS

FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

Patrick Michael Byrne

December 1996

I certify that I have read this dissertation and that in my opinion it is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

Dr. John Dupré (Principal Adviser)

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Dr. Debra Satz

Approved for the University Committee on Graduate Studies

JEALOUSY AND CONFIDENCE:
AN ESSAY CONCERNING THE JUST LIMITS OF STATE COERCION

PATRICK MICHAEL BYRNE, Ph.D.
STANFORD UNIVERSITY, 1996

Adviser: Dr. John Dupré

This work defends the limited government of classical liberalism by appeal to Rawls' principle of legitimacy, Sowell's analysis of political visions, and a critique of the model of social causation informing distributive theory. I reason that social theories generally propose schemes of social organization; some proposed social schemes are extensive; only states enact extensive social schemes; states act through laws; laws are commands coupled with threats. Thus extensive social theories tacitly propose state commands and threats. Laws are often justified by appeal to theories of harm (which draws state action), property (which circumscribes state action), market failure, and social goals. I focus on harm and property, and argue that the wrongfulness which marks harm must not be drawn from private moral visions: this limits the positive rights the law may endorse. I then survey the history of Western property theory (and critique Waldron's and Radin's theories of property) to show how certain common law principles offer worthwhile limitations on state force. Lastly, I critique the assumptions underlying discourse in distributive justice.

Approved for publication:

By: _____.
For Stanford Philosophy

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The effusiveness of these acknowledgments betrays the grip Asia retains on my imagination, but I beg the reader's indulgence. If it is base to display ingratitude then it would surely be base to neglect these debts, for every page of this work could cite a lecture I heard from, or a conversation I had with, one of the following people. I divide these into academic and personal debts, and hope that other distinctions made in this work do not collapse so easily.

John Dupré took the jumble of inchoate theories and reactions which I brought to him and methodically weeded them into a (marginally less inchoate) dissertation. Our lengthy discussions led me to surrender many positions and struggle to shore up what remained. In a just world I would refer to Professor Dupré in footnotes on every page of what follows.

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Free government is founded in jealousy, and not in confidence; it is jealousy, and not confidence, which prescribes limited constitutions, to bind down those whom we are obliged to trust with power.

-Thomas Jefferson, *Kentucky Resolutions* (1798)

High benevolence acts
Without conscious motivation.
High propriety acts
With conscious motivation.
High righteousness acts and,
As there are none who respond,
Stretches an arm to compel.

-Laozi

INTRODUCTION

This dissertation argues for an enfeebled state by criticizing two of the ways energetic states are defended. My argument is not linear, but has the structure of a chess match, and this and the next chapter, a chess opening. Like a chess opening they introduce pieces and build relationships among them, not in the order in which they will be used, but in the order in which it is most convenient to put them in play. Subsequent chapters develop each piece. My arguments are primarily agnostic: presumably this means I lack an end-game.

From experience I know that an argument for limited government is not philosophically centrist. Some time ago I suspected that I would be philosophically ex-centrist, because while the mainstream political philosophers whom I studied (by which I mean not only Rawls but, for example, Sandel, Walzer, and Jaggar) seemed sure of many things, I grew sure of less and less. I wish, therefore, to justify the evolution of my focus on state authority and my belief that its critique yields insights for political philosophy.

This introduction attempts such a justification in three steps. First, I give a short history of the intellectual misgivings which dawned within me several years ago. Second, I explain how these became concrete on two issues. Third, I explain how this suggested the line of research which led to this dissertation.

I. MISGIVINGS AND MODELS

A. Four Misgivings

I once held normal classical-Rawlsian quasi-socialist beliefs. A few years in China and England cured me of the socialism, but I continued to be strongly influenced by *A Theory of Justice* and, like many have done since that book appeared, I framed my beliefs with reference to it. In short, I dwelled within the Garden. Then in the 1990-1991 period four events led me astray:

1) I worked that year as an assistant for Stuart Hampshire while he gave a stunning series of lectures, his last as a teacher. He was also kind enough to spend a few afternoons with me discussing his then-recent work, a lucid and elegant book examining the moral visions of *Innocence and Experience* and the virtues of each.

In his last lecture Professor Hampshire summed up the criticisms of Rawls, Sandel, Walzer, and others he had discussed throughout the term. As was our custom, and in what proved to be our last meeting, we walked across the campus after class. He was troubled, it seemed, by a loss of faith in arguments which justify the activist state we both admired. At the end of our walk Professor Hampshire blurted out, "Morally shocking. That's all it is. It is morally shocking to have profound want in the midst of plenty."

I agreed with him and I still do. I also think that his point was hopelessly inadequate, for law concerns more than salving moral feelings. I have done things which some would find morally shocking, and I will happily do them again as soon as I get a chance. I do not envy a life which accomplishes nothing which some find

morally shocking, and doubt many admirable people lead such lives. A state which enforced such lives upon us would be intolerable. Yet if it is because impoverishment is morally shocking that a state seeks to eradicate poverty, and if I believe moral shock is poor justification for the state to act, on what grounds may I support a state's efforts to improve the welfare of the destitute?

2) The Gulf War broke out. While I am not a war buff I did not believe that the Gulf War presented a difficult moral dilemma. My point is not, however, whether that war was proper. My point is that a petition opposing the war circulated among the faculty at Stanford. I looked at a list of signatories and noticed that while many faculty members from humanities departments had signed the petition, no one (at least at that point) from the economics department had signed it. I do not know if this fact stood until the petition-drive ended. But at the time I found it intriguing: what was so different about the ways professors of economics and professors of comparative literature (for example) view the world that would cause them to judge the same set of facts so differently? The obvious explanation, that economists are hawks, seemed shallow.

At the same time, economists were conducting within our philosophy department seminars on social issues which lie in a no-man's land between political philosophy and economics. To my mind these seminars were unsuccessful on a conventional measure, for the two sides seemed to speak past one another. A friend and fellow graduate student explained this with deprecatory references to "the right-wing economists." I thought that answer was unsatisfactory,

for it is surely moral preening to suppose one faculty is simply more compassionate than another. I wondered, might the differences of opinion on war, on pollution laws, on taxation policies and so on, be only the manifestation of some deeper rift in world views?

3) My skepticism was nurtured that year through the work of three economists: Partha Dasgupta, Thomas Sowell, and Kenneth Arrow. Professor Dasgupta introduced me to his iconoclastic views concerning Third World development. Having experienced the aid Mafia in Asia, I too had come to doubt the conventional wisdom I received in undergraduate economics courses at Dartmouth, and as an occasional student of development economics at Stanford. Under Professor Dasgupta's tutelage these doubts began to translate into a healthy skepticism towards some domestic government programs, the desirability and worth of which I had previously taken as self-evident. By way of simple example, I came to see how government redistribution schemes, the mother's milk of so much social theory, generally worked to redistribute goods not from the rich to the poor, but from the politically disorganized to the politically organized: from people who might get breast cancer (who do not know who they are) to those who might get AIDS (who do know who they are);[1] from

[1] I do not maintain that the disproportionate share of US research funds (on a per-death basis) which flows into AIDS research versus research into other diseases can be accounted for entirely by public pressure groups. Some share of the disproportion *might* be justifiable as sound policy. Suppose it is the case, for example, that until 2%-4% of an adult population has the HIV virus the contagion can be checked, but once it has hit this threshold it mushrooms to 30% of the population, at which point people die off faster than it spreads (this example may reflect the situation in East Africa, where the disease seems to have different transmission characteristics than in the USA). In such a case it may make sense to fund a disproportionately large effort to keep the incidence of

people who consume sugar to those who grow it; from those who drive by billboards to those who build them....

At the same time Professor Sowell, with whom I had briefly corresponded and who had sent me several of his books, published *A Conflict of Visions*. Its subject matter, the hidden assumptions which underlie political discourse, addressed precisely the issue which concerned me. Along with its subject matter, I thought this book admirable for the way it revealed how a properly-chosen analytical hatchet could cleave a philosophical problem so cleanly. This lead me to his earlier works including *Knowledge and Decisions*, which in turn lead me to the work of Hayek. Together these works expressed what a (to me) plausible analysis of social processes.

From Sowell's books I came to realize that the mainstream political philosophy in which I was immersed shared, no matter its surface discord, a deep set of assumptions concerning social processes and causation, assumptions which I had come to think false. I therefore decided I had to deny such arguments, no matter their other virtues or the attractiveness of their conclusions.

Arrow's Impossibility Theorem (first introduced to me by my friend David Luban), and the book from which it sprang, *Social Choice and Individual Values*, were highly illuminating for me, for they introduced me to the (now obvious) distinction between political and market mechanisms of choice, and suggested a novel way to think about social theory. In particular, it appeared to me that if one accepted the proposition that the organization of a society should be

---

infection below such a threshold. Most diseases do not share this feature. But I doubt whether these kinds of facts drive current allocation decisions.

a function *in any way* of the wills of the agents who comprise it, then Arrow's Theorem and its extensions embarrass otherwise plausible functions by demonstrating that the amalgamation of individual wills is unlike vector-addition. It is unclear to me whether the philosophical implications of this fact, especially regarding choice among constitutional principles, have been adequately mined, and I intend much of my future work to be directed along these lines. Furthermore, Arrow's other writings exposed me to subjects such as the measurement of poverty, the interplay of racism and markets, and the complexity of property rights, which undermined my earlier belief that social questions could be pursed within a simple dichotomy of facts and values. I say much more on some of these issues later.

Being exposed to the works of these three men, and having the opportunity to discuss economics with two of them, was like being offered a drink from a fire-hose. Through them I encountered a method of thinking about social processes which made my previously comfortable convictions ill-fitting.

4) Lastly, I am not indulging in pop-culture kitsch when I say that two movies of Clint Eastwood's influenced me greatly. *Unforgiven*, his Academy Award-winning Western, is a tale of three vigilantes, led by Eastwood, who set out to earn a madam's bounty by avenging the brutal slashing of a prostitute by two cowboys. The cowboys in turn receive the protection of a sadistic sheriff of swollen self-regard, played by Gene Hackman. One initially expects a movie like Eastwood's early Spaghetti Westerns: a fearless and

stoic gunman rides into town, distinguishes at a glance the wicked from the oppressed, out-guns the former and wins the gratitude of the latter: in short, the seductive moral fantasy of the adolescent.

What transpires is far richer than that. The only truly ruthless character proves to be the madam. The only blameless character may be one of the cowboys: it is never clear that he helps slash the girl, rather than drag his mentally retarded friend off of her, although he makes no effort to defend himself to the law. The prostitute is not that badly disfigured. The evil sheriff is often also compassionate, and perhaps only seeks to apportion rough justice in frontier Montana. The vigilante-heroes prove in turn to be cowardly, indifferent, and villainous, with little to recommend them other than their loyalty to each other. Unlike a conventional Western, this story unfolds like life: people operate pretty well based on imperfect information and conflicting loyalties, discover they are wrong much of the time but have trouble back-tracking, and stuff just happens.

This moral vision was refined in Eastwood's next movie, *A Perfect World*, with Kevin Costner. Here a sheriff organizes a manhunt to track an escaped convict whom he first put away as a boy in order to free him from an abusive father. This led the boy to become a career criminal. In the finale reel the sheriff attempts to save the cornered convict but instead causes him to be killed. The movie ends with the sheriff, played by Eastwood, sitting on the hood of his cruiser. He is told, "You know you did everything you could." And Eastwood, who once played a character so sure of his moral

projects that he gunned down strangers for laughing at his mule, replies evenly, "I don't know a thing. I don't know a damn thing."

Eastwood's decades of films depict a profound moral evolution: admirable or not, this vision of tentative agents within a morally ambiguous world has come to coincide with my own.

B. Models and Social Theories

By way of concluding this uninspiring history, and as a segue into my proper subject of state compulsion, I will diagnosis the specific discontent that animated the research of which this dissertation is the visible fruit. That diagnosis concerns models.

I notice that people model data in different ways. Some think of business competition in terms of war, with shifting front lines, intelligence and counter-intelligence, grunts and artillery. Others view it as an ecosystem, with food chains, predators, and microscopic niche players who develop specialties they ride to success. Philosophical debates seem to me to model well to chess games or wrestling matches. Some people model love affairs as ballets, some as fencing matches, some as a physical science of impersonal forces which act upon us as though we are unconscious objects. I have learned it is extremely important to discover from which model a person operates.

A man whom I admire has said that wisdom is no more than carrying around in one's head many dozens of models, and choosing

the right one for a given set of facts.[2] It is unclear to me that formal education encourages this. Instead what is sought, and what intelligent people perhaps seek by habit, are a few models to which a great deal of data can be fit.[3] It is natural that education teaches such organizing principles, for without them it would be no more than a stultifying consumption and regurgitation of facts. Yet it might also be natural that it indulge this habit too generously. My earlier comments about rejecting the underlying assumptions of mainstream discourse can be stated with reference to two such models.

Consider the case of Marxian political theory. Much of what Marx wrote has properly become part of the intellectual apparatus of educated Westerners. And yet, I would add, it seems to me to be anchored to an increasingly antique model of social conflict. As G. A. Cohen, a Canadian analytical Marxist, observed in "Marxism and Contemporary Political Philosophy, or: Why Nozick Exercises some Marxists more than he does any Egalitarian Liberals," the days when a Marxist should give unbridled support to the social welfare state are over, because the Marxist model is now inaccurate.

> "The communist impression of the working class was that its members 1) constituted the majority of society; 2) produced the wealth of society; 3) were the exploited people in society; and 4) were

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[2] Charles Munger, "Investment expertise as a subdivision of elementary, worldly wisdom," in the May 5, 1995 issue of *Outstanding Investor Digest*, Volume X Numbers 1 & 2.

[3] Three examples of this in my eyes are the political writings of Noam Chomsky, those of the ultra-conservative Right (e.g., the *National Review* Right), and political discussions with highly-educated Arab friends of mine.

> the needy people in society.... Most of the present problems of Marxism, and, indeed, of the British Labour Party, reflect the increasing lack of coincidence of [these] four characteristics."[4]

Cohen goes on at length to describe the fracture of contemporary Marxism as a function of the "increasing lack of coincidence" of these characteristics and others. His discussion is admirably forthright. Unfortunately, it is diffuse enough that it is difficult to provide any other concise quote that fully conveys his sentiment that the Marxist model (or "paradigm," as he calls it) describes a set of features which never completely coincided, but which once had "enough convergence among them for an impression of their unproblematic coincidence to be sustainable, given a dose of enthusiasm and a bit of self-deception."[5] Alas, Cohen notes, "there is now patently no group which has that set of features."[6] Along with Cohen's observations that the modern welfare state supports the non-needy along with the needy, and the needy are sometimes not the proletariat but the *lümpenproletariat*, and so on, I would add that managers are not often capitalists, capitalists are not always taxpayers and owners are often workers' pension and life insurance funds (or the workers themselves), and capital can increasingly combine with labor anywhere in the world.

Thus these various interests conflict in some ways and align in others, but importantly, they do not map onto a hierarchy. One

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[4] G. A. Cohen, "Marxism and Contemporary Political Philosophy, or: Why Nozick Exercise some Marxists more than he does any Egalitarian Liberal." *Canadian Journal of Philosophy*, Supplementary Volume 16, pages 363-387. This quote is from pages 374-375.

[5] *ibid.*, page 374.

example of this oversimplified model of conflicting interests is discussed at considerable length in Chapter 5 of this thesis, with reference to the theory of property of Margaret Jane Radin.[7] My point is that this model of conflicting social interests employed by such thinkers Roberto Unger,[8] and its reincarnation in Chomsky's analysis of WASP "structures of power and authority,"[9] and Radin's theory of property, appears to me to be as grainy and faded as an old Thomas Nast cartoon. As Thomas Grey (himself no admirer of capitalism) has put it:

> "What analysis of the disintegration of property does is to indicate how totally Marxism depends upon the dubious reification of its theory of class division and class struggle."[10]

Or as Mr. Mencken put it simply, to a man with a hammer every problem looks like a nail.

More to the point of this thesis, however, is the model which stands behind theories of distributive justice. Much more will be said on this in this dissertation, but I can express the basic problem briefly. This model, which has an honorable lineage running from Rawls back to Aristotle's *Ethics*, holds that goods such as esteem, income, public office and authority, etc., are social or primary

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[6] *ibid.*, page 377.
[7] Margaret Jane Radin, *Reinterpreting Property.*
[8] Unger, Roberto Mangabeira. (1986.) *The Critical Legal Studies Movement.* (Boston: Harvard University Press.)
[9] *cf.* Noam Chomsky, *The Chomsky Reader*, Introduction, especially pages 42-45. In fact one can find such views almost at random by opening any of Chomsky's writings on political theory, such as *Radical Priorities.*
[10] Thomas Grey, "The Disintegration of Property," in *Property*, edited by J. Roland Pennock and John W. Chapman, pages 69-85 (this quote from page 81).

goods,[11] and that it is the task of social philosophy to construct principles for their distribution. As Rawls put it:

> "the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[12]

And more specifically, a theory of distributive justice provides a:

> "set of principles ... for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation."[13]

This last point is a common one: society makes possible the production of an excess of some goods, so society should determine how at least that excess is distributed.

This model is not the exclusive property of the Left or the Right. The conservative legal scholar Richard Epstein, for example, assumes the same model in the opening pages of *Takings* (discussed in Chapter 4). The economist Kenneth Arrow wrote:

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[11] Familiarity with classical Rawlsian terms such as "primary goods" is assumed in my dissertation. In Appendix A I have provided an exegesis of *A Theory of Justice* for the reader who is unfamiliar with that great work. In this case, however, I will briefly explain: "primary goods" is a term Rawls uses to name those goods which "every rational man is presumed to want.... For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth. (Later on in Part Three the primary good of self-respect has a central place.)" John Rawls, *A Theory of* Justice, page 62. One can think of primary goods as those wants one has, no matter what other wants one has.

[12] Rawls, *A Theory of Justice*, page 7.

> "My own view is that there ... are significant gains to social interaction above and beyond what individuals and subgroups can achieve on their own. ... it is only their value within a large system which makes these assets valuable. Hence, there is a surplus created by the existence of society which is available for redistribution."[14]

Similarly, some legal theorists have interpreted their profession as the one which sets the rules which distribute these various social surpluses. Yale law professor Bruce Ackerman writes in *Reconstructing American Law* that we must understand that we live in a world where "the distribution of... status is a central issue for political debate and determination."[15] Furthermore, and more concretely, our "nation's economic welfare depends upon steering decisions made in Washington, DC."[16]

In fact this approach reaches its apogee in the work of the conservative jurist Robert Bork. In jurisprudential terms, Bork favors the doctrine of plenary rights over the doctrine of enumerated powers. In philosophical terms, Bork famously advocates an interpretation of the US Constitution which denies pre-political constraints: in his jurisprudence the silence of the Constitution on various issues does not limit state authority but licenses it instead.

As one who favors plenary rights over enumerated powers, but who also believes that judges should interpret the US Constitution

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[13] *ibid.*, page 4.
[14] Arrow, *Social Choice and Justice* (Volume I of his collected papers), page 188; see pages 181-188 in general.
[15] Bruce Ackerman, *Reconstructing American Law*, page 2.
[16] *ibid.*, page 1.

with strict literalness, however, Bork faces a singular problem: the Ninth Amendment with strict literalness instructs otherwise. In fact, the doctrine of enumerated rights is not only endorsed in the Bill of Rights and *The Federalist Papers*, it is the centerpiece of the US Constitution. There are reasons our legal system has moved from a doctrine of enumerated powers to the doctrine of plenary rights, but philosophy is not one of them.

Bork overcame this seeming difficulty by dismissing the Ninth Amendment as "a blot of ink" on the Constitution (not a terribly clever trick, but one has to admire the brazenness of it). To be fair to Bork, he probably meant "a blot of ink" in the sense of a Rorschach test, and not a worthless smudge, but a Senate confirmation hearing was a poor place to explore the issue.

Appendix C takes up in detail the denial of pre-political constraints on social theory. For now, however, I wish only to discuss the model.

By conceiving of the situation as it does, distributive theory turns away from pre-political constraints and embraces an open-ended approach to social philosophy. There are "advantages" to be "distributed" by "major social institutions," and the task is to determine how to "assign" them. It addresses the question, "Who deserves what?" within a vision of society assigning things. The explanation for the claim that goods are society's to assign, that they are "available for redistribution" by society, is that such goods are (mostly or all) "a surplus created by the existence of society." Little or nothing is pre-political: most or all is up for grabs.

I call this "the allowance model." "Everything is dad's, everything was always dad's, everything is available for dad to assign." Within that context my brothers and I argued about who deserved what: one mowed the lawn, one washed the car, one raked the leaves. We created desert-arguments (time spent, distastefulness or difficulty of task, etc.) that supported our individual contentions that a certain distribution would be just, and dad should "assign" our primary goods (i.e., dollars, privileges, immunity from future demands) to create that distribution.

The allowance model employed by Rawls and others appears misguided to me. Again, Appendix C is devoted to criticizing it, but I will give here two reasons I think it is a poor model: it is an undignified way to think of the human condition, and it misconceives social processes.

The allowance model is undignified. James Buchanan, addressing the subject of one type of good, property rights (and perhaps putting it a bit extremely), wrote:

> "[Consider] the familiar assertion that property rights are defined by and subject to change by the 'government' or the state. As noted [earlier], this amounts to saying that only the government or the state has rights, and that individuals are parties to a continuing slave contract."[17]

By conceiving of the relation between man and the state as one where the locus of discretion lies in the state to "assign" out "its" surplus to us, this model inverts the Enlightenment view that a

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[17] James Buchanan, *The Limits of Liberty*, page 83.

state is owned by its citizens, who assign to the state certain of their own prerogatives in order to accomplish ends of their own.

The allowance model misconceives social processes. Consider the goods of public office or Congressional Medals of Honor. These are goods which are indeed assigned by an explicit, formal, and centralized social mechanism. It makes perfect sense to think about what rules should govern how society goes about assigning public office and Congressional Medals of Honor (e.g., "win the appropriate election" and "jump on the grenade").

Consider love affairs. No mechanism exists whereby they are "assigned," and it would therefore make no sense to ask what rule should govern their distribution. Social cooperation makes some possible (e.g., transatlantic ones) that otherwise would not be, and provides a context within which love may flourish in ways that would be difficult without society. Society may prevent particular love affairs from flourishing if it chooses to (consider modern China, where people finish college and are assigned around the country to their production units with a healthy indifference displayed to their sentimental attachments). Yet it makes little sense to ask how love affairs should be "distributed" by society.

Consider self-esteem and self respect: "the primary good of self-respect has a central place" in Rawls' theory; in fact, he writes

later, it is "the most important primary good."[18] His distributive principles propose assignments of this good. Yet it seems to me that the way in which this primary good comes into existence and is held by people more closely resembles love affairs than it resembles public office or Congressional Medals of Honor. Therefore Rawls' theory appears to me to provide an answer to a question it makes little sense to ask.

Consider income, which also appears to me to lie somewhere between goods like, on the one hand, public office or Congressional Medals of Honor (and hence appropriately distributed according to rules which govern an allocative mechanism), and on the other hand, love affairs (in which case rules governing assignments have little upon which to bite). Like public office or Medals of Honor, income is visible and quantifiable. Unlike public office or Medals of Honor, however, and like love affairs, income reaches some initial distribution through the voluntary interactions of individuals.

This is the important point: in the case of the goods of public office or Medals of Honor, the state constructs a context within which people act. People act. There is still no distribution of the good: the third step is that "social institutions" have to assign the good in question. With love affairs or self-respect, however, the process is shorter: the state creates a context, agents act, and the interactions of those agents generate a distribution. "Social institutions" may change that distribution, but an initial distribution does exist, flowing from the spontaneous interactions of individual agents. Income, perhaps opportunities, and many types

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[18] Rawls, *A Theory of Justice*, pages 62 and 440.

of goods are actually like this, though the allowance model treats them all as if they are goods of the former type.

For example, imagine that a software entrepreneur creates a computer operating system and thereby amasses a fortune: his fortune comes to him not because social institutions have "assigned" it to him, but because 170 million people want to be able to use his operating system, and they have traded with him some small pieces of what they have for the right to do so, and these small pieces add up to his fortune.[19] Government may try to "reassign" that, but that is a different thing.

One could reply that the state creates the background context which allowed that entrepreneur to prosper, by making extensive cooperation possible. Therefore, to restate Arrow, if "it is only their value within a large system which makes" that software entrepreneur's products valuable, then what amasses to that entrepreneur is in fact "a surplus created by the existence of society which is available for redistribution."

I think that this is a *non sequitur.* Imagine that this operating system entrepreneur is followed by others who write applications for computers, and such applications must run on the first entrepreneur's operating system. These application-entrepreneurs now earn their own fortunes. The operating system-entrepreneur goes to them and says, "I created the background context, my

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[19] Strictly speaking, this is an oversimplification. His fortune is actually determined by a market's valuation of his share of the company he has constructed, which is itself determined by its estimate of the cash generated by the business across the future, discounted to its present value. This oversimplification is reasonable, however, because in both descriptions the value of his ownership is a function of the willingness of other people to trade for his product.

operating system, which allowed you folks to prosper. Therefore I should determine how the benefits that accrue to you should be distributed." I would be unconvinced, were I one of those software developers. I am similarly unconvinced that by creating an "operating system" within which humans interact the state garners clear title to the outcomes of their interactions, and can "assign" as it sees fit an "appropriate distribution of the benefits and burdens" of their interactions, subject to no constraints.[20]

In summary, my point is not that primary goods such as income and opportunities are *not at all* like public offices or Medals of Honor and that they are *exactly* like love affairs. My point is that some primary goods are enough *unlike* public office and Medals of Honor that to speak of them in the same way, as things being "assigned" and "distributed", is suspect. Coupled with the fact that it inverts a noble Enlightenment and Ninth Amendment tradition maintaining that individuals suffer the state to have powers and not vice-versa, I question the reasonability of the allowance model.[21]

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[20] As one *conceivable* explanation of the dominance of the allowance model in social theory, and at the risk of sounding Maoist, I will point out that within the academy, other than the goods of job satisfaction and the esteem of colleagues, most academic goods (such as admittance, scholarships, grades, degrees, awards, fellowships, graduate slots, interviews, job offers, publication acceptances, and tenure) are goods awarded by centralized decision-making mechanisms: it should be unsurprising if this fact influences the view of social processes widely held by social theorists. Goods in other professions, such as the practice of law or business, have just the opposite feature: they tend to be distributed by decentralized processes. If the professional environment in which a person lives her life can mold her perception of social processes, then this might explain how people from different professions tend to speak past one another.

[21] I have recently come across a distinction which resembles this one, made by James Buchanan with regard to economists rather than philosophers. He refers to economists who understand the market in an "allocating-maximizing paradigm." For them, "the market is efficient *if it works*." Within this camp there are those who see markets as often working, and those who do not. This is to be opposed to economists who hold the "catallactic-coordinating paradigm." For such economists "the market coordinates the

C. Social Institutions and the Law

By the preceding path I arrived at a vague unease about the Walzerian project of seeking social specifications: the final distribution of this good in that sphere should be such-and-such, the outcome of this interplay of individuals on this question should display such-and-such a feature, etc., and leave it to law and economics to work out the details. One need only glance at the writings of some of those lawyers and economists (e.g., Posner, Epstein, and Sen) to see that they resent this arrangement and have doubts that the philosophers who endorse it understand the facts upon which they are commenting (*cf.* Posner's recent *Overcoming Law* and its criticisms of Putnam and Rawls on unemployment, oligopolistic markets, election laws, etc., or as is discussed at length in Chapter 3, Sen and Dasgupta's critique of positive rights).

At heart, what seems to me to cause the impasse are different conceptions of the relation of facts to values. To one camp, values ride above facts like the steamed milk on an espresso: to the other, questions of fact are layered with questions of value are layered with more questions of fact, like the layers of a pousse-café. This is just one of the ways in which the two sides speak past each

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separate activities of self-seeking persons *without the necessity of detailed political direction*. The test of the market [in this paradigm] is the comparison with its institutional alternative, politicized decision making." See Buchanan, "Born-Again Economist," in *Lives of the Laureates*, pages 163-180 (this quote comes from pages 167-168).

other.[22] Recognizing this suggested to me an idea to extricate myself from this impasse, this method being the first cause of this work.

I recognized at length that the phrase "social institution" is not merely a metaphor, it is a euphemism. Consider Rawls' use:

> "the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions."[23]

It should be clear on examination that "social institution" means nothing like "social practice" or "custom." Wearing an earring is a social practice in some cultures; opening a door for a woman is a social practice in some cultures. The "social institutions" with which Rawls is concerned are *rules*, and not rules such as, "One should open a door for a woman." They are rules that are to be enforced by the State: they are laws and regulations.[24]

This is so obvious I overlooked it for a long time. Rawls' difference principle in *A Theory of Justice*, his discussion of the "profoundly dismaying" fact that the Supreme Court "held

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[22] A seminar Professor Arrow gave on "The Relation of Facts to Values" to the Stanford philosophy department in the Spring of 1991 suggested this to me. In fact, in groups which include both philosophers and economists it is easy to pick up examples of such differences in thinking on even quite mundane issues: how the two camps use the word "assume," for example.

[23] Rawls, *A Theory of Justice*, page 7.

[24] The reader will notice that henceforth I conflate two kinds of legal rules: laws and regulations. These differ in important ways. In the USA laws are generated by elected officials; regulations are generated by agencies which elected officials empower. Laws carry a presumption of innocence; regulations, a presumption of guilt. Laws are generated under more public scrutiny than regulations. And so on and so forth. While the differences between them are substantial I will ignore them here, as they share the feature with which I am concerned: they are obligatory.

unconstitutional various limits on expenditures imposed by the Election Act Amendment of 1974,"[25] Dworkin's discussions of discrimination and civil rights in *A Matter of Principle*,[26] Sandel's discussion of the way that "justice finds its limits in those forms of community that engage the identity as well as the interests of the participants,"[27] and so on *ad infinitum*, are only tangentially concerned with how I as an individual should behave. The institutions which are discussed in such works are primarily rules to be enforced by government: the state should construct a certain scheme of taxation and redistribution, limit the amount of private money one may spend in an election campaign, prohibit certain hiring practices, construe a person's rights against the people in his neighborhood to have a certain depth and rigidity, and so on. This is the substance of the "social institutions" with which these political philosophers are concerned.

By way of example, consider Rawls' famed difference principle:

> "Social and economic inequalities are to be arranged so that they are both:
> (a) to the greatest benefit of the least advantaged.... and
> (b) attached to offices and positions open to all...."

It is unlikely that when Rawls wrote that he was proposing that citizens should spontaneously rearrange their interactions in order to achieve the outcome he admired. It is more reasonable to suppose

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[25] John Rawls, *Political Liberalism*, pages 359-364.
[26] Ronald Dworkin, *A Matter of Principle*, pages 355-356, for example.
[27] Michael J. Sandel, *Liberalism and the Limits of Justice*, page 182.

that he was proposing a social rule, i.e., a law (or series of laws, or system of taxation) that the government should enforce.[28]

As obvious as it seems in retrospect, this minor insight (if that is what it is) suggested to me a retreat from my doubts. For if the common denominator of social institutions is law, the common denominator of law is force and threat of force.

II. LAW AND OBLIGATION

A. How Law and Morality Oblige Us Differently

Law obliges us differently than morality obliges us; that is, they each oblige us in different senses of the word "oblige." To say that *people should drive 55 miles an hour because they should respect the environment and the safety of others* is to make one kind of claim. To say that the law should be *that no one may drive faster than 55 miles an hour* is to make a different claim: precisely, that people should be told not to drive faster than 55 miles per hour, told they will be punished if they do, and punished if they do. Thus law is a combination of a command, a prediction, and a punishment. It is, in short, a sincere threat.

This vision of law is that embraced by John Austin in "A Positivist Conception of Law" and, of course, by H. L. A. Hart in *The Concept of Law*. For Hart especially, the essential point is that "conduct may be not optional but obligatory," and that laws are "Coercive Orders."[29] Yet I do not wish to commit myself to a strictly

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[28] To be fair to Rawls, there is a great deal in *A Theory of Justice*, especially in Part 3, which one might take to heart as a person and not merely as a voter. See for example his discussion of the philosophical psychology of love and shame in pages 440-470. But the overwhelming point of his book is political.

[29] H. L. A. Hart, *The Concept of Law*, pages 7 and thereafter.

positivist theory of law, or if I do, I wish to point out such commitment is incidental. I mean to discuss what law *does*, not what law *is*, the latter being a subject about which much ink has already been spilled (see for example Pound's *An Introduction to the Philosophy of Law*,[30] or the taxonomy and discussion in the introduction to Posner's *The Problems of Jurisprudence* and references cited therein[31]). I am proposing an explanation of what law *does*, i.e. embody commands backed by threats, which should be amenable to any theory of what law *is*. If I were concerned with what law *is* I would also be concerned with a different set of questions, such as how or if law differs from the threats of a gunman. But I am unconcerned with what law is in this sense. Instead I wish to take what it *does* as obvious (threaten sincerely), and analyze the reasons we may give for having it do that. This I think should be acceptable to the legal naturalist, positivist, realist, formalist, etc.

B. Justice Weaves Together Claims about Legal Force

My point is this: There is a lively danger that by allowing "social institution" to become part of our quotidian jargon, we have admitted a Trojan Horse which bears within it force and threat of force. Nothing is inherently wrong with force or threat of force: I am not denying that the state should exist. But we should hold a presumption against force and threat of force. That presumption is lost when social philosophy couches its proposals as "social

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[30] Pound, *An Introduction to the Philosophy of Law*, pages 25-47.
[31] Posner's *The Problems of Jurisprudence* pages 5-24 in the introduction and references cited therein.

institutions" about which we are supposed to reason, and among which we are supposed to choose, with Olympian neutrality: such proposals in fact suggest that force and threats of force should be applied by the state against its citizens, and this fact gives us grounds from which to evaluate these proposals.

In the manner described above, I arrived at the belief that by developing a critique of the State's use of force and threats of force against its citizens, I would have a good method to examine various claims about justice. Such a critique would be like a funnel into which higher, more abstract claims about justice had to pass. While this might not necessarily filter all possibilities down to one, it might filter out *some* theories. Larger and more diaphanous issues of political theory could be reduced, in part, by properly defining the diameter of this funnel.

C. Two Notes on Method

1. The allowance model objection

I recognized at the outset that this position would be objectionable from the point of view of "the allowance model" described in the first section of this introduction. The rigidity of such a funnel might be constructed from pre-political constraints, but the allowance model denies the existence of pre-political constraints on political mechanisms. A theory of justice which insists social institutions must achieve certain outcomes should be confronted on its own terms or not at all, says the allowance model: if our rights are "assigned" or allowed us by political mechanisms, then it is tautologically false to say that those mechanisms are

engaged in unjust force against us if they act consistently within the "appropriate distribution of the benefits and burdens of social cooperation" that they justly assign.

Appendix C gives a lengthy reply to several versions of this position. I have already suggested that this position flows from a model of human interactions which is undignified and false. I will also add that it assumes too much regarding the pre-theoretic constraints to which I refer. I could mean by such constraints the thick natural rights endorsed by Catholic doctrines, such as those of Aquinas (or, more recently, Clarence Thomas), but I do not. I might mean only those "natural rights" envisioned by John Locke, which are (his deist rhetoric aside) significantly more reason-based and less "natural" than are those of Catholic theology (*cf.* my discussion of Locke in Chapter 4). Or I might seek such constraints in the experience of decades of economics, centuries and law, and millennia of government (in fact, this is what I do mean).

In short, what I am proposing is to beef up the "considered convictions" Rawls invites us to use in seeking reflective equilibrium when thinking about justice. I am suggesting that those considered convictions can come from a number of sources besides moral intuitions, and with them we can stand firm against otherwise compelling arguments. I do not wish to digress for the moment for the reader unfamiliar with these terms: the conclusion to Chapter 1 (along with Appendices A and C) give a fully fleshed-out explanation of these methods and arguments.

2. Terms

In order to avoid more ugly circumlocutions, I will introduce the term "coercion" to name this concept of what the state does when it enforces laws, while stipulating that I use "coercion" in as neutral a way as possible.

I recognize that the philosophical analysis of coercion is itself an interesting subject, worthy of much debate. There is debate on whether some things are or are not coercive: hourly employment looks to some like a voluntary and mutually beneficial exchange; to others, it is wage slavery. Prostitutes and pornography's actors and actresses are exercising their liberty in the most extreme way, to some; to others, they are the victims of a coercion found not in their decisions but within the social context in which they occur.[32]

Such debate is outside the realm of this dissertation. As Stuart Hampshire has pointed out, there are some things that are coercive no matter the culture or theory of the good life one holds.[33] As is discussed in Chapter 1, the anthropologist Clyde Kluckhohn has made a similar point.[34] Getting hit in the head with a hammer is an example of coercion. Being told that unless one does X, one will be shot, fined, or imprisoned, is also coercion, as I will use the term, no matter one's vision of the good, and no matter whether X is "hand over your wallet, Mister" or "do not trade securities based on inside

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[32] See for example Dworkin's "Why Pornography Matters to Feminists," Longino's "Pornography, Oppression, and Freedom," Giobbe's "Confronting the Liberal Lies About Prostitution," for articles criticizing the liberal view of choice, and Hartley's "Confession of a Feminist Porn Star," Carter's "A Most Useful Tool," and Sundahl's "Stripper" for defenses of the liberal view of choice in these matters.

[33] See Hampshire's *Innocence and Experience*, Chapter 1 and pages 100-107 and 169.

[34] Kluckhohn's *Culture and Behavior*, and *Mirror For Man*, are discussed in Chapter 1.

information." I will occasionally use "State compulsion" to name the same thing as "State coercion."[35]

Note that coercion has an odd property. With most acts, there is a difference between the act itself and a threat to perform the act. Threatening to dribble a basketball is not an instance of dribbling a basketball. Threatening to coerce somebody unless she does something is itself an instance of coercion

I am adamantly *not* using "coercion" and "compulsion" with strong negative connotations: I am not saying that "law is coercive, and coercion is wrong, therefore law is wrong." I am merely pointing out with Hart, Austin, and a slew of others, that, in the words of Rawls,

> "Political power is always coercive power backed by the government's use of sanctions."[36]

Or as Washington wrote with the vividness befitting a general,

> "Government is not reason, it is not eloquence - it is force."[37]

To be precise, it is force and threats of force, and "coercion" and "compulsion" are my way of naming force and threats of force.

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[35] I also employ a number of obvious synonyms, such as saying that a law makes the performance of some act "non-voluntary." I am using "non-voluntary" in the following way. I do not wish to be a Euclidean. The government prohibits me from being a Euclidean. I am now non-voluntarily a non-Euclidean. I acknowledge that there is a legitimate less-expansive way of reading "non-voluntary," but this is the way I will use it. "Mandatory" and "compulsory" and their cognates should be understood in the same way. A lesson I have taken from Sowell is this: it is less important for a writer to be sure that the meanings of his terms are the only defensible ones, as it is that he is explicit what his meanings are.

[36] John Rawls, *Political Liberalism*, page 136.

[37] Quoted in "Restoring Constitutional Government," by Roger Pilon.

I am being persnickety about this term because there is an alternate usage of "coercion" which presents itself: under this usage, a government does not coerce where it has first gained consent, and it may do so by insuring that the way it forms its laws embodies (in one way or another) the consent of the governed. Or it might be said not to be coercing people where its law forces people to act for their own good, although they may fail to recognize it at the time due to coordination-problems or other exigencies. In this view, laws are not coercive where they embody the consent or the best interests of the governed.

I believe that this is a bad way to use language. Take the word "push." I may push Jane from the spot upon which she is standing. I may do this because she is standing on a penny that I want, or because I dislike her, there is a cliff on the far side of her, and I want her to go over it. I may also do it because a tiger is about to leap on her and I wish to save her from harm's way. Perhaps a train is about to hit her, and she has formally declared in the past, "If you ever see me about to be hit by a train, you have my consent to push me out of the way." No matter which is the case, if I push Jane and someone asks me, "Why did you push Jane?" I think I should have a justification ready for pushing her. If instead of offering one I say, "It does not count as a push, because I had her prior consent," or, "It does not count as a push, because I did it for her own good," I would be misusing language, and asking the word "push" to carry too much weight. As I say elsewhere, I prefer to let my arguments be baroque and my terms rustic.

For the reader still trouble by my use of this term, I suggest turning to Appendix B, where I have written short essays on the important terms which appear in this dissertation. Or, if the reader is comfortable with the (to me transparent) notion that law is force and threat of force, but prefers some term other than "coerce" or "compel" to name this concept, I suggest that reader substitute the preferred term for my own wherever it occurs.

III. AUTHORITY AND LEGITIMACY

A. Legal and Moral Justifications

To pick up the thread once again: I have suggested that the common feature of "social institutions," as Rawls and others use the term, is that they are sets of laws. The common feature of laws is that they are obligatory. Thus political principles grip us more roughly than do moral principles. While moral theory tells us how we should act, our theories of justice tell us how we should be governed. The similar vocabularies of moral and political arguments disguise this difference, but we should not overlook the fact that in talking about institutions we are generally talking about controlling people.

Just as law and morality oblige us differently, so will, *mutatis mutandis*, their justifications differ. Laws will be justified differently than moral principles are justified because there is a difference between saying that people should not assault each other, and that the state should enforce a law against assault. The first, moral, claim may garner support from any of a number of private moral visions. The second, legal, claim, searches for support

in places other than private moral visions. It must do so out of practical necessity. In the modern world no single moral vision is shared by essentially all members of a society; a system of laws based on a moral vision held by less than essentially all members of a society is generally unable to attract widespread allegiance;[38] a system of laws is pointless if it cannot attract widespread allegiance. In an age of plural visions of the good a theory of jurisprudence may make morality its cornerstone but will build its foundation from more solid materials. This is the subject of much of Chapter 1, which discusses the Rawlsian principle of legitimacy.

B. Ways of Justifying Law

In general, how does one go about the business of justifying a law? After all, we may have good reasons to propose rules (such as: by controlling people in one way we enable them in another). I shall restrict my attention to three areas of law: law which restricts voluntary exchanges, law which enforces rights people maintain against each other (what one might call "simple justice"), and laws which enforce another set of rights people have against, it might be said, society at large (broadly speaking, "social justice"). We could further specify this last case by following Professor Rawls in saying that laws of social justice are the ones that "provide a way

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[38] I say "generally" for a reason. A society based on a set of religious values, for example, may function when religious minorities are small enough not to the threaten the otherwise shared fundamental values of a society. In fact, such societies may be tolerant: it has been argued that Islamic Persia in the Middle Ages was tolerant towards Judaism for this reason. See V. S. Naipul, *Among the Believers* and "Our Universal Civilization" for discussions of this, along with Albert Hourani's *A History of the Arab Peoples*, his *Arabic Thought in the Liberal Age*, and his essay "Patterns of the Past", in Thomas Naff's *Paths to the Middle East*, for discussions of toleration in Islam.

of assigning rights and duties in the basic institutions of society,"[39] but, as I have suggested, that formulation is vague (and it is this problem of specifying exactly what social justice *does* that has me worried).

I do not mean to suggest that the distinctions among restrictions on exchanges and the enforcements of simple justice and social justice are bright and that there is no overlap among them. It is not even clear that social justice is concerned with enforcing the rights I suppose here, as opposed to some subset of the rights we have against each other. Indeed, examining that issue is one of the goals of this essay.

Furthermore, I do not mean the above taxonomy to exhaust the range of government's actions. For example, governments also defend themselves and allies, maintain borders, issue passports, and push national economies from unattractive to attractive equilibria through, in part, manipulating interest rates and the currency. It is not clear how such acts can be fit into the preceding list. Even some traffic regulations do not fit the preceding taxonomy, as they are more administrative than anything else: what side of the road people drive their cars on is unimportant, just so long as there is one side only, specified in advance and enforced continuously. Other traffic regulations are not administrative in this way: society may have an interest in me driving below a certain speed, even if no one else is on the road. So I am concerned with a subset of government actions, and am asking, how does one go about justifying them?

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[39] Rawls, *A Theory of Justice*, page 4, quoted earlier.

When I argue in favor of a rule backed up by the State's monopoly on violence, there are four stories I may tell. These stories tend to meld into each other, and one told in one way may be retold in another, but as a first approximation, I say there are four.

> 1) I can say that without this rule, transactions will go awry and achieve bad results.
> 2) I can say that without this rule, people will harm each other.
> 3) I can say that without this rule, an immoral result will obtain.
> 4) I can say that without this rule, some desirable result will fail to obtain.

The third case (immoral result) I will treat as a species of the fourth (desirable result is unobtained), and combine my discussion of them, leaving the three cases of awry-transactions, harms,[40] and desirable results. These are the three rough-and-ready categories into which fall justifications of state coercion. I shall expand briefly now on each of these areas.

1. Law and voluntary transfers

One area where a theory of justice may push government to control people's behavior is in the realm of voluntary exchange. There are three reasons which can be given in support of this type of coercion: capital market failures, pure market failures, and moral failures of the market.[41]

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[40] "Harm" in legal theory traditionally has the meaning of injury of any sort. At this point I am still using "harm" and "theory of harm" in an extralegal sense, however, to signify a complex mesh of beliefs about torts, rights, causation, wrongfulness, and what results count as injurious. These components are distinguished in Chapter 2, but for the sake of convenience I now refer to a set of beliefs on these subjects as a theory of harm.

[41] This taxonomy owes much to discussions with Partha Dasgupta.

a) Capital market failures

Some projects are socially desirable but immense. While people desire a project and would be willing to pay enough for its benefits to make it feasible, no source of capital is sufficient to fund the project. Where capital markets are insufficient, the government (through size, taxing authority, and the power of eminent domain) has the ability to achieve that of which markets are incapable: it can complete large projects which leave all as well- or better-off than they were before.[42] The inadequacy of capital markets justifies many of the large transportation projects undertaken in this country's history, along with government-funded endeavors in space, allegedly.

b) Pure market failures

There are a standard set of conditions which a market must meet to function well: a large set of producers with easy entry into the market, a large set of consumers with good information about prices throughout the market, etc.[43] To the extent that such conditions do not hold there may be market failure.

For example, it may happen that not all the goods and bads brought into being by a voluntary exchange stay contained within the

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[42] This is called Pareto-efficiency. An explanation of Pareto-efficiency can be found in any basic economics text. The idea is that if everybody in a group has achieved such a level of satisfaction that it is impossible to make any person better off without making someone else worse-off, then that situation is Pareto-optimal or Pareto-efficient. If in some state it would be possible for some to improve their lots while leaving all others as well-off as they were, then that state is Pareto-inefficient.

[43] These conditions are part of the standard economic analysis of markets. See for example Ellwood, Enthoven, and Etheredge, "The Jackson Hole Initiatives for a Twenty-

transaction. When such externalities are present, voluntary exchanges can be undertaken which make third-parties worse-off, or not be undertaken when they would make third-parties better-off. Pollution is an example of an external bad, while inoculations, scientific research, and defense are classic examples of external (or public) goods. Externalities are often bound up with the Free Rider problem: individuals may unanimously prefer one outcome but achieve another due to their attempt to ride free on the efforts of others. Government coercion here is intended either to push the costs of externalities back into the transactions which generated them, or to force people not to free-ride.

The interesting feature of capital market failures and pure market failures is that, paradoxically, state authority may make all people better-off by restricting them, either by prohibiting certain transactions among them, or by forcing other ones upon them.

c) Moral failures of the market

Someone may object to a market outcome on the grounds that it is not moral. The voluntariness of the transactions which give substance to the market may be challenged as being a veneer on coercion. Or it may be that a distribution replicates original conditions, and if the original distribution "is arbitrary from a moral perspective," as Professor Rawls has it, then the distribution which it generates is also "arbitrary from a moral perspective."[44] In such cases, averting an amoral result is not immoral. Or it may be that

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First Century American Health Care System," *Health Economics*, 1 (1992): 149-168, or Paul Samuelson's classic treatment, "The Pure Theory of Public Expenditure".

[44] Rawls, *A Theory of Justice*, page 74.

final distributions are inequitable, meaning that goods are distributed in clumps, and that this is immoral. The government may interfere with (by restricting or banning) voluntary exchanges on this justification to achieve moral results or prohibit immoral ones.

d) Market forces and political choices

Balancing these three limitations of markets there is one putative theoretic advantage and one certain practical advantage. The putative theoretic advantage is that that they embrace a system of natural liberty. The practical advantage is that markets operate on decentralized information, and centralized information is costly.

Not a great deal more will be directly said about these issues, for the evaluation of these claims is primarily an economic matter, not a philosophical one. However, some philosophical issues surrounding market failures, public goods, and free-riding behavior are addressed in Appendix B.

A few points are worth mentioning before I go on. Because of the squeamishness of moderns (noted above and explored in Chapter 1) in justifying state action on moral theory alone, arguments concerning moral failures of markets may be advanced disguised as arguments about capital market or, especially, pure market failures. Arguments which point to capital market failures have become less convincing as efficient capital markets have expanded.[45] Arguments

[45] For example, a group of entrepreneurs led by Bill Gates and Craig McCaw is building a $9 billion satellite telecommunications system, Teledisc, which will span the planet. The founders are investing approximately $5 *million* themselves and raising the remaining 99.94% of the money in capital markets. This is precisely the kind of project whose scale argued for state involvement in the past. cf. *The Economist*, March 26, 1994.

which point to pure market failures are many and plausible, especially when they focus on externalities. In an age of global hyper-competitive economies, however, concerns about trusts, natural monopolies, or even plain monopolies are less plausible than they once were.

To an economist, monopolies cause two dysfunctions: a shift of wealth from consumers to producers, and an outright loss of wealth. The former is not necessarily inefficient in an economic sense, though it would likely trouble a theorist of distributive justice. The latter "deadweight loss" is an inefficiency which worries economists, yet the magnitude of monopolistic deadweight loss has been challenged by a revival in the classical economic analysis of monopolies. The neoclassical analysis of monopolies is challenged in West's "Monopoly." The deadweight loss of natural monopolies has been disputed by Demsetz in "Why Regulate Utilities?"; that for unnatural monopolies has been challenged by Baumol in "Contestable Markets: an Uprising in the Theory of Industry Structure," and Shepherd, "'Contestability' versus Competition". The general theme of these challenges is that the neoclassical model wrongly assumes that competition extends to the point of 0 returns for producers. In reality innovation, imperfectly knowledgeable producers, and imperfect capital markets delay the achievement of such equilibrium, and in its absence the lure of monopolistic profits attracts producers who lower prices *more* than the cost to society of that monopolistic margin.

While the concept of market failure appeals to social philosophers,[46] the concept of regulatory failure goes relatively unexplored within the domain. Its analysis has instead been left to public choice theorists, who seek to apply the techniques of economics, such as those that might describe the decision-making processes of a factory manager, to the decision-making processes of government agents (who are, after all, also human). The problems uncovered range from subtle ones concerning a reappraisal of what besides money may generate utility for a government agent, to the most crude and obvious problem of government noted by Shakespeare long ago:

> "though authority be a stubborn bear, yet he is oft led by the nose with gold."[47]

My point is that in choosing between market and political decision-making processes, one must not compare the market, warts and all, with an idealized conception of government. A proper choice is informed by the insights of public choice theory, which raises the suspicion that in some areas thought to be natural candidates for regulation, the invisible foot of the market may be a more steady and attractive mechanism than the obvious political mechanisms designed to supplant it.[48]

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[46] By way of example but certainly not limitation, see Gilroy's and Wade's collection *The Moral Dimensions of Public Policy Choice: Beyond the Market Paradigm*, the second half of which primarily concerns free-riding and other shortfalls of "the market paradigm."

[47] Shakespeare, *The Winter's Tale*, IV, The Shepherd's Cottage.

[48] Speaking of bears: then there's the one about the two Alaskan fisherman fly-fishing in a river. Suddenly an angry Kodiak bear comes charging at them from the woods across the river. One drops his pole and begins running along the bank; the other drops to the ground and begins changing his waders for sneakers. The first yells back over his

2. Law with the goal of simple justice

The second way in which government acts is in pursuing simple justice. I use "justice" in this case as a broad name for that set of rights we maintain directly against each other (what Berlin called "negative liberties," as is discussed in Chapter 3). In a well-ordered society a stranger cannot choose to hit me over the head with no provocation: government demands his conformity to a standard, by enforcing laws against assault. His conformity is non-voluntary. Often this situation is described with reference to a spatial metaphor: each citizen has a sphere hovering around her[49] in which not just physicality is protected but liberties of various sorts (e.g., her options governing sentences she may utter and to whom she will pray), and the government sees to it that no one else enters that sphere.

We should understand the justification for even so obvious a restriction as this one on assault. Classical liberalism justifies a rule against assault by reference to a theory of what counts as illegitimate force: for example, Mill's famous Harm Principle.

> "The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others."[50]

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shoulder, "You fool! Don't you know, even with sneakers on you can't outrun a bear?" The second yells back, "I don't have to outrun the bear: I just have to outrun *you*!"

Similarly, markets don't have to be perfect: they don't have to outrun bears, they just have to outrun politics.

[49] I occasionally use the feminine for the third person indefinite now because it will be impossible later: with it one cannot describe the thoughts of historical figures without perverse effect, and in any case one should not bowdlerize them.

[50] John Stuart Mill, *On Liberty*, page 12.

Since hitting people on the head harms them, clearly, the state may legitimately make not doing so mandatory, on the liberal account.

The harm principle, which I once took to be the essential creed of liberalism, I see is more neutral among political theories than I once supposed. If I desire a rule to restrict someone, unless I worship state power for its own sake I as a rule-proposer must accept the burden of argument for my rule and not shift it to she whom I would restrict. My justification will refer to some bad thing which will be prevented by the restriction I seek, or point to some good thing which will fail to obtain without this restriction; if the former, my justification will incorporate a background theory about what things are bad, and particularly, bad in a way or extent that the state must prevent. This is true whether I be a liberal or communitarian or anarcho-syndicalist. This incorporated theory is often a theory of harm. Many political arguments can be resolved into disputes about what should count as legal harms.[51] Chapters 2 and 3 take up this problem.

3. Law with the goal of social justice

The last area of law with which I am concerned is "social justice." Use of the expression "social justice" is common enough in political literature, draped over issues as disparate as income

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[51] What are legal harms is not generally so obvious a question. If I break into your widget factory and steal $100, I have harmed you (legally). If I build my own widget-factory and you lose customers and it costs you $100,000, under our system of laws I have not harmed you. However, according to political theorists such as Michael Sandel, for example (in an interview with Bill Moyers), if you decide to close your unprofitable widget-factory, or go to Mexico to make your widgets instead, you are harming your

inequalities, maternity leave, and criminal law, yet it is difficult to discover a straightforward definition. Consider a few examples:

> "During the long period of liberal ascendancy, from the New Deal through the 1960s, liberals felt confident that the immediate reduction of poverty was in every way good for the larger community. Social justice would, in Lyndon Johnson's phrase, make society great." - Ronald Dworkin[52]

> "For a quarter century, the United States has been trying to do good, encourage political liberty, and promote social justice in the Third World."
> - William V. Shannon[53]

> "Yet for the time being we have done what we can to render coherent and to justify our convictions of social justice. We have reached a conception of the original position." - John Rawls[54]

The use of the phrase "social justice" in the above quotes is puzzling. It is unlikely that the authors referred to the same thing by it. In seeking to define "social justice," I encounter a difficulty like St. Augustine's with time: "What then is time? If no one asks me I know: if I wish to explain it to one who asks I know not."[55] It is difficult for me to write or think clearly about a concept which is vague to me, and so I wish to find something to say about social justice with certainty.

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employees and community in a sense the law might recognize and prevent. See Moyers, *A World of Ideas II*, Sandel interview pages 149-157, especially pages 150-151.

[52] Dworkin, *A Matter of Principle*, page 212.

[53] From a New York Times editorial of 8/28/74. Quoted in Edward S. Greenberg, "In Order to Save it, We had to Destroy it: Reflections on the United States and International Human Rights." Reprinted in Werhane et. al., pages 462-470.

[54] Rawls, *A Theory of Justice*, page 21.

[55] St. Augustine, *Confessions*, xiv. 17.

One common denominator seems to be this: "social justice" is engaged in discussions of what people should be able to do, and what they should be able to have. Because they address what people may rightly have and do, theories of social justice generally carry within them theories of *property* and *harm*. If I say that a distribution should be rectified by the state, I am making a claim about the boundaries and thickness of property rights, and alluding to a background theory of how claims are formed and what it means for things to be yours and ours. If I say that you should be prohibited from doing certain things then (on one assumption) I am implicitly defining a theory of harm.[56]

The recognition that theories of property and harm lie at the root of social theory is, at least implicitly, a commonplace. Helen Longino's "Pornography, Oppression, and Freedom: A Closer Look," argues for expanding the legal theory of harm broadly enough to prohibit pornography, for it:

> "nourishes sexism... The campaign against it is an essential component of women's struggle for legal, economic, and social equality."[57]

In a footnote, she adds that:

> "Pornography thus becomes another tool of capitalism."[58]

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[56] The assumption of which I speak is the broad reading of the Harm Principle described earlier, that reading which I claim is as genial to the communitarian as it is to the liberal.

[57] Helen Longino, "Pornography, Oppression, and Freedom: A Closer Look," in Jaggar's *Living With Contradictions*, pages 154-160 (this quote from page 160).

[58] *ibid.*, page 160 note 2.

Similarly, Thomas Grey's 1980 essay, "The Disintegration of Property," criticizes a theory of property which Grey associates with "mature capitalism." The collapse of "mature capitalism's" theory of property is:

> "a factor contributing to the declining prestige, the decaying cultural hegemony, of capitalism *(sic)*."[59]

For Longino and Grey (and myself, and many others as well), advance in social theory pivots upon reinterpretation of harm and property.

A theory of social justice may incorporate theories of property and harm that are disallowed for logical, moral, or practical reasons. Thus it may reject a claim about social justice by showing that the theories of property and harm implicit in it are theories from which a reasonable person withholds support.

By examining the universe of supportable theories of property and harm one limns the boundaries within which theories of social justice are tenable. The goal of this essay is to conduct such an examination of the twin concepts of harm and property. Again, Chapters 2 and 3 take up harm, 4 and 5 take up property.

There is an additional consideration: it is possible to argue that some reasonable political theories cannot be fitted to even the broad reading of the Harm Principle, and that in fact my reading is a Procrustean bed upon which the finer points of, for example, communitarianism, are lost. Such an argument holds that law may legitimately pursue ends other than the prohibition of harms, even

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[59] Thomas C. Grey, "The Disintegration of Property," in *Property*, edited by J. Roland Pennock and John W. Chapman, pages 69-85 (this quote from page 74).

with "harm" broadly construed: it may also be used as a tool to achieve positive social goals. Analysis of this argument is too broad for this dissertation, and I will not mention it again until my concluding chapter.

IV. CONCLUSION

A. A Note on Style

The reader will find that this work is often historical. One reason for this is that I believe the value of an idea is best seen within the context in which that idea evolved, and in relation to the issues which that idea addressed. Consider, for example, the Philip's head screw, an invention which baffles until one learns that the tendency of its head to shear is a design feature, making it perfect for machine installation where robotic wrists cannot sense torque. These screws made sense when they were invented but were not intended to be used as conventional screws and, with the advent of better automation, might as well be abandoned. So it is with such blunderbuss legal concepts as "warning out," "manumission," "heresy," "harlotry," and (arguably) "seduction." On the other hand, the value of some legal concepts (e.g., "a taking") may be lost on us if we do not consider the circumstances in which they arose.

A second reason for the historical theme of much of this work is that discussions of political orderings which proceed without mention of the past disturb me, as they ignore the lessons of past orderings. John Kelly, an Irish professor of legal history and an elegant writer, confronted the same issue while teaching legal philosophy. He wrote:

> "The jurisprudence they are taught ought, therefore, to give a humane foundation to what will be their life's profession; instead of which, it seems to me, they are nowadays mostly given a sort of course in mental and moral athletics, sweating around the cinder-track of mid-twentieth-century linguistic analysis and late twentieth-century political issues."[60]

I seek to avoid that fault here.

B. The Structure of this Dissertation

This dissertation has four parts.

This introduction has given a rough idea of my project. The first chapter lays out two background principles to which much later discussion refers: the Rawlsian principle of legitimacy, and Sowell's distinction between constrained and unconstrained visions of social processes. That chapter is mostly exegetical until the final section, where I am able to state my project in formal Rawlsian terms.

The second part examines harm. It has two chapters: it explores theories of tort and compensatory justice as way to think about rights. My specific goal here is to discover whether, in a society governed by political liberalism as Rawls conceives it, the state can enforce a positive right citizens may have to altruism from each other. Thus Chapter 2 concerns torts and harms, Chapter 3 concerns rights and altruism.

The third part examines property. It also has two chapters: Chapter 4 is a history of property theory from the Greeks up to Mill

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[60] Kelly, *A Short History of Western Legal Theory*, page xii. I am indebted to this extraordinary work of Kelly (who died recently) for what slim understanding I display

and the modern economists who carry his banner. Chapter 5 addresses two current theories of property: Jeremy Waldron's and Margaret Jane Radin's. The specific goal of Chapter 4 is to draw from the history of property theory some principles with which to inform our "considered convictions." The goal of the fifth chapter is to refute the way in which Waldron and Radin reinterpret property rights to create room for the state to pursue (what they both call) "*social justice.*"

The forth part is the appendices, to which various supporting arguments and explanations have been relegated.

C. Summary of My Purpose

In summary, I address the following problem: social theory proposes things for the state to accomplish, yet States act primarily through laws, and obedience to laws is compulsory. In advocating a social theory, therefore, we support making things mandatory for ourselves. On the face of it this is curious; why not just refrain from doing those things which we expect government to prohibit, or voluntarily do those things which we expect government to encourage? In fact, of course, we have reasons for supporting a state which will make some things compulsory not just for ourselves but for others. We should be prepared to justify that support, for in the final analysis, by supporting a law we tacitly demand that people should somehow be controlled.

We should remember, however, that people have their own projects, and left to themselves interact in ways that produce

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in Chapter 4 of the relation between legal theory and the history of ideas.

outcomes. If a writer endorses law X, she will likely argue that in the absence of X people will perform acts generating outcomes which are, in some sense, failures. If the acts are commercial exchanges, she explains that peoples' free exchanges sometimes achieve results they themselves do not desire, or achieve results which are otherwise intolerable. These are failures of free exchange. If the acts proscribed by law X are not acts of commercial exchange, she may defend X by describing a way people harm each other in the absence of X: such harm-creation is another type of failure. Most simply, she may argue that in the absence of law X some things do not get done which should be done, and the state must force such outcomes into existence. Here people left to themselves fail not by producing results at odds with their various projects (as in the market-failure cases), but by *not* achieving a project that (the regulator asserts) should be achieved, whether or not individuals make it their own.

In short, justifications for state compulsion share the theme that left to themselves, people sometimes interact in ways that fail. They fail either by generating perverse results (that is, those they themselves do not desire), or by generating results which are otherwise to be condemned.

This work evaluates these justifications.

CHAPTER 1

LEGITIMACY & MODERNITY, CONSTRAINED VISIONS, AND OTHER INFRASTRUCTURE

This chapter is devoted to philosophical bookkeeping. First, I address Rawls' principle of legitimacy, and extend it in a way he would not endorse (appealing in part to Appendix A's critique of *A Theory of Justice*). I also explain here Sowell's critique of assumptions concerning decision-making based on centralized information, assumptions which gird social thought. Second, I explain my use of "Kantian," "public goods," "coercion," "theory of justice," and "institution." Third, I reply to "the Borkian Objection" to my project, an objection which denies pre-political rights and hence an independent stance from which to criticize coercion. Fourth, I restate my project in terms of reflective equilibrium. Completing these tasks now allows economies later.

This chapter is often expository, innocuous to most readers and controversial to few. I therefore have shifted sections of it to Appendices A, B, and C. Hence this chapter and those appendices form a hypertext which allow the reader to skip what is obvious, and find easily what is objectionable.

INTRODUCTION

The reader may have several qualms about the project outlined in my introduction. In response, I pursue four goals in this chapter.

1. I reveal the background vision from which I seek to address the question, "what makes law legitimate?" I argue that along with weak conditions of constitutionality and consent, a proper answer invokes conditions set by the Principle of Legitimacy, as it appears in Rawls' recent work *Political Liberalism* (which, along with some earlier papers on the subject, address the problems peculiar to multicultural democracy). I continue by working out some details of the "overlapping moral consensus" referred to by this principle.

My discussion of Rawlsian political liberalism assumes familiarity with Rawls' work *A Theory of Justice*. Not wanting to clutter this chapter with the n-thousandth exegesis of that book, I have included such exegesis in Appendix A, followed by criticism of several of his major arguments. These criticisms recur elsewhere in this thesis, but are only stated formally in that appendix.

Also in this effort to reveal background theory, I discuss Thomas Sowell's *A Conflict of Visions*, an intellectual history which demonstrates the power of a well-chosen tool of analysis. My hope is that by describing the two camps into which Sowell cleaves political visions, I will save many words later. My discussion of Waldron, for example, attacks the validity of three links in his argument, and criticizes several more with reference to the claims I make here. The message I intend is, "if one agrees with my background vision, then along with my first three objections against

Waldron, one should see that he is wrong on these other points." Laying out that vision once clearly will allow such economies later.

2. I explain my use of "public goods," "coercion," "theory of justice," "institution," "Rawlsian," and "Kantian." Rather than spending the next hundred pages sharpening my pencils, however, I shift the discussion of Rawls to Appendix A, and the others to Appendix B. I treat "harm" and "property" in the body of this work.

3. I reply to what I term "the Borkian objection," after the jurist who made opposition to pre-political rights the foundation of his jurisprudence. "Surely," the Borkian says, "the subject of the limits of state authority does not relate to theories of justice in the way you describe. If a political mechanism justly assigns a certain set of rights and goods to each individual, and then does not transgress that assignment, then tautologically it cannot be coercing someone unjustly. One would have to rely on an antiquated notion of pre-political rights to deny this."

One answer to this claim is that, even were it telling, this dissertation would still be philosophically interesting, taken as critique of political authority. A more powerful response defends an independent viewpoint from which to judge claims about coercion. This lengthier response can be found in Appendix C, so as not to bog down the reader who finds the Borkian objection unpersuasive.

4. With my assumptions explicit and my terms defined, I recast my project in terms of Rawlsian reflective equilibrium.

I. BACKGROUND: THE PRINCIPLE OF LEGITIMACY AND THE CONSTRAINED VIEW OF MAN

Modernity and Political Legitimacy

> There may be some branches of human study - mechanics perhaps - where the personal spirit of the investigator does not affect the result; but philosophy is not one of them.
>
> - John Jay Chapman[1]

> "When I try, however, to point out the most dangerous characteristic of modernity, I tend to sum up my fear in one phrase: the disappearance of taboos." - Leszek Kolakowski[2]

Consider in its barest form the act of arrest. People come to my home, knock down my door, and forcibly confine me. I am accused of breaking a rule and, if I or my lawyer fail to convince otherwise, I may be made to forfeit things, such as my freedom or my property.

Obviously there is nothing necessarily wrong with this: I may indeed have broken the rule in question, and it may be an admirable rule. I do maintain that lengthy confinements and property-seizures call for justification. What conditions justify such acts? The three conditions I will discuss are constitutionality, consent, and legitimacy. The first two conditions are weak and virtually unobjectionable, and my discussion of them is correspondingly brief.

Constitutionality - As Hans Kelsen has written, every system of law has a "basic norm," namely:

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[1] John Jay Chapman, "William James", reprinted in *The Oxford Book of Essays*, pages 336-340.

> "Coercive acts are to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe."[3]

That is, if the police in the actions described above are enforcing a rule, but that rule is one which someone merely shouts from a rooftop, or that the police draw from a hat, then it is not a rule the police should enforce. Every legal order has a set of meta-rules which govern what other rules in society should count as legal rules, and hence legitimize police enforcement. These meta-rules are constitutional rules.

Consent - Suppose that the constitutional meta-rule, the "basic norm" Kelsen mentions, simply is this: whatever Patrick shouts from a rooftop becomes a rule that the police should enforce. Is such a rule therefore legitimate? Unfortunately not. It is widely acknowledged that the meta-rule must embody the consent of the governed, as a way of providing them the respect they deserve as moral persons. This consent need not be explicit: as a rapist is dragged from his home, it will not avail him to say, "Wait! I do not consent to this rule against rape!" Not only need he not consent at the moment, it is plausible to say that he need not have openly consented in the past. Consent need not be explicit: various forms of political organization (for example, Israeli kibbutzim, Anglo-American legislative democracies, and elected chieftains from early settled Iceland), all embody the consent of the governed, yet they

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[2] Leszek Kolakowski, *Modernity on Endless Trial*, page 13.

[3] Hans Kelsen, "The Dynamic Aspect of Law," page 40.

embody that consent in various ways. Debate exists on which political organizations best embody consent: that it is the case that consent should in some form be embodied through political processes, however, is not seriously disputed.[4]

Legitimacy - The previous two conditions, constitutionality and consent, are so weak that no one would seriously propose a legal structure without them. Yet I wish to explore one further condition.

To move to a concrete example: assume that I live in a community of religious fundamentalists. Our elected officials, in response to our demands, pass a law prohibiting sex while standing up (we fear it may lead to dancing). My neighbor is seen to violate this rule and is reported. When I visit him in jail, I tell him that while I regret his circumstances, I applaud his arrest. He protests that his incarceration is unjust. Suppose that the situation is such that I can respond truthfully (in keeping with the above two conditions), "Oh, this is quite just. You violated a law, that law was formed in conformity with our legal system's constitutional meta-rules, and consent of the governed is embodied in the processes which generated this law from our constitutional meta-rules. Satisfied?"

This exchange is infelicitous. The man may well respond, "Yes, I *know* that it is a valid law. But *why* is it a valid law? Why should you be deciding such issues for me?" He is asking for a better justification than the one I supplied.

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[4] My thanks to Debra Satz for pointing out these background conditions of legitimacy.

The principle of legitimacy which I will now defend responds: we must have a reply we can give that arrestee, and be able to give it with a straight face. What it takes for a modern to reply "with a straight face" has been addressed by Rawls, and I will begin my discussion of the principle there.

RAWLSIAN POLITICAL LIBERALISM

In 1987 and 1988, John Rawls wrote two articles on what he termed "political liberalism," which appeared in altered form in his recent work of that title.[5] His assumption in *A Theory of Justice* was of a well-ordered society where individuals are animated by a shared conception of justice. In these later works Rawls considered a society more like our own: multiethnic and multicultural, inhabited by people with widely different and often antagonistic beliefs about what values should inform a proper human life. That is, they differ in their "visions of the good."

Rawls described the problem in the following way:

> "... in a democracy political power, which is always coercive power, is the power of the public, that is, of free and equal citizens as a collective body.
>
> As always, we assume that the diversity of reasonable religious, philosophical, and moral doctrines found in a democratic society is a permanent feature of the public culture and not a mere historical condition soon to pass away."[6]

Rawls emphasized again elsewhere (as do I herein) that, "Political power is always coercive power backed by the

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[5] The works I mention are John Rawls, "Overlapping Consensus," "The Priority of Right and Ideas of the Good," and *Political Liberalism*.

[6] Rawls, *Political Liberalism*, pages 216-217.

government's use of sanctions, for government alone has the authority to use force in upholding its laws."[7] Having said this, he describes "the principle of political legitimacy" thus:

> "on matters of constitutional essentials and basic justice, the basic structure and its public policies are to be justifiable to all citizens..."[8]

And more directly:

> "... political liberalism says: our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason. This is the liberal principle of legitimacy."[9]

But in a society with so little shared moral knowledge, how are such justifications going to convince? Only by not taking for granted principles which are not visible to all. Even with their widely varying beliefs, there must be some shared principles, some overlap among the moral visions of the citizens. Rawls therefore concludes:

> "This means that in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines - to what we as individuals or as members of associations see as the whole truth - nor to elaborate economic theories of general equilibrium, say, if these are in dispute. As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional

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[7] *ibid.*, page 136.
[8] *ibid.*, page 224.
[9] *ibid.*, page 137, quoted elsewhere herein.

> essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally."[10]

I wish to clarify how tightly this principle binds law. I do this by examining what is properly included in a "conception of the good," and by addressing a practical problem concerning divergence of these conceptions which Rawls seems to have overlooked.

CONCEPTIONS OF THE GOOD

By "conception of the good" I refer to beliefs about ultimate values in life, beliefs by which the holder may rank various projects and opportunities. These may be more comprehensive than her moral beliefs: some people's conceptions of the good are clearly more comprehensive and well thought-out than others. Conceptions of the good may be comprehensive religious doctrines, as Rawls mentions, or they may be philosophical or economic theories. It is worth noting that Rawls is unusual in placing philosophical beliefs on the same plane as these other doctrines, and not as superior to them.

Because "conception of the good" is often closely related to, or at least includes, a person's moral outlook, I will dispel tedium and for the sake of euphony refer to the same concept by other terms, such as "private moral vision," "set of moral impulses," etc. Clearly "moral vision" does not do justice to the economist whose conception of the good includes not only moral beliefs but theories of signaling, social choice, etc. Since most people are not in that camp, however, the substitution is generally safe.

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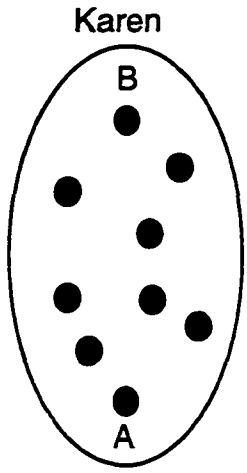
[10] *ibid.*, pages 224-225.

I wish to provide a simple illustration of this principle, one that surely has occurred to the reader by now. This graphically depicts the Rawlsian principle of legitimacy: I resort to it now to provide a basis for refinement later.

Let an ellipse signify that set of propositions called "a private moral vision" or "a conception of the good." Let "A" signify the belief that one has an obligation not to assault people, and "B" signify the Jehovah's Witness interpretation of the Old Testament to hold that blood transfusions are wrong.[11] Karen's private moral vision includes both of these beliefs, and many more:



Karen's world includes Jerry's also, and Jerry does not care about the Old Testament, but he does care about assault, and as a Confucian insists that the display of ingratitude towards one's parents is immoral.

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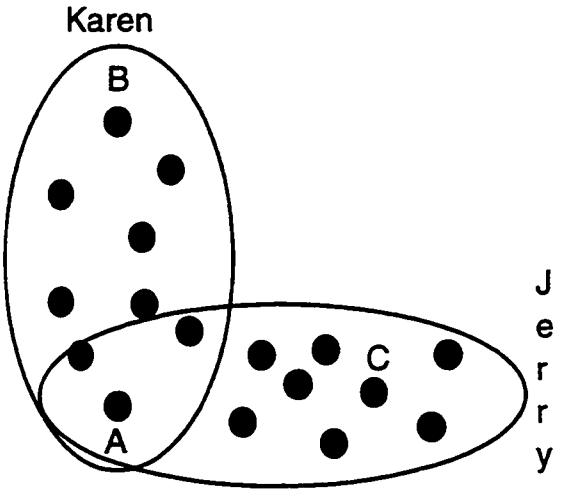
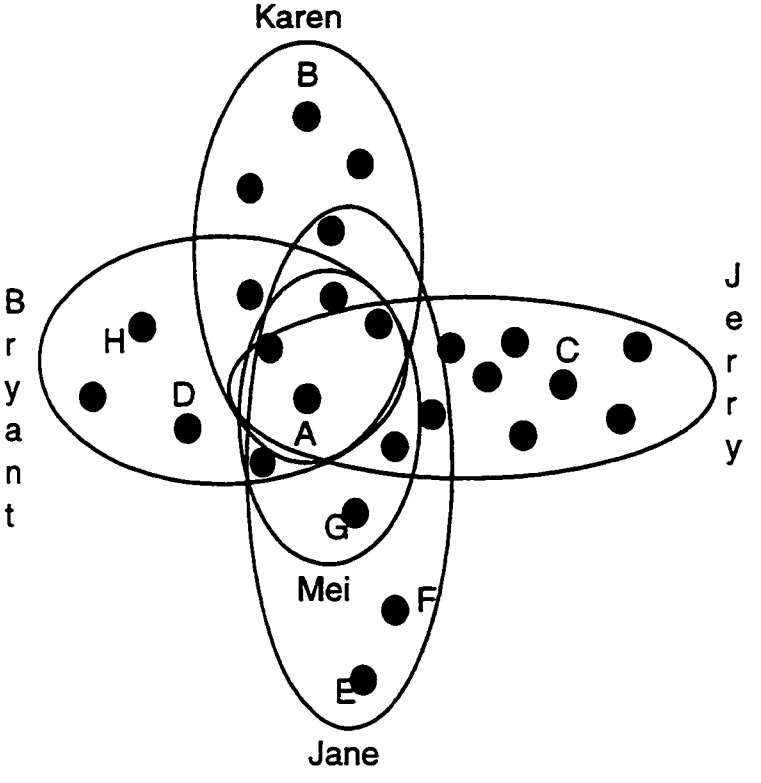
[11] In *Raleigh-Fitkin Paul Morgan Memorial Hospital v Anderson*, NJ (1964), a pregnant Jehovah's Witness declined blood transfusions. They were ordered upon her by



And so on through several more citizens:



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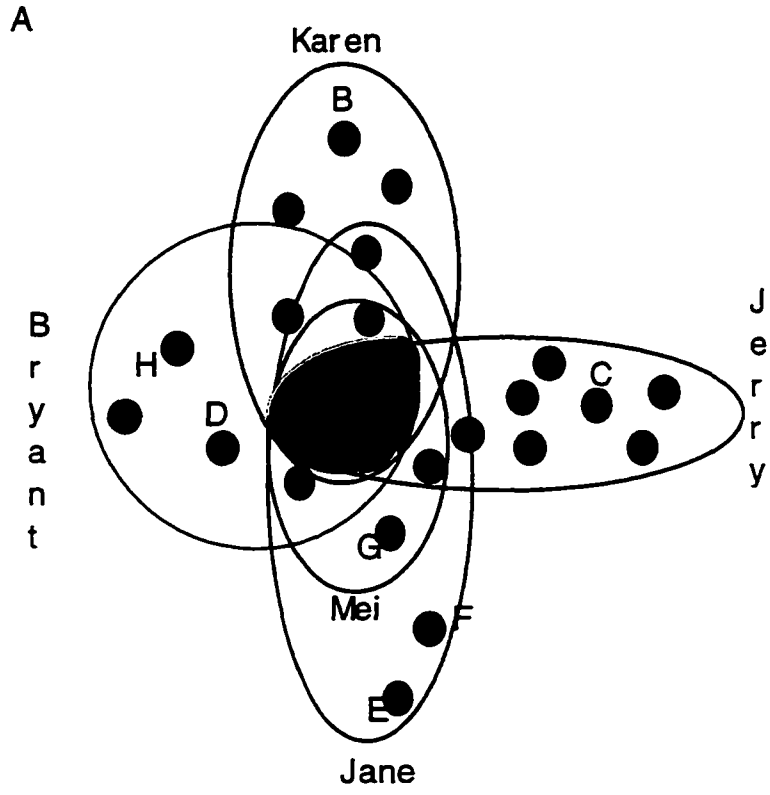
the New Jersey Supreme Court. The legal status of fetuses was different then, of course.

Then if Bryant, for example, not only advocates H, but advocates that there be law to force all the others to conform to H, and he gives as his reason no more than his H-conviction, then a state which uses force to endorse that conviction may be said to be violating the Rawlsian principle of legitimacy.

Of course, there are some shared convictions, in that area shaded below:



This area includes A and two other points (perhaps one of these points is the principle that principles which fall out of a thought-experiment such as the Original Position or, more loosely, a hypothetical bargaining situation over fair principles, are principles that it may justly be codified as law).

I will qualify this immediately by saying that in practice it will only be the moral conceptions of large majorities, perhaps, which need to be considered (else veto power is distributed too thoroughly: more will be said on this when discussing "completeness"). A law which at its core envelops one of these shared principles is not one that violates the principle of legitimacy, as Rawls uses the term.

The concept of an overlapping consensus has been explored within anthropology, primarily by Clyde Kluckhohn (but also, for example, by Franz Boas[12] and Ralph Linton[13]). In his *Mirror for Man* Kluckhohn noted that cultural differences do not imply:

> "that there is no such thing as raw human nature. The very fact that certain of the same institutions are found in all known societies indicates that at bottom all human beings are very much alike."[14]

Exploring this further in "Ethical Relativity: Sic et Non," Kluckhohn asks: "Are there universals or near-universals of any sort that cut across cultural boundaries?"[15] In answer, he disparages the way extreme "relativity exaggerated the significance of outward form and of the historically determined accidentals of human cultures."[16] Instead, Kluckhohn addresses what he terms "ethical universals," noting that:

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[12] Franz Boas, *The Mind of Primitive Man*, Chapter VI, quoted in Kluckhohn's *Culture and Behavior*, page 273.
[13] Ralph Linton, "Universal Ethical Principles: an Anthropological View," in *Moral Principles of Action*, edited by Ruth Anshen.
[14] Clyde Kluckhohn, *Mirror for Man*, page 20.
[15] Clyde Kluckhohn, *Culture and Behavior*, page 273.
[16] *ibid.*, page 283.

> "there are some rules and some principles that all human groups take seriously.... Ethical universals are the product of universal human nature, which is based, in turn, upon a common biology, psychology, and generalized situation."[17]

A similar theme appears in the political work of Noam Chomsky. Chomsky's linguistics focus on "universal grammar," the set of rules by which our minds are (allegedly) hard-wired to analyze language. At a sufficiently abstract level, one can understand Chomsky's politics as also expressing the view that there is a commonness among humans that should be reflected in social institutions. Though he denies that the connection between his linguistics and political work is a strong one, it is an analogy he often makes himself.[18]

The concept of an overlapping moral consensus has great appeal as a method of philosophical justification, if only in the negative: certainly if a rule is grounded only in some principle which is not a member of the overlapping moral consensus, it is not a good law. The positive case is more difficult. Much reference will be made in this work to the overlapping consensus. In particular, it informs my discussion in Chapter 3 on positive rights. This issue is also key in my criticism of Margaret Jane Radin's and Jeremy Waldron's theories of property.

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[17] *ibid.*, page 285.

[18] See, for example, Chomsky's *Problems of Knowledge and Freedom*, his essay "Language and Freedom" in *The Chomsky Reader*, and *For Reasons of State*, Chapter 9.

The act of violating the principle of legitimacy is an act I will sometimes refer to as "legislating morality," given the largely moral content of the conceptions of the good to which the Rawlsian principle of legitimacy defers. I believe this term makes more vivid the actual political problem with which I am concerned, and makes possible a more precise rephrasing of the principle of legitimacy.

Why should the overlapping consensus constrain social rule-making?

If one reflects on the reasons why theocracy is wrong in a multicultural state, one see why laws are wrong if they are not grounded in such a society's overlapping consensus.

Consider how the passage of Western society out of theocracy was driven by two forces. One was that, in even a mildly "multicultural" society such as 16th century England, theocracy proved unstable: the Pilgrims who settled in the New World were not pilgrims *to* something, they were pilgrimming *away* from something. They too, famously, did not get the idea, and replicated theocracy here. That proved unstable as various other sects developed.[19] But it also proved unstable under the weight of Enlightenment ideals, and the conviction that private conscience and public law existed in separate realms. The US Constitution's 1st amendment recognizes that confessional government is impractical as well as abusive: legislating morality is similarly impractical and abusive.

Legislating morality is impractical. Although much of Rawls' case for the principle of legitimacy is made on principled grounds,

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[19] See Daniel Boorstin's *The Americans*, Volume I: *The Colonial Experience* for an account of this.

with reference to the Kantian ethic of treating other selves as rational persons, Rawls' earlier paper, "Overlapping Consensus," stresses this practical justification for the principle of legitimacy. He recognizes that, in the end, the point of laws is to regulate behavior, and in a non-totalitarian society they will only succeed in regulating behavior where they have allegiance; a system of laws which cannot generate general allegiance is futile; in a multicultural society laws which do not accord with the principle of legitimacy will not earn general allegiance, and hence are futile. In short, where there are many private visions of the good there will be only weak allegiance to a set of laws which reflect but one subset of those held at large: discourse is Beirut-ified by the codification of the unshared elements of various conceptions of the good.

Legislating morality is abusive in a modern state. It is a fact of modernity that we have trouble saying we are sure about any moral proposition. Call this Hume's Problem: the claim that moral propositions may be evident but impossible to prove. If I hold a moral conviction but am unsure that it is a true proposition about the universe, then I should lose sleep if I cause someone to be sent to jail for violating it. It seems reasonable that before I put someone in jail there should be some story I can tell him about why he is being imprisoned. If I tell him that he broke a law, and the reason that law exists is that some small number of the rest of us hold a conception of the good which includes a principle which has been codified as that law, and I cannot prove that the underlying principle is a good one, then I should have trouble keeping a straight face as he goes to jail: I should see that what I am doing is not

completely honorable. For these reasons it is illicit for a state to legislate morality, as that term has been defined here.[20]

Note, however, that this leaves wide latitude for some laws. If I endorse a law against physical assault, for example, I can keep a straight face while I endorse the incarceration of a mugger: I can appeal to a *principle* (e.g., "Hitting *someone* in the head with a hammer harms them,") which I reasonably expect to find within the conceptions of the good of all people. And as will be discussed in the next chapter, the law is riddled with precisely such appeals to what a reasonable person would expect (in evaluating harm, or risks, for example).

The preceding explanation assumed that the members of society all shared some non-trivial moral convictions. To the extent that this is false, it would appear that we cannot achieve non-trivial law without illicitly legislating morality. And of course this is impractical: in a modern, well-ordered, but diverse society, "all" is a big word. Is it truly necessary that "all citizens as free and equal may reasonably be expected to endorse" a given justification while remaining faithful to their individual visions of the good, or just most people?

The next section addresses this concern.

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[20] Notice this claim concerns what the State should seek, not what individuals should do. It seems a regress is involved in saying that "People should not seek to have the State legislate morality." If one replied, "Why not?", the likely response would be, "People should not seek to impose private moralities upon others." This is what I am here calling a moral sentiment, or a moral impulse: it is an element of that person's conception of the good. If it underlay the proposition in question, adherence to that proposition would be self-defeating. This, therefore, is a situation where it is licit for a person to request the State to perform X, but it is illicit for the State to perform X.

"COMPLETE" SETS OF CONCEPTIONS OF THE GOOD

When does community become intolerance?

> "The figure... came early, with his Bible and his sword, and trode the unworn street with such a stately port, and made so large a figure, as a man of war and peace... He was a soldier, legislator, judge; he was a ruler in the Church; he had all the Puritanic traits, both good and evil. He was likewise a bitter persecutor, as witness the Quakers, who have remembered him in their histories and relate an incident of his hard severity towards a woman of their sect..."[21]

From the preceding section, if a law appeals only to a precept which is shared by all members of a set of concepts of the good, and that set includes the moral visions of all members of a political group, then the codification of that precept is not an instance of wrongful morality-legislation (or, as I use the term, it is simply not an instance or morality-legislation). As I noted, however, "all" is a big word and the disjunction of the moral visions of "all" members of a large set of people, especially modern people, may be a small disjunction indeed. People are just too different. Some people have authoritarian temperaments, some laissez-faire; in their understanding of the world some have Grassy Knoll dispositions, some Lone Gunman; many moderns operate under the assumption of the medieval Catholic Church's doctrine of "plenitude," some do not; some join the Flat Earth Society, some (claim they have) walked on the moon. The conceptions of the good of so many people will disjoin to a small set, incapable of supporting an active state

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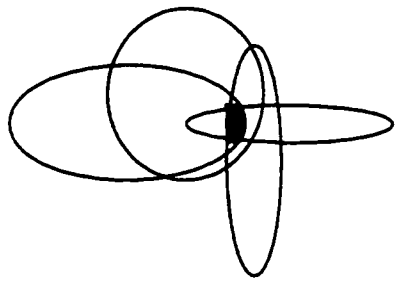
[21] Nathaniel Hawthorne, *The Scarlet Letter*, pages 22-23.

without straying outside the perimeter of somebody's private vision. Graphically, the position I am considering is this (with the gray area mirroring the size of the state that can be supported in compliance with the principle of legitimacy):



To a true political minimalist, that is all there is to say. We are left with a small "night-watchman" state as the only legitimate monopolizer of violence: such a state can enforce those laws derived from or enveloping only those moral precepts upon which *all* members are in agreement. If the state steps beyond that boundary to pass additional laws, it will signify no more than that the monopoly on violence has been usurped by some members of the community to impose their private visions of the good upon others.

This is the position taken by Robert Nozick, for example, with regard to a community-supported public address system. If the conceptions of the good life held by my neighbors include the belief that it is worthwhile to operate a PA system to play background music for the community all day, and yet I do not think it worth my time to participate, then (according to Nozick) my community is wrong to force my participation or support. They should not *use* me

to make themselves better off; they should not force me even if I enjoy the music but am too lazy to help out, for:

> "One cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this."[22]

According to this Nozickean position, true unanimity among conceptions of the good is necessary to justify state violence.

Were I to meet someone of this conviction, it is unclear to me that I could fault their logic, and not just their judgment. Such a theory may well be internally consistent. Like solipsism, it is a position from which it is hard to dislodge a believer, yet it is simultaneously impossible for him to advance from it: it is the position of a general who has dug himself into a fortress, and traded away mobility for security.

To me, however, this position is mulish and a non-starter, if one understands what must be asked of a modern state if the country it governs is even to continue operating. I will give reasons for this position, and I acknowledge they may not be decisive. The dispute, however, can be reduced to the extension of one term, "complete," so that the rest of this argument may proceed.

Assume there are a great many similar people whose private moral visions are disjoined, and which yield one full set of mutually shared moral precepts. These moral precepts inform a rich and substantive set of laws. The million people happily go about their

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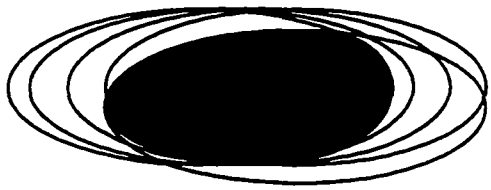
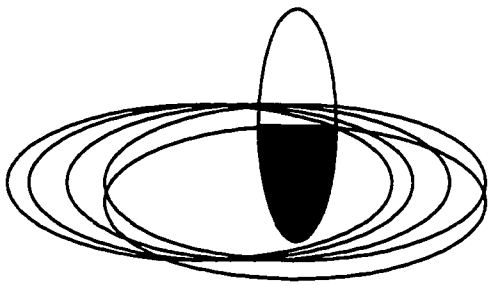
[22] See Robert Nozick, *Anarchy, State, and Utopia*, pages 93-95.

business regulated by this set of laws, acknowledging that within those laws lies a disjunction of moral givens, a large set upon which all agree (I imagine here the Pilgrims, or any society with that same thick and shared sense of community so admired by some):



One additional member, a Hester Prynne, joins this group: her moral convictions are weaker and less numerous than her new neighbors'. In particular, she shares few of the moral convictions found in the disjunction of the sets of her compatriots' moral visions. If the libertarian's analysis is accepted, the fundamental character of the state must now change, and it must divest itself of a great many of the functions it previously performed:



Yet it seems arbitrary and abusive to allow the one new citizen to have such an impact on the lives and happiness of a million heretofore satisfied people. In the name of guarding the

moral perimeters of people, we would be allowing one person to change the living arrangements of a multitude, which looks suspiciously dictatorial.

I believe this situation is related to Sen's paradox of the Impossibility of a Paretian Liberal. Sen's extension of Arrow's Impossibility Theorem assumes that in a liberal society, each person has at least one decision, some ranking of alternatives, that she alone controls. Assuming that at least one person has one issue she alone controls (say, whether she sleeps on her back or her side), plus the other standard assumptions of Arrow's proof, one can derive preference rankings whereby the outcome is Pareto-dominated by some other possible outcome. In short, the assumptions of Arrow's Impossibility Theorem show that some sets of preferences generate dictatorial outcomes: if one adds Sen's assumption that a person has some private issue over which she alone has a say, Pareto-inefficient outcomes are possible.[23]

To continue with the earlier example: consider the case where the new arrival into the community of Pilgrims brings 300,000 people with her, all of whom reject some large portion of the existing overlapping consensus. At some point, it would seem, one does question the appropriateness of retaining law which appeals to the visions of a simple majority, not a super-majority. Medieval Islam was often relatively tolerant to Christians and Jews.

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[23] See Amartya Sen, "The impossibility of a Paretian liberal." It has never been clear to me why this result is surprising: a Paretian is a utilitarian (that is, a consequentialist); a "liberal," as used here, is a deontologist. Proving "The

Ostensibly this was because they were "People of the Book." Perhaps it was also because they were few in number, especially in politically-powerful Persia. Had they grown more numerous, the state might have had to change, or else the infidels would have.[24]

By way of example, and at the risk of becoming topical, consider the state of Israel. It is, in some sense, "the state of the Jewish People." To some, a state is the state of its citizens, but ignore this objection. Suppose only one ethnic group occupies the land governed by a particular state, and that state names itself the state for the people of that ethnic group, and suppose further that this is legitimate. I thus might as well say, "Israel is legitimate to begin with." Assume then that enough Palestinians move in, or the few who are already there just give birth at a very high rate, and 5% of the population become Palestinian (who are either Christian or Muslim, but rarely Jewish in their faith).[25] Is it still legitimate for Israel to be "the state of the Jewish people"? Suppose that number gets to 20%? 35%? 85%? At some point, certainly, it becomes

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Impossibility of Paretian Liberal" is like proving "The Impossibility of an Atheist Priest." The sets of values named by the two terms are inherently opposed._

[24] *cf.* My footnote on toleration in Islam in my Introduction.

[25] I emphasize births, in part because people have no choice about where they are born, and in part because it captures the actual situation pretty well: the Palestinian "nation" has nearly the highest birthrate in the world, further complicating an already difficult issue. If I were speaking about people who know the facts before they immigrate, and yet choose to immigrate to Israel anyway, the subject of a rightful hurdle would become more murky. One could argue that such a case would be a real-life example of a social contract: surely if hypothetical social contracts reveal facts about fairness, should not real-life social contracts? This case has been made implicitly by some Israelis ("Palestinian have rights in and to their own nation - the Palestinian nation of Jordan"), and explicitly by Afrikaners in the era of apartheid ("South Africa receives millions of immigrants from the rest of Black Africa: are they not voting with their feet?"); and also explicitly in the Arabian Gulf states, where immigrant workers (mostly Pakistani's, Filipino's, and more Palestinians) do not have anything amounting to legal rights, but who choose to go work for a year or two at many times the wages

illegitimate for Israel to continue to be "state of the Jewish People," and to promulgate law based on Judaic values. If 85% of the population were Palestinian Muslims or Christians, and the government enforced a set of laws with Talmudic origin only, it would begin to look like nothing more than a Levantine Rhodesia. Presumably there is some hurdle beyond which a government must recognize dissenters from the previously shared conception of the good upon which it is based, and adjust accordingly.

I previously claimed that if a law appeals to a principle which is shared by all members of a set of conceptions of the good, and that set includes the visions of *all* members of a political group, then the extension of that principle into law is not an instance of morality-legislation. I will now amend that claim: no more will I say "the visions of the good of all members of a political group." Instead I will say "the *complete* set of visions of the good of a political group," and stipulate that "complete" may mean something less than "all." For the night-watchman libertarian it will mean 0% less than all: that is, a law is legitimate only if it draws upon a precept shared by the vision of the good of every person whom that law will regulate. For a reasonable liberal it may mean some reasonable number (20%?) less than all: in a community overwhelmingly but not entirely composed of devout Amish, for example, the liberal may acknowledge that laws governing store hours on Sunday could be legitimate. For an Afrikaner it may mean 85% less than all: if a law codifies the conception of the good of 15% of a group, but it is the "right" 15%, then that law may be legitimate.

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possible in their home countries.

In fact, a good definition of "complete" would be a function not only of the percentage of dissenters, but also a function of the intensity of dissent: presumably apartheid is wrong, even if the group discriminated against is not 85% of the population, but only 1%.

My point is that the problem referred to at the outset of this section, that in a modern society the Rawlsian "overlapping consensus" may be negligible, can be confined to a different and more manageable problem. We may talk coherently about the disjunction of the complete set of moral visions of a group, and leave "complete" to be the subject of another argument, not to be engaged in here.

An objection to the principle of legitimacy: law is not related to conceptions of the good

I wish to consider now the reply of an objector who maintains that the Rawlsian talk of overlapping consensus and my preceding extension of it were misguided, because law is unrelated to private moral visions or conceptions of the good. No such values underlie proper law, this objection continues: proper law is deducible without resort to private visions of the good.

I have suggested that one should acknowledge that *sometimes* law merely codifies the private conceptions of the good of some people (legislators or those they represent), that this has, at one time or another, happened. The objector replies that such laws are improper, and that proper law does not rest on the disjunction of conceptions of the good held within a community but on some other foundation, and merely coincides with some commonly-held moral precepts (which may, after all, spring from the same foundations).

In keeping with my explanation above, I have 5 ways of maintaining that law and conceptions of the good are in fact related.

1) My first response is to point out that we generally have a moral duty to obey the law (for a lot of reasons, and given a huge number of caveats, that I will not explore here). Therefore a moral proposition rides along within every law. It is impossible to confront a law and not engage a moral precept as well.

2) My second response is that the objector has taken too seriously my claim that law envelops moral precepts, and has interpreted my metaphor too literally. I do not mean to suggest that standing immediately behind a regulation governing, for example, sulfur emissions of a power-plant, there is a thick moral precept such as "One should not spew sulfur into other people's air," or even a less thick, one such as "One should not destroy the environment." I mean simply that, if a curious four-year old confronts me and asks why that law is on the books, and I give a response, and he repeats, "Why?", and I give another response, and he repeats "why?", and so on, eventually I will say "Because Z," where Z is some flimsy and incontrovertible claim that begins "One should". It may be a utilitarian sentence, or a sentence expressing natural rights convictions, or a sentence which would be found in an argument for an intergenerational social contract. In that sense, it seems reasonable to say that within the workings of any substantial set of laws there are a few tiny moral linchpins drawn from various conceptions of the good, and these hold the machinery together.

3) The third response I have to the objector who believes that law may develop entirely from sources which make no moral

assertions, is to ask how we can know which source is the right one. His answer would seem to have to include sentences which start, "One should". He would thus be referring to a conception of the good.

4) The objector may argue that:

A. Liberalism properly understood is about creating a proper space within which people may pursue their own private conceptions of the good as successfully as possible (this, for example, is the interpretation Rawls gave to liberalism in "The Priority of Right and Ideas of the Good").

B. Therefore liberalism is not about choosing the right moral precepts out of the community's shared pool.

I am in agreement with A, but B is a *non sequitur.* As I have been mentioned, Rawls' argument appeals ultimately to a practical point: the theory of justice animating a society must be able to win support from that society, and liberal theories are most capable of earning endorsement in a multicultural society. An anti-liberal theory cannot, but for a defense of liberalism to avoid being anti-liberal, it must be grounded in something other than a flat, non-obvious claim about what is good. The claim that "societies should be ordered so that all people can best pursue their own private visions of the good within them" is not an obvious claim today in many parts of the world, or even this country. Therefore a defense of that claim must be made if it will not itself be anti-liberal.

Stuart Hampshire has provided a defense of the viewpoint that the liberal mind-set must itself appeal to some (presumably innocuous) element of a conception of the good: the Grand Inquisitor

argument. Hampshire argues that even for the Communist leader or the Grand Inquisitor there exists,

> "great moral evils, although the Communist leader, or the Grand Inquisitor, will refer to his own conception of the good as redeeming the evil."[26]

Hampshire believes that in entering philosophical debate one maintains consistency only by acknowledging that one's conception of the good must ultimately appeal to some principle from which no reasonable person may withhold support. Therefore one tacitly acknowledges the preferability of reason over force. In short, one has to abide by certain principles when one attempts philosophical debate, these principles animate the liberal political vision, and therefore in philosophical debate there are certain anti-liberal positions one is precluded from adopting.

5) Fifth and last, the objector could say, "Yes, in making a case for why the law should be a certain way one must appeal to some tiny moral precepts, but *here* is that set of moral precepts, and these are the only ones the law should appeal to, whether the disjunction of the complete visions of the good of a group happens to include them or not, or includes their contraries." In practice this is not a problem, because such moral precepts, if they are truly tiny, will be incontrovertible, and hence will be picked up by the disjunction of complete moral visions. If they are not, then this objector is in the position of the theocrat, discussed earlier.

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[26] See Hampshire's *Innocence and Experience*, pages 100-107 and 169.

Conclusion: "complete" visions of the good

In summary, let a set of visions or conceptions of the good be "complete" for a society if and only if the moral visions (or conceptions of the good, etc.) of T of the G members of that group are included in that set. A law which is grounded in the most basic way in an appeal only to a moral precept which is a member of the disjunction of those T visions is not a law which legislates morality. T may be a high number (representing a high percentage of G) for a libertarian, a low number (or percentage of G) for a communitarian, 1 for a totalitarian and, simply as a report of my own intuition, some moderately high number for a reasonable liberal. I have suggested no decision-procedure for determining T. I have also skipped the problem of whether those G-T people have different claims based on whether they were born into G, or arrived from another group but knew the situation, and hence tacitly acknowledged the reigning conception of the good, when they came.

SUMMARY OF THE PRINCIPLE OF LEGITIMACY

Having discussed each of the important terms in it, I can now provide a more detailed statement of the Rawlsian principle of legitimacy, fleshed out to be practical in this less-than-ideal world:

> Law should not legislate morality. "Legislating morality" signifies the codification of a less than complete set of moral conceptions or visions of the good; it does not reasonably signify the case where merely *some* moral precept underlies a law. If a law appeals only to a precept which is an element of all members of a set of visions of the good, and that set is "complete" for a political group, then the codification of that law is not an instance of wrongful morality-legislation.

I have fleshed out this Rawlsian principle of legitimacy in order to refer to it as a background principle in the discussions of positive rights, harm, and property which follow. Now I shall turn to a second background principle which is infused into this dissertation: Sowell's constrained vision of mankind.

Sowell's Dichotomy of Political Assumptions

> "Conflicts of interests dominate the short run, but conflicts of visions dominate history."
>
> - Thomas Sowell[27]

I make muted appeal in this thesis to arguments of Thomas Sowell. Sowell believes that philosophy matters: that is, at least some great historical forces are ideas. Within this framework his book *A Conflict of Visions* addresses the following problem:

> "One of the curious things about political opinions is how often the same people line up on opposite sides of different issues. The issues themselves may have no intrinsic connection with each other. They may range from military spending to drug laws to monetary policy to education. Yet the same familiar faces can be seen glaring at each other from opposite sides of the political fence, again and again... A closer look at the arguments on both sides often shows that they are reasoning from fundamentally different premises."[28]

Sowell says elsewhere that these "visions are not mere emotional drives. On the contrary, they have a remarkable logical consistency," and are not "confined to zealots and ideologues. We all have visions.

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[27] *ibid.*, page 8.
[28] *ibid.*, page 13.

They are the silent shapers of our thought."[29] Specifically in his book, "a vision is a sense of *causation*."[30] They are, in short, the framework with which we interpret data about society.

Visions "differ in their basic conception of the nature of man."[31] Of the possible basic conceptions, Sowell writes:

> "it is ... possible to recognize certain key assumptions about human nature and about social causation which permit some to be grouped together as belonging to the constrained vision and others as belonging to the unconstrained vision."[32]

I summarize the basic contentions of each of these visions here.

CONSTRAINED POLITICAL VISIONS

A constrained political vision focuses on the ways that men are limited, both intellectually and morally. Believing this feature of man to be fixed, a constrained vision endorses social institutions which take advantage of such defects. If self-interest is assumed, then economic systems should follow Smith's model of harnessing self-interest in order to reach a greater social good. If rapacity among nations is assumed, one should seek out the reasons war does not occur every day, rather than try to understand the special causes of war. If man is intellectually limited, we should look with disfavor on articulate knowledge and its bearers, and instead favor mechanisms which operate on decentralized, inarticulate knowledge.

Adherents of the constrained vision maintain that we should eschew consciously-designed social processes and embrace those

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[29] *ibid.*, preface, pages 7-8.
[30] *ibid.*, page 16.
[31] Sowell, *A Conflict of Visions*, page 18.

which have been validated by long usage, such as social traditions and common law heritage. If we embrace social processes which have had such validation, then we have less need for "experts" to make decisions for the masses: we should think of society as organized organically, not as a top-down industry with "experts" at the top. And so on.

In short, the constrained vision is unambitious. It does not challenge social outcomes where it thinks that the knowledge required to do so is unachievable. Instead, it focuses on social processes, and tolerates evil today where it senses the greater evil which results from tinkering with incompletely-understood social processes. It is oriented towards markets and the common law rather than command economies and statutory law. It places little faith in "improving" people, and instead seeks to describe constraints and incentives which will steer people to make socially beneficial decisions.

UNCONSTRAINED POLITICAL VISIONS

The unconstrained vision, on the other hand, thinks that the view just outlined is little more than a combination of ancestor worship and a willingness to tolerate injustice. This vision holds an optimistic view of the intellectual and moral capacities of men.

Believing that social processes can be understood and improved, there is a greater role within the unconstrained vision for expert knowledge of various kinds. Therefore, the common law tradition is less favored by the holder of the unconstrained vision,

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[32] *ibid.*, page 37.

as are market processes, which embody inarticulate and decentralized information. Believing that more and better is possible for mankind, the unconstrained vision must explain why there is so much evil now, and does this by charging that social ills are generally the result of bad or unjust choices people make. Rather than designing social institutions to harness men's defects, the unconstrained vision claims such institutions only reinforce and reward those same defects. Political power may be centralized in order to accomplish the egalitarian ends of the unconstrained vision, especially as adherents of the unconstrained vision view political power as being concentrated anyway. Formal political equality is often thought to be a sham, a cover-up of underlying structures of power and authority, to advocates of the unconstrained vision.

As an example of this vision, consider this statement of Noam Chomsky's:

> "Our society... is a system of elite decision-making...In fact, power is very highly concentrated, decision-making is highly concentrated in small interpenetrating elites, ultimately based on ownership of the private economy in some measure, but also in related ideological and political and managerial elites."[33]

In short, the unconstrained vision believes that much better social outcomes are achievable than currently exist, that forces are at work to prevent those outcomes, and that proper analysis and design of social institutions can generate outcomes which are better than the ones we currently enjoy.

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[33] Noam Chomsky, *The Chomsky Reader*, pages 42-43.

It may appear that these are nothing more than dressed-up descriptions of the political Left and Right, but that is mistaken. While Smith is quite clearly a constrained thinker, Marx often held a constrained vision as well, especially in his historical analyses. Many people straddle the camps: Mill, for example, reasoned from the constrained vision in his economic work, but believed in the political potential of expert, articulate knowledge, as did Rousseau: in this way both operated from unconstrained visions.

SUMMARY OF THE VISIONS

In summary of these two visions, I return to Sowell:

> "The great evils of the world - war, poverty, and crime, for example - are seen in completely different terms by those with the constrained and the unconstrained visions. If human options are not inherently constrained, then the presence of such repugnant and disastrous phenomena virtually cries out for explanation - and for solutions. But if the limitations and passions of man himself are at the heart of these painful phenomena, then what requires explanation are the ways in which they have been avoided or minimized."[34]

The constrained vision seeks trade-offs, believing that cures are rare and unknowable; the unconstrained vision seeks solutions it believes are within the grasp of suitably educated and enlightened people. Believing that outcomes are impossible to determine, the constrained vision judges procedures, not outcomes. The unconstrained vision, again, thinks outcomes are more meaningful

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[34] Thomas Sowell, *A Conflict of Visions*, page 31.

than processes, and seeks to judge accordingly. Importantly, both visions agree that a certain set of social circumstances are deplorable: they disagree, however, on the causes of these ills and the best way to correct them. To the constrained vision of man, it is man himself who is the problem; to the unconstrained vision, it is the limitations which men accept which are the problem.

I could relate the constrained and unconstrained visions to a number of other dichotomies as well; to moral attitudes which Hampshire associated with innocence and experience; to deontological versus teleological moralities; to moral theories which weigh the past versus those which look to the future; to the industrial model of society versus the catallaxic model.[35] While establishing these links would be an interesting study in its own right, it is beyond me here.

My point in this section has been to provide an outline of the two schools of thought Sowell discusses, these two sets of background political assumptions. Thus I am left to identify the vision which grips my imagination.

THE POLITICAL VISION INFORMING THIS WORK

Jean-Jacques Rousseau thought natural man noble: for him, social institutions corrupt and enslave. "Man is born free," he wrote,

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[35] This last distinction falls between a view of society as being like a large factory or corporation, where "structures of power and authority" determine outcomes, versus viewing it as collection of poorly understood and decentralized processes. Hayek is an example of an adherent of the catallaxic model. For the industrial model, consider Hillary Clinton after her husband's inauguration: "My husband's running the country now." The catallaxic response would be, "No, your husband's running the *government* now." See also my discussion of Bruce Ackerman in Chapter 2.

"and is everywhere in chains."[36] On the other hand, Joseph Conrad's Mr. Kurtz, a philosopher and idealist, set out to bring civilization to "primitives." Unfettered from the restrictions and shackles of civilization Kurtz saw what lay at the heart of man and found it so unspeakable that he could only gasp, "The horror! The horror!"[37]

Though I may wish otherwise, the constrained vision provides a *far* better description of the world as I find it than does the unconstrained, and this belief no doubt lurks in the corners of this thesis. I thought it best to identify this bias from the start.

II. TERMS

> "Like so many words in constant use, discrimination is seldom defined. Familiarity takes the place of precision.
>
> The point here is not to derive the one and only possible meaning of the word. Rather, the purpose is to emphasize the importance of sticking to whatever meaning is selected, so that our reasoning is about a *meaning* and not about a *word*."
>
> - Thomas Sowell[38]

Throughout this dissertation I use terms such as "public goods," "coercion," "theory of justice," "institution," and especially, "Kantian." To some readers the meanings of these will be non-controversial: not so to others. Rather than slow the pace down with long discussion of each, discussions of these have been placed in Appendix B, for the reader's convenience.

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[36] Rousseau, *The Social Contract*, page 49.

[37] Conrad, "Heart of Darkness," in *The Portable Conrad*, page 591.

[38] Thomas Sowell, *Markets and Minorities*, page 19.

III. THE BORKIAN OBJECTION EXPLAINED

> "The problem is, how does the Court know which rights are fundamental and basic? One answer might be that rights guaranteed by the Constitution are fundamental, but that answer could be of no help to the Court, because the right [in question] is not guaranteed, explicitly or implicitly, by the Constitution."
>
> - Robert Bork[39]

> "The enumeration in the Constitution of certain rights shall not be construed to disparage or deny others retained by the people."
>
> - Ninth Amendment, US Constitution

One may object that the standard I seek by which to judge a State's aggression towards her subjects is a will-o-the-wisp, for we cannot judge coercion outside of a theory of justice which describes people's entitlements. This is to deny that there are pre-political constraints on social orderings.

For example, one might hold that a legal "taking" is really only a taking if an individual holds a property right in the object taken, and that property right is assigned by the governing theory of property. To deny this one would have to maintain that the property was owned outside of the political arrangements of that State. But things are owned only by reference to a theory of property, which is a political arrangement. We cannot even say something is a taking, let alone consider whether it is just or unjust, without reference to that background theory of property, so no external point of view exists to say whether the state even forces someone from "his"

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[39] Robert Bork, *The Tempting of America*, page 66.

property. Therefore theories of justice must either be confronted internally, or not at all.

I may respond weakly, and suggest that at the very least my discussion of limits to state authority takes up an interesting problem, even if it does not connect strongly to other areas of political philosophy. But I may answer more directly than that. The objection, which for reasons which will become clear I name "the Borkian objection," is a bad one. The reason why is suggested in this interesting passage from James Buchanan's *The Limits of Liberty* concerning the example of property:

> "This issue is brought into focus by the familiar assertion that property rights are defined by and subject to change by the 'government' or the state. As noted [earlier], this amounts to saying that only the government or the state has rights, and that individuals are parties to a continuing slave contract."[40]

Of course, that claim will be contentious to some readers. The reader who from the introduction and preceding sections of this chapter is convinced of the reasonableness of my project might skip to the next section; one who believes that it is the project of political philosophy to describe desirable social institutions *a b initio*, without stepping outside them once in awhile (so to speak), and that such constructions can be judged only by the reasonableness of the arguments which gird, may turn to Appendix C to see the Borkian objection addressed.

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[40] James Buchanan, *The Limits of Liberty*, page 83, also quoted in the introduction to his dissertation.

IV. RESTATEMENT OF MY PROJECT

> "The ultimate test of a theory of justice is that it cohere with, and help illuminate, our considered convictions of justice. If on reflection we share the conviction that slavery is unjust, then it is a powerful objection to a proposed theory of justice that it support slavery. Conversely, if a theory of justice matches our considered intuitions, and structures them so as to bring out their internal logic, then we have a powerful argument in favor of that theory."
>
> - Will Kymlicka[41]

With the preceding discussion of assumptions finished, and the necessary terms defined and defenses explored in Appendices A, B, and C, it is possible for me to attempt the most full and clear statement of my project. I am proposing a thought-experiment using an expanded version of Rawls' "reflective equilibrium" while constraining the dimensions along which it operates.

Rawls, again, begins from a set of initial conditions of justice and derives from them a set of principles of justice.[42] When judging the output of a theory of justice against "considered convictions," in Rawls' phrase, I am proposing an additional standard be considered. As was mentioned earlier, theories of property and harm are integral to some theories of justice and derivative in others (e.g., Nozick and Rawls, respectively). But in either case, a theory of justice, if it has any substance, will have associated with it a theory of property and a theory of harm.

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[41] Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, page 7.

[42] This is the Rawlsian construction of agents shorn of particularities and deposited in the original position, with a veil of ignorance shielding from them knowledge of their eventual place in the world, as is discussed Appendix A. See Rawls, *A Theory of Justice*,

I propose that a theory of property or a theory of harm which is associated with a theory of justice can be evaluated independently, and that theory judged accordingly. The evaluation can be practical ("Is this a theory of property which will undermine the flow of economic information and cause social collapse? Is it a theory which will tolerate discrepancies in well-being beyond the ability of a state to maintain order?") or it may appeal to considered convictions regarding some consequence of the theory ("Does this theory of harm classify obviously good deeds as harmful?"). This is true whether the theories of property and harm associated with a theory of justice are found in its inputs or conditions, such as in Nozick's theory, or its output or derived principles, such as with Rawls' theory.

All of the above explanation overlooks one possibility. Suppose a theory of justice proposes rules which imply theories of property and harm which I cannot support. The theorist may argue "Do not accept this principle because of the theory of property involved, or because of the theory of harm. Its justification is found in the social project it endorses." Such would be the claim of one who denies that we may restrict people only to prevent harms: we may restrict people (as Sandel's communitarianism suggests, for example) to accomplish worthwhile goals. This social-goal justification is, as I have said, beyond the scope of this work, and is not brought up again until the last chapter.

The ultimate goal of this essay then is not apodictic: I do not claim that I can use this method to establish a thick, substantive

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Chapter 3.

theory of justice and defend it as the correct one. My goal is to provide hurdles for claims about justice to clear. These hurdles are simply "Is this a theory of harm which I want to support?" "Is this a theory of property which I want to support?" "What kinds of social projects might justify compulsory rules which fail the first two tests?" I will be satisfied if I can show that these hurdles are higher than is generally thought.

With my terms more-or-less clarified, my assumptions made explicit, the consistency of my project defended, and the framework of my argument in place, I may proceed to the analysis of the proper standards for state coercion.

CHAPTER 2

TORTS AND HARMS

The common law provides a check on tyranny, and we find there clues to the limits of legitimate state force. In particular, the common law tradition responds to the question of how far law may extend under the justification of preventing harm or enforcing rights. Tort law is the area of legal doctrine which gives fullest expression to legal rights. In this chapter I look to tort law to begin defining these limits. Lastly, I use principles distilled out of the preceding discussion to reinterpret and clarify Mill's Harm Principle.

This and the next chapter have many moving parts, and so I provide a schematic at the beginning of each.

I. The problem I address is, how far may law reach under the guise of preventing harms and enforcing rights?
II. To decide what law may rightly do, one may ask what law does and how law operates.
III. Metaphorically: people live within spheres of liberties; harms are incursions into those spheres; a person's rights are the fabric from which her sphere is constructed. Of all types of law, tort law most fully reveals the outer edge of those spheres.
IV. How does tort law work? Historically, it has aimed to achieve rectificatory justice, and has been called into play by the confluence of a wrongful act, an injury, and a causal link between the two.
V. After a distinct doctrine of tort law was recognized, its elements were conflated.
VI. The conflation has been mirrored in Mill's famous Harm Principle. Finding a coherent interpretation of this principle will guide my inquiry into law's reach as an instrument of preventing harms and enforcing rights.

By supplying a breakdown of this chapter's argument in this fashion, it is my intent to allow the soundness (or lack thereof) of my argument to be judged more easily. The various propositions above have been numbered, and correspond to sections below. Some of these sections explain their matching propositions at length; several contain lengthy arguments in support of the propositions to which they correspond. A better writer than I could construct this argument with fluency, and without recourse to these signposts: I plant signposts or risk losing my reader in thickets and byways.

I. HARM AND LAW

As law is the primary instrument of justice, at least on the modern view of justice, it is useful to inquire into what kind of an instrument law is, in order to understand its reach and its limitations. My real interest, of course, is not in questioning law's ability to prevent obvious harms, or enforce obvious rights (such as rights against being assaulted). My interest is in the use of law to enforce non-obvious positive rights, or put another way, in law's ability to serve certain social goals under the guise of harm-prevention, the mainspring of the clockwork of classical liberalism.

The political concept of harm need not correspond with the concept behind the rough English usage of "harm". Because its political meaning is not plain and because it provides justification for state coercion, an intolerant who wished to command other people might insinuate into his theory of harm principles reflecting his own private preferences about how other people should live. In fact this is such an obvious path that I should be surprised not to find it well-worn.

A theory of harm may spread its roots into two soils: the area of legal theory which concerns torts, and the area of moral philosophy which concerns rights. From this I will move in the next chapter to the subject of legal rights and duties, and in particular, the duty of altruism. My purpose is to show how these issues successively constrain each other. That is, to know how expansive tort liability can be one must decide how far legal rights may extend,[1] and to know this, it is useful to gauge the depth of our

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[1] There is an area of tort liability that does not merely reflect the rights of others: strict liability. Under this doctrine I may be held liable for performing an act which is not held to have abridged anyone's rights. Therefore, like many accurate statements about

duties to each other, and in particular, our duties to behave altruistically. Put another way, if I know what my duty to altruism is, then I (may) know something about the rights of others as well. If I know this about the rights of others, then I know something about torts. If I know this I know something about law which bears on the question of whether it can legitimately accomplish the social ends which a theory of justice demands of it. Therefore this chapter and the next, which takes up rights and altruism, form one argument.

II. REAL LAW, SPECULATIVE PHILOSOPHY

Here again I take a page from the book of Legal Realism: in order to determine what the boundaries of rights are it seems natural to ask what behavior actually receives protection from the courts, and what behavior draws liability. This does not imply an allegiance to the metaphysical doctrine of the realists regarding what law is, but a commitment to a method of thinking about the law that looks first at what the law does before deciding what it should do. While one could certainly jump past the issue of what law actually does and directly argue about what law should be doing (and this enthusiasm is common), this course is unwise. The law may have good reasons for its actions, and such reasons will be lost upon a jurisprudence which does not reflect upon its past.

Thus, my focus is on the historical common law rather than on current tort theory (though I address confusions in this). This is so because the common law has a special way of suggesting limits to state action. As Leonard Schapiro, the great British Sovietologist and jurist, said in lecture summarizing one aspect of his life's work:

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law the above statement is only partially true. The issue of strict liability is discussed later in this chapter.

> "In this study my experience of the law has been a constant guide and inspiration, and I have repeatedly found myself searching the legal theory and structure of the countries with which I have been concerned for explanation which the examination of institutions alone did not provide... The major political problem of our time, in practice as well as theory, [is] the emergence of what is usually called totalitarianism in National Socialist Germany and in Soviet Russia. We often like to think - and I hope we are right - that we are immune in this country [Great Britain] from that most terrible scourge of contemporary democratic society. I believe that if we are immune, or at all events have remained immune so far, then this is intimately interwoven with our common law and in the contrasts which it presents with the legal systems of all the countries of continental Europe."[2]

A serious defense of this special claim for the common law would itself be the subject of another dissertation. The general point of such a work would be that tyranny demands convulsion, it demands radicalism, it demands certainty. It demands, in short, high blood-pressure. These demands are inimical to the tradition of the common law and its molish ways, always, in the face of some new social movement or theory, the last to get it. This makes it particularly well-suited to be mined for insights into limited government. I will argue, however, that for many decades (perhaps since the recognition of tort law as a distinct doctrine in 1859), Anglo-American tort law has been strongly influenced by social philosophy. Examining this recent law for insight into social

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[2] Leonard Schapiro, "The Importance of Law in the Study of Politics and History", a lecture given to the Carlyle Club at Trinity College, Cambridge, in 1972. Reprinted in *Russian Studies*, pages 29-44.

philosophy would then reduce tort theory to a vast echo chamber for philosophy.

Put another way, the relation of the social philosopher to the lawyer is analogous to the relation between an architect and an engineer. An architect, if commissioned to design a public hall, may desire to work from scratch without regard to previous forms or to the input of engineers. She may feel that her originality and creativity will be sullied if she first consults the works of those who have gone before her, or those who concern themselves with function rather than form. She may feel that such consultations betray a hint of ancestor worship, or an overly-strong allegiance to the past, or an acceptance of the limitations of the present, and that these allegiances must be muted if new forms and designs congenial to the future are ever to be discovered.

These intuitions surely have merit, and, where they have been absent, there has been a stultifying repetition of forms across centuries (a trait which marks the art of Confucian societies, for example). Yet our hypothetical architect may avoid costly errors if she examines how the problem of constructing public halls has been approached by her predecessors. While she need not be slavishly devoted to past forms, she may discover in them possibilities which might not have occurred to her, and see solutions to problems she had not anticipated. By consulting the experience of engineers, she may learn something important about the properties of the materials with which she wishes to build.

Also, the engineers may know something about architecture.

III. LAW AND RIGHTS-SHELLS

Why Tort Law is the Correct Law To Examine

The question arises: to which corner of law's domains should I look for these hints? The answer is tort law. It may be wondered, why focus on the law of torts, and especially on the common law of torts, in an inquiry into the subject of rights? Why not attend to constitutional principles, or to the protections offered persons by legislation and regulation?

It has been observed that in America most issues wind up in court, but this observation is incomplete: most end up in civil court. Whether the issue be one of constitutional rights (e.g., the freedom of the press versus an interest in not being libeled), environmental regulation (e.g., an ocean-front land-use dispute between those who believe use should be decided by public interest versus those who think uses are controlled by property rights), or legislative restriction of agreements (e.g., employment and rent control laws versus an alleged freedom of contract), there is sure to be a tort action on the matter through which we can determine what rights receive legal recognition.

Put another way, it is a commonplace at least 150 years old to conceive of rights as defining spheres of individual control within which we live: "shells" may be a better metaphor.[3] The walls of my shell are composed of layers of rights: rights to worship as I please, travel where I please (within certain constraints), not be punched in the nose, etc. An intrusion into my shell is a violation of my rights.

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[3] "Shells" captures better than "spheres" the (sometimes permanent) damage done by incursions. Also, if we are all working around within our shells of rights, there are some ways in which we cannot meet, and cannot bond, and this is an important fact about liberalism, according to its critics.

How far from me do the walls of my shell extend? The answer may be found in several places. Constitutional law has something to say on the matter, as do employment regulations, statutes governing property, and so on. I can look to all of these to discover how far from me the walls of my shell extend. Yet in the end it is the law of torts which best reveals the outer edge of my shell: if something pierces my shell it is actionable, whether that pierced claim is named in the constitution, or in regulations, or in statutes. If I am granted my assertion that looking to law *as it has developed* is useful in thinking about justice and the reach of law, then it will be most useful to look at what the law does in cases of civil suits, for it is here that the action of the law finds its broadest expression.

By examining the trajectory of tort theory rather than its apogee I hope to provide a better analysis of its origin in Aristotelian philosophy and the principles of its growth. Perhaps if there are good reasons for the law to develop as it has, these reasons may illuminate discussions of justice.[4]

Tort Law Preliminaries

As I will be spending some pages wading about in tort theory, I wish to make some further remark upon it here. There are three preliminary points to be made about tort law. 1) A definition must be supplied for tort law; 2) it is a good way to understand Anglo-American jurisprudence, grounded as it is in social contract theory;

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[4] Of course if that history is one primarily expressing disparities of power, as the Critical Legal Studies movement would have it, then my approach may do nothing more than replicate within a discussion of justice those inequities we *should* be seeking to undermine. So this method displays trade-offs, like any other.

3) it has long been "a battleground of social theory"[5] and the reasons for this are the reasons I conduct its exploration.

DEFINITION

First, what is tort law? It is easiest to follow Prosser in defining its borders rather than its content. Subtract from Anglo-American legal theory contract law, whose purpose is "the protection of a single, limited interest, that of having the promises of others performed." From the remainder subtract quasi-contractual law, whose purpose is "the prevention of unjust enrichment of one man at the expense of another." From this residual subtract criminal law, whose purpose is "the protection of interests common to the public at large, as they are represented by the state." What is left over, law which concerns,

> "the compensation of individuals, rather than the public, for losses which they have suffered in respect of all their legally recognized interests, rather than one interest only, where the law considers that compensation is required,"[6]

is the law of torts.

PRIVATE LAW IS THE BASIS FOR PUBLIC LAW

Distinguish between private law, which encompasses tort law, and public law, which encompasses criminal law.[7] Private law

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[5] Prosser, *Handbook of the Law of Torts*, pages 14-15.

[6] *ibid.*, page 5.

[7] While the breach of contracts may or may not be tortuous, contract law is itself not a part of tort law, as it concerns the specific interest people maintain in having promises kept, rather than the more general interest people have in being free from harms. See Prosser, pages 613-622. This distinction between the interests concerned is made nugatory, however, when the switch is made to discussion of law governing relations between private parties and relations between the individual and the public as represented by the state. Therefore I use "private law" to include contract as well as

allows individuals to insist upon the protection of their individual interests, whereas public law seeks the protection of common interests. A person who through his negligence injures me (say, by driving carelessly) is someone I confront through the private law with a tort action; someone who intentionally injures me (say, by hiding around the corner and then running me over when I walk out onto the street) is someone the state confronts in a criminal case, though I may have good grounds for a tort action against her as well.

Many of the principles of public law can be constructed from private law. Transactions have costs, and leaving all social decisions to be determined by transactions may needlessly replicate those costs. For example, it is conceivable that two parties to a contract might agree to a set of rules for adjudicating disputes at the same time as they form the contract: under such a system, however, the work of contracting would be made much more difficult. Rather than have all contracts attended by another negotiation on interpretation, one public standard for interpretation of contracts may be made known, and subsequent private negotiations can be conducted with reference to it.

Another example of how public law may be deduced from private law is found in the constitutional rule "nor shall private property be taken for public use, without just compensation."[8] This may be read as subsuming a rule governing intentional torts of property, expanded to allow for the prerogatives of a sovereign pursuing its missions.[9] Perhaps this means nothing more than that

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tort law. "Public law" includes not only criminal law, but also regulations such as those governing the environment, for example.

[8] Amendment V, US Constitution.

[9] This is the theory, for example, of Richard Epstein's *Takings: Private Property and the*

private law which has existed long enough to become a *de facto* social standard ossifies into a *de jure* social standard as well, as public law. Perhaps there are other mechanisms at work. The point is that, while no area of law strictly determines another, the long history of Anglo-American private law is a wellspring for the principles and language which course through the various channels of our public law, and clarity is found there.

This approach to thinking about private law as the basis for public law parallels the social contract theory tradition. Both start with the question of what it is that individuals may rightfully expect of each other, and from this derive broad principles which govern not just interactions among individuals, but interactions between individuals and their government. They construct the public from principles of the private. This is not an analogy I would push too hard; I merely point to their similarity in spirit.

TORT LAW AND "SOCIAL ENGINEERING"

The law of torts has proved a natural tool for "social engineering," as Prosser approvingly[10] names it: "more than any other branch of the law, the law of torts is a battleground of social theory." He believes this is justified, for while tort law originally was intended merely as an instrument of rectificatory justice, correcting and resolving disputes between private parties, "the twentieth century has brought an increasing realization that the

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Power of Eminent Domain. This is the book which Senator Joseph Biden, chairman of the Senate Judiciary Committee, famously waved in the face of US Supreme Court nominee Clarence Thomas, insisting that he declare "I am not now, nor have I ever been, an admirer of Richard Epstein." The McCarthyite attack was engendered by Epstein's argument that many actions of the modern US government violate the Fifth Amendment.

[10] Prosser, *Handbook of the Law of Torts*, pages 14-16. Oddly, though he approves of this use of tort law, he continually places the term "social engineering" in scare-quotes.

interests of society in general may be involved in [private disputes]."[11] That original purpose of tort law (rectificatory justice) pales for Prosser beside another purpose, only lately understood:

> "but far more important than [rectificatory justice] is the system of precedent on which the entire common law is based, under which a rule once laid down is to be followed until the courts find good reason to depart from it, so that others now living and even those yet unborn may be affected by a decision made today. There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and the future."[12]

Prosser goes on to specifically identify "a desirable social effect" with the "greatest happiness of the greatest number, which by common consent is the object of society."[13] The possibility that a judge may have trouble knowing what the greatest happiness of the greatest number *is* now or in the future, or how to "direct the law along lines which will achieve" the correct "social results," (or even what a phrase that directs one to "maximize X and Y" means), are possibilities not considered by Prosser in his enthusiasm for "social engineering." This is a perfect example of the Sowellian unconstrained political vision at work, as is discussed in Chapter 1.

IV. THE PHILOSOPHICAL DOCTRINES OF TORT THEORY

I wish to attempt in the next several pages a quick-and-dirty explanation of the main themes of tort law, before discussing modern variants on this law and how they illuminate harms and rights. This explanation breaks down into two pieces: rectificatory

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[11] *ibid.*, pages 14-15.
[12] *ibid.*, page 15.

justice in Aristotle's system of ethics, and the common law tradition in Anglo-American jurisprudence. Of course I mean no more than to pick out the major principles at work.

Aristotle's Rectificatory Justice

WHAT IS RECTIFICATORY JUSTICE?

For Aristotle, justice is divided into distributive justice and rectificatory justice.[14] Both distributive and rectificatory justice are bound up with the concept of proportion. By "distributive justice" he meant principles concerned with the distribution of goods which are divisible in a community, such as honor, money, or, seemingly, public office. Rectificatory justice, on the other hand, "rectifies the conditions of transactions."[15] Where an intercourse between two parties has gone awry, rectificatory justice is called upon to correct[16] the imbalance. Aristotelian rectificatory justice is thus the precursor and, I will show, the blueprint, of the Anglo-American doctrine of torts.[17] While there may not be one-to-one mapping between them, one can seamlessly alternate between discussing tort doctrine and Aristotle's rectificatory justice.

Aristotle spells out the types of transactions which are governed by principles of rectificatory justice. They are:

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[13] *ibid.*, page 15.

[14] Aristotle, *Ethics*, Book V Chapter ii, pages 176-177 in Thomson's translation.

[15] *ibid.*, page 177.

[16] Many translations of Aristotle in fact use "corrective" where mine, the J. A. K. Thomson translation, uses "rectificatory." The latter is preferable because "corrective" may be interpreted to mean "morally corrective," as in "a house of corrections," and this is not Aristotle's sense. See Thomson's note on his translation, page 179.

[17] It is customary to mention how the Athenian legal system differed in fundamental respects from ours, in that in a sense all law was private law, as all actions were brought by individuals (cf. Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law" in Feinberg and Gross, pages 399-410). But even this difference is overstated, for in cases which were analogous to our torts the disputants typically visited an arbitrator before they tried their case in public. See Thomson's *Aristotle: Ethics*, page 180 footnote 2.

> "Voluntary transactions are, e.g., selling, buying, lending at interest, pledging, lending without interest, depositing, and letting (these are called voluntary because the initial stage of the transaction is voluntary). Involuntary transactions are either secret, such as theft, adultery, poisoning, procuring, enticement of slaves, killing by stealth, and testifying falsely; or violent, e.g. assault, forcible confinement, murder, robbery, maiming, defamation, and public insult."[18]

Rectificatory justice demands that the proportion be arithmetical (as opposed to distributive justice's geometrical proportions). Aristotle is (to me) opaque on this point. By "arithmetical" he seemingly means that a transaction's gains and losses may be summed, that sum divided in two, and those halves apportioned (or transfer payments made) between the parties. Yet he also describes the judges role in such cases thus: "What the judge does is to restore equality."[19] The two principles are inconsistent in cases involving losses with no corresponding gains, such as when someone breaks my Ming vase or my nose. Here an arithmetical mean is merely half the loss (as there is no gain), and Aristotle's arithmetical principle would call for a payment from the perpetrator to the injured party of only half the loss. Furthermore, earlier in that same Chapter V Aristotle recognizes that there are involuntary transactions with only losses and no gains, but insists on using the language of voluntary exchanges for convenience. How Aristotle's principles should apply in cases of involuntary transactions with unequal gains and losses is a matter of some confusion.[20]

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[18] Aristotle, *Ethics*, Book V Chapter ii, page 177.
[19] *ibid.*, page 181.
[20] See for example Posner's "The Concept of Corrective Justice in Recent Theories of Tort Law" in Feinberg and Gross, pages 398-410.

WHEN IS RECTIFICATORY JUSTICE ENGAGED?

Setting aside the question of how rectification is to be made, it remains to be said how it is that a transaction could "go awry." What has to happen to make a transaction between two parties, Jack and Jill, go awry? In Aristotelian ethics it is the confluence of three events:

1) Jill must be harmed or have some loss;
2) Jack must be the cause of #1;
3) Jack must have been wrong to cause #1.

For Aristotle these three points were necessary and sufficient conditions to call rectificatory justice into play. Nothing else mattered, including, emphatically, the moral character of the agents:

> "it makes no difference whether a good man has defrauded a bad one or vice-versa, nor whether a good man or a bad man has committed adultery... [justice consists only in] asking whether one has committed and the other has suffered an injustice..."[21]

Punishment is not a feature of Aristotle's system of rectificatory justice. If someone breaks into my house and steals a bottle of wine from my cupboard, and I prosecute a tort action against the thief, and am sufficiently persuasive of his guilt, Aristotle would have that thief compensate me either by returning to me that bottle or the price of that bottle, and perhaps (if we follow his arithmetical reasoning literally) half of my costs of prosecuting the case.[22] This payment is intended to fix what went awry: it is not intended as a punishment.

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[21] Aristotle, Ethics, Book V Chapter iii, page 180.

[22] Assuming the bottle cost $W and the costs to me of prosecution were $P, the sum of gains and losses would be 2W+P. Half of this amount (W+.5P) would seem to be the Aristotelian award. Note that this leaves me $.5P worse-off than before. Aristotle's

To summarize Aristotle's theory of rectificatory justice, then, it is justice which seeks to restore an equality. It is engaged if and only if one person has been harmed, another person is the cause of that harm, and in so causing that harm that other person acted wrongly. The form that compensation must take is not specified by Aristotle,[23] and the mechanism he advocates for determining the compensation is probably imperfect. Lastly, Aristotelian rectificatory justice is not a mechanism of punishment, but a way of fixing something which is broken.

The Common Law Tradition

It is striking to discover how closely so many centuries of Anglo-American jurisprudence, from its obscure origins in Dark Age writs until 1859,[24] can be understood in terms of the plan which had been laid down by Aristotle so many centuries before. In particular, the common law developed as a method by which to decide when the three conditions of Aristotelian rectificatory justice were met. That is, in its development the common law gives guidance as to

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neglect to include court costs in his calculation perhaps reflects the fact that they were minimal in Athens.

[23] As Posner points out, it is not necessarily the case for Aristotle that compensation must come from the accused or go to the accuser: it depends upon facts concerning where gains and losses have fallen. In general, however, this is how rectification will work. See Posner, "The Concept of Justice in Recent Theories of Tort Law," 400-401 and 406.

[24] I pick 1859 because in that year tort law became self-conscious with the publication of Hilliard's work. Until then tort law was not understood to be a body of distinct principles, as contract law was only "discovered" in 1871 by Dean Langdell of Harvard. Not long after the discovery of tort law it became the battleground for the forays of social philosophy which Prosser applauds: for example, jurists enamored of industrial capitalism and the economic theories which attended it found it necessary to reinterpret long-standing principles of property rights so as unfetter those economic forces for which they were enthusiastic. In several 19th century US cases property rights were reinterpreted so as not to constrain the ability of industry to pollute common air, water, and land. See for example Murdock v. Stickney, 62 Mass (1851) and Head v. Amoskeag Mfg. Co., 113 US (1885) for examples of the abysmal response of judges to the Mill Acts of the US Congress. No doubt both judges and legislators were making the "conscious effort to direct the law along lines which [would] achieve a desirable social result, both

what counts as harm, what it means for an act to cause an event, and what it is for an act to be wrongful. Modern theories of tort law have not been so attentive in distinguishing harm, cause, and wrong, and so they have become conflated in different ways in recent years. This conflation has crept into political philosophy,[25] and some untangling of these concepts is in order.

Harm

"Harm" is a word with surprisingly little ambiguity in the common law tradition. It means, in Black's words, "loss or detriment in fact of any kind to a person resulting from any cause."[26] Harm is injury. It is not wrongful injury, and it is not socially pernicious injury. It is simply injury, and the philosophical ambiguities which now attend the concept were in fact swept by the common law into the latter two necessary conditions of Aristotelian rectificatory justice: cause and wrong.

This is not to say that the tradition of Anglo-American jurisprudence has been unflinchingly devoted to one definition of harm: time has seen the evolution of an increasingly sophisticated recognition of what is injury, from only the most observable to purely internal and increasingly speculative psychological injuries, such as pain and suffering. But there is a difference between being open to new understandings of what an injury is, and using "injury" to mean "injury which has come about in a wrongful way." The first keeps intact one definition but recognizes new events which meet that definition, while the latter changes the definition itself.

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for the present and the future," that Prosser and many modern jurists applaud.

[25] I will be expanding this point shortly, but by way of example I may now mention the debate in the 1980's and early years of the 1990's among Andrea Dworkin, Catherine Mackinnon and Ronald Dworkin on pornography.

Causation

Causation is a complex area in legal theory: "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."[27] This complexity stretches back deeply into the tradition of the common law, and concerns such questions as distinguishing metaphysical causes from proximate or legal causes, joint causes, foreseeability, direct causation, intervening causation, what it means for someone to have a "last clear chance" to prevent an event, and so on and so forth. These issues have little to do, however, with my project in this chapter of illuminating the first justification of state coercion which concerns me, that of preventing harm and enforcing rights, and I will pass by these issues.

Wrong

The third condition of Aristotle's, that the harmful act be also wrongful, is the crux of the issue from the perspective of political philosophy. There is nothing in the common law (as there was nothing in Aristotle's rectificatory justice) which suggests that tort law was intended to punish moral culpability. Many despicable acts are traditionally beyond the purview of tort law, though harm may well be caused. Callously breaking a parent's heart, for example, or wanton cruelty towards a lover, or ingratitude towards a benefactor, are base acts surely but not actionable in a legal sense.

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[26] *Black's Law Dictionary*, page 717.
[27] Prosser, page 236.

How can this be, if such acts cause harm and they are morally wrong? For two reasons. First, the common law is not an ass: it recognizes informational constraints and trade-offs. In each of the examples mentioned above, problems of moral hazard (i.e., asymmetrical distribution of information) would make rules recognizing baseness a nightmare to administer and cause the courts to be flooded with cases where culpability was hard to demonstrate and damages harder to calculate. Second, the principles of common law which evolved to determine what was wrongful could be applied without strong appeal to theories of what was ethically distasteful. In short, moral wrongs were distinguished from legal wrongs, and while the two overlapped a great deal the latter could be far more decisively administered.

These common law principles primarily concern the motive the defendant has for causing the harm. "Motive" in this sense does not refer to "psychological reason" but rather addresses another aspect of intent. The question of legal motive in tort law is not a question of "What was the purpose of the defendant?" but rather "How purposeful was the defendant?" If he in fact caused a harm, was his causation intentional, negligent, or, somewhere in between the two, reckless? In recent decades a new theory, strict liability, has been admitted as grounds for tortuous actions. This theory holds that when a defendant causes harm, and does so neither intentionally, nor recklessly, nor even out of negligence, he may still be liable for damages. It seems to me that it is this area of tort law which has seen the most confusion, and has been the most active Prosserian "battleground of social philosophy." I turn now to a short explanation of each of these motives.

intentional

"Intentional" is used in tort law to refer to a state of affairs where an actor desires to cause a certain consequence, or believes that this consequence is substantially certain to result from an action. Where a reasonable person would have predicted that an action A would almost certainly be followed by an event B, then the person who commits A may be said to have intended B.

Of course, intention is far more tricky philosophically than this paragraph suggests. The doctrine of double effect is an example of how the distinction between what is intentional and what is not intentional is not a bright line. But the law has finer standards by which to handle such issues.

reckless

A reckless person harms another yet does not intend to harm, in the above sense of drawing a conclusion concerning the likely consequences of her act. Instead, she fails to draw conclusions concerning the consequences of her acts. She may do so willfully, though the harm itself remains non-willful.

negligent

In the conduct of human affairs we all expose others to risk, and we have opportunity to take care to lessen that risk to which we expose others. I cannot take an infinite amount of care in my affairs; therefore I expose others to some non-zero amount of risk, just by being human. The law proposes a standard of reasonableness: the amount of care taken by typical people in performing some given action is the standard of reasonable care for that action. If I perform that action and thereby expose others to risk, and they suffer harm, and it is shown that my care was less than that which

typical people in my place would have taken regarding the security of others, then I have been negligent.

strict liability

This standard is generally applied in product liability cases. If I sell a product that reaches a consumer in substantially the same condition as that in which I sell it, and it harms that consumer, then I may be forced to compensate him for damages under a strict liability standard, even if I took all proper care to make the product pose as little danger as possible to the consumer. Like the standard of care in an antique shop, "you break it you buy it," this standard thrusts costs onto the party who causes harm, regardless of his mental state or the standard of care exercised by him.[28]

It was mentioned in an earlier footnote that some recognized torts do nothing to illuminate our understanding of rights because the tort actions do not truly claim that a right has been violated. This is the case when a party is held liable under a theory of strict liability. Consider a case where, for example, a drug company has performed in good faith all proper tests and procedures and has received FDA approval to bring a drug to market, and yet it is discovered years later that the drug has caused a large number of deaths or birth defects. That company might be held liable for the

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[28] David Luban has privately made the argument that the absence of a strict liability standard, is itself a strict liability standard. The argument runs as follows: suppose Jack makes butane torches and exercises all possible care in their manufacturer, but it seems that one in a billion such torches blows up in a consumer's hand. Jill buys that torch, and is harmed. A strict liability stature says, "We know that even among agents exercising care, such tragedies are caused by products. How should society allocate the risks of these tragedies? Allocate them to the torch company, which can buy insurance and offset its risk." If we refuse to assign the risk to the torch company, than we *de facto* assign it to the injured party. This is a compelling argument, but it is unclear to me if it would stand up to more refined concepts of agency and cause, and if the concept of a "society allocating risks" is a coherent one.

injury its product has caused. The theory behind this is: in a complex society composed of careful individuals disasters will still befall individuals; these individuals do not know who they are beforehand; it would be inefficient to expect all individuals to take so many precautions that no disasters befell anyone; therefore we can practice a form of social insurance by agreeing to spread the costs of disasters among ourselves. This social insurance is economically efficient, as it reduces the total social cost of precautions and disasters. In this example, the optimum is attained by holding the drug company strictly liable, so that it may take the disaster-costs which have been imposed on it and spread them to other consumers. (Of course, where the producer does not have a monopoly position in a market for a good with no substitute, it is not clear that this prediction of strict liability theory is correct. Therefore, the costs may not be spread so optimally.)

Yet it is odd to say that a child born with a birth defect due to the effects of a drug his mother took while pregnant has had his *rights* (either legal or moral) violated by the drug company which supplied the drug, if that company performed all the tests required of it and in good faith proceeded to sell the drug, with no knowledge of its potential side effects. Strict liability is not, therefore, an area of tort law which fits my purpose. My purpose here, remember, is to explore how far law can be made to serve as an instrument for social theory under the justification of preventing legal harms or enforcing rights. But rights are not at issue in cases of strict liability (unless someone were to make the circular claim that

people have a right not to be injured by events which are actionable under a theory of strict liability).

I am aware that the preceding claim about a child's rights might seem odd to some. One might say that people in fact do have a right to have perfectly safe products. This strikes me as odd because to reach 0% risk one needs perfect information about all possible effects: hence (if one believes that rights have correlative duties) a consumer's right to a perfectly safe product implies a producer's duty to obtain perfect knowledge before selling something. It is impossible to obtain perfect information about all possible effects of a drug. It is farfetched to insist that agents consistently have duties to do impossible things. Hence it is farfetched to insist that drug companies have this infinite duty, as opposed to a duty to exercise some reasonable standard of care.

If the company had evidence that the drug were dangerous, and hid that evidence, then we could say that some right had been violated, but in that case the court action would not come under a theory of strict liability. Therefore the finding of strict liability and the enforcement of judgments found under a theory of strict liability are government actions which do not fall under the justification of the prevention of harm, as described in the introduction to this dissertation. It falls into the last category, the achievement of a social purpose: in this case the purpose of providing social insurance against disasters.[29]

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[29] As was mentioned in the introduction, state coercion has the discomfiting ability to be framed in several different ways and is therefore able to be located in more than one of the categories of justifications I described. For example, strict liability may be thought of as correcting a market failure: the inability of consumers to purchase any "social disaster insurance." Or it might be thought of as achieving a certain social end: providing social disaster insurance. It might be thought of as providing the drug company

I cannot let this opportunity pass to point out three criticisms of strict liability which present themselves with respect to the example of the drug company:

1. It proposes using one agent (the drug company, in my example) as a tool for the purpose of achieving greater social efficiency, regardless of its lack of fault. Using agents as tools tends to violate deontological constraints which some think important. In this case the agent is a company rather than a person, and such deontological instincts might be missing here: in Chapter 5 I address and reject this kind of reasoning in relation to Margaret Radin. In any case, the scope of strict liability reasoning has been extended to include agents which are natural persons, and in such cases deontological arguments find traction.
2. The reasonableness of the above argument rests on an apparently reasonable claim that disasters befall people: in truth, sometimes disasters "befall" people, sometimes they are thrust upon them, and sometimes people make their own accidents. The reasoning of strict liability theorists such as Epstein does not properly distinguish the three cases.
3. The reasoning above makes a prediction concerning how the drug company will act, and that prediction is incomplete. The other

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incentive to take any precautions that it can think of, above and beyond the minimums set by government law. But this is an odd way to think of law: laws, as Holmes said, are lines drawn to define the permissible from the impermissible, and it does not make sense to draw a line and simultaneously maintain that allowable behavior begins far above that line. Furthermore, the notion of "taking any precautions one can think of" is a paralyzing one: there are always more precautions one may take, more tests one may run. It might also be thought of as preventing future harms by causing the drug companies to be more careful, but that is really not the case with my example: the tort action here is based not on the assertion that the drug company's care was inadequate, but that disasters sometimes happen anyway, even with the best precautions (this is synonymous with saying the action came not under a theory of negligence but of strict liability).

actions which drug companies, municipalities, schools, etc. have taken when found liable under a theory of strict liability are actions which may tip in an unfavorable direction the "social balance" to which the theory of strict liability refers.

summary of tortuous intents

For a caused harm to be wrongful, it must have its origin in an act which intentionally, recklessly, or negligently caused that harm. An act may also be tortuous under a standard of strict liability, but I have suggested that it is a stretch to call such acts "wrongful." The concept of "reasonableness" plays some part in each of the definitions of those terms. In the first three, liability is established by showing a failure to achieve the state of mind that a reasonable person would have achieved, given the identical state of affairs. In the fourth case, liability is established notwithstanding a defendant's acting reasonably (causing this standard to seem, *prima facie*, an unreasonable standard). It may seem unattractive to have states of mind (which are, after all, unobservable), decide matters of liability. But that goes with the territory: in ascertaining intent a court comes to a conclusion regarding a person's mental state, and rarely can statements be made about another's mental states with objective certainty. What one can claim with some certainty is that given a set of observable states of the world, a typical person would have a certain mental state. It is on this basis that a court concludes which standard of intention has lapsed.

V. CONFLATION OF CONCEPTS IN MODERN TORT THEORY

Having taken these pages to lay out the principles which stand behind the Anglo-American tradition of tort law, I now turn to its modern practice, to which it bears increasingly little resemblance. In particular, I wish to explain the ways modern tort theory has disrupted the principles outlined above.

Ackerman

In *Reconstructing American Law*, Bruce Ackerman adopts what I earlier referred to as "the allowance model" and "the unconstrained vision," taking as the context within which lawyers practice one where:

> "the nation's economic welfare depends upon steering decisions made in Washington, DC."[30]

It is one where:

> "the distribution of... status is a central issue for political debate and determination."[31]

Most importantly, it is one where Ackerman's opponents, the Legal Reactivists, fail "to interpret particular facts within their social and economic context."[32] Yet fortunately the law is evolving:

> "what we are witnessing is the birth of a distinctive form of legal discourse - a professionally stabilized rhetoric that increasing numbers of lawyers will be obliged to master if they hope to translate their clients' grievances into a language that powerholders will find persuasive; a new language of power, premised on a distinctive

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[30] Bruce Ackerman, *Reconstructing American Law*, page 1.
[31] *ibid.*, page 2.
[32] *ibid.*, pages 30-31.

> set of attitudes towards fact and value that I shall call Legal Constructivism."[33]

The new and distinctive set of attitudes concerning facts and values allow "activist lawyers"[34] to pursue an agenda out of reach of reactivist lawyers and their fussy preoccupations with procedure.

As an example of a new attitude towards facts and values, Ackerman discusses tort theory in the light of Coase's Theorem, which he treats as a parable. For Ackerman, Coase's Parable shows that a "bare recital of facts" in a tort case is impossible. I wish to show how Ackerman's use of Coase's Theorem corrupts the principles of tort theory described previously.

Coase considered, in "The Problem of Social Cost,"[35] the case where a rancher's cattle stray onto the land of an adjacent farmer to eat his crops. Coase argued that government best takes care of such externalities by clever creation of property rights, assigning them to those agents to whom they would trade in a frictionless world. The assertion that government may choose to make markets rather than regulate imperfect ones, an assertion which Coase famously defended during a 1960 dinner party in Chicago (and thereby converted the faculty of the economics department there), is one of the most momentous shifts in the history of economics.[36]

Were I a "reactivist lawyer" who takes the plaintiff farmer's case, according to Ackerman, my brief is going to refer to what happened on the day the defendant's cow wandered into my client's field. It is going to make the case "that the rancher's actions

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[33] *ibid.*, page 3.
[34] *ibid.*, page 33-37.
[35] Coase, "The Problem of Social Cost," *3 Journal of Law & Economics.* 1, 1960.
[36] A special issue of 1983's *Journal of Law and Economics* recounts this episode.

weren't all that the community might fairly demand of him," and in doing so will refer to "a rich set of distinctions that ordinary people use to make sense of established expectations."[37] It will, in short, refer to some of the principles outlined above, of a caused harm brought about by a wrongful act, that act being one where the rancher intentionally had his cow eat my client's corn, or would have known this would occur had he thought about it, or merely did not provide a level of care necessary to insure that his cow would not eat my client's crop, and this level of care was what a reasonable person would have exercised.

The "Coasean lawyer," on the other hand, begins his recital of the facts far earlier: when the rancher hired or failed to hire a ranchman, when he hired or failed to hire a backup ranchman in case the first got struck by lightning, when the farmer put up or failed to put up an electric wire to protect his corn in case lightning hit his neighbor's ranchman(s), etc.[38]

This is an example of Ackerman's desire for a new kind of legal discourse willing to practice "a new language of power, premised on a distinctive set of attitudes towards fact and value." Odd as it sounds, the Coasean lawyer's position has much merit, though Ackerman endorses a much broader new language, premised on an even broader set of new attitudes towards facts and values, than is hinted at in his Coasean Parable.

It is not my intention to evaluate Ackerman's agenda: rather, it is to show how this disrupts the principles of the common law tradition laid out earlier. In Ackerman's case this is easy: it

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[37] Bruce Ackerman, *Reconstructing American Law*, pages 47-48.
[38] *ibid.*, pages 48-54.

eradicates them, and specifically, it eradicates "wrongfulness" as it was understood in the common law. Like Epstein (as will be discussed shortly), Ackerman sees as tortuous acts which cause harm, regardless of their wrongfulness. Unlike Epstein, who packed wrongfulness into his theory of causation, the Coasean leaves out wrong altogether, other than as a term of art signifying a poor economic choice. Also unlike Epstein, Coasean tort theory has a caveat: the act is tortuous if and only if in a frictionless world (i.e., a world with no transaction costs), the agent harmed would have owned the entitlement which is violated by the tort. If instead it would trade to the defendant in the tort action (i.e., if the rancher would have bought the entitlement for his cattle's trespass from the farmer, or a train company an entitlement to emit sparks from the wheat farmers who abutted the train company's tracks, or a polluter a pollution entitlement from a neighboring pond owner, to name a few of the common variations of Coase's Theorem), then the defendant should be treated as if that entitlement *had* shifted to the defendant. That is to say, no damages should be awarded in these cases.

Note that in the preceding example it is not even necessary that the "fair market value" of the entitlement ever be paid by the defendant to the plaintiff, even in settlement: this follows from the fact that entitlements are to be understood as already *held by* those whom they would *trade to* in a market. In fairness to Professor Ackerman, I acknowledge that he questions this corollary of the Coasean paradigm. Suppose, he asks, the American Midwest causes sulfuric rain to descend on the East. Suppose further that one were able to strike a bargain between the East and the Midwest, whereby

the East would accept $X to let the Midwest shower it with acid rain. Suppose it would be rational for the Midwest to pay $X to the East. What difference does all this make, when the Midwest does *in fact* shower the East with acid rain, and the East has *not in fact* received $X? Where do should such hypothetical bargains gain force?[39] Ackerman does not reply to this puzzle, though replies exist. So while Ackerman encourages the legal profession's adoption of new attitudes towards facts and values (for example, those suggested by Coase's Theorem), he regards the attitudes towards facts and values brought about by Coase as being problematic. He intends that another set of facts and values (ones which involve what he loosely calls "social justice") be adopted along with, or in lieu of, those disclosed by the Coasean Parable.

The question of how deeply Ackerman is committed to Coasean attitudes, or committed to other attitudes in the same way one might be committed to Coasean attitudes, and perhaps at the expense of some Coasean attitudes, is moot here. The point is that he is at least committed enough to Coasean attitudes to endorse a new tort standard, described above, which transplants into the body of the law a standard of economic efficiency previously occupied by wrongfulness. Instead of a tort equaling a wrongfully caused harm, we seem to be left with tort as an act which causes harm, where, in a world of zero transaction costs, the right to perpetrate that act would not have settled on the defendant. Thus Ackerman's analysis eviscerates the concept of "wrongful" as it has existed in the common law, and as one who was concerned with human agents and

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[39] *ibid.*, pages 86-87, in discussing "The Poverty of Welfare Economics."

their boundaries might understand it, and turns it into a notation for "economically inefficient."

Coleman

Jules Coleman has engaged Richard Posner in a series of articles and books[40] in which he argues that the principle of corrective justice can explain some, but not all, of tort theory. In particular, Coleman claims that corrective justice provides "the grounds necessary and sufficient to justify a victim's claim to recompense" but that other principles describe the "conditions [in which] an injurer [is] obligated to provide compensation to his victims."[41]

Therefore for Coleman like Aristotle, corrective justice aims at the abolishment of wrongful gains or losses. Also like Aristotle, Coleman does not believe corrective justice has anything to do with correction in the sense of "punishment." Yet Coleman maintains that Aristotle was wrong in holding that the Principle of Corrective Justice can underlay the full body of tort theory.

Coleman's argument and taxonomy may best be expressed by defining some terms and then combining them into a chart. Assume that Karen injures Gordon. A fault liability standard holds that if Gordon was not at fault for his injury, then he deserves compensation; if Karen were at fault then she is liable for Gordon's

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[40] I am working here from "Mental Abnormality, Personal Responsibility, and Tort Liability," in *Mental Illness: Law and Public Policy*, B. A. Brody & H. Tristam Engelhardt, Jr., editors, 1980; Posner's "The Concept of Corrective Justice in Recent Theories of Tort Law," *Journal of Legal Studies* Volume 10 No. 1 (1981), (reprinted in Feinberg and Gross pages 399-410); Coleman's response to Posner's article, "Corrective Justice and Wrongful Gain," *Journal of Legal Studies* Volume 11 No. 2 (1982) (reprinted in Feinberg and Gross pages 411-422); and Coleman's *Risks and Wrongs*, Cambridge University Press, 1992.

[41] Coleman, "Corrective Justice and Wrongful Gain," page 411.

loss. A strict liability standard holds that Gordon deserves compensation and Karen deserves to be forced to compensate him, whether or not Karen's injury to Gordon was Karen's fault. Combining this with the Principle of Corrective Justice as Coleman reads it, we get the following map of liability:

	FAULT STANDARD	**STRICT STANDARD**
INJURER	If gained something, then gain was wrongful, and should be erased by being forced to compensate. If gained nothing, then there is no wrongful gain, and so corrective justice has no wrongful gain to erase.	If injury is justified, then the gain is not wrongful, therefore there is no wrongful gain to erase. (Feinberg's hiker)
VICTIM	Was not at fault for loss, therefore his loss was wrongful, therefore deserves to have loss erased.	If loss is wrongful, deserves to have loss erased.

Two explanatory comments should be offered for the preceding chart. In the northeast quadrant, the "Feinberg's hiker" refers to a case where a hiker in the mountains gets lost in a blizzard and stumbles upon a cabin. He enters the cabin, burns the furniture for heat, and helps himself for several days to provisions which have

been left there. While clearly the owner of the cabin has suffered a wrongful loss, it would be strange to say that the hiker acted wrongly. Therefore it would seem that there can be wrongful losses with non-wrongful reciprocal gains.

The second explanatory comment concerns the southeast quadrant. Under a fault standard, fault and desert may appeal to social notions of reasonableness and rights, as discussed earlier; under a strict standard what categorizes a loss as wrongful is not so clear. Coleman suggests defining both kinds of fault, (both fault standard and strict standard) in economic terms,[42] so that an agent has a duty to take accident-avoidance measures when his doing so is the cheapest way to avoid those accidents. Other agents have rights to expect this behavior of each other. Therefore when torts occur, the victim has a moral right of compensation, grounded in the Principle of Corrective Justice, while the injurer's duty to compensate (if he has one) is grounded in economic, not moral, theory. Oddly enough, this fusion of moral and economic theory is similar to Posner's.[43]

The striking gap in Coleman's account is that the injurer who receives no gain has no moral duty to compensate. The moral duty grounded in corrective justice concerns only wrongful gains and losses which, by hypothesis, do not exist for this injurer. In later work Coleman is careful to say that a duty to compensate may exist for the injurer, but it *may not* be grounded in the Principle of Corrective Justice. For example, it might conceivably be grounded in retribution, or in the claim that the victim's moral right to

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[42] *ibid.*, page 413.

[43] As Coleman himself notes in "Corrective Justice and Wrongful Gain," page 413.

compensation generates a correlative duty in the injurer, or from an economic-efficiency argument, as described above. But the Principle of Corrective Justice as Coleman reads it would imply that the tort-feasor has no duty based in corrective justice to compensate the victim. It is for this reason that Coleman has written extensively and articulately in support of no-fault automobile insurance.

Posner has argued at length against this claim.[44] His argument rests on the observation that, if a victim has losses and the injurer no gain, and the victim deserves to have his wrongful losses annulled, and he *is* so compensated, then if that compensation does not come from the injurer, someone besides the injurer must be doing the compensating. That person has now had a wrongful loss thrust upon him; i.e., she is a new victim (Lisa Newton has argued that this is the paradigm within which to evaluate reverse discrimination, and therefore rejects it).[45] In his recent work, Coleman has been careful to carve out a side-rule to prevent this extension of injustice.[46]

In contrast to Coleman, the Posnerian analysis of no-fault insurance is that it "amount[s] to eliminating liability and compelling potential victims to insure (at their own cost) against being hurt in automobile accidents," a procedure which "would appear to violate corrective justice because [it does not] redress

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[44] See for example Posner's "The Concept of Corrective Justice in Recent Theories of Tort Law," *Journal of Legal Studies* Volume 10 No. 1 (1981) (reprinted in Feinberg and Gross pages 399-410).
[45] See Lisa Newton, "Reverse Discrimination is Unjustified," *Ethics* 83, No. 4 (July, 1973), reprinted in Feinberg and Gross, pages 456-458.
[46] Coleman, *Risks and Wrongs,* pages 365-366.

injuries caused by wrongdoing."[47] Posner, in short, denies Coleman's hypothesis that the driver who injures another gains nothing by it. The driver has gained something: whatever his expense of taking accident-avoidance measures would have been. Therefore, according to Posner, Coleman is wrong to say that the injurer in this case, having no wrongful gain, has no duty to compensate. His duty to compensate is grounded in the wrongful gain of not bothering to avoid accidents as vigorously as he ought.

Coleman's reply to this is that the Principle of Corrective Justice is called into play by a wrongful loss and a wrongful gain which "is correlative of the victim's loss."[48] In the automobile case, though the injurer drives without taking the expense of avoiding accidents, and the victim suffers a wrongful loss, the automobile driver gains his gain *whether or not* the victim suffers a loss. When X happens whether or not Y happens, X cannot be said to be caused by Y. While the injurer gains whether or not the victim suffers, the injurer's gain is not *caused* by the victim's loss. Therefore the gain and loss are independent of each other. As Coleman puts it:

> "...this gain in savings is secured by negligent individuals whether or not their negligence results in another's loss. The gain in savings is not triggered by the harm a particular individual's negligence causes another. In contrast to a theft, it is not a gain that results from another's loss...
>
> ...The distinction is not relevant to determining if an individual's gain from his actions is wrongful. The distinction plays an important role, however, in determining whether the victim's loss should be imposed upon his particular injurer. In making *that* determination it is relevant to

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[47] Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law," page 404.
[48] Coleman, "Corrective Justice and Wrongful Gain," pages 418-419.

> inquire whether the injurer's gain is correlative of the victim's loss, for if the injurer's gain exists independently of the victim's loss, then it is not the victim's loss that provides the moral basis for annulling the injurer's gain."[49]

Therefore the existence of a moral right of the victim to compensation does not automatically generate a moral duty on the injurer to compensate. This is the heart of Coleman's theory of corrective justice.

Coleman's theory of tort rests on a faulty view of causation. I will explain this with regard to the no-fault accident insurance he admires. Coleman maintains that the gains and losses are not correlative, because the gain would exist without the loss. As was just described, if X exists whether or not Y, then Y does not cause X. So far Coleman is correct. But it is a mistake to say that X and Y are logically independent. It might be the case that Y is caused *by* X. That is, the wrongful gain of the injurer, his savings on accident-avoidance, is the cause of the loss of the victim. Therefore the gains and losses are not logically independent. Being logically dependent, one may correctly say that the right of the victim to have his losses annulled, a right grounded in the Principle of Corrective Justice, imposes a correlative duty on the injurer to compensate, and thereby annul his gains.

It was correct of Coleman to write that "if the injurer's gain exists independently of the victim's loss,"[50] then the victim's loss does not provide a moral basis for compelling the injurer to

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[49] *ibid.*, page 418-419.
[50] *ibid.* page 418, quoted previously.

compensate by erasing his gain. But he was wrong to jump from the position that the injurer's gain would occur anyway, with or without the victim's loss, to the conclusion that they are logically independent: it is arbitrary to hold that logical dependency exists only if the loss causes the gain, and not vice-versa.

In his recent work (*Risks and Wrongs*, pages 271-275 and 365-371) Coleman has stepped back from his earlier explicit claims about causation, (using "responsibility" to name the one-way relationship that flows from gain-holder to loss holder), yet his conclusions remain substantially unchanged. These conclusions rest on an unwarranted asymmetry between gain-causing losses and loss-causing gains in establishing logical dependency. I have just explained how a confused theory of causation stands behind this.

Epstein

In *A Theory of Strict Liability: Toward a Reformulation of Tort Law*, Richard Epstein drops wrongfulness as a condition for assigning liability (this is the strict liability standard described above: even in the absence of intent, recklessness, or negligence, a party may be liable). Epstein then builds wrongfulness into his theory of causation, which gives him (like Coleman) a confused theory of causation.

Epstein is responding to an attempt by Coase and Calabresi to remove causation from tort theory, as they "share the belief that the concept of causation should not, because it cannot, play any role in the determination of liability for harms that have occurred," albeit for different reasons. Epstein seeks to demonstrate "that the concept of causation, as it applies to cases of physical injury, can be analyzed in a matter [*sic*? manner?] that both renders it

internally coherent and relevant to the ultimate question of who shall bear the loss."[51] He does this by considering:

> "in succession each of four distinct paradigm cases covered by the proposition 'A caused B harm.' These paradigms are not the only way in we can talk about torts cases. They do, however, provide models of description which best capture the ordinary use of causal language. Briefly put, they are based upon notions of force, fright, compulsion, and dangerous conditions."[52]

Epstein goes on to provide an analysis of how each of these four causes may lie at the heart of a tort. Yet he has also brought *wrong* back into the equation, by associating force, fright, compulsion, and danger with actionable cause. Thus he has undone himself, for (as was described previously) it is the essence of corrective justice to decide what is a wrongfully caused harm.

Epstein points out that a strict liability standard is less susceptible than conventional standards to informational constraints:

> "It cannot be a point in favor of the law of negligence, [as opposed to strict liability] either as a theoretical or administrative matter, that it demands evaluation of almost everything, but can give precise weight to almost nothing."[53]

My point, again, is not to choose among these standards, but to show how they have confused their atomic concepts. Epstein wants to drop wrongfulness out of the decision-procedure, leaving a strict liability standard. In analyzing cause, however Epstein, infuses it with the characteristics of wrongfulness (i.e., "force, fright,

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[51] Epstein, *A Theory of Strict Liability*, page 21.
[52] *ibid.*, page 22.
[53] *ibid.*, page 29.

compulsion, danger"), so that it bears no resemblance to the earlier sense of cause. Instead of removing wrong from tort he integrated it into cause.

Summary of the conflation

In the opening of this dissertation I mentioned "a theory of harm," along with a theory of property and a theory of social goals, as things which one should get clear on if one wished to decide the limits of justifiable state action. I mentioned in a footnote in the introduction that I would for the time being:

> "use 'harm' and 'theory of harm' in an extralegal sense... to signify a complex mesh of beliefs about torts, rights, causation, wrongfulness, and what results count as injurious."

So far I have examined what I at first called "a theory of harm" as it finds expression in our legal culture. In fact, as I hope has been made clear, a theory which justifies state action on the grounds of harm-prevention must in fact be richer than a mere statement of what harm is. In our common law tradition this richer theory holds that a tort is a wrongly caused harm, and includes sub-theories which determine what harm is, what causation is, and what wrongfulness is. I had little to say concerning causation. I explained the states of mind which determine wrongfulness. I said that there existed a definite legal sense of "harm": injury or loss of any sort to a person, and added that Anglo-American tradition recognizes that not all losses are observable (e.g., in the form of a wound, or a stolen wallet).

Lastly, I gave three examples of how theory has become twisted in the work of modern legal theorists. I could continue this

explanation of the ways in which the concepts residing behind the traditional theories of corrective justice and tort in Anglo-American jurisprudence have been changed or been misinterpreted by recent jurisprudes. In particular, the works of Richard Posner[54] and George P. Fletcher[55] bear scrutiny. Posner, otherwise sensitive to the issues discussed here (his article "The Concept of Corrective Justice in Recent Theories of Tort Law" takes up many of these problems and argues for a traditional interpretation of corrective justice), ultimately paints a chaotic and inconsistent picture in *The Economics Analysis of Law* and *Problems of Jurisprudence.* Fletcher, on the other hand, redefines "wrong" to mean acts where the defendant (i.e., the injurer) exposes the plaintiff to more danger than the plaintiff exposes the defendant (e.g. by driving with less care than the plaintiff), and thereby vitiates the negligence standard.

The point is made, I hope, without further examples: it is not my goal to argue for the one sustainable theory of rectificatory justice, but instead to show how the modern theory of tort has lost the clarity of Aristotelian logic and the clear structure of the common law tradition. The muddle has occurred primarily not through explicit rejection of one of the three necessary and sufficient conditions (wrong, cause, and injury) which called corrective justice into play in the past, but because insufficient attention has been paid to these different ideas. They have become conflated. In particular, wrong has been eviscerated, or assimilated

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[54] Richard Posner, "The Concept of Corrective Justice in Recent Theories of Tort Law," *Journal of Legal Studies* Volume 10 No. 1 (1981) (reprinted in Feinberg and Gross pages 399-410), along with his *Economic Analyses of Law*, Fourth Edition. (Boston: Little, Brown & Co.)(1992)

[55] George P. Fletcher, "Fairness and Utility in Tort Theory," Harvard Law Review (1972).

to the concept of economic efficiency, in the case of Ackerman and Coleman, and has been infused into cause, in the case of Epstein. It does not follow from this that their tort theories are wrong. It merely means that they are muddled, and that they have, unwittingly or not, detached themselves from the tradition of rectificatory justice without explicitly rejecting it. Given the way that the concepts integral to rectificatory justice reappear in different guises in their work, it is tempting to suppose that their detachment from tradition results more from confusion than intention.

This conflation has crept into the philosophical discussion of rights, and it is to this subject that I now turn.

VI. LIBERALISM'S CONFLATION OF WRONG AND HARM

Having written at such length upon these concepts of wrongs, harms, causes, and the relations among them, I wish to reexamine them from a philosophical perspective. In particular, I wish to expose an error of classical liberalism concerning these terms, an error which may be traced to John Stuart Mill. This error ultimately explains the tension which exists between two of Mill's positions, which for clarity's sake I state together here. The first is that:

> "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others."[56]

The second is that it is the business of individuals and the state to maximize "pleasure itself, together with exemption from pain."[57]

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[56] John Stuart Mill, *On Liberty*, Chapter 1 page 12, quoted previously.
[57] John Stuart Mill, *Utilitarianism*, Chapter II, pages 143-144.

Mill's Harm Principle: an Interpretative Problem

OBSERVABILITY OF LOSSES

Harm, I wrote above, is not limited to observable losses. But John Stuart Mill, who gave such fine expression to the principle of harm, famously limited its scope. Harm could not be just *any* injury. Referring to state compulsion of an individual, he wrote:

> "His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise."[58]

Therefore harm for Mill is something which cannot be alleged on another person's behalf in order to compel that same person. Mill relaxed this standard in the case of non-rational agents, by which he meant children and in which we might include suicides, if we were concerned with explaining why there should be law against self-destruction.[59]

Yet while not all harms are observable, Anglo-American law has wisely been cautious about recognizing purely internal losses, perhaps because of a moral hazard problem. H. L. A. Hart, for example, in defending the classical liberal tradition, wrote:

> "It may be said that the distress occasioned by the bare thought that others are offending in private against morality cannot constitute "harm," except

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[58] John Stuart Mill, *On Liberty*, Chapter 1, page 12-13.

[59] The law against suicide is notoriously tricky, although I believe it has one practical benefit: if someone attempts and fails, she can be arrested and treated. One who believed in Mill's Harm Principle but wished to support this law would probably hold that a suicide is by definition an irrational agent, which some (such as Dr. Kevorkian) would deny.

> in a few neurotic or hypersensitive persons who are literally "made ill" by this thought. Others may admit that such distress is harm, even in a case of normal persons, but argue that it is too slight to outweigh the great misery caused by the legal enforcement of sexual morality."[60]

One could interpret Hart's account of the law here as being concerned with minimizing harms (considering the frustrated sexual adventurer's "misery" a harm), but as not being able to prevent all harms. Or one could interpret this to mean that the state should be reluctant to judge internal losses as harms.

A moral hazard problem stands in the way of the former interpretation. If my internal grieving were recognized as a harm, then in observing any behavior which I dislike, I will be tempted to report grieving over it. A state which took all such matters seriously, and attempted to minimize them, might then need to prevent that behavior in order to reduce the harm to me. Of course that may cause grief to the restricted party, and the state might try to weigh our griefs against each other's. But to attempt to balance truly private griefs of this sort is a foolish and impractical course for the state to take, and so the liberal state (I interpret Hart to say), displays caution regarding harms which are merely internal, hidden losses.

UNOBSERVABLE LOSSES AND THE HARM PRINCIPLE

How does this square with the statement that a harm is an injury or loss of any kind to a person? The answer is, "not at all." The reason it does not is that Mill and liberals after him have

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[60] Hart, *Law, Liberty, and Morality*, page 46.

misused "harm." Consider again, in the light of what has been said earlier in this chapter, Mill's Harm Principle:

> "The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others."[61]

I read two propositions into this:

> 1) *If* a society is exercising power over someone, and we know that society is civilized, *then* we know this power is exercised to prevent harm to someone, and;
> 2) *If* someone would harm another, *then* in a civilized community power may be exercised against that harmer, given one further condition.

The "may" in the second proposition is not the permissive "may". This is not ancillary. Mill's principle indicates that in a civilized community government is justified if it acts to prevent harms to people; in conjunction with the Utilitarian Principle, the state is directed towards preventing harms. But as utilities are generally unobservable, attempting to prevent utility-eroding harms puts the government in the position of rearranging internal results. Thus Mill's whole approach raises the moral hazard problem described above.

Furthermore, Mill's two principles put the government not in the position of preventing harm, but minimizing harm. Especially in the case where the harms concerned are all internal (e.g., the grief borne by the intolerant at the thought of the life of the sexual adventurer, versus that of the adventurer were her activities to be curtailed), the state is commanded by Mill's theory to make

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[61] John Stuart Mill, *On Liberty*, Chapter 1 page 12, quoted previously.

judgments regarding, and then redistribute, the intensities of mental states. It is difficult to imagine how a political body could do this and remain liberal.

To be generous to Mill, suppose he just did not anticipate the problem of internal losses and the advice his Harm Principle gives concerning them. Setting that question aside, and assuming that his Harm Principle were adjusted so it only referred to external (and perhaps the most blatant of internal) losses, can his Harm Principle still be understood coherently within the liberal tradition, given the way I have assigned meaning to his words? The answer is still no.

I mentioned in this dissertation's acknowledgments that ingratitude to a benefactor is base. The receipt of ingratitude may cause injury of a sort, and often this sort is not internal. The manner in which elderly in the United States are warehoused by their offspring (in the absence of true medical-care issues), rather than those same offspring absorbing a reduction in their own standing of living in order to provide care for the elderly, is morally shocking to some people of Mediterranean and Asian cultures, for example. It is a display of ingratitude which causes internal psychic injury, no doubt, but also external, visible, loss.

Assume that in a non-intrusive state, however, one may not have laws which prevent this kind of ingratitude.[62] Then the Harm Principle, counseling the state to prevent an act which will cause a

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[62] I acknowledge that this proposition is not certainly true. We have laws insisting that parents must provide a certain level of care to their children: why not to their own parents as well? The answer may be found in observations about willingly-entered arrangements, etc. I will not argue the point. And so I use "assume" not like a philosopher (= "this is so obvious I won't bother to prove it"), but like an economist (= "accept this idealization and see what follows from it").

harm which has both an indubitable internal component, and a publicly-visible external component, will still be counseling the state to adopt an intrusive policy.

One could maintain that this is exactly what Mill counseled the state to do, and that *Utilitarianism* discloses this intent. This position would reduce tension between the two works: a Millian could maintain that *Utilitarianism* concerns internal states such as pleasure and pain, and that the proper government acts in regard to the sum across society of these pleasures and pain; therefore the Harm Principle from *On Liberty* can be understood as including reference to internal losses.

This cohesiveness, however, would be dearly bought by a drastic reinterpretation of the Harm Principle. No longer would it be a stricture against intrusive government; rather it would be a radical encouragement of the power of the State, encouragement to root out base acts and prevent them wherever they caused (external or near-certain internal) losses. No distinction in principle would remain between preventing assault and regulating family affairs, or the affairs of lovers, though this seemed to be exactly the distinction which the Harm Principle sought to make rigid.

SUMMARY OF THE PROBLEM

In short, Mill's Harm Principle, taken in conjunction with the Utilitarian Principle, directs the state to prevent harm. This faces several problems. They unfold as follows:

1) There are some cases where the state can "prevent harm" only by causing another. Therefore we probably should understand "prevent" as "prevent or minimize."

2) If we re-read the Harm Principle with #1 in mind, we are still left with the problem that many harms are purely internal. Therefore the state will have to be intrusive to take advantage of the license of Mill's command, or even to know what it recommends. Therefore we should understand "harm" as "visible harm or near-certain internal harm."

3) Many morally base acts cause visible harm or near-certain internal harm, such as ingratitude towards a lifelong benefactor. It is difficult to believe that a state can be in the business of preventing or minimizing these harms, and remain non-intrusive.

4) One could respond to #3 by saying that in fact Mill meant for the state to be in that game, and that *Utilitarianism* is the playbook for it. But on this interpretation the Harm Principle of *On Liberty*, rather than counseling restraint on the part of the state, in fact gives it license to pursue a detailed scheme of moral regimentation and enforcement unseen since the Puritans. Surely this interpretation is unsatisfactory.

There is a different course one may take, however, in interpreting Mill. This is to say that by "harm" he meant what tort law calls "wrong."

A Reinterpretation of the Harm Principle

If one re-reads the Harm Principle, substituting "wrong" or "wrong which causes harm" for "harm", these problems fade away. If I have a clear idea what a wrong is, then (for example) it is easy to adjudicate between the griefs felt by the intolerant at the thought of the sexual adventurer's play, and the grief felt by the sexual adventurer when her play is prohibited. Even though her play may

cause harm (= anxiety deriving from knowledge of her activities) to the intolerant, the state may determine from its theory of wrongfulness whether that harm is to be prohibited.

Note that this theory of wrong is not a "theory of sin," for "wrong" is used here in the sense derived from tort law. Even if we take it for granted that her acts *cause* a mental state in the intolerant, and that his grieving mental state does qualify as injury to him, her causing that injury will have to qualify as wrong for the state to prevent it. It is difficult to imagine that a proper theory of wrong could include the assertion that private acts done with no specific attempt to make others aware of them, and which only cause unobservable losses, can be wrong in a sense licensing state action (that is, they "wrongly cause harm").

Therefore, there is a possible interpretation of the terms which occur in Mill's Harm Principle which do not point it in the direction of statism, as described in the preceding section. This interpretation holds that what the civilized state seeks to prevent is not harm itself, for a variety of reasons: it is a task like the Dutch boy's plugging up holes in the dam; many harms are difficult to observe; the information required to know them is beyond the reach of a non-intrusive state. A Harm Principle encouraging the state to see past these difficulties would be a Leviathan Principle. Instead, this interpretation holds that what the state is really in the business of preventing is harm-causing *wrong*.

Tort Theory and the Revised Harm Principle

This recognition, however, creates a new set of problems, which I will address shortly. Before that, however, I wish to point

out how, if we do not amend or reinterpret the Harm Principle as I suggest, we are left with two choices about how to interpret it. Each of these choices matches one of the positions taken by the modern legal scholars discussed above.

Suppose I understand the Harm Principle under the original interpretation of "harm". Suppose further that I, assimilating it to the argument of *Utilitarianism*, do not think it out of the question that a proper state may concern itself deeply with the mental states of its citizens. Then I interpret Mill with strict literalness: the state will do its best to prevent (or minimize) harms of all varieties, even those, for example, of the intolerant. In adjudicating between his grief at the adventurer's activities, and her grief in their prevention, the state will presumably look to the intensities of those griefs. This is an interpretation of Mill like that Epstein gave to rectificatory justice: harms are something to be strictly prevented (or minimized), and where they occur, strict liability is to attend them. The concept of "wrong" drops out of the equation in both cases: we are left only with cause and harm.

Alternatively, suppose I understand the Harm Principle under the original interpretation of "harm". Yet suppose I believe that this principle of Mill's cannot reasonably be interpreted to mean a statist call for a heavily interventionist legal system which will extend into every nook and cranny of life (which it must, were it to recognize private griefs such as those of the intolerant). Then I must say that the Harm Principle does not really refer to *all* harms, but just some subset of harms. Therefore there must be some principle distinguishing the harms the state really should prevent from those with which it should not be bothered. This distinguishing

principle is, or performs the same function as, a tort theory's principle distinguishing wrongful from not wrongful harm-causing acts. Given the simplicity of "harm," "injury or loss of any sort," there is little room in which to wedge an analytical chisel. The only remaining option for this distinguishing principle is that it refer to the way in which the harm is caused. If such a principle were interpreted into Mill's Harm Principle (such that it was understood to maintain that the state was in the business of preventing harms, but only those which were caused by force, fright, compulsion, or danger), then it would result in an interpretation matching Coleman's theory of tort. For Coleman, remember, the concept of wrongfulness was infused into the view of causation which formed one pillar of his theory.

The problem I have described here is one that does not end with Mill, but is one which has replicated itself in later liberal work. A focus on harm has remained (at least implicitly) within liberal writing since Mill's day, and many, such as Hart, have worked explicitly from Mill's Harm Principle. Yet the tendency of liberalism to use "harm" to mean "wrongful harm" has obfuscated the way in which law needs to be analyzed. There are many harms which cannot be within the purview of a non-total State. If it is granted that only non-total States are reasonable, then a literal interpretation of the Harm Principle is unreasonable: because "harm" may include too many things, the mandate the principle gives government is unreasonably broad. Therefore to be reasonable the Harm Principle must be reinterpreted to refer to some proper subset of harms. The

restriction I have encouraged here is that it be restricted to those harms which are wrongful.

Problems with this Interpretation of the Harm Principle

I said in the introduction of this work that there is a reading of Mill's Harm Principle which is as congenial to the communitarian and the anarcho-syndicalist is it is to the liberal. It is this reading which maintains that the Harm Principle must distinguish wrongfully-caused harms from not-wrongfully-caused harms (a reading which, if explicit, is mine, and implicitly is that of the Coleman or Epstein variations mentioned above), and that merely distinguishing harm from not-harm was insufficiently broad. After all, if the principle is understood to maintain that where harm is wrongfully caused the state may step in and prohibit it, then it will be a principle which none will dispute.[63] The communitarian, the anarcho-syndicalist, the liberal will all agree on *that* much: they will continue to disagree, however, on what constitutes wrong (and perhaps social causation).

Yet Mill's Harm Principle was intended to provide an objective standard to which to refer when considering the wisdom of particular laws. Reinterpreted as I have proposed, however, it becomes indecisive. Recast into a one-size fits-all principle, it maintains no rigidity by which to adjudicate between opposing political claims. It seems as though I have gutted the Harm Principle in order to achieve a coherent interpretation of it.

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[63] That this is *all* the state may do may still be disputed: different schools may still give different scope to arguments concerning market failures and social goals, as noted initially.

The reason for this is that the recast Harm Principle, if it is to have any bite, must distinguish between wrong harms and not-wrong harms, and to do this, it must make appeal to a theory of what counts as wrong. To some this is not beyond the ken: law, even very modern law, does not completely exclude the concept of moral wrong. For example, tort law has recognized moral wrong from medieval times up to the present day: if an act is tortuous, and also base and wicked, then the necessity to prove damages on the part of the plaintiff is weaker, and the damages awarded will likely be greater.[64]

Yet moderns should distance themselves from the medieval willingness to appeal to morality. To say that we must have some principle which distinguishes wrong harms from not-wrong harms we should be able to do more than merely cite some moral theory about what is right and wrong, for reasons described in the first chapter: law must generate allegiance, and modern societies have so many conflicting moral visions that a law based on just one of them is unable to win allegiance.

Furthermore, the distinguishing principle obviously cannot be "an act is wrong if it causes harm." This embraces too broad a range of human action, as has been examined above (e.g., ingratitude towards a benefactor) to serve as a legal principle. We need a principle distinguishing between two types of harm (wrong and not-wrong), which this would fail to do.

The key question associated with the Harm Principle then turns out to be not one of distinguishing what is harmful from what

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[64] *cf.* Wigmore, "Responsibility for Tortious Acts: Its History," Harvard Law Review, 1894:7, cited in Prosser, page 14.

is not, but on selecting those harms which are wrongful (and discerning where writers have imbued the concept of wrong into their theory of harm). Where may moderns discover wrongfulness?

The answer is found in the Rawlsian principle of legitimacy discussed in Chapter 1. How that principle limits what we may count as wrong, and thereby limits the reach of law under the pretext of preventing harm, is explored in the next chapter.

CHAPTER 3

RIGHTS AND ALTRUISM

This chapter examines the missions a state may pursue under a theory of harm-prevention or rights-enforcement, when rights are understood as side-constraints. The issue is shown to reduce to the ubiquity of support in moral theory for the duty of mutual aid. I demonstrate that Kantian morality does not consistently demand altruism; therefore the moral demand for altruism is not ubiquitous; therefore law cannot be used to enforce positive rights in a society which includes consistent Kantians without violating the principle of legitimacy.

The goal of this chapter is to answer the following question: "If rights are understood as side-constraints, then does law which enforces positive rights to altruism, or positive duties to behave altruistically, violate the principle of legitimacy?" Understanding that the preceding was a dense sentence, I spend the next several dozen pages unpacking its components.

I begin again with a list of the subjects of each of this chapter's sections:

I. Political rights may be understood as expressing moral side-constraints on actions, as a way of recognizing the Kantian inviolability of persons; alternatively, rights may be understood as shorthand expressions of welfare.
II. Positive and negative rights are distinguished.
III. Positive rights generate reciprocal positive duties.
IV. The relation of side-constraints to legitimacy.
V. If a "right" is interpreted as a moral side-constraint, then do laws which enforce positive rights violate the principle of legitimacy?
VI. Such law does not violate the principle of legitimacy if and only if there is no member of society's "complete" moral visions (as described in Chapter 1) which spurns such duties.
VII. The Kantian argument for altruism is unsound. As an aside, it is no complaint against a moral theory that its demand for self-sacrificial altruism makes normal life impossible. Other arguments against self-sacrifice, such as Williams' integrity argument, may be sound.
VIII. Thus a law enforcing a right to altruism (with "right" understood deontologically) violates the principle of legitimacy in any society which includes (a reasonable number of?) consistent Kantians.

I. POLITICAL RIGHTS: SIDE-CONSTRAINTS OR SHORTHAND EXPRESSIONS OF PUBLIC WELFARE?

To return to an earlier metaphor, an individual walks within her egg of privacy, the shell of which is found in practice by examining what the courts will defend. For this reason it should be clear that what counts as legal harm to her, and her legal rights, are reciprocals. If I intrude upon her some distance, and legislators have asserted (and the courts will enforce) the proposition that in doing so I am harming her, then it is also reasonable to maintain that she has a right to expect that distance from me. For this reason I will begin to type "right-enforcement" in the place of "harm-prevention" *(mutatis mutandis)* in many instances, in order to avoid ugly circumlocutions.

What does it mean to have a right? What can be said of this class of rights which receives legal enforcement? One answer is that respect for personhood is the basis of rights. Yet there is no reason to wed ourselves unthinkingly to this tradition, for all the problems of modernity described earlier, and there is another appealing position that maintains that we have rights to those things in which we have strong interests. In short, political rights may be understood as expressing moral side-constraints on actions, as a way of recognizing the Kantian inviolability of persons; alternatively, rights may be understood as shorthand expressions for welfare. This distinction matches the one between deontological and consequentialist moral theories. The fact that political rights may be rooted in two different moral traditions introduces a problem for morally pluralistic societies.

Two Methods of Judging

TELEOLOGY

A teleological or consequentialist moral or political theory judges choices by the states of affairs they call into being. In general, a consequentialist theory comes:

> "in two parts. First, it gives some principle for ranking overall states of affairs from best to worst from an impersonal standpoint, and then it says that the right act... is the one that will produce the highest-ranked state of affairs..."[1]

Utilitarianism is one example of a consequentialist moral theory: in utilitarian, states of affairs are judged by the level of satisfaction of the agents who inhabit them.[2]

If I am a consequentialist, I believe that there is some good, some "right stuff," and I will advocate a moral or political system to secure that right stuff. Whatever I think that right stuff is, I believe that if I will only think clearly about it, then I can specify the system which will produce the most of it. Under a consequentialist political theory, saying that "People have rights to assembly, free speech, religion, and housing," is but a shorthand way of saying "the states of affairs produced when people may assemble, speak, worship, and have housing, are higher-ranked [have more of that good in them] than when they don't."

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[1] Samuel Scheffler, *Consequentialism and Its Critics*, introduction.

[2] See Amartya Sen and Bernard WIlliams, "Utilitarianism and beyond", their introductory essay in a book of the same name, or my discussion of Mill in Chapter 2, for a statement of this.

DEONTOLOGY

A deontological political theory maintains that people have claims that result from their status as persons. These claims must be acknowledged when considering public policy and its effects. In particular, although a policy may achieve a highly-ranked state of affair on some consequentialist measure, it does so (responds the deontologist) only by making use of some people; the deontological political theory opposes such policies. Political rights in this view are side-constraints on the steps by which we may reason when we think about law. If I am a deontologist, I will hold that:

> "Side constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable."[3]

Under a deontological political theory, to say that someone has a right to religious freedom, for example, means that the state cannot restrict that person's worship in order to accomplish some other project, no matter how worthy.[4]

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[3] Nozick, *Anarchy, State, and Utopia*, pages 30-31. Reprinted in *Consequentialism and its Critics* as "Side Constraints", pages 134-141.

[4] Though prohibitions on shouting, "Fire!" in a movie theater, or conducting a demonstration without a permit, are sometimes adduced as evidence of how rights to speech and assembly may be politically limited, I believe this is a misapprehension. Such restrictions occur (federally) under the police powers authority of the US Constitution. This power, which is derived from the Tenth Amendment, implies that the government is first charged with the duty of maintaining civil order, "insuring to each [citizen] uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws" (*Black's Law Dictionary*, page 603). To do this it must restrict disorder. That the disorder in question might be a creation of speech, or assembly, is incidental to the restrictions enforced under the police power. Therefore these examples do not prove that our system rejects a deontological theory of rights.

Having explained the traditional distinction in moral philosophy between consequentialist and deontological moral theories, and while acknowledging that I will live with that distinction here, I shall grumble briefly. I think the distinction is a poor one. It is poor because, outside of highly artificial examples, it does not seem to me to capture the ways in which moral issues confront us. One could just as easily distinguish among ethical theories based on the way they weigh the claims of the past against the claims of the present or the future. Likewise, one could distinguish between theories which counsel the adoption of rules versus those which evaluate acts or situations on a case-by-case basis. However, because the consequentialist-deontological distinction is traditional, and because it is reasonably satisfactory for discussing political theories (as opposed to moral theories), and because it serves my purpose, I will stick to this distinction here.

Moral Neutrality and Modernity

As was demonstrated regarding torts, the law is not morally opaque. Clearly and historically some thread of moral theory is woven into the fabric of tort law. But this historical fact cannot be its own justification: my purpose in referring at length to the history of law has been to see if there were lessons to be drawn from it, not to say that moderns must adopt its conclusions as our own.

I addressed in detail in Chapter 1 the political problem of modernity. The basic idea was that it is difficult in a multicultural

society to ground political rules upon a thick moral theory. A feature of a political system is that it maintain order, which, for example, a theocracy cannot do in a multicultural society. Some condition of moral neutrality should guide us in our selections among political principles: the principle I advocated was the principle of legitimacy. Therefore, if rights are to be understood as binding side constraints, some account must be given of how this position, which rests on a Kantian moral proposition, may still meet a moral neutrality condition such as the principle of legitimacy. Otherwise this position is untenable.

Before going into this, however, I must pursue one further distinction regarding rights.

II. POSITIVE AND NEGATIVE RIGHTS DISTINGUISHED

Berlin's Two Concepts of Liberty

I begin with the distinction between positive and negative rights made by Sir Isiah Berlin in his classic lecture, "Two Concepts of Liberty".[5] In that essay, Berlin distinguished between two modes of thought which used similar vocabularies but which, he claimed, returned "different and conflicting answers to what has long been the central question of politics - the question of obedience and coercion."[6] The negative sense of liberty to which Berlin drew attention is that sense which signifies an ability to,

> "act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree..."[7]

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[5] Isiah Berlin, "Two Concepts of Liberty," reprinted in Berlin's *Four Essays on Liberty.*
[6] *ibid.*, page 121.
[7] *ibid.*, page 122.

This is to be contrasted with the positive sense, which addresses a different question, namely "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"[8] As Berlin writes:

> "The 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be...moved by reasons... which are my own, not by causes which affect me. I wish to be somebody, not nobody; a doer..."[9]

While discussing Montesquieu, Kant, and Burke(!), Berlin's expressed the concern that:

> "The common assumption of these thinkers (and of many a schoolman before them and Jacobin and Communist after them) is that the rational ends of our 'true' natures must coincide, or be made to coincide, however violently our poor, ignorant, desire-ridden, passionate, empirical selves may cry out against this process."[10]

He thought that a theory which developed a sense of freedom apart from the freedom of "the empirical man," but which was geared instead towards "the rational man,"[11] opened the door to totalitarian rule by experts who believed they held some special insight into what "the rational man" wants in his freedom.

Incidentally, it was for this reason that in a Appendix B I make the bald and perhaps unconvincing claim that Rousseau and Kant were great enemies of freedom. Rousseau's conception of *la volonté*

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[8] *ibid.*, page 122.
[9] *ibid.*, page 131.
[10] *ibid.*, page 147-148.
[11] *ibid.*, page 150-152.

générale divorced people's ends from what they *say* their ends are. Kant provided respectability to this idea by distinguishing noumenal and phenomenal selves, and locating political freedom with the former, and, incidentally, with the subordination of the goals of merely phenomenal individuals to the greater mission of the *Volk* to which people "belong."[12] These ideas degenerate quickly into Hegelianism, where the greater mission not merely of one's *Volk* but of Reason itself defines freedom; Marxism, where the greater mission of mankind defines freedom; Leninism and Maoism, where the greater mission of the vanguard of mankind (the Party) defines freedom; and National Socialism, where once again the mission of one's *Volk* defines freedom. Somewhere along the line, the quaint Enlightenment and Anglo-American idea that one's own mission defined one's freedom got lost on many thinking people. Thus it was originally Kant who gave philosophical respectability to a process whereby people can be enslaved by coercers, who then say (to themselves at least), "These people are now serving their 'true' ends." Berlin was correct to trace this totalitarian tendency to Kant.

Berlin's distinction between positive and negative freedom is problematic, however. Ingrained in his vision is the supposition that if a man is not his own master, it is the fault of another. In defining positive freedom, for example, he writes, "I wish to be the instrument of my own, not of other men's, acts of will."[13]

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[12] These issues are taken up in Appendix B's discussion of Kantianism.
[13] Berlin, "Two Concepts of Liberty," page 131.

Berlin may define his terms anyway he wants, of course. Yet the definitions he chooses provide an example of the unconstrained vision's assumptions at work, as explained in my section on Sowell in Chapter 1:

> "Running through the tradition of the unconstrained vision is the conviction that foolish or immoral choices explain the evils of the world..."[14]

While I have not argued that this conviction is false, I have suggested that it is not my own. There is therefore for me a sense that while Berlin put his finger on an important distinction, the assumptions which he carried with him in making that distinction prevented him from dissecting the issue correctly. Berlin's concern was with the lack of political freedom of a great many people in mid-century Europe, but he took it for granted that removing their masters would make individuals their own masters. There is a real sense in which this has proven to be false. Partha Dasgupta has redrawn this distinction in a more meaningful way.

Dasgupta's Two Concepts of Liberty

In a series of works, Partha Dasgupta has refined a concept of positive freedom distilled from Berlin's essay.[15] Dasgupta's positive freedoms are those whose,

> "exercise requires goods and services in a pervasive way. The source of a foreclosure on such freedoms is destitution."[16]

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[14] Thomas Sowell, *A Conflict of Visions*, page 37, quoted previously.
[15] Partha Dasgupta, "On Measuring the Quality of Life,"(with Weale); "Well-being and the Extent of its Realization in Poor Countries"; and *An Inquiry into Well-Being and Destitution*, pages 40-42.
[16] Dasgupta, *An Inquiry into Well-Being and Destitution,* page 41.

So while he maintains Berlin's conception of a negative freedom as the ability to proceed with one's projects free from the interference of others, Dasgupta's conception of positive freedom does not embody the unconstrained assumption mentioned in the last paragraph and discussed in the first chapter of this thesis. A person's inability to be his own master, even without the direct interference of others, need not be construed as a result "of other men's...acts of will."

Dasgupta's is a simpler concept than Berlin's. From a person's lack of some good or service we deduce no more than that she lacks that good or service: we do not deduce a proposition about the wills of other men. Her inability to be her own master is a function of that lack, and that lack translates into a loss of positive freedom; it is not the cause of that lack which determines the status of her positive freedom. This simpler concept is not problematic.

The following charter makes vivid Dasgupta's distinction between freedoms:

> "Article 18:
> Everyone has the right to freedom of thought, conscience, and religion...
> .
> .
> Article 24:
> Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.
> Article 25:
> Everyone has the right to a standard of living adequate for the health and well-being of himself

> and of his family, including food, clothing, housing and medical care and necessary social services..."[17]

So in short, where Berlin gave political interpretations to the sense of negative and positive freedoms, for Dasgupta the former is political, while the latter is more-or-less one of economic options. Negative freedoms and negative liberties (Dasgupta uses the terms interchangeably) are rights to be free from interference: for example, my right to worship, publish, or eat dinner in my home, unmolested by others. Positive freedoms and positive liberties are options embodied in rights *to* a home, or to food to eat there, or in a right not just to speak but to access the technology necessary to reach a significant audience.

Positive and Negative Liberty: Some Further Comment

Before moving on, I would like to make a few brief ancillary points about this distinction in order to flesh it out and show its explanatory power.[18]

NEGATIVE AND POSITIVE LIBERTY IN TRADITION

Clearly the negative conception of liberty is that which has most often animated the Anglo-American tradition, while the Continental tradition has placed more emphasis than the British and Americans on the positive sense of liberty. When Anatole France famously observed,

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[17] *The United Nations Universal Declaration of Human Rights, 1948*, reprinted in Werhane, Gini, and Ozar, *Philosophical Issues in Human Rights: Theories and Applications*, pages 484-489.

[18] In these comments, I have benefited greatly from many conversations I have had with Partha Dasgupta, as well as from his written work.

> "The law, in its majestic equality, forbids the rich and the poor alike to sleep under bridges, to beg in the streets, and to steal bread,"[19]

he was appealing to the positive sense of liberty. And indeed, there is a long tradition of maintaining that negative liberties are meaningful only in an environment where people enjoy some quantity of positive liberty as well.

While I am sympathetic to this view, I fear that some of its force rests on an error of logic. Simply put, if Y is not meaningful without Z, or if Z is a causal precondition of Y, it does not imply that Z is more important than Y, or even as important as Y, and it does not imply that Y and Z are the same type of thing. For example, suppose I believe in a general right to freedom of the press. Admittedly this right is not going to be important to me if I am starving. I grant that the right may even be meaningless to me if I am starving. Yet the fact that the right to publish as I wish is meaningless to me if I lack bread does not imply that if I believe people should have a right to publish freely I should also *necessarily* that believe they should have a right to bread. The mere fact that one is a causal precondition of the other does not imply that a claim on one is similar to a claim upon the other: i.e., that both are rights.

I may well maintain that, "I think people should enjoy a right to publish freely. A causal precondition of enjoying that right is that they also have bread. Therefore since I want them to have the former I will acknowledge their right to the latter." But strictly speaking there is nothing *inconsistent* about saying "People have a

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[19] Anatole France, *The Red Lily*, Chapter 7.

right to publish, but they do not have rights to whatever it would take for them to publish." That is, it is consistent to maintain that I have a right to one thing and not another, even if I cannot use the first without the second. As Sowell put it:

> "The options approach asks, 'What freedom does a starving man have?' The answer is that starvation is a tragic human condition - perhaps more tragic than the loss of freedom. That does not prevent these from being *two different things*. The false issue of *ranking* things cannot be allowed to confuse questions of *distinguishing* things.
>
> "The mere fact that something may outrank freedom does not make that something *become* freedom."[20]

So my willingness to adopt the distinction between positive and negative liberties does not imply acceptance of the existence of both sides of the distinction: it may be a distinction between rights which exist and those which do not. That is the issue I am actually addressing in this chapter.

RELATIONS AMONG PEOPLE AND FROM PEOPLE TO THINGS

Negative liberty governs relations among people, while positive liberty governs *prima facie* the relation between people and objects. If I have a right not to be assaulted, then Tom has a specific duty: namely, not to assault me. This negative right describes a relation between Tom and me. But if I have a right to food, then (as a first approximation), this right describes a relation between this loaf of bread and me, or some loaf of bread and me, or *some* food *somewhere* and me, if it has any meaning. The question of

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[20] Thomas Sowell, *Knowledge and Decisions*, page 117.

whether that is all that this positive right describes is addressed momentarily.

For example, a positive right might be said to govern a relation between me (who lacks bread) and bread; it might also be said to govern a relation between me (who lacks bread) and somebody who has surfeit of bread: either may be a plausible way to interpret or implement the positive right. The point is, however, that physical objects enter into the relations governed by positive rights in a way that they do not enter into relations governed by negative rights.

LIMITS ON LIBERTIES

The preceding point, coupled with the observation that physical objects are generally finite and often scarce, generates an additional distinction between positive and negative liberties. Negative liberties seem in most instances to be unlimited, or virtually so, while positive liberties are limited by facts about the world. Discounting strange counterexamples, there is no obvious reason why everyone cannot enjoy unlimited freedom to worship whatever gods they please. The ability of people to enjoy rights to food or housing, however, may be limited by the economic climate in which they live.

LIBERTIES AND ECONOMIC DEVELOPMENT: DASGUPTA AND SEN

From the end of World War II up until fairly recent years, it has been a common perception of intellectuals in much of the developing world that negative liberties were a luxury affordable only to wealthy countries, much as environmentalism is perceived by many Third World governments today. In the People's Republic of

China, for example, the concept of "bourgeois freedoms", which for Marx denoted those freedoms with which the bourgeoisie were most concerned (such as freedom of the press, speech, etc.), has evolved to signify those freedoms only appropriate for bourgeois countries. Similarly in many post-liberation African nations: writers such as Nyerere and Fanon suggest, "let us first fill our stomachs, let us first worry about our food, our housing, our medical care, and then we will worry about our presses." Partha Dasgupta and Amartya Sen have written extensively on the trade-offs between positive and negative rights in developing nations,[21] and on the counterintuitive (to me) relationships which exist among them.

Dasgupta: bourgeois luxuries and phony choices

Dasgupta has tested:

> "The argument, which I have often heard expressed in conversation, that poor countries cannot afford the luxury of civil and political rights..."[22]

He examined the poorest 51[23] countries on the planet over the period 1970-1980, using changes in 1) real national income per head; 2) changes in rates of life expectancy at birth, infant mortality, and

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[21] Dasgupta's papers "On Measuring the Quality of Life,"(with Weale), and "Well-being and the Extent of its Realization in Poor Countries," first put forth the argument I discuss here. This argument has been partially reproduced in *An Inquiry into Well-Being and Destitution*, pages 116-121. Sen, of course, has written extensively on ethical issues in economics. See for example *Poverty and Famines: An Essay on Entitlement and Deprivation*, and *On Ethics & Economics*. He provided a summary of his moral concerns in an address given in receipt of the second Agnelli Prize in Ethics in Industrial Society (!), "Individual Freedom as a Social Commitment," which was reprinted in *The New York Review of Books*, June 14, 1990.

[22] Dasgupta, *An Inquiry into Well-Being and Destitution*, page 116.

[23] These countries were those which, in 1970, had per capita national income less than $1500 in 1970, at 1980 prices, according to Summers and Heston's 1988 study, "A New Set of International Comparisons of Real Product and Prices: Estimates for 130 Countries, 1950-1985".

adult literacy; and 3) political and civil rights indices of those nations,[24] as measures of those nations' economic development, positive rights, and negative rights, respectively.

Dasgupta used Borda rankings to determine the relationship among these factors. He concluded that "The correlation matrix tells us that the alleged choice between civil and political liberties and economic progress is a phoney kind of choice; that statistically speaking, societies aren't faced with this dilemma." He drew some additional conclusions, of which I will mention only a few here:

> "1. Political and civil liberties are positively and significantly correlated with real national income per head and its growth, with improvements in infant survival rates, and with increases in life expectancies at birth...
> 4. Political and civil rights are not the same. But they are strongly correlated.
> 5. Increases in the adult literacy rate are not related systematically at all to per capita incomes, or to their growth, or to infant survival rates. They are positively and significantly correlated to improvements in life expectancy at birth. But they are negatively and significantly correlated with political and civil liberties."[25]

Of this last, Dasgupta notes, "regimes that have bad records in political and civil rights are associated with good performance in this field. I have no explanation for this, which is compelling to me, but it is difficult to resist speculating on the matter."[26] Having spent a fair bit of time in authoritarian and totalitarian societies I am tempted to speculate as well regarding the demands and

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[24] Taylor and Jodice, *World Handbook of Political and Social Indicators*, (New Haven: Yale University Press), tables 2.1 and 2.2.
[25] Dasgupta, *An Inquiry into Well-Being and Destitution*, page 120.
[26] *ibid.*, page 121.

prerogatives of statism, but I will spare the reader such further digression.

Sen: power and famine

One of Amartya Sen's major professional concerns has been the occurrence of famine in the Third World. In accepting the second Senator Giovanni Agnelli International Prize for the Ethical Dimension in Advanced Societies(!),[27] Sen wrote with reference to the 1943 Bengali famine, which he had witnessed as a boy growing up in Dhaka's Hindu neighborhood. It was a famine which:

> "took place without the supply of available food being exceptionally low. This can be found in many other famines as well (e.g., in the Ethiopian famines of 1973 and of the early 1980's). Some famines have in fact occurred when the amount of food has been at a 'peak' level (e.g., during the Bangladesh famine of 1974)."[28]

This is a phenomenon in need of explanation: how may famine occur where adequate food stocks exist? The answer for Sen is found not in describing the level of food supplies, but by describing how *entitlements* to that food are held.

Sen's belief is that famines occur in places where entitlements are highly centralized. Entitlements, however, are politically determined. Where the political system faces checks on

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[27] Sen, "Individual Freedom as a Social Commitment," *The New York Review of Books*, June 14, 1990. A prize, it might be added, which was evidently named by someone with either a keen sense of irony or none at all. The songwriter and political satirist Tom Lehrer said that he gave up writing political satire when the Swedes gave Henry Kissinger the Nobel Peace Prize...

[28] Sen, "Individual Freedom as a Social Commitment," page 50. This point is well-documented and extends to more recent times. For example, see P. J. O'Rourke's account of the Ethiopian famine of the early 1990's in *All the Trouble in the World: The Lighter Side of Overpopulation, Famine, Ecological Disaster, Ethnic Hatred, Plague, and Poverty*, pages 65-95 and especially his discussion of Sen in relation to that famine.

its behavior (i.e., negative liberties), such centralized entitlements are unstable: in such political systems negative liberties generate attractors which preclude famine equilibrium positions. Sen adduces as examples various states of pre- and post-independence India, as well as sub-Saharan Africa and, especially, mainland China, where, in spite of three years of famine, "The government did not feel threatened; there were no opposition parties; no newspapers criticized the public policies." He concludes:

> "Indeed, in the terrible history of famines in the world, it is hard to find a case in which a famine has occurred in a country with a free press and an active opposition within a democratic system.
>
> "If this analysis is accepted, then the diverse political freedoms that are available in a democratic state, including regular elections, free newspapers, and freedom of speech (without government prohibition or censorship), must be seen as the real force behind the elimination of famines. Here again, it appears that one set of freedoms... are causally linked with other types of freedoms... The negative freedoms... can be powerful in safeguarding the elementary positive freedoms of the vulnerable population."[29]

It is not Sen's mission to defend a blind devotion to negative freedoms alone, but to argue for a commitment to individual freedom which is some function of positive and negative freedom. This commitment generates principles of social decisions which look to more than utility for their information base (hence Sen's proof of the impossibility of the Paretian liberal, mentioned in Chapter 1). Sen looks instead to facts about negative freedoms and human

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[29] Sen, "Individual Freedom as a Social Commitment," page 50.

abilities to convert these into positive freedoms, and argues that this mechanism has been misunderstood.

Summary of Negative and Positive Freedoms

In summary, Isiah Berlin made a distinction between two ways that "freedom" and its analogues are used. This distinction was between the negative sense of freedom, suggesting freedom from obstruction, and the positive sense, suggesting autonomy to live by one's own projects. Partha Dasgupta has reinterpreted this to be a distinction between rights to be free of obstruction versus rights to goods. Sen more-or-less parallels Dasgupta. Under their version of the distinction, negative rights correspond closely with the Anglo-American tradition of rights, are virtually unlimited, and govern relationships among people. The positive sense appears more consistently in Continental political philosophy, are inherently finite, and govern relations between people and things (at least as a first approximation). Most importantly, Dasgupta and Sen argue that the relationship between these two senses is not simply one of rank, but may be grasped only through a richer theory of dependency informed by empirical study.

III. LAW AND POSITIVE RIGHTS

Summary: if one claims that people have a positive right to a good, one should be also willing to defend the proposition that some other people have a positive duty to supply that good.

It should be clear from the foregoing description how one may claim that a law may enforce a positive right, in particular, a right to altruism for those who need it, or a duty to altruism from those who can afford it.

Take for example the case of housing. Various governments with the United States pass laws with the goal insuring that all people have housing. The particular structure of these laws take the form of rent controls, public housing projects, rights to issue tax-free bonds (as in this country's RTC "80/20 Program" or its successor, the Affordable Housing Disposition Program), tax credits (as in this country's HUD and FHA Low-Income Housing Tax Credit), or voucher-subsidies.

If a state passes a law to provide housing, it might do so out of the conviction that the housing market displays failures, that housing is a public good, that people free-ride on the provision of housing by others, and so on, or on the supposition that homelessness breeds crime, and reducing crime is a public goal. Radin's justifications incorporate such themes, for example: this is addressed in a later chapter. The point here, however, is that it may pass such a law when animated by the conviction that people have a positive right to housing.

If I propose a positive right, I should have in mind some place to locate the correlative duty. Furthermore, it was suggested above that a positive right governs a relationship between a person and a thing: for example, a positive right to housing, or food, seems to govern my relationship to a house, or an apple. But it should be clear now that this is only true as a first step. All rights tell someone what to do, and positive rights do not do that telling to the house or to the apples: we are not modern-day Canutes, commanding the earth to be bountiful. So the question is, then, to whom does the positive right address itself?

The two obvious choices seem to be that the duty to provide housing or food which corresponds to a positive right to housing or food is a duty held by government, or else it is held by individuals (and particularly, those individuals who can afford it), though government may have a duty to police the proper performance by individuals of this duty. To put it a different way I might ask, "If I believe that people have a right to housing, then does the duty to provide housing fall on the government alone, or is that duty held by other individuals who can afford it (though the government may enforce their observance of their duty)?"

Are Positive Duties Held by States or by Their Citizens?

Is it possible for a government to have a positive duty that is not also held by, or originate in, the duties of at least some of its citizens? I have spoken of government as its own agent up to this point, but in fact it is a synthetic agent, as a business corporation is a synthetic agent. Yet while it makes perfect sense to speak of a corporation's duties without implying that shareholders in that corporation have duties, it makes little sense to speak of a state's duties which are not grounded in the duties of its citizens.

If John owns a share of Exxon, and Exxon spills oil and wipes out a sub-Arctic ecosystem, presumably Exxon has a duty to the human inhabitants of that region (and perhaps the non-human inhabitants?) to make amends. Yet it would be odd to hold that John has a similar duty, in most cases.[30] Or, if he does, presumably that

[30] This might not seem odd to the reader, and I would grant that some such cases exist. Suppose John buys shares in a chemical company and earns dividends. Unbeknownst to him, that chemical company is making a fortune providing bombs and poison to an insane German immigrant to drop on Asian peasants. When John discovers this, it is reasonable

duty is reflected in the lowered value of his shares. But this can scarcely be called a "duty" of his. He has no real choice about accepting the fact that other people will now trade him less dollars for his shares than previously. If something is going to happen to John whether he wants it or not, and there is nothing he can do to prevent or alter it, then it is odd to say, "John has a duty to accept it."

Could one maintain, analogously, that a positive right to certain goods imposes a duty on a state which is not also a duty upon the citizens of that State? The answer is no, for two reasons: because a government is a moral flow-through vehicle (to continue the analogy with corporate law, it is a general partnership and not a corporation), and because (if one accepts social contract theory as a reasonable way to think about rights and duties) it would otherwise be difficult to give an account of how those government's duties came into existence. These will be taken in turn.

A government differs from a publicly-owned company in an important respect: its economic resources are not "its" own, for the state belongs to its citizens. Germany, for example, provides significant payments to Israel as reparations for the crimes of World War II. It would be odd for Hans, a German citizen, to say, "Yes of course my government should pay Israelis for the crimes committed by Germans two generations ago, but none of us should be

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to suppose he has some duty to those people from whose immiseration he prospered. Taking this too seriously, however, would entangle the economic system in a mass of duties to repair (it is this fact, of course, which drives law to limit the liability of the corporate shareholders).

In any case, the point of my analogy is made *stronger* if the reader believes it is not strange to hold that the duties of synthetic agents devolve upon their elements.

taxed for it!" John the oil company shareholder may make the analogous claim, saying that he has no special obligation to put to an ecologically worthwhile purpose the dividends he received from owning a share in a reckless polluter: his obligations are met when that reckless polluter is fined. One may debate whether John's claim is correct; Hans' claim is not even meaningful.

The second reason concerns the potential origin of positive duties held by the state only. Our social contract tradition, running from Locke up to Hayek, holds that the class of rights which have the state as their duty-holder is an empty set, and that the concept is meaningless.

Hayek, for example, argued against this on the grounds that the state was a construction into which rights and duties got deposited. One could not say that the state had a right or a duty if one could not say where it came from. For Hayek, the state was a thing which saw to it that the rights and duties of individuals were carried out, but did not have rights and duties original to it: though the state polices, only derivatively does it hold rights and duties. Therefore to say the state has such and such a positive duty, I must say either it is a police act, or it got deposited with the state from somewhere else.[31] If certain benefits such as food or housing are deemed to be a matters of rights, then the provision of these benefits must be an example of the government policing of citizens' duties. For someone committed to the social contract tradition, the problem is how to know if I have that positive duty in a state of nature: I would have to

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[31] See Hayek, *Law, Legislation and Liberty:* Volume II, *The Mirage of Social Justice*, especially Chapter 9 and its appendix.

maintain that in a state of nature that natural positive duty exists. This is not an impossibility, of course, but it is a strong claim (and one which the end of this chapter addresses).

Therefore one should not say that government holds a duty to provision people's positive rights without acknowledging that this duty flows through in some respect to the citizens of that government. An advocate of social contract theory would face an additional difficulty of explaining how such positive duties were formed in a state of nature.

Therefore while the positive right to a good does directly link the rights-holder to an object, it also creates a correlative duty which either falls upon other citizens directly, or it falls upon their government, but only as a surrogate for those citizens.

Positive Duties

What does this duty look like? I am imagining something fairly simple. One could say that "People have a right to housing (supplied by the state)," and thereby suggest the duty: "Citizens have a duty to supply housing (through the state)." The parenthetical expression is included to clarify that this as a legal claim and not merely a moral abjuration towards those who would oppose it. However, I oppose this formulation because it makes it look as if only some people are holding the right at any given time, those being the ones who inhabit or deserve that housing supplied by the state. But if such a right exists, it exists for all of us, and this may be captured better by another formulation: "People who cannot afford it have a right to have housing (supplied by the state)." This also suggests that the

correlative duty is, "Citizens who can afford it have a duty to supply housing through the state to citizens who cannot afford it." This formulation of rights and duties seems to express what is going on backstage in the welfare state (if one accepts the initial proposition that this is all being justified by reference to rights, and not market failures or social goals).

One last point should be made here regarding rights and duties. For the sake of exposition I have taken for granted the existence of a one-to-one correspondence between rights and duties. This actually rests on two further assumptions: that rights have correlative duties, and that those rights and duties map one-to-one. I take each in turn.

1) It makes no sense to speak of rights and deny they call duties into existence. The willingness to assert that a duty matches up with every putative right is the only discipline a moral or political philosopher has to keep from playing Santa Claus. It is, so to speak, her bottom line. Anyone can go around drawing rights in thin air: it is the willingness to say "OK, so you have this duty, and you have this duty, and you over there, you have this duty," which gives a moral theory its rigidity.

2) As Joseph Raz has pointed out in *The Morality of Freedom*, there may be many more duties than rights in the universe.[32] If

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[32] Joseph Raz, *The Morality of Freedom*, pages 170-171. In fact Raz denies what he calls "the correlative thesis," but only on the grounds that Richard Brandt's statement of the thesis is incomplete, for Brandt makes correlative duties conditional upon rights-holders' desires, formulates duties as guarantees to rights-holders' interests, and maps duties one-to-one to rights. I am amplifying this last criticism: where Raz's point is that a right may generate multiple duties, and these duties are constantly in flux (depending upon certain social facts), my point in the paragraph corresponding to this

someone crashes a car outside my house and rushes to my door, asking to use the phone, that person does not have a right to my phone, but, it may fairly be said, I may have a duty to let him use it.

I have a right not to have Karen punch me in the nose; Karen has a duty not to punch me in the nose. I have a right to speak what I will; Karen has a duty not to muffle my mouth. I have no right to Karen's phone when I crash outside her house; Karen has a duty to let me use that phone. Thus, there seem to be duties without correlative rights.

If one denies the last claim of the preceding paragraph, then my earlier discussion stands. If one accepts that the last claim of the preceding paragraph is correct, then one might claim that my entire talk of positive rights to goods is skewed. One could reasonably claim that the point is not that people have positive rights to these goods which we associate with social justice, but that people who can afford it have duties to provide those goods (through the mechanism of the state, or otherwise). This seems a fair and plausible assertion, but while it is an objection to my earlier argument, it actually gets me to where I am going more easily.

It is my point here, after all, to say that laws formulated to guarantee access to goods are laws which enforce positive duties,

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footnote is that a duty may exist with no specific right upon which to be grounded. I am not committed to this point, but am merely pointing out how, if one held it, it would add a slight complication to my previous discussion. In fact I conceive of duties and rights like paragraphs and footnotes: the former can exist without the latter, but find amplification there. It is impossible to have footnotes without paragraphs, just as it is impossible to have rights without duties. And one can have multiple footnotes to one paragraph.

just as a law against assault can be seen as enforcing Karen's duty to refrain from punching me in the nose. I have argued that even if one views such laws originally as enforcing positive rights, this enforcement is only sensical when it simultaneously enforces duties. If an objector were to maintain that duties exist without rights, and that such laws are positive duty-enforcements, then this objection just saves me a step. Fine, I say, we have reached by alternate routes a point of agreement: some laws are positive duty-enforcements (perhaps with those duties framed in terms of obligations held by those with surfeit to aid those in need). Now I ask, how might I justify saying these positive duties exist and that the state should enforce them?

IV. SIDE-CONSTRAINTS AND THE PRINCIPLE OF LEGITIMACY

I have explained the distinction between rights as side-constraints and rights as instruments of public welfare, and also the distinction between positive and negative rights. I have explained as well the relation between positive rights and aspects of social justice. The question remains, are there positive rights which can be viewed as moral side constraints which do not violate the moral neutrality condition expressed by the principle of legitimacy?

Consider briefly again the question of whether political rights may be understood as side-constraints or as shorthand expressions for public welfare. The view that they are understood as side-constraints rests on a Kantian argument concerning the inviolability of persons. And in some sense it would be preferable if they turn out to be such: it is good if people say that I have a right to free

speech, but it is better for me still if they say this because of respect they have for me as a person, and not because they think it serves some other purpose of their own. If they only grant me my right because it serves some end of theirs, then what happens to me the day it stops serving their end? I am more secure in my rights if they are understood as moral side-constraints on the calculus of others, and not merely as an item of deliberation for that calculus.

For this reason, assume for the rest of this chapter that of the two interpretations of rights, either as deontological side constraints or as consequentialist shorthand, the former is adopted. That is, I am going to pretend that it has been proven that rights are actually side-constraints, and show how this position confines what other beliefs I may reasonably hold.

V. DO LAWS ENFORCING POSITIVE RIGHTS LEGISLATE MORALITY?

Now that I have discussed at length the meanings of all the italicized expressions used in the following question, I again ask:

If *rights* are understood as *side-constraints*, then does *law* which *enforces positive rights* to altruism, or *positive duties* to behave altruistically, violate the *principle of legitimacy*?

VI. HOW LAW MAY ENFORCE POSITIVE RIGHTS WITHOUT LEGISLATING MORALITY

Imagine a legislator advocates a law which refers to the provision or distribution of certain goods (goods which are not just

the behavior of other people). Imagine further that her advocacy does not refer to market failure, and it does not refer to social goals that need to be accomplished. Instead it refers to rights, and she maintains that people have rights to some level of these goods. This is an example of what I have been calling law endorsed under a harm-prevention or rights-enforcing justification.

From everything that has come before, it should be clear that law endorsed under a harm-prevention or rights-enforcing justification does not violate the principle of legitimacy (that it, it does not "legislate morality") *if and only if* there is no member of the "complete" moral visions held within society which spurns altruism, with "altruism" broadly understood for now as signifying "the act of giving up something in order to meet the needs of another" (a more precise definition will be given shortly).

Do I have to examine all plausible social theories to decide if there is such an overlapping consensus? Yes, if I want to prove it exists. But if I want to make a skeptical argument, saying such consensus does not exist, then I need to find one well-known moral theory which does not demand altruism, but which should be included in the "complete" set of moral visions of a society: then it will be certain that there is no overlapping consensus from which to defend the claim that making altruism legally mandatory is an instance of the legal enforcement of duties we all share.

So if I want to be skeptical in confronting this legislator, I must find a moral theory which *does not* coherently demand altruism, but which *is* a member of the "complete" set of moral visions of society. I face the problem that many candidates I could

suggest might be said not to be members of the "complete" set of moral visions, as that term was defined in Chapter 1. One candidate whose membership this legislator could not deny, however, is Kantian ethics, because it is generally upon Kantian ethics that the interpretation of rights as side-constraints rests.

Not all members of the overlapping moral consensus coherently demand altruism: the moral theory I will use to make this case is Kant's own.

VII. KANTIAN ETHICS DO NOT COHERENTLY DEMAND ALTRUISM[33]

It is natural to test a moral theory by asking, Upon what kind and amount of altruism does it insist? Two answers a theory might give are problematic: it might not insist on any mutual aid, and count benevolence as supererogatory, or it may charge us with an unrealistically high level of mutual aid, leaving us no time to pursue the goals and projects constitutive of a full human life. I wish to pursue this question with reference to Immanuel Kant's *Grounding for the Metaphysics of Morals*, Barbara Herman's *The Practice of Moral Judgment* (a book of essays clarifying and reinterpreting

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[33] What is altruism? I will mention by way of example three kinds of acts; 1) good works involving direct contact with the recipient, such as changing the tire for a stranded motorist or volunteering at a shelter; 2) charity to unknown beneficiaries, such as donations to organizations such as UNICEF; 3) the intermediate case of direct donations to unknown people, such as street beggars. Redistributive taxation is arguably but a state-directed version of #2.

I divide with Herman the maxims of mutual aid into non-benevolent ("never aid another") and benevolent, which is itself divided into sacrificial beneficence ("help others at any cost to yourself") and nonsacrificial beneficence ("help others if and only if the costs to you and your projects are not too high"). I will occasionally switch between "benevolence" and "beneficence" for purposes of euphony, but understand them to name the same concept.

Kantian ethics), and, in passing, an argument of Bernard Williams regarding integrity from *Utilitarianism: For and Against.*

At first blush both problems mentioned in the last paragraph present themselves to Kantian moral theory; either it seems that no altruism is demanded of those confident that fortune's grace is not fickle, or that too much altruism is demanded, and that we must yoke ourselves to maxims of sacrificial benevolence which undermine our integrity as persons. Barbara Herman provides an interpretation of Kant's theory she believes removes it from both criticisms. I will argue that Kant and Herman's interpretation of Kant have no sustainable equilibria, in that either they permit us to be niggardly or insist we be saints.

Does Kantian Morality Demand Benevolence?
THE PROBLEM OF THE CONGENIAL MISER

A proper moral theory not only tells us principles of morality but give us reasons for following them. It is tempting to give as a reason for following moral rules, "Because it is in your own interest to do so."[34] This temptation may explain the role of the afterlife in religion.[35] This answer, however, is denied to Kant, who desires to establish the Categorical Imperative as a moral principle:

> "Hence there is only one categorical imperative and it is this: Act only according to that maxim

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[34] A point made in D. H. Monro's essay "Self-Interest."

[35] cf. Plato's *Republic*, Chapter 10. Several years ago there was a book of pop-philosophy called "Why do Bad things Happen to Good people?" A wider and more receptive audience might greet a book entitled, "Why do Good Things Happen to Bad People?"

> whereby you can at the same time will that it should become a universal law..."[36]

Thus runs one of Kant's formulations of the Categorical Imperative. Kant could not ground this Categorical Imperative in empirical claims, for he maintained that it is knowable *a priori.* He had, therefore, to give an explanation for why his CI should be followed, and this explanation could not begin, "It would be good for you to -" or with any similar empirical claim.

In illustrating the function of the Categorical Imperative Kant appears to answer with just this appeal to prudence. He writes of one who "is himself flourishing, but he sees others who have to struggle with great hardships." Rather than helping that other person this man says, "I won't deprive him...; I won't even envy him; only I have no wish to contribute anything to his well-being..." Kant acknowledges that mankind might fare better were it to drop its hypocrisy on this matter, but insists:

> "it is impossible to *will* that such a principle should hold everywhere as a law of nature. For a will which decided in this way would be in conflict with itself, since many a situation might arise in which the man needed love and sympathy from others, and in which, by such a law of nature sprung from his own will, he would rob himself of all hope of the help he wants for himself."[37]

That is, the outcome of Kant's Categorical Imperative test seems to rest on his empirical claim about the situations which

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[36] Kant, *Grounding for the Metaphysics of Morals*, Ellington's translation, page 30 (in Volume IV of the Königliche Preussische Akademie der Wissenschaften text's numbering system, page 421, hereinafter "KPAW page ___").

[37] Kant, *Groundwork of the Metaphysic of Morals*, Paton's translation pages 90-91 (KPAW page 423).

arise in life. Yet it is illicit (because it would be an appeal to self-interest) for Kant to argue that "You should follow the CI because you will be better-off if everyone does." Instead it must be the case that the selfish man described above fails the CI. I wish to examine, therefore, how it is that one fails the CI, so as to know if the above explanation succeeds and is not just appealing to a justification from self-interest proscribed to Kant.

How Does Non-Benevolence Fail the CI?

2 WAYS OF FAILING THE CI

There are two ways a maxim (which Herman calls "Kant's term of art for representing willings"[38]) fails the Categorical Imperative: willing it can produce a contradiction in conception, or a contradiction in the will.[39] Kant is claiming that a policy of non-benevolence fails the second test, causing a contradiction in will.

What Kant envisions is a case of free-riding: everyone needs aid at one time or another, so a system of mutual aid benefits us all. I contradict myself by willing not to contribute to this system (and, under the universalizing procedure of the Categorical Imperative, willing that others also do not contribute), while willing to accept its benefits. That is, I am seeking the benefits of a system which I simultaneously cause to unravel. This is the contradiction in the will to which Kant's argument draws attention.

Yet this rests on an empirical claim or, weaker yet, a timid *prediction* : "You *might* need the help of others someday, so do not be stingy now." And this of course is open to Daddy Warbucks' response

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[38] Herman, preface to *The Practice of Moral Judgment*, page xi.
[39] *ibid.*, page 47. See also KPAW page 424.

(from *Little Orphan Anne*): "Why be nice to people on the way up if you're not coming down?" What answer does Kant have for the strong man who steels himself to adopt a principle of never demanding aid, or the miser who positions himself so as never to need the help of others (by hoarding his wealth and diversifying his risks), or just the risk-seeking individual who believes with regard to social insurance that the game is not worth the candle?[40] A further perverse result of this argument is that it demands benevolence from those most likely to need help, and excuses the tycoon who uses wealth to insulate herself from the vicissitudes of life.

NON-BENEVOLENCE IS IRRATIONAL GAME-THEORETICALLY, BUT THIS FACT DOES NOT HELP KANT

I shall attempt to state this problem in tighter fashion. Suppose I concede that there is a sense of "rational" in which non-benevolence is irrational, and that is in a strategic, game-theoretic sense. A strong argument may be made that even those who are most flourishing are wise to hedge their positions, taking out social insurance by practicing mutual aid. This argument insists that the Daddy Warbucks response is not just callous but irrational in the following way: were I and Warbucks in the same position economically,[41] and I adopted a strategy of benevolence while he adopted non-benevolence as a strategy, and we were able to play the game repeatedly, over time I would fare better than Warbucks. It has been said that "the woods are full of geniuses who go broke;" the

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[40] This was Sidgwick's response in *The Methods of Ethics*.

[41] I have here reduced Kant's notion of "flourishing" to mere economic well-being, which is a thin representation of what constitutes a life which has flourished. Since charity and aid are at issue, however, and since these often are expressed in monetary form, I make this simplification for exposition's sake.

woods are also full of well-off people, happy people, wealthy people, and respected people, who became respectively miserable, discontent, broke, and infamous.

By way of example, a recent Congressional study showed that a household in the bottom income-quintile in 1979 stood a higher chance, by 1988, of being in the top quintile than of remaining in the bottom. Downward mobility from the top quintile was also robust. One explanation of this latter fact might be that wealth is often stored in real estate, and Reagan's tax-reform of 1986 destroyed many types of real estate values (and the value of the S&L's which had made loans collateralized by real estate). The "rich-get-richer" Reagan years were, in fact, a period of high egalitarian mobility among classes.[42] Thus it seems that this world is just the kind of place where flourishers fail often enough to warrant their opting for social insurance.

Kant's words are not obviously at odds with this strategic interpretation: indeed, on a first reading he appears to be appealing to the interests of the flourishing individual in just this way, only expressing as a certainty what I have expressed probabilistically. But it is clear that Kant has a richer notion of "reason" in mind than the modern game-theoretic sense of what is rational, and wants respect for the humanity of others to be more than just an optimal strategy. This means that even the foregoing concession of the irrationality (in a strategic sense) of non-benevolence does not give

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[42] See *Income Mobility and Economic Opportunity*, a report to the Joint Economic Committee of Congress, June 1992.

Kant what he needs to argue that the Categorical Imperative counsels against non-benevolence.

HERMAN'S DEFENSE OF KANTIAN ALTRUISM

The Rawlsian defense of Kantian altruism rejected

Barbara Herman considers and discards a possible response for Kant provided by John Rawls in a lecture series at Harvard in 1977,[43] and her argument lends insight into the Kantian agenda. Rawls had argued that moral agents should screen themselves from knowledge of contingent facts about themselves when deciding their policies for self-governing, in moral philosophy's equivalent to the veil of ignorance from *A Theory of Justice*.

In my view Herman is right to reject this claim of Rawls, because it is a feature of moral deliberation that agents suspect, or hope, that there is something special about their case which excuses them from the *prima facie* duties incumbent upon others. I do not walk around saying constantly to myself "What does morality require me to do now?" Instead, I make plans and go about my projects and, occasionally, this planning trips some recognition that a question of morality is at stake. Reasonable questions to ask myself then are "How do I frame my maxim?" and then "How much does my case resemble the typical case to which the maxim in question applies?" As Herman points out, I:

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[43] Herman refers to this series of lectures and notes Rawls made available at those lectures, none of which have been published. Herman is careful to point out that while this argument is clearly "'Rawlsian' in spirit" it is not necessarily one Rawls would defend in print, though he found support for his argument in Kant's *Critique of Practical Judgment*, pages 68-72 in Beck's translation.

> "will not be shown that [I] am wrong by being told that all features distinguishing [me] from others are morally irrelevant."[44]

Though rationalization of wrong-doing is one of life's constants, reasonable arguments can be made for many unlikely exceptions to generally approvable maxims.[45]

Herman's claim: non-benevolence is a contradiction of will

Herman supplies Kant with an alternate response: the practitioner of non-benevolence will be contradicting his own will unless he can "guarantee in advance that he can pursue his ends successfully without the help of others." In particular, he must guarantee that what he gains from not participating in the scheme of mutual benefits outweighs what he gives up, and furthermore, that he has no ends which are *sine qua non* ends, "ends that it is not possible for any rational agent to forgo (ends that are in some sense necessary ends)."[46] Herman terms such a person "the strong man." A strong man cannot make his guarantees successfully, Herman argues, for this reason:

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[44] Herman, page 51.

[45] Assume Mother Theresa is a benevolent super-capitalist with $1, and could invest it so that it doubles every year, or give it away now. It is not clear what she should do. Does she give it the lepers of Calcutta now, let it accrue for some length of time (a lifetime?) to an enormous sum and then use it to improve their lives, or adopt an intermediate policy of investing but siphoning off a small percentage each year? Note that giving a dollar now imputes an incredibly high time-preference for money for the Calcutta poor (which is probably appropriate). In any case, I mean that a complication arises for those whose charity at one instant affects their ability to be charitable later, beyond the initial loss of resources (e.g., capitalists), and that this complication may authorize a closefisted maxim. I do not mean to suggest that Mother Theresa's argument here is insurmountable, just that it is plausible and indicates how we may reason with regard to our own moral duties. Rawls' argument denied this because he overlooked the way in which moral issues confront us.

A special confusion about charity and capitalism has always existed. Consider the British journalist who came over to do a profile of Andrew Carnegie and wrote home, "I had no idea there was so much money in libraries!"

[46] Herman, page 52.

> "The extent to which one's skills are adequate to one's needs and projects, the extent to which the things one needs are plentiful or ready to hand, and the extent to which the help of others will be necessary for the successful pursuit of any end - all of these involve contingencies that are not within our power."[47]

I will argue that Herman's demand that the strong man guarantee he receives a net gain from opting out of social insurance, and guarantee he has no ends he cannot forgo, is an arbitrary demand.

Why non-benevolence is not a contradiction of will

The question of guarantee arises, Herman argues, because of the "ubiquity (inescapability) of the possibility of needing help."[48] This is a profound and unwarranted shift from her earlier discussion. Consider the following two sentences:

> A. There is a ubiquity of needing help.
> B. There is a ubiquity of the possibility of needing help.

These are different claims.

There is a decided difference between *the ubiquity of needing help* and the *ubiquity of the possibility of needing help,* just as there is a difference between needing scissors and the possibility of needing scissors. I may go through my whole life and never have a reason to use a pair of scissors, while knowing all along that a possibility always existed that I might need scissors. I might reach my grave never once having needed a pair of scissors. If along the way someone asked me "Why don't you carry scissors?" I could truthfully

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[47] Herman. *The Practice of Moral Judgment*, page 53.
[48] *ibid.*, page 52.

respond, "Don't need 'em!" Likewise, the miser or the stoic (or the strong man) may seek to position herself so as to minimize the chance she will need help (by saving, diversifying risks, or adopting a policy of free exchange to get what she wants). She does this in the same way that I neglect to carry scissors: from an estimation of the costs and benefits of caution and the likelihood of catastrophe.

Herman claims that it is irrational to forswear permanently something which you might sometime need, (e.g. the help of others). But if the cost of maintaining access to scissors demanded a high enough payment, and the possibility that I might someday desperately need scissors were, so far as I could tell, small enough, there would be nothing irrational about my withholding that payment and foreclosing my ability to access scissors.

The point of the analogy between the miser and me (the scissors-avoider) is this: The possibility that she might need help at some point may always exist, while no actual need for help ever exists. No more contradiction exists for her than for me when I decide never to carry scissors and to avoid situations where I might need scissors (while knowing that a vagary of fate might make me badly need a pair of scissors). No contradiction exists in anything the miser (who braves life without social insurance) or I (who brave life without scissors) has *willed*, whether or not fortune punishes us for our lack of precaution. Therefore Kantian morality does not coherently insist on mutual aid, at least on Herman's grounds for believing so.

My personal response to this claim about a moral theory would be a cautious, "so what?" I do not go so far as to subscribe to the Gordon Gecko theory of ethics, "Greed is good."[49] And yet, as Smith wrote,

> "I have never known much good to be done by those who affected to trade for the publick good."[50]

There are large areas of important human activities where altruistic behavior can be counterproductive or self-defeating, such as in most games, the allocation of capital, sex, and voting. Therefore while I admire altruism it is not an absolute *reductio ad absurdum* for me if a moral theory does not demand mutual aid, though this response is not open to Kant.

Does Kantian Morality Demand Sacrificial Benevolence?

Assume my foregoing criticisms of Herman were false, and we accept her argument that Kantian theory demands mutual aid. Let us consider Herman's further claim that only non-sacrificial beneficence is demanded by Kantian ethics.

Herman is responding to the possibility that, if I do not sacrifice myself to aid another, I might be operating under a maxim which fails the test of contradiction of the will. The problem is, if I do not practice sacrificial benevolence to aid another, might I not reach a situation where I need someone to *sacrifice* himself for me? And by both willing a universal law of non-sacrificial aid, and

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[49] Gecko was a character in Oliver Stone's movie, *Wall Street*, who proclaimed this as an abiding moral truth. His statement was unqualified, ridiculous, and, with reference to his subsequent act of trading on inside information, utterly false. If confined to the specific issue which he was *purportedly* discussing (the corporate merger mania of the 1980's), it was entirely correct.

[50] Smith, *The Wealth of* Nations, page 446.

willing the sacrificial aid of another, will I not find my will in contradiction? So is not sacrificial aid demanded by Kantian morality?

HERMAN WRONGLY REJECTS SACRIFICIAL BENEVOLENCE

According to Herman, sacrificial benevolence is not demanded by Kantianism because:

> "in the [mutual aid] case it is the willing of a law of universal nonbeneficence that deprives one of what one needs. In the case of nonsacrificial beneficence, it is not what is willed but the contingent unavailability of resources that raises the issue of sacrifice...So whether I get the help I need [in a world of nonsacrificial beneficence] depends on ... accidents ... which make it the case that the satisfaction of my need requires sacrifice. This is not a function of my willing."[51]

I believe that Herman's distinction in this case is spurious. In all three cases under discussion, non-benevolence, nonsacrificial beneficence, and sacrificial beneficence, an agent is faced with a choice as to what policy to adopt. Kant's Categorical Imperative, remember, is two tests in one: it tests for contradiction in conception and contradiction in will. The "contradiction in will" test can be viewed as a decision-making procedure: you can adopt this policy if and only if in a world where you and all others had adopted this policy, the ends for which you adopted this policy would not be thwarted.[52] In the case against non-benevolence, your will and the world's contingencies may combine to make your strategy self-

[51] Herman, page 57.

[52] Of course there is another step in this decision-procedure which embodies the contradiction in conception test, but that is not at issue in any of the discussion involving beneficence.

defeating. I argued that the fact that they *can* combine this way is of no importance, while Herman argued that this possibility, and the agent's recognition of this possibility, make that agent irrational.

Assuming Herman was right, then in the case of nonsacrificial beneficence the same combination will occur. If I adopt the maxim which leads me to aid people only when sacrifice is not demanded of me, there is the possibility that events will arrange themselves so that I will wish someone would practice sacrificial beneficence towards me. Since "it is not possible for an agent to guarantee in advance that he can pursue his end successfully without the [sacrificial] help of others,"[53] would she not, on Herman's earlier argument, be irrational to permanently forswear that kind of help by denying it to others?

The point is that in the cases of non-benevolence and nonsacrificial beneficence, what I have willed and the contingencies of the world mix and cause me to be satisfied with my choice or to regret my choice. Herman maintains that with non-benevolence it is the act of will which causes later regret, while in the nonsacrificial beneficence case the contingencies of the world generate regret. While I accept the claim that in the non-benevolence case if I had not so willed then I would have had no later regret, and in the nonsacrificial benevolence case if the contingencies had not so occurred I would have had no regret, that does not imply that in the first case my *will* is the cause of my later regret and in the second

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[53] Herman, page 52. Here I am merely testing her claim about sacrificial beneficence against the standard by which she judged non-benevolence.

contingencies are the cause of my later regret. The same claims could just as easily be switched.

This is a fallacy which is common enough it deserves its own name, though as far as I know it has none (roughly speaking, it is a confusion of necessary and sufficient conditions). There are workers in large corporations who say (roughly), "I work in the marketing department, which is really the heart of the company, as this company would not exist if something were not being sold"; "I work in the production line, which is really the heart of the company, as this company would not exist without something to sell"; "I am a manager, which is really the heart of the company, as the company could not run without management"; and so on with personnel, product design, and so forth. I have heard similar claims about the centrality of certain disciplines to intellectual life, with various candidates proposed for that progenitor discipline. What is being forgotten in these cases is that just because Y is needed to have Z does not mean that Y causes Z or that Z can be blamed on or attributed to Y: perhaps there is an X which stands in the same relation to Z as Y does.[54]

Herman is guilty of this fallacy when she says:

> "whether I get the help I need... depends on the accidents of circumstances which make it the case

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[54] I believe that a more historically significant example of this fallacy was Ricardo's labor theory of value. This could denied, of course, by arguing that, while land, labor, and capital together generate profit, capital is an accrued form of labor, and that land, being inert, does not "cause" anything. Therefore profit can be attributed to labor. This argument rests on some strong metaphysical claims. In any case, my point is merely that Herman's argument fails to distinguish necessary from sufficient conditions.

> that the satisfaction of my need requires sacrifice. This is not a function of my willing."[55]

While it is true that without the "accidents of circumstances" I would not need sacrificial help, this does not imply that whether I get help or not *depends* on accidents of circumstances. It depends equally (or similarly?) on what I have willed to be the universal maxim upon which others adopt, and if through the CI's universalizing procedure I willed that only nonsacrificial beneficence is practiced, then I will also not get the help I need.

Therefore if we accept the argument that nonbenevolence leads to a contradiction in the will, then nonsacrificial benevolence also leads to a contradiction in the will. Therefore it is ruled out by Kantian morality. Therefore, if non-benevolence is non-Kantian, only *sacrificial* benevolence is Kantian.[56]

On Herman and Sacrificial Benevolence

This section addresses two points. First, it argues there is a further inconsistency in Herman's claims about benevolence. Second, it addresses the issue of sacrificial beneficence directly, asking if it is wrong for a moral theory to demand sacrificial beneficence of us.

HERMAN IS INCONSISTENT TO REJECT SACRIFICIAL BENEVOLENCE

As has been explored above, Herman finds that there is a duty of nonsacrificial beneficence only. Later, however, in exploring

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[55] Herman, *The Practice of Moral Judgment*, page 57 (quoted earlier).

[56] By saying such-and-such is Kantian, I am of course not now saying that Kant recommends it. In fact, Herman points out that in Kant's *Doctrine of Virtue* (page 122) he rules out sacrificial benevolence, stating that the "duty of helping others at all costs... is one... we do not, and morally could not, have." I am pointing to what I believe is a deep schism in Herman's interpretation of Kant, and through her, to Kant himself.

what she calls "the casuistry of beneficence,"[57] she describes the perimeter of the duty of nonsacrificial aid, and it is a wide circle indeed. Herman writes:

> "The duty of mutual aid has its ground in the fact that we are dependent beings and beings with ends that it is not rational for us to forego: ends set by 'true needs' whose satisfaction is a necessary condition for the exercise of rationality...As a person's true needs are those that must be met if he is to function (or continue to function) as a rational, end-setting agent, respecting the humanity of others involves acknowledging the duty of mutual aid: one must be prepared to support the conditions of the rationality of others... when they are unable to do so without help...
>
> "The ground of mutual aid then reveals its moral point. The good it looks to is the preservation and support of persons in their activity as rational agents...Thus we may refrain from helping only if such action would place our own rational faculty in jeopardy."[58]

That is, there are legitimate needs of others, and there are legitimate reasons why we can ignore their needs. The legitimate needs of others are their "true needs," which are analogous, I believe, to Rawls' primary goods: the ends that they must have before they can truly set their own ends. And the excuses we can provide which shelter us from these needs of others mirror them: we do not need to help so long as helping would actually cut into the satisfaction of our own true needs.

Yet this is equivalent to saying that we must help so long as helping will not deprive us of our own true needs, if we are

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[57] Herman, page 46.
[58] *ibid.*, page 67.

confronted by someone whose true needs are unmet. Yet in any world remotely related to today's, there are going to be people with unmet true needs. And the range of what we can do while still supporting our own true needs is vast: I can live on gruel, see no movies, buy no albums, wear burlap clothing, and still meet my true needs and hence support my status as "a rational, end-setting agent."[59]

Earlier, however, Herman argued against a duty of sacrificial beneficence. We do not have to sacrifice ourselves, she maintained, when that is necessary to help another in need. Now I discover that she must have meant that in an extremely literal way: my life, my organs, a subsistence diet and the like, are what I can call my own. These are the components of the "self" over which I have unconditional claim: the other claims of this self are extraneous, in that they are trumped by "true needs" claims of others.

The nonsacrificial duty of beneficence which Herman generates, then, does not ask me to sacrifice "myself" only because it draws an extremely tight circle around what can be called my "self" and leaves the rest open to trade-offs with the needs of others.[60] One might have thought that the line between sacrificial

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[59] There is a different way to think about needs, however: perhaps they are set by social context. Smith defined poverty as the lack of necessities, but defined necessities as, "not only the commodities which are indispensably necessary for the support of life, but whatever the custom of the country renders it indecent for creditable people, even of the lowest order, to be without... But in the present times, through the greater part of Europe, a creditable day-labourer would be ashamed to appear in public without a linen shirt, the want of which would be supposed to denote that disgraceful degree of poverty, which, it is presumed, no body can well fall into without extremely bad conduct." See Smith, *The Wealth of Nations*, Volume II Book V, page 869.

Acceptance of this would also support a clear distinction between sacrificial benevolence and non-sacrificial benevolence. Herman speaks of needs only in an absolute sense, however, so as I argue above, her distinction between non-sacrificial and sacrificial benevolence collapses (along with her endorsement of one and rejection of the other).

[60] This parallels a philosophical argument made against Rawls by both Sandel and Nozick.

and nonsacrificial beneficence would be drawn between activities such as tithing, which may play a part in a normal human life, and charity so deep that nothing is left from which one may construct a recognizable, non-eccentric human life. Instead, Herman in her casuistry of aid has either contradicted her earlier rejection of sacrificial beneficence, or maintained consistency by re-drawing the line demarcating nonsacrificial from sacrificial benevolence so that it distinguishes not the life of a generous human from that of a monk, but the life of a monk from that of a martyr. I need to address the propriety of so strong a demand arising from a moral theory.

MAY MORAL THEORY DEMAND SACRIFICIAL BENEVOLENCE?

In contrast with the earlier case regarding non-benevolence, there is a large "so what?" to be raised when a theory proposes sacrificial altruism, "a duty of helping others at all costs," as a moral imperative. Such theories are problematic in two ways. One is that it might be reasonable to ask of a moral theory that there is a possibility it can gain some measure of allegiance, and a theory demanding sacrificial beneficence probably cannot. The second is that moral theories should not make unrealistic demands on us, not

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This is explained in Appendix A, and also in Chapters 4 and 5, with reference to the property theory of Jeremy Waldron. But I will summarize the dispute here. Near the beginning of *A Theory of Justice* Rawls defined his project as that of countering the utilitarian willingness to use one person for the benefit of others. Yet his distributive principle seems to do just that. He denies that in his theory some people get used for the benefit of others, by distinguishing between a self and its attributes (in which Rawls includes talents and personality traits).

In response to this, Nozick and Sandel responded "Why we, thick with particular traits, should be cheered that (only) the thus purified men within us are not regarded as means is also unclear." See Rawls, *A Theory of Justice*, page 102, Nozick, *Anarchy, State, and Utopia*, pages 228-231, Sandel, *Liberalism and the Limits of Justice*, pages 94-102, and Rawls' response in "Justice as Fairness: Political, not Metaphysical."

Again, this debate is discussed at length at several other points in this dissertation.

only for the practical reason that unrealistic demands are easy to ignore, but also for a deeper reason concerning the integrity a human life must have before it can be moral. This second point is the one I would like to consider here.

The case against sacrificial benevolence

I guiltily reflect on how many opportunities I let pass to relieve suffering around me, let alone distant suffering. Every CD I buy, restaurant meal I eat, and movie I watch, costs several lives, in the sense that the money I spend on these activities, if directed elsewhere (e.g., through UNICEF), would save (or prolong?) those lives. Over a year, the money I could have saved by reducing my life to essentials could buy pumps and plumbing enough to provide clean water for several Third World villages.[61] I shield my conscience with the wonderfully subtle trick of just not thinking about it. To an objective outsider, is this indifference not monstrous? In my defense, I wish to adapt an argument from Bernard Williams concerning utilitarianism.

Williams criticized utilitarianism on the grounds that it erodes the integrity of human action. Suppose one, a man with projects which are central to his life, takes up the call of utilitarianism and becomes busily engaged in the task of maximizing happiness. A tension develops. As Williams wrote:

> "...he is identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about... It is absurd to demand of such a

[61] Infant mortality rates in Less Developed Countries are driven in large measure by water conditions, which are incredibly cheap to improve.

> man, when the sums come in from the utility network which the projects of others have in part determined, that he should just step aside from his own project and decision and acknowledge the decision which the utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his action in his own convictions...this is to reflect the extent to which *his* actions and *his* decisions have to been [*sic*] as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus, in the most literal sense, an attack on his integrity.[62]

Perhaps this response can be tailored to fit the case of sacrificial beneficence. Yes, it is the case that I could live on just enough thin gruel to give me the energy to work the highest paying job I could find for as long as I could so I might donate the maximum amount to UNICEF before retiring to my YMCA dormitory room. But I would become a simulacrum of a human being with no moral center of gravity. Morality, so this argument goes, cannot demand we yield the integrity of a human life with private goals and commitments, when it is integrity which provides the foundation for a moral life as well.

As Orwell observed astutely with regard to Ghandi,

> "Many people genuinely do not wish to be saints, and it is probable that some who achieve or aspire to sainthood have never felt much temptation to be human beings."[63]

In his remarkable essay on Ghandi, Orwell argues against sainthood on grounds of the uncompromising judgments it demands. Noting

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[62] Williams, *Ethics and the Limits of Philosophy*, page 49.

[63] Orwell, page 332. Stuart Hampshire and David Luban have also written persuasively about moral inflexibility and why it is admired in youth.

that Ghandi was willing to let his wife and daughter die rather than give them the animal food which the doctor had recommended, Orwell wrote that Ghandi felt there to be limits on what one would do to remain alive, "and the limit is well on this side of chicken broth."

An argument for sacrificial benevolence

Yet this justification of even minimal selfishness, that saints are suspect and a life of self-denial will lack the projects necessary to support human integrity, is flawed. As Orwell noted in the same essay, a picture of Ghandi's possessions at his death showed a walking stick, a cloth wrap, and some spectacles. The whole lot, as Orwell conceded, could have been purchased for about £5. Yet would one accuse Ghandi of a lack of integrity?[64]

If I were offered the choice between saving someone's life or enjoying a fine meal, surely I should choose the small sacrifice of my pleasure for the life of another. It happens that limitations of the world prevent this choice from being presented to me clearly, limitations which concern information and my ability to process it. Yet I could know more than I do about the suffering of others, and in the end, I see no way to justify indulging even the smallest pleasures just because the suffering of others is distant. The deep commitments which are central to my life do not justify my selfish expenditures. It is no mark against a moral theory that it counsels

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[64] Yes, if one were aware, for example, of his weak opposition to German Nazism: he believed that the appropriate response of Jewry to Hitler would have been to commit mass suicide, and thereby shame the world with their plight. Orwell considered this a non-starter, and an example of the moral bankruptcy of pacifism. See Orwell, and Louis Fisher's *Ghandi and Stalin*, cited therein.

an incredibly high standard of morality that few actually achieve, any more than it is a mark against a ballet system that it sets a standard of perfection that few if any achieve. As I congratulate myself for not being as bad as I could be, I must wonder if I am as good as I imagine.

Conclusion: Kant and Altruism

In these last sections I have argued a range of points.

1. Kantian morality, both on his account and on Herman's interpretation, does not coherently generate the duty of mutual aid it claims to generate.
2. If Herman's interpretation of Kant *does* generate a duty of mutual aid (as she believes), it generates not a duty of non-sacrificial beneficence (as she believes), but the stronger duty of sacrificial beneficence.
3. The duty of non-sacrificial benevolence Herman believes is generated from Kantian ethics is essentially indistinguishable from the duty of sacrificial beneficence.
4. Thus, I am revealing three contradictions in Herman's argument, and pointing out that her argument generates a claim on us that most, including Kant and Herman, find absurd.

Lastly, I speculated that it may be right and appropriate that moral theories make absurd demands to which few live up.

VIII. CHAPTER SUMMARY

Assume that political rights are side-constraints rather than shorthand for welfare. Assume also that a society codifies positive rights (or positive duties to behave altruistically) into law. If the complete set of moral visions of that society includes consistent Kantianism, then that society violates the principle of legitimacy.

CHAPTER 4

A SHORT HISTORY OF PROPERTY THEORY

This chapter explains some fundamentals of property theory, and then discusses the history of property theory from the Greeks to Mill and the economic analysis of property. My purpose is to illustrate an awareness that evolved over time of how property rights function primarily as checks against state authority, and only derivatively act as checks against other citizens.

Note: The subject of property takes up the next 250+ pages, which are by turns historical, exegetical, and critical. A positive theory of property is indeed woven into these pages, but I choose to let it unfold in this manner: my arguments are better infiltrators than conquerors. Appendix D, however, draws from these various crannies to one theoretical purpose, and the reader may turn there to find that unadulterated purpose.

This chapter sets out a history of the theory of property, and explains how property rights increasingly and correctly came to be understood over 2500 years as claims not against fellow men but as checks against the power of government. The next chapter develops and critiques two current theories of property. There is no sharp break between history and the present. I have chosen to include the economic analysis of property (e.g., Epstein, Posner) in the last section of this chapter (concerning Mill's utilitarianism), and use the next chapter to critique the property theories of Jeremy Waldron and Margaret Jane Radin.

This chapter tells a story more than it performs an analysis. Like all stories it is incomplete. Developments which would be interesting within another context are only ancillary to my plot line. I therefore dispense in a few lines with subjects which, judged on their intrinsic merits (and not their relevance), deserve volumes. I write this hoping that it may be judged not on its completeness, but on its plausibility: *se non e' vero, e' ben pensato.*

I. SOME INITIAL CONSIDERATIONS

Property Defined

First, note that property rights are best thought of as bundles. Rights to a simple piece of land, for example, may be fee simple, surface, mineral, patent, occupancy under a life estate, etc., to name

but a scarce few.[1] Scholars propose various taxonomies of those bundles. The traditional and relatively naive theory of property is that it expresses a relationship between a person and a thing: as Thomas Grey has recounted, however, the concept of property has evolved over the last two centuries to mean something else.[2] In general, it is now understood that a property right in X conveys at least the option to decide how X is *used*. Private property rights, in addition, convey *exclusivity* (the option of deciding who gets to use X), as well as the ability to *convey* X in some manner (i.e., the right to sell, rent, or delegate X to another).[3]

A. M. Honoré has provided this useful and influential recital of kinds of property rights: rights to possession, use, management, income, capital, security, and transmissibility.[4] Because I wish to avoid a semantic detour, I propose that we accept this list as everything that property rights *might* mean, and that "property rights" in general be thought of as referring to a bundle of options.

Property and Expropriation

This discussion of property is written with reference to the subject of limited government. In particular, the theory of property is relevant to the subject of distributive justice: the more flimsily we construe property rights, the more scope government may have to expropriate and redistribute it.

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[1] *Black's Law Dictionary*, "Land," "Property," and "Estate," especially pages 1216-1218.

[2] Thomas Grey, "The Disintegration of Property," in *Property*, edited by J. Roland Pennock and John W. Chapman.

[3] Following Armen Alchian's taxonomy.

[4] "Ownership," in A. G. Guest, ed. *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1961), pages 107-147, cited in Gould.

Notice that several types of expropriation can accompany the redistributive activities of government. In deciding what to expropriate, one can look to inequalities in a stock such as wealth, or a flow such as income. Different measures and different types of information are required for rearranging each. It is much harder for a state to know what somebody has in all forms, and what those things are worth, than it is for a state to know what somebody is getting from others, particularly if it is income. Information-gathering of the former type is generally intrusive, while information of the second type is relatively easy to come by.

In both stocks and flows, redistribution can be achieved gradually or by ceilings. That is, the state can say that one can *have* this much and no more, or that one can *acquire* this much in such-and-such a period of time, and no more. Or it can enforce rates of expropriation graduated to reflect the amount a subject has or acquires (as the tax codes of most industrial states do, in theory).

Taxonomy of Property Theories

There are two questions at stake. The first is the more fundamental:

> 1) When someone claims that she has a property right in some thing, is she asserting that she has an interest that is so strong the state should defend her in her exercise of it? Or is her "right" merely an assertion that society is best-off or most well-ordered when it constructs its rules in some fashion, that fashion being one which endorses her putative claim on that object?
> 2) What limits does theory of property place on distributive justice?"

Waldron and Radin have provided alternative ways of classifying answers to the first question. Neither is wholly satisfactory, though Radin picks up an aspect of the liberal tradition which Waldron overlooks, as will be explained later. Their answers may be broken out as follows:

> **A**. Property rights name intrinsically strong interests of individuals, and deserve defense.
> **B**. Property rights should be considered as institutions and evaluated on an aggregate basis: which institutions produce the greatest good for society?

This distinction is the one by which Waldron proceeds. **A** could be called the Kantian tradition, **B** the Benthamite. Within the Kantian tradition there is the Hegelian school and, to risk an anachronism, the Lockean school.

The Hegelian school maintains that property ownership is generated by the infusing of one's will with an object, and that property rights are important because they contribute to the ethical development of mankind. Property makes this contribution because in ownership one asserts one's self, and learns the virtues of prudence, responsibility, and respect for other persons.[5] Hegel's is a "General Right theory", meaning that property rights are not only *able to be* held by all people, but actually *are* held by all people in virtue of their being persons.

The Lockean view of property, on the other hand, is that it is a special right not automatically conveyed on all people. While the ability to have property may be common to all mankind, the actual

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[5] See Chapter 1 of Waldron's *The Right to Private Property* for his explanation of this distinction, and Chapter 10 of for a lucid explanation of Hegel's views on property.

possession of property is brought into being by some special act (in Locke's case, the acquisition is generated through labor). Locke's is what Waldron calls a "Special Right theory."

In her work *Reinterpreting Property*, Margaret Radin makes distinctions which appear similar to those of Waldron's, but which actually fall along different lines. Her primary distinction is between economic theories of property and personhood theories of property. Under the former she includes such figures as Smith, Hume, Bentham, and Mill (all of whom defend property rights in virtue of the outcomes they call to life), while the latter (personhood) rubric holds such figures as Kant, Hegel, and Marx. Within personhood theories, property rights give expression to, or allow, or develop, some aspect of being a person. For Kant, property is a means of expressing the will; for Hegel, as was mentioned, it is a way for transmuting the will into something actual; for Marx, man recreates himself by working his will upon the world, an act which demands property (albeit of a different sort than the bourgeois property he confronted). Radin's focus is on personhood-property. She argues that some property may be more constitutive of personhood than mere fungible assets, and that the fungible type of property is more open to redistribution than the personhood-type.

Critiques of Waldron's and Radin's positions take up the next chapter, when I turn to modern theories of property. Two things should be said about them now, however. The first is that they use "Kantian" in slightly different ways. For Radin, a Kantian property theory refers to Kant's specific theory, a theory which maintains that the will finds expression in the actual world, and that such

expression depends upon property-ownership. For Waldron, a "Kantian property theory" does not refer to Kant's specific theory, but to any theory which views property rights deontologically ("deserving defense in virtue of the interests they represent"), rather than teleologically ("deserving defense in virtue of the states they bring into existence").

Second, it is the point of this chapter to argue that the relation of property to liberty has often been misunderstood within philosophy. Waldron is guilty of such misunderstanding, whereas Radin is not. Radin acknowledges the tradition which conveys an:

> "understanding that ownership is connected to individuality and freedom. The British branch of that theoretical history.. still connects with a common understanding that freedom involves free markets."[6]

And yet Radin juxtaposes this tradition with the personhood conception of property. This is odd, for if she acknowledges that the economic tradition implicates questions of "individuality and freedom", then it may fairly be said to concern questions of personhood as well. It is false to suggest that a theory is unconcerned with personhood if it concerns itself only with the satisfaction of the aims and projects of agents, for such a theory lets agents define their personhoods for themselves, rather than positing claims about their personhood for them.

The taxonomy I endorse among theories of property, therefore, cleaves first along the following lines. Is the notion of personhood implicit in the property theory an agent-defined notion, or is it

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[6] Radin, *Reinterpreting Property*, pages 6-7.

theory-defined? If agent-defined, then that property theory, like Bentham's and Mill's, may refer to personhood in the context of satisfying people's desires and needs (the underlying assumption being that such satisfactions have something to do with their personhood). If on the other hand an argument posits its own vision of personhood, as Kant's, Hegel's, or Marx's do, then from it will flow a theory of property designed to develop personhood in society, as viewed from within those theories. Thus the fundamental distinction Radin makes is the correct one, but for her to call one type of theory a "personhood" theory is a misnomer.

Within the theory-defined-personhood theories of property, Waldron's distinction holds. They can be split into Special Rights theories such as Locke's, which relies on a distinct vision of how a person may under special circumstances generate ownership over a good, to a General Rights theory such as Hegel's, which has a different view of personhood along with a vision of how property develops it.

Property Rights and Distributive Justice

Consider the range of possible answers to the question, "What limits do theories of property place on distributive justice?" In some sense the answers can be defined by the types of theories described above. But at a more concrete level I would like to present a spectrum of possible answers to this question, in order to illustrate the connection between theories of property and distributive justice. That spectrum looks like this:

A. "Individuals have rights," as Nozick says, including property rights, "and there are things no person or group may do to them (without violating their rights)."[7] On this view, to confiscate someone's property through taxation is no different from denying her free speech and proscribing her free practice of religion. In particular, to confiscate the product of one person, year after year, to put at the disposal of others, is to put that person into the position of a slave, forced to labor for the benefit of others through no free choice of her own. If this view is correct, the state can affect virtually no redistributive measures.[8]

B. Rights are important things, and respecting rights is an important component of doing justice. There are other components of justice, however, and it is not the case that property rights trump all else, and are to be adhered to "though the heavens fall." Rights are merely strong claims; still they are capable of being outweighed. In particular, rights concerning ownership of objects are not as meaty as rights which describe issues central to someone's personhood and freedom: they lie at the periphery of the personal, so to speak. And there is ownership in some objects which is less central to an individual's personhood than others. Therefore the state can intrude upon these rights without degrading anyone's status as a person, if there is reason to do so.[9]

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[7] Nozick, page ix.
[8] This is the view of the modern libertarian. The language of this paragraph is taken from Nozick's.
[9] See for example R. Dworkin's "Rights as Trumps" in *Law's Empire*.

C. External objects cannot be mine in the "real" sense in which, for example, my thoughts are mine. There is a long tradition of thinking otherwise: this dogma of human social relations has been reified until it appears an objective feature of the world. If humans live with a 55 mile-per-hour speed limit long enough, perhaps one day that will come to be seen as only natural as well: clearly, however, we should set the speed limit to that point which most desirably balances the competing interests of energy conservation, human safety, convenience, and so forth. Similarly, since property rights are but human contrivance, we are free to define them to be as rigid or as spongy as we desire: we should define them to that degree of rigidity which permits the distributive theory to operate which is most conducive to human welfare.[10]

D. Belief in the "naturalness" of property rights is pure reification. People may be allowed to own property, but the presumption is against them: that is, in some sense everything is society's, to be distributed as it wills (though we prefer it adopt a good principle to act upon in this regard). Rather than demand of the group a justification for expropriating something from an individual through law, the burden of argument rests on the individual who wishes to withdraw something from common ownership.

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[10] See for example R. Posner's *Economic Analysis of Law*, pages 8 and 32-35. In fact though the economic analysis implicitly grants great leniency in the definition of property rights, treating them as inherently spongy and in theory definable in order to achieve an attractive outcome, the outcome of this analysis, particularly with Posner, is that such rights should be set firmly and guarded jealously in order to achieve the most satisfactory outcome for humans.

Answers C and D are similar and I would not push the distinction between them too hard. If there is a distinction it is this: C says, in effect "We the state give you a justification for taking your property. We seek the highest well-being for our citizens. In balance that leads us to set property rights with such-and-such rigidity, and acting within that constraint we have taken your things with an eye to promoting the greatest welfare." Answer D on the other hand says simply "Tell us why you *think* that was yours." The two answers grant the same ontological status to property rights, but recognize different burdens of argument.

Often an argument concerning social surplus attends the latter two of the above four arguments. This argument holds that the existence of society makes possible a specialization of labor and peaceful trade which generates an abundance beyond what any person or group could attain alone; therefore, that abundance is in some sense "owed" to society, or at least held by individuals only with the permission of society, and is available for redistribution.[11] This is the vision of the allowance model, discussed in the introduction and in Appendix C.

II. A HISTORY OF PROPERTY THEORY

I turn now to a rather lengthy history of the theory of property from the Greeks and Romans, through the Christians, Enlightenment social contract theory, Marx, and ending with utilitarianism. I do not mean to explore the Greeks, Romans, and Christians in any great detail, wishing only to show the broad outlines of their concerns

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[11] cf. Arrow, *Social Choice and Justice*, pages 175-189 and especially 188.

(which, I will argue, evolved from claims against other people to claims against the state), and to provide a setting within which to discuss in detail the contractarians, Marx, and the utilitarians. I shall single out here, however, one specific claim I will advance: there is a contention by some moderns that distributive justice is inconsistent with a theory of property which dates back to Locke and which underlies much legal and philosophical tradition. I argue that this claim is false and rests on a misinterpretation of Locke.

The reader more interested in philosophical argument than history of ideas might skip, then, to the section titled "The Social Contract Tradition: Hobbes," or else risk tedium.

The Classical Tradition

Even nomadic peoples have conceptions of what is "ours" and what is "others'", although the lines delineating one from the other may exist for them in time and not space, or may exist in space but be fixed to groups of people rather than to things.[12] If nomadic societies find it necessary to have theories of property, then it is even more necessary to settled people. The conceptions of property employed within the Western tradition, however, have varied tremendously. These conceptions have turned on two issues: the evolving perception of a property right not as a claim not against fellow men but as a claim against the power of the state, and the question of whether such rights are intrinsically valuable or instrumentally valuable.

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[12] cf. Bruce Chatwin's *The Songlines.*

Greece

Custom codified

Greek law is not the well-defined body that, for example, Roman law is. Partly this is because its origins are shrouded in the mythic days of pre-history, rooted not in explicit politics but in custom.[13] It appears the Athenians, proud of having made the transition from custom to a set of written laws, were intent on being ruled by statutory rather than common law, which they equated with the barbarian devotion to custom. Unfortunately the archeological data on their statutory law is poor, and is deduced as much from the literature and philosophy of the era as from preserved texts.

Because what the Greeks meant by ownership we probably would not recognize as such, it is difficult to say precisely whether they believed it to be a right. It is certain no Greeks perceived ownership as a natural right: according to one source, such talk was to the supercilious Athenians reminiscent of the barbarian

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[13] cf. Kelly, *A Short History of Western Legal Theory*, pages 5-9, Michael Grant's *The Founders of the Western* World, E. Zeller, *Outline of the History of Greek Philosophy*, pages 18, and van Loon, *The Story of Mankind*, pages 58-59. Loon considers Dracon the first great Greek giver of laws (albeit "draconian" ones of course), and Solon the provider of the moderation which was to mark first Greek and then Western law. Zeller considers Solon, to Kelly also the first great law-giver, as a writer of maxims, and Dracon, not at all.

I wish to acknowledge here my great debt to Kelly's astonishingly interesting history of law. As should become obvious in the following pages, not only have I referred to it while filling in many hard-to-research and tangential gaps, especially between the Roman law and Thomas More, but on many non-tangential issues his book has been a wonderful resource for a philosopher trying to come to terms with jurisprudence.

In this vein, I also mention Michael Grant's *The Founders of the Western World*, and Quentin Skinner's two volume work, *The Foundations of Modern Political Thought*. Having had little familiarity with writers after Aristotle and before More, except for Aquinas, these works allowed me to avoid having to become a historian myself in order to string together a theory on the evolution of principles of property and limited government.

supernaturalism towards which they were hostile.[14] The property theories of Plato and Aristotle, however, are well-documented, and prefigure the debates of later ages.

First explicit theories
Plato

In Plato's *Republic* all property is to be held in common by all men and women, though possession is to be distributed by a government desiring certain ends. In the *Laws* women join children as things which are possessed in common:[15] on the other hand, written as it was as a blueprint for a colony, there is an element of practicality in the *Laws* missing from the *Republic.*

For example, knowing perhaps that it would be hard to recruit colonists if everything which they brought to the colony were seized, Plato allowed for unequal and private possession of the items with which the colonists arrived. Land was to be divided into allotments for the settlers. Plato proposed, however, a floor and ceiling for property: no man was to own less than one allotment (one original share), nor could come to own more than two to four allotments. Even this ownership is not the kind we would recognize as such, for Plato asks that:

> "he to whom a lot falls is yet bound to count his territory the common property of the whole of society, and since the territory is his fatherland, to tend it with care passing that of son for mother...."[16]

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[14] Kelly, pages 10-11.
[15] Plato, *Laws*, 739c. Plato proposes three constitutions from which Clinias may choose: the views discussed here are those Plato puts forth in what he calls the best constitution.
[16] *ibid.*, 740a.

Lastly, Plato later offers the first known (to me) criticism of wealth begotten by commerce rather than by production, while proscribing the trading or sale of land and homes.[17]

Aristotle

As one would expect, Aristotle understands more practically than Plato the institution of private property. He writes:

> "Property should be in a certain sense common, but, as a general rule, private; for, when everyone has a distinct interest, men will not complain of one another, and they will make more progress, because everyone will be attending to his own business."[18]

J.M. Kelly, writing on ancient Greek legal theory, extends Aristotle's position as follows:

> "A leveling communism... extinguished enterprise, makes likely an inefficient administration of the community's wealth, and diminishes both the motive and the capacity for private liberality."[19]

The first claim (that men with distinct interests make more progress) anticipates the coordination theory of Smith, the second and third (that common ownership produces disincentives and inefficiencies) anticipate the claims of Hayek, the Austrian school of economics, and (in the case of the third) those of the public choice theorists, while the fourth (that charity is made obsolete) anticipates an argument put forth by Christian moralists.

Aristotle follows Plato in distinguishing between property obtained through commerce versus physical production. This

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[17] *ibid.*, 741b-c.
[18] Aristotle, *Politics*. 2.3, quoted in Kelly, page 37.
[19] Kelly, page 37, commenting on Aristotle, *Politics* 2.5.

distinction is supported by his view that money is instrumental as a medium of exchange allowing producers of unlike goods to trade and store value, while the pursuit of money *qua* money is perverse. He therefore thinks the middleman and merchant, gaining money through retail, brokering, or above all, usury, are inferior to the artisan or farmer.[20]

Rome

In the early days of Rome before the advent of written law, only small plots of land were allowed to be owned privately, though these could be willed and inherited; by the sixth century BC., however, property had become an established right in Roman law.[21] According to Grant, plebeian demands resulted in not only the consular representation of plebeian interests, but the first written and publicly visible version of Roman law: the Twelve Tables of the Law (451 BC.) These limited the amount of land one man could own.[22]

Two arguments about property advanced by Romans are of interest. Lucretius, foreshadowing Locke, imagined that the earth had once been bountiful enough to support humans in harmony: with the discovery of gold, however, harmony turned to strife and greed. The consequent chaos led men to impose on themselves a political order charged with protecting men in their security, including the security of their possessions.

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[20] cf. Aristotle, *Nicomachean Ethics*, 9.i, Kelly (pages 37-38) and Michael Grant, *The Founders of the Western World*, (pages 98-100 and 240), this last especially for more concerning Aristotle's influence on the development of Athenian law.
[21] Kelly, page 45 and 76, citing Martino, i. 24 ff.
[22] See Michael Grant, *The Founders of the Western World*, page 154.

Cicero extended this justification to private property: a theater may be a public theater, but there is some sense in which this seat in the theater can be *mine.*[23] This, coming from one of the first philosophers explicitly sensitive to an "understanding of the limitations intrinsic to political life,"[24] is the first instance of a defense of private property's rightfulness, rather than its instrumentality.[25] Also, it anticipated an argument of Gratian, who codified a mass of previous Papal Decrees into one canon,[26] a point of which was that property was tied to the Fall of Man (though for Christian moralists this was often indictment and not justification).

Christian Middle Ages

The Middle Ages has little jurisprudence outside of that propounded within the walls of the church. This was a church with a distinct political agenda which conditioned the thought therein. Still, the jurisprudence of the church is an interesting study if only because so much of Renaissance and modern jurisprudence was formed in reaction to it, and because it mirrors some other modern arguments. I would like to touch upon some of the important arguments put forth between the end of antiquity and its rediscovery in the 1400's, lingering only with Thomas Aquinas.

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[23] As Kelly notes (page 335), Proudhon countered this argument in *What is Property?* by pointing out that while a man may have one seat in a theater, he may not have three. I will argue that within John Locke's work lies appeal to a similar intuition.
[24] Holton, "Marcus Tullius Cicero," in Strauss, page 174.
[25] For a fuller discussion of the Roman view, see Kelly's superb history of Roman law (Kelly 39-78).
[26] Skinner, *The Foundations of Modern Political* Thought, Volume I page 14.

There is a view that early Christians believed property should be held in common: indeed this is a claim made by some modern Christians. Yet St. Paul's preaching on the equality of men was taken by early Church leaders to be a statement about slavery rather than property possession. Though there is not a solid theory of property at which to point, the Christian theological tradition from Roman times to the latter Middle Ages held that while Christ himself favored charity and selflessness and opposed the hoarding of wealth, he was not antagonistic to the institution of property.[27] On the other hand, church dogma held that in the earliest days of the world all property had been held in common, and that it was men and men's laws that individuated possessions. For this reason, St. Gregory and St. Ambrose argued, property was a creation of human and not natural law.[28] In the end these considerations (along with some private motives of its own, perhaps) led the Church to adopt the position that the acquisition of property was not in itself good or bad: the use to which property was put determined its moral worth.[29]

Gratian (*c.* 1140) linked private property to mankind's fall from grace: it is with the emergence of iniquity that man comes to say this is mine and this is yours. His commentator, Rufinus bishop of Assisi, weakened this somewhat, arguing that there are *demonstrationes*, non-obligatory moral arguments: property "must

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[27] See Strauss and Cropsey, *History of Political Philosophy*, pages 176-205.
[28] *ibid.*, *History of Political Philosophy*, page 202.
[29] For background on this period, see volume one of Skinner's *The Foundations of Modern Political Thought*, especially 49-68. More specifically for these points, see Kelly, 79-158, especially 102-109 and 150-154, along with Carlyles, volume 1, pages 44 and 119-145 (cited in Kelly).

not be regarded as based in wickedness, but rather as blameless (*irreprehensible*)."[30] Medieval theologians furthermore argued that private property was assumed by two of the commandments: the eight, "Thou shalt not steal;" and the tenth, "Thou shalt not covet...."[31] In short, the medieval church was caught between the idealism of the New Testament and the practicality of the Old, and adopted a position which did itself no harm.

Thomas Aquinas gave perhaps the first principled defense of property.[32] Even then, he did not defend it as a natural right:

> "By virtue of human law a man says, This is my villa, this is my house, this is my slave; by human law, that is, by the emperors' law... But take away the law of the emperors, and who will be able to say, That villa is mine, etc.?"[33]

That is, what can be granted by human law can be taken by human law.

Yet, continues Aquinas, things can be seen as right by nature, or right by virtue of their consequences. Property may be seen as right in the latter sense, he argues, in this passage which points to what we would call the free-rider problem, the coordination problem, and a utilitarian justification.

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[30] Quoted in Kelly, 151.

[31] See, once again, Kelly's discussion of William of Auxerre, Accursius, Azo, and Alexander of Hales, who believed that private property could be justified under natural law, the first three basing this claim especially on the implicit assumption of the eighth commandment against theft.

[32] See Ernest L. Fortin's essay on Aquinas in Strauss and Cropsey's *History of Political Thought*, pages 248-275.

[33] *Tract VI in Joannis Evang.* Quoted in Kelly, page 108.

> "[Private possession is] necessary to human life for three reasons. First, because everyone is more concerned with the obtaining of what concerns himself alone than with the common affairs of all or of many others; for each one, avoiding extra labor, leaves the common task to the next man; as we see when there are too many officials. Secondly, because human affairs are dealt with in a more orderly manner when each has his own business to go about: there would be complete confusion if everyone tried to do everything. Thirdly, because this leads to a more peaceful condition of man, provided each is content with his own. So we see that it is among those who possess something, jointly and in common that disputes most frequently arise."[34]

Two further theories appear in this period for the first time: the labor basis of property, and the theory of takings. The former appears during Thomas Aquinas's discussion of property:

> "considered in itself there is no reason why this field should belong to this man rather than to that man, but when you take into account its being put under cultivation and peacefully used, then, as the Philosopher demonstrates, it is fitting that it should be owned by this and not that person."[35]

This argument, that one "put[ting a field] under cultivation and peacefully us[ing]" it acquires a right to that field, is an example of the labor basis of private property: it is by mixing one's labor with something that it becomes one's own. Much more will be said, both in this chapter and the next, concerning this labor basis of property.

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[34] *Summa Theologica*, 2a 2ae 57. 2. Quoted in Kelly, 152. This and Aristotle's earlier statement are interesting in that they suggest that the belief in the centrality of property to human nature has a long history.

[35] *ibid.*, 2a 2ae 57.2, quoted in Kelly, 151. See also Fortin's "St. Thomas Aquinas" In Strauss and Cropsey, 253-258.

John of Paris referred to this basis when he argued against papal dominion over the world, and therefore, against a general papal right of taxation. As laymen had acquired their possessions through their own labor, he argued, those possessions were in the dominion of the laymen and not the Pope.[36]

Notice here the shift from Aquinas to John of Paris: Aquinas spoke of ownership in terms of, "should it be owned by this and not that person?" It is a boundary drawn between people. For John of Paris, however, a right in a property was a check against papal authority, a check that could be held by a layman. This is a remarkable shift in outlook: for the first time, the right in property was conceived of as a right against superior authority. To my knowledge, this is the first inkling in the Western tradition of a relation between property theory and limited government.

The theory of takings was first put forth by William of Ockham in response to a claim of Odofridus in the thirteenth century. Odofridus maintained that the lord of a realm is lord not in the sense of "owning it all," but in being charged with *protecting* what was within. This claim of Odofridus, if strictly interpreted, would prohibit all taxation or expropriation.

William of Ockham's response, however, left the door ajar for both taxation and expropriation. In one passage agrees with Odofridus:

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[36] cf. Kelly, 152. See also Skinner, *The Foundations of Modern Political Thought*, Volume 1, page 65 for a description of the origin of popular (and hence limited ecclesiastical) sovereignty.

> "the emperor is not lord of all temporal things... in such a way that it is licit or possible for him to dispose of all such things according to his will;"

William continued by carving out an exception to this otherwise blanket prohibition on expropriation, in a way that would resonate within English common law for centuries down to the drafting of the American constitution, right up to legal battles of recent decades and a legislative battle that is being fought in the US Congress as I write:

> "...however, he [the emperor] is in a certain manner the master of all things to the extent that, in the teeth of any objection, he can use and apply them for the common benefit, whenever he judges that this is to be preferred to the interest of individuals.... [He may not do this arbitrarily, but only] on account of the owner's guilt, or for good reason, i.e. for the public benefit."[37]

Regarding this, Kelly notes,

> "civil lawyers generally emphasized that, even where public necessity justifies an expropriation, compensation must be paid; though some thought that, where the expropriating measure weighed equally on all, compensation was not called for, only when its burden fell on a single individual."[38]

This then is the origin of the theory embodied in the takings clause of the US constitution.

To summarize, then, we have seen that for the Greeks, the Romans, and the Christian theologians, no one theory of property became dominant. Rather, it was an increasingly sophisticated

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[37] Quoted in Kelly, 153.

[38] Kelly, page 153. *cf.* Gierke, *Political Theories*, 81, 179 ff.

repetition of a debate which began with Plato and Aristotle. Some saw it as a practical necessity; for some, it was not natural law, or even ideal law, but tied to man's fall from grace; some argued that, as a creation of human law, it could be abolished by human law; some viewed it as woven into the fabric of the Judaic law in which Christianity had first cloaked itself; for others it was an aspect of natural law.

The earlier thinkers cited here saw a claim to private possession as a claim against one's fellow men, and evaluated its morality on that basis. By the end of the Middle Ages, however, in the writings of John of Paris, Odofridus, and William of Ockham, it was understood to be a claim against the State, or a check on the authority of the state, rather than a claim against mankind.

As a purely practical matter (and leaving aside another philosophical question which is addressed in Appendix C), this conception of property as a check on state prerogatives is most relevant to our modern situation. In a complex industrial society expropriation does not occur directly between persons but is achieved through the authority of the state (and it must be so, if chaos is to be avoided). Hence a rigid property right directly constrains the actions of the state. The move from considering abstract property rights as claims against mankind, to considering them in the context of early concerns about the limits of state power in a just world (such concerns being first expressed in the late Middle Ages), was an important theoretical development.

The Renaissance

The Renaissance marked the end of the domination of church authority over much of Europe. Massively disproportionate distributions of wealth, and especially land, were integral to the feudal system; the Catholic Church participated handsomely in these inequalities. Though it had still not embraced private property as a natural right, for centuries the church had equivocated upon, and had not opposed, the private ownership of property. Accordingly some reformers made not just Church property but all private property the target of their attacks, equating property with sin and mankind's Fall from divine grace rather than with an incapacity to live harmoniously in a mythic pre-history of plenty.[39] And again in this period there are echoes of earlier arguments: De Soto argued that the virtue of liberality would be extinguished by common ownership; Suárez, the Spanish theologian and scholar, argued that while not a natural right, private property fit man in his fallen state better than communal ownership.[40]

MORE

The most interesting argument of this period is that of Thomas More because his *Utopia*, in the words of Skinner,

> "embodies by far the most radical critique of humanism written by a humanist."[41]

More's ambiguity towards his protagonist embodies our modern dissatisfactions: and while the communism of Utopia is "very

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[39] See Skinner, 32-35, 39, 69, and 152-155, and Kelly, 164-165, for some discussions of reformers and property during the Renaissance.
[40] see Kelly, pages 196-197.
[41] Skinner, *The Foundations of Modern Political Thought*, Volume 1, page 256.

absurdly established"[42] it is the logical conclusion to an effort to resolve humanist concerns. In More's *Utopia*, men have all in abundance because no man has surfeit of anything: all is held in common. But More simultaneously understands the practical difficulties involved. With no general right to private property, general wealth becomes impossible:

> "for how can there be abundance of goods, or of anything, where every man withdraweth his hand from labor? whom the regard of his own gains driveth not to work, but the hope that he hath in other men's travails makes him slothful?"[43]

The impressive body of literature interpreting More has never satisfactorily resolved this question: what is More's attitude towards his subject? Kelly suggests that More is ambivalent towards what Hythlodaeus observes in Utopia: he seems to suggest that we may admire the workings of a society which we would not seek to emulate.[44] For Skinner, however, More is unambiguously seeing humanism through to its logical conclusion, not as a *reductio ad absurdum* but through conviction. Simply put, More is arguing that the humanists of his day lack the courage of their convictions: they agree that "virtue constitutes the only true nobility"[45] but, rather than taking that as license to criticize the existing hierarchy of the day, accept that "the virtues are, as it happens, most fully displayed by the established members of the ruling classes."[46] More (according to Skinner) should be read as much more thoroughgoing in his

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[42] *ibid.*, page 256, citing More, 245-7.
[43] cf. *Utopia*, Introduction, and also Kelly, 179-198.
[44] cf. Kelly, page 197.
[45] cf. Skinner, page 257.
[46] *ibid.*, page 259.

radicalism: no hierarchical society can be virtuous, because hierarchies generate pride, and in them, the worst elements gain control[47] (as Dr. Thompson in *The Great Shark Hunt* summed up the Nixon years, "The Scum Also Rises"). Furthermore, hierarchies gain their form through mal-distributions of private property. Ergo, the virtuous society permits no private property.

More's attitude towards his subject is impossible to ascertain, I believe. Skinner notes that two schools of interpretation converge on the supposition that More meant for Hythlodaeus's recommendation of socialism to be taken seriously, either because More was a socialist before his time (as Marx and Kautsky claimed) or a particularly devout Christian humanist.[48] Perhaps More discovered, as Warhol did much later, that sarcasm and a life lived tongue-in-cheek open new horizons for hypocrisy. Or perhaps Kelly was correct in reading More to be a distant admirer of a system the impracticality of which he recognized. In the final analyses, More provided the first sustained critique of the institution of property from a humanist (rather than a scriptural) point of view, a critique which foreshadowed those of later continental philosophers.

The Social Contract Tradition

Hobbes and Locke are the two exemplars of social contract theory to which I will attend, defining as they do opposite poles of theories of state power and its limits to which so many later writers have been attracted. It is upon Hobbes' and Locke's theories of the state that I focus, as from these their theories of property

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[47] *ibid.*, page 259-260.
[48] *ibid.*, page 257 ff. 1.

follow simply and directly. To accomplish this, I wish to describe how the social contract tradition acted as the confluence of two tributaries, arriving from different directions and carrying within them material from the different grounds over which they had flowed, and instead of mixing thoroughly, became one channel with two distinct currents within it.

The Renaissance undermined divine authority in more than just scientific circles and in the devolution of power from the Vatican (and Avignon) to the new nation-states. Law and philosophy increasingly outgrew the vestments in which they had been cloaked since the fall of Rome. As the printing press put the literate family of the day in possession of a Bible by which its members could have relationships with their God independent of the intercessions of a priest, and as the structure of the heavens could be discovered by man armed with the tools and mathematics of the day without the aid of the Bible, so did the substitution of rationality for faith allow men to think about their civil ordering without resort to an extra-human standard. Legal scholars, who for so many generations had faith-based natural law as the yardstick against which they measured their creations, gradually converted that yardstick into a standard of reason.[49]

Although even the Greeks had written of the origin of civil authority as arising from a pact among members of a state of nature made for mutual advantage (as described earlier), and some medieval

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[49] I mean this as a personal interpretation of well-known historical events. The transformation of faith-based natural law into reason-based natural law is discussed in Appendix C.

thinkers (Marsilius of Padua and Manegold of Lautenbach)[50] had considered it in explaining the *legitimacy* of the existence of states, it is only with Hobbes that there first appears a substantial theory of the state originating in a compact among men.

HOBBES

Hobbes (1588-1679) was notoriously gloomy about men ("who naturally love Liberty, and Dominion over others"[51]) and their instincts; unbridled (or more precisely, "pre-bridled") from civil authority. Men with their conflicting appetites created for each other a living hell which was, in his wonderful phrase, "solitary, poore, nasty, brutish, and short."[52]

Because he saw the state of nature as a barroom brawl of all against all,[53] and because he believed man's instinct for self-preservation trumped all other instincts, Hobbes maintained that men (had?) bound themselves in a pact to obey one firm master who could eliminate dissension:

> "and therein to submit their Wills, every one to his Will, and their Judgments, to his Judgment. This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, I Authorise and give up my Right of Governing my

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[50] cf. Kelly, 169.

[51] Hobbes, *Leviathan*, 2. XVII (page 223)

[52] *ibid.*, 1. XIII (page 186).

[53] Neither Hobbes nor Pufendorf nor Locke took the states of nature they described to be historically accurate; rather, they seem to have thought them hypothetical constructs deducible from theories of man's nature (and, it least in Locke's case, *possibly* historically true). Hobbes, writing while the Civil War raged over England (and perhaps attempting to flatter Cromwell) must have felt especially justified in believing that the state of nature he posited was not far-fetched ("was near-fetched?").

> selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.... And in him consisteth the Essence of the Common-wealth; which... is *One Person, of whose Acts a great Multitude, by mutual Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defense.*
>
> The attaining of this Soveraigne Power, is by two wayes. One, by Naturall force; as when a man maketh his children, to submit themselves...The other, is when men agree amongst themselves, to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected by him against all others."[54]

In short, in their compact men have bridled and harnessed themselves, and then put the reins of their liberties in the hands of one driver to keep them untangled. Because the state is founded for Hobbes in an original act of subjection, his philosophy lends no support to one who would oppose the actions of a tyrannical Leviathan[55] who governs: the ass, having traded-in the burrs and thirsts of the wild for the master's barn, hay, and oats, cannot complain that his harness is ill-fitting.

What is essential about Hobbe's social contract is that it is not a compact *between* the governed and the ruler, but a compact *among* the governed to submit to a ruler. The governor accepts no consideration (in the legal sense) and is not a party to the contract;

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[54] Hobbes, 2 XVII page 227-228.

[55] "Leviathan" is from the Book of Job, and though commonly taken to denote "whale" or "monster," is, according to some scholars, the old Hebrew word for crocodile.

therefore, he has no obligations under it which he may fulfill or fail to fulfill.

Because Hobbe's theory of the state is supportive of a tyrannical ruler, the theory of property derived from it provides no constraint on state action. While in the several centuries before him there arose, as I have explained, an interpretation of the right to property as a constraint upon the actions of feudal lords (starting with John of Paris and Odofridus), Hobbesian sovereigns may dispose of people's property in a way which services the overall public good, or in ways which service their private whims. In either case the concept of an external standard by which to judge the fulfillment of their side of a bargain is lacking.

Therefore while Hobbes' argument is a product of the Renaissance in that it is by-and-large secular, and appeals to no standards beyond reason, it is also reactionary, in that it undermined citizens' common law protections which predated *Leviathan* by over three centuries. Hobbes wrote against a background of state and church (especially Church of England[56]) antagonism towards the idea that secular authority was granted not by divine authority but by consent, and wrote in the time of Cromwell and the English Civil War: it is no wonder that his conclusions were less radical than later social contract theorists'.

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[56] cf. Carlyles, vi., and Kelly, 210.

LOCKE

By the early 1600's there are several instances of the social contract being explaining not merely the legitimacy of state authority (as it did for Hobbes), but as a way of providing grounds from which to criticize the misrule of a leader. Yet not until Pufendorf and Locke was the social contract developed as an argument for limited government, and it was Locke who truly solidified this quantum leap in the social contract tradition.

There are two differences between Locke's and Hobbe's social contract theory relevant here. The first is the type of men imagined to come together to form a compact. Second is the nature of the civil order they generate. I wish to explain these aspects of Locke's theory of the social contract in some detail.

First difference: the Lockean contractors are not desperate in nature

One must know something of Pufendorf to understand Locke. Pufendorf argued primarily by critiquing Hobbes' view of man's natural passions. More reasonable and less desperate than Hobbesian denizens of the state of nature, Pufendorf's come together in calm deliberation to set up boundaries and agree on principles. These principles are merely the codification of laws of nature which can be known by all men through reason; for Pufendorf, the state has power merely to force all men within its jurisdiction to recognize such rules of conduct.[57]

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[57] see Kelly, page 215, and Gough, *Social Contract*, 122-124.

Like Pufendorf, Locke did not imagine the highly contentious state of nature that Hobbes had, because Locke's view of human nature differed from Hobbes'. What Locke's view of human nature was, however, is not easy to say, and was perhaps inconsistent.

Unlike Hobbes, who devotes the first quarter of *Leviathan* to the natural appetites of men, Locke provides in neither of his treatises on government a full explanation of his view of the human appetites which define his state of nature. One needs turn to Locke's *An Essay Concerning Human Understanding* to find explanation of these appetites, and to find the philosophical foundation for the argument made in his second treatise. There Locke, in the course of defending his view that there are no innate practical principles, acknowledges:

> "Nature, I confess, has put into Man a desire of Happiness, and an aversion to Misery: These indeed are innate practical Principles, which (as practical Principles ought) do continue constantly to operate and influence all our Actions, without ceasing..... but these are Inclinations of the Appetite to good, not Impressions of truth on the Understanding... [These wills and appetites] never cease to be the constant Springs and Motives of all our Actions, to which we perpetually feel them strongly impelling us."[58]

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[58] Locke's Essay, Book 1 Chapter 3 section 3 (page 67: page numberings cited are to the Laslett edition, unless otherwise stipulated). This would seem to accord with the modern neo-conservative attempt to evaluate laws by the sets of constraints and incentives they bring into being (for example, the argument that subsidizing something generates more of it, be it wheat or out-of-wedlock births). Interestingly enough, however, in a diary entry in 1678 Locke brilliantly located happiness and misery not in legal sanction and its avoidance, but in reputation: "Where love of one's country is the thing in credit, there we shall see a race of brave Romans; and, when being a favorite at court was the only thing in fashion, one may see the same race of Romans all turned flatterers and informers. He therefore that would govern the world well had need consider what fashions he makes than what laws..." see Bourne, *The Life of John Locke*, quoted in

Here Locke reads like Hobbes, viewing man as marching to the drumbeats of desire and fear which impel and constrain him. Also like Hobbes, Locke understood that without law these impulses may override order and morality. He differed from Hobbes, however, in suggesting that in the state of nature such law already existed as "laws of nature" by which men understand they must police their own conduct or face chaos. Therefore, Locke took an intermediate position between Hobbes, who held that man ungoverned is degenerate with naked vices, and later continental philosophers, who argued that man was born with innate moral sentiments.[59] For Locke there was an intermediate ground:

> "I would not be here mistaken, as if, because I deny an innate Law, I thought there were none but positive Laws. There is a great deal of difference between an innate Law, and a Law of Nature; between something imprinted on our minds in their very original, and something that we being ignorant of may attain to the knowledge of, by the use and due application of our natural Faculties."[60]

The content of those laws is spelled out in the *Second Treatise*:

> "But though this be a *State of Liberty*, yet it is *not a State of License*, though Man in that State have an uncontroleable Liberty, to dispose of his Person or Possessions, yet he has not Liberty to destroy himself... 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,

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Macpherson's introduction to the *Second Treatise*, page xii. *cf.* also Stuart Hampshire's *Innocence and Experience* and Machiavelli, *The Prince*, page 56.

[59] e.g. Kant.

[60] Locke's *Essay*, Book 1 Chapter 3 section 13 (page 75), partially quoted in Macpherson's introduction to the *Second Treatise*, page xi.

> Liberty, or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker.... there cannot be supposed any such *Subordination* among us.... Every one... when his own Preservation comes not into competition,... may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another."[61]

In this crucial respect Locke differed from Hobbes. For Locke, one could speak of laws of nature, meaning laws which reflective men understood they must live by if natural appetites were not to triumph, even in the absence of positive law (i.e. organized society). An unreflective inhabitant of a Hobbesian state of nature therefore lead a nasty life where the reflective citizen of a Lockean state of nature leads a peaceable one.[62]

Second difference: The Lockean civil order is organic

The second way that Locke's theory differs from Hobbes' is that the Lockean civil order formed is organic, a result of man's political tendency (as Aristotle affirmed), and not merely the result of a discrete act of will brought about by egoistic humans acting out of desperation. The Lockean society is not the deliberate order

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[61] Locke's *Second Treatise*, Chapter 2 section 6 (pages 270-271 in Laslett's edition). The influence on Jefferson's *Declaration* is evident.

[62] Macpherson in his introduction to the *Second Treatise* makes an interesting argument that Locke's position is self-contradictory here. Locke needs to argue that life would be nasty enough that people would agree to submit to an authority, but not so nasty that they would surrender liberties to an absolute authority. In order to make this anything but *ad hoc*, Locke needs to supply a view of human nature that would generate such a quasi-nasty state of nature. Macpherson denies that Locke does so. I am not sure this is true; Locke acknowledges that even reflective men in a state of nature will face transgressors.

deduced by Hobbes from the state of nature, but is what Hayek called a spontaneous order.[63]

This Lockean order develops in a two-step process: from the state of nature to civil society, and then from within civil society to the choice of a government and its institutions:

> "And 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 everyone has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation.[64]

And much later:

> "Man... hath by Nature a Power, not only to preserve his Property,[65] that is, his Life, Liberty, and Estate, against the Injuries and Attempts of other Men; but to Judge of and punish the breaches in that Law in others... where.. his Opinion, requires it. But because no Political Society can be, nor subsist without having in it self the Power to preserve the Property, and in order thereunto punish the Offenses of all those of that Society; there, and there only is *Political Society*, where every one of the Members hath quitted this natural Power, resign'd it up into the hands of the Community... Whereby it is easie to discern who are, and who are not, in *Political Society* together. Those who are

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[63] Hayek termed such spontaneous orders *catallaxies*, and believed they were generally preferable to deliberate orders. The characteristics of spontaneous orders are that they are slow-changing and non-ruthless, as intermediate steps have to be mutually satisfactory or face opposition; they therefore carry with them built-in safeguards. Deliberate orders can be quickly installed, even over opposition, so they have less reason not to be ruthless. The ways Locke and Hobbes view the evolution of government illustrate this point. See *The Essence of Hayek*, pages 319 and 326.

[64] Locke, *Second Treatise*, Chapter 2 section 7 (page 271).

[65] It is important to note this use of the word "property." For Locke, I believe, property includes not only objects possessed, but things which we now term "rights." As Kelly points out, "he means it to comprehend the subject's entire legitimate interest." (Kelly, page 217). cf. also Locke, *Second Treatise*, Chapter 15.

> united into one Body, and have a common established Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, are in Civil Society one with another."[66]

Lastly:

> "...when any body of Men have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to act as one Body, which is only by the will and determination of the *majority*.[67]

The government so arising from a Lockean state of nature is of a different character than one arising from Hobbes'. For Locke, government is a "trust" in the legal sense of the term, similar to a land trust, for example, and has concomitant fiduciary obligations. This fiduciary character of government arises because it is a party to the social contract, and not just a beneficiary of it (as was the case with Hobbes). As Locke puts it:

> "Political power is that power which every man having in the state of Nature has given up into the hands of society, and therein to the governors whom society hath set over itself, with this express or tacit trust, that it shall be employed for their good and the preservation of their property."[68]

The two differences between the types of authority supported by Locke's and Hobbes' theories is that Lockean authority is *contingent*, and it is *limited*. It is contingent upon the ruler fulfilling his duties as initially contracted: if he reneges the deal is

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[66] Locke, *Second Treatise*, Chapter 7 section 87 (pages 323-324).
[67] *ibid.*, Chapter 8 section 96 (page 331). It seems from the rest of the passage that Locke was perhaps thinking of this in physical, Newtonian terms: "it is necessary the body should move the way whither the greater force carries it...."
[68] Locke, *Second Treatise*, Chapter 15, quoted in Kelly, page 217.

off, and the subjection of the citizens ends. It is limited by the principle of "*nemo dat quod non habet*".[69] One cannot trade into the hands of the community more than one had by the laws of nature. Therefore, as none in the state of nature had the power to regulate my life in certain ways, no one has traded such a right to the state which would now permit it to regulate my life in those same ways. Only those rights which 1) I had over myself, and 2) I traded to the State, or 3) others had against me and 4) they traded to the State, are rights which the state now exercises over me.

It should be noted how firmly Locke's argument incorporates a right of contract. The origin of the state is founded upon the ability of men to trade things, and contract is the lifeblood of trade. The right to contract, then, is one of the properties held by men in the state of nature (with "property" understood in its broadest sense). Yet it is not the case that this right of contract is thoroughgoing: as will be explained, there seem to be some aspects of Lockean property which are weakly held, and the right of contract over these aspects is correspondingly weak.

Thus, in summary; for Locke men have no innate moral intuitions (in the sense of intuitions about what is morally right and wrong), but they do have innate appetites of happiness and misery-avoidance; reflection on the result of unbridled appetites reveals to a man in a state of nature the laws of nature by which he must regulate himself; these laws permit him to pursue "self-help

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[69] "None gives what he does not have." See Kelly, 218.

justice"[70] in the state of nature; men may gradually combine into a civil society to reduce enforcement-costs, and will forsake their rights to self-help justice; a community so formed may create a body by which disputes may be resolved and harms adjudicated; the purpose of this body is solely and entirely the preservation of the property of the individuals (with "property" broadly understood to refer to all rightful claims); besides being so limited, the allegiance of the governed is properly conditioned by the fiduciary rectitude of the government.

Lockean property and social justice

I wish to make two points concerning the theory of property espoused by Locke: 1) his story of the origination of property claims is problematic; 2) Locke's theory of property is not nearly so absolutist as is generally reckoned.

how coherent is Locke's theory? the regress of *occupatio* and the incoherence of labor-mixing

The pillars upon which Locke's theory of property stands are the Roman principle of *occupatio* and Aquinas's labor basis of property.[71] The former, of course, is a function of the 17th-century European view of the world as a *terra vacua* waiting to be occupied

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[70] The phrase is Nozick's.

[71] Oddly enough, the contract element is largely absent, whereas that is overwhelmingly important in the theories of modern Lockeans. Nozick, for example, stresses that a chain of transfers must be composed of just links (i.e. contracts), (but neglects the empirical fact that nearly any current holding in the USA could be traced back to, or at least involved, some earlier unjust appropriation from, say, aboriginals). The missing contract element in Locke's treatment of property is explicable when one considers that there was no distinct theory of contract for nearly two centuries after Locke wrote, existing only as a sort of free-market ideal in the law until it was noticed by Langdell and O.W. Holmes. *cf.* Gilmore, *The Death of Contract*, page 6-8.

by Europeans.[72] In Locke's version, what is undeniably a man's own is "his Body, and the *Work* of his Hands" and hence what he creates with them and that which "he hath mixed his labor with"[73] is undeniably his own. For Locke, a claim of having occupied something results from having worked it in some way (as opposed to the theories of Ireton and Grotius, which require explicit acts of occupation, such as saying "I occupy this"[74]).

Locke famously limits his theory of *occupatio* :

> "For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.[75]

As has been pointed out by Nozick, this principle seems to be caught in a regress. Suppose there are ten parcels of land available around a pond. Eight have been occupied, Sue occupies the ninth, and now I wish to occupy the tenth. I cannot: doing so would not leave "enough, and as good" for others to occupy. That being the case, it was wrong of Sue to have occupied the ninth; doing so did not leave "enough, and as good" for others to occupy. And so on from the ninth back to the

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[72] The jurisprudence developed to support this is more interesting than one would imagine, and deserves a book in itself. The main principle is *Terra manens vacua occupanti conceditur*: land held vacant is given to the occupier. For reasons I have been unable to discover, while the British considered American aboriginals persons, and hence their land occupied (and them agents with whom one formed contracts), they did not believe this the case with Australasian aboriginals. For this reason, a Native American rights lawyer in the USA has a different job from, say, an Aboriginal rights lawyer in Australia. The former seeks to have the law enforced: the latter, to have it changed.

[73] Locke, *Second Treatise*, Chapter 5 (pages 287-288).

[74] Kelly, 230.

[75] Locke, *Second Treatise*, Chapter 5 (page 288).

first. Therefore no one can have established a legitimate property right by occupation.[76]

Jeremy Waldron has pointed out another difficulty with Locke's theory of original acquisition. Waldron claims that the idea of "mixing one's labor" with something is incoherent, and that furthermore, *no* Principle of Just Acquisition is tenable within the contractarian tradition. Both of these claims will be taken up in the next chapter's discussion of Waldron.

I am going to set aside these problems for now, not because they are unimportant, but because my task in this historical section does not include shoring-up Locke' theory of property. Other troubles with this theory, such as Locke's inadequate treatment of a state of emergency (which both Grotius and Nozick address, and which is recognized in jurisprudence by the common law principle of *force majeure*[77]) will likewise be set aside.

how absolute are Lockean property rights?

How strong an argument could be made that thick Lockean property rights provide a veto power on efforts by the state to redistribute resources? That is, how much do modern attempts at distributive justice run afoul of Locke's political philosophy? I will argue: not at all, for three reasons. 1) The claim that they do rests on a misunderstanding of what gets "traded up into the hands of the

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[76] Nozick, page 175-176. Nozick's proposes a weakening of the Lockean proviso to overcome this regress: that the proviso should not stipulate that there be as much and as good left over, but that others shall not be made worse-off (net-net) by an acquisition.
[77] "Such clause...in...contracts to protect the parties in the event that a part of the contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by the exercise of due caution." cf. *Black's Law Dictionary*, page 645.

community," and therefore also mistakes the boundaries of legitimate state action, while 2) it gets wrong the meaning of the word "consent" in Locke's theory, and 3) overlooks two contingent features of property rights which Locke himself acknowledged.

The Rights "Traded-In"

Let us flesh out the argument that sets its stance in a Lockean theory of property and braces itself against the claims of distributive justice. Such an argument would run as follows. Suppose Andy joined in the compact formed in the state of nature. The resulting government now attempts to seize some property of Andy's and redistribute it to Betty, who is worse off than Andy. But no other members of the state of nature had the right to seize Andy's property. On the principle that *nemo dat quod non habet* the state therefore has not acquired a right to seize Andy's property. Therefore the state is acting only "under color of law" when it seizes Andy's property: that is to say, illegitimately.[78]

This argument finds support in some passages from Locke, primarily:

> "The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of Property being the end of Government, and that for which men enter into Society, it necessarily supposes and requires, that the people should *have Property*, without which they must be supposed to lose that by entring into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own. Men therefore *in Society having Property*, they have

[78] Nozick, who provides a refined Lockean theory, argues so; furthermore, this is the substance of popular libertarian arguments against the state.

> a right to the goods, which by the Law of the Community are theirs, that no Body hath a right to take them, or any part of them, from them without their own consent; without this they have no Property at all."[79]

This is the substance of popular libertarian and conservative attacks on taxation and redistribution, arguments which often make direct appeal to Locke's philosophy, and is also a common interpretation of Lockean theory.[80] It misunderstands the terms of the Lockean social contract, the meaning of "consent" for Locke, and the distributive considerations which infused Locke's theory.

The principle that *nemo dat quod non habet* is not relevant here, because the sample argument above misses the source of the state's right to dispose of Andy's property: Andy. Among the things which Andy trades in during the formation of the social contract is the right to dispose of his possessions unilaterally, as Locke makes clear:

> "'Tis true, Governments cannot be supported without great Charge, and 'tis fit every one who enjoys his share of the Protection should pay out of his Estate his proportion for the maintenance of it. But still it must be with his own Consent..."[81]

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[79] Locke, Second Treatise, Chapter 11 (page 360).

[80] cf. Rothbard's *For a New Liberty: The Libertarian Manifesto* (pages 31-33), Richard Epstein's *Takings*, and, of course Nozick (whose theory of rights owes much to Locke) for views which are sympathetic to this reading. See also Buchanan's *Marx and Justice: The Radical Critique of Liberalism* (page 55) and Sandel's *Liberalism and the Limits of Justice* (pages 2 and 66) as but two of many examples which accept this reading of Locke as accurate but dispute the soundness of the argument.

[81] Locke, *Second Treatise*, Chapter 11, section 140 (page 362). This would seem to support a three-tiered interpretation of Lockean rights. Some rights are held weakly, in that they can be traded. So it would seem with the right to property. Next, some rights are strong, and are unable to be traded: such as my right to consent to the political process. Next there are rights so integral to ourselves that they are not even ours: they are God's. For example I have no right to commit suicide, because the right over my life is held by God.

So Locke recognizes the need for public taxation to support the state, which must not be an "Arbitrary Power" but a,

> "Power in the utmost Bounds of it,... *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."[82]

Therefore Locke does not dispute in principle the right to taxation, as long as the power doing so is acting in the public interest, is not arbitrary or willfully impoverishing the subjects, and does so with the consent of the taxed.[83]

Lockean Consent

"Consent" is the second place those err who would find in Locke a fortress from which to defend property against distributive justice. "Consent" for Locke has a technical meaning: the passage quoted above continues:

> "...But still it must be with his own Consent; i.e. the Consent of the Majority, giving it either by themselves, or their representatives chosen by them."[84]

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[82] Locke, *Second Treatise*, Chapter 11, section 140 (page 357).

[83] Here is one place where Nozick has tweaked Locke's theory; for Nozick, the inhabitants of the state of nature would find it irrational to contractually surrender the right to dispose of those things which one enters a contract to protect. His argument is perhaps the most opaque in an otherwise lucid book, and ends (as I understand it) with the assertion that a person would surrender the right to enough property to support a police force that could protect the rest of her property, but not so much right that her property could be redistributed to others. In short, Nozick believes in a limited trust only, and rejects the fiduciary character of government Locke supports.

[84] Locke, *Second Treatise*, Chapter 11, section 140 (page 362). This of course was one of the rallying cries of Locke's revolutionary admirers in the American colonies.

For Locke a person's consent to an act is obtained by his participation in a political process, whether or not the outcome of that process is something which he desires.

This above reading of Locke, though not the most accepted one,[85] is in my opinion not strained. Clearly Locke supported the idea that one may surrender clear title, so to speak, to some properties in order to maintain them (with "properties" construed now in the broadest sense to include modern rights).

Consider for example Locke's support for the oppression of Catholics and atheists because of their challenge to the peaceful order. The only way to make sense of this is if we suppose Locke would concede that rights one has under the laws of nature (in this case, rights to free speech and thought) would be surrendered in civil society if doing so furthered the protection of some other set of rights. The *sine qua non* of a legal system is that is establishes order and is seen to establish order. It would be self-defeating to propose a system of law which entered the ring with its hands tied behind its back, unable to command the resources equal to the task which it must fulfill to command allegiance.

Lockean Property is not Absolutist

The last error of the anti-redistributive argument above is that is fails to recognize the curious ways in which Locke acknowledged distributive considerations in his discussion of the

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[85] I refer to those writers referenced in an earlier footnote who, while differing in their sympathies towards Locke, share a belief that Lockean property rights are, once established, more or less iron-clad.

laws of nature. It is not only a matter of leaving "enough, and as good" for others, as is commonly recognized. The Lockean law of nature, as discussed much earlier, is not natural law (in the theological sense) or Kantian innate moral intuition: it is that law which is accessible to a rational person reflecting on the way in which innate appetites must be limited in order that men may live peaceably. Such reflection, believed Locke, will lead one to this conclusion:

> "It will perhaps be objected to this, That if gathering the Acorns, or other Fruits of the Earth, etc. makes a right to them, then any one may *ingross* as much as he will. To which I Answer, Not so. The same Law of Nature, that does by this means give us Property, does also *bound* that *Property* too. *God has given us all things richly,* 1. Tim. vi. 17 is the Voice of Reason confirmed by Inspiration. But how far has he given it us? *To enjoy.* As much as any one can make use of to any advantage in life before it spoils; so much he may by his labor fix a Property in. Whatever is beyond this, is more than his share, and belongs to others...especially keeping within the bounds, set by reason of what might serve for his use..."[86]

This strange and infrequently quoted passage belies the common interpretation of Locke as hostile to the demands of distributive considerations. However, as Waldron has pointed out,[87] it fixes a limit in what one can have, that limit being set by the ability to use a good "before it spoils", and this limit provides less and less of a constraint in the modern world, where the value of a good is quite easily stored through the medium of money "before it

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[86] Locke, *Second Treatise*, Chapter 5, section 31 (page 290).
[87] Waldron, *The Right to Private Property*, pages 207-209.

spoils". But the passage shows that Locke was willing to temper his enthusiasm for property rights with a recognition of their possible excesses.

The excess he singles out in the above quote is the excess presented by having such surfeit that things spoil before they are used. Arguably this constraint on property became nugatory with the introduction of money (which serves to store value), and markets (which allow trades across time and hence often by-pass the spoilage to which Locke avers). But it is possible to read a bit more into this quote, especially its final words: "the bounds... set by reason of what might serve for ... use" might refer to more than spoilage, but to ostentation. If so, then it would seem that Locke was bounding property so that it is not an absolute claim, and not merely by what could be used before it spoiled, but by what is seemly.

Further support for this prudence can be found slightly earlier in that same chapter, and also in the first treatise. In his first treatise, Locke wrote:

> "But we know God hath not left one Man so to the Mercy of another, that he may starve him if he please: God ... has given no one of his children such a Property, in his peculiar Portion of the things of this World, but that he hath given his needy Brother a Right to the Surplusage of his Goods; so that it cannot justly be denyed him, when his pressing Wants call for it.... As *Justice* gives every man a Title to the product of his honest Industry... so *Charity* gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise; and a Man can no more justly make use of another's necessity, to force him to become his vassal, by

> withholding that Relief, God requires him to afford to the wants of his Brother, than he that has more strength can seize upon a weaker, master him to his Obedience, and with a Dagger at his Throat offer him Death or Slavery.[88]

The preceding passage occurs in the more rhetorical first treaty, but its echoes reverberate in the second. For example, Locke opens Chapter V of the second treatise saying,

> "Whether we consider natural *Reason*, which tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence..."[89]

These passages indicate that Lockean property rights are not unconditional, but exist against a background and general Right of Subsistence. They govern those goods which exist above and beyond that set of goods required to provide for the preservation and sustenance of everyone. In short, like Rawls, John Locke had a theory of "primary goods": unlike Rawls, Locke lacked a further distributive theory to govern the allocation of non-primary goods. Unlike Nozick, whose standards of justice are stiff procedural ones (concerning chains of just transfers), Locke's standards, while also procedural (focusing on initial acquisition and not chain of title, as has been noted), are tempered by recognition of the effects of uncurbed appetites. They are procedural standards whose outcomes are "bound by reason" and which reject arrogance towards the state of nature.

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[88] Locke, *First Treatise*, Section 42, page 170. Quoted partially in Waldron. This is an obscure quote that I have not seen elsewhere in discussions of Locke, but one which would seem decisive.

[89] Locke, *Second Treatise*, Chapter V, Section 25, page 285.

Marx and the Principled Critique of Property
FROM LOCKE TO THE SOCIALISTS

In John Locke's philosophy men stand as agents forming contracts; in Karl Marx's they are particles suspended in a tide beyond the apprehension of most or the control of any. Between Locke and the century of Marx lies the Enlightenment. I do not mean to linger in discussion of this period, but I do wish to point out two intellectual events which transformed the stream of political history as Locke left it into the one in which Marx was immersed. The first event was that social contract theory, when it reached Rousseau, pivoted and took a new direction. Second (and paradoxically for an era known as "the Age of Reason"), the foundations of natural law, even a secularized one founded in the dictates of reason, were undermined by philosophical attacks on reason by David Hume and Immanuel Kant.

ROUSSEAU

Rousseau employed the social contract quite differently than had either Hobbes or Locke. Hobbes, remember, used the mechanism of contractarian reasoning to posit a being in whom authority was invested: as was pointed out earlier, the man in whom such authority was invested was not a party to the contract and not accountable to anyone. Hobbes wrote of this Leviathan as a man or as the apparatus which surrounds a ruler. For Locke the compact included the ruler as a party, and hence the authority granted under the contract was limited. Still, both Hobbes and Locke respected a similar constraint on their theorizing. I yield to the temptation to call this constraint

the Law of the Conservation of Reality: no new things come out of *their* social contracts, it might be said, just old things in new relationships.

This is not the case with Rousseau. His social contract generates a new thing, *la volonté générale*, the general will. This seed which Rousseau planted in the soil of social philosophy found life there and grew quickly: in time it would play a vital role in the political philosophy of Kant, Hegel, Marx, and much twentieth century authoritarian philosophy. The influence of this idea puzzles me, because as Rousseau describes it the general will is entirely magical. We move from such phrases as "a sum of forces" to "the whole common force"[90] and from such concepts as "a people.... regaining its liberty" to the claim "These clauses, properly understood, may be reduced to one - the total alienation of each associate, together with all his rights, to the whole community."[91]

I express in Appendix B my abhorrence of Rousseau's concept of the general will: it was a meaningless concept which subverted liberal concepts into bearers of the authoritarian impulse from which the Enlightenment had nearly freed mankind. I wish to note here merely that Rousseau charmed a new entity into the world, an entity which was permitted its own ends, ends which might diverge widely from the ends of the people about whom it hovered. Thus did Rousseau's incantations take a tradition which reached fruition in Hobbes (and who drew from it a justification of the existence of the

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[90] In consecutive paragraphs in Rousseau, *The Social Contract*, Book VI page 23. My point is that while it may be meaningful to speak of the sum of individual forces or individual human wills, to speak of that sum then as a unit, a single common will, stretches the bounds of metaphor too far.

[91] See Rousseau, *The Social Contract*, Book VI page 23.

state), and which ripened with Locke (who drew from it a theory of the proper limit of the state), and transform it into a philosophy where the sovereign is ontologically superior to its subjects.

I will note a few things about Rousseau's theory of property. He thought of property strictly as a claim against other men, rather than as a check on the state; in this his view was closer to that of the Greeks and Christian clerics who preceded John of Paris and William of Ockham than it was to these medieval and Renaissance jurisprudes. This is not to say Rousseau was completely agnostic on the subject of property. He recognized the legal principle of *occupatio*, but in a form consciously opposed to that of Ireton and Grotius (referenced earlier). Like Locke, it was effected "not by an empty ceremony, but by labor and cultivation." Like Locke (only more definitively) it was limited in that a man "must occupy only the amount he needs for his subsistence." Furthermore, the land being occupied had to be uninhabited property. Though this is implicit in Locke's and Grotius' theory, they are not clear about what it takes for a property to be inhabited (as discussed in an earlier footnote). Rousseau, an admirer of the Noble Savage and primitivism in general, had no illusions that when,

> "Nuñez Balboa, standing on the seashore, took possession of the South Seas and the whole of South America in the name of the crown of Castille," this did "dispossess all their actual inhabitants."[92]

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[92] *ibid.*, Book IX page 29.

The recognition that technological primitivity is not synonymous with vacancy is one of the few progressive and admirable sentiments in Rousseau's political philosophy.

THE END OF REASON-BASED NATURAL LAW AS A TRANSITION TO MARX

The second twist that legal philosophy took during the course of the Enlightenment was that reason was undermined as a suitable stand-in for divinity in natural law. In the next few pages I wish to give a brief historical account of how I perceive this happened, as a segue to Marx.

For many centuries human law was perceived as possibly imperfect and capable of being judged by an extra-human standard. This standard hung from a cosmic framework: divine law.[93] I have suggested above that the secularization of politics led theorists such as Locke to find a less ghostly material from which to reconstruct this standard: reason. For Locke reason was what man used in the state of nature to ascertain natural law, and reason is what led him to contract a limited state into existence. Reason provided a vantage point from which to judge the actual world. Reason created a gap in which a modern could be also a legal formalist.[94]

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[93] Consider the revolutionary nature of the line from *The Book of Daniel*, where Daniel interprets the writing on the wall to mean that the king has been judged in the balance, and found wanting. In an era where no boundary existed between political and divine authority, such an utterance must have seemed nonsensical. Perhaps seemingly nonsensical utterances are the hinges upon which the history of a civilization turns.

[94] Legal formalism, as opposed to legal realism, is an epistemological doctrine. If one asks me "What is law?" and I reply in terms of concepts, philosophical foundations, theories of justice and so on, I am a legal formalist. If I reply that I need a description of the activities of legislators and judges, from which I will say what law is, then I am a legal realist.

The eighteenth and early nineteenth century ended this special role for reason in political philosophy. Vico grounded his discussion of law not in reason or in divinity but in imagination and practice.[95] He related the laws of nations to the customs, histories, needs, and myths of their national cultures. For Vico, law and justice were not defined in a vacuum, but with reference to particular societies and their pasts. Hume went further, not only positing a standard different than that of reason, but criticizing reason as a faulty instrument. Habit and custom, according to Hume, are what we use to find our way around the world; we dress these up in principles of rationality for our own consumption. As is discussed in Appendix B, Kant's extended critique of reason removed vast grounds of philosophical discourse from the scrutiny of rationality, permitting it to descend into the mysticism of German Idealism in which Marx was reared. Furthermore, he propounded in *The Metaphysics of Justice* a new theory of the state, a theory which would be developed by Hegel and which provided an alternative to the story told by social contract theory.

Laissez-faire capitalism, which mushroomed in England at the end of the eighteenth century and across northern Europe within the first few decades of the next, and which drew agricultural workers to the horror of the sweatshops of the city, seemed to contain no internal mechanism to check the disproportionate accumulation of

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[95] See Stuart Hampshire, *Innocence and Experience*, pages 45-46, for his discussion of Vico's project of defending the study of history and culture as the appropriate model for truth-seeking, as opposed to the Cartesian model of natural sciences and mathematics. See also Posner's *The Problems of Jurisprudence*, page 103, where he discusses understanding as an act of imaginative reconstruction rather than simple rationality, and mentions Vico in this regard.

property. Within this context freedom of contract, the soul of laissez-faire capitalism, was challenged: social reformers argued that such freedom was illusory when contracting parties bargained from intensely unequal situations. The increasing distrust of contract as a means of revealing justice lead to the eclipse of the social contract tradition for nearly two centuries. Hegel furthered this eclipse by developing Kant's theory of the state, not just as a political or civil body, but as *ein Volk* with a purpose, an individual's subordination to which led to his greatest freedom.[96] To the early nineteenth century continental philosophers a Jefferson or a Madison, molding the laws of a new nation to a standard of Lockean inalienable principles knowable by reason, or a jurisprude such as Blackstone, reading from the common laws of England an enduring set of principles with quasi-divine stature, must have seemed quaint indeed. A new vision reigned: laws were rules enacted and enforced by humans, and nothing more. Within this context of legal realism Marx came to evaluate the role of laws governing property.

MARX'S CRITIQUE OF PROPERTY

It is a commonplace that Karl Marx was hostile to private property; certainly his modern epigones express no great affection for it.[97] In fact the truth is much more complex. Marx's writings are nothing if not architectonic, and saying exactly what Marx believed on a subject is always difficult because his beliefs evolved. This is

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[96] In fact Kant's *The Metaphysics of Justice* is so much a precursor to Hegel that after reading it one is tempted to view Hegelianism as strikingly derivative.

[97] See for example Jaggar's *Living With Contradictions: Controversies in Feminist Social Ethics*; the existence or distribution of private property is implicated in most of the social problems addressed by those contributors critical of liberalism.

to his credit, for consistency in writing over 60 years would suggest a dark and ugly psychology. But there is a reasonable consistency to the role property played in his work, especially his non-polemical work. We may discern there what might be loosely called descriptive and normative theories of property. The descriptive is merely his theory of what laws of property actually are: expressions of class interest. The normative corresponds to what property would be in communist society.[98] I wish to present Marx's theory of property here with only as much exegesis of his general theory as is necessary.

Marx's descriptive theory of property

Marx was a legal ultra-realist. For him laws were not just the activities of men, they were the activities of a subset of men, a class of men: most specifically, the dominant class in society. Every set of economic relations (slavery, feudalism, capitalism) had bolted to it a superstructure of ideology: this superstructure incorporated the laws, mores, and civil relations of a society. Law does not get judged by higher measures but rather is itself secondary, a manifestation of the class conflict which is the true engine of history. For Marx, it is not meaningful to ask whether a law is ultimately right or not; rather, it is meaningful to ask how that law expresses a class interest:

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[98] This distinction is not one I would push too hard in Marx's case. His theory of communist property was normative if and only if he believed that communism *should* arrive, not merely that it *would* arrive. In fact whether Marx was fatalistic about it is something of an open question: are his life's actions consistent with such fatalism? Or was the inevitability of communism something he claimed to bolster his claim to have described history scientifically? In the end I do not think it far-fetched to suppose that the writer of *The Communist Manifesto* was describing something he thought should happen.

> "But none of all this is the economists' general concern in this general part. The aim is, rather, to present production-see e.g. Mill - as distinct from distribution, etc., as encased in eternal natural laws independent of history, at which opportunity *bourgeois* relations are then quietly smuggled in as the inviolate natural laws on which society in the abstract is founded."[99]

Therefore Marx's concern with laws governing property is different from the concerns of his predecessors: the latter hunted the subject, while Marx sought to unmask it. His writing on property can be divided into that which concerns his theory of history and that which concerns his economic theory. I begin with the former.

In his early work Marx seemed more concerned with the socially atomizing effects of private property than with its economic role. His *The German Ideology* traced the history of property from its origin as tribal property (as opposed to individual property), the boundaries of which were "determined with the Romans chiefly by war, with the Germans by the rearing of cattle." When tribes coalesced to form towns their common property "appears as state property, and the right of the individual to it as mere 'possession'[100].... Real private property began with the ancients, as with modern nations, with movable property."[101] Of this evolution Marx continued:

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[99] Marx, "The Grundrisse," in Tucker, page 225.
[100] This distinction between property and possession can also be found in Rousseau: "In taking over the goods of individuals, the community, so far from despoiling them, only assures them legitimate possession, and changes usurpation into a true right and enjoyment into proprietorship. Thus the possessors, being regarded as depositaries of the public good..." (*cf.* Rousseau, *The Social Contract*, Book I Chapter 9 page 30).
[101] Marx, "The German Ideology," reprinted in Tucker, page 186.

> " In the case of the nations which grew out of the Middle Ages, tribal property evolved through various stages, feudal landed property, corporate moveable property, capital invested in manufacture- to modern capital, determined by big industry and universal competition, i.e., pure private property, which has cast off all semblance of a communal institution and shut out the State from any influence on the development of property.... Through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society."[102]

Several months earlier, Marx had included in his analysis of capitalism a more explicit critique of the atomization of society caused by "huckstering," by which he meant capitalism. This was his essay *On the Jewish Question*.[103] Here, in analyzing that subset of rights he would later call bourgeois rights, Marx wrote:

> "Let us notice first of all that the so-called *rights of man*, as distinct from the *rights of the citizen*, are simply the rights of a *member of civil society*, that is, of egoistic man, of man separated from other men and from the community. The most radical constitution, that of 1793, says: *Declaration of the Rights of Man and of the Citizen*: Article 2. 'These rights, etc. the natural and imprescriptible rights are: *equality, liberty, security, property.*"

And in discussing these, he writes:

> "*Article 16* (*Constitution* of 1793). 'The right of *property* is that which belongs to every citizen of enjoying and disposing *as he will* of his goods

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[102] *ibid.*, page 186-187.

[103] Marx equated Judaism with capitalist economic relations.

> and revenues, of the fruits of his work and industry.'
>
> "The right of *property* is, therefore, the right to enjoy one's fortune and to dispose of it as one will; without regard for other man and independent of society. It is the right of self-interest.... It leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty."[104]

So early on Marx had identified private property as being implicated in a feature of the world he found unattractive: the atomization of men in capitalist society. While this was neither a novel insight[105] nor a particularly profound one, Marx expanded it later in the same year to tie private property to a deeper and more peculiarly Marxist issue: the alienation of labor. In the "Economic and Philosophical Manuscripts of 1844" he wrote:

> "Through *estranged, alienated labor*, then, the worker produces the relationship to this labor of a man alien to labor and standing outside it. The relationship of the worker to labor engenders the relationship to it of the capitalist, or whatever one chooses to call the master of labor. *Private property* is thus the product, the result, the necessary consequence, of *alienated labor*, of the external relation of the worker to nature and to himself...
>
> "True, it is as a result of the *movement of private property* that we have obtained the concept of *alienated labor* (*of alienated life*) from political economy. But on analysis of this concept it becomes clear that though private property appears to be the source, the cause, of alienated labor, it is really its consequence, just as the gods *in the beginning* are not the cause but the effect of man's

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[104] Marx, "On the Jewish Question," in Tucker, page 43.

[105] As Sowell has pointed out: see for example Antoine-Nicolas de Condorcet's *Sketch for a Historical Picture of the Progress of the Human Mind.*

> intellectual confusion. Later this relationship becomes reciprocal."[106]

In passing I should mention that it is later in the same work that Marx makes perhaps his earliest mention of the abolition of private property. "In order to abolish the *idea* of private property, the *idea* of communism is completely sufficient. It takes actual communist action to abolish actual private property."[107] I will argue shortly that this abolition has to be understood in a special sense, and that this sense has often escaped Marx's followers.

In summary of this point, then, Marx followed many who preceded him by believing that in an ancient age when property had been held tribally, that is, communally, and that with the advent of moveable property this communism had vanished. The private ownership of things had evolved from a state where artisans owned their capital goods and hence owned the product of these tools of production, to a stage where the worker replaced the artisan, capitalist ownership replaced the artisan's ownership of his tools, the worker was alienated from his labor, and the produce of that labor was owned privately by another. Property had become the consequence, the distillate, of modern alienation.

Marx's normative theory of property

Property played a more precise and sophisticated role in Marx's economics. In his magnum opus *Capital*, Marx distinguishes between two forms of private property, individual and capitalistic. With individual private property the laborer owns the capital goods

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[106] "Economic and Philosophical Manuscripts of 1844," in Tucker, page 79.
[107] ibid., page 99.

with which he works, he owns his work, and he owns the output of the labor-process. Such petty industry exists even under slavery and feudalism, but:

> "it flourishes, it lets loose its whole energy, it attains its adequate classical form, only where the laborer is the private owner of his own means of labor set in action by himself: the peasant of the land which he cultivates, the artisan of the tool he handles as a virtuoso."[108]

Curiously, Marx seems to be pointing here to an incentive effect, something for which Marxian economic systems are generally not known.

Capitalism brings "the dissolution of private property based upon the labor of its owner."[109] This is because the system of petty industry just described:

> "excludes the concentration of the means of production, so also it excludes cooperation, division of labor within each separate process of production, the control over, and the productive application of the forces of Nature by society, and the free development of the social productive powers. It is compatible only with a system of production... moving within narrow and more or less primitive bounds."[110]

In Marx's terminology the means of production, also known as the forces of production, include at least land, technology, and capital goods. The concept corresponds roughly with our modern notion of factors of production, although these are now recognized to include

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[108] Marx, *Capital*, Chapter 23, in Tucker, page 436-437.
[109] *ibid.*, page 436.
[110] *ibid.*, *Capital*, Chapter 23, in Tucker, page 437.

management and entrepreneurial skill.[111] Characteristically, Marx gave no credit to these and I find no mention of them in his work.

The decentralized capitalist production referred to above "fetters" the productive forces.[112] In Marx's description of what happens next we find his normative theory of property.

> "It must be annihilated; it is annihilated. Its annihilation, the transformation of the individualized and scattered means of production into socially concentrated ones... forms the prelude to the history of capital...
>
> "As soon as this process of transformation has sufficiently decomposed the old society from top to bottom,...then the further socialization of labor... takes a new form. That which is to be expropriated is the... capitalist exploiting many laborers. This expropriation is accomplished by the action of the immanent laws of capitalistic production itself, by the centralization of capital. One capitalist always kills many....Along with the constantly diminishing number of the magnates of capital... grows the revolt of the working-class...
>
> "The capitalist mode of appropriation... produces capitalist private property. This is the first negation of individual private property, as founded on the labor of the proprietor. But capitalist production begets... its own negation. It is the negation of negation. This does not re-establish private property for the producer, but gives him individual property based on the acquisitions of the capitalist era: *i.e.*, on co-operation and possession in common of the land and of the means of production."[113]

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[111] See, for example, Stephen Slavin's textbook, *Introduction to Economics*, page 7.

[112] In Marx's day scale was still thought to convey economy automatically; today's production challenge is known as "teaching the elephant to dance," that is, trying to make large systems of production run with the leanness and efficiency of small ones.

[113] Marx, *Capital*, Chapter 23, in Tucker, page 437-438. The above quote assumes familiarity with Marx's theory of the crises of capitalism and the centralization of capitalist production. Explanation of this component of his economic theory is omitted.

I interpret this as follows. Mankind has moved from a primitive era marked by group ownership (of land) to scattered individual ownership of the means of production. This scattered individual private property gets incentives lined up correctly but is unwieldy due to its lack of centralization. Capitalism engenders the social concentration of these means of production (Marx's focus is not on whether these means of production are privately owned: his point is that their scale is social). Some of the output of these productive forces is, however, expropriated by the capitalist.[114] In the final, communist, stage of history this expropriation ends: both the means of production and their output are socially owned but the output (presumably if not itself a capital good) is awarded to the laborer who produced it. In communist society individuals may own the fruits of the economy but not the orchards.

Marx's theory of property is therefore much more complex than mere antagonism.[115] It is false to suggest that Marx was opposed to property. He clearly believed that things could be socially owned, so *ipso facto* he believed they could be owned. It is also false to claim that Marx generally opposed private property: he was opposed to *bourgeois* private property, and then only after it had served its purpose. He believed in individual private property, property which would carry no stigma of alienated labor. And interestingly, he recognized (in the first of the quotes from *Capital* above) an incentive effect of property ownership tied to labor, for:

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[114] This is where Marx's theory of surplus value fits in.

[115] I am alluding to the claims of the less sophisticated adherents of Marxism, as well as Marx himself, sometimes, in his polemical writings. By Marx's polemical writings I mean, for example, Part Two of *The Communist Manifesto*.

> "only where the laborer is the private owner of his own means of labor set in action by himself: the peasant of the land which he cultivates, the artisan of the tool he handles as a virtuoso" does the economic system "flourish [and let] loose its whole energy."[116]

The question of the importance of such incentives is at the heart of the next theory of property I wish to examine: that of Mill and the economists.

Mill and the Economists

Wilde said that there are two ways to dislike poetry: one way is simply to dislike it, the other is to read Pope. Similarly there are two ways to dislike economics, and the second is to read Mill. His thought informs the principles from which economics is constructed. Therefore this section will reconstruct Mill's theory of property only briefly, and focus primarily on that theory of property found in the economic analysis of law.

MILL'S UTILITARIANISM

The background conception of justice in *Utilitarianism*

Mill's classic *Utilitarianism* seeks to lay "the foundation of morals" on:

> "Utility, or the Greatest Happiness Principle, [which] holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure."[117]

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[116] Marx, *Capital*, Chapter 23, in Tucker, page 436-437, quoted earlier.
[117] Mill, *Utilitarianism*, page 144.

Mill believes justice may be seen as deriving from this principle in the following way. Felicitous uses of "justice" occur in four contexts: in discussing the violation of *legal rights*, of getting what one *deserves*, of *impartiality*, and of *equality*; "unjust" is used felicitously where one has done what he *ought not* to have, or *breaks faith* with some prior commitment.[118] Morality and justice may be distinguished from Expediency and Worthiness, on the grounds that the sense that punishment is necessary is invoked when an act violates principles of morality or justice, but not when a merely non-expedient or unworthy act is committed. Lastly, concerning perfect duties (those duties one has to particular people, such as the one I have to the owner of that car not to steal it), and imperfect duties (those owed to the world at large, such as duties to toleration or charity, for example), Mill writes "I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality."[119] Having described justice's sphere, Mill turns to its make-up:

> "The two essential ingredients in the sentiment of justice are, the desire to punish a person who has done harm, and the knowledge or belief that there is some definite individual or individuals to whom harm has been done."[120]

This desire to punish is itself the "outgrowth from two sentiments...; the impulse of self-defense, and the feeling of sympathy." And as a final step, the feeling of sympathy invokes some sense "that we ought to shape our conduct by a rule which all

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[118] *ibid.*, page 187-190.
[119] *ibid.*, page 194.
[120] *ibid.*, page 195-196.

rational beings might adopt *with benefit to their collective interest.*"[121] We use "right" as a shorthand for this combination of sentiments (of a desire to punish, and a sympathy for the collective interest): it follows therefore that a right is exactly,

> "to have something that society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give no other reason than general utility."[122]

To summarize Mill's background conception of justice: justice is that area where legal rights, desert, impartiality, and equality are called into play, and where illicitly held rights, and breakings of faith, are excluded. Principles of justice and morality are distinguished from those of expediency and worthiness in that the violation of the former two invokes a sense that punishment has become necessary, while the latter two do not. Principles of justice are invoked when someone has failed in a duty held to some specific person(s), and our desire to punish is conjoined with a sentiment of sympathy for the public welfare which will be degraded were punishment not forthcoming (and also, in this case the person to whom the duty was owed can be said to have had a "right"). This "public welfare" is utility: therefore utility is the bedrock upon which the structure of justice rests.

Property in *Utilitarianism*

What does this mean, as far as property rights go? I find no explicit answer within Mill, though perhaps this is because *Utilitarianism* was written from the viewpoint of a 19th Century

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[121] *ibid.*, page 198.
[122] *ibid.*, page 199.

European, and took as given and indubitable many of the elements of that viewpoint. For example, while there is discussion in *Utilitarianism* of progressive taxation versus poll taxes, there is no discussion of the institution of private property *per se*. It is not, however, too difficult to reconstruct what Mill would have written were that institution itself questioned.

First, consider that a right, for Mill, means precisely the conjunction of two elements: "a hurt to some assignable person or persons on the one hand, and a demand for punishment on the other."[123] My property right in this computer, if such a right exists, would mean precisely that were someone to steal this computer . from me I would suffer some hurt, and my demand that the thief be punished in some way would be appropriate. There is nothing obviously strange or unfeasible about this, from which we may easily draw the inference that the existence of property rights was not antithetical to Mill's project in *Utilitarianism*.[124]

While it is clear that Mill would allow property rights, the question remains, how far would he extend them? Consider his discussion of various forms of taxation: should taxes be based on ability to pay, or should there be a poll tax? Or, as a compromise, should all men "pay an equal capitation tax for the protection of their persons (these being of equal value to all), and an unequal tax for the protection of their property, which is unequal"?[125] Mill

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[123] *ibid.*, page 198.
[124] Furthermore, Mill uses words such as "robbery" throughout *Utilitarianism*, words which only make sense within a background assumption of private property.
[125] Mill, *Utilitarianism*, page 204.

assures the reader that "From these confusions there is no other mode of extrication than the utilitarian."[126]

Mill neglects, however, to provide the extrication. He neglects to say what he believes the right answer is, in this and some other cases (dealing with criminal punishment and immorality). While there can be little doubt that Mill was sympathetic to a strict interpretation of property rights, he seems to have satisfied himself that, having provided the proper algorithm to decide the matter, he could leave it to others to grind through the procedure. This brings us to the economists.

THE ECONOMIC ANALYSIS OF PROPERTY

The modern economic analysis of property rights addresses the issue of property in a new way. Recognizing that property rights convey discretion, the economist maintains that a refusal to assign discretion in some decision to an individual is equivalent to assigning it to the body politic. For this reason, economists tend to speak of property rights as existing in fact, but ask whether they are privately held, held by the state, or held in common.

Privately-held property rights

The private ownership of property is, for obvious reasons, the crux of the debate on property theory. Because the socialization of property appears as a taking, at least to those who oppose it, the analysis of takings lies at the core or the analysis of private property. Thus those who desire to expand government discretion at

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[126] *ibid.*, page 204.

the expense of private agents will, in general, disparage restrictive theories of takings. Thomas Grey, for example, writes:

> "This body of 'takings' law, which most nearly corresponds to popular conceptions of property as thing ownership, is difficult to rationalize in terms of modern legal and economic theory."[127]

Grey's statement is false. Takings law does not depend in the least on "popular conceptions of property as thing ownership," and is quite amenable to the conception (which Grey advocates) of property as discretion over uses. Furthermore, takings jurisprudence gets "legal and economic theory" (and ethics) exactly right (in a way that Gray does not). The following pages will defend this claim.

At the simplest level, according to Richard Posner, the:

> "legal protection of property rights creates incentives to use resources efficiently."[128]

Imagine an open, fertile field, capable of growing much food: without a legally-enforceable right to the product of that field, no individual farmer is going to have an incentive to improve, irrigate, plow, and sow that field. That is, without a property right in the field, the ultimate value for that field will never be realized. And in order for that value to be fully realized, it is important that the property right convey not only *exclusivity*, but that it be transferable as well, or else ownership in the field will not trade to the person who can create the most value with it.

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[127] Thomas Grey, "The Disintegration of Property," page 72.
[128] Posner, *Law and Economics*, page 32.

In *The Economic Analysis of Law*, Judge Posner's project was to show not only how law should be constructed so as to create the incentives to turn resources to their highest-valued use, but also, in part, to show that the common law evolved to create those incentives. Posner attempted to show that within its sometimes odd and seemingly arbitrary principles, the common law grew to embody a rationality that directed the social use of resources in efficient directions.[129] Much of that classic work of Posner's is, in fact, devoted to demonstrating the economic efficiencies which seem to have been infused into common law principles.

This attitude towards the past, traditional practice, etc., is one component of the constrained vision mentioned in the first chapter of this work. Typically speaking, it is anathema to modern philosophy. It smacks of faith, of an unquestioning obedience to or reliance on the thinking of others, of "ancestor worship," as one philosopher has put it.[130] I should like to demonstrate by way of example how this kind of respect for the common law tradition may do more than betray a mystical and an Oriental-like reverence for the past. The example I would like to use is Epstein's argument concerning the takings clause of the US Constitution.

the economic rationality of the takings clause

As has been explained previously in this chapter, William of Ockham responded to Odofridus, who had argued that the lord of a realm is not lord in the sense that everything is owned by him, but

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[129] There is, in fact, an extensive law-and-economics literature on the history of property rights which has unveiled just that point. See page 35, note 1 to §3.2, in *The Economic Analysis of Law*.

[130] David Luban, quoted previously.

rather is lord in the sense that it is incumbent upon him to protect all things in his realm. This would seem to leave little room for taxation. William responded for the emperor:

> "...he is in a certain manner the master of all things to the extent that... he can use and apply them for the common benefit, whenever he judges that this is to be preferred to the interest of individuals.... [He may do this] on account of the owner's guilt, or for good reason, i.e. for the public benefit."[131]

There is sound economic reasoning built into this principle. Consider for example a farmer with a field which is worth $1,000. A town wants to take that field over for some public purpose: a roadway or a sewage plant, for example. The takings clause demands that the town must pay the farmer $1000 in order to do so. Now if that land with the plant or road on it has a value to the town of $1,500, then there is no reason for the town not to take it. The farmer is as well-off as he was before, and the town is $500 better-off.

Imagine instead, however, that the value to the town of the new plant is only $700. With the takings clause in place, the town is not going to find it feasible to pay-off the farmer so as to take his land. Doing so would leave the town $300 worse-off. Without the takings clause in place, the town could take the land, not provide compensation, and be $700 better-off.

The rationality of the rule on takings is then clear. If one accepts that governments should not be in the habit of making someone X worse-off in order to make others or the rest of its

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[131] quoted in Kelly, 153, and quoted more fully previously in this chapter.

citizens some amount < X better-off, then the takings clause will limit the state to performing just those actions which are actually socially beneficial, and abstain from socially pernicious actions at the behest of the politically powerful.

But should one accept the assumption given in the last paragraph, that a government should not make someone X worse-off in order to make someone else < X better-off? It is easy to think of redistributive acts the government could do that meet this description, but which are not obviously awful or unjust. The answer, however, is yes, one should accept this proposition. One reason is that to do otherwise one would have to believe strongly that interpersonal comparisons of utility are possible: while these may be intuitively obvious, they are philosophically suspect. There are three more reasons, however, that do not pit logic against intuition:

1) A government which consistently acts to make one person X worse-off in order to make society < X better-off, will over time consistently make that society worse-off.

2) For any takings where the loser loses more than the gainers gain, some alternative transaction is possible which each side should prefer. In the example given above, instead of forcing a loss of $1,000 upon the farmer in order to make the town $700 better-off, the farmer could give $850 to the town. The town is then better-off than it would be if the taking occurred, as is the farmer. Therefore this outcome Pareto-dominates the alternative.

3) Without such a rule, it is tempting for those with political power to grant favors to politically influential groups, in effect using the mechanism of the state to transfer wealth from those who do not expend resources attempting to sway the political process to those who do. This is public choice theory's "captive bureaucrat" problem.

Therefore, if one accepts that the state should not consistently make some people X amount worse-off in order to make others some amount <X better-off, then the takings clause is a sound decision-procedure. It binds the hands of government agents to pursue those projects which actually create a net benefit for society, and it prevents corruption. In short, it provides a "bottom-line" so that the state does not go about rearranging holdings willy-nilly, but rather, judiciously and with the clear interest of the public at heart.[132] For a 700 year-old legal principle, this is surprisingly sophisticated.

This argument was propounded by Richard Epstein in his book, *Takings: Private Property and the Power of Eminent Domain.* This argument alone would have been an interesting and plausible step in the evolution of law and economics. What made Epstein's argument radical was that he continued it by saying that many actions of the modern US federal government are merely disguised takings.

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[132] See Epstein's *Takings*, Chapters 2, 12-14. As of this writing, the US House of Representatives is considering legislation which, in effect, beefs up the takings clause to apply to zoning restrictions on uses which are not themselves takings.

In the farmer's case described above, assume that the town only needs to take 2/5 of the field. Under takings law, the town would normally have to compensate the farmer $400. But suppose the township zones out of existence $400 of the farmer's value (say, by decreeing that the farmer cannot let a condominium be built on his land), because some greater good would accrue to the town, in the belief of the zoning committee (freedom from eyesores, or achievement of a bucolic appearance, both of which would benefit the town through increased tourism). Epstein argued that in such a case the town has a similar duty to compensate and, if held to that standard, would be forced to pick and choose among political demands more carefully than they have in recent decades. It was this possibility that gave Senator Biden such trouble, as described earlier.

an illustration: private lands and wetlands

As Margaret Radin points out, too much discussion of property theory takes place against a background assumption of land being acquired or traded (in the tradition of Locke). In order to break up what is a fairly dry history, and because this is an essay on limited government, and because I have argued that property rights can be understood as checks on the coercive power of the state, I would like to amplify that contention by way of an example that concerns takings.

At the risk of becoming topical once again, I refer to the issue of wetlands in the United States, hoping to use it to show why one should occasionally consider real consequences of proposed rules, in

the context of modern situations, and check to see if these consequences are compatible with other political goals we think admirable. Wetlands are areas of land that the government has declared shall not be developed by their owners, and are an example, some argue, of a "regulatory taking." The Clean Water Act of 1972, which is the basis for current wetlands law, does not actually contain the word "wetlands", but instead mentions rivers and lakes. In 1975 a federal judge construed that act to apply to bodies of water that drained into rivers. The Environmental Protection Agency subsequently expanded its mission to include regulating the use of wetlands, under constitutional reasoning which became known as "the glancing geese test", and ran thus:

By Article 1 Section 8 of the constitution, Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes..." Migrating geese are "interstate waterfowl", and if as a goose flies it may notice a body of water and consider it as a possible resting place, then Congress has an interest in regulating the owner of that body of water, in the interests of regulating interstate commerce.[133]

The United States Army Corps of Engineers and the Environmental Protection Agency were the two federal agencies charged with policing the citizenry for the environment-crime of disturbing wetlands, a crime which, again, was not actually mentioned in the law which governed the matter. George Bush,

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[133] The interstate commerce clause has been used for noble purposes, but one wonders at the purpose of a constitution when it may be given such broad readings as to legitimize the glancing geese test. See James Bovard's excellent discussion of the wetlands issue in *Lost Rights: The Destruction of American Liberty*, pages 33-38.

campaigning for president and influenced by William Reilly (who would become his EPA administrator), made the famous promise that during his administration there would be "no net loss of wetlands." His election heralded a new campaign by the federal government. The glancing geese test originally had lead to the protection of bodies of water 20 feet by 20 feet; after Bush's election new rules were promulgated by the Corps of Engineers, rules which held that a wetland could be as dry as a bone 350 days of the year, and as small as a puddle when it *was* wet. Nevada, for example, has been called "The Great Wetlands State" because the Corps of Engineers has decreed that when a foundation is dug for a house, and water will stand there for seven days, that land is wetland.[134] Claimed Robert Pierce of the Corps of Engineers, the man who literally wrote the book determining what counted as a wetland:

> "Ecologically speaking, the term 'wetland' has no meaning ... for regulatory purposes, a wetland is whatever we decide it is."[135]

These developments were not purely legalistic or academic: they had consequences. One consequence was that the federal government more or less expropriated many billions of dollars worth of value throughout the country, by determining the use of land. As land often represents the savings of the elderly, it was often retired people lacking resources to challenge the EPA's determinations, or even understand them fully, who bore the brunt of these developments. Often confronting and challenging a wetlands takings

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[134] Representative Jim Hayes, from a Congressional Record of March 8, 1991, quoted in Bovard, *Lost Rights:*, page 35.
[135] Bovard, *Lost Rights*, page 34.

costs several hundred thousand dollars, and may take up to fifteen years.[136] During the Bush administration a number of stiff jail terms were given to retirees who attempted to build on land that they had set aside years previously, and to several families who dumped sand on lots they owned. In one 1989 Florida case Ocie Mills was sentenced to 21 months in prison for having his name on the title to a 1/4-acre field with a dry ditch into which his father dumped sand, although it was acknowledged that he did not participate in that crime.[137] In the last year of the Bush administration, a federal judge struck down the glancing geese test, but was overturned on appeal to the Seventh Circuit (ironically enough, Posner's court).

It is striking to note that, until this point, while people were being jailed, there was not actually a law mentioning wetlands. There was a Clean Water Act which did not mention wetlands, and two federal agencies who had expanded their jurisdictions with the help of aggressive readings from federal judges. Seeking to remedy this situation, in August of 1993 the new Clinton administration pushed Congress to amend "the Clean Water Act to make it consistent with the agencies' rulemaking." As James Bovard observes:

> "The White House proposed a simple solution to the problem [of overly-zealous enforcement beyond the written law]: 'Congress should amend the Clean Water Act to make it consistent with the agencies' rulemaking.' With this single sentence, the Clinton administration effectively sought to codify the nature of modern government: Congress as a tail being wagged by the federal bureaucracy. In earlier

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[136] *ibid.*, page 38.
[137] *ibid.*, page 35.

> eras, the statement that federal agencies were imposing burdens and restrictions on private landowners that were not justified by federal law would be a confession that the government was violating people's rights. But nowadays, it is simply a technicality requiring a few words from Congress to retroactively sanctify the actions of lawless bureaucrats."[138]

Bovard also remarks upon the fact that while some agencies such as the EPA are busy protecting wetlands, the US Department of Agriculture actively destroys them. His explanation of this apparent irrationality refers to a problem of public choice economics:

> "...a high-ranking USDA official, gave North Dakota farmers explicit permission in 1989 to drain 6500 acres of swampland in order to expand their crop acreage. While the EPA was busy sending people to prison for filling a quarter-acre of wetlands, USDA - by promising farmers lavish subsidies for future crops - effectively underwrote the destruction of thousands of acres of wetlands... Price supports and strict import quotas are the main reason why sugar is still produced in Florida - and sugar production is the main reason the Everglades are being poisoned, with the loss of thousands of acres of wetlands each year. But it is easier for politicians to send federal agencies on vendettas against landowners than to end the gravy train for selected campaign contributors."[139]

As I mentioned, and as Margaret Radin has pointed out, the background model within which property is too often discussed assumes, for example, that concepts like *occupatio* make sense with regard to modern property (e.g., Nozick and Waldron, discussed in the next chapter). These concepts seem artificial today. It is wise

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[138] *ibid.*, page 38.
[139] *ibid.*, page 38.

occasionally to check a theory against its practical implications, to examine the goals and values which are actually furthered by that theory. I have discussed the wetlands issue not only to dispel monotony, but because I wanted to illustrate the actual consequences, in the context of a modern situation, of the abandonment of a rule such as the takings clause. I suggest that these consequences are incompatible with a reasonable vision of an admirable State.

summary of the economic analysis of property

To summarize this section: the economic analysis of property rights suggests that privately held property rights generally convey the advantage of the efficient use of resources. The law and economics movement has been concerned to show that many principles of common law have in fact embodied abstruse principles of economic efficiency, and are not as arbitrary as they may appear. The takings clause of the US Constitution, repeating a tradition going back to William of Ockham, embodies just such a principle of economic rationality. Lastly, a modern dispute concerning private property and takings by the federal government was examined to illustrate how the enforcement of property rights may serve to check tyranny, and to illustrate a common way in which government failure, not market failure, may occur.

State-held property rights

Government can hold property rights in two ways. The first way is just as an agent in the economy like any other: the state owns cars, the military owns tanks, the federal government owns close to

a third of the land of the United States. The second way is not so obvious.

As was pointed out at the beginning of this chapter, property rights are really bundles of different options. At their most basic, however, and regardless of the type of good being described, these can be lumped into three categories: 1) options concerning the exclusive ability to decide how a good is *used*; 2) options concerning *access* to a good; 3) options concerning the sale or temporary *exchange* of any members of categories #1 and #2.

When the government regulates a natural person's property right, it *de facto* arrogates to itself some element of one of these sets. For example, if the state says that a certain good that I otherwise own may not be rented by me to another person on a certain set of otherwise mutually agreeable terms, the state has in fact taken control of one of the options of category #3, described above. When it enforces a rule concerning how a good may be used, it is in fact exercising one of the options from the first category above.

So the state can hold property rights in two ways. The first, as was said, is when the name of one of its agencies is on the title to a piece of land, or an automobile, etc. The second is through regulation such as price controls and zoning, for in such regulation the state is now exercising the options that heretofore (and "normally") were included in a conventional bundle of property rights.

There are good reasons for the government to hold property rights in resources. Such holdings can make society better-off. It

is also possible that they make society worse-off. The economic analysis of property rights attempts to distinguish the two cases. Specifically, there are two types of goods in which property rights are thought to be obvious candidates for government ownership (either partial or complete). These two types of goods are natural monopolies and hard-to-defend goods.

natural monopolies

The first type of good for which there is a strong argument for government-held property rights, is goods which are most easily distributed by a natural monopoly. The neoclassical analysis of monopolies, as was pointed out in the introduction to this work, maintains that monopolies move wealth from consumer to monopolist and, more importantly, impose a "deadweight loss" on society.[140] Artificial monopolies can be broken by trust-busting: busting a natural monopoly, however, imposes an inefficiency of a different sort on a society. A water company lays water mains through a neighborhood, or a telephone company, lines. Left to themselves they will charge monopolistic prices and cause deadweight loss. For the state to "bust" them in a conventional way and try to introduce competition, it would require that one or more additional pipes or lines must be run to each house. Surely this would result in grossly inefficient use of resources. Therefore, the state exercises some of the options grouped under heading #3 above, setting the good's price in a way which is supposed to provide a

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[140] In fact this analysis of monopolies has been challenged recently. See pages 38-39 of my introduction for a description of recent economic literature challenging the neoclassical critique of monopolies.

"fair" rate of return to the firm which invested the capital to distribute the good in question.[141]

hard-to-defend goods

The second type of good which is a natural candidate for state-ownership is that type of good which is difficult to defend. Remember that, for the economist, the "legal protection of property rights creates incentives to use resources efficiently," as Posner put it. It does so by reducing inefficient forms of competition for a resource and replacing them by efficient forms of competition (a field trades to the farmer who knows how to grow the most corn on it, rather than to the one who successfully runs-off his competition in an anarchic situation where no property rights are in effect).

Yet some resources cannot be defended efficiently if they are held privately. Air is one example. It might be possible, hypothetically, to grant every person a property right in the air over her land. Then when a factory emits sulfides and they drift over my home, and I breath them, I could file a trespass or nuisance action. There would be so much trouble deciding which factory had committed which trespass, however, and such a tangle of lawsuits would develop, that the state assumes the mantle of owner of (at least some) of the bundle of property rights for air. It then defends those rights through regulating the polluters and suing them when they do not heed those regulations.

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[141] Actually, though that is historically the most conventional way to regulate the price of a good distributed by a natural monopoly, it is not the only way. Recent years have seen intense debate on this issue among economists. One plausible alternate system is to regulate prices as a function of marginal costs. Perhaps this has gained ground due to the fact that the sunk costs of the great natural monopolies have amortized to 0 over the decades since they were made.

It is worth noting the trade-off here: this situation creates a classic public choice problem. The State's regulatory and policing functions are carried out by humans. A human may have a different goal than the organization in which she works. It is at least arguable that the State's goals may be achieved better by having the hard-to-defend-good in question be privately owned, and having that private owner be regulated or policed by the State, than through direct state ownership of the good. Adversarial relationships can be the most honest kind. The same argument may be made, *mutatis mutandis*, for water, research, defense, and so on: that is, for goods and bads the provision of which are bound up in externalities.

Some method of evaluating actual externalities from pseudo-externalities would be required to fully discriminate hard-to-defend goods which should be State-owned from those that should still be privately owned. Though this is a rich subject, it is, as I said in the introduction, an economist's tangent that I will not pursue further.

Common ownership of property rights

Communally-held property rights are the worst kind. Typically they exist in, or are advocated for, a group which is spiritually so tightly-bound that for a member to insist on enforceable property rights would be to stake a claim against one's fellows. In fact, to the extent that communal ownership of a resource is seriously proposed today, it is generally associated with a claim that it will generate (or its absence will forestall) the community *Volksgeist* which is a group's alleged principle.

the tragedy of the commons

The reason that communally-held property rights work so poorly is because of the problem known as the Tragedy of the Commons. This is the problem that occurs when everyone owns a resource: in the end, no one owns it, and so no one has an incentive to preserve it.[142]

There is an explanation for this. If a village is serviced by a forest, or a well, and that village is small enough that essentially everyone knows each other, and it is possible for villagers to monitor each other's use, then it is plausible that people in that village will say to themselves, "We own this forest/well." As the village grows, or if monitoring becomes less feasible, or if a transient population passes through, then perhaps those villagers come to think of the forest, or well, as owned by no one. Therefore there will be less incentive to preserve it. Furthermore, when there is a valuable resource owned by no one, and some people are helping themselves to it in a way that may exhaust it, then it becomes foolish *not* to join in its overuse.

One should note that the tragedy of the commons may not necessarily be prevented by artificial steps to restrain the psychological change described in the preceding paragraph. Even if it is possible to prop up the *Volksgeist* of a group, there may be other groups which do not share its *Volksgeist*, but do share some resources in common with that first group.

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[142] My thanks to Partha Dasgupta and John Dupré for our numerous discussions of this issue.

Garrett Hardin, the professor of human ecology who has done so much to analyze the tragedy of the commons, has discussed the example of a 1974 satellite photograph showing an enormous denuded patch in northern Africa.[143] Closer investigation revealed that it contained a patchwork of lush vegetation interrupted by areas of devastated soil. The lush parts proved to be fenced in and protected: in such private areas, farmers had incentives to let land lie fallow and to rotate grazing. Where land was not privately held, herdsmen of various tribes had dramatically overgrazed the soil. Each tribe, no doubt, knew that if it did not, another would. So even though a key element in the tragedy of the commons is the decision made by numerous individuals to free-ride, the tragedy of the commons can recur at higher and higher levels, even if the proper psychology can be instilled in individuals for their interactions.

SUMMARY: THE TELEOLOGICAL VIEW OF PROPERTY

Mill and economists in general argue that rights, and by extension, property rights, do not immediately reflect an individual's claim to be treated as a moral person (in the Kantian sense). Instead they name various social arrangements which are justified on the basis of the social outcomes they generate (these outcomes, in turn, might be said to be valued in a way that reflects respect for humans).

Property rights are best thought of as bundles of options: options about who gets access to a good, options about how that

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[143] See Garrett Hardin's *Managing the Commons* and his *Science* article "The Tragedy of the Commons". See also Dasgupta's *Well-Being and Destitution*, pages 208-209 and, especially, 290-294.

good is used, and options concerning the terms by which that good is conveyed to another. Unlike previous theorists, the economist does not ask: does a property right in this good exist? Instead she understands that property rights (in the sense of control of options) exist *somewhere*, and asks: how are the options concerning a good's use, access, and conveyance split up among private, state, and common agents?

Private ownership has the advantage of locating discretion closest to bearers of knowledge, and checks the authority of the State, but has the disadvantage of excluding most people from the use of that good. The State's control of a property right has the advantage of social determination of uses, and in the case of some goods, prevents free-riding on otherwise hard-to-police arrangements. The disadvantages of state ownership are that the loci of discretion are located with political agents who may not have the knowledge to choose the most socially desirable uses for these goods, and may not have the incentives to implement the best choices in any case. Common ownership of a property right is generally the worse possibility: in large and non-cohesive communities, or in cases where use is difficult to monitor and arrangements hard to enforce, the good is often overused.

History of Property: Summary

I have attempted to summarize the subsections of this chapter as I went along, so no lengthy summary should be necessary here. The point that I hope has evolved is that theories of property once focused on claims of men against fellow men, and attempted to

justify or deride them in that light. With the dawning of the realization that political leaders might not have total discretion in how they choose to arrange the affairs of those they rule, and that their discretion might be partial and that therefore institutions had to be constructed to check state authority, the concept of property as a check on tyranny came into its own.

Subsequent attacks on property in the Marxist tradition have not been attacks on property *per se*, but on the forms of property relationships which attend markets and capitalism. Other attacks, which pick up Kantian themes (as will be explained in the next chapter), are rooted in a conception of what it takes to be a full moral person, and are attended by claims that capitalist property relations tend to undermine that personhood.

The utilitarian tradition strips property rights (like all rights) of their "sacredness" or naturalness, but still by-and-large favors strong property rights as most conducive to generating utility, and has left deep questions of "moral personhood" alone. I discussed the economic view of property in relation to wetland regulation in the United States, to show how the state becomes unfettered by certain interpretations of property rights. Lastly, I discussed and defended the economists point of view that to ask, "Should there be a property right in this good?" is the wrong question; the right question is always, "How should the rights of use, access, and conveyance in this good be distributed among private, State, and common ownership?"

I turn now to two recent answers that have been given to that question.

CHAPTER 5

TWO MODERN THEORIES OF PROPERTY CONSIDERED

This chapter critiques Jeremy Waldron's and Margaret Jane Radin's theories of property. Though I raise different arguments against them, my conclusions are similar. Neither of their theories respects the economic analysis of property discussed in the last chapter, and both theories rely too heavily on Hegelian moral visions which do not satisfy the principle of legitimacy.

This chapter addresses two analyses of property published during the last decade: Jeremy Waldron's *The Right to Private Property*, and Margaret Jane Radin's *Reinterpreting Property.*

I have chosen three steps in Waldron's argument to dispute:

1. Waldron's criticism of Locke's principle of acquisition;
2. his objection to *all* Principles of Just Acquisition;
3. his argument for a general right to property in the Hegelian tradition (but for a stronger such right than Hegel demanded).

The structure of this first section is a short overview of Waldron's theory, then a detailed presentation of the first stage in his argument followed by my response to it, then the second argument followed by my response to it, etc.

Margaret Radin's argument is grounded as much in law and the reasoning of actual courts as in philosophy. Much of her discussion, for example, concerns the subjects of takings and rent control laws. Therefore my critique of her argument is less purely philosophical. The structure of that second section is a lengthy synopsis of her argument, followed by a lengthier critique of it. I argue that one of her core principles is badly argued, and that she has made false empirical generalizations in order to make her argument more palatable.

I. WALDRON

> Every person enjoys property rights, including the right to own, use and dispose of property, both individually and jointly with other individuals. Ownership rights are guaranteed by law. The inalienable right to own property guarantees personal individual interests and freedoms."
>
> - 1991 Russian Constitution

> "... for decades social critics in the United States and throughout the Western world have complained that 'property' rights too often take precedence over 'human' rights, with the result that people are treated unequally and have unequal opportunities. Inequality exists in any society. But the purported conflict between property rights and human rights is a mirage - property rights are human rights.
>
> - Armen A. Alchian[1]

> "The slogan that property is a human right can be deployed only disingenuously to legitimize the massive inequality that we find in modern capitalist countries."
>
> - Jeremy Waldron[2]

In his 1988 work *The Right to Private Property*, Jeremy Waldron argues for a theory of property which draws elements from Locke and Hegel. From the Lockean tradition Waldron rejects all but a general "right of subsistence" (i.e., a right to obtain from the surplus stocks of others enough of the necessities of life to survive). From the Hegelian tradition Waldron draws a right to enough property to support each individual's ethical development as a person. I criticize his attack on Locke and his support for Hegel.

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[1] Alchian's entry on "Property" in Henderson's *The Fortune Encyclopedia of Economics*, page 69.

[2] Waldron, *The Right to Private Property*, page 5.

A. Overview of Waldron's Argument

I will briefly summarize Waldron's argument.

In the opening of the last chapter I described Waldron's taxonomy of property theories. Waldron, it will be remembered, follows the traditional philosophical distinction between deontological and teleological theories in his analysis of property. He does this by distinguishing between theories which maintain that property rights name strong interests deserving defense, from those theories which maintain that property rights should be judged in light of the social consequences they bring into existence. Waldron divided the former deontological theories into those which are "Special Rights Theories" and those which are "General Rights Theories". SR-theories assert that while everyone may be capable of developing a property right, the actual possession of property demands some special act on an agent's part (i.e., an acquisition or transaction which meets a specific description). GR-theories assert that ownership is a prerequisite of full human development. Locke's theory of property is an example of the former, while Hegel's theory is an example of the latter.

Waldron correctly ascribes to Locke a belief in a universal right to subsistence. As was discussed in last chapter's on Locke, and specifically the sub-section "Lockean Property is not Absolutist," this Lockean subsistence-right[3] covers that set of basic goods which all people need in order to exist. Yet Waldron claims that the labor theory upon which Locke's principle of just

[3] I discussed this general right to subsistence with reference to a passage from Locke, *First Treatise*, Section 42, page 170

acquisition rests is an incoherent theory, and claims that this incoherence undermines Locke's principle of acquisition. Waldron goes one step further, arguing that not just Locke's, but *any* Principle of Just Acquisition, no matter its content, is untenable.

Waldron then distills from Hegel the proposition that "everyone must have property," because property is nearly a necessary condition of, and contributes immensely to, the ethical development of persons. "We cannot argue, on the one hand, that property-owning is necessary for ethical development, and then, on the other hand, affect unconcern about the moral and material plight of those who have nothing."[4]

Noting that there may be internal tension in the claim "everyone must have property" (for such a claim seems to demand the very redistribution of property that property rights seemingly enjoin), Waldron argues that there is nothing intrinsically self-contradictory about advocating universal property rights, in this case limited so that everyone may have a meaningful amount of some property. In fact, as he points out, this Hegelian principle "can ride in on the back of the [Lockean] general right to welfare, which has to be conceded on any account."[5]

B. Three Links in Waldron's Argument

This section will rebut three key steps of Waldron's argument: that Locke's labor theory of acquisition is incoherent, that any and all Principles of Justice in Acquisition are untenable, and that it has

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[4] Waldron, *The Right to Private Property*, pages 3-4.
[5] *ibid.*, page 5.

"to be conceded on any account" that there exist general rights not only to subsistence but also to actual property-ownership.

1. LOCKE'S LABOR THEORY OF ACQUISITION

The acquisition problem

Locke's theory of acquisition was discussed earlier. Setting aside the issue of the Lockean Proviso[6] (in which Waldron puts little weight in any case), Locke's theory faces several objections from Waldron. Following Pufendorf, he notes the troubling fact that, if Locke is correct, when I make a Lockean acquisition I may reduce the stock left for others, and generate obligations in them towards me (to leave my property alone), by a unilateral decision on my part to which no one else consents.

Suppose for example that I decide to cultivate a piece of land that was previously unowned. I consult no one: I do it, and then notify my neighbors. They now have an obligation to refrain from using that land, crossing it, and gathering the wild fruit on it. I have imposed these obligations on them unilaterally. Waldron notes Pufendorf's concern that "a bare corporal Act ... should be able to prejudice the right and power of others" without their assent.[7]

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[6] The Lockean Proviso was a background claim against which Locke developed his theory of just acquisition. It holds that the steps which one undertakes to acquire property must leave "enough and as good left in common for others" to acquire as well. This is notoriously tricky, because it seems to unravel all chains of acquisitions of finite properties. See Locke, *Second Treatise*, Sections 27 and 34, and particularly Nozick's discussion of the proviso in *Anarchy, State, and Utopia*, pages 178-182, along with my discussion of this in Chapter 4.

[7] Pufendorf, *Of the Law of Nature*, Book IV, Chapter iv, section 5 (page 322), quoted in Waldron, *The Right to Private Property*, page 176.

Review: Locke's labor theory

The answer lies in Locke's labor theory of acquisition: the situation described above may be justified by saying that a special relationship comes to exist between the laborer and the improved resource. As was explained in the preceding history of property theory, this is the theory of labor first put forth by Aquinas: that by "mixing one's labor" with some previously unowned thing, one takes possession of it. Earlier I contrasted this theory of appropriation with the principles of *occupatio* advanced by Ireton and Grotius, which required mere formal statements of occupation. Locke's argument in support of a labor-based theory of acquisition is an argument from self-ownership: a man owns himself (or at least that part of himself not owned by God), and at least "his Body, and the *Work* of his Hands". Therefore that which "he hath mixed his labor with"[8] becomes his as well. Locke's theory of acquisition rests on the solidity of this labor theory of appropriation.

The critique of Locke's theory of acquisition

Waldron's first criticism: coherence

Waldron argues that this labor theory of appropriation is incoherent because the notion of "mixing one's labor" with something is incoherent. Consider the sentences:

(P) Individual A mixes his labor with object O.
(Q) The cook mixes the egg with the milk.

These sentences look similar and meaningful, yet the meaningfulness of (P) is only apparent, says Waldron. With (Q),

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[8] Locke, *Second Treatise*, Chapter 5 (pages 287-288), quoted previously.

there are three objects (the cook, the egg, the milk), and one action (mixing). The action (mixing) is not identical to any of the objects named (cook, egg, milk). In (P), there would also seem to be three objects (individual A, his labor, and object O), and one action (again, mixing): yet here the action (mixing) is identical with one of the objects (laboring). That is, the mixing itself happens not only at the time of the labor, but actually *is* the labor. As Waldron says:

> "The situation lacks the requisite plurality... So instead of the four distinct entities we had in the straightforward case of (Q), we have now at most only three... The phrase 'mixing one's labor' is shown to have the logical form of 'mixing one's mixing". And that just seems defective."[9]

Waldron denies that there is a way out of this by proposing alternative interpretations of P, or arguing that it is rhetorical or metaphorical. A non-literal interpretation of P would prevent labor from playing the role in Locke's theory demanded of it. And any other interpretation, argues Waldron, will retain this deficiency. "Just as we do not ordinarily talk of *mixing* actions with objects, so we do not ordinarily talk of *joining* or *annexing* them to objects, and my criticism explains why."[10]

response to Waldron's first criticism

Waldron's criticism is specious. It is not stated why the plurality is "requisite", and that a sentence of the form of (P) is only

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[9] Waldron, *The Right to Private Property*, page 186.
[10] *ibid.*, page 187.

meaningful if its parts can be mapped on to (Q). Consider the case where I go outside holding a pail of milk. It begins to rain, and I say:

(R) It is raining in the milk.

At first glance, this would appear to have only *two* things in it: one of them is an object (milk), and one of them is an action (the action of raining). And yet it is a coherent sentence. Suppose that I am pushed to name what it is that is raining in the milk. I say:

(R') It is raining rain in the milk.

This is an unusual sentence, like (P), but perfectly meaningful. And yet, like (P), it has two objects and one action, and also like (P), one of the objects (rain) is identical with the action (raining). *Raining* does not exist without *rain* in the same way that *mixing* does not exist without *labor* in a Lockean acquisition. (R') is a strange sentence, as (P) is a strange sentence, but this does not mean it is not well-formed. Furthermore, this line of attack is an especially odd one for Waldron to take, given his later defense of labor theories of value versus labor theories of acquisition

Waldron: Denies labor theories of acquisition but accepts labor theories of value

Waldron defends the intelligibility of the Marxist claim that:

> "certain products take on the character of capital, they confront the workers as 'dead labor' oppressing and alienating that of the living."

He suggests that this proposition "can be expressed without recourse to the incoherent idea that objects contain labor in any literal sense."[11] On one reading of Marx this is implausible: a straightforward reading of the claim that capital goods are "accrued

[11] *ibid.*, page 194.

labor" would hold that objects may "store up" labor in a way reminiscent of the way labor is "mixed into" objects in the Lockean account. But perhaps this reading of Marx is too naive: how else might a Marxist propound a labor theory of value without maintaining that capital goods "contain labor in any literal sense"? One may defend the Marxist view by saying that capital is "accrued labor" in a metaphorical and non-physical sense, and that the claim in question is a claim concerning a capital good's origin in the previously alienated labor of a worker.

One cannot accept labor theories of value while denying labor theories of acquisition (on Waldron's grounds)

It is inconsistent for Waldron to deny the coherence of Locke's vision of labor being "mixed" with an object yet to support Marx's view of capital as "accrued" labor. If Waldron's interpretation of Marx's labor theory is allowed, it opens an avenue for Lockeans: one could maintain that his concept of "mixing one's labor" is not meant to be understood as a physical imputation of some new thing into some old thing. Rather, it is to be understood as a claim about the history of that thing: it once had this use, and as a result of someone laboring on it, it now has some other use.

The odd connection between Nozickean (and by extension, Lockean) property theories and Marxist ones has been explored in G. A. Cohen's "Marxism and Contemporary Political Philosophy, or: Why Nozick Exercises some Marxists more than he does any Egalitarian Liberals". Cohen's argument is that Marxist assertions about exploitation in capital-labor relations only make sense against a background assumption of self-ownership; Nozick's libertarianism is

grounded on an unargued but intuitionist appeal to a principle of self-ownership; theorists of the liberal welfare state do not take self-ownership seriously. Therefore the center can dismiss Nozick in a way that the Left cannot.[12]

The link which Cohen noted between the Nozickean and Marxist views I believe undermines this aspect of Waldron's argument. As I have tried to explain above, Waldron cannot deny the meaningfulness

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[12] It is worth noting that in his *Critique of the Gotha Program*, Marx rejected the theory of value as embodied labor. He writes there that:

1) "Labour is *not the source* of all wealth. *Nature* is just as much the source of use values... as labour, which is itself only the manifestation of a force of nature, human labor power" (*CGP*, page 525).

Furthermore, he seemingly rejects self-ownership, writing:

2) "Within the co-operative society based on common ownership of the means of production,...in contrast to capitalist society, individual labour no longer exists in an indirect fashion but directly as a component part of the total labour" (*CGP* page 529).

Of course, forests have been denuded to provide the paper for discussions of what Marx *really* maintained. Given his voluminous writings, quotes taken out of context can be adduced as evidence to support a wide range of positions (a similar fate befell Mao after his death and the ouster of the Gang of Four: every new policy of Deng's was introduced with a quote from on of Mao's 30,000 pages of publish writings, proving that the new policy was anticipated by the Great Helmsman). For example, Marx writes:

3) "But what is the growth of productive capital? Growth of the power of accumulated labor over living labor" (*Wage Labor and Capital*, page 210).

Elsewhere he refers to wage-labor as "wage-slavery."

In quote #1 (two paragraphs above), it is not clear how much Marx is arguing that labor cannot be seen as the sole creator of wealth because there is another such creator (nature), or that because labor is *part* of nature it cannot be seen to be a sole creator. Furthermore, it is not clear how quote #1, taken from a May 1875 work, is consistent with #3, taken from a December 1847 work (such life-long consistency would be remarkable). So I will set aside the consistency problem.

One way to make sense of this is to suggest that Marx believed that past capital-labor relations were exploitative (thereby implying the principle of self-ownership that Cohen suggests), but when he considered future society with shared ownership of the means of production, he did not consider society-labor relations as exploitative. This would account for how a principle of self-ownership seems implied by his discussion of the present and past, but drops out of his discussion of the future.

Lastly, I will note that the text to which this footnote refers concerns G. A. Cohen, an "analytical Marxist" (in his words), and how *he* reads Marx. I am commenting on that.

So in short, the theory I have attributed to Marx above seems to conflict with statements he made in *Critique of the Gotha Program*. I am responding that there may not be real conflict (if discussion is limited to capitalist society), that if it exists the conflict is not big, that such conflicts are to be expected in the work of any prolific writer, and lastly, that it is not *my* problem, it is Cohen's and Waldron's problem.

of Locke's "mixed labor" while defending the Marxist view of capital and alienated labor.

Waldron's second criticism of Lockean acquisition
Waldron takes up Nozick's criticism

Waldron's defense of Nozick's criticism of the Lockean theory of acquisition is more compelling. Nozick seemingly accepts the coherency of "mixing one's labor" with something, but questions its relevance. He points out that Locke assumed that in mixing what one owns with what one does not own,

> "Ownership seeps over into the rest. But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it into the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?"[13]

Though better than the other attack on the coherency of "mixing labor," this is not a compelling argument. If I walk along the quay and purposefully jump to catch a drop of sea spray in my can of tomato juice, assuming that sea is commonly owned, is my can of tomato juice (with a drop of common sea water whose molecules evenly dissipate within it) now public property? If not, this shows that the Lockean concept of ownership gained through mixing, if it is coherent, does not fall to Nozick's criticism. Perhaps it merely

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[13] Nozick, *Anarchy, State, and Utopia*, pages 174-175, quoted partially in Waldron, *The Right to Private Property*, page 189.

needs some proviso about the proportions which go into a mixture to define when ownership is gained via mixing and when it is lost.[14]

Waldron refines Nozick's criticism

Waldron endorses Nozick's criticism of Locke's idea that the entire value of the worked-on object has been appropriated, and not the added-value. He is, however, critical of the alternative theory of appropriation proposed by Nozick, one which holds that appropriation is legitimate when it does not leave other people worse off. In the end, Waldron proposes this alternative theory of appropriation:

> "What I have in mind as an alternative is that the appropriator should acquire a substantial interest in the object he has worked on, roughly proportionate in some sense to the labour he has expended on it, but that this should not be deemed to exclude altogether the common rights of other men.... It may be objected that this sort of sophisticated discrimination between greater and lesser property interests is possible only in a positive legal system... But even if this point were valid, it would establish at most that the full and exclusive entitlements acquired by appropriation in the state of nature were to be viewed as provisional."[15]

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[14] Debra Satz points out to me another serious objection to Locke's "mixing theory." A servant mixes his labor with an object but gains no right to it: if Locke's argument were metaphysically sound, this would be impossible.

This objection resembles the trading objection discussed several pages hence: if mixing labor is so important to acquiring ownership, how can I buy something and have as strong a right to it (having mixed none of my labor in it) as had the person who appropriated it first? The servant case can be seen as a special case of this latter problem: the servant is in an ongoing trading relationship with his boss, mixing his labor in things and continually handing them over to his boss in exchange for salary. Therefore I defer discussion of the servant example to the more general discussion of the trading problem.

[15] Waldron, *The Right to Private Property*, pages 190-191.

response to Waldron's second criticism

There is definitely a sense in which property rights may be viewed as provisional, but it makes little sense to view property rights in the provisional sense Waldron proposes. There is an asymmetry between property rights and most other rights in this regard. It is the non-provisional nature of a property right (in this sense) that makes it valuable. Unlike some other rights, such as the right to free speech, the value of property rights is derived in a large part from their intertemporality. A right to free speech, on the other hand, has value today even if the right will not be in effect next year (although of course we may hope it is).

Assume, for example, that I and my colleagues assemble and petition the government for a redress of some grievance (say, a housing policy). Suppose we know that the right to assemble and petition will expire in one year (e.g., the front-running candidate for the next national election has made a plank of his party's platform the promise to undermine such constitutional guarantees). This will not make our ability to assemble and petition *today* significantly less valuable. The intertemporal provisionality of a right such as free speech does not in general undermine its value to the people who want to exercise it during times it does exist.

This may be a little obscure, so I will expand. Suppose that the government wants to pursue some policy to which I am opposed: it announces a decision to open a minimum-security prison for pederasts next to my child's kindergarten. If citizens have the right of assembly and free-speech, then this right has value to me today because I can meet with other parents and organize a protest to

block the government's plans. Even if the government decides today that, for some strange reason, this first amendment privilege is going to be revoked three years from now, its value to me now remains roughly constant. On the other hand, if the government decides today that three years from now my land is to be converted into a minimum-security prison for pederasts and I will lose all property rights in it, then I have suffered a diminution in the value of that right *today*: for example, I am going to get less money if I try to sell it, and I have lost the opportunity to improve it and plant asparagus on it, etc.

Property rights do not work the same way. If they guarantee something, that guarantee is intertemporal or it means little. The whole *point* of the property right is to assure the farmer improving his land, or the drug company when it directs its research staff to pursue some project, that the rewards which will come into existence from their efforts will accrue to them for some definite period of time. It is not important that this period be infinite, but it is important that it be definite (or provisional in a limited way, to be addressed shortly). A property right is increasingly nugatory the more "provisional" it is, in Waldron's sense, in a way that other rights are not. Therefore, it makes little sense to suggest that property rights be "provisional" in Waldron's sense, because property rights only have value by being non-provisional in this sense.

In response, it may be argued that this is an unnecessarily absolutist interpretation of property. Waldron earlier correctly defended provisionality by noting that property rights are commonly

and justly limited by law in many ways (as was discussed at length in Chapter 4). Yet those limits are of a different nature than the one he suggests here: such limits typically strip off from the bundle of property rights which attach to an object some small number of them, and put these in the hands of the state. For example, I may have legal title to an apartment, but in passing rent-control laws the state arrogates to itself one of the property rights that would otherwise go with that apartment, the right to decide the terms of its conveyance. It is a different thing altogether to leave some right in an individual's hands, but call it provisional. It is not the case that the law *never* does that (see the earlier discussion of takings: what is a taking but the assertion that a property right is only provisional?), yet the law is loath to do so, and in the Anglo-American tradition since Ockham, demands compensation to the rights-holder whose right turns out to be "provisional". Such compensation is just what Waldron is disputing: by claiming that even the limited property rights reflecting the "rough proportion" of one's labor in an object are provisional rights, he means that they are flimsy: "They could not operate as moral constraints on the activity of a ... civil society determined to strike retrospectively ... a fairer balance between the legitimate claims of the appropriator and those of the rest of mankind."[16] This is quite a different sense of the provisionality of a property right than the type of restrictions on property rights to which Waldron made earlier analogy.

Note that nothing I have said commits me to an absolutist theory of property. It is still possible for property rights to be

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[16] *ibid.*, pages 191.

provisional in some sense, but, I think, not in Waldron's. The sense in which they may be provisional and still not open to these criticisms I have made of Waldron is a subject taken up after discussion of his general right to subsistence.

2. PRINCIPLES OF JUST ACQUISITION

Waldron provides a lengthy infrastructure to support two criticisms he makes of Principles of Just Acquisition. The initial part of this section summarizes that infrastructure, while the following two parts explain and attack his criticisms.

Waldron's criticisms of historical entitlements

Not content with merely criticizing Locke's theory of property, Waldron devotes a subsequent chapter to an argument that all historical theory of entitlements are untenable. The opponent he chooses for his battle is Nozick, finding in Nozick's work just the sort of abstract theory lacking in detail that makes an attack on Nozick stand for an attack on any theory of the same school.

Waldron's attack on Nozick is in fact an attack on the school of Special-Rights based theories of property (hereinafter, "SR-theories"), described earlier. This is so because historical entitlement theories must tell some story of the history which generates a property right over some particular good, for some person and not others. This story refers to "the performance of particular actions or transactions"[17] that some people did and others did not. It will therefore be an SR theory. And of this school, Nozick's theory is a perfect foil for Waldron, he claims:

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[17] *ibid.*, pages 254.

> "...the fact that Nozick's theory is at the same time uncompromising and insubstantial is ideal. For it means, we can concentrate our attention *on the idea of an SR-based argument for property* without being distracted by any considerations of content. We can see in a stark and exposed form what sort of position the SR-based defender of private property is arguing towards, and what the difficulties of that sort of position are."[18]

A historical entitlement theory looks to distributions of goods and does not ask whether that distribution is equitable or unseemly, and it does not ask if the distribution matches the distribution of some other thing such as moral worth or ability.[19] Instead it looks to the history which generated that distribution, and judges that history against some set of principles.

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[18] *ibid.*, pages 256.

[19] See Nozick, *Anarchy, State, and Utopia*, pages 206-209, for an interesting paradox he puts to Rawls. Rawls' theory, as is described in Appendix A, describes a social contract setting from which principles of justice are to be derived, a setting of "pure procedural justice." "Pure procedural justice" names those games where the outcome of the game is by definition just: there is no external standard of justice to which to appeal. Poker and chess games are examples of pure procedural justice: if people play, and follow all the rules, then the outcome is the just outcome, period (compare this with, for example, a trial's outcome, which one may reasonably argue is just or unjust). Rawls' original position spits out a set of principles, and by his argument they are necessarily just: one must accept them as is (albeit with the tweaking supplied by reflective equilibrium, described in Appendix A).

The outcome of Rawls' game is a set of principles which cover, in part, distributions of certain goods. Therefore they maintain in principle that some outcomes, some distributions of goods, are unjust, and have to be adjusted to be in conformity with principle. Nozick's point here is to ask, why not have a set of rules of appropriation and exchange of goods, like the rules of a poker or chess game, and then view as just whatever outcomes arrive? This would also be an example of pure procedural justice, but one where the outcomes concerned are distributions of goods rather than (in Rawls' case) *rules* which govern the distribution of goods.

The question Nozick is putting to Rawls, therefore, is this: how can a contract theory (such as Rawls') which rests on pure procedural justice as a way of generating principles simultaneously rule out as unjust the use of pure procedural justice as a way of generating distributions?

In general, the structure of such a theory will be found in three parts. The first is a principle of justice in acquisition ("PJA"); the second is a principle of justice in transfer ("PJT"); the third is a proposition that something is held justly if and only if it was gotten through recursive applications of the PJA and PJT. The point of Waldron's argument is to say that in a social contract bargaining situation, properly constructed, no one would agree to any PJA.

As Waldron correctly points out,

> "Nozick does not tell us what his favored PJA is; that is, he does not himself embark on the task of specifying which procedures for acquiring control over resources from their natural state are just and unjust."[20]

As was mentioned earlier, Nozick criticized Locke's labor theory of appropriation, but only hinted at an alternate (that one can take as long as one does not leave others worse-off by doing so). Nozick is clearly committed to some PJA, however. And this commitment is what Waldron questions.

What does it take to be committed to a PJA? One troublesome aspect of such a commitment is that, unlike a PJT, we moderns have little direct experience with acquisitions, the bulk of the world having been appropriated long ago. We have experience with transfers, but generally not with acquisitions: therefore, says Waldron, "considerations of justice in acquisition are bound to be obscure and recondite."[21] Furthermore, commitment to a theory with this structure entails further, non-obvious, commitments: for

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[20] Waldron, *The Right to Private Property*, pages 257.
[21] *ibid.*, pages 258.

example, the PJA must have some explanation as to why an individual, by performing the act required of her by the PJA, now has some special claim on that resource, a moral claim that others should respect. It involves a commitment to the belief that even if a person acquires a thing through the PJA, and some moral claim *does* bind that object and that person together, why that claim does not get weakened when ownership is transferred. For example, if we say that "mixing one's labor" is so important that it can bind an object to a person morally, then when that object is transferred to another who mixed no labor with it, does it not follow that this second person lacks precisely the special relationship with that object which the PJA claims is vital in establishing ownership?

Waldron narrows his focus to include just PJA's. All PJA's must have the following form, he notes:

> "For all *x* and for all *r*, if *x* does A with respect to *r*, then for all other individuals *y*, *x* acquires a right that y refrain from using *r*."[22]

Of this Waldron writes, "This is the *form* of a PJA. To specify a particular PJA is to indicate the range of '*r*' and the act-description which is to replace 'A'."[23]

Waldron claims that two arguments may be raised against any principle of the form given. The first is that principles of this form are ethically "unfamiliar and repugnant"; the second is that no such principle could flow from a contractarian argument. It is on these two points that Waldron's criticism of PJA's stands or falls.

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[22] *ibid.*, pages 265.
[23] *ibid.*, pages 263.

On the unfamiliarity and repugnancy of PJA's
do PJA's entail onerous claims?

Waldron thinks that PJA's are unfamiliar and repugnant because they constrain the lives of people so terribly, and yet there are no other moral duties which resemble them. They constrain people because, as they generate rights, they generate duties in others (on the correlation of rights to duties, see Chapter 2):

> "the obligations correlative to property rights *are* onerous. They concern our access to and use of resources which are scarce... And these demands are urgent because, in many cases, the use of material resources is a matter of life or death. So what we are being asked to accept, when a PJA is put forward, is this: that there are actions which individuals can perform whose moral effect is to place millions of others under obligations whose discharge may require them to place their own survival in jeopardy."[24]

Yet the issue of the onerousness of property rights is uncertain, as Waldron has himself insisted. He has elsewhere in the same book argued that Locke's theory of property, the grandfather of all PJA theories, is itself stated against a background and general right to subsistence, as was discussed above. Therefore the statement that PJA's license actions which put "millions of others under obligations ... to place their own survival in jeopardy" is mere melodrama. Waldron *knows* that this is not necessarily the case, because elsewhere he *insisted* on it regarding Locke's PJA.

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[24] *ibid.*, page 267.

The claim that PJA's generate duties which resemble no other moral obligations is more telling. It is the case that there are some rights and duties which are artificial (meaning they are consciously generated). Waldron argues that these are duties such as those generated by promises: in their case, the duty falls on the person undertaking the action, and is not imposed by that person on another. In the case of PJA's, however, my acquisition of a resource generates duties for others. Can we find any duty which has the characteristics of a PJA? That is, a duty with these characteristics:

> "(1) The duty is owed to and benefits some individual *x*;
> (2) the duty comes into existence as a result of some action *a* by *x*;
> (3) discharging the duty may be dangerous or morally embarrassing to those who have it; ...
> (4) those who have the duty have not consented to being put in that position.
> (5) the action *a* is performed by *x* with the intention of imposing the duty described in (1)-(4)."[25]

The only similar duties which come to mind are those to aid people in dangerous plights, and generally these situations only match features (1)-(4) above. If a person knowingly puts himself in a situation matching all of the above features, such as in a "cry for help" suicide, there seems less and less reason to jeopardize one's own position in order to rescue the unfortunate (implies Waldron). Because we can find no other duty like that generated by the PJA and

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[25] *ibid.*, pages 269.

which maintains a strong grip on our moral imagination, we should be extremely suspect of PJA's. Waldron concludes:

> "I think I have done enough to show that the inclusion of a PJA in our morality is not to be taken for granted or regarded as in any sense self-evident. Because it is so unfamiliar, we should not be surprised if people refuse to 'see' it."

One may interpret this as a *prima facie* objection only and, as is the case with all such objections, one must question how hard one wishes to work to respond to it. By not responding, is one admitting agreement? I will respond to this *prima facie* objection of Waldron's, because he took the trouble to make it, and because I perceive it as slightly odd, for two reasons.

The first is trivial: just as Waldron does not "see" the duties generated by PJA's, I do not "see" why it is crucial that the way one type of duty is generated must resemble the way other classes of duties are generated. For example, if Waldron is right about PJA's, then there *is* a set of duties which resembles none others: those which adhere to promises of various sorts. These have the feature of being obligations spontaneously generated and voluntarily assumed, and on Waldron's own account they seem to be unique (if PJA-duties are spurious, as he thinks). If Waldron's critique of all PJA-duties is correct in that they resemble no other known duties except promises, then if one rejects PJA's, then promises would become a class of duties which no other duties resemble, and hence a class which should be rejected.

I would not push this argument too hard, because promises bear one crucial distinction from PJA-duties: the duties generated

be a promise fall on the initiator of the action, not others. But this aspect of Waldron's case was made by two points, the first being the uniqueness of PJA-duties, the second being the lack of consent from those upon whom those duties fall: the first of these points is not terribly strong, because a derivative implication of Waldron's ultimate assertion (that PJA-duties are spurious) is that *promissory* duties would then stand alone. Clearly he is unwilling to call these duties repugnant and unfamiliar as well.

The second argument against Waldron's claim (that a duty meeting conditions (1)-(5) listed above would be an unfamiliar and spurious duty) is that throughout the first half of *The Right to Private Property*, as well as in his conclusion, Waldron himself insists on the existence of such a duty: the Lockean general right of subsistence, against which all other Lockean claims are supposed to be interpreted.

The subject of altruism was taken up at the end of Chapter 3. Yet I will sketch this problem here. Consider a man who lives in a college town which (perhaps because of its "progressive" social programs?) has a large homeless population. This man is a philosopher and a man of good will (and is in fact, a good British socialist): he often gives money to the people who approach him on the street and ask him for help. Eventually he recognizes the same faces on the same street corners, and some of those faces belong to young, seemingly able-bodied males, often with educated middle-class accents. He begins to suspect that his donations are taken for granted by some people, people who have made panhandling a

profession from their own choice, for whatever freedom it affords them. Suspecting that he has become a mark of sorts, and after seeing some of the same people using the same approaches for several years, the man decides that in the future he will give money only to people who have some obvious problem that keeps them in dire straights (or at least he will give no more money to people who obviously do not have any reason to be in dire straights, but for their own decisions). Suppose further that this man has a surplus above his necessities that he could give away and furthermore, that he learns with certainty that some one of the panhandlers has chosen to keep himself in his wretched state (assume the homeless man confesses it about himself).

In respect to the case described above, the Lockean general right of subsistence, as Waldron reads it, would imply that the socialist has a duty to give from his surplus even to one who has willfully put himself in such a situation. It might also be read that the government has a duty to provide for that man, by drawing on the social surplus of citizens, including that of the socialist, but for simplicity I discuss the case of direct donations only.

Now I am decidedly not appealing to any intuition that says this case is common, and I am also not appealing to any intuition that says the socialist in the situation described may *not* have a duty to aid his perpetual accoster. My point is that Waldron's interpretation of the Lockean general right to subsistence, a right which he subsumes into his grand scheme (it is "on the back" of this right that the Hegelian right to enough property to accomplish one's ethical development rides in, as Waldron put it), is precisely that

analogous right Waldron says does not exist. That is to say, if in one spot Waldron asserts the existence of a subsistence-right for that homeless person who has purposely put himself in his situation (by hypothesis), then this situation matches in every detail that described by the conditions (1)-(5) given above (in order to match (3), assume the socialist has some other moral duties, say to his children, but which do not rise to the level of true needs, so the Lockean right to subsistence still has grip).

In short, applying Waldron's subsistence right to the facts of this example, we would be led to the conclusion that the homeless person is (1) "owed ... benefits" (2) "as a result of some action" by that homeless man, when (3) "discharging the duty may be ... morally embarrassing" to the British socialist or other people who have it, people who (4) "have not consented to be put in that position," while (5) the homeless man's self-immiseration is "performed with the intention of imposing the duty" described above.

Thus, Waldron has spent nearly half his book arguing for the existence of a right-duty pair which is capable of displaying the features for which he later dismisses PJA-duties as repugnant.

Can PJA's flow out of contractarian theories?

Waldron insists that no parties to the original position would choose a PJA

> "One of the functions of political philosophy is to show how (or whether) political and legal arrangements which are on the face of them coercive can nevertheless be reconciled with the

> principle of the autonomy of the individual moral agent." - Jeremy Waldron (pages 271-272)

The above quote, repeating a then-recent theme of Rawls', stands as a challenge to the proponent of a PJA. As Waldron points out, contractarianism has both positive and negative procedures. One can, like Rawls, argue that a certain set of principles flows out of a properly constructed initial contract setting; on the other hand, on can more easily argue against a principle by maintaining that it would never be chosen by the inhabitants of such a bargaining situation. Waldron makes such an argument with respect to abstract PJA's: they could not win support within a Rawlsian original position.[26]

Waldron's argument runs as follows. Consider the debate of the parties[27] in the original position: the subject of a PJA arises. Maybe it is a PJA without content: they wish merely to consider the *idea* of a PJA, and decide if it is a principle they could agree on. They would be aware of a number of points:

> "that a PJA puts individuals in a position unilaterally to impose far-reaching, dangerous, and morally embarrassing obligations on other people- obligations [which]... may imperil their survival... They would be aware that ... duties might be imposed without regard to their social distribution. ...everyone would have a motive to perform the

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[26] An exegesis of basic Rawlsianism and the workings of the original position is provided in Appendix A.

[27] This formulation is artificial, because the original position may be thought of as holding only one person. In this case, the "debate" referred to is that agent's internal debate. As a heuristic device, however, it is convenient to speak of "the parties in the original position," as Rawls himself does (cf. *A Theory of Justice*, page 19). Strictly speaking, however, those agents are indistinguishable, so one can run the thought experiment as easily with one party as one can with plural parties, as Rawls notes on page 139 of *A Theory of Justice*.

> acquisitive act A with respect to some useful resource;...[they would] look closely at the suggested acquisitive act A. ...the specification of A would be the specification of an action which some people were more adept at performing that others. Some would be very good at A-ing... whereas others might be altogether incapable of A-ing...
>
> The parties in the original position, then, would...know that those who, on account of handicap or situation, were least good at A-ing would have all of the onerous duties and few or none of the rights which acquisition generated."[28]

Remember that in choosing principles in the original position, parties are bargaining in good faith: they are submitting themselves to be bound by the principles they choose. If they choose a PJA as a principle, they do so with a sincere unanimous commitment to respect it. But in doing so, they:

> "would know that ... at least some of them would be committing themselves to refrain from using resources to satisfy their pressing needs in circumstances where it would otherwise be open and perhaps sensible for them to do so. It seems to me that this is not a commitment that anyone can enter into in good faith."[29]

response to Waldron: PJA's can flow from the original position

Waldron assumes too much risk-aversion

This argument is flawed in several ways. One objection is that it assumes a risk-aversion for the inhabitants of the original position, yet as a famous debate between Harsanyi and Rawls has shown, it is unclear that risk aversion should guide the inhabitants

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[28] Waldron, *The Right to Private Property*, pages 275.
[29] *ibid.*, pages 276.

of the original position in their calculations of expected outcomes.[30] Even if one agrees with Rawls that risk-aversion is rational over a set of suitably defined primary goods (goods necessary no matter one's ends), then Waldron's point is conclusive only when considering acquisitions over that set of primary goods. It may indeed be impossible to commit in good faith to a situation where one's share of such primary goods could be foregone, as Waldron has it. Yet this could as easily be handled by a PJA-proviso as by throwing the PJA out altogether: the PJA could be proposed against a background set of rights to basic necessities. Clearly Waldron cannot maintain that this is incoherent, for this is the interpretation of Locke's theory of property he advocates and supports. Such a proviso (or possibly even a Nozickean one, holding that acquisitions must not make others worse-off on a net basis) would make a commitment to a PJA a reasonable one for someone to make. At least such commitment would not be unreasonable for the reasons Waldron gives: people would no longer be making the commitment with the knowledge that it might later put them at risk of their life.

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[30] In fact Rawls denies that his theory rests on an assumption of risk-averse inhabitants of the original position. He maintains instead that their choice of principles governing distributions of primary goods is a strictly rational choice under uncertainty. This point has merit: given the primacy of some goods over others (without them, no other goods have value), it is arguably rational to choose to avoid the risk of ending up with a dearth of primary goods. Harsanyi, on the other hand, maintains that this fact about primary goods is picked up by calculations of utilities, and only a risk-averse person chooses, for example, to accept utility X over a 50% chance of utility 0 and a 50% chance of utility 3X. See Harsanyi, "A General Theory of Rational Behavior in Game Situations," "Can the Maximin Principle Serve as a Basis for Morality?", *Rational Behavior and Bargaining Equilibrium in Games and Social Situations,* "Cardinal Welfare, Individualistic Ethics and Interpersonal Comparisons of Utility," and *Essays in Ethics, Social Behavior and Scientific Explanation*; see also Rawls' "Some Reasons for the Maximin Criterion," "The Basic Liberties and their Priorities," along with, of course, *A Theory of Justice.*

Yet the best response to this argument of Waldron's comes from taking the bull by the horns: Waldron's argument rests on an ambiguity of language.

"At least some of them would be committing themselves" to a situation which would put their life or their moral integrity in jeopardy, says Waldron, and this is not a commitment people can make in good faith. This assertion has two interpretations. The first is true, and the second is false. But it is the second that must be true for Waldron's point to be telling. Consider the proposition:

> (A) Some x in R are committing themselves to a situation where they will be worse off.

One way (A) might be used is this: there is a group of people agreeing that, say, everyone with gray hair gets to board buses first. Some people with red hair are persuaded to go along with this plan, for whatever reason (e.g., respect for the aged). They know that it will make them worse off, so in the moment that they agree to the plan, the redheads "commit themselves to a situation where they will be worse off." Now if this is the sense in which Waldron were writing these words, then he would be entirely correct: there is no reason that in the original position a person would commit himself to a plan with that feature.

But there is another interpretation of (A) that is meaningful. Consider one of the opening scenes in the movie *Shogun*: a group of European sailors are held prisoner by a Japanese warlord. They are in a cave and are told that they will released unharmed if they will select two among themselves who will come out and die a horrible

death by torture. The sailors agree to draw straws, and the two with the short straws will submit themselves to be tortured. In that situation also, some people have committed themselves to a principle which will make them worse off. They just do not know it yet. And yet there is nothing irrational about such a commitment.[31]

In both the bus and Shogun cases, some members of a group have committed themselves to a principle which will make them worse-off. The difference between the two cases, of course, is that in the first they know who they are, in the second they do not. In the second case their decision is not irrational, nor is it a commitment someone cannot make in good faith. They can all make it reasonably and in good faith.

Yet remember that one of the defining characteristics of the original position is that a veil of ignorance shields members from knowledge of their decisions' consequences over themselves:[32] it is this feature which guarantees impartiality. Rawls himself points out that under his scheme the talented will be committing themselves to a scheme whereby they will be worse-off: just like the Shogun's prisoners, however, they do not know who they are beforehand. Therefore Waldron's assertion (that PJA's must be rejected because they demand that people commit themselves to schemes whereby they will be worse off), is actually a criticism which goes beyond PJA's and reaches to Rawlsianism itself. And yet Waldron is convinced of the appropriateness of the reasoning

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[31] In fact the Shogun's offer was that only one sailor had to be tortured to death. For ease of grammar and comparison I have made it the case that he demanded the torture of two sailors.

[32] As explained elsewhere in this dissertation, in my synopsis of Rawls. See *A Theory of Justice*, pages 18-20 and 140-141

mechanism Rawls proposes in *A Theory of Justice*. So either he abandons one of the pillars to which he frequently refers, or he acknowledges that there is a sense in which people can commit themselves to a set of principles which will make some of them worse off.

In short, it is the second sense of (A) which matches the original position. And in that second sense it is not the case that such a commitment can only be made in bad faith or irrationally, as I have just explained.

3. HEGELIAN RIGHTS TO PROPERTY

I skip now to the end of Waldron's line of argument. Here he argues that the reasons for defending private property are also reasons for saying that the mere opportunity to own property is not enough, and that actual ownership of private property must exist if we are to achieve a "property-owning democracy." In this line he is breaking from Hegel, and he makes a convincing case that Hegel contradicted himself to stress the benefits which accrue to property ownership while maintaining that its *opportunity* rather than its *realization* was sufficient for justice.

I will not discuss all the apparatus and supporting arguments Waldron makes for this position. I will discuss one of the arguments he makes to set up the claim, and another assumption underlying this argument which he neglects to state, let alone defend.

The common asset of natural talent

Waldron defends Rawls' famous argument concerning the distribution of natural talents, an argument which has drawn

criticism from Nozick and Sandel, among others. Rawls' argument as originally stated was that benefits and gains accrue to some set of talents and abilities in society;

> "distributive shares are decided by the outcome of a natural lottery; and this outcome is arbitrary from a moral perspective."[33]

Given that it is arbitrary from a moral perspective, Waldron continues, then Rawls was right to say that:

> "The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases."[34]

Sandel and Nozick rejected this in what are some of the most moving passages in both of their works, arguing that Rawls' point of view undermines precisely that respect for distinctions between individual which Rawls promised to defend. Because Sandel's relied so heavily on Nozick, I will attend to Nozick's argument only.

Nozick, noting that Rawls opened his work with a criticism of utilitarianism and its tendency to discount the inviolability of individuals in favor of concern for the welfare of society as a whole, wrote the following passage (quoted in Sandel, Waldron, and elsewhere in this paper): Rawls' project is consistent:

> "Only if one presses *very* hard on the distinction between men and their talents, assets, liabilities,

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[33] Rawls, *A Theory of Justice*, page 74. Quoted elsewhere in this paper, and partially quoted in Waldron, *The Right to Private Property*, page 402.
[34] Rawls, *A Theory of Justice*, page 104

> and special traits. Whether any coherent conception of a person remains when the distinction is so pressed remains an open question. Why we, thick with particular traits, should be cheered that (only) the thus purified men within us are not regarded as means is also unclear."[35]

Rawls defended himself in a later paper, "Justice as Fairness: Political not Metaphysical". The soundness of his reply is discussed elsewhere in this dissertation (in Appendix A, where the meaning of "Rawlsianism" is discussed). Essentially I conclude there that Rawls' request to us to interpret his earlier statement as a political and non-metaphysical claim is spurious, for it was the very metaphysicality of the interpretation that supported the coherence of his project: the metaphysical interpretation is pinned, I write, as a knight on a chess-board may be pinned.

The issue here, however, is *Waldron's* defense of Rawls on this point. That line of defense is different than the one Rawls took. In defending Rawls, Waldron asserts that:

> "It is not, I think, merely pedantic to point out that Rawls never says that personal talents are to be regarded as collective property. What he says is that their distribution is to be treated as a common asset - in other words, the fact that talents have been distributed thus and so is to be exploited for the benefit of all."[36]

But what sense does it make to distinguish between property rights in personal talents, and the distribution of an allegedly common asset? Suppose the bill comes to me in a restaurant, and I stand up and propose to all the other clientele that we pool our

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[35] Nozick, *Anarchy, State, and Utopia*, page 228.
[36] Waldron, *The Right to Private Property*, page 403.

money, and then pay all of our bills from that pool. Someone shouts back, "Why is it that 'personal dollars are to be treated as collective property'?" I reply, "I am not suggesting that we should treat our personal dollars as collective property. I am saying only that 'their distribution is to be treated as a common asset.' So pony up!"[37] It is not the reasonableness of either of these claims that is at issue: what is at issue is the difference between them. There is none.

Furthermore, Waldron's point highlights in another way what it is that Nozick and Sandel found objectionable. In saying "the fact that talents have been distributed thus and so is to be exploited for the benefit of all," he has not grappled with the problem that those talents may now be Sue's, mine, and that other fellow's. As Sue may be proud of her talents, and in fact think of herself as being partly constituted by them, Waldron's request that we treat them as things "to be exploited for the benefit of all" may look to Sue a lot like Waldron is telling us to exploit *her* for the benefit of all. Waldron's restatement of Rawls just reconfirms Nozick's point: one must push *very* hard on the distinction between people and their talents for this argument to go through.[38]

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[37] The reader should note that I am using Waldron's words adapted to a restaurant situation. In short, I am saying that, his protestations aside, Waldron's distinction is indeed merely pedantic.

[38] This problem is discussed at more length with reference to Rawls himself in Appendix A. There I argue that the response to Nozick's claim, a response which maintains that the distinction between persons and attributes is not metaphysical but only one of politics, is inadequate for Rawls. Rawls is critical of the way utilitarianism overrides the inviolability of individuals in favor of the welfare of society as a whole, and if he does not distinguish between persons and their talents *metaphysically* then he is left with the same problem as the utilitarians.

General property rights and ethical development

Waldron's adoption of Rawls' argument about the moral neutrality of distributions of natural talents has a purpose: it is defended in order to make room for Waldron's defense of a property-owning democracy, as was explained above. This tradition traces back to Proudhon's *What is Property?* and various works of Hegel.

Waldron articulately amplifies upon this tradition, arguing that the focus on negative freedom (discussed herein with reference to Berlin, Sen, and Dasgupta) is a focus on action-types, while a true concern for freedom focuses on action-tokens. If the ability to act as one wishes defines freedom, is it not contradictory, asks Waldron, to look only at the types of actions which are available to people, rather than at the instances of such actions being undertaken? Without the opportunity to own property, say some, a man is not free: without actual property, responds Waldron, a man's freedom is a paltry thing, a flimsy setting within which "the ethical development of persons" is impossible (to use Hegel's phrase).

> "Freedom requires private property, and freedom for all requires private property for all. Nothing less will do."[39]

Waldron gives little concrete evidence for this, but his claim that property ownership has this effect is plausible. Consider the history of the amortizing mortgage in the United States: before its advent in the 1930's, mortgage payments merely covered the interest on loans made to buy homes. With the advent of amortizing mortgages, however, a small amount of principal was repaid with

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[39] Waldron, *The Right to Private Property*, page 412.

each installment. This had the effect of turning a renter into an owner over the course of a generation. The relationship between this change in financial instruments (along with, perhaps, the GI Bill which came into being during the next decade) to the rise of middle-class America (and the decline of 1930's radical politics) would be an interesting study.

This point about property is one Waldron seeks to make more vivid with reference to basic liberties. The right to publish freely is one that benefits me, even if I do not publish freely myself: I can read what others publish freely. But most liberties are not of this sort. Privacy and free trade are examples. Private property makes these meaningful only if I own a home in which to be private, or things which I go about trading freely. And without actually owning property, I can do little but trade my labor to one who does: doubtless this gives him a hold over me and my views which renders some of the formal freedom in my life meaningless. In this crucial passage Waldron brings the various strands of his book together:

> "... a person without property is likely to become economically dependent ... on someone who has property, and so he is that much more likely to be sensitive to his patron's or employer's views and be wary of crossing them. A person with a reasonable amount of property, on the other hand, has not only the leisure but the independence to trust his own judgment and develop patterns of reflection and deliberation which embody values that appeal to him, not just values he has adopted because they appeal to someone else.
>
> If this is a good argument, it is an argument for seeing to it that everyone has property (or, more broadly, for ensuring that no one is ever in a

> situation in which economic dependence is likely to undermine his independence of thought, action, and evaluation).[40]

Paradoxically, the *opportunity* to own property without the *actual* ownership of property may narrow the range of free action, and will decrease actual action-tokens while it increases action-types. So runs Waldron's argument.[41]

I have two responses to this argument. It rests on a fantastic theory of the state's ability to determine distributions (let alone ethical development!), and he is forgetting to ask, "Compared to what?"

Waldron's "unconstrained" bias

Surely the Hegelian view that a particular economic policy will drive the ethical development of citizens is a flawed view. In any case, it is an extreme form of the unconstrained vision of man, as explained earlier in that section of the first chapter of this dissertation concerning Thomas Sowell's *A Conflict of Visions.*

I wish to show why this is so. Waldron writes,

> "We cannot argue that property-owning is necessary for ethical development, and then, on the other hand, affect unconcern about the moral and material plight of those who have nothing. [Therefore] a general-rights-based argument for private property establishes a duty to see to it that everyone becomes a property-owner."[42]

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[40] *ibid.*, page 414; the arguments preceding the quote appear through the preceding several pages of Waldron's book.

[41] Waldron, *The Right to Private Property*, pages 412-415. I do not mean the following criticism to imply that I think this is a position without merit. The possibility that freedom can narrow choices rather than create them was one of Tocqueville's most acute observations concerning political discourse in America.

[42] Waldron, *The Right to Private Property*, page 4, quoted previously.

Thus, Waldron's general-rights-based argument has this structure:

> 1. People need property to achieve ethical development as persons;
> 2. We have a duty to help people achieve ethical development as persons;
> 3. Economic policy *C* will cause more people to have property;
> 4. We have a duty to adopt *C*.

Set aside the fact that theologians and philosophers from the East and West, thinkers traditionally concerned with "the ethical development of persons," have held for about 3,0000 years that #1 is false.[43] Set aside also that "the ethical development of persons" is precisely that kind of nebulous area into which the multicultural society ventures with caution (perhaps, a cynic might say, the state might first worry about delivering mail promptly and get to "the ethical development" of her citizens later). That is, assume that Waldron's argument for #1 and #2 goes through. To what types of polices does Waldron refer in #3, and what argument has he provided for #3? I take these two questions in turn, as A and B.

A. What economic policy is Waldron advocating? What Waldron urges upon government is vague, but I believe the likely reading is that government should tax and redistribute. Waldron leaves no doubt that his,

> "GR-based theory is *radical* in its distributive implications: even if it is not excessively egalitarian, it generates a requirement that private

[43] Wittgenstein, for example, refrained from giving his possessions to the poor out of fear of corrupting them, and gave them to his family instead: a cynic might note that he would have had an easier time getting them back from his family if he had changed his mind.

> property, under some conception, is something all men must have."[44]

Insisting on a rule that "X is something that all men must have" opens an interpretative question: does the author mean that all men should see to it that their neighbors have X, or does it mean that the state should see to it that all have X? Clearly when talking of property, the state is the likely overseer of compliance (what sense does it make to insist, "Everyone has a right to X, but I only mean that one should check in on one's neighbor to be sure he has X"?) Clearly, Waldron foresees that the state should enforce this right: that is, he wants this to be a *legal* right.

How the state is to make sure that "all men have property" is something Waldron nowhere states. However, given that Waldron writes frequently of "distributive implications," he clearly anticipates a process whereby the state distributes enough property so that all men have it. Therefore I am reading the policy implications of Waldron's argument to be that the state should distribute property to people. He acknowledges at the beginning of the book, however, that his argument leaves "considerable leeway for variations in social policy and economic distribution."[45] I read this to mean that he is not expressing preference between distributing actual property, or money, or distributing vouchers to buy specific property (like Food Stamps) or merely checks (e.g., AFDC), etc.

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[44] Waldron, *The Right to Private Property*, page 444.
[45] *ibid.*, page 5.

B. What evidence or argument does Waldron supply to support his contention that the types of policies described above cause significantly more people to have property? The answer is, "none at all." Now it may seem self-evident to say that an economic policy of distributing property to all will cause more people to have property. And I am aware that it may seem tautologously false to declare otherwise. How can distributing property not lead to better distributions of property? There are a variety of explanations, but what concerns me here is *that* this happens, not *why* it happens. I will explain with reference to the Poverty Gap Ratio in the United States.

a digression on distributive justice and poverty

Let Y = National Income, let P name the set of poor people in a society, let p be any one poor person, y_p = the income of that poor person, and y^* = the poverty line in that society. Then we can define the Poverty Gap Ratio:

$$PGR = \sum_{p \in P} (y^* - y_p)/Y.$$

In simple English: figure out how much money each poor person would need to be brought up to the poverty line. Sum those numbers for all people in society. Divide it by the national income, and one finds out what percentage of national income must be redistributed to eliminate poverty.[46]

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[46] The theoretical framework here comes from discussions and readings with Partha Dasgupta, who also convinced me long ago that the PGR was a better way to think about poverty than are Lorentz Curves, Gini coefficients, and Headcount Indices. A more extensive treatment of this is provided in Dasgupta's *An Inquiry into Well-Being and Destitution*, pages 78-81.

It is both heartening and disheartening to learn how small that number is even for poor nations (heartening because it shows how easily poverty could be eliminated; disheartening because it shows how easily poverty could be eliminated). Consider a few cases, where "extremely poor" names people with incomes below than $275 1985 PPP,[47] and "poor" names those with incomes below $370:[48]

Region	Poverty Gap extreme poor	Poverty Gap poor	Life Expectancy
Sub-Saharan Africa	4%	11%	50
East Asia	0.4%	1%	67
China	1%	3%	69
South Asia	3%	10%	56
India	4%	12%	57
Middle East & North Africa	1%	2%	61
Latin America & Caribbean	1%	1%	66
All developing countries	**1%**	**3%**	**62**

[47] Read, "275 purchasing power parity dollars in 1985." Purchasing-power parity is a means by which economists create shadow exchange rates that wash out the effects of exchange rate fluctuations, and make inter-country comparisons of statistics possible. While better than nothing, I have doubts about inter-country comparisons which rely on PPP's, because in practice it is so hard to buy Big Macs in Kansas and sell them in Tokyo. My purpose above, however, is not to compare what happens between nations, but to examine what occurs within them individually.

[48] This information is from a table that appears in *Poverty: World Development Indicators*, the 1990 World Bank Development Report, pages 25-29, which in turn cites work by Hill and Pebley (1988). It appears in Dasgupta's *An Inquiry into Well-Being and Destitution* as well.

For all Western industrialized nations the Poverty Gap Ratio is below 1%. For the United States it hovers at approximately .75%. This indicates that something on the order of $50 billion is necessary to fill in the poverty "pothole" in the United States, or approximately $1,500 per poor person.[49]

What is odd about this is that the US federal government administers anti-poverty programs which transfer 3% of national income down-the-ladder (as explained in the preceding footnote, standard US poverty statistics exclude non-cash transfers so this does not lead to double-counting). For government at all levels this number is considerably higher.

Isabel Sawhill, director for human resources, veterans, and labor at the Office of Management and Budget, wrote in 1993:

> "The United States... has devoted in recent years more than $500 billion per year, or about 12% of its gross national product, to public assistance and social insurance programs....Despite our wealth and these efforts to reduce income inequality, poverty is more prevalent in the United States..."

Her *Journal of Economic Literature* article, "Poverty in the United States: Why Is it So Persistent?", debunks some common explanations. In any case, my point here is not to hypothesize

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[49] These figures are derived from several sources: The US Census Bureau's *Poverty in the United States (1991)*; *The 1990 Statistical Abstract of the United States*, section 14, and *The American Almanac*, primarily charts #684, #722, #727. Poverty measures in the US use cash income figures (including government transfers) but exclude non-cash government aid. Since 1988 poverty figures have been recalculated by the Bureau of the Census to reflect a variety of non-cash transfers and other items. When such aid is considered the percentage of people living below the poverty line declines from ±13% (in the middle 1990's) to <9%, according to the Bureau of the Census (cf. chart #740) and, according to Isabel V. Sawhill, several percentage points further when all transfers are included (*cf.* her "Poverty," 1993).

explanations of this phenomenon, but to describe it and suggest that it should be important to philosophers.

It is a fact of economic life that many policies with self-evident purposes create unanticipated consequences. Building roads can increase traffic congestion; Latin American programs aimed at reducing urban unemployment caused it to balloon; price ceilings on food staples have caused famines. Countless less dramatic examples could be adduced. This happens because people are not automata, dully following one algorithm while economic policies rearrange the facts of their world. More lanes of highways may cause proportionately even more people to find it rational to drive; a work program creating one new job in Mexico City may cause two peasants from the countryside to find it rational to move there; bread-loaves selling for 1/4¢ in Moscow shops lead children to play soccer with the loaves in the streets, until the supply runs out.[50]

The problem of unanticipated or reciprocal consequences is part of the fabric of economic thinking. One cannot say "we will raise prices (or taxes) and thus garner more revenue" without raising the eyebrows of an economically literate person; one does not say, "we will limit the price of X (or declare that all have a right to X), in order to make the ownership of X more prevalent" without drawing a snicker. So it is, or so should it be, with the simple idea of redistribution.

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[50] The first is a well-known dilemma of city-planning. Simon Kuznet's work from the 1960's concerned the Latin American labor markets. The third happened in 1990, and I witnessed a similar situation in Vietnam in 1988, where a famine occurred when the price of rice was set so low that farmers were able to feed it to their hogs, for a time.

This habit of thought is not so prevalent in educated people as it could be, however. Garrett Hardin, for example, insists while much concern is voiced over our citizenry's lack of literacy and numeracy, our general lack of "ecolacy" is ignored:

> "The basic insight of the ecolate citizen is that the world is a complex of systems so intricately interconnected that we can seldom be very confident that a proposed intervention in this system of systems will produce the consequences we want.... Like the Sorcerer's apprentice, we learn the hard way that we *can never do merely one thing*...."[51]

While this habit of thought may not be generally prevalent, its near-absence from the philosophical treatment of poverty and distributive justice is especially regrettable.[52] In Waldron's case, he argues from the benefits of property to a right to property: his assumption is that by establishing a right to property, and by having the state closely administer the distribution of property, property will end up better distributed. I have questioned here the proposition that propertyless-ness can be reduced simply by such distribution schemes, yet Waldron urges this duty upon government. I may be wrong to question this proposition, but Waldron is wrong to

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[51] Garrett Hardin, *An Ecolate View of the Human Predicament*, The Environmental Fund Monograph Series, October 1984.

[52] One might disagree that it ecolate analyses are missing from discussions of distributive justice, pointing to the fact that Rawls, for example, recognizes that an incentive effect is associated with taxation. Yet this is but a faint echo of what "ecolate" thinking is about: ultimately, it is interwoven with the constrained view of man that I discuss in the first chapter, and have attempted to illustrate, in one way or another, in every chapter of this work, culminating in my discussion of Radin here.

assume it is so obvious as to need no argument, and let it lie as a hidden assumption within his argument.[53]

compared to what?

A second problem with Waldron's argument is that it contrasts a free-market with a situation described by lines that run, "A person with a reasonable amount of property, on the other hand, has ...", and, "it is an argument for seeing to it that everyone has property..." Yet this is the wrong contrast to make. We cannot reasonably compare snapshots of poverty with situations where people just *have* property. The political right Waldron advocates implies the existence of a state which either takes and redistributes property, or enforces some mechanism by which property is prevented from accumulating in certain ways. In either case, there has to be some mechanism within the state to achieve the specified aim. And when that mechanism within the state becomes the distributor of so much, then a *great* many people may find themselves "sensitive to [their] patron's ... views and ... wary of crossing them." With the state so thoroughly an arbiter of outcomes, with its hand reaching into the conditions and boundaries of the lives of so many, is it unreasonable to expect a corrosion in the average man's "independence to trust his own judgment and develop patterns of reflection and deliberation which embody values that appeal to him,

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[53] I have referred elsewhere in this dissertation to my belief that questions of value do not ride on questions of fact like whipped cream on an espresso; rather, they layer like the liqueurs in a pousse-café. To believe that the value question, "For what income distributions should we strive?" can be answered without regard to the effects of that striving itself, is to assume that the world can be manipulated in a way that in fact it cannot. One cannot approach economic questions of value without regard to questions of fact.

not just values he has adopted because they appeal to" that arbiter? Has it ever occurred to Waldron (for no hint of this possibility appears in his book) that an agency of the state with that much authority might confront each man and "undermine his independence of thought, action, and evaluation"?

Waldron does not address the features of the state organ that would be necessary to administer his general property right. His error is common enough, and is one that chafes public choice theorists. It makes no sense to compare the free market as it actually operates, with its warts and imperfections, against a situation one describes as if it might magically appear In fact Waldron's preferred outcome of a property-owning democracy would take a state agency to create and preserve the property distribution, insuring that no person falls below the level necessary to support his "ethical development". Such state agencies may have track records of, and reasons for, undermining the very ends (independence of thought and action) for which Waldron would constitute them. How and why this happens is the subject of an enormous body of economic literature: my point is not to convince the reader that such an outcome *must* happen, but that Waldron, by not ever mentioning this problem, is flatly assuming that it *won't* happen.

4. THREE FURTHER CRITICISMS SKETCHED

In closing this section, I wish to sketch a few further criticisms and show their relation to other parts of this work.

The first is not a deep criticism of any one aspect of Waldron's argument. It is instead a criticism of how programmatic his work

is. That is a strong claim, I am sure, but fair. A programmatic author reveals himself in the type of language which he uses, and discloses whether his intention is to balance the force of arguments or harness rhetoric to his private ends. Consider the end of the chapter Waldron devotes to Nozickean theories. Discussing the possibility of a PJA held against a background proviso of general guarantees of rights to some goods (and even though he has committed himself to one weak proviso of this sort), Nozick wrote:

> "The reverse theory would place only such universally held general 'rights to' ... be in a certain material condition into its substructure so as to determine all else; to my knowledge no serious attempt has been made to state this 'reverse' theory."[54]

After quoting this, Waldron claims:

> "the last point is made in ignorance not only, as we have seen, of the theory of John Locke, but also of much of the most interesting recent work in distributive theory, from Rawls to Walzer."

As we have actually seen, John Locke's description of general rights to subsistence appears explicitly stated in one paragraph of the *First Treatise* only, a work devoted to an attack on a political opponent (Robert Filmer). In his more theoretical Second Treatise there are odd hints and phrases that suggest it is Locke's view (because these phrases only make sense against such a background assumption), but it is not so strongly stated that one would want to hang one's coat on it. Furthermore, Nozick may well be amenable to

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[54] Nozick, *Anarchy, State, and Utopia*, page 238.

a proviso of *that* strength: in fact, finding Locke's proviso incoherent, he advocates an alternative.

But more important and strange is Waldron's criticism that Nozick's *Anarchy, State, and Utopia*, was written in ignorance of distributive theory "from Rawls to Walzer." In an accompanying footnote Waldron clarifies that he speaks of Rawls' *A Theory of Justice*, Dworkin's 'Equality of Resources', Gewirth's *Human Rights*, and Walzer's *Sphere's of Justice*. What Waldron might have meant by saying Nozick worked without considering Rawls' distributive theory in *A Theory of Justice* is beyond me. And the latter three works were published in 1981, 1982, and 1983, respectively: that is, Waldron is criticizing Nozick for being ignorant of works written seven, eight, and nine years *after* Nozick's book was published. This is, I suggest, an example of a writer sacrificing balance for rhetorical force.

I wish to sketch two more criticisms briefly, because I will be able to repeat them more forcefully in discussing the work of Margaret Radin. These criticisms concern plenitude and Rawlsian political liberalism.

"Plenitude" was a term of Christian theology which referred to a bounded universe with a finite number of things in it. The "doctrine of plenitude" was the belief, evidently often debated by medieval clerics, that there were a finite set of things "under the sun." Did God create the universe perfect, so that nothing new could come into existence? Or did perfection allow room for processes of

creation and destruction? The doctrine of plenitude held that there were no entrances to, or exits from, the cosmic stage.

The ghost of the doctrine of plenitude haunts modern political discourse on both the Left and the Right. It is common where unconstrained assumptions rule: the unconstrained vision looks at outcomes instead of processes, and so is amenable to the doctrine of plenitude because outcomes are snapshots and snapshots have finite numbers of things in them. Yet it is not confined to the unconstrained vision: Nozick is as guilty of it as Waldron, and Waldron is guilty.

Both Nozick and Waldron are guilty of assuming the doctrine of plenitude because they both believe that all property-holdings can be described as acquisitions, transfers, or iterations of these steps. In John Locke's time this may have been plausible: before the industrial revolution most objects may have fallen into one or the other category. Land clearly was not made, but appropriated. The instruments of life were by and large not that far removed from the natural state, at least by today's standards: a chair, an article of clothing, a boat, all had histories of their ownership which might neatly be broken into chains of acquisition and transfers.

There is a sense, however, in which it is artificial and almost ridiculous to describe modern goods in this manner. The kinds of resources of which Locke wrote (e.g., land) are not generally "appropriated" from the commons any more, for the most part: they are often just purchased from the State. This is covered by a PJT only if we assume that the State's ownership of land is gotten by appropriating it from the commons. Yet even this is strange to say.

Thomas Grey's "The Disintegration of Property" criticizes this classical model of property as a tangible thing acquired through acquisitions and transfers. It is inappropriate for "mature capitalism," for it is the development of capitalism itself which requires that:

> "entrepreneurs, financiers, and lawyers who carry the process through have the imagination to liberate themselves from the imprisoning [classical] concept of property as the simple ownership of a thing by an individual person."[55]

And as Margaret Radin has put it:

> "the standard ideology of property stubbornly pictures property as a tangible object - indeed, usually land - owned by a natural person."

Yet, she continues, few modern property issues are captured well by this model. Therefore using it as "the purported justification of all property holding" is illicit, for it can "only be a justification of a small part of it."[56]

The range of resources on which a modern economy is based is a range far broader than that which Locke considered, and over which PJA's might felicitously apply. In a knowledge-based economy one of the scarcest and most valuable goods is knowledge, and this is symbolic, immaterial, and its acquisition and transfer do not resemble the kinds of acts of which Locke (or Nozick, or Waldron) wrote. The computer before me has a story behind it, and while the stories of the silicon, petroleum products, glass, and metals which went into it are all stories of acquisition and transfer as Locke

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[55] Thomas Grey, "The Disintegration of Property," page 75.
[56] Radin, *Reinterpreting Property*, page 12.

would write them, these stories are not even the footnotes to the footnotes to the story of this computer. PJA's and PJT's may reasonably address a pre-industrial world based largely on barter: when goods are generally not appropriated from the commons and when transfers are often between symbolic storehouses of values and not often between material goods that resemble anything which has been appropriated from a commons, such principles turn anachronistic.

Furthermore, Waldron misses the point about property rights known to economists, and discussed earlier in relation to Alchian. One may address any property question in this vein: "Should there be a private property right to this good? If not, it is held in common." This is in fact how Waldron treats the subject. But a better way to formulate the problem is as follows. There is a set of property rights to this good:

1. Are some or all going to be held privately?
2. Are some or all going to be held by the State?
3. Are some or all going to be held in common?

There is a long tradition of assenting to the third answer by default. Even taking *that* for granted, the right way to approach the subject, even if one is concerned about the issues of the ethical development of the person, as Waldron is, is to ask how well such ethical development takes place with property rights being distributed under the three different schemes. Waldron stacks the deck by decrying the problems that may arise in the first alternative, while failing to consider those that may arise in the second and third. In

fact, he never even distinguishes the second and third case, as was discussed above.

Surely these faults are not Waldron's alone: he is merely immersed in a tradition that stretches back to the first days of social contract theory. This tradition stills speaks the language of 17th century Europe and its expansion into the world, and the concepts its words name just do not jibe with those needed when thinking about a modern state or a modern economy.

The third additional criticism that I would like to sketch briefly here is the incompatibility between the Hegelian tradition of property theory, a tradition from which Waldron draws strongly, and the political liberalism discussed elsewhere in this dissertation. A principle that recurs several times in this work is one inspired from John Rawls' *Political Liberalism*, and concerns overlapping consensus. As he wrote:

> "Our exercise of political power is proper and hence justifiable only when it is excised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[57]

The argument I have endorsed in Chapter 1 is that it is not constructive to propose a system of law which cannot earn widespread allegiance; in a modern state there is no single vision of the good shared by all or even almost all citizens; a system of law

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[57] Rawls, *Political Liberalism*, page 137, quoted and discussed in Chapter 1 of this dissertation.

grounded in some solitary private vision of the good will not earn widespread allegiance; hence is not constructive to propose a law grounded in some solitary and private moral vision.

Waldron's theory of property rights enthusiastically resorts to discussion of the ethical development of persons, and argues from a private vision as to what counts as ethical development and ethical retardation: this is precisely the kind of theory which liberalism opposes. To say that ethical development of personhood has something to do with having and pursuing autochthonously the projects of one's life is the kind of claim that may fit within the overlapping moral consensus of society, as described in my sections on Rawls and my chapters on torts, rights, and altruism: to say that such ethical development is impossible without property, greatly enhanced by property, etc., is to make precisely the kind of thick and problematic claim against which moderns should be braced.

C. Summary of my Critique of Waldron

This section may seem to have been an unreasonably harsh and antagonistic reading of Jeremy Waldron's theory of property. I have attempted to be fair in evaluating Waldron's case, and I think this analysis is aided by Waldron's unusually clear and careful exposition.

I have addressed two negative and one positive arguments of Waldron's:

1. Locke's theory of acquisition is incoherent;
2. *any* Principle of Just Acquisition is impermissible;
3. We should support a general right to enough property to nurture the ethical development of personhood.

In addition, I sketched three other criticisms which spring largely from a Sowellian "constrained vision" of man, and hence might not be persuasive to all. I summarize these responses in order.

1) Waldron argued against Lockean acquisition on the grounds that it was based on a concept of "mixing one's labor" which was incoherent, and that Nozick's criticism of the relevance of Lockean mixing was persuasive. He then proposed an alternate theory of acquisition which generated only provisional appropriations.

I have responded to Waldron's analysis of the grammar of sentences concerning the mixing of labor and argued that they *are* coherent, or at least not less coherent than sentences drawn from the Marxist labor theory of value, a theory whose coherency Waldron endorses. I have argued that Nozick's criticism of the relevance of mixing could as easily be handled by a proviso concerning proportions as by rejecting the Lockean principle of acquisition which (if the coherency of mixing is granted, and judging from Waldron's own desire to retain a weakened version of it), does seem to capture some important intuition. And I have argued that the theory of provisional acquisition which Waldron proposes as an alternative to Locke's and Nozick's is provisional in a way that a property theory cannot afford to be: property rights may be provisional in some ways, but not in Waldron's ways.

2) Waldron's attack on the possibility of any Principle of Just Acquisition had two branches: first, he claimed they generated duties which were unfamiliar, and that they were repugnant because

they displayed a set of five noxious features. Second, he argued that no contractarian could support a PJA because the inhabitants of the Original Position could never assent to a PJA in good faith.

Though not in total disagreement with Waldron here, I suggested that PJA-generated principles are not unfamiliar; if they are, then so are the duties generated by promises; and that the unfamiliarity of a duty is not decisive against it. More conclusively, I pointed out that the five features of repugnancy which Waldron associates with PJA's are also displayed (under certain conditions) by the Hegelian general property right which he spends another hundred and fifty pages of his book defending. And I argued that Waldron's claim that the denizens of the original position could not commit themselves in good faith to any PJA was a claim that rested on a misuse of language, and that in fact such people could make such an agreement reasonably.

3) Waldron argues not only for a Lockean subsistence-right, but also in favor of a right to enough property to support the ethical development of personhood. Waldron makes room for the existence of such a right by defending a Rawlsian claim that the pool of natural talents is a common asset. That claim defended, he writes that the arguments which exist in support of property argue strongly for it not merely as an opportunity but as an actual entitlement to enough property to cause each person "to take seriously his responsibility for its use and management." An opportunity-right without an actual entitlement will undermine the virtues that property is supposed to gird.

I have responded to this argument in three ways:

a) I have endorsed Nozick's and Sandel's attack on the notion of a Rawlsian common pool of natural assets, on the grounds that pooling natural attributes is exploitative and corrodes the very individuality Rawls set out to defend.

b) I have pointed out the Waldron shares a quite common fallacy concerning the State's ability to generate distributions of its liking, and ignores the ways in which such actions by the state may undermine the independence which this Hegelian right is alleged to nurture.

c) I have pointed out that Waldron considers a false set of alternatives: he writes as though the choice we face is between property rights held by individuals and those held in common, when in fact property rights can be held by individuals, or in common, or by the State, and the Hegelian right he endorses is really a call to transfer certain property rights to the State, not the commons. Therefore Waldron should not have argued merely by pointing to the disadvantages which obtain when property rights are held by individuals: he should have compared these disadvantages with those which occur when such rights are held in common or by the State. No mention of the difference between State-held and commonly-held property rights appears in Waldron's book, nor is there any attempt to compare their disadvantages to those of privately-held property.

Lastly, I sketched three additional arguments. First, I pointed out that Waldron's causticity reveals the programmatic nature of his

argument. Second, I pointed out that like most distributive theories, it assumes the medieval Doctrine of Plenitude, and this is a bad doctrine through which to understand economic problems. Third, I discussed how it is anti-liberal in a way that no modern theory can afford to be: the concept of "the ethical development of the person" in Waldron's strong Hegelian sense is precisely the kind of thick moral concept not found in the overlapping moral consensus of society. Therefore we should not appeal to it in a modern society (this draws on the discussion of Rawlsian political liberalism, and the legislation of morality, which appears in Chapter 1). None of these last three sketches were meant to be conclusive, of course, but merely indicate ways which further arguments could be pursued.

In conclusion, therefore, Waldron's theory of property may be an attractive and well-designed structure, yet it is cobbled together from defective materials. While his argument has many stages the three discussed here are crucial ones, and within each of them I have located one or more bad inferences.

I turn now to the work *Reinterpreting Property*, by Margaret Jane Radin, a work which explores the connection between property and personhood from a point of view which combines analytic philosophy with jurisprudence.

II. RADIN

> "As the law has developed, the issue of keeping one's home can be seen can be seen as inextricably intertwined with the issue of developing and protecting one's political voice."[58]

Margaret Radin's *Interpreting Property* collects essays she wrote between 1981 and 1992 on the subject of property theory. The goal of these essays was to counter the tendency (as Radin sees it) of both the Left and the Right to think of liberty as a type of property right; instead, her essays reinterpret property within a framework of political rights. This section explores Radin's argument and its application to takings (briefly) and rent control (more extensively). Fortunately readers of her book have the benefit of Radin's introduction, where she not only draws together the themes of the seven papers included there, but includes responses to critics of those papers. Therefore in reconstructing her general argument and her arguments on rent control, I alternate between the relevant chapters and amplifications found in her introduction. Furthermore, while I admire her book, in the end I reject Radin's thesis.

The structure of this section differs from the preceding one on Waldron. In Waldron's case, I interwove presentation of the links in his argument with criticism of those links. Here, however, I present a lengthy exegesis of Radin, and then a lengthier critique. I choose this method for Radin because her argument is flatter than Waldron's, and more like a hub-and-spoke than a chain. Also, rather

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[58] Radin, *Reinterpreting Property*, page 144.

than letting my distrust of Radin's argument shine through in my reconstruction, I use her own words as much as possible (though this makes for a lengthy exegesis).

Before providing that exegesis, I begin with a brief overview of the portions of Radin's thesis which concern me. The reader satisfied with that, or already familiar with Radin's work, might then skip approximately 15 pages to reach the beginning of my response to it.

A. Overview of Radin's Argument

Radin makes eight points that I will discuss:

1. Much legal theory, such as Ackerman's Legal Constructivism (discussed in Chapter 2 with reference to tort), and Posner's economic analysis of law (discussed in Chapter 4 with reference to property), discusses personal attributes as *things* we have rights in, just as we have rights in property. Property, however, is a commodity. Therefore much legal theory commodifies personhood.
2. Libertarians believe in a principle of self-ownership: they believe that personal attributes do not just *adhere* to, but *compose*, a person. They also believe personal attributes are alienable. Libertarians are therefore caught in a contradiction: one cannot simultaneously maintain that a personal attribute is constitutive of a self *and* maintain that it is alienable from that self.
3. No baseline interpretation exists for property rights.

4. The common law protects some types of property better than others: it protects (and should protect) personal property better than it protects fungible property.
5. We may distinguish between property which is personal (in that it is constitutive of personhood), and fungible (in the sense that one holds it for its value, but would happily trade it for other property of equal or greater value). A woman's attachment to the wedding ring of her deceased husband is an example of personal property; a jeweler's attachment to an identical ring as an item for sale is an example of fungible property.
6. The proper way to distinguish between personal and fungible property is by the community's moral consensus, just as sanity and insanity are defined with reference to the community. If a deep attachment to a piece of property is seen as normal by the community, then that property is personhood-constituting property, and should receive strong legal protection. If, on the other hand, the community sees such attachment to a piece of property as fetishistic, then that property is fungible and should receive weaker legal protection.
7. Corporate assets are always fungible, and thus should receive weaker legal protection.
8. These distinctions play out with regard to the laws of rent control. Such laws respect and develop personhood in two ways. First, for the tenant a home is a person-constitutive property , but for the landlord an apartment block is only fungible property. Second, rent control laws further the integration of tenants into communities, and community is a necessary condition of

personhood. Thus, by elevating tenant interests over landlord interests, and by furthering community, rent control creates a fecund environment suited to the flourishing of personhood.

Each of those eight points matches one of the following eight sub-sections. The reader desirous of seeing any of these points expanded may turn to the corresponding sub-section below. However, as I noted above, the reader who is already familiar with Radin's arguments, or accepts the elements of the preceding list, should skip ahead approximately 15 pages to the section entitled, "Response to Radin."

B. Radin's Argument In Detail

1) RADIN'S TARGET: COMMODIFICATION

From the outset it is clear that Radin is not radical on the subject of property. She writes:

> "In my essays I did not address the issue of whether private property *must* exist - whether justice, or human flourishing, requires the existence of private property. As a pragmatist, I started in the middle, within a property system... [and] argued that we could be truer to the ideals of individuality and freedom by which we justify property if we [adopt her theory of property]."[59]

Radin's property theory is a response to (what she views as) a threat from both the Left and the Right of interpreting as property rights more and more non-property rights. The Posnerian cost-benefit analysis of crime (and by extension, Calabresi's and

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[59] *ibid.*, page 6.

Melamed's of rape) is a case in point: one may say that a rape victim has a property right in her body, and treat its violation as a matter for economic analysis (who receives a higher use-value from that body, her or her attacker?). Or, similarly, Ackerman reduces homosexual rights to property rights over one's body.

But to Radin these approaches make "trivial and insult the value being talked about." This is because "Certain 'goods' are rights and duties (or better, attributes) of citizenship, and it is degrading and harmful to community or political life to conceive of them as market commodities."[60] Elsewhere Radin extends this criticism:

> "When personal interactions come to be conceived of and perspicuously described as transactions of property, then we have progressed very far indeed toward a commodified world view. Things which we previously conceived of as intrinsic to the person, or attributes of personhood, come to be conceived of, and socially constructed as, separable alienable objects... Today's deep division over 'the body as property' makes clear the stakes in this debate. Do we 'own' our sexuality, our kidneys, or our reproductive capacities so that we may sell them as we sell books?"[61]

Radin has a motive for rejecting the assimilation of other rights into property theory: she wants those other rights to be thick, to receive strong support and protection from the state, but she does not believe all property claims should receive that kind of support. Therefore to reinterpret such claims as being kinds of (or akin to)

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[60] *ibid.*, page 201. Radin is responding to Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harvard Law Review 1089, 1125 (1972); Posner's *An Economic Theory of Criminal Law*, 85 Columbia Law Review 1193 (1985); and Bruce Ackerman's *Liberating Abstraction*, 59 Chicago Law Review 317, 342-346 (1992).

[61] Radin, *Reinterpreting Property*, page 15.

property rights *weakens* them, not strengthens them. This is so because when a good is conceived of as property, it typically can be traded: yet this commodification undermines the sense in which the good in question may constitute a person, and not just be *owned* by her.

2) LIBERTARIAN SELF-OWNERSHIP AND ALIENATION

The preceding point is amplified in Radin's attack on Nozick. Radin suggests conceiving of the self as a dot in the center of two concentric circles, the inner circle representing the attributes of the self, the outer circle represents the possessions of the self. As is discussed elsewhere twice in this essay (in sections on Rawls and Waldron), Nozick maintains that the self is thick, in that it not just has, but *includes*, the first circle (attributes). It is on these grounds that Nozick critiqued Rawls' theory of a pool of natural assets. And as the self includes the first circle, it has a strong grip on the second as well: the possessions that accrue to a person due to his natural talents become an expression of the self.

Radin argues, however, that a libertarian such as Nozick is also committed to a strong sense of alienability: a person is free to trade away what is *his*, at his discretion. So, for example, Nozick believes that a person may even self himself into slavery.[62] This seems to call for a thin theory of the self:

> "The self as bare contentless free will can sever all of its attributes, characteristics, endowments, etc., without destroying its essential selfhood."[63]

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[62] Nozick, *Anarchy, State, and Utopia*, page 331.
[63] Radin, *Reinterpreting Property*, page 26.

Radin contends that these are contradictory: the libertarian argues for an entitlement theory which demands a thick view of the self, yet this contradicts the libertarian theory of personal freedom which incorporates a view of alienability that only makes sense given a thin view of the self. Radin believes that the thin view, which is what libertarians are *really* committed to, is too insubstantial a view of the person from which to do ethical theory. So Radin actually argues from a thicker view of the self than that to which (she says) Nozick is committed!

3) DOES A BASELINE INTERPRETATION OF PROPERTY EXIST?

Radin brings well-deserved criticism of the way in which discussions of property since Locke have often assumed an implausible background against which to frame arguments. She writes, "the standard ideology of property stubbornly pictures property as a tangible object - indeed, usually land - owned by a natural person." Radin terms this the conservative, or "classical liberal ideology". She points out the great extent to which modern property bears no resemblance to this picture, and therefore, aims "to show that the purported justification of all property holding could at best only be a justification of a small part of it."[64] This was one of my points in the preceding section on Waldron: criticize as he did Locke and PJA's in general, Waldron still accepted the Lockean conception of the problem of property as his own (as did Nozick).

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[64] *ibid.*, page 12.

The next logical step for Radin is to argue that there is no "baseline" set of rights which we name with the phrase "property rights". Instead, there is only a set of conceivable social arrangements from which we choose:

> "since it is obvious that in the past two decades the tenant's 'bundle of stocks' has gotten larger and the landlord's smaller, why haven't the courts declared these changes to be takings?...a deeper explanation is that there is no one government 'action' that 'took' rights from landlords and 'gave' them to tenants. Instead, there has been a gradual evolution of the legal package called tenancy, coextensive with a gradual evolution in the cultural commitments surrounding residential occupancy of rental property."[65]

Thus no baseline for property exists: instead there are a number of possible arrangements from which we should pick the most suitable.

4) PERSON-CONSTITUTIVE PROPERTIES

A separate line of reasoning in Radin's argument is her attack on the distinction between subjects and object, in which her argument against the commodification of personhood-constitutive goods is the major step. By breaking down the subject/object distinction, and then by proposing that there is no baseline against which property rights my be measured, Radin opens an opportunity to suggest what property rights *should* be. And here her answer is that the rules which govern some objects should be tweaked to look more like the rules we use to govern subjects.

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[65] *ibid.*, page 21-22.

Where the economic analysis of law reduces (Radin claims) the person to less than the body, treating the body as alienable property, Radin expands the person *beyond* the body to include relationships with some external objects. As has been mentioned at various points in my discussion of property, this is a position within the property tradition developed by Kant, Hegel, and Marx. Radin's position most resembles Hegel's, who (accepting Kant's distinction of the noumenal and phenomenal selves), concluded that "the person becomes a real self only be engaging in a property relationship with something external."[66]

5) PERSONAL PROPERTY, FUNGIBLE PROPERTY

In view of what has been summarized above, Radin proposes that we think of property relationships as lying across a continuum, from personal to fungible. This is the range from "a thing indispensable to someone's being to a thing wholly interchangeable with money."[67] The epitome of the fungible good is money: it is the point of a dollar, after all, that I do not care whether I possess this dollar or that dollar. I am indifferent to trade among them.

A personal good, on the other hand, may be the home in which I live, and in which my memories and projects are shaped: I am *not* indifferent between having this home versus that home as I am between dollars. And some goods may be both personal and fungible, depending upon their owner: to a jewelry store owner, the loss of a wedding ring is something that may be made up for with an insurance payment; to a woman who wears a wedding ring in memory

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[66] *ibid.*, page 45, citing Hegel, *The Philosophy of Right*, §45.
[67] Radin, *Reinterpreting Property*, page 53.

of a deceased partner, it may have connotations and be wrapped up with her person in a way in which no other good may substitute.[68]

The effect of this perspective for Radin:

> "is that property for personhood gives rise to a stronger moral claim than other property... The underlying insight... seems to be that some property is accorded more stringent legal protection than other property, or is otherwise deemed more important than other property by social consensus... the claim is that some property is worthier of protection than other property."[69]

And years later, in responding to an attack from several jurists on this dualism, Radin downplayed the moral weight of non-personal property:

> "fungible property rights are not entitled to so much weight merely by virtue of being conventionally recognized as property. Having disaggregated the concept of property, I sought to assimilate the fungible category with the category of money. People have certain rights to keep their money, of course, but the point is that there is no special mystique about it. Those of us who are not radical libertarians readily accept that people can be taxed from time to time, and asked to accept certain other diminutions in their holdings for the benefit of the polity. This analysis is at the heart of the way I address the 'takings' issue, and particularly the problem of 'regulatory takings'.[70]

The preceding four points have been purely philosophical. The remaining four work out the legal implications of Radin's perspective, and involve practical as well as philosophical matters.

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[68] Expanding slightly on an example from Radin's introduction.
[69] Radin, *Reinterpreting Property*, page 48.
[70] *ibid.*, page 14.

6) DISTINGUISHING PERSONAL FROM FUNGIBLE

We must recognize that a legal theory based on quasi-subjective relationship people have with objects may be faced with a moral hazard problem: surely people will have an enormous incentive to claim the "right" type of relationships (strong personal attachments) with their property in order to acquire for themselves the strongest possible legal protection for their property. How may we distinguish good claims of this sort from bad ones?

> "My answer to this is roughly that the entanglements, *when we can see them, and see them as appropriate,* are not 'subjective' in the sense such readers have in mind... our ability to see and understand entanglements between persons and things is not wholly separate from any procedure by which we judge them as appropriate or inappropriate."[71]

Fetishism and capitalism

In particular, an inappropriate relationship is the "fetishistic" relation which exists between the capitalist and her possessions. Radin's argument for this lies at the core of her political agenda.

Recognizing the need for a method of distinguishing proper personal property relations from fungible and improperly personal property relations, Radin proposes that "object relations that should be excluded from recognition as personal property" are those whose nature "works to hinder rather than support healthy self-constitution." How do we know "healthy" self-constitution from not? Radin's argument for this is extraordinary, and I quote it at length:

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[71] *ibid.*, page 11

> "We can tell the difference between a healthy person and a sick person, or between a sane person and an insane person. In fact, the concepts of sanity and personhood are intertwined: at some point we question whether the insane person is a person at all. Using the word 'we' here, however, implies that a consensus exists... consensus must be a sufficient source of objective moral criteria... In the context of property for personhood, then, a 'thing' that someone claims to be bound up with nevertheless should not be treated as personal vis-à-vis other people's claimed rights and interests when there is an objective moral consensus that to be bound up with that category of 'thing' is inconsistent with personhood or healthy self-constitution...
>
> Judgments of insanity or fetishism are both made on the basis of the minimum indicia it takes to recognize an individual as one of us..."[72]

The last step for Radin is to equate capitalism with such fetishism.

> "Even if one does not accept that all capitalist market relations with objects destroy personhood, it is probably true that most people view the caricature capitalist with distaste. Most people might consider her lacking in some essential attribute of personhood, such as the capacity to respect other people or the environment....[Her desire to] constitute herself as the complete capitalist could not objectively be recognized as personal property because at some point there is an objective moral consensus that such control is destroying personhood rather than fostering it."[73]

Having shorn the capitalist of her ability to view her life as a healthy one (indeed, Radin suggests that capitalists are typically "insane"), Radin proceeds to more mundane considerations of how a

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[72] *ibid.*, page 43.
[73] *ibid.*, page 44.

legal system may in practice distinguish healthy commitments from morbid commitments.

How to judge fetishism

She asks, given that "courts may not be institutionally appropriate to try to put them into practice; do we really want to encourage judges to make distinctions between personal and fungible property?"[74] Her answer has two parts: first, Radin argues that the courts are already making such fine distinctions anyway; second, she argues that the courts will not need to make fine distinctions to institute her theory.

> "Do we want to encourage judges to draw these distinctions?...
>
> My thesis is that legislatures and judges are already doing these things... So the question becomes whether it is better to go on in this unfocused way or better to make the issue explicit. I cannot see any advantage to keeping the issue covert. On the other hand, making it overt might result in better policies. For example, grassroots property tax limitation measures enacted to protect resident homeowners could have excluded commercial holdings."[75]

Taking it for granted, evidently, that unlimited taxation of commercial holdings is better policy.[76]

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[74] *ibid.*, page 11.

[75] *ibid.*, page 18.

[76] This may seem unfairly sarcastic, but note that it does follow from the logical structure of Radin's paragraph. Let "xBy" signify "x is better than y"; "Lx" signify "x should be limited"; "r" signify "taxes on residential property"; "c" signify "taxes on commercial property". Then the last two sentences imply (Lr&¬ Lc)B(Lr&Lc). Is it the case that if (a&c)B(a&d) then cBd? Not always: I, for one, prefer pizza and beer to pizza and wine, but I prefer wine to beer. This is due to a dynamic which exists among pizza, beer, and wine, but Radin does not hint that *this* dynamic exists between tax rates on residential and commercial property (her whole work is about *another* aspect of residential and commercial holdings). Thus I think it hard to deny (and it certainly is the most natural interpretation of her words) that for Radin, (Lr&¬ Lc)B(Lr&Lc)

Her second defense of the possibility that her theory of property could be enacted as a practical program rests on the claim that it would not demand of judges distinctions too fine for them to make:

> "it is understandable that someone would blanch at the notion of giving a judge the power to decide whether her jewelry or paintings are personal or fungible. But the issue whether or not something is appropriately considered personal property is not 'subjective,' ... and therefore does not call in general for this kind of case-specific judgment. Whether or not something is appropriately considered personal instead depends upon whether our cultural commitments surrounding property and personhood make it justifiable for persons and a particular category of thing to be treated as connected.
>
> Courts are not called upon to decide case-by-case whether the claimant actually experiences connection with her property, but rather to decide in general which types of cases involve personal property... for example, ... it will not call upon the court to decide in any particular case whether a resident owner really cares enough about his or her home."[77]

7) CORPORATE HOLDINGS ARE ALWAYS FUNGIBLE

One corollary of Radin's argument so far is that corporate property *by definition* cannot be personal property, in the sense of her term. Businesses (micro-theory tells us and "market ideology" endorses) are rational agents, seeking to maximize their own well-being. They trade assets towards that goal, come what may. Furthermore, though the law treats corporations as persons, a

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because (Lc)B(¬Lc). Her book explains *why* she thinks this: I am merely highlighting *that* she must think this for the quoted sentences to make sense.

[77] *ibid.*, page 18

corporation is not a natural person, and so cannot "become attached in some noneconomic sense to the land or the plant it has long been using."[78] They neither form strong relationships, nor are they even persons in the sense in which Radin uses the term. Therefore they cannot conceivably have the personal attachments to property, constitutive attachments, that are demanded if their property is to receive strong protection. Instead, their assets are fungible, and should receive only the weak protection afforded to fungible assets.

8) RENT CONTROL

Radin focuses her discussion of property rights by addressing the subject of rent control, which she correctly perceives as an instance of "regulatory takings" (*cf.* my earlier discussion of Epstein and takings). She does not blindly advocate rent control, pointing that "the issue remains to be discussed whether legal enactments of tenants' rights is the best way to make progress toward a world in which landlords and tenants are more closely linked in community."[79] Note that this assumes that both landlords and tenants *want* to be "more closely linked in community", or that they should be forced towards such links even where they do not.

To Radin's credit, she is aware of some of the economic arguments against rent control. She gives a partial list of the "unmitigated evils" that may accompany rent control:

> "Landlords will use their buildings for something other than rental housing; they will not use vacant land to build more rental housing; tenants will stay put when otherwise they would move; more tenants

[78] *ibid.*, page 12.
[79] *ibid.*, page 21.

> will want to rent the remaining (cheaper) apartments. The housing shortage will then be even worse than the shortage before the imposition of the rent ceiling, and the 'real' market price will be even higher."[80]

(I say "partial" because she neglects the ways rent control increases discrimination and improves the lives of middle-class reformers at the expense of poor people: I address those issues shortly).

In light of this, Radin makes an interesting assumption at the outset of her critique of markets versus rent control:

> "to consider approaches other than the simple allocative efficiency model, we must assume that rent control works to some extent, in the sense that tenants are really paying less money for the same thing... Hence, we must assume that accompanying circumstances make it impossible for the landlords to reach a new market equilibrium of no benefit to tenants... This in practice will mean that along with rent control there must be concomitant legal safeguards. They might include enactments such as prohibition of disguised pricing; strict housing code enforcement; and limitations on conversions to other uses, such as condominiums."[81]

That is, we will assume that we can enact rules against the deleterious effects of rent control mentioned above, and then decide if we are in favor of it.

And so unsurprisingly, in the end Radin is an advocate of rent control. As usual, she provides a concise summary of her argument:

> "Rent control is often imposed to alleviate a shortage of affordable housing. The standard

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[80] *ibid.*, page 72.
[81] *ibid.*, page 74.

> economic analysis says that ... rent control is an unmitigated evil...
>
> I argued that regardless of how the economic efficiency calculus comes out (but still more clearly if its outcome is questionable), efficiency is not the only issue. If a tenant stands to lose her home so that the landlord can reap a higher profit, that can be perceived as wrong. Resident homeowners don't have to pay over more and more of their income to the lienholder as the market value increases or as interest rates increase. Even adjustable mortgages are capped in advance. Resident owners have security of tenure as long as they can maintain the level of payment they planned for. My essay made the case for treating similarly situated residents similarly."[82]

Radin's argument for the position that "residential housing is appropriately treated as incompletely commodified"[83] comes from two directions. She maintains that it is implied by the nature of personhood and the nature of community.

Tenant personhood

The first argument runs as follows: a person's "interest in continuing to live in an apartment that she has made for herself" is a more compelling interest than a "commercial landlord's interest in maintaining the same scope of freedom of choice regarding lease terms and in maintaining a high profit margin (*sic*)."[84] And the inefficiencies to which the economist draws attention generally accrue to new, would-be tenants: people who would move into the community if new home construction were not being stifled by rent

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[82] *ibid.*, page 20
[83] *ibid.*, page 78.
[84] *ibid.*, page 79.

control, as opposed to present tenants who will benefit from rent control. As Radin puts it:

> "Since the intuition that residential tenants have a better claim than commercial landlords does not extend in full force to would-be residential tenants, the salient distinction is not (or not only) between noncommercial and commercial interests, or even between use as a home versus other uses. The salient point is rather the strength of one's interest in an *established* home versus other interests..."[85]

The landlord's interest is fungible, according to Radin, and so is not constitutive of him, whereas the tenant's interest in her home is constitutive: her "individuality and selfhood become[s] intertwined with a particular object."[86] Therefore it trumps the landlord's interests.

Interestingly enough, in her article "Residential Rent Control" Radin does not address the possibility of the existence of a landlord who *does* feel connected to her property or her tenants in a personal sense, and who therefore would seem to deserve to have her property receive the strong protection the state should afford *personal* property. In "The Liberal Conception of Property", however, Radin does take up just the problem of a landlord who lives in one-half of a duplex and rents out the other half, or one who lives in an apartment house and rents out its other units. While stating that "subjective feelings cannot by themselves render property

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[85] *ibid.*, page 81.
[86] *ibid.*, page 81.

personal,"[87] Radin asks: in cases where the landlord's interest is not only in property, but in the tenant's themselves, might the property rights of the landlord receive strong protection?

The answer is ultimately still "no," for to hold otherwise would be "morally counterintuitive". It would be to grant the "good" landlord greater power over others, which would undermine the very reason one should be "good" in this sense: the desire to treat others as equals and not to have power over them. "Therefore we do not recognize and foster human flourishing as expressed in incomplete commodification if we treat incomplete commodification as somehow giving rise to stronger property claims on sellers' part and weaker property claims on buyers' part."[88]

Tenant community

Radin gives a second argument in favor of rent control which focuses not on individuals but on "spiritual communities of tenants."[89] There are three steps to this justification in any given case: the principle must be demonstrated that the preservation of real community can trump the fungible interests of landlords; a particular community must be shown to be a spiritual community; rent controls must be shown to prevent dispersion effectively.[90]

Radin's argument here proceeds along well-established and easily guessed lines. 1) There is value to community life even on utilitarian grounds, and also on the nonutilitarian grounds that "persons are (partly) constituted by communities"; 2) the

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[87] *ibid.*, page 144.
[88] *ibid.*, pages 144-145.
[89] *ibid.*, page 87.
[90] *ibid.*, page 87.

"individualist base" would "assume that communities are merely of instrumental value." And having demonstrated that an "individualist base" erodes community, Radin discusses the nonutilitarian criteria for personhood-enhancing communities, and describes how they may be met. Her discussion, involving the alignment of political and spiritual boundaries, will be skipped here.

C. Response to Radin

Radin's argument is lucid and plausible. I reject it, however, for six reasons.

1) Radin's concern that legal theory commodifies personal attributes is a worry that only makes sense against a background assumption which makes her argument a tautology.
2) In claiming that libertarian self-ownership undermines personhood, Radin has judged absolutely and not with reference to alternatives.
3) Radin ignored the role that discretion plays in personhood.
4) Radin's criticism of baseline property rights is a non-sequitur.
5) The distinction between personal and fungible property is a poor one, for four reasons. Social institutions are *not* capable of seeing this distinction clearly; the moral consensus of the majority on one vision of personhood should not suffice to ratify that vision into law (I consider the case of commercial and sexual entrepreneurs); the consensus on "fetishistic capitalism" to which Radin appeals is non-existent; Radin misunderstands corporate ownership and neglects the way it may blend personal interests.

6) Radin's rent control argument fails because she has overlooked important problems with rent control, problems which undermine most of the interests Radin seeks to further. I make that argument with appeal to three lemmas:

Rent Control Lemmas:

1. Rent control causes misallocation of resources;
2. Rent control makes middle-class reformers better off at the expense of poor people;
3. Rent control increases discrimination.

In addition, I add one bonus lemma to liven an otherwise bald and tedious tale:

4. *(bonus lemma)* Interesting and humorous data about the effects of rent control are adduced to buttress my themes.

As before, each of the preceding points corresponds to one section below. Some receive more attention than others. In particular, I focus on rent control, as this is Radin's focus.

1) RADIN'S COMMODIFICATION CRITICISM IS TAUTOLOGOUS

Radin, it will be remembered, writes that "Certain 'goods' are rights and duties (or better, attributes) of citizenship, and it is degrading and harmful to community or political life to conceive of them as market commodities."[91] Yet this is true only if one views market commodities as degrading or harmful. To men such as Ackerman and Posner, who from the Left and Right view property

[91] *ibid.*, page 201, quoted earlier.

with substantial respect (cf. my earlier chapter on torts), to frame a person's right to control his homosexual conduct as a property right in his body is to pay it singular respect. Radin's assertion that it degrades and harms political life is an assertion that can only be made *against* a background theory of property and, in particular, one which views property as "degraded." It therefore cannot be simultaneously adduced in favor of such an argument.

2) LIBERTARIAN SELF-OWNERSHIP COMPARED TO WHAT?

Radin's argument that libertarians contradict themselves on self-ownership is plausible only at first glance. The proposition that "The self ... can sever all of its attributes, characteristics, endowments, etc., without destroying its essential selfhood"[92] seems to contradict the thick view of the self the libertarian maintains in order to counter Rawls' argument about a common pool of natural talents. And yet, as always, one must ask, "Compared to what?" The libertarian holds that a self's holding the conveyance rights over its essential attributes is preferable. The question is, preferable to what?

The answer is, it is preferable to maintaining that the state hold those rights. As was discussed with reference to Alchian, one should not think of property rights as bundles of possibilities whose actual existence we debate. Instead, we should think of them as an existing set of rights to *exclusivity*, *use*, and *conveyance*, and ask in each case, how are those rights distributed among private, State, and common ownership?

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[92] *ibid.*, page 26, quoted earlier.

For this reason, it is perfectly plausible for the libertarian to maintain that the self is thick and, when asked if the self can convey its right in some of its constitutive components, respond: "If I say no, then that amounts to awarding a conveyance right to the State. Saying that I should not be permitted to sell an attribute of my person is equivalent to saying that the state should hold the conveyance right in that attribute, and that I do not hold it. As long as *someone* has to hold it, I would rather hold it than let the state hold it. And if I hold it, I can sell it (though I may have no reason to do so)."

As I suggested in one of my final criticisms of Waldron, people err by debating whether a property right should exist or not, when the correct question to debate is, should an individual hold this right or the State? And if neither, are we happy to let it be held in common? Radin consistently fails to ask "Compared to what?" in discussing alienability of personhood-constitutive attributes.

3) DISCRETION AND PERSONHOOD

This is a good point to illustrate how her theme of undermining the decision-making power of individuals runs contrary to Radin's desire to reinterpret property to make room for the development of personhood. A clear illustration of the case of the brilliant piano-player who sells her right to play the piano. According to Radin, if the pianist's playing is constitutive of herself, then treating her ability as a commodity undermines her personhood, rather than enhances it as the "liberal ideologues" maintain.

But in response to this, I say that decisions as well as attributes constitute a person: the decisions a person has made through her life tell me as much about her as her characteristics, and certainly they tell me more than the skills (such as piano-playing) she has acquired. To *deny* the piano player the option of making the decision to sell her right to play the piano would be to strip her of a component of selfhood, rather than to enhance that selfhood.

There is a better example which reveals how Radin's desire to deliver security in order to enhance personhood is a self-defeating pursuit, because Radin's program robs individuals of discretion, and discretion is intrinsic to personhood. This mis-valuation of Radin's must be teased out of one of her arguments.

Consider the passage quoted earlier:

> "Resident homeowners don't have to pay over more and more of their income to the lienholder as the market value increases or as interest rates increase. Even adjustable mortgages are capped in advance. Resident owners have security of tenure as long as they can maintain the level of payment they planned for. My essay made the case for treating similarly situated residents similarly."[93]

Whenever one says that two things are similar, it generally makes sense to ask, in what way are they similar? I may say, "I am wearing matching socks," but that does not tell the listener much if I don't also say, "One is red and one is blue, but I judge by thickness." Unless things are *identical*, what an assertion of similarity likely

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[93] *ibid.*, page 20. Such universals are true only if one assumes the United States is the universe, which Radin and other American philosophers (including myself) tend to do.

means is that in some respect thought *relevant* to the topic at hand, two things resemble each other.

In the case of Radin's last quote, her assertion is only intelligible by discovering what respects she thinks are relevant, and by implication, what are not. She is comparing tenants to residential home owners who have mortgages. She notes that mortgagors do not face changes in the amount of their monthly payments due to fluctuations in market prices or (usually, and always within limits), interest rates. They have security as long as they keep up the payments they once agreed to. Tenants are similarly situated, she believes, and so they should be afforded the same kind of security.

What is the way in which tenants are "similarly situated" for this claim to make sense? A tenant is similarly situated in respect to a homeowner with a mortgage in the sense that they both occupy a dwelling. But beyond this there are many ways in which their situations differ.

a) A decline in market prices will improve the situation of the tenant, while it will hurt the homeowner (as the real estate deflation of the late 1980's showed).
b) A decline in interest rates will produce a benefit for the tenant, but not so for the homeowner (unless he is able to refinance his mortgage, and this will be much harder to do in the future than in the past, as banks hedge this risk with more stringent pre-payment penalties).
c) The tenant has flexibility in lifestyles and household economics that the homeowner does not: given a new job in another town, or

a change in her salary, she can adapt her living situation with far more ease. And so on.

But the most important way in which the situations of the owner of a mortgaged home and the apartment tenant differ is in the terms they have contracted with their respective suppliers (the landlord in the tenant's case, the provider of capital in the homeowner's case). Tenants conceivably could acquire the same hedges against changes in interest rates as homeowners, for example, either in the terms of their rental contracts or in some secondary market. One could offer to pay slightly more per month in return for a longer guarantee of fixed rent, or one could offset the risk of a climb in interest rates by shorting short-term Treasury bonds, for example.

The point is not whether or not renters do these things or are sophisticated enough to do these things. The point is that the situations of homeowners and tenants are similar in one (superficial) way: they both dwell somewhere. The are dissimilar in others: importantly, they have entered dissimilar contracts which spread risks over different eventualities in different ways. To argue that property law must be "reinterpreted" so as to deliver both tenants and homeowners the same degree and type of security in their occupancy it to overlook entirely the ways they have agreed to accept risks from their respective suppliers.

This, like the piano-player example, is important in that it reveals what things are important to Radin. Radin's claim is that she wants a "reinterpretation" of property law in a way that accords

more respect to personhood. And yet the practical measures she endorses vitiate the decisions and discretion people might otherwise have to construct the terms of their lifestyles and to arrange levels of flexibility and risk in ways they desire.

I will address later in this section Radin's decision to endorse the interests of present tenants over the interests of potential movers-in. But a point on that subject must be made here: the decision to adopt rent control policies in one region does not just conflict with the monetary interests of potential movers-in, as Radin suggests (but which she thinks is relatively unimportant): it conflicts with the ability of potential movers-in to fashion the terms of their own lifestyles if they decide to come. It undermines the *discretion* they would otherwise have in the types of contracts they could enter into if they did come to that region.

Like the piano-player example, then, Radin's point is to say that a particular kind of personhood can be enhanced if certain restrictions on contract are enforced. But the notion of personhood to which she refers is recondite and ephemeral compared to the notion of a person as an autochthonous agent having the discretion to decide the terms on which she lives in the world and accepts or trades away from its risks. The person that Radin would lead us to accept is a passive creation, perhaps more secure in her *existence*, but stripped of various discretions over her *life*.

The argument cited above is possible only because it does not occur to Radin to consider discretion as an element of personhood, focusing as she does on security and not recognizing the important

ways in which the tenant and the owner of a mortgaged home differ. And yet I would suggest that discretion is the *sine qua non* of a person; the reader may accept or reject this, but should note that Radin does not even notice it as a potential grounds for distinguishing the two cases in her preceding quote. This fact and the piano-player example suggest that she is not attuned to the role that discretion plays in personhood.

4) THE CRITICISM OF BASELINE RIGHTS COLLAPSES

A dinner guest argued moral relativism with Johnson, and insisted that there was no real difference between honesty and thievery. Johnson turned to his companions and said, "Well then, let us count the spoons!" It is a fashion in jurisprudence to argue that some case has no baseline, or some piece of text has no most preferable reading, and then to suggest an interpretation which is merely the private theory of the writer.[94] I will show that this is what Radin has done in her book.

Radin aptly criticizes the assumptions behind the "liberal ideology of property." As was discussed with reference to Waldron, it seems odd at this stage of history to be discussing property as goods which were either acquired from common ownership, such as land in the "uninhabited" New World, or goods gotten through transfer. Too many of the most valuable goods today do not have

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[94] A bold claim, surely, but it seems to this outsider to be an overused technique in legal writing. See for example Dworkin's discussion of cruel and unusual punishment in *A Matter of Principle*, pages 40-43, along with his many discussions of constitutional principles, civil rights laws, etc. It is a fault of which both the Left and Right are guilty. The arguments seem to run along these lines: There is no exact meaning for these words, therefore we are free to supply a meaning. As Sowell has pointed out, however, the question is not whether some text has an *exact* meaning, but whether it has *enough* meaning. See *Judicial Activism Reconsidered*, pages 6-12.

that structure. Radin correctly questions the appropriateness of continuing to think of property in terms of these 17th-century views of the world.

Yet Radin is also self-contradictory. She writes,

> "it is obvious that in the past two decades the tenant's 'bundle of stocks' has gotten larger and the landlord's smaller..."[95]

Elsewhere she maintains,

> "...rights that are considered 'property' are taken more seriously than any general rights to 'liberty.' This is even more true than it was a decade ago. The American Supreme Court goes out of its way to protect people against what it perceives as threatened government invasion when the issue is property rights, yet often goes out of its way to side with the government against the claimant when the issue is liberty."[96]

As has been argued *ad nauseam* by now, the above statement misconstrues the relation between property and liberty: property rights are checks on governments, not citizens, in a well-ordered state. But my real point here is that it is strange to maintain that property rights are receiving excess protection at the expense of liberty *and* to argue elsewhere that it is obvious that courts have eroded landlord's rights in favor of tenants. Perhaps the confusion about a baseline for property is Radin's own making, as she makes contradictory assertions that are both "obvious" to her, and she gives little more argument for the lack of a baseline than what was quoted (essentially in full) earlier in this chapter.

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[95] Radin, *Reinterpreting Property*, pages 21-22, quoted earlier.
[96] *ibid.*, page 14.

Furthermore, even taken in isolation Radin's argument on the lack of a baseline (quoted at length earlier) is a *non sequitur*:

> - Courts have changed the rights-bundles of landlords and tenants; courts have held these not to be takings; a "deep explanation" is that there were no takings, there has just been an "evolution of the legal package" of property rights; therefore property rights are not fixed.

This argument merely assumes that the Epstein argument on takings (discussed in the previous chapter) was in error. A different explanation for the phenomenon Radin cites is:

> - Courts changed the rights-bundles of landlords and tenants; courts held these not to be takings; courts were in error not to hold these to be takings.

Maybe this is not the kind of "deep explanation" Radin prefers, but it is as consistent with the phenomena as Radin's own explanation.[97]

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[97] The principle of *stare decisis* suggests one way of discussing law: we read into the body of common law the principles we must in order to make its decisions make sense, and then apply those principles in the cases before us. Our act of reading principles into the common law is supposed to resemble the way scientists read organizing principles into the data they generate.

Unfortunately this principle short-circuits *philosophical* discourse, as opposed to legal discourse. If I am discussing with a philosopher whether X or Y is *just*, we will make arguments from the ground up. If I have the same discussion with a lawyer, she might refer to a series of decisions which indicate the operation of a principle within the common law, and argue that this principle implies X and not-Y. In this case it is not clear that we are even talking about the same thing.

So it is with Radin's argument. I am questioning the judicial erosion of property rights. If in response Radin says, "But the principle I am supporting is consistent with the decisions of courts over the last two decades, and yours is not," then clearly we are speaking past each other. For I am questioning the very tradition to which she is appealing, and so her reply will make little sense to me. In any case, this seems to be a potential source of confusion when lawyers and philosophers speak to each other.

5) PERSONAL AND FUNGIBLE PROPERTIES

As Radin uses rent control to reveal the workings of her property theory, it is difficult to critique that theory without some implementation of it to which to refer. Like her, I will use rent control when example is necessary.

We arrive finally at the centerpiece of Radin's theory, the continuum she proposes of personal and fungible property. Radin's argument, remember, is that personhood may be conceived of as extending beyond the body and individual attributes, and can include some set of goods which heretofore have been conceived of merely as property. These goods, which she calls personal property, are so constitutive of personhood that a consistent liberal should recognize that they deserve the same strong kind of protection that the libertarian, for example, wants to afford the body.

The questions to ask are: 1) can social institutions do the job Radin demands of them? and 2) is the vision of the person to which Radin appeals too thick a vision, or can it be located within the "moral consensus" to which she appeals?

For now, I set aside the question of whether institutions in a reasonably free society may (as Radin flatly assumes) actually enforce, "enactments such as prohibition of disguised pricing; strict housing code enforcement; and limitations on conversions to other uses, such as condominiums."[98] Later in this chapter I discuss the possibility that it is not easy to control prices and prevent the side-effects mentioned.

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[98] Radin, *Reinterpreting Property*, page 74.

Social institutions distinguish "person relationships" poorly

Can social institutions make the distinctions Radin asks of them? Radin has suggested that the job of legislatures under her theory would not be to make "case-specific" judgments, but to decide "in general which types of cases involve personal property". They will do this by determining "cultural commitments surrounding property and personhood."[99] If they cannot do so from within the moral consensus to which Radin herself appeals, then they cannot do so legitimately, on Radin's own account. So the first of these questions, "can social institutions make the distinctions Radin would demand of them?", rests on the answer to the second question: is Radin's theory of personhood too thick to meet the Rawlsian principle of legitimacy?

Radin's theory of personhood is too thick

Is Radin's theory of personhood neutral, part of the shared "overlapping moral consensus" to which Chapter 1 was devoted, or is it based on the private vision of the good held by Margaret Radin? If the former, then the state can reasonably legislate based on it: if the latter, then the state legislates from that vision only at the peril of visions of the good of other people.

The theory of the person behind Radin's argument sounds neutral but is, in fact, loaded. I have already explained how hers is a theory which upholds individual security and comfort at the price of individual discretion, with respect to the piano-player and the

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[99] *ibid.*, page 18.

putative similarity between the tenant and the owner of a mortgaged home. My point was that the one thing that a theory of personhood should not do is sacrifice large amounts of individual discretion in order to achieve something else, such as security, for the result is a secure and comfortable automaton blindly following the preferences of social reformers.

It is not necessary to prove that this vision of mine is correct. What is important to note is: 1) Radin is willing to sacrifice individuals' discretion over the terms of the agreements that bind their lives; 2) she offers no argument maintaining that discretion is less important than security; 3) the vision I espouse of the centrality of discretion to freedom is not uncommon, and surely one should not assume its absence from our society's overlapping consensus of the good. But I shall move to other ways in which her theory of the person is too thick to be acceptable to a politically liberal society.

The consensus of the Moral Majority on the fetishisms of capitalists

Recall Radin's description of "fetishistic capitalists," an analysis which lies at the core of her argument (for it is the interests the capitalists have in their fungible property that must defer to the interests of others in their personal property, claims Radin). And here, remember, the justification is that we should respect "entanglements, *when we can see them, and see them as appropriate.*"[100] The "we" doing the seeing is the same "we" that judges the health or sanity of others, the "we" of consensus. If there

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[100] *ibid.*, page 11.

is a consensus that capitalists' "entanglements" are inappropriate to personhood, that consensus is "a sufficient source of objective moral criteria"[101] to conclude that they are inappropriate. And lastly, Radin assets that such a consensus exists:

> "it is probably true that most people view the caricature capitalist with distaste. Most people might consider her lacking in some essential aspect of personhood, such as the capacity to respect other people or the environment."[102]

This principle, that the conception of personhood held by "most" people is adequate grounds for legislation, is too strong a strong, for it conveys too much power to simple majorities and away from individual people; furthermore, Radin's empirical claim is probably false, and she makes no attempt to support it.

Radin's "moral consensus" is too strong

Radin's general principle, that one can legislate from a moral consensus, looks something like the "overlapping moral consensus" of my earlier arguments concerning rights and altruism, or my discussion of Rawlsian political liberalism. But the resemblance is superficial. That principle has several formulations and was not completely worked out, but its weakest formulation was, if a rule appeals to a principle *not* in the overlapping moral consensus, (that is, not in the disjunction of the "complete" set of visions of the good), then it was disallowed. I further stipulated that while the

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[101] *ibid.*, page 43.

[102] *ibid.*, page 44, thinking, no doubt, of the tremendous respect towards the environment displayed by government worthies in pre-liberated Eastern Europe and other places where people were protected from "caricature capitalists.".

"complete" set might not include the moral visions of everybody in a group, unanimity would be ideal.

Radin's principle, on the other hand, refers blandly to "most" of the people, and therefore gives terrific license to bare majorities to legislate personhood. Does the same group feel that personhood is undermined by the weak performance of filial duties? Homosexuality? Irreligiousness? The preferences of a simple majority of the people may often be framed as conditions of "true" personhood, and thereby, on Radin's test, be allowed to govern.

Furthermore, preferences about other people's sexual or religious selves are intrusive, and therefore bad enough. The preferences Radin calls on regarding other people's economic selves are intrusive *and* self-interested. Suppose it is true that "most people" think that landlords have "insane" attachments to their property, as Radin claims. If rent control is enacted, it is likely that those same "most people" will reap benefits (actually, I will argue, they will not get the results they expect). Those "most people" might think that landlords' personhoods would be benefited by coming over and mowing the lawns of those "most people" once a week, but we might cast a suspicious eye on the motives behind the beliefs about "personhood" of these "most people."

fetishistic capitalists or dynamic entrepreneurs?

I wish to dispute the idea that "most people" believe about "fetishistic capitalists" what Radin claims they believe. Radin never specifies if she is referring to "most people" who teach at the Stanford Law School, or who live in the Bay Area, or Silicon Valley,

or the United States. If we survey people within two miles of the Stanford Law School we may get a different result than if we survey within ten, or if we conduct a survey in Omaha, Nebraska. There are places where "most people" think that people building homes for other people, having others moving in, raising families, holding jobs, etc., is actually rather a good thing. Those of us who are not homeless reap the benefits of the past acts of some such "fetishistic capitalists" daily. Mere grumbling about the cost of something does not mean that "most people" really want price controls: in California, many people grumble about migrant workers (witness Proposition 186), but they do not tire of buying grapes at $1.49/pound.

In sum, what people approve of and disapprove of should not translate into law as directly as Radin suggests; what they say they disapprove of is not necessarily indicative of what they want changed; such approval or disapproval may be skewed by the terms used ("fetishistic capitalists" versus "home-builders" or "real estate entrepreneurs"); a self-interested general consensus should be taken lightly; and Radin gives zero evidence that such a general consensus exists anyway.

For such a central argument in her book, upon which her entire argument rest, the one page Radin devotes to proving that capitalist holdings are "fetishistic" and maybe "insane," and destructive of personhood, is strangely weak.

summary of moral consensus and fetishism

The point of discussing a moral consensus, in Rawls' case and also in mine (in Chapter 1), was overwhelmingly negative: a law is illegitimate, it legislates morality, if it appeals to moral propositions outside the overlapping consensus of a group of people. I weakened this somewhat, saying that the overlap might be only of a "complete set" of people in the group, and thereby carved-off the question of whether there had to be near-unanimity (as Rawls seems to think) or something moderately less.

Radin, on the other hand, takes a moral consensus as license, rather than taking the lack of it as restriction. This is a different claim. Furthermore, "complete" for her means a simple majority. Furthermore, she is willing to accept a consensus not on specific moral propositions, but on the much vaguer question of healthy "personhood." Any bigotry at all can be framed as an assertion about people's personhoods and what would benefit it: therefore, any bigotry of a simple majority can be codified as law, if Radin's principle is accepted. Furthermore, when the vision of personhood which people endorse, and which is supposed to be codified as law, turns out to be a self-interested vision for those people to maintain, we should take it less seriously. And lastly, the consensus which Radin believes exists, does not.

Corporate property is a blend of personal interests

Radin misunderstands corporate ownership

Radin's argument that corporate property is by definition "fungible" displays how narrow a conception of personhood is the one

from which she works. First, of the approximately 20 million business entities in this country, about 8 million are the C-Corporations which have the feature of disinterested anonymity to which Radin refers.[103] The others are partnerships, sole proprietorships, sub-S corporations, and limited liability companies, all of which generally act as mere legal surrogates for the people behind them. That is, they do not really provide any additional layer of disinterestedness: if an entrepreneur may be non-fetishistic while directly owning an apartment building, as Radin herself acknowledges,[104] there is no reason to say he *becomes* fetishistic when he moves ownership into a sub-S corporation in order to limit his liability. The same may be said, in general, for sole proprietorships and partnerships. A dairy may make a fine family business, and the lifelong attachment to it by family members may be non-fetishistic, and yet this attachment is not vitiated if that family seeks the liability protection which incorporation offers.

Ignoring the problems with Radin's characterization of the entities which own property, we may still ask, if she were right about the entities, would she be correct to call their assets fungible? In a sense, yes, for we assume that the firm is willing to trade among properties in an effort to maximize returns. And yet here Radin misses something as well: while decision-making within the entity may make one conclude all its property is fungible, the ownership *of the entity* may make one second-guess that judgment.

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[103] See Slavin, *Introduction to Economics*, Chapter 1.
[104] Radin, "The Liberal Conception of Property", in *Reinterpreting Property*. See especially pages 144-145, discussed above.

Corporate ownership may be viewed as free-standing, but it may also be looked upon as a funnel for private ownership.

This is especially true with the ownership of real estate in this country, and it is real estate which so occupies Radin: large-scale corporate ownership of real estate such as apartment houses, where it exists, is by-and-large accomplished by Real Estate Investment Trusts. These are essentially huge trusts that permit any saver to invest in real estate: a person with a hundred dollars may not be able to invest in an apartment house on his own, but by buying shares in a REIT that is precisely what he is doing.

The market capitalization of REIT's has risen dramatically in the last twenty years, and especially in the last five: from approximately $1 billion in 1975, to ≈ $8 billion in 1990, to over $55 billion in 1995.[105] Due to the favorable tax treatment of REIT's (they are flow-through vehicles, like partnerships, as long as they distribute 95% of net income to owners) this number will likely continue to skyrocket. Furthermore, approximately 2/3 of REIT ownership is "institutional," and another 5% is held within dedicated REIT mutual funds.[106] The institutional character of REIT ownership (generally speaking, pension funds and insurance companies) means that one should properly think of the economic interest in REIT ownership as being spread out across pensioners and insurance buyers, especially buyers of life insurance.

So the question really to be addressed is, may the private ownership of real estate be thought of as fungible, when that

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[105] Lee Schalop, "Quarterly Update: Real Estate Investment Trusts," page 28.
[106] *ibid.*, pages 24-25.

ownership is, at least in an economic (i.e., non-legal) sense, divvied up across millions of savers? If not, if it may be said to be personal, then no longer does rent control pit purely personal interests against purely fungible ones: instead, at a fundamental economic level, it pits some people's personal interests against other people's personal interests.

corporate ownership is not as fungible as Radin believes

But can an investment in a REIT, or for that matter, an entrepreneur's investment in a duplex, be thought of as anything but fungible? Clearly they are so close to monetary holdings that they cannot be treated as personal property if dollars cannot be treated as personal property. And here, ultimately, we reach the bedrock of Radin's argument: money is for trading, while homes are for living in, and the latter should be treated with more moral weight than the former.

And yet, dollars are not only for trading among values: they also serve to store value. A person may have traded something personal in order to acquire the dollars. Radin could rejoin that in such cases the personal property was not really personal. But it could have been, if it were something the person had to give up anyway: time.

Radin's fungible/personal distinction breaks down

The point I am getting at in this roundabout way is this: people save. They save by contributing to pension funds and IRA's, by buying life insurance and stock in companies. What they gave up, portions of their lives, in order to have those dollars to save, were terribly

"personal" in Radin's sense of the term. One individual may work all of her life and save enough to buy a small apartment building, counting on the income from it to carry her through retirement;[107] others may save by putting money in partnerships which buy many such buildings; others may have their savings put in pension funds which own enormous chunks of real estate through the mechanism of REIT's. All these people are trading in years of their lives in order to have that ownership. It is wrong for Radin to think of rent control, for example, as pitting personal ownerships against fungible ones, because at a fundamental level the interests being pitted against each other may all be personal. There is no obvious reason why the pension fund contributors, or even the lone duplex owner, should be told that what that owner acquired by foregoing other goods (or trading time for work) is not as dear or personal to her as the housing good held by the tenant. There need be nothing "fetishistic" about the savings mechanisms which stand behind such ownership, as such savings generally represent portions of a person's life. Therefore the fungible/personal continuum Radin has sought to elongate shrinks upon itself.

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[107] Incidentally, as is discussed later in this chapter, this seems to be a common strategy of minorities who face discrimination. Especially in the days when it was virtually impossible to advance in corporations, and therefore impossible to participate in corporate pension funds, a common retirement strategy for Black Americans (especially in cities such as Chicago and Denver) was to use savings to acquire small amount of rental property by which to supplement Social Security payments, as is discussed in Tucker's *The Excluded Americans: Homelessness and Housing Policy.*

6) RADIN'S RENT CONTROL ARGUMENT CRITICIZED

> "In many cases rent control appears to be the most efficient technique presently known to destroy a city - except for bombing."
> - socialist economist Assar Lindbeck[108]

Lastly, I turn to the arguments Radin has adduced in favor of rent control. I take this as an opportunity to give an economic analysis of not only rent control but, *mutatis mutandis*, a large class of policies which most social philosophers seem intent on endorsing.

I remind the reader of three lemmas given at the outset of this criticism of Radin, to which I will add a fourth item:

1. Rent control causes misallocation of resources;
2. Rent control makes middle-class reformers better off at the expense of poor people;
3. Rent control increases discrimination.
4. Some humorous and interesting evidence exists concerning the effects of rent control. I include this to break up an otherwise monotonous tale for the reader who has plowed thus far, and to recall my *leitmotif*: facts and values are entangled.

I will present each in turn, and then switch back to Radin, to show how these lemmas undermine her argument.

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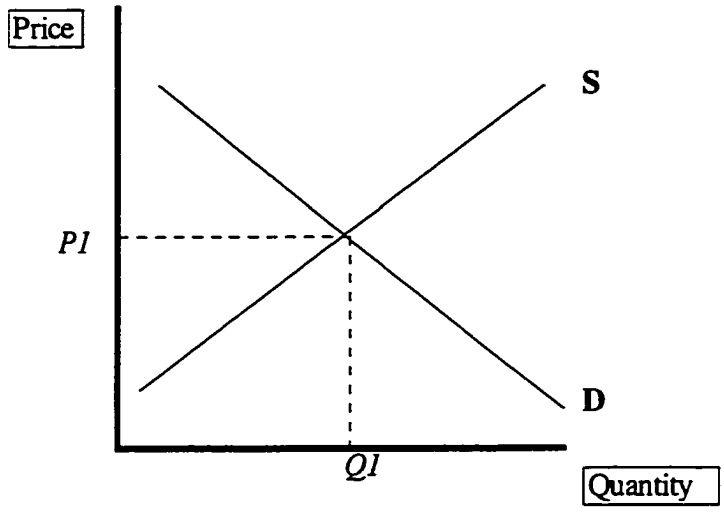
[108] Assar Lindbeck, *The Political Economy of the New Left 1970* (New York: Harper and Row, 1972), page 39. Quoted in Gwartney and Stroup's *Economics: Private and Public Choice*, page 56.

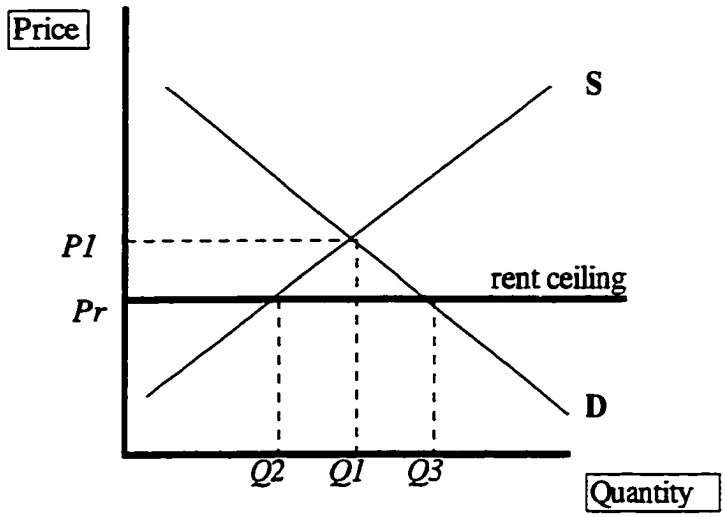
Rent control lemmas

#1: rent control causes misallocation of resources

Consider standard supply and demand functions for a housing market, where P_1 indicates pricing, and Q_1 indicates quantity supplied, in equilibrium:



Assume the imposition of rent control laws. Though such laws differ, their common result (in fact their purpose) is to cap or limit prices in some way. I model this effect as a simple price ceiling:



Some of the effects of rent control are evident:

- There is now a supply of Q_2 and a demand of Q_3. There is a perceived shortage of housing of $Q_3 - Q_2$.
- Rent control has caused a housing-supply decline of $Q_1 - Q_2$.
- Rent control has created an "artificial" demand of $Q_3 - Q_1$. This and the preceding point together imply a housing crisis.
- Q_2 people are better-off. Previously they paid P_1 rent, for a total of Q_2P_1. Now they only pay Q_2P_r. Their savings = $Q_2(P_1 - P_r)$.
- Some people are worse-off: , Q_1-Q_2 are now worse-off by the amount they were previously willing to pay for housing, P_1.

So some people have given up $P_1(Q_1-Q_2)$ worth of value in order to provide a benefit of $Q_2(P_1-P_r)$ to others: the effect of the rent control is a transfer of wealth between these two classes of consumers of housing. Notice that the Q_2 beneficiaries are probably (depending upon the slope of the curves) many greater in number than Q_1-Q_2, and so in a democracy they can continue to vote themselves their largess at the expense of other renters.

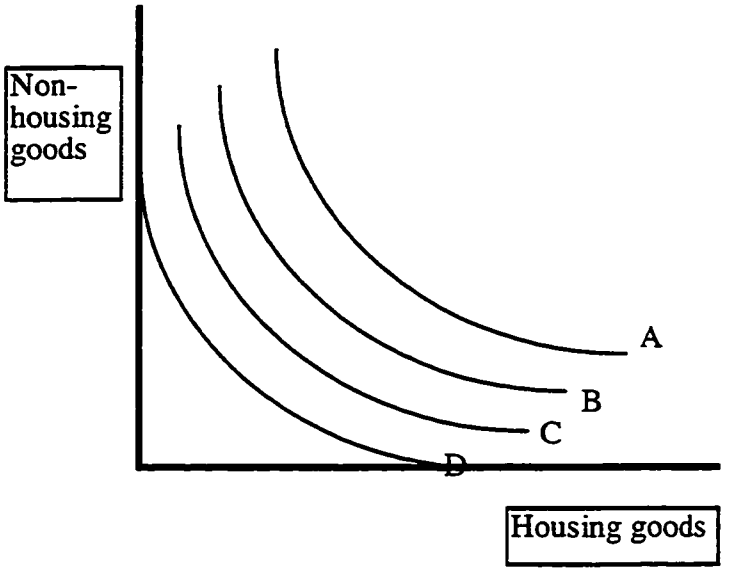
There is some question as to the gain that will accrue to those renters who benefit. The above graphs model one simple component of housing: quantity. But in fact not all units of housing are equal. Landlords offer housing of different quality, with different amounts spent on upkeep and repair, security, how much they demand in deposits, and countless other variables. When the state chooses to regulate one variable, the landlords may find it rational to "win it back" on others. And in fact this is a common phenomenon associated with rent control: the deterioration of the quality of housing stock.

There are other conceivable effects of rent-control: it becomes less rational for capital to move into a heavily regulated business like residential housing than into a less-regulated business such as commercial real estate, even if the returns are similar (which is unlikely). Therefore less capital will go to work to provide residential housing. Furthermore, as rent control laws often regulate lower-cost housing and exempt units above a certain price (as is the case in New York), this produces the further effect of steering capital, when it does move into residential housing, away from housing for the poor and towards providing a greater supply of (and hence, lower-priced) housing for the wealthy.

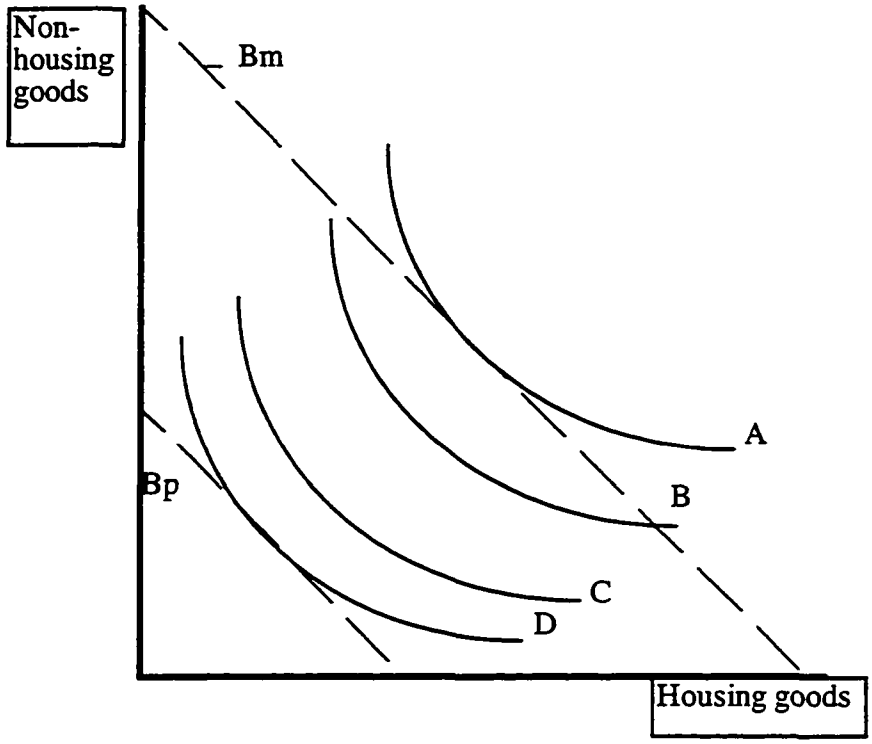
#2: rent control makes middle-class reformers better off at the expense of poor people

In *Markets and Minorities*, Thomas Sowell wrote of the benefits middle-class reformers achieve at the expense of poor tenants. In fact his analysis could be extended to many "consumer advocate" policies, especially those which seek to regulate explicit quality aspects of a good (rather than implicit variables, such as safety).

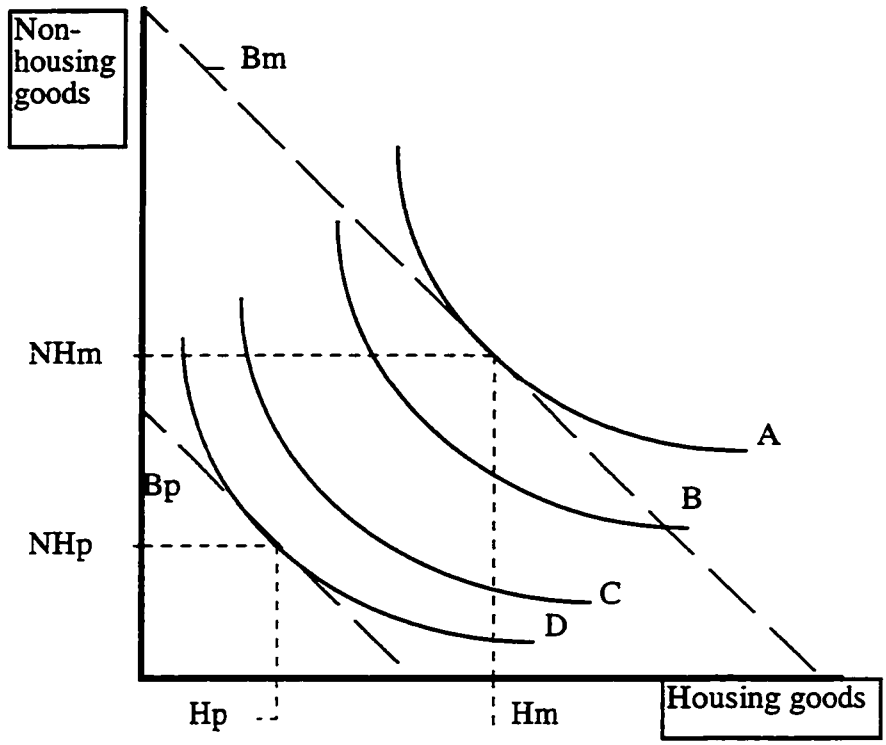
Consider a pre-rent control market, with consumers facing a choice between housing and non-housing goods, and their indifference-curves mapped as A, B, C, and D:



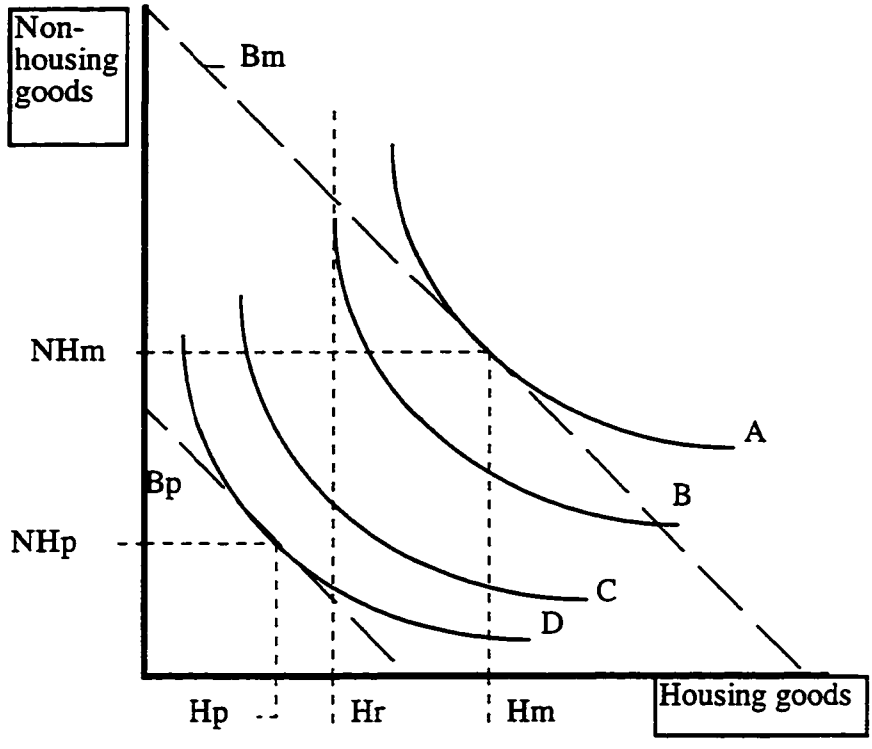
Households face budget constraints. The budget constraint of poor households is marked B_p; the budget constrain of middle-class households is marked B_m.



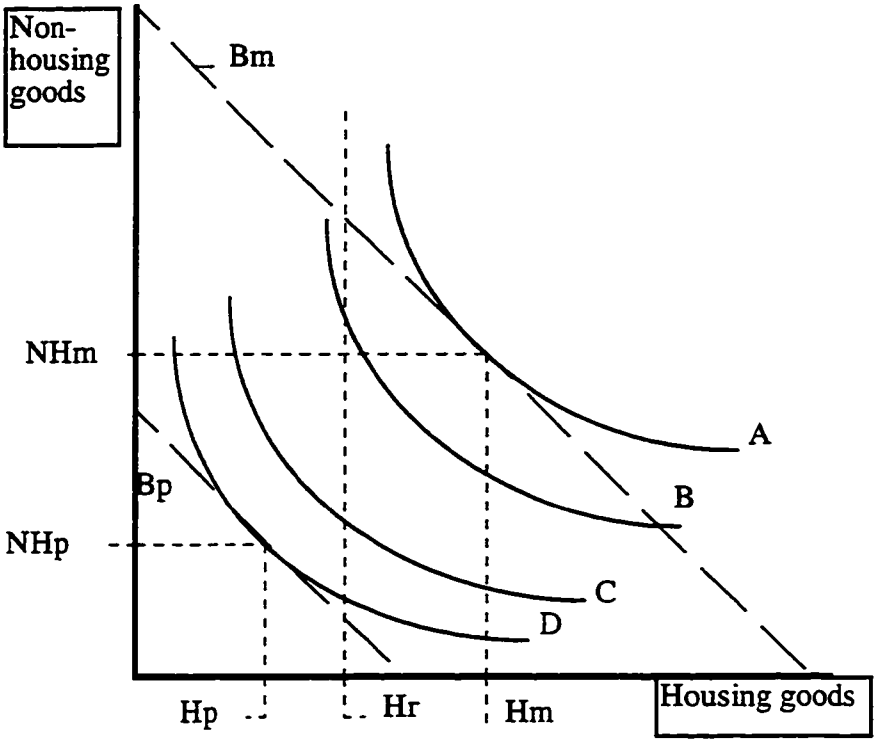
The intersections of budget constraints and utility curves determine the mix of goods that a given household will consume. Here, "H_p" indicates the level of housing good a poor household consumes, "H_m" the level a middle-class household consumes, and "NH_p" and "NH_m" the levels of non-housing goods consumed by poor and middle-class households:



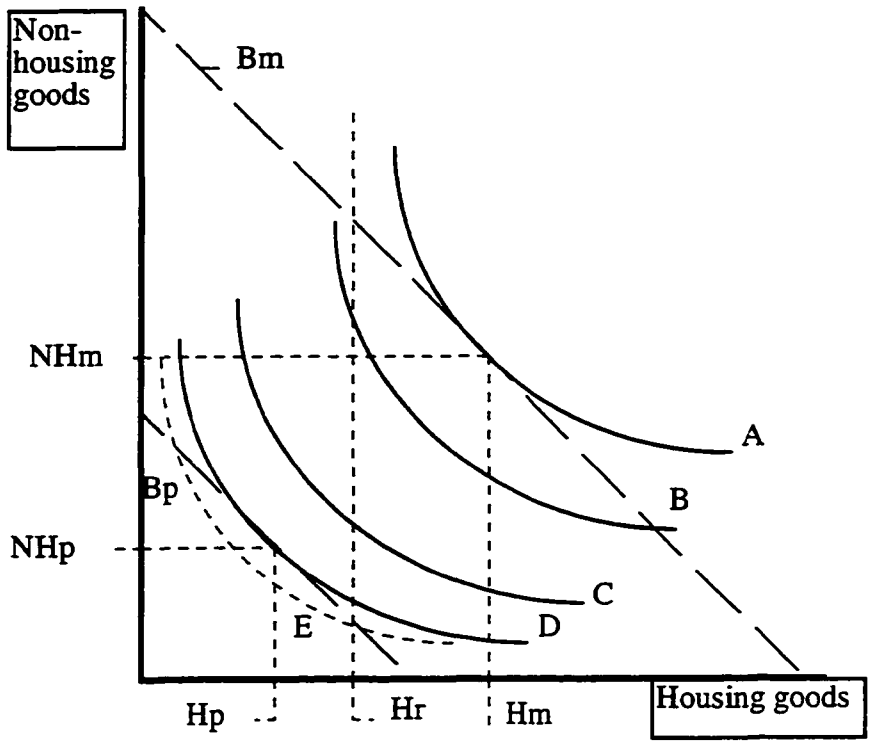
Assume a middle-class reformer driving by slums every day suffers discomfort and distress. Attempting to better the living conditions of the impoverished, she pushes for legislation that sets a floor on the type of housing good that "fetishistic capitalist" landlords are permitted to offer to the public, indicated in the graph below by the line labeled H_r:



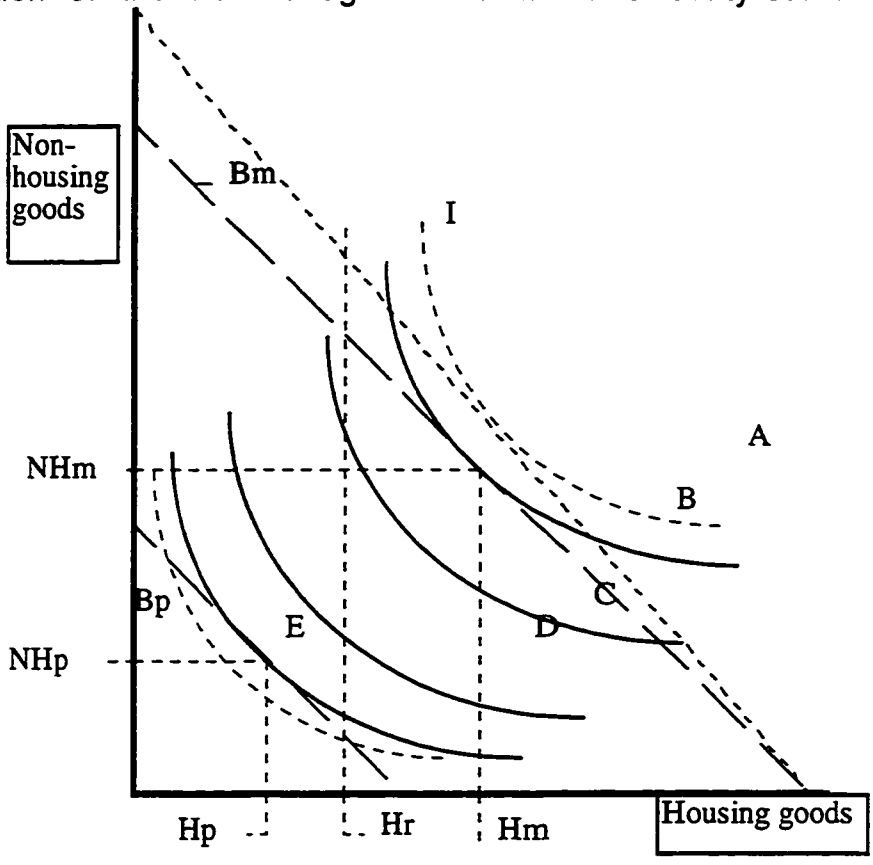
Assume that people are law-abiding. Then poor households must shift their consumption away from the mix they previously chose, and to a new more housing-rich mix, indicated by the intersection between H_r and the poor households' budget constraint B_p:



Notice that the utility curve which intersects this point is now E:



Furthermore, the middle-class reformer has a new good: she no longer feels the psychological distress of seeing slums, and (erroneously) feels satisfied for having done her part to improve the lot of the less-fortunate. This satisfaction may be thought of as a non-housing good: she now enjoys a budget-constraint that, while anchored in the same place on the housing side, has shifted upwards on the non-housing side, shifting her consumption to the intersection of the new budget-constraint and utility-curve I:



So in conclusion, the net effect of the reformer's policy is to shift poor households to a lower indifference curve, and to shift the middle-class reformer's household to a higher indifference curve. As with many economic policies, unintended effects swamp goals.

Sowell has given an altogether fuller analysis of this aspect of rent control, including its effects upon households and landlords who disobey the new law, bribe housing inspectors, etc. The point of his analysis is that poor households can recover through bribery some of the losses imposed on them by reformers, but there are theoretical limits on this which prevent them from achieving the state of well-being they enjoyed before the ministrations of their benefactors.

#3: rent control increases discrimination

Assume a society with some prejudice among landlords: if they are given the opportunity they will offer differing terms of rent to various potential tenants, based upon race. Also, assume that perfect enforcement of anti-discrimination laws is impossible.

A racist landlord will offer to rent an apartment to a White man for $300 per month. If a Black woman comes and asks to rent it, he will be disinclined emotionally, but presumably there is *some* amount at which he will rent the apartment. Assume that amount is $500. If the man is faced with a choice between two potential tenants, one White man and one Black woman, and the woman offers him $500 and he still does not take it, I will say that his prejudice "costs" him $200.

Suppose, however, that the city imposes a rent ceiling on apartments of this size, or freezes the rent, or says that he cannot raise rents more than 4% a year, etc. In one way or another, the effect of this will be to fix a price ceiling: this is, after all, the point of rent control laws, though different laws fix those ceilings in different ways (as was mentioned in Lemma #1).

Assume that the effect of this law is to prevent the landlord from charging more than $400 for his apartment. If he cannot charge more than $400, then even though the Black and White would still offer different amounts, choosing the White's offer now only "costs" the landlord $100. In fact, as the rent controls get more stringent, the price he pays for his discrimination goes down. Eventually, if the rent control laws fix the price at or below what the White is willing to pay, the cost of discrimination goes to $0. Given standard economic assumptions concerning demand functions and prices, racist landlords will "consume" more discrimination when its price is lowered, and will consume a lot when its price goes to $0.

Thus rent control, when it fixes prices below the level that Blacks, or women, or any unfavored people, would voluntarily bid for an apartment, will increase discrimination if landlords are prejudiced.

#4: humorous and interesting things to know about rent control

> "The Americans couldn't destroy Hanoi, but we have destroyed our city..."
> - Nguyen Co Thach, former Foreign Minister of Vietnam, on the benefits of rent control[109]

The preceding lemmas were all theory. This last point will examine the question of whether empirical support exists for them (and provides a bit of light relief: it is, in short, the sorbet).

- New York's rent control law is officially titled, "The War Emergency Tenant Protection Act." The name suggests that this is a

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[109] From a report in *Journal of Commerce*, quoted in Block's "Rent Control."

temporary, "emergency," measure having something to do with protecting tenants from war, or during war, or from the effects of landlords who do things to take advantage of war emergencies or, well, something to do with war. The war referred to in the law's title is the outbreak of World War I.

This point, mentioned in Lemma #1, is explained by public choice theory. A law such as "The War Emergency Tenant Protection Act," like many laws, creates a set of beneficiaries. These beneficiaries are self-aware: they receive benefits, they know that they receive benefits, and they know that the benefits they receive are due to that law. If they are able to vote, they will likely vote against people who intend to change that law. So the benefit-flows of this law, like most government imposed benefit-flows in a democracy, ratchet.

- By the late 1960's, 29% of rent-controlled housing in the US was deteriorated, compared with 8% of uncontrolled housing.[110] By the mid-70's, similar results were found in Britain and France.[111]

Witnessing this fact, and witnessing the success of rent control in destroying literally miles of buildings in the South Bronx, many other cities in the United States decided to experiment with rent control in the 1970's. So the effects of rent control in a number of large cities may now be observed empirically.

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[110] Paul L. Niebeck, *Rent Control and the Rental Housing Market in New York City*, 1968.

[111] Joel F. Brenner and Herbert M. Franklin, *Rent Control in North America and Four European Countries*, 1977. Quoted in Block's "Rent Control."

- Where rent control was imposed in the 1970's, (e.g., LA, Washington DC, and San Francisco), investment in new construction typically halted, even in cities which exempted new construction. Entrepreneurs evidently did not believe that, once they had new housing built, city governments would not change their minds and confiscate value.[112]

They had good reason for believing this: according to William Tucker's *The Excluded Americans: Homelessness and Housing Policy*, since New York's War Emergency Tenant Protection Act was passed, New York City has excluded new construction from rent control three times. They have reneged on that promise after new housing was constructed three times.[113]

- In all major cities which enacted rent control in the 1970's, vacancy rates declined as the housing shortage predicted in Lemma 1 came into effect.[114]

- Condominiumization is one common and effective response to the blight of rent control. In Washington DC, where rent control was enacted in 1974, the number of condominiums went from 1,000 in 1976 to 10,000 in 1979.[115]

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[112] Gwartney and Stroup's *Economics: Public and Private Choice*, page 56.
[113] William Tucker, *The Excluded Americans: Homelessness and Housing Policy.*
[114] Gwartney and Stroup's *Economics: Public and Private Choice*, page 56.
[115] *ibid.*, page 56.

- Between 1972 and 1982, as New York's rent control laws grew increasingly stringent, 30,000 apartment units were abandoned annually.[116]

- Cassandra Moore studied New York's scheme of housing regulations in "Housing Policy in New York: Myth and Reality."[117] Her conclusions:

- 42% of occupants of rent control housing have incomes greater than $20,000
- 14% have incomes > $40,000
- 6% have incomes > $50,000
- The city's labyrinthine building code and regulations on quality escalate the cost of housing in the five boroughs more than 35%.
- 60% of landlords own only one building, and a majority of landlords have incomes below $40,000.

William Tucker's *Zoning, Rent Control and Affordable Housing* expands upon this misperception of housing markets. He writes:

> "landlords are now primarily members of the 'working' classes - people who entered the field through the building trades or who bought rental property as a part-time investment or as a vehicle for upward mobility or retirement security."[118]

He notes (correctly) that since the skills involved in being a landlord are those of the building trades, "landlords tend to be carpenters, plumbers, electricians, and other small investors."

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[116] William Tucker, *The Excluded Americans: Homelessness and Housing Policy.*
[117] Cassandra Chrones Moore, "Housing Policy in New York: Myth and Reality" No. 132 in Cato Institute's Policy Analysis Series.
[118] William Tucker, *Zoning, Rent Control and Affordable Housing*, page 27.

> "The pattern of small-scale ownership has been verified by every major study that has been done on ownership of rental housing. [A 1966 study by George Sternlieb of Rutgers University] found that rental housing was completely dominated by small operators. 'Craftsmen' - both factory workers and household craftsmen - were the largest occupational group, making up 31 percent of all owners. People who listed their profession as 'retired' were second, with 13 percent... Lawyers, that traditional 'slumlords,' accounted for only 5% of owners, and big businessmen only 1 percent. 'Housewives' accounted for 4 percent... most landlords are of the same economic stratum as their tenants."[119]

As I pointed out in the previous section with reference to REIT's, there has been some change in the ownership mix of rental housing over the last 7 years, due to the tax-laws regarding REIT's. Approximately $55 billion of real estate is now held in this form in the country. Virtually *all* large-scale corporate ownership of rental housing is of this form (because it would be wildly tax-inefficient to hold it in the conventional C-corporation Radin seems to be thinking of when she writes about "corporations"). To the extent that REIT's invest in apartment buildings (as opposed to commercial offices and malls), they always invest in large apartment blocks, as they cannot manage small buildings as efficiently as typical owner-occupant landlords. And again, as I pointed out, over 70% of REIT ownership is institutional: pension funds and life insurance companies, to whom locking in stable income streams is more

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[119] *ibid.*, pages 27-28. Citing George Sternlieb, *The Tenement Landlord* (New Brunswick, NJ: Rutgers University Press, 1966), page 128. I have been unable to locate Sternlieb's book.

important than maximizing returns. Both vehicles scatter the economic interest in housing ownership even more widely than is depicted in Sternlieb's, Tucker's, and Moore's studies.

Given these facts, it is surprising that Tucker concludes that the class warfare-aspect of rent control is based on misperception. Rent control quite certainly *does* embody class warfare and class consciousness: the attack on workers and savers, retirees, craftsmen, pensioners, insurance buyers, and so on, by "a highly mobile and articulate population of university-oriented professionals" who want to take something without paying for it. The fact that working-class towns systematically eschew rent controls, while they are popular in Berkeley and Santa Monica (and were defeated in Palo Alto by the NAACP),[120] should come as no surprise to Tucker.

- One oft-predicted effect of rent control is to discourage people from giving up apartments, even when they no longer need them. This is the "little old lady" hypothesis: rent-controlled apartments end up inhabited by people whose children have grown and left, and perhaps whose spouses have died, but who shut off parts of their apartments and amble about in a couple of the rooms.

In 1988 Arthur D. Little, Inc., a respected research and consulting firm, prepared a study entitled "Housing Gridlock in New York," concerning the use of rent-controlled apartments in New York. They concluded that, of households occupying rent-controlled

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[120] William Tucker, *Zoning, Rent Control and Affordable Housing*, pages 28-29.

apartments, 24% were at or below the poverty line. This number is identical with the percentage for New York City as a whole. On the other hand, the median age of inhabitants of rent-controlled housing was 65. Furthermore, on average, less than 2 people lived in each rent controlled apartment: this is true of no other city in America. It also suggests that the 24% of households at or below the poverty line is misleading.[121]

- In a 1984 survey of 211 American economists, 207 agreed with the statement that rent control "reduces the quantity and quality of housing available."[122]

Radin abstracts values from facts, and is wrong to do so

It makes little sense for Radin to insist that to think clearly about rent control:

> "we must assume that rent control works to some extent, in the sense that tenants are really paying less money for the same thing... Hence, we must assume that accompanying circumstances make it impossible for the landlords to reach a new market equilibrium of no benefit to tenants..."[123]

And therefore, we assume that government successfully creates:

> "enactments such as prohibition of disguised pricing; strict housing code enforcement; and limitations on conversions to other uses, such as condominiums."[124]

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[121] Arthur D. Little, Inc. "Housing Gridlock in New York." 1988.
[122] Frey, et. al., "Consensus and Dissension Among Economists: An Empirical Inquiry." *American Economic Review*, December 1984.
[123] Radin, *Reinterpreting Property*, page 74, quoted previously.
[124] *ibid.*, page 74.

It makes no more sense to assume this than it makes to assume the perfectly competitive markets of an introductory economics course. It is wrong to compare an ideal with reality, and in reality not only markets fail, but legislators have trouble anticipating and proscribing all side-effects, state officials have private incentives, and people lie about previous intentions. The effort to regulate out of existence the deleterious side-effects of a command economy, in housing or elsewhere, has not had a history of remarkable success: certainly the falsity of Lemma #1 should not be "assumed."

Rent control undermines the interests Radin seeks to further

Setting that aside, and turning to the individualist argument Radin gives for rent control, for purposes of argument I will equate tenants with the poor and landlords with the wealthy. This is a famously incomplete characterization, as lemma #4 discloses, but it is Radin's and I will use it.

One wonders at Radin's weighing of relevant interests. She compares the individual's interest in personal property (staying in her home) against the commercial interest of the landlord: as was argued above, that commercial interest may be a blend of many personal interests. Similarly, she weighs the interests of existing tenants against tenants who might have moved in had rent control not cut off the supply of new housing, and argues that existing residents have stronger interests than potential residents. And yet, by Lemma #3, rent control increases discrimination. The real weighing should therefore be: are potential minority residents' interests in not being discriminated against less weighty than

actual residents interests in their homes? I do not see why they should be, and Radin does not consider this question.

Furthermore, the real juxtaposition is not only between real residents and potential residents: it is also between classes of real residents. Consider the following economic story: without rent control, high returns generate desire among entrepreneurs to build. With a greater supply, housing prices will generally fall. Those in lower quality housing will be able to afford to move into better quality housing. If this is true, then the imposition of rent control merely aids those living in more desirable housing at the expense of those who would otherwise move into better apartments.

Now one could doubt that the stories above actually hold, while I would argue that they are true (again, as point #4 suggests). But such arguments are beside the point, for Radin argues that even if the "utilitarian evils" of rent control come to pass, rent control is still justified when viewed in the light of the juxtaposition of interests concerned.

I reply that this is false: when the utilitarian evils of rent control come to pass, not only are poorer people's personal interests pitted against wealthier people's commercial interests, as Radin believes. By Lemma #2, the interests of the poor are pitted against the interests of middle-class reformers. By Lemma #3, the interests of unfavored minorities are pitted against those of favored majorities. And by the above argument, the interests of different groups of poor people are pitted against each other.

Rent control, in short, will cause losses to the interests of minorities in favor of those of majorities; losses to the interests of very poor people to the interests of less poor people; and losses to the interests of all poor people to the interests of middle-class reformers. The balancing of interests Radin discussed, a balancing that came out in favor of rent control even in the light of utilitarian "unmitigated evils," was radically incomplete. And this is true if Radin has properly understood housing ownership, which she hasn't.

D. Summary of Radin

Margaret Radin has written a lucid and admirable book drawing attention to the way modern discussions of property are haunted by the outdated assumptions within which Locke reasoned about the subject. She attempted to define a spectrum along which property rights could be located: at one end of the spectrum properties would be stripped of some of their current sacredness, while at the other end they would be afforded the kind of protection we normally associate with persons and not things. Radin thus extended the concept of personhood to include items with are constitutive of moral personhood. Her extension was sometimes individualistic and sometimes enhanced by her vision of the types of communities that must exist for personhood to be obtainable within them.

I have responded to Radin's arguments in six ways:

1. Radin worries that legal theorists on the Left and the Right overlook the way in which people are different than

commodities. Yet her claim only makes sense if we believe with her that *ownership*, even ownership of personal attributes, is a weak relation. If we believe it is a strong relation, then self-ownership will be a strong claim.

2. Radin has argued that libertarian self-ownership is disrespectful of personhood, for to say that a person owns some attribute means, for the libertarian, that she can alienate herself from it. My reply has been that, if the choice is between self-ownership of attributes and state ownership of them (or at least, conveyance rights in them), then self-ownership, however mildly disrespectful of personhood, is less disrespectful than state ownership.
3. Radin's discussion of personhood is framed in terms of *things had*, whether they be psychic attributes or the type and amount of physical property which are conditions of personhood. Her emphasis on *things had* causes her to neglect the role of *choices made* in determining personhood. Hers is thus an unconstrained theory: it looks at outcomes, and not at processes.
4. Radin's argument against baseline property rights is unsatisfactory, as it draws a conclusion about justice out of judicial decision-making. The principle of *stare decisis* permits lawyers to draw from prior judicial decisions some conclusions about how the courts should act now, but such arguments ring false in *philosophical* discussions about justice.

5. Radin's distinction between personal and fungible property is unsound in four ways.
   i) Legal institutions judge the distinction poorly;
   ii) While the absence of the moral consensus of the majority does *prohibit* law by the principle of legitimacy discussed in Chapter 1, its presence does not necessarily *ratify* law. Furthermore, consensus on "personhood" is untrustworthy: law which ratifies what "most" people think it takes to be "one of us" hands too much power to the community and away from individuals such as commercial and sexual entrepreneurs;
   iii) The consensus on "fetishistic capitalism" to which Radin appeals is non-existent;
   iv) Radin misunderstands corporate ownership and neglects how it blends personal interests.

6. Radin's rent control arguments fail because her picture of how the market pits interests against each other is radically oversimplified. It pits many interests against each other in ways which Radin overlooks, and many of these are interests in "personal property" deserving special protection on Radin's own account. Thus the interests she wishes to further with rent control are undermined by it. Those of us who are troubled by this will not be impressed by flat assertions that "we must assume that rent control works to some extent..."

I have attempted in this section to illustrate a point first mentioned in my introduction: issues of facts and values are layered back-and-forth. If one reasons about values abstracted from facts, one's answers are untrustworthy.

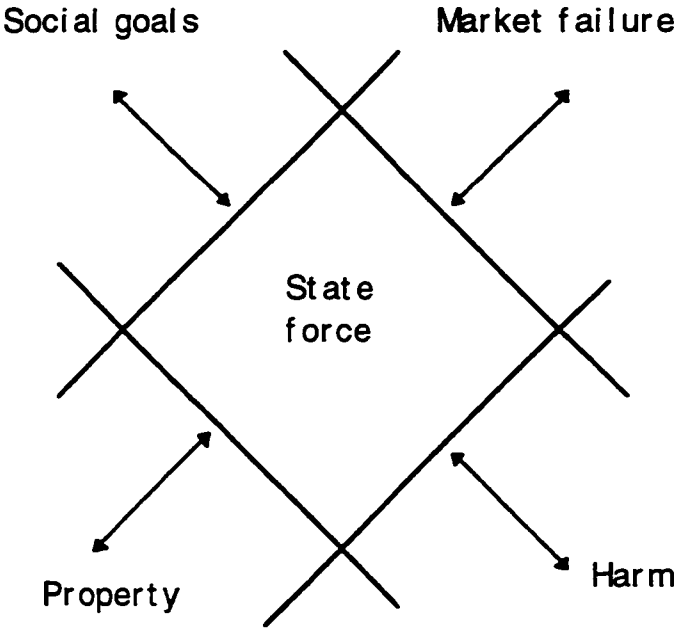
CHAPTER 6
CONCLUSION

I summarize here my arguments on market failures, harms and rights, and property. Social goals, mentioned in my introduction, could only be addressed in another lengthy work, so I leave off, except to suggest the direction my argument on this topic would take. The summary complete, I then express the admiration for limited government which one who has read thus far would expect.

I have attempted to include enough mileage-markers throughout this dissertation that no lengthy summary should be necessary. I shall summarize the thrust of my argument and state my conclusion.

I. SUMMARY

In my introduction I outlined four paths by which, it seems to me, justification of state compulsion proceed. I wrote that debates about law often seem to hinge upon arguments about market failure, harm, property, or social goals. I picture these arranged as follows:



That is, a theory which holds that many things are market failures creates room for the state to pass laws (i.e., sincerely threaten citizens) in order to resolve such failures. Similarly, a theory of harm which makes it easy for things to count as harms

(e.g., counting as harm the envy or distress the ascetic feels envisioning the actions of the commercial or sexual entrepreneur), creates room for the state to expand on that dimension in the interest of preventing harm. The same holds true, *mutatis mutandis*, for theories of property and theories of social goals.

On the other hand, I suggested, if one doubts these justifications, then the realm of state compulsion shrinks. One thing that engenders skepticism is not absolute judgments, but asking, "Compared to what?" For example, if one judges the outcomes of imperfect markets not against the success of perfect markets, but against the success of political mechanisms, then one might regard with suspicion those justifications for state action which rely upon claims of market failures. Suspicion does not mean, "reject out-of-hand," but it means (in this case) assuming that the same constraint of limited and imperfect information applies to political mechanisms as applies to market mechanisms. And again, the same holds for theories of harm, property, and social goals.

To address these subjects properly, I laid some groundwork in Chapter 1. There, I defended and expanded the Rawlsian principle of legitimacy. This principle holds that justifications of laws must not appeal to overarching moral theories or conceptions of the good, but to principles found in the overlapping conceptions of the good of the citizenry. I expanded this argument to consider quasi-overlaps. I then explained Thomas Sowell's dichotomy between constrained and unconstrained political visions. Then, referring to the exegesis of Rawls' *A Theory of Justice* found in Appendix A, I concluded

Chapter 1 by restating the purpose of this dissertation as one of beefing up the considered convictions which we bring to bear on theories of justice. Chapter 1 was, I wrote, primarily a bookkeeping chapter, intended to introduce and defend concepts and distinctions which could serve me through the rest of this dissertation.

I addressed the subjects of market failures, harm, property, and social goals as follows.

Market Failures

In my introduction I provide a taxonomy of market-failure arguments, and then dismiss the subject as primarily one for investigation by economists. In Appendix B, however, I explore some of the philosophical issues embedded within the subject of market failures. But I recognize that the proper treatment of this issue was beyond the bounds of this dissertation.

Harm and Rights

In Chapter 2 I wrote at length about harm and the legal protection of rights. My approach was to examine law for the insights it had to offer regarding this area of political philosophy. Of the fields of law which present themselves, I chose tort law as that area where the doctrines of harm and rights receive their fullest expression. I worked there from Aristotle's theory of rectificatory justice through the Anglo-American common law tradition, to show how the three conditions of **wrongfully caused harm** gave tort doctrine its substance. I showed how these three have been conflated by modern legal theorists such as Ackerman,

Coleman, and Epstein. Referring to this conflation, I argued that Mill's famed Harm Principle either is incomprehensible or endorses highly intrusive States.

Chapter 3 addressed the subject of rights, and distinguished between teleological and deontological rights, and also between negative and positive rights. I discussed the relation of positive rights to social justice, and argued that a positive deontological right to altruism could not be found in the overlapping consensus of the good of a society which included consistent Kantians.

Property

Chapters 4 and 5 were devoted to property theory. Chapter 4 traced the evolution of property theory from the Greeks up to the modern economic analysis of property. The theme which I explored was this: beginning in late medieval opposition to papal authority, the perception of property rights as checks against fellow men was transformed into a perception of such rights as checks against political power. The first such circumscription on political authority that I found was in the theory of takings developed by William of Ockham, in opposition to the early libertarianism of John of Paris. Later in Chapter 4 I showed how this theory, which extended through common law to a clause in the US Bill of Rights, was based on sound law and economics. Later in that chapter, and also in Appendix C, I described how Supreme Court rulings since the 1870's, and increasingly since the 1930's, along with an expansive federal bureaucracy, have more or less made nugatory this important check against state authority.

Chapter 5 was devoted to criticizing Jeremy Waldron's and Margaret Jane Radin's theories of property. Regarding Waldron, I focused on his claims that Locke's theory of acquisition is incoherent; that all principles of just acquisition are untenable; and his argument (from the Hegelian tradition) for a universal right to enough property to support the ethical development of personhood in citizens. I responded that these three links in his argument are weak, for reasons summarized in the middle of Chapter 5. These were, in brief, that Locke's theory of acquisition is not incoherent, at least not only Waldron's grounds, and if it is, so is the Marxist labor theory of value Waldron endorses; that principles of just acquisition can flow from the original position reasoning-mechanism Waldron endorses; and that his general right to property neglects to consider alternatives, neglects insights of the economic analysis of property, and neglects the way such a right may be self-defeating.

Radin's critique of property hinges upon her claim that recent decades of common law suggest we adopt a spectrum-conception of property, from types in which one's interests are personal to types in which ones interests are fungible. I argued that Radin's spectrum of property rights collapses when one considers actual property ownership, that Radin's crucial claim about moral consensus is specious, and that regarding housing markets (the specific issue in which she works out her theory), Radin's theory of property does not nourish personhood, but disrespects and undermines it.

Social Goals

I have written little on the fourth subject, the question of the meaningfulness of "social goals." Near the end of my introduction I stated that this was too big an issue to address in this dissertation. Yet I cannot ignore it completely, as it is one of the four ways of justifying state force against people, and state compulsion is the subject of this dissertation. So I will make a few comments here, to suggest the direction that a fuller argument would take.

It is not clear to me that the concepts of a social goal, a commitment of the polity, a general will, or a common purpose, are even meaningful. The terms summon up images of the wills of different people being amalgamated, just as the forces acting upon a billiard ball can be amalgamated by adding together the vectors which represent them. Yet suppose I have a goal, and so does my neighbor. What sense does it make to speak of amalgamating our goals? Does it make any more sense to speak of it than it does to speak of amalgamating our hungers, our hatreds, our desires, or our fathers? Or is this just one of those concepts which we take for granted, but which on inspection is bizarre?

There is an enormous body of social choice literature which calls into question the *prima facie* plausibility of social amalgamation. This work stems originally from Arrow's Impossibility Theorem,[1] which showed that mechanisms which amalgamate voters' preferences cannot satisfy four seemingly innocuous constraints while remaining democratic. Further

[1] Kenneth J. Arrow, *Social Choice and Individual Values.*

impossibilities (such as Sen's Paretian Liberal, mentioned in Chapters 1 and 3) have been discovered since then.[2]

Much of the work in social choice theory seeks technical efficiency: which constraints can be relaxed in order to make disheartening impossibilities disappear? More rarely, it appears to me, has social choice been examined for its possible contribution to practical political questions (Edward McClennen's "Rational Choice and Public Policy: A Critical Survey," and David Luban's excellent "Social Choice Theory as Jurisprudence," are notable exceptions[3]). But it is this contribution which is intriguing: there may be a way of salvaging the notion of social goals, if there is a satisfactory *resolution (from the point of view of constitutional interpretation)* of Arrow's Impossibility Theorem. But again, exploring that question adequately would be an enormous project in its own right.

Even if the concept of social goals turns out to be meaningful, I believe it is dangerous. The political turn that this century took is a result of the fact that many people are intellectually defenseless against the following claim from a group:

> We know you have your own projects, but we have projects too. Our projects, our goals, are expressions of our common purpose. So please do not object too strenuously if we decide we have to sacrifice your projects (and, perhaps, you yourself) to our greater purpose.

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[2] Amartya Sen, "The impossibility of a Paretian liberal." *Journal of Political Economy.*
[3] Edward F. McClennen, "Rational Choice and Public Policy: A Critical Survey," *Social Theory and Practice*, Volume 9, Nos. 2-3, 1983. David Luban's "Social Choice Theory as Jurisprudence" is an unpublished paper that he has kindly provided me.

The reason that people are often defenseless against this claim[4] can be traced to Kant.

As I state in Appendix B's discussion of Kant's political theory and its origin in Rousseau's *The Social Contract*, Kant's political writings are largely ignored today in favor of his *Critiques*. This is regrettable, for his political writings were not ignored by other philosophers such as Hegel and Marx, and so Kant has influenced this century's events at second hand. And again as I explain in Appendix B and in Chapter 3's discussion of Isiah Berlin's work on liberty, Kant's political writings are heinous, and bear within them totalitarian seeds which flowered successfully in this century.

I can give a short indication of the path a defense of this claim would take by quoting from Bertrand De Jouvenal's magisterial study, *On Power: The Natural History of Its Growth*. There, Jouvenal wrote:

> "From the twelfth to the eighteenth century governmental authority grew continuously. The process was understood by all who saw it happening; it stirred them to incessant protest and to violent reaction.

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[4] I say "articulate and educated people" because it is hard to imagine the following words drawing anything but snickers in such a group, while they would not be out of place in a bar. And yet they make an excellent claim.

"Listen ... listen to me, Mister." Hank's voice was taught. He pushed past Evenwrite and held his lantern close to Draeger's neat-featured face. "I'm just as concerned as the next guy, just as loyal. If we was to get into it with Russia I'd fight for us right down to the wire. And if Oregon was to get into it with California I'd fight for Oregon. But if somebody - Biggy Newton or the Woodsworker's Union or anybody - gets into it with me, then I'm for *me*! When the chips are down, I'm my own patriot. I don't give a goddamn the other guy is my own brother wavin' the *American* flag and singing the friggin' 'Star Spangled Banner'!" Hank Stamper, in Ken Kesey's *Sometimes a Great Notion*, page 363.

> "In later times its growth has continued at an accelerated pace, and its extension has brought a corresponding extension of war. And now we no longer understand the process, we no longer protest, we no longer react. This quiescence of ours is a new thing, for which Power has to thank the smoke screen in which it has wrapped itself. Formerly it could be seen, manifest in the person of the king, who did not disclaim being the master he was, and in whom human passions were discernible. Now, masked in anonymity, it claims to have no existence of its own, and to be but the impersonal and passionless instrument of the general will."[5]

I understand that my claim that totalitarianism feeds off the acceptance of a common purpose, a commitment of the polity, or a general will, is a strong and improbable claim. It is unlikely to persuade the reader, yet I could neither forego it nor give it its just defense. Thus I merely make it here, and suggest how it fits into the structure of this work: if true, it provides further reason to be skeptical of government power when it exerts itself with reference to the justification of fulfilling social purposes or general wills.

II. CONCLUSION

This work has been anti-statist. I have argued that laws coerce, coercion is *prima facie* bad, and therefore the burden of argument lies on one who insists that we need a given law. Justifications for laws do exist, and I have broken down such justifications into four categories, four hurdles that arguments must clear. I dealt with two of them summarily: market failures

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[5] Bertrand De Jouvenal, *On Power: The Natural History of Its Growth*, pages 13-14. Translated by J. F. Huntington. 1948: New York, Viking Press.

(which I discussed briefly in the introduction), and social goals (which I discussed briefly above). The other several hundred pages of this dissertation have been devoted to looking at justifications which rely on "reinterpreted" theories of property and harm to make their case. The common themes of such justifications are generally that a proposed law can clear a high hurdle (perhaps because it is predicted to achieve philosophically-desirable social outcomes, such as nourished personhood), or that the hurdle is low in any case (for example, that no baseline exists, so no hurdle exists). In each case I have questioned whether a thick conception of philosophical desirability can be appealed to in a modern state, or whether the desired social outcomes can be predicted accurately, or whether the rejection of baselines is philosophical consistent with other important values.

I mentioned in the opening pages of this work that in my experience a philosophical defense of limited government is uncommon. I wish to close by allaying concern that I endorse a radical agenda. As I opened with a few personal stories, so will I end with one that expresses this point.

I was fortunate to have the opportunity in the late 1980's to spend a few weeks driving about in Cambodia with an Australian and a Swedish diplomat. In the eastern region of the country especially, it was common to see trenches, several feet across and several feet deep, dug in straight lines across fields, over hills, and disappearing into forests. I assumed for some time that they were trenches for telephone lines or power cables. In fact, I was told eventually, they

were a manifestation of Pol Pot's Maoist social theory. He believed that the ancient Khmer's lived and farmed in an ordered, rectangular world, border by straight and regular irrigation canals. On coming to power he ordered many of the major irregular and haphazard canals scarring Cambodia to be destroyed and, taking a map, a pencil, and a ruler, he sketched out where new canals should be dug. Unfortunately it turned out that the water did not flow very well up and over hills, even in straight lines, and agricultural production did not take the "Great Leap Forward" he expected.[6]

I experienced an epiphany when I saw this. For years, I had been exposed across Asia and, briefly, in Europe, to that perception of the United States which suggests that we are an anti-intellectual and boorish people. We are, indeed, and seeing the straight Cambodian trenches I became thankful for this. Perhaps as a result of the Anglo-American adherence to the molish common law (as is suggested by Leonard Schapiro and as is discussed in Chapter 2), or perhaps for some deep cultural reason that is beyond me, a grand social theory which demands that masses of people rearrange their lives will not find a wide audience in the New World. The success of grand social theories in this century has largely been a Eurasian phenomenon, and their death has been a Eurasian death.[7]

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[6] See Ben Kiernan's *How Pol Pot Came to Power: History of Communism in Kampuchea* (1985). Kiernan, certainly no friend of American policy in Cambodia, does not corroborate this explanation of the straight trenches that run for miles across parts of Cambodia, but he does provide many equally bizarre examples of Khmer Rouge social engineering. I have been unable to find confirmation for this explanation of the trenches, but I have been found no other, and given other policies whose results I witnessed it is completely plausible to me. The expression "A Great Leap Forward," incidentally, was the one Mao used in the early 1960's when he turned his attention to China's iron industry and destroyed it.

[7] See Francis Fukuyama's "The End of History?" in *The National Interest*, 16 (Summer 1989) for an argument to this point: of the three grand theories of the last two hundred

Without getting lost in more philosophical digressions (such as: why does liberalism not count as a grand social theory which demands that people rearrange their lives?) I will state my point: I do not admire radicalism. Radicalism demands high blood-pressure and a certainty about outcomes that is inherently untrustworthy. Therefore I think radical arguments, including the one I make in this dissertation (to the extent that it calls for drastically less government), are untrustworthy. As I discussed in Chapter 1 with regard to Sowell's constrained political visions, it seems to me that problems, even big problems, are more often fixed by tinkerers and muddlers than by radicals.

Thus I do cheerfully recant any radicalism that has seeped into these pages. This has been a long argument for limited government, but I have attempted to construct it so that its base does not rest on far-fetched claims about the world, what "personhood" is, what goals in life are fetishistic, or predictions of social outcomes. Recognizing that I may have failed, I do not endorse anything beyond cautious tinkering. Yet by exposing the false promise of several representative arguments, I have sought to disclose the direction such experiments should take.

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years (liberalism, Marxism, Fascism) only liberalism still lives. Fukuyama believes that while conflicts over *things* (resources, borders, etc.) will continue, the deep *ideological* conflicts of history are over. No one, he argues, seriously debates anymore the desirability of democracy or the undesirability of socializing a nation's entire productive economy (although some people may still reasonably want some key industries socialized). The Fascist idea died 50 years ago; the Marxist one fared poorly, in any case, in the few years after Fukuyama wrote. With proper qualifications, and referring to the political agendas of nations rather than to the work of professional political theorists, Fukuyama's controversial claim that liberal democracy is "the endpoint of mankind's ideological evolution" seems vaguely tenable. Still, it is odd to come across a breathing Hegelian.

APPENDIX A : RAWLS

Summary: Rawls' *A Theory of Justice* gives a social-contract argument specifying an initial situation wherein participants discover justice. By screening some knowledge from them we capture intuitions about what considerations are fair to admit when thinking about justice. The outcome of Rawls' game is a set of principles of justice which, loosely put, direct us to judge a society by the position of its worst-off member. After explaining the preceding in more detail, I discuss three points: 1) if Rawls' principles are egalitarian, it is not clear why or how much; 2) Rawls fails his stated purpose of defending individuals from the utilitarian calculations of others; 3) Rawls project is flawed because he falsely believes his argument generates pure procedural principles of justice.

Throughout this dissertation I have assumed my reader's familiarity with John Rawls' *A Theory of Justice.* I assumed this familiarity not because I thought it likely all readers would know the book, but because I hoped to avoid cluttering the body of my dissertation with a lengthy report on another's ideas. Such an assumption may, however, have left the reader in the dark on one or more points. I therefore now provide a summary of the aims and scheme of Rawls' main argument. I warn that what follows is not intended as deep philosophy, but rather is another of the innumerable synopses of Rawls' argument, provided as crib-notes for the reader unfamiliar with his book. I do this in the interest the overall completeness of my dissertation. I then develop three lines of criticism to which I think Rawls has proved vulnerable and which are relevant to this essay.

Unless otherwise qualified, by "Rawlsian" I mean the case presented by John Rawls in his book *A Theory of Justice.*[1] As I note

[1] John Rawls, *A Theory of Justice*, (Cambridge, Massachusetts: Harvard University Press, 1971).

elsewhere in this essay, Rawls has backed away from some of the positions expressed in that book, and in the last decade has published several other important works: in particular, "Justice as Fairness: Political not Metaphysical,"[2] "Overlapping Consensus,"[3] "The Priority of Right and Ideas of the Good,"[4] and *Political Liberalism.*[5] But within philosophy the shared common conception of Rawlsianism directs attention to his magnum opus, *A Theory of Justice.*

I. THE ARGUMENT OF *A THEORY OF JUSTICE*

The Topic of Rawls' Work

Rawls was concerned with the way that utilitarianism and intuitionism "have long dominated our philosophical tradition." In particular, utilitarianism overlooks the fact that,

> "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests..."[6]

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[2] John Rawls, "Justice as Fairness: Political not Metaphysical," *Philosophy & Public Affairs*, 1985.
[3] John Rawls, "Overlapping Consensus," *Oxford Journal of Legal Studies* 7, 1987.
[4] John Rawls, "The Priority of Right and Ideas of the Good," *Philosophy & Public Affairs* 17, 1988.
[5] John Rawls, *Political Liberalism.* 1993. (New York: Columbia University Press.)
[6] Rawls, *A Theory Of Justice*, pages 3-4.

With this criterion for justice in mind, Rawls then sought to discover some "set of principles of social justice" which would assign "rights and duties in the basic institutions of society" and "define the appropriate distribution of the benefits and burdens of social cooperation."[7]

The Mechanism of Rawlsian Reasoning

JUSTICE AS FAIRNESS

Rawls worked within the social contract tradition, a tradition which holds that the rules of a just society are a function of what agents would agree to were they positioned in some pre-societal situation. As was discussed in Chapter 4, the roots of this tradition stretch back to the days of Greece, and it was first systematically developed during the Renaissance: rarely in this tradition has "pre-societal" been understood literally. If the agreement is understood hypothetically, however, then social contract arguments rely upon the possibly implausible premise that hypothetical agreements should be binding (it is this fact which lead David Hume to refer to social contract theory as "philosophy for butterflies").

Rawls' points out that in the special case of thinking about justice the proposition that hypothetical agreements should be binding has merit.[8] "This explains the propriety of the name 'justice as fairness': it conveys the idea that the principles of justice are agreed to in an initial situation which is fair."[9] More specifically:

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[7] Rawls, *A Theory of Justice*, page 4.
[8] See Rawls' defense of this point in his 1988 paper, "The Priority of Right and Ideas of the Good," *Philosophy and Public Affairs* 17.
[9] Rawls, *A Theory of Justice*, page 12.

> "The intuitive idea of justice as fairness is to think of the first principles of justice as themselves the object of an original agreement in a suitably defined initial situation. These principles are those which rational persons concerned to advance their interest would accept in this position of equality to settle the basic terms of their association."[10]

The point is to define that initial situation in such a way that it embodies just that knowledge that one may allowably consider when one thinks about justice, and discards the type of knowledge that will generate bias.

THE ORIGINAL POSITION, THE VEIL OF IGNORANCE, AND THE CONDITIONS OF JUSTICE

Rawls proposes a hypothetical bargaining situation called "the original position" to correspond to the state of nature of classical social contract theory. Rawls has been subjected to much criticism for his construction of the original position. I believe that the majority of this criticism is unfair, as it overlooks that the idea of the original position:

> "is simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on these principles themselves."[11]

Thus the debate should focus on what those restrictions are, and not on the technique Rawls hit upon for dramatizing them.

The gist of the original position is this: agents come together in an initial bargaining situation. They are screened from the world

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[10] Rawls, *A Theory of Justice*, pages 118-119.
[11] Rawls, *A Theory of Justice*, page 18.

by a "veil of ignorance" through which only certain kinds of knowledge permeates. In particular, the veil will:

> "nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage."[12]

In short, the veil of ignorance embodies the neutrality one should adopt if one wishes to think fairly about justice.[13]

The agents in the original position are therefore symmetrical: they have no knowledge of their individual attributes, natural abilities, future social luck or status, individual commitments and projects, or visions of what it is that makes life good. These agents are also self-interested. They come together to decide on the set of principles which will describe the basic institutions of the society in which they will live. Shorn of particular knowledge, they are unable to "tailor principles to the circumstances of [each] one's own case."[14] These features of the initial bargaining position, which embody convictions we have of what it means to have equality among moral persons, are what Rawls terms "the conditions of justice." The principles these agents bargain out are the principles of justice as fairness.

REFLECTIVE EQUILIBRIUM

The conditions of justice are those conditions of the original position which embody principles of moral equality among persons. Rawls' reflective equilibrium is the process by which he believes we

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[12] Rawls, *A Theory of Justice*, page 136.
[13] Rawls, *A Theory of Justice*, pages 140-141.
[14] Rawls, *A Theory of Justice*, page 18.

can proceed from those conditions of justice to sound principles of justice. The idea is that we start from weak conditions and from them derive substantive principles of justice. If we cannot, we strengthen the conditions until we have some substantive principles to judge. Lastly, we see if these principles match our considered convictions of justice:

> "These convictions are provisional points which we assume any conception of justice must fit. But we have much less assurance as to what is the correct distribution of wealth and authority. Here we may be looking for a way to remove our doubts. We can check an interpretation of the initial situation, then, by the capacity of its principles to accommodate our firmest convictions and to provide guidance where guidance is needed."[15]

Thus we start from an original position whose features are drawn from a set of plausible and weak conditions of justice, and see what principles of justice would be derived. If the principles derived match our considered convictions of justice, then we are finished. If not (and it is not that simple, of course), we either tweak our initial conditions or we ask ourselves how confident we are in our considered convictions. We "work from both ends," as Rawls says, going back and forth until we have arrived at a set of principles which match our convictions (suitably reappraised) and, if we are lucky, illuminate and systematize them as well.[16]

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[15] Rawls, *A Theory of Justice*, page 20.

[16] See Rawls, *A Theory of Justice*, page 20. It is because he employs this method that I question the claim that Rawls is truly engaged in universal justice theory. While the conditions from which he begins reasoning (the original position and its attending veil of ignorance) sound neutral enough, the "considered convictions" to which he appeals are those of a modern liberal social-democrat, and not those, for example, of a Marxist. This, along with the issue of what knowledge is carried behind the veil of ignorance, have

The Principles of Justice Adduced By Rawls

Without further delay, I will give the two principles of justice which are derived by Rawls.

> • First principle (Principle of Equal Liberty) - Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
> • Second Principle (Difference Principle) - Social and economic inequalities are to be arranged so that they are both:
> a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
> b) attached to offices and positions open to all under conditions of fair equality of opportunity.[17]

The principle of equal liberty trumps the difference principle: they both trump concerns of efficiency and welfare.

The equalitarian thrust of Rawlsianism is thus clear:

> "All social primary goods - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."[18]

II. SOME PROBLEMS WITH RAWLSIANISM RELEVANT TO THIS WORK

At the outset of this section on "Rawlsianism," I suggested that there are some problems with Rawlsianism which are relevant to this dissertation, and I will take this opportunity to mention

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provided the basis for many of the criticisms of Rawls.

[17] This formulation of Rawls' principles of justice are taken more or less intact from his final statement on pages 302-303 of *A Theory of Justice.*

[18] Rawls, *A Theory of Justice*, pages 303.

them. The first is found not in his argument, but in its reception. Because of the Difference Principle, Rawlsianism is generally thought to be an egalitarian social philosophy. Both the extent to which it is egalitarian, and if it is, the extent to which this is a result of the Difference Principle, is debatable. Second, it is not clear that Rawls has succeeded in his stated mission of devising a political philosophy which buttresses the inviolability of the individual against the undermining influence of utilitarianism and intuitionism. Third, Rawls' conception of his own project is flawed, for he indeed presents the reader with an outcome-oriented theory of justice, not a procedural theory, a fact which he denies.

How Redistributive is the Difference Principle?

From its inception, Rawlsianism has been understood to be redistributive, especially as a result of the Difference Principle.[19] It is unclear how true this claim is. Allen Buchanan has argued that a proper understanding of the workings of a capitalist economy would lead one to believe that it is the Principle of Equal Liberty which most emphatically demands redistribution: to a Marxist (among others), disproportions of wealth cause effective disproportions of liberties, even where formal liberties remain equal.[20]

On the other hand, an argument could be advanced that Rawlsianism is not redistributionist at all: the principles of justice derived may be stated as hypothetical imperatives, the antecedents

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[19] This is such a commonplace in the literature on Rawls, especially the early literature, that citation seems unnecessary. To give but one example, this is the interpretation of Rawls which Nozick makes throughout his attack on Rawls in *Anarchy, State, and Utopia.*

[20] See Allen Buchanan, *Marx and Justice: The Radical Critique of Liberalism*, page 122.

of which are false. Indeed, in the United States since Kennedy's tax-cuts ("a rising tide lifts all boats") to Reagan's "trickle-down" economics, policies have been defended by appeal to their benefit to the less fortunate. Policies which seem to make the worst-off worse-off are defended as making them better-off in the medium or long run, and policies which clearly make the worst-off better off in the short run are criticized for making the worst-off worse-off in the long run (e.g., the current American debate on welfare reform displays these features).

My point is that the principles of justice Rawls adduces seem definitive and clear. In fact it is not clear if the difference principle is even a load-bearing wall, for it may be the principle of equal liberty which upholds the apparent egalitarian thrust of Rawls' theory. Or it may be that the difference principle is clear and decisive, but points to data which are intangible and hard to quantify. In either case, it is hardly a virtue of a theory that it gives clear and precise instructions about how to weigh various social facts against each other, but chooses only the most hazy and imponderable social facts to consider.

Rawlsianism Poorly Protects the Inviolability of Individuals

The second problematic claim concerns Rawls' ambition to reconfirm the inviolability of individuals in the face of utilitarianism. As he develops his theory, it becomes evident that "individuals" for Rawls are beings to which not just social status and luck attach (and hence provide benefits which are subject to redistributive measures), but are beings to which natural attributes

such as intelligence, ambition, commitment, and skill attach. Therefore the benefits of their attributes are also subject to redistribution.

As Nozick and Sandel have both argued, and as is discussed in detail in Chapter 5's section on Waldron, this "individual" whose inviolability Rawls confirms seems to be a shadow of a man. Therefore what is made "inviolable" for Rawls is no more than a gray inhuman blob, and one has difficulty seeing the importance of protecting the "inviolability" of such a being. As Nozick said,

> "Why we, thick with particular traits, should be cheered that only the (thus) purified men within us are not regarded as means is also unclear."[21]

Rawls has defended himself from this charge in "Justice as Fairness: Political not Metaphysical." In that paper, he argued that he was not committed to the *metaphysical* proposition that individuals are beings shorn of attributes, but that he was committed to it only as a by-product of a thought-experiment that he, and anyone wishing to think fairly about justice, should be willing to undertake. As he put it:

> There are, however, certain hazards [to the original position thought-experiment]. As a device of representation the original position is likely to seem somewhat abstract and hence open to misunderstanding. The description of the parties may seem to presuppose some metaphysical conception of the person, for example, that the essential nature of persons is independent of and prior to their contingent attributes, and indeed, their character as a whole. But this is an illusion

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[21] Nozick, *Anarchy, State, and Utopia*, pages 228.

> caused by not seeing the original position as a device of representation. The veil of ignorance, to mention one prominent feature of that position, has no metaphysical implications concerning the nature of the self; it does not imply that the self is ontologically prior to the facts about persons that the parties are excluded from knowing."[22]

Thus Rawls' insisted that his view of the individual was political, reflecting a commitment to the neutrality of Kantian ethics, and was not a metaphysical commitment.

Unfortunately this explanation fails, for Rawls' original commitment to "the thin view of the self" in *A Theory of Justice* served two purposes. It was part of a thought experiment designed to "make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice," as was discussed earlier: the thin view of the self is a vivid representation of moral equality among persons.

However, the thin view of the self also provided for Rawls an answer to the critic who maintained that, to the extent that Rawlsianism *did* demand redistribution of goods earned as a result of personal attributes, then Rawlsianism endorses the use of components of some people as means to provide benefits to others. Within the framework of the argument in *A Theory of Justice*, Rawls could reply that his theory never put one *person* at the disposal of another, but that it only put attributes contingently *associated* with

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[22] John Rawls, "Justice as Fairness: Political not Metaphysical," page 16.

one person at the disposal of another. As he put it, the distributive shares, our holdings in natural talents and abilities:

> "are decided by the outcome of a natural lottery; and this outcome is arbitrary from a moral perspective."[23]

Only by arguing thus could Rawls avoid that error for which he criticized utilitarians: discounting the inviolability of individuals in favor of an overriding concern for the welfare of society.

But a lottery is this kind of a thing: there are agents, and prizes now not owned by those agents, and through the lottery those prizes get spread out among those agents so that they now possess them. Agents *do* stand ontologically prior to the prizes they win in a lottery. There is no other way to even *conceive* of a lottery, as far as I can tell, other than as a situation where agents *come into* possession of things that they do not start out with. If they started out with them, why go to the lottery?

Thus when Rawls reversed himself, declaring his thin view of the self to be a political rather than a metaphysical claim, he defended the reasonableness of his thought-experiment at the expense of his claim that he was reinstating the inviolability of individuals in the face of utilitarianism. If Rawls acknowledges that people are *in reality* thick (that is, they *are* composed partly of their attributes, characteristics, skills, etc., and are not just contingently associated with them), then Rawlsian redistribution *in reality* overrides their inviolability in favor of the welfare of others in society. Rawls' commitment to the thin view of the self is like a

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[23] Rawls, *A Theory of Justice*, page 74. Quoted elsewhere in this paper, and partially quoted in Waldron, *The Right to Private Property*, page 402.

chess piece, formerly on the defensive, now attempting attack, yet finding itself pinned in the defense of another more vital piece, unable to be repositioned.

Rawls' Protests Aside, Rawlsianism is not Pure Procedural Justice

Lastly, consider the question of whether Rawls' is a procedural theory of justice or a pattern theory of justice. Procedural theories differ from pattern theories in the following way. A procedural theory such as Nozick's (as was discussed in Chapter 5's section on Waldron), establishes what it takes for something to be properly acquired and properly transferred. It looks to see if a particular distribution is just by examining the history of exchanges which generated that distribution. A pattern theory of justice, however, describes the ways entitlements may be distributed across a society and still be just. It does this by looking at facts about the distribution as it stands (e.g., its Gini coefficient, its Poverty Gap Ratio, or its Headcount Index, as are discussed in Chapter 5's section on Waldron). Rawls takes pains to argue that his theory is not a pattern theory of justice, but he is incorrect about this.

To see why Rawls is wrong on this point, let us distinguish with Rawls among *perfect* procedural justice, *imperfect* procedural justice, and *pure* procedural justice. In instances of perfect and imperfect procedural justice, a standard exists by which to determine whether the outcome of a process is fair. In the case of perfect procedural justice there is a mechanism to obtain an outcome (such as two people splitting a piece of cake, who practice the "you split I choose" method), and a right outcome (in this case,

an equally-divided cake), and the right procedure will deliver parties to that right outcome. In the case of *im*perfect procedural justice, while there is a "right" outcome there is no mechanism to arrive necessarily at that right outcome (as in the case of a criminal trial, for example).

In cases of pure procedural justice, however, there is no "right outcome," no external standard by which to judge the fairness of an outcome. There is only procedure, and the results that procedure generates are automatically fair (as is the case with gamblers in a non-rigged game).

Rawls argues that the principles of justice derived from his thought-experiment are principles of pure procedural justice. He writes:

> "Now I have said that the basic structure is the primary subject of justice....
>
> "These considerations suggest the idea of treating the question of distributive shares as a matter of pure procedural justice. The intuitive idea is to design the social system so that the outcome is just whatever it happens to be, at least so long as it is within a certain range.
>
> "In order, therefore, to apply the notion of pure procedural justice to distributive shares it is necessary to set up and to administer impartially a just system of institutions... The intuitive idea is familiar. Suppose that law and government act effectively to keep markets competitive, resources fully employed, property and wealth (especially if private ownership of the means of production is allowed) widely distributed by the appropriate forms of taxation, or whatever, and to guarantee a reasonable social minimum."[24]

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[24] Rawls, *A Theory of Justice*, pages 84-87.

For Rawls, then, it is because the conditions and rules of that experiment are specified in advance, and because they capture fairness and moral equality among persons, the principles of justice which are the outcome of that procedure embody pure procedural justice. As with all pure procedural games there is then no external standard by which to criticize their fairness, just as in a game of poker it would make no sense to criticize the outcome of a hand while acknowledging that the play was fair.

Seasoned gamblers may enter a high-stakes card-game with the announcement of, "No tears." This means in essence, "the outcome is the outcome: no excuses or complaints." Similarly, Rawls asks us to join his thought experiment and (reflective equilibrium-tweaking aside) understand that we are in a pure procedural game, "no tears."

It is the point of this essay to argue for a standard for state coercion by which the demands of a theory of justice may be judged. Therefore I should argue that Rawls is wrong in saying that his principles of justice are pure procedural principles. And in fact I do believe Rawls is confused on this point. His confusion is this: there is a difference between saying that principles are generated using a system of pure procedure, and saying that the principles so generated are themselves pure procedural principles.

Consider the case where I try to choose a set of principles to govern how I will arrange flowers today. There are three sets of possible principles, and I write them down on three separate slips of paper. I decide to choose among them using a simple random method.

I put them all in a hat, stir them up, and draw one out at random. The principles which govern which slip I draw are principles of probability and chance. But it would be wrong to say that the principles which I draw out are therefore principles of chance. They are not: they are principles of flower arranging.

In a similar way, Rawls argues that his choice of principles (by which he will generate principles of justice) are those of pure procedural justice, and he is correct. This does not imply that the principles thereby chosen are principles of pure procedural justice, or any kind of procedural justice. They are not.

The principles generated by Rawls' thought-experiment are principles which determine what distributions of primary goods are allowed and which are to be rejected. They are, in Nozick's phrase, "pattern principles of justice," for they distinguish acceptable patterns from unacceptable patterns. While Rawls has constructed an elaborate *procedure* for arriving at principles of justice, those principles themselves ignore procedures and address only *outcomes*.

This raises another interesting problem for Rawls: if proper procedures are admirable, so much so that we should be ready to accept, come what may, the principles of justice which are spit out by his procedure, then why should not our economic processes work the same way? If choosing the right procedures while reasoning about justice is the way to reach fair outcomes, then why should the same not be true for our social interactions? In short, if pure procedural justice is good enough to govern our discussion of

justice, why should the principles which arise address only outcomes and be unconcerned with procedures?

Whether or not this latter criticism is accepted, the earlier point concerning Rawls' principles of justice is compelling. Though Rawls insists otherwise, the fact that he deduces principles through a pure procedural mechanism does not imply that those principles *themselves* are pure procedural principles.

As Vermonters say of the children of "flatlanders" who move to their state, "A cat crawls in an oven and has kittens, it don't make 'em muffins." Ayup.

III. SUMMARY

It seems difficult to discuss Rawls' great work without recreating his argument, and innumerable books and papers which discuss Rawls provide that recreation. I thought it would be tedious to do so again within the body of my dissertation. I assumed familiarity with his argument as a framework within which I discussed many issues in this dissertation. Therefore it seemed illicit to take such a framework for granted without revealing it in more detail in this appendix, and thereby letting this serve as a resource to which other sections of my dissertation might point.

APPENDIX B: TERMS

> Some prefer the use of fewer terms with many meanings coupled to each; I prefer to use more terms, and attach fewer meaning to each.
> - Benjamin Franklin, *The Art of Virtue*

This appendix is a series of short essays on various terms that have appeared in my dissertation. Like the preceding appendix's discussion of Rawls, these short explanations would have demanded unnecessary detours to my main line of argument had I included them within the body of the work, yet my dissertation would be incomplete were I to leave them out entirely. The terms I will discuss are "Kantian," "public goods and the coordination problem," "theory of justice," "institution," and "coercion."

I. KANTIAN

In ethics, "Kantian" generally means, "committed to the proposition that people should be treated as ends, and not as the means to someone else's private ends." As is discussed in Chapter 3, this is the view proposed in Kant's *Grounding for the Metaphysics of Morals*,[1] as well as elsewhere. This is a commitment to deontology versus teleology, the difference being that the former insists that moral action is delimited by moral side-constraints,[2] the latter

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[1] Paton, H. J. 1964. *Immanuel Kant: Groundwork of the Metaphysic of Morals*. New York: Harper & Row. First published in 1948 as *The Moral Law*. London: Hutchinson & Co., Ltd.

[2] See the introduction to Samuel Scheffler's *Consequentialism and Its Critics*, or my explanation of this point in Chapter 3.

holding that moral action maximizes a certain good. The former evaluates procedures, the latter evaluates outcomes.

The deontological commitment of Kantian moral theory has a political corollary, so that political philosophers speak of "Kantianism" to refer to the proposition that people have rights, and that there are things the state cannot do to them without violating their rights.[3] This view appeared in the Appendix A's section on Rawls: the quote asserting that in a just world the good of some is not sacrificed for the benefit of others, and that people have an inviolability which does not enter a social-welfare calculus, is strictly Kantian in spirit, at least as philosophers conventionally use the word "Kantian."

For the sake of clarity I adopted in this work the convention of using "Kantian" to mean a commitment to a refusal to use one person as a tool for the benefit of others, as both a personal moral creed and a political position. Yet I must register a deep distrust of this term, for while it accurately describes Kantian morality it is a far cry from Kant's actual political convictions, which were what moderns should recognize as tyrannical.

The misinterpretation of Kant's political creed

It is surprising how under-discussed are Kant's politics (not *Kantian* politics). Hans Reiss, editor of a book on Kant's political theory, notes in his introduction that:

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[3] The phrase is Nozick's, from the introduction to *Anarchy, State, and Utopia.*

> "Kant, at least in English speaking countries, is not generally considered to be a political philosopher of note."[4]

Schopenhauer dismissed Kant's political writings as "not the work of this great man, but the work of an ordinary common man."[5]

Hannah Arendt goes so far as to deny that they exist:

> "Unlike so many other philosophers... [Kant] never wrote a political philosophy."[6]

Arendt was more keen to scour *The Critique of Judgment*, Kant's work on aesthetics, for traces of his political sentiments, than to turn to the political writings Kant actually produced. Her point was that Kant's aesthetics claim that in judging beauty we seek to represent within ourselves the points of view of others, and this internal representation of the points of view of others can be interpreted as a political ideal as well. Arendt's desire to find clues to Kant's political convictions in his aesthetic theory, and the general avoidance of his political work, may be a function of the fact that Kant's political writings appear to contradict his moral theory.

Yet it is wrong to assert that Kant left no significant political work, or to believe that they are jejune. His political writings are less bulky than his others, but they are methodical and mature. Furthermore, there is an interpretation of his political theory which does not contradict his moral theory, as the one is intended to

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[4] Hans Reiss, *Kant: Political Writings*, (Cambridge: Cambridge University press, 1970), page 3.

[5] Quoted in Hannah Arendt's, *Lectures on Kant's Political Philosophy*, page 8.

[6] Hannah Arendt, *Lectures on Kant's Political Philosophy*, page 7.

govern the relation between man and the State while the other is intended to govern relations among men. This interpretation bears no resemblance to his moral theory and its insistence on the individual as an end in himself.[7] I give in this section an account of Kant's political philosophy, in order to support my bold claim above.

Rousseau's Influence on Kant

Kant, toiling in his bare, Pietist study, had but one ornament: a portrait of Jean-Jacques Rousseau hung on his wall.[8] And he worked out in his methodical way the implications of the theory of *la volonté générale*, the general will, of Rousseau's social contract. Of this Rousseau had written:

> "If then we discard from the social compact what is not of its essence, we shall find that it reduces itself to the following terms:
> *'Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.'*"[9]

Later Rousseau wrote of the unlimited power of the sovereign, the interpreter of the general will:

> "the sovereign power need give no guarantee to its subjects, because it is impossible for the body to wish to hurt all its members."[10]

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[7] The masculine pronoun here is intentional: Kant believed that people were ends in virtue of their rationality, a quality he believed lacking in women.

[8] For biographical data I rely primarily on Cassirer's *Kant's Life and Thought*, Yale University Press, 1961.

[9] Rousseau, *The Social Contract*, page 24. Italics in the original.

[10] *ibid.*, page 26.

He identified the general will in a just state with the will of the Leader: "Thus, the dominant will of the prince is, or should be, nothing but the general will or the law;..."[11] And lastly, Rousseau describes the relation of the individual to this sovereign:

> "..whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than he will be forced to be free; for this is the condition which, by giving each citizen to his country, secures him against all personal dependence. In this lies the key to the workings of the political machine; this alone legitimizes civil undertakings, which, without it, would be absurd, tyrannical, and liable to the most frightful abuses."[12]

To summarize Rousseau's theory of the State: associated with every people[13] there is a will or mission or interest. This *volonté générale* is not the same thing as the will or mission of the majority of the *Volk*, nor is it necessarily the interest of the majority of the *Volk*, as they themselves perceive it. It may be, in fact, that only one person fully understands what *la volonté générale* really is. And when our Leader interprets our general will to us, and forces us to comply with his vision, it only looks like a State which is "absurd, tyrannical, and liable to the most frightful abuses." In fact this prince is just "forcing us to be free."

Kant, as I mentioned, labored under a portrait of Rousseau, and formalized a theory of the State which reflected Rousseau's vision.

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[11] *ibid.*, page 63.

[12] *ibid.*, page 27.

[13] From now on I will use "Volk" in place of "people" as the English "people" lacks the proper denotation, just as the English people generally lack this concept, to their credit.

Kant extends Rousseau's vision

Summary: Kant accepted Rousseau's vision of "freedom" as a quality of human life achieved through subordinating one's individual goals (those of the mere "phenomenal self") to the proper external goal, and he accepted that the proper external goals were those of *ein Volk*. He went further than Rousseau in elaborating what a proper *Volk*-goal is: the expression of Reason through nature. A more proximate goal is dedication to life in a kingdom of ends, where everything is *in ordnung*, and this means not disputing or disrupting the State, the guarantor of *ordnung*, no matter its depredations.

I provide the preceding summary for the reader uninterested in wading through a detailed textual exposition of Kant, masterful stylist though he be. This exposition will work primarily from *The Metaphysics of Morals Part 1: The Metaphysical Elements of the Theory of Right* (hereinafter *The Metaphysics of Right*), in Reiss's *Kant: Political Writings*, pages 122-176, and especially 132-148.

For Kant, the ideal form of government was republican. Reiss writes that,

> "The term 'republican' in Kant's writings could be interpreted to represent what nowadays is generally called parliamentary democracy, though it does not necessarily have this connotation."[14]

A more precise reading, however, can be found in *The Metaphysics of Right*, §45. There Kant wrote that in a *civitas*, (that is, "what a state ought to be according to pure principles of right,") there are three distinct parts of government:

> "these are the *ruling power* (or sovereignty) in the person of the legislator, the *executive power* in the person of the individual who governs in accordance

[14] Reiss's *Kant: Political Writings*, page 25.

with the law, and the *judicial power* (which allots to everyone what is his by law)."[15]

What is key for Kant is the divorce of those who make the laws from those who carry them out. Republicanism consists in just this separation of powers (executive and legislative powers especially). In *Metaphysics of Right*, §48, Kant sums up his doctrine of the separation of powers:

> "It can be said of these powers, considered in their appropriate dignity, that the will of the *legislator* (*legislatoris*) in relation to external property cannot be reproached (i.e. it is irreprehensible), that the executive power of the supreme *ruler* (*summi rectoris*) cannot be opposed (i.e. it is irresistible), and that the verdict of the supreme *judge* (*supremi iudicis*) cannot be altered (i.e. it is without appeal).[16]

In explicating the separation of powers, Kant discovers that the separation implies the unfettering of powers as well. In §49 he writes:

> "The *ruler* of the state (*rex princeps*), is that moral or physical person who wields the executive power (*potestas executoria*)...
>
> "The sovereign of the people (the legislator) cannot therefore also be the *ruler*, for the ruler is subject to the law, through which he is consequently beholden to *another* party, i.e. the sovereign. The sovereign may divest the ruler of his power, depose him, or reform his administration, but he cannot *punish* him... For to punish the ruler would in turn be an act of the

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[15] Kant, *The Metaphysical Elements of the Theory of Right*, in Reiss's *Kant: Political Writings*, page 138.

[16] Kant, *The Metaphysical Elements of the Theory of Right*, page 141.

> executive power, which alone possesses the supreme authority to apply *coercion* in accordance with the law, and such a punishment would mean subjecting the executive power itself to coercion, which is self-contradictory."[17]

It is this separation, and this separation only, which institutionalizes the interests of the citizenry in avoiding tyranny. That separation in place, then, as Reiss puts it:

> "The sovereign ... can never do wrong; whatever the laws given by him are, they have to be obeyed."[18]

Thus Kant writes in "General Remarks on the Legal Consequences of the Nature of the Civil Union,"[19]

> "The origin of the supreme power, for all practical purposes, is *not discoverable* by the people who are subject to it. In other words, the subject *ought not* to indulge in *speculations* about its origin with a view to acting upon them, as if its right to be obeyed were open to doubt (*ius controversum*).
>
> From this there follows the proposition that the sovereign of a state has only rights in relation to the subject, and no (coercive) duties. Furthermore, if the organ of the sovereign, the ruler, does anything against the laws ... the subject

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[17] *ibid.*, pages 141-142. Reiss sums this up: "The ruler cannot be judged by the sovereign since if this were done the legislature would usurp the power of the executive or judiciary which is self-contradictory and thus not right." Reiss, page 24, citing Kant's *Gesammelte Schriften* (Berlin: Prussian Academy of Sciences, 1900), xix, 515 No. 7782; 566 No. 7965; and 572 No. 7982.

[18] Reiss, in *Kant: Political Writings*, page 24, citing Kant's *Gesammelte Schriften* (Berlin: Prussian Academy of Sciences, 1900), xix, 515 No. 7782; 566 No. 7965; and 572 No. 7982.

[19] In Reiss's *Kant: Political Writings*, pages 143-161. Reiss extracts from many parts of *The Metaphysics of Morals* and it is difficult to know how closely Reiss's abridgment matches Kant's original structure, but this essay is still part of *The Metaphysics of Morals*.

> may lodge *complaints* (*gravamina*) about this injustice, but he may not offer resistance.
>
> Indeed, even the actual constitution cannot contain any article which might make it possible for some power within the state to resist or hold in check the supreme executive in cases where he violates the constitutional laws."[20]

And finally, what is the point of all of this? What is the condition sought? Earlier, Kant had explained why the relation of the State to the individual should be as he depicts.

> "There are thus three distinct powers (*potestas legislatoria, executoria, iudiciaria*) which give the state (*civitas*) its autonomy, that is, which enable the state to establish and maintain itself in accordance with laws of freedom. The *welfare* of the state consists in the union of these powers (*salus reipublicae suprema lex est*). But this welfare must not be understood as synonymous with the *well-being* and *happiness* of the citizens, for it may well be possible to attain these in a more convenient and desirable way within a state of nature (as Rousseau declares), or even under a despotic regime. On the contrary, the welfare of the state should be seen as that condition in which the constitution most closely approximates to the principles of right; and reason, *by a categorical imperative*, obliges us to strive for its realization."[21]

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[20] Kant, "General Remarks on the Legal Consequences of the Nature of the Civil Union," pages 143-144.

[21] Kant, *The Metaphysical Elements of the Theory of Right*, pages 142-143.

Summary of Kant's Political Vision

In summary, then, here is Kant's political vision: "*Salus reipublicae suprema lex est.*"[22] The welfare of the State is the highest law. What is this welfare? Is it a function of the welfare of the people who live within the State? Nothing so mundane: it "must not be understood as synonymous with the *well-being* and *happiness* of the citizens,"[23] such as the benefits that people enjoy using their lives to pursue their own, self-defined, projects (as another German, Nietzsche, said, "Only an Englishman cares about happiness"). State-welfare is a function not of the satisfaction of such projects, but of the satisfaction of a project *Kant* defines: "that condition in which the constitution most closely approximates to the principles of right."[24] Individuals should forego their own lives' projects and work to achieve this grander, Kantian, project because "reason... obliges us to strive for its realization."[25]

Incidentally, without delving into Kant's moral theory, I will mention that it is here that his moral theory fits like a missing piece to a puzzle. In that moral theory, to pursue happiness is to attend to the life of the phenomenal self, while to strive to act in accordance with Reason is to attend to the life of the noumenal self. The latter is preferred by Kantian morality. Another, nth-order digression which I will not pursue would be to investigate the degree to which this moral scheme is merely a philosophical

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[22] *ibid.*, pages 142.
[23] *ibid.*, pages 142.
[24] *ibid.*, pages 143.
[25] *ibid.*, pages 143.

reproduction of the tenets of the Pietist Protestantism in which Kant was raised.

To return to the summary: the proper arrangement of the three organs of the State is "that condition in which the constitution most closely approximates to the principles of right." Again, the power held by these three organs may not be "reproached...opposed...[or] altered."[26] In particular, the "person who wields the executive power" is "the *ruler*," (I prefer "Leader" as having the proper connotation), and this Leader is never "subject to the law." To hold otherwise would mean submitting his "executive power itself to coercion, which is self-contradictory."[27] The "people who are subject to" this "supreme power" should not dare "to indulge in *speculations* about its origin...as if its right to be obeyed were open to doubt." For "the sovereign has only rights... and no (coercive) duties" such as having to respect constitutional restraints on its prerogatives. In fact, the notion of such a restraint is an oxymoron for Kant, for the constitution "cannot contain any article which might... resist or hold in check" the Leader, even where he "violates constitutional laws."[28] And so ultimately, individual freedom is not found in pursuing ones own projects (these being mere callings of the earthy, phenomenal, self), but is found in striving to make one's acts accord with Reason, and Reason, "*by a categorical imperative*,

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[26] *ibid.*, page 141.

[27] *ibid.*, pages 141-142. Reiss sums this up: "The ruler cannot be judged by the sovereign since if this were done the legislature would usurp the power of the executive or judiciary which is self-contradictory and thus not right." Reiss, page 24, citing Kant's *Gesammelte Schriften* (Berlin: Prussian Academy of Sciences, 1900), xix, 515 No. 7782; 566 No. 7965; and 572 No. 7982.

[28] Kant, "General Remarks on the Legal Consequences of the Nature of the Civil Union," pages 143-144.

obliges us to strive for [the] realization"[29] of the scheme outlined here. We may guess from Kant's personal life that he had a pathological fear of a loss of *ordnung*. The thought that human affairs might be arranged into such a society must have kept him warm in his austere study.

Response to Kant's Political Philosophy

The above claims are obviously disgusting. They stand in direct opposition to the Enlightenment, which valued the ideals of representative government, the moral weight of individuals, limits on government's ability to interfere with the projects of those individuals, and the ability of individuals to pursue their own projects at the expense of *Volks*-projects. It is for this reason that I claimed earlier that it is a mistake to group Rousseau and Kant with Enlightenment philosophers.

The disastrous effects of this doctrine are difficult to overstate. As I noted in Chapter 3, Isiah Berlin mentioned this problem in passing:

> "The common assumption of these thinkers (and of many a schoolman before them and Jacobin and Communist after them) is that the rational ends of our 'true' natures must coincide, or be made to coincide, however violently our poor, ignorant, desire-ridden, passionate, empirical selves may cry out against this process."[30]

It is Kant's moral theory which cleaved mankind into "true" noumenal selves and "desire-ridden, passionate, empirical"

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[29] Kant, *The Metaphysical Elements of the Theory of Right*, pages 142-143.
[30] Berlin, "Two Concepts of Liberty," pages 147-148.

phenomenal selves. It is Kant's political theory which championed the goal of making "the rational ends" of our noumenal selves "coincide... or ... made to coincide, however, violently our" phenomenal selves "cry out against this process." Berlin seems to find this quirk of Kant's theory puzzling (because we all know that Kant is a great friend of liberty), for it opened the door to so much carnage. Yet it is not in the least puzzling, as I have explained here. It is no quirk of Kant's political theory that it does this: it is the heart of that theory.

Very briefly and baldly and perhaps rabidly, I will explain how these ideas worked out over the intervening two centuries. Kant's concepts fermented within German philosophy. First they developed within Hegelianism, which nourished the idea of the goals of Reason so far that the possibility of phenomenal selves' goals were swept away under Hegel's metaphysics. Freedom under his doctrine was found in subordinating oneself to the project of Spirit or Reason. Next, Marx reset social goals to be not the goals of Reason, but the goals of mankind as a whole. Freedom therefore equates for Marx with subordinating oneself to this world-historical project. Lenin reset the goal as well: no longer mankind's goals, but the goals of the vanguard of mankind, were freedom-defining. Mao adopted this with reference to the Communist Party, and Pol Pot with reference to *Angkar* (Cambodian for both "the system" and "Reason"). And Hitler, of course, revived that original notion of the *Volk*-goal so successfully. Incidentally, as one who has lived fairly lengthy periods in totalitarian States, I can attest that (along with their Marx) the political cadres there know their Rousseau, Kant, and

Hegel well, and express *precisely* this Kantian understanding of the relation between the individual and the State: freedom is defined for them in terms of subordination to higher missions of the State, Party, *Angkar*, or *Volk*.[31]

Along the way, that quaint Anglo-American notion of freedom as being something found in the pursuit of one's own projects has been on the defensive. People do not know their own projects, they suffer from false consciousness, the pursuit of one's own projects is fetishistic, and so on: these are the words with which people who want infinite government console themselves.

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[31] Consider the traditional position of Maoist jurisprudence in the People's Republic of China, which prohibited lawsuits against the party. The argument ran as follows: the Party is the sole instrument of justice; to sue the Party one would have to maintain that it acted unjustly; this is tautologically false: therefore one cannot sue the party.

In fact this example of Maoist wisdom fits nicely into the traditional Chinese conception of the law. Not until 1908 did the Imperial Throne authorize administrative courts to hear complaints about the actions of officials (after its 1906 mission to study the Japanese legal system, which in turn had been copied from Germany and Austria); the Emperor abdicated before this court was actually formed. While such a court was formed during the republican years, as Susan Finder has discussed, it "could not award damages, and most citizens were either unaware of the Court's existence or did not have the resources to make the necessary appeals." The Communist Party enshrined the right of the people to sue the state in Article 97 of their 1954 constitution, saying that citizens "suffering loss by reason of infringement by persons working in organs of the state of their rights as citizens have the right to compensation." *Zhonghua Renmin Gongheguo Xianfa* (Constitution of the People's Republic of China.) According to Finder and Hiroshi Oda, however, this right was nugatory: it was one of the "five major rejections," that is, types of cases which the Party forbade all courts to hear. See Susan Finder, "Like Throwing an Egg Against a Stone? Administrative Litigation in the People's Republic of China," *Journal of Chinese Law*, Volume 3 No. 1, Summer 1989, and also Hiroshi Oda, "The Procuracy and the Regular Courts as Enforcers of East Asian States," 61 *Tulane Law Review* 1339, 1348 (1987).

On April 4, 1989, the Communist Party passed the Administrative Litigation Law to allow people to sue the state. Eleven days later, Hu Yaobang died. Subsequent student attempts to have Hu's contribution to the Party favorably reevaluated at the expense of conservatives led within a month to the erection of a "Goddess of Democracy" statue, and within weeks of that, to an attack on the students by People's Liberation Army troops from the nation's interior. It is unclear whether anyone has yet successfully sued the Communist Party under the Administrative Litigation Law.

Unfortunately, Kant's political vocabulary is drawn from the classical liberalism of his day. Yet his conception of the relation between the individual and the State bears no resemblance to the conception held by Kant's contemporaries in Britain and the Americas. "*Salus reipublicae suprema lex est*" would delight, however, Joseph Göebbels or Mussolini. It is for this reason that I balk at using "Kantian" to refer to a political theory which espouses a belief in side-constraints on what government may due to individuals as it pursues its ends (proper as the term "Kantian" is to describe a deontological *moral* theory). Because, however, that is how other philosophers use the term, to avoid confusion I have in this dissertation joined in this error.

II. THE COORDINATION PROBLEM AND PUBLIC GOODS[32]

I have generally side-stepped the issue of public goods in this dissertation. Rich as that subject is philosophically, its treatment is more of an economic problem than a philosophical one. Furthermore, this dissertation is long without it, and I think it implausible to explore every related issue. However, because I have referred to government-intervention to correct failures in the allocation of public goods, and because there has been some debate as to the importance of this problem for political philosophy (e.g., both Derek Parfit and Richard Tuck challenge its significance), I wish to provide a short explanation of the issue and defend its importance.

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[32] This section draws partially on work I did for a master's thesis at Cambridge University, where I argued for public subsidies for art on the grounds that it is a public good.

There exists a set of goods, called "public goods," whose provision cannot be left to the market. This is due to the fact that their production or distribution generates externalities, and people may "ride free" on externalities. So I will build this explanation from the ground up, starting with externalities and free-riding, before moving to public goods.

Externalities

A class of goods exists which calls extrinsic effects into existence: "Externalities (or spillover effects) occur when firms or people impose costs or benefits on others without those people receiving the proper payment or paying the proper costs," wrote Samuelson.[33] For example, assume I own a widget factory which releases noxious fumes into the atmosphere. I trade you a widget for dollars, and both goods stay confined within our private transaction. But the fumes my factory belched in order to produce that widget are spillover effects which do not remain within our transaction: they spread across the city for everyone to enjoy.

Similarly, you may hire watchmen to guard your home and your widget. The guards patrol the street in front of your house, but their presence deters crime in your entire neighborhood. Here the transaction between you and the private guard company does not retain all the effects it brings into existence: a spillover good has been delivered to your neighborhood. The spillover pollution is an

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[33] Samuelson and Nordhaus, page 48.

example of an external bad; the spillover public safety is an example of an external good.

Public Goods and Free-Riding

Assume the defense of the nation were supported by private purchases from the military. Assume further that the true preference of each citizen is to buy $1,000 of defense, and that I know this about my fellow citizens. Once a year a general comes to my door and asks how much defense I wish to purchase. I may reason as follows: "Other people will either state their true preference or not. If they do all buy $1,000 worth of defense, then even if I do not buy any (or buy only some token amount), then the defense of this nation (of nearly 300 million people) would not be diminished in any real way. No one will be worse off, and I will be better off: therefore I should say I do not want to buy any defense. But suppose that other people in general do not state their true preference to buy $1,000 worth of defense. Then surely I am not going to be one of the only suckers! In that case I should also refuse to buy any defense. In both cases it is rational for me not to state my true preference, but instead, to buy no defense (or a token amount). But people will either state their true preferences or not: in both cases I am better off to opt-out. Therefore I will opt-out, and tell the general I wish to buy no defense."

All of us can be expected to reason equally rationally from the same set of data, and therefore the private provision of defense collapses. The same arguments could be made with respect to volunteer fire and police departments, the conservation of a common

but scarce resource,[34] scientific research (especially medical research), and so on, regarding goods from which it is impossible to exclude non-purchasers. In all these cases the behavior and reasoning I described above is known as "free-riding."[35]

Goods subject to such free-riding behavior are "public goods". Their provision cannot be left to the market, for if we do,

> "there is a lively danger that we will not, collectively, spend the sum we would be willing to spend if we each thought this necessary; so we will, perversely, end by not spending what we collectively want to spend."[36]

Or, if we talk of public bads, that we will not individually take the costly precautions that we wish to collectively.

Between public goods and private goods there is a third class of goods, called "mixed public goods," which tend to attract "free-clingers" (as Dworkin termed them). Like public goods, these are goods from which non-participants cannot be excluded: unlike public goods, however, the benefit which accrues to the free-clinger is not as great as that accruing to the people who actually buy the good.

A classic example of the mixed public good is inoculation against disease. Assume there is some cost to getting an inoculation against the flu (either in dollars or in exposure to risk):

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[34] This point was discussed in Chapter 4, regarding the subject of commonly-held property rights.

[35] After the example of a bus system which operates on the unmonitored payment of fares. If only a small number of people ride the bus, then I know that my withdrawal will cause the system to collapse. But as the number of riders gets bigger, the temptation I face to ride for free increases. Hence "free-riding."

[36] Dworkin, "Can a Liberal State Support Art?", *A Matter of Principle*, page 223, with reference to government subsidy for the arts.

if everyone else gets inoculated, why should I? My chances of getting the flu are radically diminished if most or all of the people around me take precautions with their own health. Yet, if I do not take the precaution of having an inoculation, my risk is still *somewhat* higher than the risk borne by the people who participate. I may ride in their bus for free, but I must sit in the back.

The State and Public Goods

Ever since the Mill Act decisions of the last century, regulations rather than strictly interpreted property rights have been used in this country to redress external bads.[37] Government also has taken a role when people transact to generate goods from which other people cannot be excluded. In cases of such public goods, mixed or otherwise, a government may through taxation and subsidy provide people (counter-intuitively) what they want anyway but refrain from buying due to free-rider logic. For example, rather than supporting medical research solely through private subscription, we decide how much we (collectively) want to spend on such research, and then tax everybody enough to pay for it. Taxation and subsidy here serve to shift groups of people to the tradeoff position between research and non-research goods they desire.

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[37] The Mill Act decisions are discussed briefly in a footnote in Chapter 4. Furthermore, one interpretation of Coase's Theorem is that in a society with no transaction costs, an external bad will continue to be generated if the marginal profit which that bad allows is greater than the cost to society of the bad. Coase's Theorem is discussed in relation to Ackerman's theory of tort in Chapter 2.

The Importance of Free-Riding Behavior for Political Philosophy

There has been debate on the implications of free-riding for political philosophy. This debate concerns the range of people who act in a free-riding fashion. The reasoning I walked through above implies that a "rational egotist", a person intent on promoting her own utility, may free-ride. In fact, according to Marcus Olson's *The Logic of Collective Action*, a classic work on the subject, even altruists can behave in this fashion:

> "Even if the member of a large group were to neglect his own interests entirely, he would still not rationally contribute towards the provision of any collective or public good, since his own contribution would not be perceptible....The only requirement is that the behavior.... be rational, in the sense that their objectives, whether selfish or unselfish, should be pursued by means that are efficient and effective for achieving those objectives."[38]

The claim that a rational altruist may free-ride is a claim denied by both Richard Tuck and Derek Parfit. They base their denial on criticism of a hidden assumption in Olson's argument: this is the move from saying "only an imperceptible good is contributed" to saying that "one need not contribute an imperceptible good."

Tuck considers the problem in relation to the Sorites Paradox. This paradox holds that if I start with a heap of stones and subtract one stone at a time, I can never not have a heap (assuming that nothing that is a heap of stones is made not-a-heap-of-stones by the

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[38] Olson, *The Logic of Collective Action*, page 64, quoted in Tuck, "Is there a free-rider problem?", pages 148-149, in Harrison's anthology.

subtraction of one stone). The free-rider problem is like the Sorites Paradox in that I subtract my contribution from the defense budget and still believe there is "a heap" of defense. So Tuck argues that,

> "While there is a free-rider problem for the utilitarian, it is not one that should be taken seriously; we have seen that it is connected with a *paradox*, and the essence of paradoxes is that their conclusions should not be believed...."

If we consider an example where a group has to complete a task by having everyone perform small parts of it, such as building a heap of stones by having everyone carry one rock, and compare it with the case where the same task is performed entirely by one individual, we see that the same problem arises: there is no logical point in ever starting. According to Tuck, what this shows is,

> "that the free-rider problem is not a problem of *political* theory alone - it is merely a particular application of a general logical problem."[39]

Therefore it is a problem not for political theorists but logicians, according to Tuck.

Parfit extends this line of reasoning by challenging the claim that to cause someone an imperceptible loss is to cause no harm at all (or that causing someone an imperceptible gain is no benefit). To do so he makes the Sorites Paradox work *for* him. Consider the situation where a thousand of us each have one pint of water, and there are a thousand men dying in the desert. One hundred of us give over our pints, so all the dying men get one-tenth of a pint. Assume

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[39] Tuck, "Is There a Free-rider Problem?" page 154.

there cannot be imperceptible benefits (that is, if a good is imperceptible it doesn't benefit). If the one hundred and first man gives over his water, each dying man has a thousandth of a pint more than he would have otherwise. Surely this is imperceptible: his pain is as great as before (if not, increase the numbers to make the fractions smaller). The one hundred and second man gives his water, and no doubt the pain is still at least as great for each of the thousand men as when only one hundred and one men gave their water.....If the thousandth man hands over his water, the pain will still be at least as great for each dying man is when only 999 men put in their pints, which in turn is at least as great as when 998 put in their pints....which is at least as great as when only 100 of us turned in our pints.

But then we are saying the thirsting men's pain is as great when a thousand of us put in our pints as when a hundred do, or that a pint relieves a thirsting man's pain no more than a tenth of a pint. This is absurd. Therefore the assumption that there are no imperceptible benefits and harms is false. Parfit concludes therefore that there are such things as imperceptible benefits and harms. Hence if I am altruistic, I will not let the fact that I am causing only a small loss or gain which is spread out among many people dissuade me from doing what I can to prevent that loss or secure that gain. That is, I will not free-ride.[40]

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[40] Parfit, *Reasons and Persons*, pages 78-85.

Though Parfit's argument is the more persuasive of the two, both slightly miss the point, I believe. Tuck asks "is there a free-rider problem?" but he addresses "is there a free-rider problem for rational egotists and altruists?" And he is wrong to dismiss the free-rider paradox as a problem fit for only for logicians. For his and Parfit's arguments are aimed at establishing that one cannot be both altruist and free-rider, while Olson argues the opposite. Yet surely this is a different face of the problem than what political philosophers confront. The problem is that *in fact* sometimes people ride free. Oil cartels fail because member-producers cheat; people in a drought go on watering their lawns because they expect the rest of the community to ration water; nations pollute while expecting others to reduce their pollution. It is perfectly appropriate to ask whether, in cases where people or groups free-ride on a public good, government control of people's behavior is just. What is irrelevant to the task of political philosophy is an argument pointing out that *if* people were altruists/rational egotists etc., *then* no problem would result: political philosophy must sometimes stipulate when people should follow their own desires and when the state is right to force people to act against their wishes, and must be cognizant of the fact that some possible arrangements will not work because people will free-ride. Outside the scope of moral philosophy and in the realm of political philosophy, it is no rebuttal to argue that people well-versed in the utilitarian calculus would not be so inclined.

III. THEORIES OF JUSTICE

"Justice" and "theories of justice," with various modifiers, appear throughout this work. Whether the focus has been criminal justice, rectificatory justice (the law of torts), the law of contracts, etc., or distributive justice and the more general issues of social justice, the concept of justice has historically been linked to notions of proportion and desert,[41] but this is more the starting point of argument than the resolution. A "theory of justice," on the other hand, has a specific meaning in this work.

Descriptions of the Just Society

What I term a "theory of justice" is a theory philosophically rich enough to address such questions as "What are the principles by which it is just to organize a large, industrial, quasi-capitalistic, democratic nation? What are the basic institutions of such a nation if it is just?"

There is a higher level of abstraction possible, and that is an ideal or universal theory of justice. A universal theory of justice is one which pays little heed to this or that feature of a given state, and only addresses the question "What are the principles by which we wish to organize a state?" Plato's *Republic* and *Laws* are examples of ideal theories of justice, as are Hobbes' *Leviathan*, Moore's *Utopia*, and a slew of others. Rawls' magisterial *A Theory of Justice* could be considered an example of an ideal or universal justice theory. I believe, however, that this is not the most

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[41] cf. Aristotle, *Nicomachean Ethics*, 5.

consistent way to read *A Theory of Justice*, and it is a claim from which Rawls has backed sharply away in the intervening years.[42]

The difference between a theory of justice and a universal theory of justice is the amount of detail assumed. If we ask ourselves what would be just institutions for a country to adopt or work toward, with the background assumption in mind that we are thinking of a country with the history and characteristics of, say, Britain, France, or Germany, we can arrive at a rich, elaborate, and philosophically interesting theory of justice. If we set our sights on developing a set of institutions to adopt or work toward, and insist that the theory be as applicable to an impoverished oriental agrarian society as to a wealthy occidental industrial nation, we seek a universal theory of justice.

Disregarding the difference between the last two cases, then, when I write of a "theory of justice" I am envisioning something of the following sort: an input of some proposed set of principles or assumptions, a proposed decision-making procedure as well, and an output which is a description of "the nature and aims of a perfectly just society" and its principles: in short, "the basic structure of

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[42] See Rawls, *A Theory of Justice*, pages 4-7. This is *faux* ideal justice theory: Rawls argues that he is describing *A Theory of Justice* for a well-ordered society of basically cooperative people who find themselves in a condition of moderate scarcity. The weakness of this set of conditions supports the view that his is an ideal theory. But Rawls has been criticized for making the inhabitants of his original position think a lot like people from the United States, Canada, or Western Europe and not, for example, like Chinese peasants. In his more recent work he significantly strengthened the conditions described above. See "Overlapping Consensus," *Oxford Journal of Legal Studies* 7, (1987), and "The Priority of Right and Ideas of the Good," *Philosophy and Public Affairs* 17, (1988) and my discussion of this point in Appendices A and C, with reference to Allen Buchanan.

society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties" across a society.[43]

IV. INSTITUTION

I have adopted the convention of writing of the "institutions" of "the basic structure of society" because contemporary writers use the term. Rawls, for example, holds that:

> "the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions."[44]

Speaking of our social choices as institutions, however, can be a dangerous euphemism which settles blithely over debate and hides the nature of what is being proposed. We must not let our language hide from us the fact that theories of justice propose rules to be enforced by state violence.

Suppose for example we are considering three rules which hold that commercial transactions must be race-blind, that no old guys may wear Bermuda shorts with dark socks, and that polygamy is disallowed. These may or may not be fine rules (and I believe one of them is), but imagine that someone proposes them as social rules. Then he is saying "You shall not be bigoted/display bad taste/have multiple husbands. If you do the state will punish you by taking some of your things or putting you in a cell or commandeering your

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[43] Rawls, *A Theory of Justice*, pages 7-11.
[44] *ibid.*, page 7.

labor. " The soundness of his theory of justice should be evaluated on the basis of these violent threats it entails, and not on its claims about "institutions" of equal opportunity, fashion, or the monogamous family, claims which do nothing but conceal the fact that the output of a theory of justice such as Rawls' is a set of commands, not hints.

V. COERCION

Words such as "harm" and "property rights" are used extensively in this paper, and what they mean precisely, and what they have meant historically, are at times my main focus. Words such as "coercion," "compulsory," "force," "non-voluntary," and so on, which all name a similar concept, are used as well, but without any great attention paid to them. This may seem odd: when a word and the concept it names play as integral a part of an essay as "coercion" and its synonyms do this, it is customary to spend a great deal of time selecting one definition of the word and defending it as the right one. An unfortunate result of this is that too much of the burden of argument is borne by terms within it, to the point that people can utter similar words but be in profound disagreement.[45]

Coercion and Theories of the Good

The word "coercion" has been the battleground of ideological struggles. Hourly employment looks to some like a voluntary and

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[45] For example, I would argue that the great political achievements of the Enlightenment became entangled in the thickets of Rousseau's and Kant's language. For these two men, words like "general will," "freedom," and even "republic" had meanings different from the meanings they had for those classical liberals with whom they are wrongly grouped, as I discussed earlier in this appendix.

mutually beneficial exchange; to others, it is wage slavery. Prostitutes and pornography's actors and actresses are exercising their liberty in the most extreme way, to some; to others, they are the victims of a coercion found not in their decisions but within the social context in which they occur.[46] There is no doubt a great philosophical literature on what "coercion" is, along with, of course, related concepts such as "restraint" or "force," and antonymic ideas such as "liberty" or "freedom".

But there is little point in delving into such literature here, for I merely intend to name a fairly simple idea that should not be problematic to any reader. I wish to discuss something it is that the State does to its citizens. Surely the State does some things, such as issue passports and run voting booths, that do not seem to be forcing anyone to do anything. But often the State is engaged in passing laws and, as was discussed in the introduction in relation to the literature of legal positivism, these laws oblige us to do things. A red light at a traffic signal tells me to stop; I am obliged not to steal cars or wallets, or sleep in the park after sundown. I am not *asked* to do these things by the State, I am *instructed* by the State not to.

Now of course it may well be that I would have acted just as the State wanted, even had they not told me what to do. Perhaps I would refrain from stealing cars and wallets, or even sleeping in the

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[46] See for example Dworkin's "Why Pornography Matters to Feminists," Longino's "Pornography, Oppression, and Freedom," Giobbe's "Confronting the Liberal Lies About Prostitution," for articles criticizing the liberal view of choice, and Hartley's "Confession of a Feminist Porn Star," Carter's "A Most Useful Tool," and Sundahl's "Stripper" for defenses of the liberal view of choice in these matters. These examples were also mentioned in my introduction.

park after sundown, from my own sense of honor. But there is some sense, certainly, in which the State is regularly telling people what to do and what not to do. It is, as I said in the introduction, sincerely threatening them with sanctions for non-compliance.

A simple way to conceive of this is to imagine that I am pointing a gun at someone where she stands. I tell her to move two steps to the right: I am threatening her, and my threat is sincere, for I intend to pull the trigger if she does not comply. I am using "coerce" to name this situation.

Now it may be that a tiger is about to leap on her and I have no time to explain, or the rest of us need her to stand to the side for some other reason, say, some other project of ours. I might be tempted to say in these cases that I am not coercing her, but rather, I am liberating her, or increasing her freedom by letting her act to help our group maximize our ends. So perhaps "coerce," with its ring of dungeons and despicable acts, does not seem to fit what is going on here: perhaps in these cases I could be said to be "freeing" this woman rather than coercing her, as I am contributing to her freedom.

While I would not object too strenuously to such a usage, I think it is a bad way to use language. If one used "to free" in this way, one would always need to use it with an asterisk: "* Note that 'to free' can mean 'to coerce with the object of saving a person, or forcing her to contribute to the projects of others, projects wherein her true freedom is located.'" Done successively with important

terms, one may build a solid edifice, but one builds it at a far remove from the shores of natural language.

As the quote from Benjamin Franklin suggests, I prefer to use more terms with less meaning attached to each one. Therefore I have called this act of telling people what to do, for ease of reference, "coercion." "Coercion" seems to name the concept roughly, but admittedly it is imperfect. "Coercion" can mean many other things, and discussing all the philosophical ramifications of these meanings could be another dissertation. But such an exercise would be meaningless, for my point is not to explore coercion; my purpose is to explore this action by the State. So I use "coercion" as an easy way to refer to that action of the State commanding its citizens.

In fact, that the State often commands its citizens in some ways is I think a relatively innocuous idea, not needing a great deal of philosophical unpacking. As Stuart Hampshire has pointed out, no matter what their ideologies, visions of the good life, or political agenda, there is some common ground concerning coercion upon which all reasonable people agree.[47] If I threaten to hit you in the head with a hammer unless you do things my way, it is coercion. Similarly with holding you up at knife point, or putting you in a box for years. Were someone to call such acts of mine "coercive," she would not be confessing the particular theory of the good to which she adhered. Some would call my use of these terms unsophisticated and unreflective. This is, of course, my point: philosophical

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[47] Hampshire's point was taken up in more detail in Chapter 1.

arguments may be baroque, but the *terms* that bear them should be rustic.[48]

The State and Coercion: Three Possibilities

How then should my use of "coercion" be understood, with reference to the state? State authorities can take one of three attitudes towards an individual's act. They can not prohibit it, they can prohibit it, or they can allow it but levy a toll on it. The latter two are both coercive, as I am using the word. If the state prohibits something and I do it anyway, the procedure is this: I may go to jail or have something taken from me or be commanded to labor for the State. If I refuse to yield those things or refuse to perform the labor demanded, I will be jailed and if I try to leave they will put me in a deeper jail for a longer time, or shoot me. Levying a toll is a weaker form of coercion: it is a request backed by a threat to insert me into the middle of the above procedure.

It might be thought that there should be an extra category here, for the times when the State allows an activity but regulates it. For example, the state regulates nude sunbathing: is it actually coercing people by regulating it? If not, then there would seem to be

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[48] The situation I seek to avoid is a replication of what I might call "Enderton's Problem." Enderton wrote the book *An Introduction to Mathematical Logic*, which is used in middle-level logic courses at Stanford. Enderton is keen on packing as much into terminology as possible, to the point that in the middle of his book, where he gives his proof of Gödel's Incompleteness Theorem, it takes less than half a page. His terms do the majority of the work, so that his proofs are simple.

This is acceptable for a book of logic, where proofs once given can be represented in shorthand by a technical vocabulary. But the vocabulary of political philosophy is often drawn directly from common English, and so to pack dense meaning into terms which have simpler and less contentious meanings outside of philosophy is surely a road to confusion.

a fourth category: non-coercive regulations. This could be, but for simplicity I think this can still be handled by the above three concepts.

Consider the activity of nude bathing: the State may say that one can do it at Jones' Beach, but not at Smith's. One could say in this case that the State is not banning an activity, just regulating it. Or one could say that the State is permitting the activity at Jones Beach, and banning the activity at Smith's. The point is the same whether I handle this with three categories or four: I just wish to discuss an activity of the State, and the word "coerce" seems to name that activity as well as any other word.

To further illustrate, consider that Muslim practice historically has often been to provide conquered people tax-incentives to convert, at least if they were "People of the Book" (as opposed to "pagans," who were offered more stringent incentives). In some cases this tax-incentive was actually administered by the religious bureaucracy of the people being discriminated against. For example, when the Ottomans conquered Constantinople, they permitted the Greek Orthodox Church to continue its services, but demanded a special tax from the patriarch. This rule was coercive because the payment was not voluntary. It may not have been as coercive as that which obtained on the other side of the Bosporus, or as coercive as the rule which was enforced by later Ottomans, but neither was it one we would now recognize as a rule protecting religious freedom.

Therefore in general I consider rules backed by state authority to be coercive. I might also say they are non-voluntary, to distinguish them from involuntary acts (such as jerking my leg when the doctor strikes my knee) and voluntary acts. What the state says I must do may coincide with what I would have done voluntarily, but this coincidence is just that. The fact of my willingness to have behaved as the rule now demands is beside the point. I might also say that a rule is compulsory, or that it compels me, or that it is mandatory. All of these terms share one theme, that the state is forcing me to behave in a certain way, not by physically controlling the movement of my hands in prayer or physically restraining them from knocking someone on the head, but by commanding me to behave in a certain way, and sincerely threatening me with sanctions for non-compliance.

Non-coercive Rules

As I pointed out earlier, there exist exceptions to these categories, rules which do not fall cleanly into my taxonomy. These can be divided into administrative rules and rules with holistic or convention-setting justification. Administrative rules include, for example, the number of days one has to pay a parking ticket, the rules which govern the evidence admissible in a criminal case, and rules which govern procedures in a civil case. It would be a stretch to call these rules "coercive." Like the rules of grammar, they provide structure within which acts are possible that would not be possible in their absence. Second, there are rules such as "you must drive on the right-hand side of the street" which can find no direct

support from any of the three classes of justifications given previously. Such rules are nodes in webs of rules, however, which may be measured against that standard: in this case, a pre-determined side of the street upon which to drive is a condition of having traffic rules, and we have traffic rules because of a "market failure" (or coordination failure) which occurs when each person chooses to drive as she wishes.

Once again, my argument is not that coercion is wrong, but that coercion has to be justified. Social philosophy advocates social policy, and social policy by-and-large does not concern what actions individuals should undertake, but what rules a state should enforce. These rules are backed by state authority. The coercive element within them must be examined, no matter the internal consistency of the argument which calls for them. My purpose has been to describe the tests that coercion must meet to be justified.

APPENDIX C: THE BORKIAN OBJECTION

One may object that the way I confront social institutions is misguided. The right way to look at things, this objector continues, is through the allowance model: social theory generates "principles of social justice: they provide a way of assigning rights and duties..."[1] Such principles generate assignments by defining "the major social institutions [which] distribute fundamental rights and duties and determine the division of advantages from social cooperation."[2] Our rights and duties express our entitlements. It is therefore tautologically false to say that a State's use of force is unjust if that use respects the boundaries of such entitlements.

For example, assume a theory distributes entitlement-X to people. A state animated by this theory strips some not-X thing from a man. His *entitlements* have not been violated. I cannot measure the state's act against a standard for all coercion, though I may challenge the theory which endorsed it. In short, theories of justice do not allow themselves to be judged on any terms but their own.

I call this "the Borkian objection," for reasons to be explained. To reply, it seems I must defend pre-political entitlements, i.e., natural rights. Only by declaring that there are natural rights, my antagonist continues, do I gain the vantage point I seek from which to inspect theories of justice. And so I am reduced to defending the antiquated doctrine of natural rights, or surrendering.

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[1] Rawls, *A Theory of Justice*, page 4.
[2] *ibid.*, page 7.

In fact, however, there are eight ways I may respond.

I. One may pursue political philosophy not merely as a pastime, but in order to visualize how our society should look. The rejection of pre-political constraints runs against the grain of the US Constitution, properly understood. That a proposed theory is antithetical to the Constitution is at least of passing interest.

II. While a strong doctrine of natural rights is antiquated, some non-antiquated doctrines of pre-political rights are defensible.

III. This calls for a digression on the jurisprudence of Judge Bork, which shows what is at stake on this issue.

IV. The allowance model is undignified and asserts false claims.

V. The allowance model misconstrues the relationship between facts and values.

VI. The allowance model fails to justify state coercion as it should.

VII. The objection would be right, if I were trying to do in this dissertation what the objector says I am trying to do. In fact, however, he misconceives my project, and my true mission is less heroic, but not open to this objection. In any case, it can be restated in less heroic terms.

VIII. My method of justifying state coercion accords with the principle of legitimacy in a way that the allowance model does not.

These replies are *logically* possible, but some are better than others. I pursue them in order, and the better ones at length.

I. ENUMERATED POWERS AND PLENARY RIGHTS
The Debate

The debate outlined above maps with great simplicity onto a classic debate of US Constitutional theory. This debate opposes the doctrine of enumerated powers to the doctrine of plenary rights. The doctrine of plenary rights maintains that government, and particularly the federal government, may do things which do not abridge a right granted to people by the Constitution. The doctrine of enumerated powers insists that government has just those rights granted it by the Constitution, and no more. The doctrines therefore differ in where they locate burden of argument.

The doctrine of plenary rights has emerged as the dominant one in American jurisprudence, especially in the last 50 years but beginning with the *Slaughter-House* cases of 1873. There, the Louisiana legislature granted an exclusive license to a New Orleans slaughterhouse. When that company's competitors complained, naturally enough, the case made it to the US Supreme Court. As one modern legal historian, Lawrence Friedman, wrote,

> "A bare majority of the Supreme Court held... that the Constitution had nothing to say about the killing of intrastate pigs."[3]

Friedman believes that this decision was "self-evident." His claim evinces the triumph of the doctrine of plenary powers among moderns, for this decision is "self-evident" only against a background assumption that the silence of the Constitution on an

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[3] Lawrence Friedman, *A History of American Law*, pages 343-344.

issue, the fact that "the Constitution had nothing to say about" an issue, indicates that government has the power to regulate there. As will be explained, an argument can be made that 100 years of Jim Crow laws in the South owe their existence to this decision.

The American debate on abortion-rights illustrates just how deeply the doctrine of plenary rights dominates American legal theory, and how debate is framed within that context. It is often argued by pro-choice writers that abortion-rights are grounded upon an implicit right to privacy located in the Constitution: this right, first named in *Griswold*,[4] was the pillar of the *Roe* decision.[5] This right to privacy, it was decided, could be found in the "penumbra" of other rights which are named in the Constitution, and which make no sense without a background assumption of a right to privacy.

Others deny that such a right can be found in the Constitution. For Robert Bork, for example, the Constitution never mentions abortion or anything related to abortion: therefore there is no pre-political constraint upon the ability of legislatures to regulate or prohibit it.[6] In a similar vein, George Will has observed that "The US Constitution simply is silent on the subject of RU-486."[7] The implication is that legislatures have power where the Constitution does not forbid it. The silence of the Constitution is thereby read to license the authority of government, rather than to undermine its reach.

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[4] *Griswold v Connecticut*, 381 US 479 (1965).
[5] *Roe v. Wade*, 410 US 113 (1973).
[6] Robert Bork, *The Tempting of America: The Political Seduction of the* Law, pages 8 and 169-170.
[7] *This Week with David Brinkley*, March of 1993.

The interesting thing about this debate is that both sides of it assume that it is up to abortion's defenders to locate in the Constitution an individual's right to an abortion. The pro-choice position proceeds by teasing that right out of penumbras and implications and constitutional "values,"[8] while the pro-life side and the strict constructionists insist on a meticulous reading of that document. That it is unnecessary for the opponents of abortion to locate in the constitution the requisite government power to regulate abortion is rarely, if ever, questioned. This example illustrates the degree to which the doctrine of plenary rights dominates our legal theory and sets the context of our political discourse.

The Constitution and Its Interpretation

The emergence of the doctrine of plenary rights in our Constitutional theory is a philosophical oddity, to put it mildly, for the doctrine of enumerated powers is not just *mentioned* in the US Constitution, it is the centerpiece, the alpha and omega, of the US Constitution. There is simply no philosophically consistent way to read the Constitution and find in it a doctrine of plenary rights.

The Framers of the Constitution worked within a "rights-powers conception" that viewed individual rights and government

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[8] Along with the *Roe v. Wade* decision, which is actually quite an awful example of legal thought (as even its supporters recognize), see for example Ronald Dworkin's many writings on the subject, and especially his book *Life's Dominion*, along with Lawrence Tribe's *Abortion: The Clash of Absolutes*, especially Chapter 5, pages 78-106. For a feminist perspective, see Alison Jaggar's "Abortion and a Woman's Right to Decide," in *Living with Contradictions*, pages 281-287, along with pages 272-314 in general.

powers as "logically complimentary."[9] What was held by government as a power was subtracted from the sum of individual rights. Yet opposition arose within the states to the ratification of the Constitution without a bill of rights, for it was recognized that the Constitution's division of rights between the individual and government was inherently incomplete, and it was feared that government might come to usurp any powers that were not explicitly named as belonging to people.

Hamilton opposed the inclusion of a bill of rights in the Constitution: he felt it unnecessary and dangerous. In his famous essay on the subject, *The Federalist Papers #84*, he wrote:

> "It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogatives in favor of privilege, reservations of rights not surrendered to the prince... It is evident, therefore, ... that they have no application to constitutions, professedly founded upon the power of the people...
>
> I go further and affirm that bills of rights... are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for example, should it be said that liberty of the press shall not be restrained, when no power is given by which restraint may be imposed?"[10]

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[9] Randy Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, pages 5-6.

[10] Hamilton, Madison, Jay, *The Federalist Papers*. This is from "No. 84: Hamilton," pages 510-514.

Hamilton, incidentally, went on to become a great enthusiast of concentrated federal power. See, for example, his dispute with Jefferson over a national bank, and the Alien and Sedition Acts regulating the freedom of the press. Jefferson's rejoinder to these acts, "The Kentucky Resolutions," is quoted on the frontispiece of this dissertation.

The citizens to whom his plea was addressed did not heed Hamilton's counsel, and so a Bill of Rights was added to the Constitution in order to secure its ratification. The issue of the proper resolution of the rights-powers dichotomy was carefully addressed in the Ninth Amendment:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[11]

This amendment expresses the philosophical position that merely because some rights of individuals have been listed, it does not follow that everything unlisted is hence a power of government; rather, the powers of government have been listed, and anything unlisted is not a governmental power.

This constraint is fairly simple: there is a background assumption that people have rights, and whatever is not explicitly awarded to government as a power remains a right of individuals. In fact it is only under this assumption that a great many phrases and sentences in the Constitution make any sense. "We the People" in order to accomplish X "do ordain and establish" Y (preamble). "All legislative Powers herein granted" (Article 1 Section 1). "Congress

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[11] US Constitution, Ninth Amendment, 1791.

shall have Power To" do 42 specific things (Article 1 Section 8), and neither the federal or state governments will be able to do another 40-odd things (Article 1 Section 9). "The powers not delegated to the United States by the Constitution..." (Amendment 10). And so on. James Madison, in a speech on the meaning of the Constitution (which, after all, he wrote), referred to the courts as "guardians of those rights; they will be an impenetrable bulwark against every assumption of power" and "every encroachment upon rights" (including unenumerated ones) by the more energetic legislative and executive branches.

All these utterances only make sense against a background vision of rights, not as things distributed outward from government, but as things which are already "out here," and we must arrange things so government does not grow to subsume them. I will not bother to cite the many dozens of similar examples of powers being "granted" or "delegated" (always to the government, not away from it) from within *The Federalist Papers*, for the document is permeated with the language of enumerated powers (but suggest that the reader might find some more examples by opening, almost at random, any of Madison's essays #41-45). I will note, however, that in reading through this material, it becomes harder and harder to understand quite what the hullabaloo was once about: I repeat, there is simply no philosophically consistent way to read the US Constitution and say that it prefers a doctrine of plenary rights to one of enumerated powers.

Since 1873 the Supreme Court has read a doctrine of plenary rights into the US Constitution. One could find earlier omens, or more solid examples from later years, but I choose 1873 because it was in that year that the Supreme Court upheld the ability of the Louisiana legislature to award a virtual monopoly to the Crescent City Live-Stock Landing and Slaughter-House Co. To do this, they had to obviate the Privileges and Immunities Clause of the 14th Amendment, which guarantees that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

There is no obvious reason that being a butcher is not a "privilege" of citizens of the United States. However, the Louisiana legislature had passed a law preventing many (Black) people from being butchers (no issues of public health or safety were implicated in this law). To uphold this in the face of the 14th Amendment, the Supreme Court had to maintain that choice of occupation was not a privilege or immunity of citizens of the United States. It was within this context that:

> "A bare majority of the Supreme Court held... that the Constitution had nothing to say about the killing of intrastate pigs."[12]

The Court's error here, and Friedman's, is in moving from the true assertion that "the Constitution had nothing to say" about a profession to the conclusion that it is thus a fit subject for regulation. Given that no issue of public safety was involved (which would have allowed either state or federal action under a "general

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[12] Lawrence Friedman, *A History of American Law*, pages 343-344, quoted previously.

welfare" or "police powers" mandate), this extension of government authority was wrong. True enough, "the Constitution had nothing to say about the killing of intrastate pigs." It also had nothing to say about regulating the killing of intrastate pigs.

The 14th Amendment had been crafted by the Reconstruction Congress to prevent a return to *de facto* slavery in the South. Its opening paragraph gave us the Privileges and Immunities Clause, Due Process, and the Equal Protection Clause. The Slaughter-House case gutted the Privileges and Immunities Clause, and opened the door to nine decades of post-bellum segregation in the South.

This emergence of the doctrine of plenary rights was abetted by increasingly broad readings of Article 1 Section 8 of the Constitution, in particular, the General Welfare Clause, the Commerce Clause, and the Necessary and Proper Clause. These read, in turn: "Congress shall have Power To... provide for the common Defense and general Welfare of the United States..."; "To regulate Commerce ... among the several States"; and, after enumerating 41 other powers that Congress will have, "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers..."[13]

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[13] Randy Barnett's *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, and Roger Pilon's "Restoring Constitutional Government," along with a talk delivered by him, have influenced me on the subject of the Ninth Amendment, and such influence should be evident in the line of argument I take here.

In fact, there seems to me to be surprisingly little discussion in the United States of the erosion of the doctrine of enumerated powers: its death is assumed. Hence currently Congress is debating whether certain programs are best left at the federal level, or should be moved to the states to administer: the question of where the power to administer those programs is assigned by the Constitution is studiously ignored. Hence what should be an *institutional* question gets treated as a *policy* question.

The General Welfare and Necessary and Proper clauses were initially interpreted to *restrict* the authority of the government: Congress's acts could not be partisan, they could not benefit one group at the expense of the other, but the benefits of laws had to be general. Furthermore, the means which Congress employed to achieve its ends had to be necessary and proper ways of achieving those ends. Congress could not regulate as it wished and propose just any explanation as its purpose: it had to have an explanation as to why that specific regulation was necessary to achieve the end in question. The Commerce Clause, on the other hand (and unlike the General Welfare and Necessary and Sufficient Clauses), was always understood as power-conveying, but the powers conveyed under it were traditionally thought to be relatively limited: it was understood as removing from state governments the right to impose tariffs and duties on intrastate commerce, and as moving to the federal government the discretion to regulate such trade.

The Necessary and Proper Clause lasted only a few decades and has scarcely been heard of since. The General Welfare Clause lasted in some semblance of its former self well into this century, until Franklin Roosevelt needed to eviscerate it in order to pass his New Deal. This fact, incidentally, seems to have been well-understood by Roosevelt, who in 1935 wrote to the chairman of the House Ways and Means Committee:

> "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation."

Rexford Tugwell, Roosevelt's adviser on the New Deal, put this point even more succinctly years later in *Change* magazine in 1968:

> "To the extent that these policies developed, they were tortured interpretations of a document intended to prevent them."[14]

After four years of fighting Franklin Roosevelt's New Deal, the Supreme Court caved-in and began to read the General Welfare Clause as an enormous loophole through which state power could slip. Under the newer interpretation, government could regulate where doing so could be thought to increase the (now vague) general welfare of society, even if no other part of the Constitution might authorize such regulation.

For example, in the early 1930's the milk industry of New York successively caused that state's legislature to pass a series of price controls on the retail trade in milk. Like our current national quotas on sugar, this was a classic case of the dispersed costs and concentrated benefits to which democratic mechanisms veer, and which public choice theory explains clearly. The Supreme Court upheld in *Nebbia v. New York*[15] the conviction of a grocer who had committed the anti-social crime of selling milk below the price set by a state government. The Court insisted that it had no authority to second-guess the means a legislature adopts to increase "the general welfare" of the population it represents. How selling inexpensive milk to a population might possibly lower its general welfare was left unexplained. In fact, in a 1936 case involving

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[14] Both quotes in Roger Pilon's "Restoring Constitutional Government," pages 3-4. This monograph of Pilon's suggested to me both this subject as an area of research, and the relevance of this question to the Borkian objection I am considering here.

[15] *Nebbia v. New York*, 291 US 502 (1934).

Social Security, the Court further abdicated even the minimal responsibility of declaring whether an act of Congress increased the welfare of a special interest (which it called "a particular interest") or the welfare of society as a whole, and returned that discretion to Congress.

In this way, the general welfare clause evolved from a moat into a drawbridge: rather than protecting citizens from the depredations of those who would harness power to their private ends, this radical reinterpretation of the General Welfare Clause encouraged such invasion. Groups which could muster the political power to sway a legislature to grant charters, monopolies, or price controls, and claim with a straight face that the general welfare was thereby improved, could finally proceed, safe from any need to demonstrate how such regulations improved the general welfare. Under this interpretation of the General Welfare Clause, the same elected officials who vote for a law determine whether it passes the constitutional test of promoting the general welfare. The inmates had been handed the keys.

Government authority similarly extended its reach under stretched readings of the Commerce Clause. By 1942, in *Wickard v. Filburn*, the Supreme Court held that a farmer who grew wheat on his own land, for his own consumption, was violating federal quota regulations set by the Department of Agriculture. They reasoned that if he had *not* grown the wheat on his farm he would have had to buy it, and some of what he had to buy might have been imported from another state, and hence the federal government had the power

to regulate such an otherwise private act of his, under the guise of regulating interstate commerce.

A modern extension of this clause was discussed in Chapter 4, with reference to wetlands. There it was noted that in the last two decades the federal government has been regulating the use of puddles (20X20 feet), which may be wet only two weeks out of the year, and imprisoning those who "misuse" such public resources which happen to be on their land. This extension of power occurs under the "glancing geese" test adopted by the EPA: geese migrate across state lines; some people eat geese, so geese are products; if a puddle is big enough that a goose might notice and visit it, then the federal government can regulate its use under the justification of involving itself in interstate commerce.[16] Enough said.

Summary

The Framers worked from beginning to end, from the opening lines of the Declaration of Independence to the final words of the Constitution, and all in-between, within the doctrine of enumerated powers. Then, fearful that there might someday be a question on the matter, they passed the Bill of Rights, and specifically the Ninth Amendment, which explicitly endorses the doctrine of enumerated powers over the doctrine of plenary rights. Yet we are now confronted by a government which lives and breathes the doctrine of plenary rights. I said in the introduction to this work that there may be many reasons we have moved from a doctrine of enumerated

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[16] This long-standing test of the EPA was partially struck down in a 1992 decision by the federal judge Daniel Manion. *cf. Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 1992 US Appellate LEXIS 7329, April 20, 1992, cited in Bovard, page 343.

powers to a doctrine of plenary rights, but philosophy is not one of them. I am not sure what the actual reasons are, but surveying the cases cited above I will venture a guess. The doctrine of plenary rights is a breeding-ground for lawless government agents clamoring to expand their dominions, and politically-organized private groups eager to gorge on what isn't theirs: the welfare and freedom of other people.

Therefore, to the extent that one engages in social philosophy to explore the question of what law should be, I think there is a practical problem of working from a social theory which denies pre-political constraints if one wishes to think about US issues. Such theory directs one to policies which are antithetical to the words and spirit of the Constitution. Furthermore, the above history suggests that a commitment to plenary rights theory might be philosophically problematic, if one considers the shape and character of the social institutions such theory spawns.

II. HOW IMPLAUSIBLE IS NATURAL LAW?

It is the work of this appendix, remember, to answer an objection which maintains that the analysis of state compulsion cannot be general, unless it springs from a theory of natural rights. Natural rights doctrine, the implication runs, is musty with the smell of medieval clerics in dimly-lit halls, laboriously copying the *Summa Theologica* over and over again: it is a doctrine which coincided with the denial of a heliocentric universe, and is equally as outdated. In short, it is thought to be an unfit basis for a modern political theory.

I will be relatively brief in answering this point because I think it is compelling, although not for the reason stated. It is a good point because a strong version of the doctrine of natural rights cannot be defended in a liberal society without violating the Rawlsian principle of legitimacy.

The Strong Doctrine of Natural Law is Inadmissible in a Liberal State

The view that there was a normative element to the universe dates back to the Ancient Greeks, whose *mythos* was fundamentally concerned with the content of that normative order. In the first century BC this viewpoint was introduced to the Romans by Cicero.[17] It was not, however, until the work of Thomas Aquinas in the thirteenth century AD that natural law emerged as a doctrine of divine intention, rather than a vision of the patterns woven into the fabric of the natural order. In the fourteenth century natural law became, with the rest of Thomistic doctrine, the party line of the medieval Catholic Church. Today it still finds its most common expression in the law schools of Catholic universities.[18]

This medieval theology distinguished between laws which stated facts about the world and laws which were man-made. The key fact about natural law is its *independence*: it was thought to exist independently of courts, legislators, or other law-givers. Men may do a better or worse job of matching man-made law to natural law, but the natural law is itself beyond the craft of humans.

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[17] See Lloyd L. Weinreb's *Natural Law and Justice*, especially the introduction.
[18] See Charles Rembar's *The Law of the land: The Evolution of Our Legal System*, pages 47-48.

I will call this "the strong doctrine of natural law," as it rests on strong assumptions which derive from faith. It should be obvious that the strong doctrine of natural law is an inappropriate way to think about law in a modern liberal society, if the Rawlsian principle of legitimacy is accepted. Too many people hold faiths which do not espouse this doctrine, or hold no comparable faiths at all, for it to be found in the disjunction of the complete set of visions of the good of a modern society, as is discussed in the first chapter.

The Weak Doctrine of Natural Law

That is not to say that all doctrine of natural law is without merit. It has a religious heritage and like many ideas with religious heritage it is given short thrift within the academy today. But a weaker version, one which does not refer to divine intention and which I will call "the weak doctrine of natural law," is considerably more plausible than the strong doctrine of natural law. I will give three reasons for this:

> 1) The weak doctrine of natural law resembles an element of a plausible philosophy (Rawlsianism) which does not reek of medieval clerics in robes. Recognizing the similarity makes the foreigness of natural law doctrine less glaring.
> 2) The weak doctrine of natural law may be grounded not in faith but in reason (Locke), and hence not be so objectionable to moderns;
> 3) The weak doctrine of natural law can be grounded in a distrust of reason (Finnis) and in an appeal to pragmatic issues.

Each of these points is discussed below.

Natural law and Rawls

The ultimate point of natural law doctrine is that States have obligations to treat people in a certain way *qua* persons, that *personhood* itself generates claims beyond the power of a legislator to amend. This is a view which resonates within more acceptable theories, such as the ethical theory of Immanuel Kant.[19]

Even Rawls admits entrance of "considered convictions" to his method of choosing the correct description of the original position:

> "There is, however, another side to justifying a particular description of the original position. This is to see if the principles which would be chosen match our considered convictions of justice or extend them in an acceptable way."[20]

The point, discussed in Appendix A, is that one achieves "reflective equilibrium" by going back-and-forth between the logical conclusions of Rawls thought-experiment, and our considered convictions. One prunes the conditions of the original position, and one prunes one's moral intuitions, until the principles of justice are in accordance with, and perhaps amplify, the moral intuitions.

An interesting case can be made[21] that Rawls' argument is *primarily* an intuitionist argument, not a social contract theory argument, and that the social contract aspect of his work is mainly a heuristic device serving:

> "to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for

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[19] This is true of Kantian ethics. As is discussed in Appendix B, however, it is untrue of Kantian political theory, the tyrannical nature of which is widely overlooked.

[20] Rawls, *A Theory of Justice*, page 19.

[21] In fact, Will Kymlicka makes just such a case. See Chapter 3 of his *Contemporary Political Philosophy*, especially pages 67-70.

> principles of justice, and therefore on these principles themselves."

In short, the intuitionist argument is the true load-bearing wall, while the original position argument is more of a façade. I am unsure that this latter claim is true, but if so, it merely supports my point.

If one is willing to appeal to moral intuitions to seek reflective equilibrium, one should be prepared to examine the origin of those moral intuitions. If, for example, the principles of justice which are generated from the original position include principles which allow slavery, and we adamantly hold a conviction that slavery is wrong and therefore the conditions of the original position must be tweaked, it would appear that we believe slavery is wrong in a *pre-theoretic* sense. If we are asked to defend this we will respond, it is likely, with discussion of the claims persons have *qua* persons, and not as a result of "entitlements" they have been "assigned by social institutions." Though we may ground such claims in non-divine arguments, their similarity to natural law doctrine is obvious.

The preceding was an argument that one should not be dismayed by the foreigness of natural law doctrine, antiquated as its principles sound to the modern, non-church-going ear. I shall now suggest two other ways of thinking about natural law, ways which also favor a weak (i.e., non-divine) theory of natural law. One is a reason-based argument, one is a pragmatic argument: both will be described briefly, in an attempt to make natural law doctrine more plausible.

The reason-based defense of the weak doctrine

John Locke's *Second Treatise of Government* makes many appeals to divine intention. He assumes, for example (and nowhere seeks to demonstrate), that a Creator exists, and that the Creator created not randomly but with an intention, and that our duties and capacities reflect these intentions.

> "To understand political power right, and derive it from its original, we must understand what state all men are naturally in..." (Section 4)
> "The state of nature has a law of nature to govern it, which obliges everyone. 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. For men all being the workmanship of one omnipotent and infinitely wise maker, all the servants of one sovereign master, sent into the world by his order and about his business, they are his property whose workmanship they are, made to last during his, not one another's, pleasure..." (Section 6)
> "God, who hath given the world to men in common, hath also given them reason to make use of it..." (Section 26)

Thus, the natural order is suffused with the will and the reason of the Creator; Mankind's duty is to carry out the will of the Creator, and we come to know our duty, we come to read it off the face of Creation, through the proper use of that same reason which orders it.

Because this is couched in claims about a Creator and His divine intention, it is easy to overlook the fact that Locke is espousing a free-standing reason-based defense of natural law.

With one foot in the Enlightenment and one not, it would have been unthinkable for Locke to fashion a theory of the state which made no reference to higher authority. Reason itself was insufficient. Reason had to be grounded on something considered more solid: theology and biblical authority. Thus we find a great many quotations from the Bible sprinkled throughout the *Second Treatise*.[22]

The effect of this is misleading, however, because to modern eyes reason-based arguments might stand on their own. One can judiciously excise a great deal of the biblical support for Locke's position, and find in the remainder a healthy, reason-based explanation of natural law. I would not go so far as to call the theological portions of the *Second Treatise* mere embellishments, but neither do they need to be as load-bearing as they once were. The argument stands without them.

What is that argument? As I pointed out in Chapter 4's section on Locke, it cannot fully be found in either of the treatises. One has to turn to his *An Essay Concerning Human Understanding* to find the clearest statement of the role that reason plays in Locke's political philosophy:

> "I would not be here mistaken, as if, because I deny an innate Law, I thought there were none but positive Laws. There is a great deal of difference between an innate Law, and a Law of Nature; between something imprinted on our minds in their very original, and something that we being ignorant

[22] For example, out of the first 25 sections of the *Second Treatise*, sections 1, 11, 21, and 24 cite scripture, and many others make theological claims.

> of may attain to the knowledge of, by the use and due application of our natural Faculties."[23]

How does "the use and due application of our faculties" teach us the natural law? The answer is partially supplied in the quote from Section 6 of the *Second Treatise* given above. My reading is that reflective men use reason to discover the laws of nature by asking themselves, "In a state of nature, would I do X to another without causing trouble? If it would disrupt the concord of the state of nature, then that is another way of saying that people have the right to expect not-X from me." So law is neither imprinted on nature, as Thomastic doctrine held, nor is it politically discretionary, as the legal positivists would later maintain. It may be discovered by the application to nature of that same instrument which Locke thought had crafted nature: reason.

Lloyd Weinreb notes that the notion of natural law as reason was extended by Rousseau. He argues this on the grounds that for Rousseau, while conformity to the general will (discussed in Appendix B) is necessarily absolute (which is suggestive of positive law), that general will itself has a normative element: it is bent towards "the preservation and welfare of the whole and of every part..."[24] Therefore, says Weinreb,

> "Embodied in the civil law, [Rousseau's] general will combines the certainty of Hobbes's positive law actually in effect with the certain, objective

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[23] Locke's *Essay Concerning Human Understanding*, Book 1 Chapter 3 section 13 (page 75), quoted also in Chapter 4.

[24] Rousseau's entry on "Political Economy" in Diderot's *Encyclopedia*, quoted on page 85 of Weinreb, *Natural Law and Justice*.

> moral obligation that Locke derived from natural law. Rousseau's civil law is a model of law as will *and* reason."[25]

In Appendix B I give my reasons for thinking this approach to civil law is tyrannical and unsatisfactory.

In any case, my point here has been that there is a view that natural law can be discovered through reason and not faith. This was the essence of Locke's view of natural law. He couched this claim in an explanation of why reason was the proper tool for the discovery of natural law, and that explanation appealed to a claim that the natural order reflected the reason of a Creator. Perhaps early scientists had to make similar arguments as to why reason could be the revealer of nature's structure: perhaps they too claimed that since the Creator had worked with the instrument of reason, so could we discover His intentions with the same instrument. In any case, the point here is to show that natural law theory has not always, and does not have to, unfold along the lines of faith. In Locke's philosophy it unfolds along the lines of reason, which he (unnecessarily from the modern viewpoint) defended as being one component of faith.

I now turn to a modern defense of natural law, a defense which is grounded in an *attack* on reason.

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[25] Weinreb, *Natural Law and Justice*, pages 85-86.

The pragmatic defense of the weak doctrine

John Finnis, a professor of law and legal philosophy at Oxford, defends natural law on practical grounds in "Natural Law and Legal Reasoning."[26] He does this by distinguishing:

> "between *(sic)* the orders of reality with which human reason is concerned. There is the order we can understand but which is in no way established by human understanding- the order of nature as investigated by the natural sciences...There is the order which one can bring into one's own inquiries, understanding, and reasoning- the order studied by logic, methodology, and epistemology. There is the order one can bring into one's own dispositions, choices, and actions- one's *praxis*, one's doing- the order studied by ... moral and political philosophy.... Legal rationality, I suggest, has its distinctiveness, and its peculiar elusiveness, ... in the service of third-order purpose- the chosen purpose of living together in a just order of fair and right relationships..."[27]

What Finnis calls "incommensurability" is "of great importance on legal reasoning."[28] "Incommensurability" refers to the problem I discussed in Chapter 1: that there exist in modern societies a great many different conceptions of the good, and these are often in conflict. As he puts this, incommensurability is:

> "the problem that there is no *rationally* calibrated scale for 'weighing' the goods and bads at stake in a moral and political choice..."[29]

Outside of a range of basic human goods upon which all visions of the good coincide, then,

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[26] John Finnis, "Natural Law and Legal Reasoning," *Cleveland State Law Review: Natural Law Symposium*, No. 38, 1990.
[27] *ibid.*, pages 5-6.
[28] *ibid.*, page 11.
[29] *ibid.*, pages 9-10.

> "no reason can be identified as rationally preferable to the reason not to choose to destroy or damage a basic good in a human person..."[30]

This is an odd and powerful observation. It parallels my earlier argument: in the end, the forces of modernity do not *allow* almost anything, they *disallow* almost everything, at least as far as the state is concerned.

That is, one of the features of modernity, as was observed, is the disappearance of taboos, and the breakdown of taboos seems to equate with permissiveness. But there is one "taboo" that is difficult for anyone, even the modernist, to reject: this is the principle that, all things being equal, there is a presumption against using force to hurt people. And yet this is what the state threatens constantly, to back up its laws. To justify this one must be able to appeal to values, to goods which outweigh the bad of that use of force: but modernity erodes many of the goods to which one could point. Thus, modernity undermines not just the Old Guard but the New Guard as well: it undermines Guards in general, because it undermines so many of the ways one can justify Guards.

And so, Finnis concludes,

> "Much academic theory about legal reasoning greatly exaggerates the extent to which reason can settle what is a greater good or lesser evil, and minimizes the need for authoritative sources which, so far as they are clear and respect the few absolute moral rights and duties, are to be respected as the only rational basis for judicial reasoning and decision, in relation to the countless

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[30] *ibid.*, page 11.

> issues which do not directly involve those absolute rights and duties."

Thus Finnis advocates natural law as a set of fixed rights and duties by which to judge, because in the absence of such fixed rights and duties judges are faced with the prospect of making calculations which are beyond them (Finnis gives as examples Posner's Economic Analysis of Law, and Dworkin's model of judicial decision-making). Thus Finnis defends natural law not from reason, but from the inadequacy of reason; not based on the intentions of a divine agent overseeing creation, but because it is impossible for any agent (such as a judge) to oversee what the alternatives to natural law demand.

In short, for Finnis the role of natural law is like the role of approximate equations in the engineering sciences. It is a common feature of engineering problems that the actual equations which model an interaction are known, but devilishly difficult to solve. Engineers often seek out equations which only approximate right answers, but which are easy to work with.[31] Finnis suggests that academic jurisprudence is misinformed about the information and computation-power available to judges, and so has overlooked the desirability of a straightforward decision-making system of natural laws. Importantly, he advocates the doctrine of natural law not as a *metaphysical* claim about the universe, but as a practical matter, and suggests that political philosophy should conceive of its role in this manner.

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[31] See for example David Packard's *The HP Way, How Bill Hewlett and I Built Our Company*, page 41.

Summary

I have explained what natural law is, and distinguished between the strong doctrine of natural law (based on religious faith) and the weak doctrine (not based on religious faith). I argued that the strong (Thomastic) doctrine of natural law is inadmissible in a multicultural society without violating the Rawlsian principle of legitimacy, and may in fact look ludicrous to the irreligious modern. However, I continued, there are weak doctrines of natural law which do not violate this constraint. One is a version that appeals to Kantian ethical intuitions regarding the respect people deserve *qua* persons, rephrased as a demand on political and not private actions. Since Rawls admits the same intuitions into his political theory (via backdoor "considered convictions"), such a theory would be no more ludicrous than his. Also, Lockean political theory gives an account of natural law which is based on reason: the fact that his theory is embedded within and supported by a broader set of theological claims should be of little concern to moderns, who generally feel reason-based arguments do not need the support of faith. And lastly, I have pointed out a modern pragmatic defense of natural law founded on a criticism of reason. This theory, advanced by John Finnis, holds that legal theory does not have to be metaphysically *true*, it has to work, and alternatives proposed to natural law doctrine (e.g. Dworkin's and Posner's) rely too heavily on exaggerated confidence in the reasoning and information-processing abilities of judges. For Finnis, natural law reasoning is an approximation which works.

Together, these responses to the Borkian objection maintain: yes, my rejection of the allowance model and the Borkian objection smacks of natural law jurisprudence. But one should not allow the doctrine of natural law to be tainted by its origins in Thomastic theory. for there are more plausible ways to think of natural law.

III. A SHORT DIGRESSION ON JUDGE BORK

I mentioned in the introduction to this work that Judge Robert Bork defends a social theory which denies pre-political constraints. Having discussed the doctrine of enumerated rights and the concept of natural law at length, it is now possible for me to expand on that earlier point.

Judge Bork, it will be remembered, is perhaps the foremost living advocate of a school of jurisprudence which holds that the Constitution should be interpreted with little imagination. To give up a strict interpretation, and approach the document with, for example, the techniques of literary criticism, results in a situation similar to not having a constitution at all.[32]

Judge Bork also wishes to deny the existence of constraints on political outcomes, if such constraints are not mentioned explicitly in the Constitution. As was noted earlier, Bork's stance on abortion, which proved to be politically unpopular, holds that no reference is made to abortion or to a "right of privacy" in the Constitution, so therefore the discretion to regulate abortion lies with the government.

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[32] See Richard Posner, *Law and Literature*, pages 178-180 and, especially, 259-261, for a discussion of this.

The dilemma for one who reasons thus, but who wishes to construe the Constitution literally, is that the Ninth Amendment directs us to adopt a different line of reasoning. As was discussed previously, the doctrine of enumerated powers which is expressed in that amendment equates silence with individual right, and not with government prerogative. How, then, can a strict constructionist such as Bork abandon the enumerated rights doctrine explicitly endorsed by the Ninth Amendment?

Put slightly differently, in terms of loci of discretion, Bork believes that a strict reading of the Constitution reduces the amount of discretion judges exercise, and shifts discretion to legislators. As one who opposes expanding the discretion of judges to second-guess the work of legislators, Bork has to argue against the Ninth Amendment, which gives quite open-ended discretion to judges to do exactly that. So in one way or another, Bork must reject the Ninth Amendment.

Bork accomplishes this feat by declaring that the mysteries of the Ninth Amendment are too impenetrable to be of use. In his confirmation hearing before the US Senate, he said,

> "I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it."[33]

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[33] Quoted in the introduction to the second volume of Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment.*

That is to say, there is an informational constraint. Unenumerated rights are, of course, unenumerated, and judges are not better at guessing them than are Congressmen. It is better to locate with the people's elected representatives the discretion to decide these constraints than it is to locate the discretion with the courts.[34]

What then of natural law, which would be the source of such constraints? Presumably the set of unenumerated rights referred to by the Ninth Amendment is that set of rights we hold naturally but have not invested into government, that set men "are endowed by their Creator with."[35] To be consistent, if he denies the Ninth Amendment then Bork would seemingly have to deny the existence of natural law.

In fact, Judge Bork steers a middle course. He acknowledges the existence of natural law and natural rights, but he denies that they have any place in our judiciary, due to informational constraints and the leeway natural law permits judges. He writes:

> "I am far from denying that there is a natural law, but I do deny both that we have given judges the authority to enforce it and that judges have any greater access to that law than do the rest of us. Judges, like the rest of us, are apt to confuse their strongly held beliefs with the order of nature."[36]

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[34] See Robert Bork, *The Tempting of America: The Political Seduction of the Law*, pages 183-185.

[35] *Declaration of Independence*, second paragraph. Bork cannot deny the significance of these words, incidentally, as he argues that such documents, including the *Federalist Papers*, the *Anti-Federalist Papers*, records of the convention where the constitution was drawn up, and early treatises by such jurisprudes as Judge Story, etc., are useful in establishing the Framers' intentions. See Bork, *The Tempting of America*, page 166.

[36] Robert Bork, *The Tempting of America: The Political Seduction of the Law*, page 66.

In short, Bork's position is that there are unenumerated natural rights but that the Constitution does not say what they are (else they would not be unenumerated). We have no way of guessing what the Framers meant by this amendment. Allowing judges the discretion to navigate in this twilight would be tantamount to allowing them the discretion to weave law from the threads of their own private convictions. They do not "have any greater access to that law than do the rest of us." Taken in conjunction with the rest of Bork's philosophy, this seems to imply that discretion over these matters is properly located with the legislature. In short, judges should not assume the mantel of philosopher-kings, so if these murky areas are going to be navigated at all, it must be by the elected representatives of the citizenry.

That position reminds me of a story:

> A man calls his three friends. He tells them, "We have been friends for years, and our friendship has meant more to me than anything else in life. As a sign of the esteem in which I hold you, I am giving each one of you an envelope with $10,000 in it. I want you to throw your envelopes into my open grave. I do this as a sign of my trust in you."
>
> The man dies and is buried a few days later. Sure enough, all three of his friends throw their envelopes into the grave, to be buried with their friend. A few days later they meet in a bar. Over a drink, the first says, "Fellows, I have to confess something. I was going to throw that money into the grave, but I started thinking of all the starving children in India, and I could not bear to do it. So I stuffed the envelop with some cut-up newspaper, and sent the money to an orphanage in Calcutta."

> The second says, "What a relief! I have been feeling terribly guilty, because *I* got thinking about the terrible state of race relations in this country, and could not bear to see that money go to waste. I, too, stuffed my envelop with newspaper, and sent the money to a center which works to promote racial understanding."
>
> The third glares at them and said, "I'm surprised at you two. *I* threw in a check for the whole amount!"

When it comes to natural rights, Bork "throws in a check for the whole amount." They exist, but judges cannot measure the acts of the legislature against them: that is a task for the legislature itself. Bork denies "that we have given judges the authority to enforce" natural rights. In fact the Ninth Amendment gives precisely that authority to courts who, as Madison said, are the "guardians of those [Constitutional] rights; they will be an impenetrable bulwark against every assumption of power"[37] by the very legislature that Bork wants to entrust with their protection.

In fact, Bork's supporting denial "that judges have any greater access to that law than do the rest of us" may be read to imply that legislators are to be entrusted with the protection of these rights. But the suggestion that the protection of *any* constitutional rights is to be entrusted to legislators is an odd suggestion indeed: from whom are they protecting these rights? From themselves? And lastly, the suggestion that the legislature is supposed to protect natural, i.e., pre-political rights, appears to me to be tautologically impossible. The Framer's point in referring to these unenumerated

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[37] Speech before the House of Representatives in 1794, quoted in Pilon and elsewhere herein.

rights could only be to *remove* them from the discretion of legislators.

So in summary, Bork's suggestion that it is the job of legislators to protect a right referred to in the Bill of Rights is a bad suggestion: again, it is handing the inmates the keys. That the legislators could define and protect the natural rights referred to by the Ninth Amendment is, I believe, logically impossible, given the meaning of the words "legislator" and "natural right." Given these facts, it appears to me that Bork's claim that he is "far from denying that there is a natural law" is disingenuous.

IV. THE ALLOWANCE MODEL IS IMPLAUSIBLE

In the introduction to this dissertation I briefly discussed the "models" people employ to analyze social issues. A model, I suggested, is more than just a set of factual assumptions: it is a theory of how things interact, of how processes flow.

The vision of social theory which informs the quotes given from Rawls, Arrow, Sandel, Ackerman and others in this dissertation's introduction, and which are partially quoted again on the first page of this appendix, and taken to an extreme by Bork, is the dominant model in social theory. With but a few exceptions (e.g., the Austrian economists), it seems to me that the following assertion is rarely questioned: it is the task of social theory to discover sets of principles which disclose "the appropriate distribution of the benefits and burdens of social cooperation,"[38] as Rawls put it, such benefits being a "surplus created by the existence

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[38] Rawls, *A Theory of Justice*, page 4.

of society which is available for redistribution,"[39] as Professor Arrow stated.

Setting aside for a moment my great respect for these two thinkers, this strikes me as an implausible way to conceive of the mission of social philosophy. In the introduction I gave two reasons for this claim: the allowance model is undignified, and it misrepresents social processes. I will expand on those here.

The Dignity-Failure of the Allowance Model

Having discussed the Enlightenment doctrine of enumerated rights, and its handmaiden, natural rights theory, I can expand on the Buchanan quote given in the introduction. That quote read in part that believing that the benefits of human cooperation are "assigned" upon humans by the State,

> "amounts to saying that only the government or the state has rights, and that individuals are parties to a continuing slave contract."[40]

The position that our entitlements are assigned to us by the state is reminiscent of the English feudal doctrine of tenure:

> "The mode or system of holding lands or tenements in subordination to some superior which, in feudal ages, was the leading characteristic of real property."[41]

This tenure doctrine denied property rights as we now know them. Instead, all land was owned by the State, that is, the king and his

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[39] Arrow, *Social Choice and Justice* (Volume I of his collected papers), page 188; see pages 181-188 in general.
[40] James Buchanan, *The Limits of Liberty*, page 83.
[41] *Black's Law Dictionary*, page 1469.

noblemen, and a commoner was only able to hold rights to use *their* land. The allowance model's supposition that entitlements are assigned and distributed to us by political processes, that they are licenses and not rights, replicates the doctrine of tenure, a feudal doctrine of land ownership, as the setting for *all* of our rights. I have trouble seeing why this model is associated, then, with progressive political theory.

The doctrine of natural rights, whatever its other drawbacks, is an enormously dignified way to think of the human condition. That does not make it true, of course, and I would attempt no defense of it based on its original theological underpinnings. But the weaker versions of the doctrine are not only immune to criticism from the Rawlsian principle of legitimacy (discussed above), but give a political interpretation to a defensible deontological moral doctrine: the Kantian demand for respect for persons *qua* persons. The Kantian moral doctrine asserts that there are things about John that I should respect when I deal with him, no matter my other purposes. Natural law doctrine insists that there are things about John that the state should respect when it deals with him, no matter its other purposes. The similarity of the two does not make natural law doctrine correct: but if one acknowledges that Kantian ethics are not ludicrous, then it seems to me that one should also acknowledge that a weak doctrine of natural rights may also be non-ludicrous, notwithstanding its origins in medieval theology.

Perhaps this is mildly dishonest, and looks like no more than an argument to reject the model assumed by Rawls and Arrow

because it is undignified, not because it is false. Wishing that the human condition were dignified is not grounds for believing that it is dignified.

Yet models are not true and false in the way that assertions are: they either capture, or do not capture, relevant features. If that is the case, and if we believe human dignity is an important consideration, then it is tempting to insure that the model we choose with which to reason about state force is a model that captures, or expresses, some minimally basic facts about human dignity. The natural law model, embodying as it does a vision of *intrinsic* human claims as opposed to claims *permitted* humans, does this better than the allowance model adopted by Rawls and Arrow.

I have given reasons to disdain the allowance model as a way to think about social issues because of the dignity it robs from humans and assigns to the State. A possible response is that one does not choose among political models based on one's preferences about human dignity, but based on which model best represents reality. I am unsure that this is in fact the way to think about our choice of models in social theory, and that we do not want to choose based on some of our "considered convictions" about the priority of human dignity, or on pragmatic grounds, as Finnis asserts (described above).

Yet assume that one insists that we must choose between the natural law model and the allowance model based on facts about the world, and not preferences regarding their relative powers to convey a sense of human dignity. It is still apparent to me that a natural

law model based on the weaker doctrine of natural law is a reasonably good model, and furthermore, it also seems clear that the allowance model expresses false propositions about the world. If I am right about this, then the real burden of the dignity argument is borne by the argument against the realism of the allowance model. If I can into doubt the reasonableness of the picture suggested by Rawls and Arrow, then the lack of human dignity expressed by the allowance model is just further reason to reject it.

THE REPRESENTATIONAL-FAILURE OF THE ALLOWANCE MODEL

The initial version of the allowance model

What reason do we have to believe that the allowance model expresses reality well? Let me state it again, working closely from words of Arrow and Rawls:[42]

> A1. "There is a surplus created by the existence of society." (KA)
> B1. "It is only [its] value within a large system which makes [this surplus] valuable." (KA)
> C1. "[This] surplus ... is available for redistribution." (KA)

How does the act named in C1 happen?

> D1. "The principles of social justice [describe] the basic institutions of society." (JR)
> E1. "[These] major social institutions distribute and determine the division of advantages from social cooperation." (JR)

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[42] These lines are taken from the Arrow and Rawls quotes which appeared in the introduction. See Rawls, *A Theory of Justice*, pages 4 and 7, and Arrow, *Social Choice and Justice*, pages 181-188.

So in sum, the initial statement of the allowance model seems to be:

> A1. "There is a surplus created by the existence of society." (KA)
> B1. "It is only [its] value within a large system which makes [this surplus] valuable." (KA)
> C1. "[This] surplus ... is available for redistribution." (KA)
> D1. "The principles of social justice [describe] the basic institutions of society." (JR)
> E1. "[These] major social institutions distribute and determine the division of advantages from social cooperation." (JR)

The reader who compares these assertions with the original quotes will find, I trust, that I have not glossed with an intent to mislead, but have distilled these lines from the available descriptions to create a fair, accurate, and grammatical account of the vision of the allowance model.

Massaging the allowance model into clear English

I wish to find out what these sentences mean, for they are vague to my eye. First, I will get rid of any passive voices and rephrase them systematically, filling in the appropriate subject where necessary.

> A2. The existence of society creates a surplus.
> B2. Society and only society makes this surplus valuable.
> C2. Society is therefore entitled to distribute this surplus.
> D2. The principles of social justice describe the basic institutions of society.

E2. These social institutions distribute the surplus.

I will now make a confession that is probably unsurprising to the careful reader: I have a strong aversion to the word "society." I have only a moderate aversion to society, but a strong one to "society." Propositions about what society does and wills leave me puzzled, and it is rarely clear to me what they mean. Such propositions seem to be vague and perhaps meaningless anthropomorphisms. For this reason, in fact, the reader will find that I have avoided use of that word in this document, outside of cases where I am discussing someone else's use of the word.

My method of dealing with this aversion, which borders on a phobia, is to ask people who utter sentences with the word "society" in them to rephrase those sentences without that word. Only then can I discover if such sentences have concrete meanings:

A3. People working alone and not interacting create stuff (tangible and intangible). If they work together and interact and specialize, they also create stuff. If one adds together all the stuff created by them working singly, it makes a smaller pile than the pile one gets by adding together all the stuff that they create when they cooperate and interact as a group.
B3. It is the fact that they work together, and only that fact, which accounts for the difference between the two piles these people can create.
C3. The people as a group therefore get to say which among them receive that marginal stuff.
D3. There are group meta-rules: these govern the choice of group-rules by which the group operates.
E3. These group-rules performs the function named in C3: they specify which members get to keep that marginal amount of stuff created by cooperation.

I apologize if the above seems pedantic or silly. In attempting to translate vague propositions into clear propositions, it is hard to avoid sounding a bit silly. Silly or not, one should note that other than the term "stuff," each of the other words in the above final formulation are concrete, specific words. And the term "stuff" can be thought of (depending upon one's taste) as naming everything from tangible goods which are a result of specialized labor's high productivity, to those intangible goods, such as opportunities and self-esteem, with which Rawls is especially concerned. I will now occasionally alternate "goods" for "stuff" for the sake of euphony.

Evaluating the propositions of the allowance model

Having clarified the propositions which are the foundation for the allowance model, I can immediately assent to A3 and B3. There is no serious challenge to the proposition that people produce more goods when interacting, and that their higher productivity is a result of that interaction. Also, I will agree to D3: one can talk meaningfully about the group-rules that the interacting people must follow only with reference to some meta-rules which specify how to tell group-rules from just any rules. These are the constitutional rules, or what Hans Kelsen called "basic norms," mentioned in Chapter 1:

> "Coercive acts are to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe."[43]

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[43] Hans Kelsen, "The Dynamic Aspect of Law," page 40.

Furthermore, if C3 is acceptable, then E3 is acceptable. If the people in the group get to say which among them will receive the marginal stuff (C3), then those people as a group must have a group-rule which turns the decision of C3 into actuality (E3).

The problematic proposition is C3:

> C3. The people as a group therefore get to say which among them receive that marginal stuff.

The background assumption behind it is that the marginal goods created are held by the people "as a group" and not individually, and that the people individually, if they have shares of this marginal stuff, have it because they have "received" those shares from the people as a group. The supposition seems to be that people as individuals are in a position to receive stuff from the people as a group. The picture seems to be like that of land in the Old West: the federal government owned it (once its native inhabitants had been run-off), and titles to pieces of that "vacant" land were conveyed out to homesteaders, freedmen, retired officers, and people who promised to build railroads.

However, who is "the group"? The group is themselves. They are going to receive things from themselves, then. Clearly this is nugatory unless what is meant is: some are going to get title to things which are others'. And if this is the case, then the rule which will govern this will not look anything like the one suggested by the language of E3: it will not be a rule about how marginal stuff is divvied up, it will be a rule about who has to give what to whom.

I have no *prima facie* objection to this. There may be ways of justifying such rules. But my objection to the allowance model is

that it disguises what rules have to be justified. The type of rules which have to be justified are not rules of the form:

> "$Person_1$ must receive $stuff_1$, $Person_2$ must receive $stuff_2$....$Person_n$ must receive $stuff_n$,"

for all n people who are members of the group, as the allowance model suggests. Instead, such rules will distinguish between two classes of stuff that come into existence due to the fact that people cooperate. Some goods come into existence with no obvious person to whom they are associated: call this set of goods $stuff_c$. Other products of the cooperation of people come into existence associated with individuals already: call these goods $stuff_s$. The actual group-rules will not look like the one above. Instead, they will read as follows:

> "$Person_1$ must surrender $stuff_{s1}$, $Person_2$ must surrender $stuff_{s2}$....$Person_n$ must surrender $stuff_{sn}$, and simultaneously $Person_1$ must receive $stuff_{r1}$ and $stuff_{c1}$, $Person_2$ must receive $stuff_{s2}$ and $stuff_{c2}$....$Person_n$ must receive $stuff_{sn}$ and $stuff_{cn}$."

This is a much healthier representation of the group-rules mentioned in E3, underneath the rhetoric of the allowance model. They should be justified, if at all, on these terms.

A less precise but simpler statement of the above claim is this: I wrote that the allowance model's propositions speak of the set of marginal goods created by people's cooperation as being similar to vacant Western lands under the Homesteading Act. "Perform such-and-such acts, and you will receive from the state something it now holds: clear title to a piece of land." In fact, that

set of goods created by people's cooperation (and competition?) includes some goods which are like these Western lands, but some goods which are not. Goods like opportunities and the social basis of self-esteem are not goods now held by the government, waiting to have their titles distributed like titles to land in Old Montana. They come into existence associated with certain people, and the rules must explain what to *take* and *distribute*, not just *distribute*. The justification for them is therefore different and more difficult than the language of the allowance model suggests: these justifications will not assume that titles to these marginal goods can simply be distributed like cards in a blackjack deal.

Summary

This section, and the section of the introduction which it extends, criticized the use by social theory of the allowance model as a context within which to reason about political issues. My criticism is based on two points. First, the allowance model is an undignified way to conceive of the relation between people and their government. To the extent that we reasonably have discretion in our selection of models (which I have suggested is a large extent), then in choosing an undignified model upon which to base our social theory we are building human indignity into that theory. The natural rights model which I have suggested as an alternative is preferable to the allowance model on this point. Furthermore, I have suggested that the allowance model distorts reality: many of the goods it would distribute must in fact be *re*-distributed. Furthermore, some of the goods deemed most important within the allowance model

(e.g., by Rawls), are not goods which lend themselves to be distributed or re-distributed.

In short, there may be ways to justify harnessing the force of the state to achieve particular distributions. But we will never know as long as we reason within the allowance model, for the allowance model takes as given, and glosses over, precisely those features of redistribution which need justification, and which generate political opposition. It does not address the actual political problem which confronts us.

V. THE ALLOWANCE MODEL GETS THE FACT/VALUE RELATIONSHIP WRONG

Up to this point I have focused on the strand of the allowance model (and its expression in the Borkian Objection) that denies pre-political entitlements (indeed, it is Bork's radical denial of anything pre-political that has caused me to name this objection after him). There is a second strand of the allowance model, however, which is ideal justice theory (discussed in Appendix A). The allowance model brings the two together. I wish to examine this second strand.

The relation of fact to value in ideal justice theory

It is worth noting that the denial of pre-political entitlements and ideal justice theory are not necessarily related: one could pursue ideal justice theory within a framework of natural law (e.g., I believe Nozick is an example of this), and one could deny pre-political constraints but simultaneously think of justice primarily in non-ideal terms (perhaps some economists fit this description). However, the denial of pre-political constraints is a major

constraint-denial that ideal justice theorists may make, although such theories also deny that we are constrained by facts about our present society when we reflect upon the subject of justice.

As has been discussed briefly in Appendix A, universal justice theory speaks according to the following convention: we begin by seeking out what justice would be for an ideal society, and then we know the direction in which to steer our own. At least since Plato's *Republic*, and especially since More's *Utopia* (discussed in Chapter 4), this has been a common way to think about justice: we seek what amounts to the ideal Form of justice, and once we think we have it, we let that animate our convictions concerning the direction that our society should be pushed. For example, one convinced of the reasonableness of Rawls' *A Theory of Justice* may conclude (after doing some research, or making some assumptions, about the relation of poverty and incentives in the US) that our tax and welfare policies must be pushed in a more progressive direction, even if the bland way we measure well-being in this country, GNP, shows that such policies will leave society as a whole worse-off.

This way of looking at things has such a striking plausibility it need hardly be questioned. I wish to question it. Unfortunately it is difficult to even express my skepticism without recourse to an odd thought-experiment. Once again, I beg the reader's brief indulgence: the following thought-experiment does have a point.

Daoist Systems

Consider a "system" with which I am familiar: the location of a can of soda on my desktop. Suppose I thought justice were somehow implicated in the choice of that can's location, and I settle on a theory which maintains that the only just place for the can to rest while I work is on the northeast corner of my desk, and that it is unjust for me to let the soda get warm without drinking it. This theory of justice will govern my can-desk system. Assume that the can is now along the southeast side. My theory insists that to be just I should push the can with force directed from the south, that is, toward the place where it should be. I have no idea how or why justice could be implicated in my can-desk system, but as a heuristic device I pretend that it is.

Imagine that today I discover that my can-desk system has an unusual feature. When I push from the can from the south, it moves to the west. When I push from the north, the can moves to the west. When I push from the west, it moves to the south sometimes, and the east sometimes. And oddly enough, I discover that when I push from the east, the can moves to the east. Furthermore, if I leave the can resting in the northeast portion of my desk, it quickly rolls to the southwest. If I leave it on the northwest side, it spills easily. Left in the southeast, it slides to the northwest. And left in the southwest, it becomes too heavy to lift.

Call a system "daoist" if it has features like this, especially this one: pushing it *from* one direction makes it strain back, and even

move back, *towards* that direction.[44] If I discover this to be the case, then my reasoning about justice and the desk-can system must become correspondingly complex. If in developing my theory, my *values*, I do not take these *facts* about the system into account, then I am likely to be perpetually frustrated on the question of justice and the can-desk system.

Economic systems are daoist. If this assertion is true, and we do not take note of it, then we are likely to be perpetually frustrated on the subject of justice and economic systems.

What evidence exists to support the claim that economic systems are daoist? That with regard to economic life, as Thomas Sowell often puts it, "Effects outweigh intentions"?[45] Asking me to demonstrate this is like asking me to demonstrate that there is a desk in front of me: if the reader does not believe it now, then I am not going to make any noticeable impression with anything short of another dissertation. I have discussed two examples of economic systems with this feature in Chapter 5: anti-poverty programs and housing markets. Furthermore, I dare say that it is a *very* common impression of economists that economic systems display this feature. If they are right, then ideal justice theory is a poor way to begin thinking about justice, for in the process of idealization facts which are related to a proper theory will evaporate.

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[44] A good explanation of why I call such system's "daoist" is unnecessary for those who are familiar with the Chinese philosophy of Daoism, and impractical for those who are not. A short explanation, however, is this: the Daoists believe that "All Under Heaven," the universe, nature and, especially, humans, display this feature.

[45] This line or variations of this line appear in practically every work of Sowell's. See *A Conflict of Visions* or *Knowledge and Decisions* for examples.

I will attempt a more philosophical, and less informal, way of stating this point. For a theory of justice to be unconcerned with coercion-justification it must assign allocations according to some principle, so that in monitoring and enforcing those allocations the state can be said to be doing justice. But principles which assign allocations tend to overlook the organic nature of society, treating it instead as a gigantic architectural riddle to be solved. "What will be the basic institutions of our society? How should they be constructed to achieve this or that end? What are the ends of our society? How do we assign rights and duties to the members of our society so that these ends are accomplished?" To one who understands society as a collection of organic processes rather than a mechanical, programmable instrument, such questions make little sense. Society is not an enormous erector set waiting to be unpacked, but a set of agents with independent agendas.

As I have tried to make apparent in this essay, philosophical issues do not ride on top of practical issues like steamed milk on a cappuccino: rather, together they form a pousse-café, with questions of values layered into questions of facts layered into more questions of value, and so on. Shall we judge a society by its least-advantaged member, as Rawls would have it?[46] How do we measure advantage? For that matter, how do we measure well-being? Do we use our own values or those of the agent whose well-being we seek to measure? Is well-being relative or absolute? How confident can we be of any economic measuring rod? What are effective ways to change

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[46] Rawls, *A Theory of Justice*, page 302.

distributions? A theorist of justice who does not address coercion skims over key issues in favor of abstract formulas and goals unconstrained by limitations of man's knowledge or abilities.[47] The objection of the ideal justice theorist, which holds that no factual constraints exist which bind reasoning about justice because ideal justice theory carries within it its own internal definition of justice (and hence coercion), is an objection as diaphanous as the theory which spawned it, and creates no obstacle to my project of setting standards by which to evaluate state force.

This section, incidentally, is my explanation of the tension between economics and philosophy which I mentioned in the introduction to this work. If economists and lawyers (such as Posner, Dasgupta, and Sen) believe that they are working within daoist systems, then the guidance of philosophers, if it does not display familiarity with these features, will seem perpetually lofty. One can read just such sentiments at play in some of Posner's and Dasgupta's work, and perhaps between the lines of some of Sen's.[48]

If the preceding argument is accepted, then an ideal or universal theory of justice does not correctly address the compulsion which needs to be justified in discussing the State. Rather than: 1) imagining the ideal society; 2) justifying it *as* the

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[47] An examination of justice-seeking within the bounds of reasonable information-gathering can be found in Sowell's *Knowledge and Decisions.*

[48] See for example Posner's *Overcoming Law*, pages 458-460, for criticisms of Putnam, Rorty, and Rawls for this failure; also, Dasgupta's *An Inquiry into Well-Being and Destitution*, pages 116-121, and tacitly, Sen's "Individual Freedom as a Social Commitment," *The New York Review of Books*, June 14, 1990.

ideal society; 3) nonchalantly insisting that we do what we can to get there, the social philosopher should address a different task. Many facts about the existing society and its features (especially the daoist features of its systems) should be included within the set of considered convictions we employ in seeking reflective equilibrium (see Appendix A). The facts and values relevant to justice theory have similar specific gravities: they stay mixed no matter how we pour.

VI. THE ALLOWANCE MODEL FAILS TO JUSTIFY A TYPE OF FORCE NEEDING JUSTIFICATION

The above response turns its back on the objection raised by the theorist of justice. Now I shall attempt a reply that grips the objection by the shoulders.

Assume that the Borkian Objector rejects the preceding arguments. She insists that justice is the first virtue of social institutions, and one can pursue it without looking around at the world as it is. She constructs a theory which maintains that certain social rules and institutions are just.

I reply, "The rules and institutions you propose are far different from those which currently reign. To get from here to there, we would need a powerful state to rearrange things, and to strip some people of their entitlements. We should independently evaluate whether or not those forms of coercion are justified."

To which she replies, "It is not my business to say, 'This is what the world should look like, and we can arrive there by reasonable and appealing means.' Lenin showed us that you cannot

make an omelet without breaking a few legs. I do not know if the chasm between where we are and where we should be is too great a leap for us to make. I seek merely to discover what ideal justice is: I make no claims as to whether or not we can arrive there through admirable means. "

In short, the Borkian still argues against my attempt to examine coercion from outside the setting of a thick theory of justice. She says that her purpose is merely to discover how a just society would be formed. If such a society has institutions quite distinct from ours, and if it would take a great deal of disruption and coercion to reform our institutions into those of her just society, that is more a reflection of the present state of affairs than of her theory.

For example, she might argue, if one proposed to Genghis Khan a liberal democracy as the model of the perfectly just society, and he responded that it would take brainwashing, imprisonment, and coercion on a massive scale to transmute his hordes into classical liberals, this would tell us nothing about classical liberalism. It would speak only to the depravity of his citizens. Similarly (she continues), even if it would take extreme state coercion to reform our present society into the just society of her theory, this does not give us reason to condemn her theory: the Ghengis Khan example shows this. Social theory must first be judged on its own internal arguments, she insists, and this first judgment does not include practical considerations. In short, the amount of coercion it would take to move from our present society to that envisioned by an ideal justice theory is no way to measure that ideal theory.

To this argument I give two replies. One is ethnocentristic, one examines equilibrium coercion.

Response: permissible ethnocentrism and equilibrium coercion

the ethnocentristic response

We should dare to be ethnocentristic at times: we need not be relativists between the theory of justice of the khanate and that of liberalism. If we are willing to take it for granted that liberalism provides a more admirable type of justice than did Genghis Khan, then we might insist on the following rule: when a theory of justice would need to apply a great deal of coercion to reform a society which we recognize as relatively admirable, then that theory is probably not admirable. Therefore her Ghengis Khan example is not compelling, if it is used to defend a theory which would apparently apply a considerable amount of coercion to a relatively admirable society.

equilibrium coercion

Assume that the Borkian Objector has not relinquished ideal justice theory as the proper way to reason about justice. She finds none of the preceding arguments against it compelling. With exasperation I say to her, "Let us set aside the question of how much coercion would be required to leave our present state and achieve the state you call ideal. Let us assume you are able to design your state of ideal justice as you wish *ab initio*, and then set it going in motion. Will your state be stable? Or will it require constant supervision to keep it in equilibrium? If it requires constant

supervision, i.e. state coercion, then we may rightly ask about the justifications for that coercion, and judge the theory you have supplied by those justifications."

Consider for example two theories, one of which held that in a just world all property would be distributed equally, and the other which held that in a just world miscegenation would not exist. Both claims have seen the light of day in this century, and both surely have living proponents. In both cases I will put aside the question of the amount of coercion it would take to "re-form" our present society into one with either of these features.

It is still legitimate, I argue, to ask the advocate of either theory, "Once you had achieved the society for which you aimed, what would it take to keep that society in order?" In the first case it would take a state which held perfect information concerning the commercial life of every citizen, and which had the ability to override agreements between people in order to restore egalitarianism. In the second case it would take a state which held perfect information concerning all sex lives, and which had the ability to override consensual sex acts.

I say to my antagonist, "In order to prohibit or reverse the consensual commercial or sex acts of people, you must supply a justification for the coercion." If in response she gives only those arguments which she gave to support her theory to begin with, and these do not include justifications taken from the categories mentioned at the outset of this thesis (market failure, harm, property, and social purpose), I believe her response will be insufficient. Her ideal theory explains the format of a just State,

but if it does not appeal to one of these four justifications, it will not justify the maintenance of that State. So in the end, at this last stage, it seems to me that she finally must reply with a justification for the coercion implicit within her theory, and this justification must come, as far as I can tell, from one of the categories mentioned at the outset of this work. And so I will have pried her loose from the internal workings of her argument to be judged based on arguments I have been developing in this dissertation.

VII. MY METHOD CAN BE RESTATED AROUND THE BORKIAN OBJECTION

Assume that the foregoing arguments are all unsound. Assume that there is no way to defend any pro-political constraint on the act of theorizing about justice. I may still reply that the Borkian Objection does not go through, because it misreads my intentions. I need not frame all of my arguments about state coercion as standards which exist outside of, and check, any theories of justice, as I have done so far. For a reasonable theory of justice will include some sphere for such arguments within it, and what I have proposed may be understood as a suggestion for the content of that sphere.

Ideal Justice Theory has Room for Practical Considerations

The theory of ideal justice defended by Rawls in *A Theory of Justice* admits the possibility that its results must be tempered by "considered convictions."[49] If we engage in Rawls' thought-

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[49] Rawls, *A Theory if Justice*, page 21.

experiment about justice, and wind up with principles permitting slavery, the discord between those principles and our internal convictions about slavery should cause us to rethink the conditions of the original position used in our thought experiment.[50]

Furthermore, the denizen(s) of his original position are allowed to hold knowledge of various general social facts. In that sense it is not *completely* ideal: they are allowed access to facts about social processes. This feature of Rawlsianism, like considered convictions, allows room for practical considerations to be admitted into the formulation of principles of justice. As Rawls writes:

> "It is taken for granted, however, that they [the parties to the original position] know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology... There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate, and there is no reason to rule out these facts. It is, for example, a consideration against a conception of justice that, in view of the laws of moral psychology, men would not acquire a desire to act upon it even when the institutions of their society satisfied it... This kind of general information is admissible in the original position."[51]

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[50] *cf.* Kymlicka, page 7.

[51] Rawls, *A Theory if Justice*, pages 137-138.

In fact the Marxist critique of liberalism put forth, for example, by Allen Buchanan in *Marx and Justice: The Radical Critique of Liberalism*, addresses just this point.[52] To him, the social facts of which agents should be aware while within the original position include facts about exploitation and the way that liberal rights mask power relationships. Knowing these "facts," the inhabitants of the original position do not settle on Rawls' liberal principles of justice.

I am proposing that this thesis could by rephrased along the same lines. The social "facts" with which I am concerned are not those endorsed by Buchanan, however. They concern instead the organic and non-mechanistic nature of social cooperation and the limited means government has at its disposal to direct that organism in directions it (the government) chooses. These facts about society are alleged by the Austrian school of economics. If the Sowellian claim is true that when it comes to economic systems, "effects outweigh intentions," then there is no reason such information cannot be included among the social facts to which the parties in the original position have access. And if they have access to these facts, then the principles of justice they agree to may not display the distributive features which Rawls proposes. A full defense of this would include a defense of the insights of the Austrian school.

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[52] Allen Buchanan, *Marx and Justice: The Radical Critique of Liberalism*, pages 122-158, and especially, pages 132-134 and 142-145.

Similarly, my arguments about harm and property rights could similarly be defended as social facts to which the inhabitants of the original position have access. The economic wisdom of the takings clause might be known to them, for example, or the tyrannical effect of the erosion of this clause's enforcement. And so on. This information could be defended as belonging to the general social information to which the inhabitants of the original position should have access.

In short, what has been phrased consistently in this work as a set of standards by which we should measure principles of justice might be rephrased as information which is included in the formulation of those principles. On the Rawlsian account that room is provided by his specification that general social knowledge is available within the original position, and by the use of considered convictions in the process of establishing reflective equilibrium. I suggest that on any reasonable account of justice, there is similar room for such general social knowledge.

The question comes down, then, to the problem of whether the claims I have made about properties, harms, and economic systems are examples of such general social knowledge. It is clear from the quote from *A Theory of Justice* of several paragraphs ago, by "general" Rawls did not necessarily mean "widely-held." And the claims I am proposing are no less general than the Marxist claims mentioned above. For example, Allen Buchanan claims that:

> "Rawls' theory suffers from a failing that is characteristic of liberal theories: it accords

> priority to civil and political rights without adequately acknowledging the problem that social and economic inequalities produce inequalities in the effectiveness with which equal rights can be exercised."

For example, formal equality of freedom of speech results in *de facto* asymmetry in freedom of speech, when the means of producing speech (the ownership of presses, for example), reflect differences in the way that resources are distributed.[53] If that claim is a possible candidate for inclusion in the general social knowledge accessible from within the original condition, then I see no reason why the economics of the Austrian school would not also be candidates for inclusion in that pool. Of course, ultimately an inclusion of an item of social knowledge in the pool which is available within the original position includes a defense of the claim that such knowledge *is* knowledge, i.e., that the claim is true.

The preceding argument can be given in five steps.

> 1) Rawls allows the parties in the original position access to facts concerning the workings of society, economics, etc. Call this set of facts, whatever its elements, K. The outcome of Rawls' thought-experiment, given the claims he includes in K, is a set of principles of justice, P.
> 2) One Marxist criticism of Rawls is that he fails to include in K certain facts about exploitation, liberal rights in a capitalist society, and so on. If such facts had been included to produce K', then the principles of justice generated by the thought-experiment would have been P'.
> 3) For the benefit of one who balks at my project of seeking independent standards by which to judge state coercion, this dissertation could be rewritten from another perspective. I could claim that the

[53] *ibid.*, page 122.

Marxist K'-K assertions are mostly false, and that there is a better set of claims which, added to K, makes K", and from k" the principles P" spring.
4) A Marxist such as Buchanan would challenge K"-K, as I do K'-K. He could challenge on two points:
a) K"-K claims do not qualify as the sort of general social knowledge admitted in the original position, and;
b) K"-K claims are false.
5) I have responded that the K"-K claims are the same kind as K'-K: if he insists (4a), the Marxist cannot simultaneously defend (2). So the Marxist claim would hinge only on point (4b): that the Marxist insights about social causation and social processes were more accurate than the ones that have informed this dissertation.

Summary

In summary, if the reader is still unconvinced of the coherency of my project, and insists on an absence of pre-political constraints binding social deliberations, and insists that the allowance model is the correct one in which to discuss social theory, then there is still hope for my project. I could take a page out of the book of the Marxist critique of Rawls and restate my claims within the context of the Rawlsian theory of justice. I would do this by inserting many of my observations (e.g., concerning Daoist systems, Poverty Gap Ratios, etc.) into the set of considered convictions and general social facts which inform the thought-experiment of the original position. I would thus be duplicating the Marxist critique of Rawls, but where that critique injects one set of claims into the Rawlsian thought-experiment, I would inject a different set of claims.

Of course, actually performing this task would be a waste of time, for two reasons. It would be an intellectually trivial

endeavor, as the arguments of the preceding chapters would merely be given new form. And I should not have to go so far, because one of the preceding arguments of this appendix should have already convinced the reader that the Borkian Objection and the allowance model are not useful ways to think about justice.

VIII. MY METHOD OF JUSTIFYING COERCION ACCORDS WITH THE PRINCIPLE OF LEGITIMACY, AND THE BORKIAN'S DOES NOT

In Chapter 3 I took up Barbara Herman's objection to Rawls on a point regarding Kantian ethics. Herman's objection was based on the observation that moral issues do not confront us in the way that Rawls envisioned. Here I wish to make an analogous point: questions of justice do not confront us in the manner envisioned by the Borkian objector.

As is discussed at length in Chapter 1, Rawls' principle of legitimacy maintains that "public policies are to be justifiable to all citizens..."[54] He believes that such justifications:

> "are not to appeal to comprehensive religious and philosophical doctrines ... nor to elaborate economic theories of general equilibrium, say, if these are in dispute."[55]

The meta-language in which we discuss how justifications are to work may be rich with philosophical concepts, as is Rawls', but the language of actual justification must not be arcane: if it is, that justification will not fall within the "overlapping conception of the good" of the citizenry, and hence law based upon it will show disrespect to citizens' moral status as persons.

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[54] Rawls, *Political Liberalism*, page 224. Quoted in Chapter 1.
[55] *ibid.*, pages 224-225.

Yet the objection which this chapter is addressed seems to have just such justifications in mind. It says that laws can be defended upwards, against the backdrop of an over-aching philosophical theory. My project is to ask how laws may be defended downwards, by virtue of the actual restrictions they impose upon people. The objection in question says that the downward-justifications are not necessary: even if one cannot be found, an upward-justification may remain. A law governing the price of housing, as is discussed in Chapter 5, might not be justified with reference to market failures, harms, or property theories: its *justification* might be found in some Hegelian theory of personhood (as Waldron attempted).

Yet that is precisely the kind of justification which Rawls' principle of legitimacy forbids. Our laws and constitutional principles must be defended without "appeal to [such] comprehensive ... philosophical doctrines..." The richness of the conceptual language of such theories precludes their inclusion in the overlapping consensus of the good. Far less conceptually rich is the language of the justifications I examine in this dissertation. Though my arguments may have been baroque on occasion, the resulting justifications, "market failure," "harm," "property," and "social goals," are relatively straightforward.

Thus if one accepts the Rawlsian principle of legitimacy, one should prefer my attempt to see how law may be justified downwards over the Borkian's attempt to justify state force upwards. And for practical and ethical reasons discussed in the first chapter, one *should* accept the Rawlsian principle of

legitimacy. Therefore, for practical and ethical reasons one should prefer my way of justifying law over the method endorsed by the objection in question.

IX. SUMMARY

I wrote this appendix to respond to an objection which maintains that it is the project of political philosophy to describe desirable social institutions *ab initio*, and that such constructions can be judged only by the reasonableness of the arguments which gird them. The theories they generate answer such simple questions as, "How should the basic structure of society be arranged? What are the basic institutions of the just society? How are rights and goods (such as money or esteem) distributed through society?" Presumably we seek answers to these questions to know the standard to which we should struggle to make our own society conform.

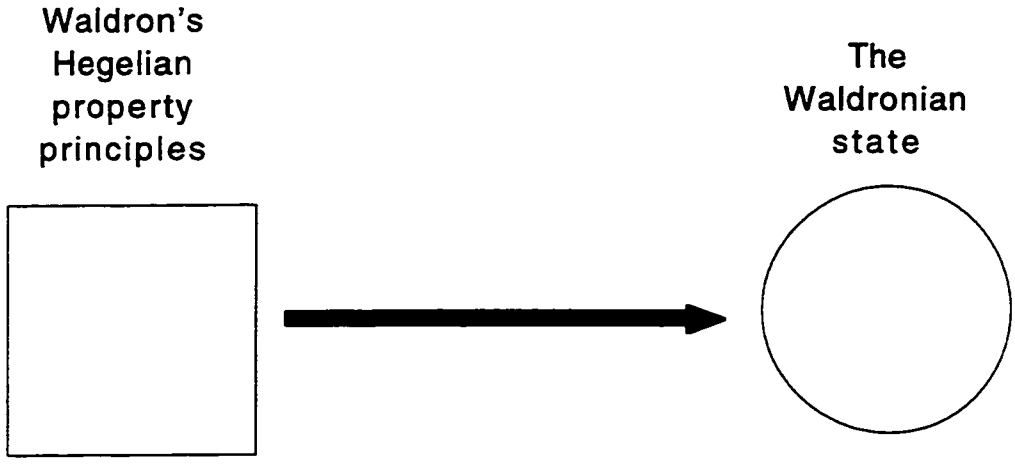
The advocate of such a theory maintains that her system cannot be held to any external standard measuring the coercion within it. If a state operates according to the dictates of a particular theory of justice, and I can mount no argument against that theory, and that theory assigns a certain set of rights and goods to each individual, and the state does not transgress those assignments, then tautologically I cannot claim that the state is coercing someone unjustly. To deny this, one would have to insist on an antiquated notion of pre-political rights.

I have responded in a variety of ways. I have pointed out that the Constitution, properly understood, is a doctrine of enumerated powers, and that this is consistent only with at least a weak

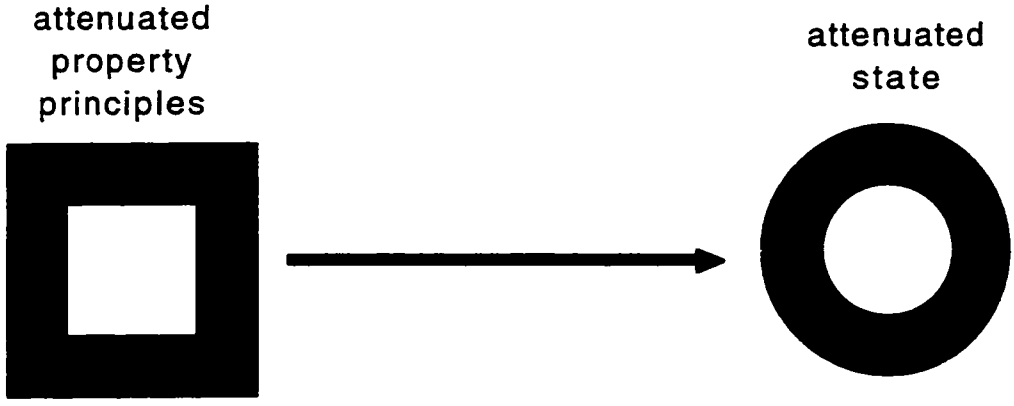
doctrine of natural rights, and that this should be of interest to those who think about political philosophy for practical purpose in this country. I have further argued that some weak natural rights doctrines are supportable: I described one that is Kantian, and quite similar to one aspect of Rawlsianism, and two more, one of them reason-based, one of them reason-rejecting, but still not faith-based. This allowed opportunity to discuss the jurisprudence of Judge Bork, to show how these issues appear within a concrete legal debate. Furthermore, I have argued that the objection to which this appendix responds is an objection based on a bad model of the social world, which I have called "the allowance model," for it treats all human entitlements as privileges awarded by politics, and this treatment is undignified; the model also expresses propositions which are manifestly false. I argued that the allowance model furthermore misconstrues the relationship between facts and values. I argued that this model fails to justify all the state coercion that needs justification. I argued that even if the above arguments failed, I could restate my case to make it not open to the objection in question (this restatement would be in terms of the considered convictions and general social knowledge which Rawls admits to his thought experiment: it would parallel Allen Buchanan's Marxist critique of Rawls). And lastly, I have pointed out that my method of examining state coercion with reference down to its effects upon humans accords with the principle of legitimacy: the allowance model, which justifies such acts upwards to an "over-arching" theory, does conflict with this principle.

APPENDIX D: PROPERTY AND NATURAL ASSETS

In this thesis I gave a chisel-down rather than a ground-up account of property, for doing so let me be parasitic on the theoretical structure of others. For example, Waldron reasons thus:



Chiseling-down his principles reduces the state he justifies:



My theoretical structure, then, is the same as Waldron's, Radin's, and others' who analyze property in order to "right-size" the state. We differ merely in what we say about property, not what we say about the way property theory determines something about the state.

Yet my parasitic approach has drawbacks: it is at best offish, and at worse opaque. I do not admire mere criticality in others' work, and look for affirmative arguments there. There have been many affirmative arguments in these pages, but I have left it to the reader to draw them together to judge as a whole. This appendix attempts to fix that oversight. I wish to distill from the nearly 250 pages of this work that concern property those points that have comprised my frame of reference throughout. There are 12:

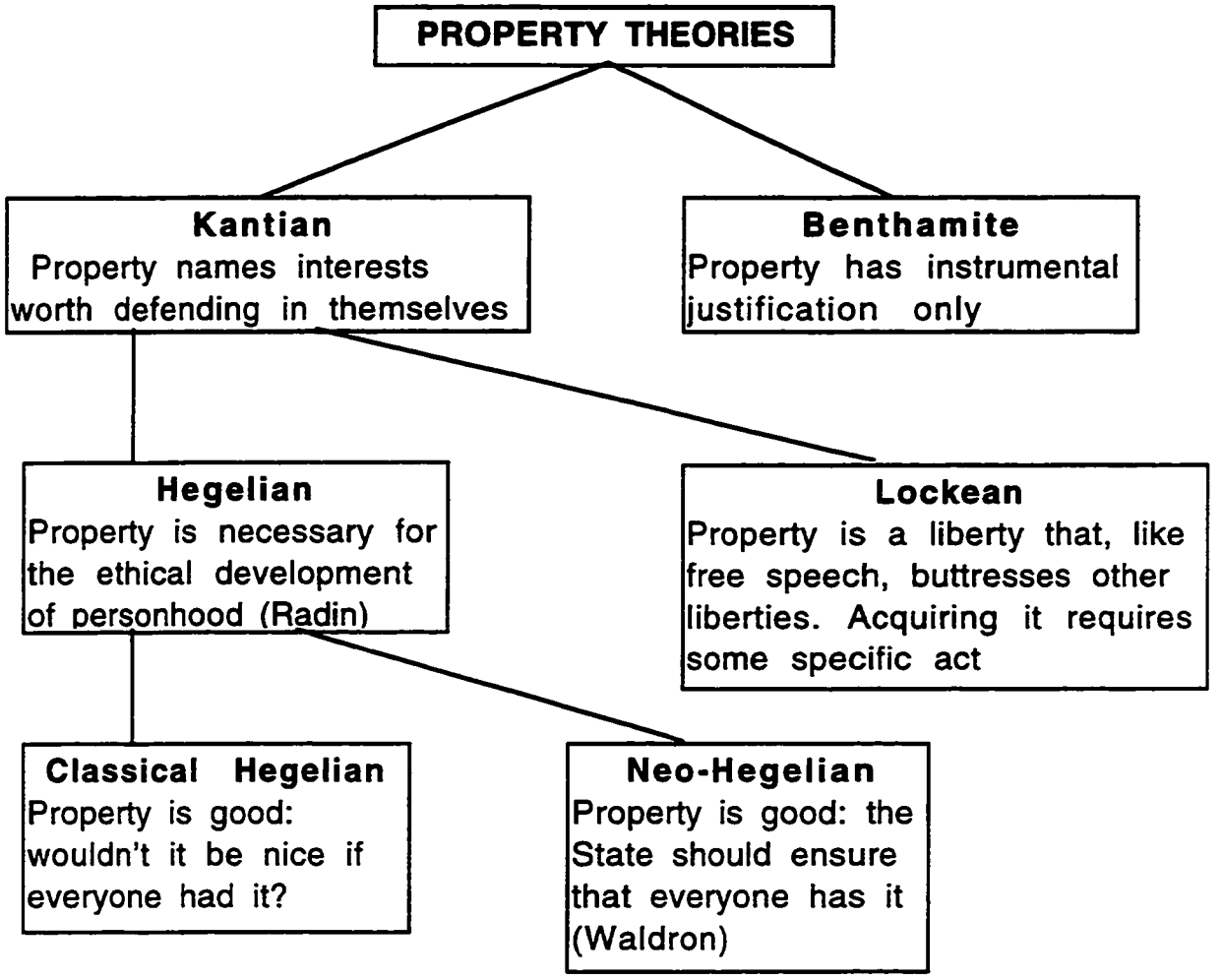
1. The organization of property theories;
2. The nature of a property claim;
3. Disaggregating property rights;
4. Assigning disaggregated property rights;
5. Characteristics of three property assignments;
6. Disaggregated property and statist ideology;
7. Some historical comments regarding property;
8. The political nature of property;
9. Takings;
10. Absolutism and property.
11. Labor theories of acquisition and value.
12. Natural assets, Rawls, and property.

I intend this appendix to be a road-map. It avoids repeating the many arguments that have given this work such bulk, but tells the reader where to find supporting arguments, and it gives a bird's-eye view of their relationships. Arguments appear here only if they were not appropriate for any other specific spot in this work.

Lastly, I remind the reader that if my claims here seem over-bold, and to lack caution, such is the case with any distillate.

1. The organization of property theories

I organize property theories in this fashion:[1]



2. The nature of a property claim

There is an important theme in the evolution of property theory, a theme to which I drew attention in Chapter 4. This evolution starts with the simplistic view of a property right as a

[1] The reader may find this presented at greater length in Chapter 4, pages 195-204. Note that I follow Waldron at the expense of Radin in this taxonomy.

relationship between a person and a thing: that is, mere object-possession. This is the view of property that the ancients held, whether they argued for or against it (as I discuss in pages 204-210 of Chapter 4, concerning property in the ancient world). Such a view sees possession as a near-mystical relationship between a person and an object, and is an easy view to lampoon.

Property theory has evolved, however, to name not a relationship between a person and a thing, but to decide relations among agents. The substance of a property theory is found in its descriptions of those relationships, its descriptions of the agents who enter such relationships, and the relationships it establishes among those agents.

3. Disaggregating property rights

I proposed that we accept Honoré's recitation of the ways property may be disaggregated into rights to the possession, management, income, security, and transmissibility of property. For my purposes in this work, however, I used only the disaggregation of property into three components: use, access, and conveyance rights. These are the categories through which students are introduced to property in law schools, and encompass Honoré's finer categories.

With respect to a simple plot of land, then, my ownership of that property decomposes into:

use rights - The holder of the use right decides how the land is used. Is it used to grow corn, or does it host a softball diamond, or a house?

access rights - The holder of the access rights gets to decide who accesses that property, walks across the field, enters the house, etc.

conveyance rights - The holder of conveyance rights decides if the property will be sold, and under what terms.

All of these may be split into further sub-rights. For example, conveyance rights might be divided into those whose holder decides the terms under which a property is rented, and those whose holder decides the terms under which a property is sold (e.g., classic rent control). Use rights might be divided a different way. One agent may decide whether a property is used for agricultural, commercial, light industrial, or industrial uses: assuming that this agent's choice is that the property will be used for agricultural purposes, another agent may choose whether it is used to grow corn, or wheat, or sheep (i.e., zoning).

As these examples show, the simple concept of possession is actually broken down by our legal system into a number of distinct rights which may be fixed among a wide number of agents. The loci of discretion governing a range of choices is thereby spread across these various agents.

4. Assigning disaggregated property rights

With property rights revealed to be bundles rather than simple attachments, the question to be asked is, who may hold the elements of those bundles? The answer that the economists provide, and that I endorse, is that the varying rights which make up a rights-bundle may be held in any of three ways: private agents (such as individuals) may hold a right, the government may hold a right, or a right may be held "in common." I discuss this in pages 259-276.

This is more subtle than it appears. A naïve way to think about property is to ask a question such as, "By what power can any person claim that this field, or this lake, or this air, as his own?" A better way to think about the issue is to address one specific type of property right (use, access, or conveyance), and say, "This right is held by someone. Who holds it? Does some individual hold it? Does the government hold it? Or is it held by mankind (or society) in common?" The difference between the two approaches is that the first asks *whether* a property right exists, and admits the possibility of a negative reply; the second *assumes* that a property right exists, and asks where it is located. What appears as a negative answer on the first approach ("no one holds the rights to these grazing grounds) appears differently to the second approach ("the rights to these grazing grounds are held by everyone in common").

5. Characteristics of three property assignments

If we accept that a property right may be held privately, or by the state, or in common, it is natural to ask what the advantages and disadvantages are of each. I discuss those briefly here, again directing the reader to the fuller treatment I give these subjects in the body of this work.

Private property

The advantage of private property is that it "creates incentives to use resources efficiently" (as Chapter 4, pages 259-261, discuss in relation to Posner and Epstein). If I know that the relevant use and access to this plot of land are my own, for example, I may plant asparagus on it, knowing that years hence the product will be mine.[2] I would not waste time and other resources improving and planting this plot if I thought that when the crop comes in any passerby will be free to come help himself to it.

Another advantage to private property is that the markets which spring up around private property operate on decentralized information. They operate on signals which, through prices, flash across those markets. Operating on decentralized information is attractive, because information comes that way naturally, and centralizing it is expensive.

A disadvantage of private property is that deplorable distributions can obtain with them. There is something offensive and arguably unjust about one person hoarding resources that he

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[2] It typically takes four years for the first good asparagus crop to come in.

cannot use, while surrounded by people who, with the same resources, could profoundly improve their lives. This does not imply that the other two assignments necessarily score better on this measure.

State-held property

The state may also hold property rights to goods. What kinds of things should or must have their rights held by the state? Two obvious candidates are natural monopolies and hard-top-defend goods. For example, a town's water-delivery system is a natural monopoly: it makes little sense for two or more firms to invest the capital to build water pipes to every house. A preferable solution is for one firm to build the system, and have the government regulate the price that this firm charges for the water it delivers: in this case, a conveyance right is being held by the government.

On a similar note, the property rights to air are arguably best held by the state. Air is hard to defend compared with, say, the grass on my lawn. If someone drives on my lawn and destroys it, and I have property rights in that lawn, then I can bring a civil action against the perpetrator and be made whole for the damage he has caused me. Similarly, if I breathe increasingly smelly air that drifts over my land, and I have property right in that air, then I could go find the polluters and bring them to court under a tort action. Yet air is hard to defend in this way, due to its physical properties. Therefore an efficiency can be obtained if the state holds the property rights in air, and defends it for all of us simultaneously.

There are two disadvantage of state-held property rights. The first is that problems of public choice theory arise. The political system may be manipulated to create situations of private profit and public nuisance, and in fact this is a common problem where markets and politics meet. For example, a tariff on imported sugar in the United States costs the average consumer a few dollars a year, and thereby generates many of hundreds of millions of dollars for the US sugar industry. I will not take the time to write my Congressman to protest this in order to save myself a few dollars a year. It is unremarkable, though, that the sugar industry pays a few million dollars to Congress every year to insure that this transfer of wealth continues.[3] Even were money taken out of politics, there are other reasons that, in a democratic state where that government holds important property rights, the political system will veer towards outcomes of diverse costs and concentrated benefits. As one wag has put it,

> "When buying and selling are controlled by legislation, the first things to be bought and sold are legislators."[4],[5]

The second disadvantage to the holding of property rights by the state is that the state has imperfect information about people's preferences. In the example of air above, how is the state to weigh a given amount of pollution against an increase in industrialization,

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[3] *cf.* my discussion of this in relation to wetlands, pages 268-269.

[4] P. J. O'Rourke, *Parliament of Whores: A Lone Humorist Attempts to Explain the Entire US Government*, page 211.

[5] I have mentioned public choice theory in this work in the introduction, and in responding to some of the claims of Waldron and Radin. I am lead here by an excellent work of James Gwartney's and Richard Wagner's entitled, *Political Economy and Public Policy*, volume 6: *Public Choice and Constitutional Economics* (Greenwich: Jai Press).

for example? Without precise knowledge of how individuals weigh pure air against the other goods that industrialization affords, the decisions the state makes will be haphazard.

I discuss state-held property rights in Chapter 4, pages 270-274, and Appendix B, page 446-454. Some of the pitfalls associated with the state holding property rights in order to generate certain preferred outcomes are discussed in Chapter 5, in the section on Waldron entitled "a digression on distributive justice and poverty," (pages 319-324), and in my sixth reply to Radin, especially my four lemmas on rent control (pages 378-397).

Common ownership of goods

This is often encouraged when goods are judged necessary conditions of life (e.g., medical resources), or are associated with aesthetic beauty, such as recreation in nature, and hence, in both cases, thought to be degraded by the commercial activity which attends markets. Such analysis is romantic. In fact, common ownership of scarce goods is so frequently a disaster that I have not wasted much time on it in this work. The reason is found in Hardin's "tragedy of the commons." I discuss this issue in Chapter 4, pages 374-376, and Appendix B, pages 446-454.

6. Disaggregated property and statist ideology

It is worth noting that both Grey and Radin somewhat disingenuously link what I call in the preceding point a "naïve" view of property with what they deride as "capitalist ideology" and

"liberal ideology." Grey asserts that the capitalist view of property and principles associated with it (e.g., the takings principle), are "difficult to rationalize in terms of modern legal and economic theory."[6] Similarly, Radin decries the way that "the standard ideology of property stubbornly pictures property as a tangible object - indeed, usually land - owned by a natural person," a viewpoint she terms "liberal ideology."[7]

There is more than a little intellectual preening in such words. In fact, it is the *philosophical* treatment of property which remains mired in antediluvian concepts. Simple land acquisition and ownership is still used as a framework for discourse (witness Nozick and Waldron) three hundred years after Locke. In fact capitalism, and the Anglo-American common law which embodies it, have been making distinctions among use, access, and conveyance, and much finer distinctions as well, for centuries. "Capitalist ideology" is no stranger to the disintegration of property, and in fact takes this disintegration several steps further than Grey imagines. The right to use a piece of land, for example, is nowhere the simple "thing-ownership" that Grey imagines, but broke down early in the 19th century into surface rights, mineral rights, riparian rights, use rights, access rights, and conveyance rights, and so on. For Grey to urge that capitalist ideology should give way in the face of "the disintegration of property" is nothing short of absurd, for capitalism has been living with, and its markets operating under, precisely this disintegration for generations. The

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[6] Thomas Grey, "The Disintegration of Property," page 72.
[7] Radin, *Reinterpreting Property*, page 12.

only thing "difficult to rationalize in terms of modern legal and economic theory" is the way that many modern philosophers "stubbornly picture property." I discuss these points with reference to Waldron, Grey, and Nozick in Chapter 5, pages 327-330.

In fact, this theoretical move of both Grey and Radin is a transparent attempt to discover within the common law support for the statist ideology they both propound. In both cases, they maintain that the disintegration of property implies that the state holds certain property rights drawn out of that bundle of rights which together makes up a full set. Thus, to counter critiques on rent control and Rawlsian redistributive schemes, Radin and Grey (respectively) respond that such critiques insufficiently understand the decomposition of property rights which has occurred in the law. This is precisely the argument that Radin makes with regards to baseline property rights, as I discuss in the second half of Chapter 5 (specifically, Radin's argument #3 and my response #4), and the purpose of Grey's essay, "The Disintegration of Property." But their arguments on these points are non-sequitors. It simply does not follow from A) the law admits the decomposition of property rights-bundles into fragmentary rights, that B) the state is the cache of any, all, or the most significant of those rights.

Consider the situation of a farmer who, like most farmers, is perfectly familiar with the way that property rights in his land are actually bundles of rights. He converses about, and even trades in, these various rights in a sophisticated fashion. One year he sells to a mining company the mineral rights to his land, and with them go the access rights to those minerals. Another year he sells to a

neighboring farmer some of his riparian rights, and to another, his grazing rights (perhaps for some finite period).

Imagine that this farmer's local zoning board decides one day that certain uses of his property are outlawed (e.g., new home construction, or any commercial activity besides farming). He protests, and they respond, "Ah, you are arguing from an antiquated theory of property as simple thing-ownership. In fact, property has disintegrated into smaller fragmentary rights. One of those fragmentary rights is use, and specifically, the right to decide if the property will be used for agrarian, industrial, or commercial activity." The farmer should properly respond, "*I* know that property rights are bundles of smaller rights. *I* know that a use-right is just one component of the whole. But who told you fellas that *you* hold my land's use-right? When did you get it?"

In short, Grey and Radin maintain that their opponents, tied as they are to "capitalist ideology," do not comprehend that property is not simple thing-ownership, but is in fact an agglomeration of rights. Mired as they are in their antique conceptions of property, these capitalist ideologues do not comprehend the prerogatives of a modern legal system. This is false. Capitalism has been comfortable with disintegrated property for hundreds of years, and markets are perfectly capable of functioning when property rights have this structure. What "capitalist ideologues" oppose is attempts by modern *statist* ideologues to locate all newly disintegrated rights with government. There is nothing inconsistent about opposing such statism while accepting the disintegration of property.

7. Some historical comments regarding property

As this appendix's first point I wrote that property evolved from a claim about a metaphysical relationship between subject and object ("possession") into a statement about a relation between subjects. Both elements are found within the medieval Church, existing as it did as both a theological and a political institution. Within that period were harkenings of other aspects of modern property theory. Aquinas, for example, recognized incentive problems (as had Aristotle, for that matter), along with free-rider and coordination problems which attend non-private property. Also with Aquinas we find the first articulate labor theory of value. Such theories tacitly assume self-ownership, and suggest that through laboring on an object, that object is imbued with some of that ownership. Explicitly or otherwise, *self*-ownership is the foundation for *object*-ownership in these theories. I discussed these points in Chapter 4, pages 210-217.

Since Marx at least, there has been a strain of thought (illustrated by the Radin, Waldron, and Grey examples discussed here) that certain principles thought to be natural and obvious features of property and economic relations are in fact the reifications of capitalist economic relations. This was one of the reasons that I went to such lengths to develop the history that appears in Chapter 4: I wished to show that free-riding behavior, coordination problems, and the necessity of incentives, were all recognized many centuries before capitalism.

8. The political nature of property

Two things must be said about the view that property, if it is not a pre-political right, is subject to assignment by the state. The first is that, taken too seriously, this undermines the very purposes of property; the second is that resistance to such claims does not imply acceptance of any dogmatic and absolutist theory of property.

The value of property, as has been discussed above and throughout much of this work, is that within regular and enforceable property rules, people can form expectations, and thus invest time and labor in projects which will have only future pay-offs, while remaining confident that they will receive those pay-offs. Hence a major component of the value of property rights is their intertemporality. Other kinds of rights typically do not have this feature. I develop this argument in responding to Waldron's second criticism of Locke's labor theory of acquisition, pages 292-295.

It should thus be clear that in opposing the view that property rights are assignable in an ongoing fashion by a political mechanism, one is not necessarily committed to an absolutist theory of property, or even to the view that property rights are indivisible. The attempt by any political mechanism to take even disintegrated property rights without paying for them (such as rent control, wherein government takes some conveyance rights in an apartment), undermines the values of all such rights, even where it does not take.[8] Furthermore, even if that political mechanism is democratic

[8] Washington, DC, for example, has a law that holds that before apartment buildings of certain descriptions change hands, tenants have one year to match the price named in the

and admirable it may still veer to outcomes of dispersed costs and concentrated benefits, as shown above in point #5.

If we approach the issue with the least cynicism about government, we can easily imagine how the political mechanism may be manipulated to steal from one private agent to give to another. Two farmers own land near a developing town, separated by a road. The first farmer sells his land to a developer, who puts in a shopping mall. Fearing the diminution in the value of his property that a nearby competitor would bring, that developer "convinces" the town planning board to prevent commercial development on the second property. If it accedes to his demand, then it will have transferred wealth from that second farmer to the real estate developer.[9]

Recognizing this, and seeking to constrain the degree to which government behaves arrogantly towards the intertemporality of property rights, does not, therefore, display a commitment to any archaic theory of property as a mystical relation with objects, somehow supervening across political forces. Even where property is recognized as a political relation, it should be safeguarded from politics.

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purchase contract. How much higher must returns be to incentivize an entrepreneur to build apartments there? The day this law passed , what happened to the value of already-built units, even when no sale was being considered?

[9] People who make their living in commercial real estate might say that such acts are not the aberration, they are not the exception, they are the *bread-and-butter* of zoning, at least where it concerns commercial issues. Real estate developers even have a saying to cover this: "Every putt makes somebody happy." Every major decision of a zoning board makes someone rich and penalizes someone else. It should be unsurprising, therefore, that developers place a high value on their ability to influence a zoning board.

9. Takings

The subject of takings ties together these discussions of the disaggregation of property rights and their subsequent location. Thomas Grey suggested that it is hard to reconcile takings law with "modern legal and economic theory,"[10] by which he meant the disintegration of property. Nothing could be further from the truth. In fact, the most famous modern proponent of takings law, Richard Epstein, *bases* his analysis on the disintegration of property.

This is another example of the issue I raised as point #6 above: Grey tries to use the fabric of modern jurisprudence to cloak a statist ideology that is simply feudal, all the while claiming that his argument accords with modern jurisprudence, and that it is his opponents who are reactionary. In Appendix C's section, "The Dignity Failure of the Allowance Model" (pages 499-502), I discuss the curious relation between the assumptions which gird discussion of distributive justice, and the feudal legal doctrine of tenure.

A rigid takings law gets law, economics, and ethics all right. It gets law right because it recognizes that if the state takes some *fraction* of the rights-bundle in *all* of a plot of land, then that state has taken some of the value of that property just as surely as if it had taken *all* the rights associated with a *fraction* of the land. Takings law gets its economics right because, where it is rigid, it means that property will not be converted to socially sub-optimal uses. Lastly, takings law gets its ethics right because it is wrong to take things without paying for them, whether the someone doing

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[10] Thomas Grey, "The Disintegration of Property," page 72, quoted above.

the taking is a person, ten people, a corporation, or all members of society but one.

This argument is taken up in pages 261-265 of Chapter 4: "The Economic Analysis of Property."

10. Absolutism and property

At a deep level, these tensions were played out centuries ago in ago between Hobbes and Locke. I wish to frame this issue in terms of these two thinkers.

I mentioned above that the medieval Church, spanning as it theological and political concerns, saw property in both theological (meaning, mystical and absolutist) and political ways. Moving into the Renaissance, the foundations of natural law shifted from theology to reason (indeed, as my discussion of John Finnis in pages 489-491 shows, the foundations have shifted so far into pragmatism that it is difficult to recognize it as natural law at all). This shift to a reason-based foundation for natural law suggested, I believe, the early social contract theories, for reason suggests contract, and contract suggests trade.

And yet from such similar origins, Hobbes and Locke developed antagonistic theories. For Hobbes, of course, the state is the beneficiary of a contract made among its subjects: it receives powers from them, but returns no duties. Having promised no duties, it has no duties which it can abrogate: it is absolute. For Locke, on the other hand, government is a party to the social contract, and acts as the trustee of certain powers yielded to it. As

a trustee it is a fiduciary: it has duties which it can, hypothetically, abrogate.

Thus the nature of the Hobbesian state is absolutist, and rights are provisional. The power of the Lockean state, on the other hand, is provisional, and the rights are absolutist.[11] The issue is framed by the tension between Hobbes and Locke: *to the extent that rights are claims against state power, we must endorse an absolutist state and weak rights (including property rights), or absolutist rights and a weak state.* Suitably qualified, that is the essence of political choice regarding property.

All of these historical points are developed in much greater detail in those sections of Chapter 4 which concern Hobbes and Locke, pages 221-241. The philosophical point I have sought to convey here is that any objection to the strength of a property right is, at best, half the story: one must simultaneously explain why a political mechanism so strengthened on that dimension will perform more admirably. I argue this point against Waldron in the section entitled "compared to what?" on pages 324-325.

11. Labor theories of acquisition and value

Labor plays a pivotal role in two major theories of property of the last three hundred years: Locke's labor theory of acquisition, and

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[11] This is not, strictly speaking, true, for Lockean rights are not entirely absolutist: God and the demands of reason qualify rights, including property rights. I discuss the way Locke qualifies property rights in several sections of this work, especially that section of Chapter 4 dealing with Locke, pages 233-241.

Marx's labor theory of value.[12] I have implicitly rejected both of these in this work, without drawing much attention to these rejections. I wish to suggest arguments against them here, again with reference to material from the body of my thesis.

In the first quarter of Chapter 5, I reviewed Nozick's and Waldron's criticisms of Locke's labor theory of acquisition. The most telling criticisms are those which complain that the labor theory of acquisition allows possession in excess of contribution. As Nozick reminds us, if we take Locke's theory seriously, I would acquire an ocean by mixing my can of soup in it. There is little within Locke's theory to discourage such imbalance.

Nozick and Waldron sought different solutions to this problem. Waldron suggested that the labor theory of acquisition could be retained if its claims were tailored to reflect the proportion that labor had added to the value of the acquired objects, and if such claims were understood to be provisional in any case. Nozick handled this problem differently, by adding a proviso concerning the situations other people were left in by any one act of acquisition. These subjects are discussed in Chapter 5, "Locke's Labor Theory of Acquisition," pages 285-292.

But to me, both of these solutions miss the real problem of any labor theory of acquisition. It is simply artificial in the modern era to speak of property as being acquired in this fashion, and it probably was artificial even in Locke's day (unless one followed him

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[12] The labor theory of value had proponents who preceded Marx, such as Ricardo, I have considered it Marx's theory for purposes of this work.

in assuming that aboriginals were not people). This artifice can be traced back to two sources: the doctrine of plenitude, and the legal doctrine of *terra manens vacua occupanti conceditur.*

The doctrine of plenitude is discussed in Chapter 5, pages 327-330. In essence, the doctrine was a medieval theological principle which held that there were a finite number of things in the universe: property within this world-view tends to be thought of as *things-had.* In fact, this doctrine of plenitude still grips the modern imagination, to the extent that modern discussions of distributive justice and poverty often make the background assumption of a zero-sum game, and insist on looking at *things-had* rather than *processes-creating.* Chapter 5, pages 316-320, suggests why the *things-had* approach may be ineffective.

The metastasis of European savages across the world was inspired in part by *terra manens vacua occupanti conceditur.* Land that is held vacant is granted to the occupier. Coupled with racist doctrines that prevailed throughout Europe at that time, (and indeed, most of the world that bothered to have doctrines), it meant that Europeans could take what they wanted.

I ask the reader to attempt the imaginative act of donning the world-view of some 17th century person who accepted both the doctrine of plenitude and the doctrine that *terra manens vacua occupanti conceditur.* What would such a world-view be like? I imagine it would look something like this: "There are a lot of objects out there. Some are owned by me, some are owned by others, and some are just sitting there, waiting to be owned by someone. Those objects become mine if I go involve myself somehow with

them. Other people should be indifferent about my doing so, as they are not already using those things anyway." Roughly speaking, and quite vaguely, that is the sense of the world that these doctrines paint in my imagination.

Now this just strikes me as a *profoundly* silly model to use when thinking about the modern issue of property. I can think of nothing I own that might be described in this way (except perhaps one small piece of driftwood that I carved). One (e.g., Nozick), might reply that it is not important that modern property be like this: it need only be like this, or have gotten this way through chains of voluntary transfers. But goods with these origins make up such a minimal part of the pattern of property today, that this suggestion is equivalent to saying we should analyze a Bach fugue by discussing the frequencies of the sound waves that pass through the air around me, or the chemical reactions which occur in the muscles of the organist's fingers. At some point the pattern is so rich it ceases to be analyzable in terms of the elements which spawn it. And in any case, no one could seriously pretend that much property anywhere in the world today could be traced back through unbroken chains of just transfers to just original acquisitions from nature. There is no corner of this Earth that some war has not washed over.

This issue is discussed at several places in Chapter 5, in particular in the pages cited above (with regard to Waldron, Locke, and Nozick). To her credit, Margaret Radin is suspicious of this "stubborn ideology," as I have mentioned in the section which concerns her.

I discussed the Marxist labor theory of value twice in my thesis, once in Chapter 5 (to explain that Waldron's endorsement of it is inconsistent with his previous criticism of Locke), and once in Chapter 4 (while explaining Marx's descriptive and normative theories of property). I did not seek to criticize it, and I drew nothing from it. I suspect it will be no surprise to the reader to learn that I do not endorse it. I wish to explain here briefly my two reasons for this. The first is that it seems to me to make a precise metaphysical claim, and I distrust precise metaphysical claims; the second is that the labor theory of value inverts the relation between labor and value.

The labor theory of value is an architectonic theory that generates precise results: other than quantum mechanics, I cannot think of many scientific theories which do this well. It is especially difficult to think of an *economic* theory which does this successfully. Yet this is only a reason to be suspicious of the labor theory of value. A reason to reject it is that it does not make any actual predictions at all. By appealing to a value which is not what people will pay, but an unobservable value thought to accompany an object, and be related to the labor that went into it, the labor theory of value divorces its claims from any observable quantities in the world. I just do not know how to measure whether the labor theory of value is a good or bad theory of value, for its immunity from measurement is a sign not of its coherence, but of its unreality.

It is for this reason that while I presented Marx's descriptive and normative theories of property in Chapter 4, and discussed the subject in relation to Jeremy Waldron in Chapter 5's lengthy

footnote #12, I have otherwise neither weighed heavily against it or attempted to draw from it. I just do not know what to make of a claim of the form that "labor determines value."

"Value determines labor," however, is a claim that I can readily comprehend, and this is the second of the points I wish to make about Marx here. "Labor determines value": the amount of labor that goes into a product determines something about its value. I outlined above why I reject this. But "value determines labor": the value of a product determines how much labor goes into it. This is true in a free market economy. It is also true that the value of an object determines how much capital goes into it, how much land, and how much entrepreneurial talent.

Consider milk. Farmers sell milk to dairies, and are paid by the pound: in Vermont the price range is typically between 23¢ and 16¢ per pound (at the former dairy farmers make a good living; at the latter, they struggle to stay afloat). When consumers are buying a lot of milk,[13] the price that dairies (typically co-ops) can charge

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[13] The wary reader will have noted, of course, that I take peoples' preferences to be exogenous. This reader may even object that mine is a naïve view of a modern economy, when billions of dollars are spent on advertising to determine peoples' preferences. My answer is: that's right, I do, for a reason. Actually, three reasons: 1) even immensely powerful advertisers often discover that they cannot determine peoples' preferences (as Coke found out, when they introduced their new formula); 2) most advertising must cancel out other advertising (Coke is telling us, implicitly, "Buy Coke and not milk!" while the Council of American Dairy Producers tells us the opposite, and both are being shouted down by someone who wants us to Fly the Friendly Skies); 3) taking peoples' preferences as given, even if naïve, is better than taking them as the mere result of Madison Avenue puppeteers, and hence trivial or unimportant. As the punch-line went to the joke that was footnote #48 of my introduction: "I don't have to outrun the bear. I just have to outrun *you*!" Similarly, exogenous preferences don't have to outrun bears, they just have to outrun endogenous preferences.

rises, and the prices they pay their farmers rises to 23¢/pound, and production shifts. Some farmers turn hay and corn fields to pasture for Holsteins, they shift their efforts from logging or syruping, and they raise their Holstein calves rather than slaughter them for veal. A farmer may even borrow and build a dairy barn, and buy industrial milking machines, in order to cash in on the high price of milk. Conversely, if the price drops to 16¢ (perhaps due to over-production, or a BGH scare, or shifting demographics, or more vegans), then some farmers will leave the business. They will shift to logging or syruping perhaps (where prices may have soared due to the earlier desertion to milk production).

Thus, in both cases, the way that the consumer values milk, as indicated by its market price (a measurable amount), determines how much labor (a measurable amount) goes into its production. It also determines how much capital and land gets shifted into milk production. To suggest instead that the amount of labor that people expend in producing a pound of milk determines its value, and that this value may be something other than what consumers will pay to drink a pound of milk, puts the cart before the horse.

12. Natural assets, Rawls, and property

Lastly, I address natural assets and self-ownership, developing my argument in contradistinction with Rawls. The reader will see how this draws together themes from the previous 12 points.

It should be unnecessary at this point to re-summarize Rawls' main argument in any detail, having done so in Appendix A. The three points that concern me are these:

A) Rawls begins with a clear strike against utilitarianism by writing:

> "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."[14]

He later specifies the specific problem of utilitarianism to be one of not keeping straight the distinction between individuals, a failure to recognize the moral equality of persons. He intends that his theory of justice not display this defect. There is some serious question as to whether he succeeded. I discuss this in pages 416-417 and 423-427 of Appendix A.

B) Rawls develops a theory that, on the face of it, is equalitarian and redistributive. I am not confident that his theory is as equalitarian as is commonly thought or, if it is equalitarian, if it is so for reasons of the Difference Principle, rather than the Principle of Equal Liberty. My point is that the Difference Principle, if it has any bite, must point at facts and processes which are extremely difficult to measure; furthermore, the Principle of Equal Liberty may effectively constrain unequal distributions more significantly than the Difference Principle (these subjects are taken up in the first part of the second

[14] Rawls, *A Theory of Justice*, page 3.

section of Appendix A). In any case, it is significant that Rawls clearly believes that his theory is equalitarian, and that its thrust is towards a system of government taxation and redistribution (see my pages 422-423).

C) Points A and B are *prima facie* inconsistent, for the simple reason that a scheme which has some people being taxed in order to provide benefits to others looks, on the face of it, like the former people are being made to serve the interests of the latter people, and this would *seemingly* conflict with the inviolability of those wage-earners. Rawls insists that there is no inconsistency, while I have argued (in part 2 of the second section of Appendix A) that there is an inconsistency. I will not re-create that debate here. Instead, I wish to focus on Rawls' theory of natural assets, with the simple reminder that if Rawls is not contradicting himself with positions A and B above, it is due to the tenability of his argument concerning natural assets.

Rawlsian natural assets

What is Rawls' theory of natural assets? Following Rawls, I will give the intuitive argument, and a formal argument.

The intuitive argument begins with a minimal claim about justice that most would accept: a theory of "equality of opportunity," which holds that society should be arranged so that advantages of birth and inherited wealth are not allowed to reinforce themselves. The principle would seem to be that

outcomes should be a function of how people choose, and not a function of things that people do not deserve, such as the social position into which they are born. But just as no one deserves "a more favorable starting position in society," no one deserves "a greater natural capacity."[15] Thus it is inconsistent to block the influence of social starting position while permitting advantages of natural assets to play themselves out. At least one commentator believes that this intuitive argument is the load-bearing wall within *A Theory of Justice*: in this commentator's mind the remainder of Rawls' book, concerned as it is with the original position, veil of ignorance, and so on, can be understood as a mere dramatic device of lesser philosophical consequence.[16]

The formal version is the one I will address, however. It first assumes that outcomes are largely determined by talents and abilities, or "natural assets." I hold some money in the bank, but that is merely a financial asset. I may also hold some skill, such as the ability to play basketball well: that is a natural asset. It is an obvious feature of our society that some natural assets (such as intelligence, diligence, perhaps ruthlessness, certainly basketball talent) generate large returns in the form of income, opportunities, and social recognition.

Yet we might ask of a man whose natural assets have generated large returns: what has that man done to deserve the returns which accrue to his natural assets? In some cases, such as intelligence or athletic ability, we can imagine that the -

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[15] Rawls, *A Theory of Justice*, page 102.
[16] See Will Kymlicka, *Contemporary Political Philosophy*, page 63.

> "distributive shares [in these assets] are decided by the outcome of a natural lottery; and this outcome is arbitrary from a moral perspective."[17]

Certainly some of the talents which generate profound returns in our society are awarded by a genetic lottery. Consider the most profoundly talented people in arts such as music, or sports, business, or in the sciences: it often appears to the rest of us that such prodigies as Michael Jordan are born and not made.

But perhaps this is merely the sour-grapes view of those who have never practiced their ball-handling skills late into the night, or practiced scales while their peers watched cartoons, or risked all their savings and their friends' savings on an entrepreneurial vision. Perhaps the attitude that the highly-skilled are born and not made is disrespectful of the discipline and drive that has created success where equally-talented but lesser-motivated people did not prosper.

Rawls considers this possibility as well, and repeats the question about talents at a higher level:

> "The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases."[18]

In short, we may ask of a talented man, What did you do to deserve your talent? If he answers that he received it in a natural lottery, then he did not deserve it (because no one deserves what he wins by

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[17] *ibid.*, page 74.
[18] *ibid.*, page 104.

chance). And if he has his talent because he developed it through drive and discipline, the question becomes, what did he do to deserve his drive and discipline? The answer is, once again, he received it from his family or social circumstances, which he did not deserve. In one way or another, therefore, he has his talent largely due to things he did not deserve (natural lottery or family and social circumstances). Since in neither case did he do anything to deserve the talent, he does not deserve the various returns which accrue to his talent.

Thus when society follows the Difference Principle in distributing across the population returns which had accrued to one man's natural assets, it is not putting him at the disposal of others, it is not overriding his inviolability for the sake of others' welfare, it is not overlooking his equality as a moral person, in fact it is not even taking something from that talented man. For those returns *are never his to begin with.* They are not *his* returns: the *talents* are his, and he may choose to use them or not, or choose to let some languish so as to pursue others (Michael Jordan may give up basketball to play baseball). But when he does activate a talent and lets it generate returns, those returns are social. He did not *deserve* the talent so he does not *deserve* the returns, and thus society may redistribute it without undermining his inviolability or failing to recognize him as a moral equal.

Thus runs Rawls' theory of natural assets, on my reading. I cannot overstate how vital a role this argument plays in *A Theory of Justice*. It is the clutch which fits together claims A and B above. I have two responses to it.

The natural assets model is flawed

I will quickly dispense with the most obvious challenge to the natural assets model from which Rawls reasons. The obvious way to question Rawls' model is to point out that there is a distinct theory of human nature and education implicit in the model, and moreover, an acceptance of a radically reductive determinism. In fact we have little hope of reducing "talent" to its causes, other than, perhaps, some bare genetic influences. The sentence, A man's "character depends in large part upon his family and social circumstances" sounds roughly true, at least to me. So does the sentence, "A man's character does not depend in large part upon his family and social circumstances." I have no way of deciding between them. Either could be true, they both could be true: in short, psycho-babble. "Character" is amorphous enough to begin with that one wonders what any sentence of the form "Character depends on X" actually purports to say. Trying to correlate "character" with social settings may yield some interesting result, but Rawls does not mention any research in this line, and I have no idea if any exists.

But I will set aside this almost trivial complaint, because I think that accepting Rawls' claim on this point opens up a more interesting response to the natural assets model. I will also skip the counter-argument to Rawls that Nozick and Sandel made, (that Rawls' theory seems to pose a subject as ontologically prior to its attributes, and that this is disrespectful of personhood): I have treated that counter-argument in the first section of Chapter 5,

pages 310-324, regarding Waldron's account of natural assets. Instead, I move to the next level, where Grey has responded on Rawls' behalf by arguing that the Nozickean objection embodies an antiquated theory of property rights as simple thing-possession.

Grey's point about property, which I have discussed in numerous places in Chapters 4 and 5, along with point #6 above, is that property is not simple, that it has literally *dis-integrated* in the law (along the lines that I have discussed at such length), and that therefore Nozick's claim is weak. By analogy with the modern legal conception of property, it is possible for a person to own a right to his natural asset, but not to own the right to the return that this natural asset generates (just as it is possible for one farmer to hold the access rights to a piece of land, while another holds the use rights to it, and determines what is planted there). If a person holds the rights in his natural assets, he gets to choose which assets he wishes to develop and employ: Michael Jordan chooses whether to play baseball or basketball. But having made his choice, he has no right to the return that his natural asset generates. Thus society recognizes Jordan's inviolability and moral equality by standing back while he chooses which asset to employ, and distributes the returns thereby generated without ever transgressing any of Jordan's property rights in his assets. Thus has Grey linked the anti-Rawlsians with a property theory which is untenable in the face "of modern legal and economic theory,"[19] while showing that Rawlsianism is compatible with such "modern theory."

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[19] Thomas Grey, "The Disintegration of Property," page 72.

What Grey has missed is the way that the law's disintegration of rights to which he points is disanalogous with the Rawlsian disintegration. It is as though someone at a birthday party cuts the cake into thin horizontal slices, each the diameter of the whole cake. When challenged, she says, "What I'm doing is completely conventional: I've heard all my life that people cut cakes into slices. Haven't you ever heard of 'a slice of cake'?"

The disintegration of property that has actually occurred in the law (and which, as I pointed out in #6 above, is nothing new to "capitalist ideology,") is, roughly speaking, a disintegration into use, access, and conveyance rights. Many further distinctions are made in the law, as I have discussed. What the law does not typically do is slice a right horizontally and say, "You hold this right X, but someone else holds the right *to the return* on X."

In fact, it is difficult to imagine what this could mean in the law. "David has use-rights, access-rights, and conveyance-rights in this land, but society holds the rights to the returns that David's use, access, and conveyance rights generate." If that means anything, it would be something like, "David may work the land, but everything he grows belongs to society; David may charge people to walk across the land, but the fees go to society; David may sell the land, but if he does, society gets the money." In such a situation it would be specious to say that any aspect of David's rights in the land have been respected. Yet this is precisely what the Rawlsian picture does with natural assets, and that is what is so objectionable.

In sum, the law *does* disintegrate property into a number of vertical slices, and these can be sliced into even narrower slivers. But the Rawlsian picture cuts *across* rights, and separates them into a right-holding, and a return-on-right-holding. There is no basis for this in the law.

Natural assets and disintegrated property

Assume that I am wrong about the preceding point, and that we can accept this way of disintegrating rights. The Rawlsian agenda and Grey's defense of it are *stilled* flawed. We see this if we approach the subject by analogy with the farmer discussed in point #5 above, in light of the framework proposed in #4.

As discussed above, Rawls is in essence asking of Jane, a talented basketball player, What have you done to deserve the returns on your natural asset? And since Jane (allegedly) has no good response, Rawls maintains that the returns to that natural asset are society's to distribute. But that takes the default position to be, "everything is society's unless proven otherwise." And objecting to this was the purpose of point #4: we do not ask naïvely with the ancients, "Is this owned or un-owned?" We must ask instead, "Are the property rights in the returns on this natural asset held by Jane, the state, or society?"

Now Rawls would no doubt want to answer, "society," but I would suggest that he be put to the same test as he puts Jane. He has asked Jane, What have you done to deserve the returns on this natural asset? And I ask similarly, What has everybody else done to deserve the returns on Jane's natural asset? At least Jane has

practiced her ball-handling skills, so that some returns are being generated due to her playing. That is more than other people can say about the development of Jane's natural talent. If Rawls can't see what *Jane* did to deserve her ability to dribble well, then I can't see what everybody *else* did to make Jane such a good dribbler. Rawls denies Jane's claim to deserve the returns generated by her ball-handling skill, but then awards those returns to a group of people (society) who on average have done infinitely less to deserve that talent of Jane's.[20]

I have argued that the Rawlsian theory of property rights in natural assets is dissimilar to the legal theory of disintegrated property to which Grey draws attention. Even if this were not so, and even if there were an analogy between the two, I would question how good an idea *that* is. Radin, for example, thinks that to picture a piano-player as owning her right to play the piano serves to objectify her and her talent. If a person is objectified by owning her *own* ability (or the returns on her ability: Radin does not distinguish the two), how much more is a person objectified when *other* people (or the state) own the same aspect of that person? This is the line I developed in Chapter 5's response to Radin #2: "Libertarian Self-Ownership Compared to What?"

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[20] Note that I give Rawls the benefit of the doubt, and pose this as an opposition between Jane's claims and society's. I think the real opposition is between Jane's claims and her government's, and a stronger argument could be made to my point.

Self-ownership

The argument that I have been making can be seen, I believe, as a special case of a more general argument towards self-ownership. Having made the specific case, I will be relatively brief on the general case.

I have discussed in several places (my introduction, and in the early part of Chapter 5) Cohen's 1990 article, "Marxism and Contemporary Political Philosophy, or: Why Nozick Exercise some Marxists more than he does any Egalitarian Liberals".[21] While I am in disagreement with Cohen on many things, I am sympathetic with him on a range of points he makes in this article, the primary one being that Marxists and Nozickeans share a common respect for self-ownership, a respect that so-called "liberals" (such as Rawls and Nagel) do not display. Cohen follows Locke and Nozick on this one crucial point: an individual owns himself.

Why should one agree with the proposition that "an individual owns himself"? For one simple reason, again found in point #4 above. One cannot approach the subject like the ancient Greeks, asking if something is owned or unowned. Instead one must start by recognizing that a person owns himself, or the state owns his self, or his self is owned in common by everybody. Those are the only possibilities. And I believe that a theory which starts off assuming that I own my self (and its "returns") is, in the end, likely to

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[21] Cohen, G. A. 1990. "Marxism and Contemporary Political Philosophy, or: Why Nozick Exercise some Marxists more than he does any Egalitarian Liberals". In *Canadian Journal of Philosophy*, Supplementary Volume 16, pages 363-387.

respect me as a moral person, just as I doubt that a theory which assumes that the state owns my self, or that everybody else owns my self (or its "returns") in common, can succeed in this regard.

An individual owns his self. My self must be constantly defended from people who would steal it. Among these I number fascists, for obvious reasons. I include crypto-fascists such as Rousseau and Kant, as I explain at such length in Appendix B, pages 432-446 ("crypto" because while they use the vocabulary of people who respect selves, the selves that they respect are only the selves that Rousseau and Kant *wish* people had, not the selves they actually are, as Berlin notes). And I include such thinkers as Rawls, Radin, and Grey, who would pick my pocket as the count my change. These three thinkers, decent and compassionate as they no doubt are, will say that they are leaving each person with his or her own self at the same time they hoard the returns that go with that self's components (returns which often are the thing which makes holding those components interesting or valuable). They give us the sleeves out of their vests.

Conclusion

In my introduction I discussed how the use of improper models can steer thinking awry. This long discussion of property and its relation to Rawlsian distributive justice has, I hope, gradually revealed this about Rawls. What model did Rawls choose to use

when reasoning about natural assets? Model's are revealed by the language a writer chooses. In this case, "natural *assets*" and the "returns" they "generate." It takes no poetic leap to see it:

Rawls' model was financial investment.

The choice of a model suggests cause-and-effect relationships that may not be there in actuality, and can constrain a thinker from missing relationships that are there in actuality but are missing in the chosen metaphor. In this case, consider the features of a typical financial investment, whether it be a bank deposit, the purchase of a savings bond, a deposit in a pension fund, etc. The two key elements are that the thing I invest, my asset, is something I *have*, it is not something I *am* (I deposit *dollars* in a pension fund, I don't deposit my *self* in a pension fund); second, the asset I deposit generates returns while I remain passive (I don't have to do anything but hold savings bonds for its returns to be mailed to me).

Now I think there can be no disagreement if I say that this is just one way of modeling social and economic relationships, and that it is just one way of modeling the way that our skills and efforts express themselves in the world. And perhaps at least some would agree that Rawls' is an odd and idiosyncratic way to conceive of life and its relationships. Perhaps I am guilty of some weird Freudian identification, but I think that I do invest what I *am* in my life, and I don't passively receive what "returns" my meager skills may "generate." Not only can I not picture my life in this fashion, I cannot picture how someone *could* picture life in this fashion.

What is left out of Rawls' picture (as it is left out of Radin's: *cf.* Chapter 5 response #3) is the role that choice plays in a life. By using a financial model to conceive of, and financial terms to discuss, the problems of justice, Rawls made it difficult to see that holding "assets" of any kind (rather than "skills," or "dumb luck," or a "tolerance for risk") which "generate" (rather than "get exercised or traded for") "returns" (rather than "whatever others would trade in order to better pursue their own ends"), is a profoundly misleading setting within which to discuss social arrangements.

If we take seriously the proposition that lies at the base of the intuitive argument that Rawls puts forth, that the choices people make (as opposed to morally arbitrary factors) should determine their lives, then we shall be left hungry by a vision that speaks of assets and the returns they generate. The choices people make should indeed determine peoples' lives, but while their assets are generating returns, what choices are they making? Like the US soldier in Vietnam famously said, "We had to destroy the village in order to save it," Rawls reasons within a social model wherein choice is minimized, while reaching for a system wherein the choices people make determine their lives. If he is serious about maximizing the effect that choice has in determining outcomes, he might consider the sub-optimal line of the libertarians:

"From each as he chooses; to each as he is chosen."

Property and justice: Waldron, Radin, and others have explored the former in order to unfetter (their visions of) the latter. I explored the former in order to constrain the latter, or rather, in order to constrain the actions the state may pursue while cloaking itself in claims about justice. I have explored, through this appendix and at greater length through this work, the history of property and the elements of a tenable theory of property, in order to fix this constraint more rigidly.

This does not mean that I disagree with the mission that Waldron, Radin, and Rawls encourage. I merely believe that one should not claim that persons have an inviolability that the welfare of society does not override, then locate outside that inviolability everything about a person that society might use to improve its welfare (the path that Rawls took). I believe (returning to the chart in point #2) that one should not claim that property rights name interests intrinsically worthy of defense, then go through contortions to justify a redistributionist state (as both Waldron and Radin did). This leaves utilitarian arguments for a welfare state unscathed. Ultimately I think such utilitarian arguments for the welfare state are the best there are, yet for reasons found in my analysis of positive and negative rights (Chapter 3), property rights (Chapter 4), and distributive policies (Chapter 5), I should still be surprised if the energies of such a state are boundless.

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