I'VE GOT A RIGHT TO SING THE BLUES:
AN EGOIST CONCEPTION OF RIGHTS

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ABSTRACT

Rights today are a jumble of conflicting and incompatible claims. Without correction, the concept of rights will be eroded and eventually abandoned. The loss would be tragic, because rights are essential to our long-term planning and success. Incompatible claims have arisen from incommensurable conceptual foundations. Historically and essentially, rights are egoistic. Attempts to justify rights according to other criteria – divine command, human dignity, altruism, utilitarianism – fail on their own terms. Egoism or self-interest is fully compatible with social responsibility and with regard for the interests of others. The nature of rights is examined and ethical diversity is defended. The evolution of rights is traced from Roman antiquity through medieval developments through modern refinements, with particular attention paid to the rights theories of Gerson, Grotius, Hobbes, and Locke. A will theory of rights is proposed based on contract rather than on natural law and teleology. This will theory is explained using state of nature theory, with reference to Olson's logic of collective action. It is contrasted with the egoistic theories of Rand and Smith, with the utilitarian will theories of Hart and Wellman, and with the interest theories of MacCormick and Kramer.

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CHAPTER ONE: THE PROLIFERATION OF RIGHTS

When Socrates wanted to understand a moral concept such as courage or justice, he would ask a purported expert what the concept meant. The expert would proffer a definition, which Socrates would test against popular usage. The definition's shortcomings would become apparent; refinements would be proposed; testing would start anew. This process would continue iteratively until Socrates' interlocutor, disabused of his opinion, lost all patience. In the end, Socrates' attempts at universal definitions were failures, but he still found his aporistic inquiries illuminating.

> What begins as wonder ends in perplexity and thence leads back to wonder. How marvelous that men can perform courageous or just deeds even though they do not know, can give no account of, what courage and justice are (Arendt 1978, 166).

If Socrates were alive today, what sense could he make of the concept of *rights*? Would the bewildering range of uses to which the word *right* is employed, many of them conflicting, discourage him? Or would he grasp something specific and vitally important underlying the term?

Today, Socrates would encounter a baffling battery of rights. He would hear of children's rights and animal rights, employers' rights and workers' rights, states' rights and the rights of entire peoples to self-determination. He would hear of one's right to remain silent, one's right to an attorney, and one's right to make one phone call. He would hear of one's right, upon reaching the legal age, to purchase and consume alcoholic beverages, and in some states, one's right to smoke marijuana with a doctor's prescription. He would hear of one's right to carry concealed handguns and, in some jurisdictions, one's right to marry partners of the same sex. He would hear of the right to life and of the right to die. He would hear that the children of illegal immigrants have a right to free public education, and that handicapped persons have rights to ramps.

Socrates might be surprised to learn that legal rights are continually being minted. In November 2007, the City of Philadelphia, PA passed a law protecting the right of diners to meals prepared without trans-fats (Philadelphia Ordinance 060958). In June 2008, the Swiss Federal Ethics Committee affirmed the right of plants to dignified treatment (Swiss Federal Ethics Committee). In June 2008, Martin Roberts reported that the Spanish Parliament's environmental committee had approved resolutions extending the rights to life and freedom to the great apes (*Reuters*, June 25, 2008). In September

2008, Ecuador adopted a new constitution that gives nature – its mountains, rivers, forests, etc. – legally enforceable rights to "exist, flourish, and evolve." In November 2008, the Supreme Court of Canada ruled that obese airline passengers have the right to two seats for the price of one (Supreme Court of Canada 32729).

Additional legal rights are constantly being proposed. Bastard Nation, "The Adoptee Rights Organization," insists that everyone has a civil and human right to know her origins, and demands that grown children of adoption be given free access to their birth records:

> Bastard Nation is dedicated to the recognition of the full human and civil rights of adult adoptees. Toward that end, we advocate the opening to adoptees, upon request at age of majority, of those government documents which pertain to the adoptee's historical, genetic, and legal identity, including the unaltered original birth certificate and adoption decree. Bastard Nation asserts that it is the right of people everywhere to have their official original birth records unaltered and free from falsification, and that the adoptive status of any person should not prohibit him or her from choosing to exercise that right. (Bastard Nation mission statement).

In April 2010, Dr. Brett Mills complained that wildlife television documentaries violate animals' right to privacy. Mills wrote that animals, like humans, have public and private lives. Mills believes that, while it is alright to film animals' public activities, such as hunting, it is wrong to film animals' intimate private moments, such as mating, giving birth, and dying (Mills 2010, 193-202).

All these new and proposed rights would seem to testify to the strength and vitality of rights. But alas, each of these laws, however well-intentioned, restricts human liberties. Philadelphia's law against trans-fats forbids the Termini Brothers from selling crisp cannoli in Philadelphia's Reading Terminal Market. Switzerland's resolution requiring the dignified treatment of plants forbids expatriate Americans from carving pumpkins into jack-o-lanterns with gap-toothed grins. Less trivially, Spain's extension of rights to the great apes forbids Spanish scientists from conducting AIDS experiments on chimpanzees, the species from which AIDS originated. Ecuador's extension of rights to forests and lakes and mountains means that the ecosystem's right to lie undisturbed may take precedence over the rights of authorities to construct hydroelectric dams, and over the rights of landowners and developers to use their resources to satisfy human needs. If a second airline seat must be provided to an obese Canadian passenger at no extra charge to him, then the extra charge must be borne by others –

either the remaining passengers or the Canadian taxpayers – and if the flight is fully booked, then at least one passenger must take a later flight. According to Jason Nark, an Atlantic City woman is suing New Jersey's Department of Children and Families for identifying her to her biological daughter, whose unannounced appearance on the mother's doorstep revived traumatic memories of the rape that conceived her (Philadelphia Daily News, June 23, 2009).

Do all of these instances labeled *rights* have something in common with prototypical liberty rights such as freedom of speech and of assembly? Or are they equivocations?

In economics, there is an analogous principle, Gresham's Law, which states that "bad money drives out good." Henry Dunning Macleod named this principle in 1858, but it had long been recognized that whenever debased coins are accepted at face value, coins with a higher content of precious metal would be withdrawn from circulation and hoarded or melted down. In modern terms, whenever a government inflates its currency by printing more money – money backed by fiat rather than by gold – then investors will abandon the currency in favor of another. By the same token, whenever illegitimate or frivolous rights gain currency, legitimate rights, the bulwarks of civilization, lose currency.

CHAPTER TWO: THE IMPORTANCE OF RIGHTS

In *The Revolt of the Masses,* Ortega y Gasset supplied a partial explanation for the proliferation of rights. In a normal society, a minority distinguishes itself from the majority through talent and accomplishment, asking much of itself, and undertaking difficult projects. The minority comprises society's natural leaders. The majority, meanwhile, are bereft of opinions, blithely ignorant of their debt to the minority men and women who created the conditions in which the majority could thrive.

The masses comprise average people without special qualifications who ask little of themselves. Huge problems arise when the masses usurp the role of the minority.

> The characteristic of the hour is the commonplace mind, knowing itself to be commonplace, has the assurance to proclaim *the rights of the commonplace* [italics mine] and to impose them wherever it will (Ortega 1957, 18).

The masses are quick to form opinions without the careful, disciplined thought that alone can justify opinions, and they do not hesitate to impose their opinions on everyone else. The common man

> …accepts the stock of common places, prejudice, fag-ends of ideas or simply empty words which chance has piled up within his mind, and with a boldness only explicable by his

> ingenuousness, is prepared to impose them everywhere. This is…the characteristic of our time; not that the vulgar believes itself super-excellent and not vulgar but that the vulgar proclaims and imposes *the rights of vulgarity* [italics mine], or vulgarity as a right (Ibid., 70).

The masses are not amenable to reasoned arguments; their souls are "hermetically-closed:"

> Whoever wishes to have ideas must first prepare himself to desire truth and to accept the rules of the game imposed by it. It is no use speaking of ideas where there is no acceptance of a higher authority to regulate them, a series of standards to which it is possible to appeal in a discussion (Ibid., 71-72).

Ortega called the masses' imposition of their ideas on everyone else the triumph of hyper-democracy, and the first steps toward civilization's reversion to barbarism. Liberal democracy, by contrast, concedes the rights of minorities:

> Liberalism is that principle of political rights, according to which the public authority, in spite of being all-powerful, limits itself and attempts, even at its own expense, to leave room in the State over which it rules for those to live who neither think nor feel as it does, that is to say, as do the stronger, the majority (Ibid., 76).

Ortega called liberalism “the noblest cry that has ever resounded in this planet,” but added cynically, “Hence, it is not to be wondered at that this same humanity should soon appear anxious to get rid of it” (Ibid.).

What if the concept of rights were lost? Would that be so terrible? After all, many countries have few rights or reserve rights to the few (Togo, Zaire, North Korea), and they seem to get by OK. Don’t they?

They do not. Rights are requirements if people are to protect themselves from violence and fraud, to organize themselves politically, to provide for their physical needs beyond the needs of a hand-to-mouth existence, and to make and to execute long-range plans.

In the 1960’s, Raleigh cigarettes were packaged with coupons redeemable for merchandise. In a series of popular television commercials, smokers were asked to imagine life without Raleighs. One by one, the appliances and furniture in the room winked out of existence. Never mind that the smokers could have had better furnishings – and better lungs – if they had spent their money directly on appliances and furniture. Had they smoked brands different from Raleighs, i.e., brands that cost the same but which did not offer redeemable coupons, their lives would have been poorer.

In 1970, Joel Feinberg conceived a place called Nowheresville, “a world very much like our own except that no one, or hardly anyone…has rights” (Feinberg 1973, 243). Feinberg need not have resorted to fiction; there are many countries in which rights do not exist, e.g., North Korea and Somalia. But it is only in fiction that this world could be “very much like our own” (a fact that would not have eluded Feinberg; he was making a different point).

In Nowheresville, duties would still abound, but no one would be able to stand on his rights and demand performance of duties owed *to him*. In Nowheresville, duties would be performed perfunctorily, without regard for the beneficiaries. But in societies where rights obtain, duties are subordinate to moral principles. When a woman demands that other people pay her *her* due, she is making a declaration of self-worth and dignity. And when she pays others *their* due, she is implicitly conceding their worth and dignity.

Let us leave Nowheresville and return home. Now, imagine what life would be like *here* without rights. As in the Raleigh commercials, many of the things that we take for granted would wink out of existence, never to be created in the first place.

Without the right to speak or to publish, we would lose our ability to advertise the superiority of our products and services. An inefficient command economy would supplant our market economy.

Without the right to choose our occupations and to negotiate our terms of employment, we would be reduced to serfdom.

Without the right to speak or to publish, we would also lose our ability to persuade others of the superiority of our ideas. Democracy would become impossible. Democide would not.

Without the right of *habeus corpus*, we could be incarcerated at any time, for any duration, without explanation and without recourse to attorneys.

"Imagine no possessions. I wonder if you can." Without the right to property, every bite that you took and every stitch that you wore would be by someone's permission, and someone's permission could be revoked as easily as it was granted. Without property rights to the fruits of our labor, no one would voluntarily expend labor. Farmers would not plant crops; entrepreneurs would not take risks. They would not build factories subject to confiscation (note the economic collapse of kleptocracies such as Camaroon, Togo, and Zaire).

As I look around my room, I see my CD player and computer printer winking out of existence, never to be purchased. I find my fingers drumming purposelessly on the tabletop because my laptop just vanished. And I see my life-sustaining CPAP machine (a treatment for sleep apnea) and diabetic supplies likewise disappearing, never to be developed. Without them, *I* may soon wink out of existence.

Let us dramatize the importance of property rights by imagining Somewheresville, a sister-city to Nowheresville. Somewheresville has all the requirements for prosperity, except for electricity …and rights. It has a copper mine, a grove of rubber trees, and fertile farmland. It has a navigable river and a good harbor. It has an educated and industrious labor force.

It would be boom time if only Somewheresville had a power station. But there is no bank from which to borrow the investment capital. No one would deposit money in a bank, with no right to withdraw it. No one would design the power station, with no right to be paid for his work. No one would build on the site, for which there is no secure title. No one would provide turbines, transformers, fuel, cables, or even desks and chairs, with no right to payment. And if, against all odds, a power plant were built, it would not sell power to customers from whom it would have no right to be paid.

There will not be any power station in Somewheresville five years from now, or twenty years from now, or a hundred years from now. The people of Somewheresville will continue to carry water in jugs on their heads. They will continue to heat their homes by burning dung.

Rights are a primary factor determining the wealth of nations. This is not to deny that growing economies may become targets of

rapacious neighbors, but wealth must be created before it can be looted, and rights provide ideal growing conditions. In fighting for rights, we choose freedom and prosperity over repression and grinding poverty.

Furthermore, rights promote the noblest possible future for mankind, by protecting its best sons and daughters – persons like Socrates and Hypatia, Galileo and Sakharov – from their societies' determination to silence their gifts.

These are the stakes in the fight for rights.

There are competing theories of rights. The primary theories of the function of rights are will theories and interest theories (Cruft 2004, 347). The primary theories of the foundation of rights include contractarianism, contractualism, divine command theory, and deontological theories.

I will defend a version of will theory based on contractarianism. On this interpretation, rights are essentially and historically egoistic, and the surest way to preserve rights would be to restore their conceptual base.

Will theory and interest theory both exclude some rights that the reader may have come to expect. While excellent scholarship has been published in support of both theories, I consider the case for will theory superior.

Will theories of rights are based on the dominion of the right-holder in possible disputes with second or third parties. This assumes free will. A right-holder can hold someone to the performance of his duty, or she can waive his obligation. Under will theory, a right-holder has the authority to shape aspects of her world to her purpose, without requiring anyone's approval. Will theory protects right-holders' freedom to live as they choose. But it restricts rights-holding to entities with free will, which excludes infants, mentally-incapacitated adults, and animals.

I myself am a will theorist, but I am dismayed that most will theorists attempt to place will theory in the service of utilitarianism. A utilitarian standard would frequently require rights-holders to act in ways that are contrary to their own interests. Worse, utilitarianism trivializes rights. It would be pointless for a right-holder to demand dominion if he and a pretender were both ethically bound to maximize happiness and to minimize pain for all parties involved. Differing interpretations aside, they would normally choose the same. Rights and utilitarianism are incompatible, because rights are based on self-interest, while utilitarianism is based on distributed interest.

Interest theories of rights hold that the function of rights is to protect or promote the interests of rights-holders. This means that a right-holder's need for health care or education is sufficient to entitle

him to those benefits. Interest theory has the advantage of protecting infants, mentally-incapacitated adults, and the higher animals, whose well-being most people instinctively want to protect. But interest theory has serious liabilities. If some people are entitled to benefits, than other people are obliged to provide them, even if they would prefer to spend their money on other things. This puts interest theory in conflict with traditional property rights. Interest theory does not explain how people acquire their unchosen obligations, nor does it explain which interests generate rights and which do not. In practice, interest rights are limited by the amount of money that can be transferred, voluntarily or involuntarily, from more productive people to less productive. In theory, rights are boundless with respect to interests, and also with respect to right-holders. Setting aside will theory's criterion of free will, rights may be ascribed to lower animals, to plants, and even to "the planet" – to any entity that can be conceived as "interested."

Interest theories of rights are based on altruism, which is antithetical to the values that rights were devised to protect. In popular usage, altruism has become synonymous with benevolence, but I am using the term as it was coined by August Comte, the founder of Positivism. Altruism is the belief that everyone *must* live for the sake of others. Comte wrote, "...to live for others [is] the definitive

formula of human morality" (Comte, 1973, 217). There is nothing optional about altruism. Altruism justifies and even demands the use of force against anyone who would withhold her assistance:

> Positivism never admits anything but duties, of all to all. For its persistently social point of view cannot tolerate the notion of right, constantly based on individualism. We are born loaded with obligations of every kind, to our predecessors, to our successors, and to our contemporaries. Later, they only grow or accumulate before we can return any service. On what human foundation then could rest the idea of *right*, which in reason should imply some previous efficiency? Whatever may be our efforts, the longest life well employed will never enable us to pay back but an imperceptible part of what we have received. And yet it would only be after a complete return that we should be justly authorized to require reciprocity for the new services. All human rights then are as absurd as they are immoral (Ibid., 230).

Altruism is a debtor's prison where your wages do not cover your room and board, let alone reduce the mounting interest on your astronomical debt. Anyone who uses any of his waking hours for any purpose except to work for others is unfairly withholding his effort

from the community, whose representatives are authorized to compel his effort. The phrase “Genius is no excuse” has a different meaning here. The slim possibility that someone might revolutionize the arts, business, or industry is insufficient reason to relieve him of his obligation to toil unremittingly; else, everyone would present herself as a potential genius. There will be no violin lessons for Joshua Bell, and no leisure for anyone to attend concerts. Unable to guarantee success in advance, Norman Borlaug, credited by the U.S. Congress with saving more than a billion lives, would have been consigned to a life of serfdom rather than one of invention and innovation. The moments that make life worthwhile would be fleeting, furtive, and forbidden. Like the protagonist in Theo van Gogh’s film, Submission, everyone would long for the grave. No doctrine that makes life unbearable should be mistaken for a moral ideal.

Divine command theory is a deontological theory which states that an action is right because God ordained it. People who trace their religions back to Abraham, i.e., Jews, Christians, and Muslims, maintain that everyone has rights because we are all God’s children, created in His image. This has undeniable appeal, but people disagree about the content and even the existence of God’s message. Besides, philosophy does not deal in revealed truths.

Contractarianism holds that rights are derived from agreements or social contracts entered into by self-interested men and women who sought mutual advantage in cooperation. In politics, contractarianism holds that a government's legitimacy is derived from the consent of the governed.

Contractualism posits a different kind of social contract. It holds that rights are derived from agreements entered into by men and women who want to justify themselves to others who have their own interests to pursue. It concedes equal moral importance to all rational, autonomous parties, in conformity with Kant's principle that we should treat other people not as means only but as ends in themselves.

There are at least two distinct forms of contractualism. In T.M. Scanlon's version, the contracting agents are primarily motivated by a need to justify themselves to others. Accordingly, Scanlon attempts to base rights on principles that no one could reasonably reject.

In John Rawls' version of contractualism, *the contracting parties are motivated by self-interest*. Rawls sought principles to which all would agree, rather than principles that none would reject. To identify these principles, he imagined everyone behind a veil of ignorance, where they would have to bargain without knowing their relative advantages and disadvantages. Because each person could end up

being the least advantaged, self-interest would motivate everyone to ensure fairness to all.

I am a will theorist and a contractarian. I define rights as contractual agreements that determine whose choice will prevail in certain contexts and under certain conditions. I will expand upon this definition when I present my theory in Chapter 4, and when I contrast my theory with other theories in Chapter 5.

It would be easy but ultimately pointless to arbitrarily select a single definition of rights and then to rule out-of-court all uses that fail to conform. In the first place, I believe that we should always be attentive to well-considered opinions that differ from our own. In the second place, I recognize that every one of the “rights” mentioned above was intended to protect or to promote something desirable.

Nonetheless, I have offered a definition of rights that precludes many “rights” widely-accepted in social and political discourse. By describing rights as contractual, I am denying that “human rights” apply to all people in all societies since the dawn of modern humans approximately two hundred thousand years ago. Classical liberals like to say that the government cannot confer rights; that it can only respect rights or violate them. Does this mean that primitive humans on the African savannah had freedoms of speech and of worship that their fellow tribesmen were bound to respect? What set of facts could

possibly make this proposition true? Claims that people have rights for which they never bargained are based on theories other than contractarianism.

I also restrict rights to moral agents, i.e., to beings capable of exercising free will. This entails the denial that animals, infants, and the mentally incapacitated can be rights-holders. This does not mean that I condone mistreating babies. It means only that I regard rights as one branch of moral theory and not its entirety. Rights are meaningless to beings who cannot conceive and choose between alternatives. A separate justification is needed to protect non-right-holders, but this is outside my topic.

Furthermore, I give little consideration to people's right not to be killed, because it doesn't protect anyone's choices. It might be argued that the right not to be killed protects future choice-making. This is certainly true, but life is more fundamental than rights; it is the source and the standard of values. We don't value life for the sake of choices; we value choices for the sake of life. I will make this clearer in my discussion of meta-ethics. I certainly think that it is wrong to kill people, but I believe that the principle involved is different from rights. In any event, it is outside my topic.

Finally, collective or group rights are also outside my topic, but I will comment on them briefly. In *Multicultural Citizenship*, Will

Kymlicka distinguished two kinds of claims that an ethnic or national group might make. The first involves the claims of a group against the larger society. The second involves the claims of a group against its own members.

With respect to the first kind of claim, Kymlicka pointed out that most so-called group rights are really group-differentiated rights. Group-differentiated rights are still rights exercised by individuals. For example, francophones in Quebec province have the right to use the French language in the Canadian federal courts, but this is a right accorded to and exercised by individuals (Kymlicka, 1995, 45). It may seem unfair that speakers of other minority languages in Canada do not have the same right, but the special advantage of the Quebecois arose from the terms of Canadian federation. Similarly, treaties with the United States secured the hunting and fishing rights enjoyed by some American Indian tribes. But within the tribes, hunting and fishing are activities practiced by individual Indians. Rights are often secured by selecting one value along a range of reasonable values. There is no obvious injustice between a voting age of eighteen and an age of twenty-one. It would be surprising, therefore, if every state independently adopted the identical age. If the several states were to confederate, then such differences could be accommodated indefinitely, to the understandable unhappiness of disenfranchised

youth on the wrong side of some state border (in the United States, the Twenty-sixth Amendment to the Constitution was adopted in 1971; it standardized the voting age at eighteen in order to match the age of military conscription).

The purest case of a collective right that I have reviewed is the right of an entire people to self-determination. The United Nations Charter asserts this right (United Nations 1945, Chap. IX, Art. 55), but leaves the word *people* undefined. The right of an entire people to self-determination is obviously not a right that can be exercised by any single individual. Nonetheless, any state action would be subject to plebiscite, and individuals would cast the votes. It is my position that agency or choice can be exercised only by individuals.

The second type of claim that an ethnic or national group might make involves claims by the group against its own members. “Internal restrictions,” wrote Kymlicka, “involve *intra-group* relations – the ethnic or national group may seek to use the state power to restrict the liberty of its own members in the name of group solidarity” (Kymlicka 1995, 36). The group may try to compel members to attend a particular church or to uphold particular gender roles. For example, throughout the Muslim world, apostasy is a capital offense. We should respect external restrictions that protect the group against the actions of the larger society, but we should reject internal restrictions that

would punish group members who question or try to reform their group's authorities and practices. We value groups because they provide their members with cultural options. It would be contradictory to value groups that deny their members options.

It is not hard to understand why people attempt to couch every moral issue in the language of rights. They want the moral force that rights summon. This force is considerable: rights are principles on which individuals can stand against their fellow-men, against their societies, even against the whole world. Everyone wants to wield this moral force, but few will commit to the principles that give rights that force.

Rights are iceberg-tips, under which lie concealed conceptual foundations of varying depths. Some persons use the language of rights as mere exclamation points to punctuate demands that other people accede to the speaker's wishes. Some use the language of rights for emphasis, as if to say, "I really mean it!" Some drag the language of rights into disputes in which rights are generally unhelpful, e.g., in resolving differences between family members. Other persons use the language of rights as conclusions to complex arguments involving particular answers to questions of metaphysics, epistemology, ethics, and politics.

Despite the disparate ways in which people use the term *rights*, I contend that the term has a specific meaning, rooted in historical usage. Rights are based on self-interest, and every stage in their development was driven by self-interest. Attempts to hijack rights in the service of entitlements are attempts to borrow the prestige of rights while undermining their essence.

Human knowledge has a hierarchical structure. We store transmissible knowledge in the form of concepts. As data accumulate and as needs dictate, we form ever wider abstractions, and also ever narrower ones. New concepts are derived from and depend upon earlier ones, which are their genetic roots. Consider, as an example, the concept *orphan*, and as a counter-example, Pierre-Joseph Proudhon's "concept" *theft*.

The concept *orphan* presupposes and depends upon the concept *parent*. No one can grasp the meaning of *orphan* without first grasping the concept *parent* (Brandon 1963, 2).

Now consider Proudhon's slogan, "Property is theft" (Guerin 2005, 48). Karl Marx criticized Proudhon's expression as confusing and self-refuting. "...since 'theft,' as a forcible violation of property, presupposes the existence of property, Proudhon entangled himself in all sorts of fantasies, obscure even to himself, about true bourgeois property" (Marx 1979, 192-193). Proudhon later elaborated on his

slogan, “Property is theft!” by adding another, “Property is freedom!” (Guerin 2005, 55), which did not dispel anyone’s confusion, Proudhon’s least of all.

Something similar happens when people twist the word *right* to mean its opposite. They undermine the processes of concept formation and validation.

When we divorce the concept right from its epistemological base, we are left with a floating abstraction. Persons who want to separate rights from their conceptual base want to retain the moral force of rights without committing themselves to the underlying principles that generate that force. They want to keep the effect while abandoning the cause; they want to have it both ways. But divorced from their conceptual base, rights lose their meaning. When groundless rights are arbitrarily asserted and accepted, then the power of all rights is vitiated.

The range of rights that we described earlier reflects our living in an ethically diverse society. This diversity is frequently referred to as ethical pluralism, but there are reasons to doubt the validity of ethical pluralism. Ethical pluralism is the belief that ethical norms, values, and virtues are *irreducibly* diverse. This theory states that morality serves many different interests, and that no single theory of the good or ethical behavior derived from a single moral consideration is likely to

satisfy everyone. Within a pluralistic society, there may be radically different but equally justifiable moralities.

Stated this way, ethical pluralism is a stand-in for cultural relativism. Cultural relativism makes the following claims: first, that different societies have different moral codes; second, that a society's moral code determines what is right and wrong within that society; third, that there is no objective standard by which to judge one society's moral code superior to another's; fourth, that our own society's moral code has no special standing; and fifth, that it would be arrogant for us to pass judgment on the moral codes of other societies.

If we were to accept the implications of cultural relativism, then we would no longer be able to judge *any* moral practices. There would be no external standard by which to condemn another culture's honor killings and slavery. And there would be no *external* standard by which to judge our own culture's capital punishment and abortion on demand (although we might sometimes be able to say whether or not some practice conforms to "community standards").

Moral progress would become impossible, since there would be no standards by which to judge new ways better than the old.

Michelle M. Moody-Adams has analyzed some of the difficulties with the cultural relativist position. First, without external standards,

we have no basis by which to judge other culture's moral principles as being *equal* to our own. Second, assertions that other cultures are not comparable to ours explain away moral disagreements, denying that moral conflicts between diverse groups are even possible. Third, any argument for relativism relies on intuitions formed by local moral concepts and practices that would themselves be relative, according to this doctrine (Moody-Adams 1997, 14).

Moody-Adams raises a fourth, even more fundamental difficulty, which she calls descriptive cultural relativism:

> Descriptive cultural relativism is the claim that differences in the moral practices of diverse social groups generate "ultimate" or "fundamental" moral disputes, disputes that are neither reducible to non-moral disagreement nor susceptible of rational resolution – disputes, that is, that are in principle irresolvable (Ibid., 15).

Moody-Adams shows why this position is untenable. First, if a moral disagreement was truly fundamental, then it would not even be possible to classify it as moral (Ibid, 16). Second, normative relativism is usually associated with a call for universal toleration, which cannot be shown to be trans-culturally valid (Ibid., 17). Third, cultures are not homogeneous and hermetically sealed:

> No human community – whether a small tribal village or a modern nation-state – is a windowless monad; every such community must, to some degree, face the likelihood of encounters with other communities whose beliefs, values, and practices will face varying degrees of pressure on the calm pursuit of any local way of life (Ibid., 27).

Within a culture, generalizations about moral practices are underdetermined (Ibid., 30). Internal conflicts are the rule and not the exception. Ignoring internal conflict can create a false picture of a community, by denying its complexity. Sometimes, internal conflict carries supreme importance for the culture. A critic may prompt a culture to scrutinize its practices for incompatibilities with the group's deeper commitments. Two thousand years ago in Palestine, an anthropologist could reasonably have supposed that the culture's values were represented by the Roman Empire or by the occupied peoples. It is unlikely that she would have noticed the tiny but growing influence of the Christians.

How can we be sure that differences between cultures are truly irreconcilable? A belief in ethical pluralism encourages us prematurely to quit looking for a common denominator, irrespective of situational meanings.

Anthropologists have surveyed moral behavior around the world and found striking differences. King Darius of Persia noted that the Callatian Indians ate the bodies of their dead fathers, while the Greeks cremated the bodies of their own dead fathers. Neither could bear the thought of adopting the practice of the other (Rachels 2007, 16).

From the mere fact that the Callatians and the Greeks disagreed about the Callatians' practice of eating their dead fathers, it does not follow that neither is objectively right or wrong, that it is merely a matter of custom that varies from one culture to another. It is possible that one group is right, and the other, wrong (Ibid., 20-21).

It also does not follow that this example demonstrates descriptive cultural relativism. The difference in funerary practices may appear to be irreconcilable. But such differences may also present opportunities for broad-minded people to learn from one another:

> The Callatians, according to Herodotus, were "men who eat their fathers" – a shocking idea, to us at least. But eating the flesh of the dead could be understood a a sign of respect. It could be taken as a symbolic act that says: We wish this person's spirit to dwell within us. Perhaps this was the understanding of the Callatians. On this way of thinking, burying the dead could be seen as an act of

> rejection, and burning the corpse as positively scornful (Ibid., 30).

Most people in our culture consider cremation an uncontroversial option, but traditionally, the Catholic Church considered it a pagan practice and a denial of the doctrine of the resurrection of the body. Not until 1963 did the Church accept cremation under some circumstances, and not until 1997 did it allow cremated remains to be present during funeral masses.

Many irreconcilable differences are only apparent. Even if we grant that many moral disagreements are strictly cultural, it does not follow that *all* moral disagreements are strictly cultural. As a moral objectivist, I maintain that some moral principles apply across all cultures. No culture could long survive if it did not care for its young, or if it condoned lying or countenanced murder. The human condition imposes conditions upon our surviving and flourishing. Some, like those noted immediately above, are absolute. Others allow any value within a narrow range, e.g., the age of consent for sexual intercourse. Others allow considerable wiggle-room, e.g., time and place restrictions on public nudity.

Even if we reject the idea of ethical pluralism, we are left with the fact of ethical diversity. In our society, different ethical theories co-exist, with different theories of the good and opposing

recommendations for action. For example, animal rights theories reflect concern for helpless creatures, and demand the abolition of all commercial animal agriculture (Regan 1983, 13-15). Property-rights theories that protect the ownership of animals reflect concern for the choices of property-holders; they deny legal standing to animals, and protect the owners' decisions to raise and slaughter animals for profit. It would be difficult to bridge the differences between these opposing camps. But it would be wrong to assume that they cannot be bridged.

Philosophers and psychologists have attempted to explain opposing moral values. W. D. Ross maintained that moral differences can arise from conflicts between different types of duties, of which he distinguished six: duties of fidelity and reparation, of gratitude, of justice, of beneficence, of self-improvement, and of non-maleficence [sic.] (Ross 1930, 21).

Thomas Nagel maintained that divergent moral principles could arise because there are five distinct sources of value: special allegiances, universal rights, utility, perfectionist ends of self-development, and individual projects (Nagel 1977).

Alasdair MacIntyre pointed out that different cultures do not arrive independently at identical moral concepts. Moral concepts reflect and partially constitute different forms of social life (MacIntyre 1966, 2). These concepts differ from one community to the next, and within

the same community at different times. This will become apparent when we examine the evolution of the word *dominium* over a millennium of Roman Law. Different societies use concepts differently, too. Even when people adopt the same terms, they may not be using them in the same way.

MacIntyre reviewed the abortion debate in the United States. The pro-life side of the debate, relying on a particular interpretation of Christianity, characterizes abortion as murder:

> Murder is wrong. Murder is the taking of innocent life. An embryo is an identifiable individual, differing from a newborn infant only in being at an earlier state on the long road to adult capacities and, if any life is innocent, that of an embryo is. If infanticide is murder, as it is, abortion is murder. So abortion is not only morally wrong, but ought to be legally prohibited (MacIntyre. After Virtue, 7)

But the pro-choice side of the debate, relying on a theory of privacy, casts the issue in terms of individual rights:

> Everybody has certain rights over his or her own person, including his or her own body. It follows from the nature of these rights that at the state when the embryo is essentially part of the mother's body, the mother has a right to make her own uncoerced decision on whether she

> will have an abortion or not. Therefore, abortion is morally permissible and ought to be allowed by law (Ibid).

Each side is reasoning correctly from its premises, but the two sides' premises are incompatible. Attempts to halve the difference, such as proposals to allow abortions up to the point at which fetal brain waves develop, miss the point. The two sides must delve deeper to find common ground.

CHAPTER THREE: ETHICAL EGOISM

Ethical egoism is the theory that everyone should be motivated by self-interest. It differs from psychological egoism, the theory that everyone *is* motivated by self-interest.

Psychological egoism is contradicted every day by self-sacrificial behaviors. From duty, a man donates a kidney to a sister whom he loathes. A woman remains in a loveless marriage for her children's sake. A soldier accepts a suicide mission.

Proponents of psychological egoism would maintain that each of these examples, while appearing to contradict self-interest, in fact affirms it. The kidney donor participates in a scheme of unguaranteed reciprocal organ donation that could one day save his own life. The unhappy wife has made her relationship to her children a higher personal value than her longing for divorce. The soldier accepts his suicide mission because he would rather fight for a world in which his values prevail than accept one in which his values are vanquished. Furthermore, each of these moral agents may, from self-interest, be acting to avoid the pangs of guilt.

The theory of psychological egoism may be unfalsifiable. But just because it is possible to make selfless behavior appear self-interested in any particular instance, does not make it the best explanation of selfless behavior in every instance.

Ethical egoism must also be distinguished from predation, an apparent form of ethical egoism that holds that self-interest can be advanced by lying, cheating, stealing, and murdering. Few ethical egoists condone or engage in such behaviors; therefore, attempts to equate ethical egoism and predation exhibit a fallacy of composition.

Critics of ethical egoism sometimes assume that self-interest inevitably leads to predatory behavior. Plato examined this position in The Republic. Thrasymachus argued that unjust rulers would profit from their injustice by enriching themselves at their subjects' expense. But under Socrates' withering questioning, Thrasymachus was forced to concede that unjust rule leads to hatred, fighting, and civil war, while just rule leads to friendship and common purpose. Furthermore, cheating and stealing undermine the peculiar virtue of the soul, justice, one of whose functions is living (353d). Socrates inferred that a just man would live well and be happy, while an unjust man would live badly and be wretched.

Machiavelli's advice in *The Prince* may also be instructive. Machiavelli began by distinguishing the moral from the practical (a theme to which I will return):

> ….there's such a difference between the way we really live and the way we ought to live that the man who neglects the real to study the ideal will learn how to accomplish his

> ruin, not his salvation. Any man who tries to be good all the time is bound to come to ruin among the great number who are not good. Hence a prince who wants to keep his authority must learn how not to be good, and use that knowledge, or refrain from using it, as necessity requires (Machiavelli 1992, 42).

Machiavelli's Florence was vulnerable to foreign invasion and political intrigue. In the face of such dangers, he maintained that the virtues of statecraft are different from, and may even be opposed to, the virtues of individual Christians. Accordingly, he held that effective rule required the flexibility to employ force, duplicity, and cruelty as required. "To preserve the state, he [the ruler] often has to do things against his word, against charity, against humanity, against religion" (Ibid., 49). A modern form of this argument arises in the debate over the U.S. government's use of torture in order to extract potentially life-saving information from suspected terrorists. Exactly where the Constitution, whose eighth amendment forbids the use of cruel and unusual punishments against convicted felons, authorizes the use of such tactics against merely suspected felons, is a question that seems not to torment proponents of torture.

But to return to sixteenth-century Florence, Machiavelli certainly did *not* recommend that rulers routinely practice unscrupulous

behavior and unrestrained violence. He condemned Agathocles, who became the prince of Syracuse by slaughtering the city's senators and richest citizens:

> "….it certainly cannot be called 'virtue' (virtu') to murder his fellow citizens, betray his friends, to be devoid of truth, pity, or religion; a man may get power by means like these, but not glory" (Ibid., 25).

By glory, in this context, Machiavelli meant reputation as a great ruler.

Machiavelli's advice was not intended to help a prince attain personal happiness. It was intended to help him to rule effectively. The prince would still be accountable to God for his actions. The ethics that Machiavelli encouraged was a duty-ethics, far removed from ethical egoism.

By itself, ethical egoism does not specify what is in a person's self-interest, or how she may obtain it. It says only that a person should be the beneficiary of her own actions. Therefore, ethical egoism is compatible with a wide range of ethical theories and codes of conduct, including Aristotelian virtue ethics, Epicureanism, Stoicism, Spinoza's ethics, and Christian morality practiced in order to secure one's own place in heaven. As an ethical system, egoism can be compared to utilitarianism, which also specifies who should be the

beneficiary of a person's actions, but does not by itself say what will make a person happy.

The egoistic basis of rights has long been conceded. Jeremy Bentham wrote that declarations of rights foster "selfish passions." Karl Marx wrote that "None of the so-called rights of man goes beyond egoistic man…an individual drawn into himself, into the confines of his private interest and moral caprice…." (Marx 1977, 54) More recently, Jeremy Waldron wrote that

> Rights…represent what those who propound them regard as the ineliminable core of self-interest in political morality: our rights are, in a sense, those of individual interests which it would be wrong or unreasonable to require us to sacrifice for the greater good of others. (Waldron).

These quotations posit an opposition between the rights of individuals and the interests of society. Few ethical egoists would make that concession. In agreement with free-market economists since the Scottish Enlightenment, they would insist that society's good is best served by each person's pursuit of his own, individual good.

In *An Inquiry into the Nature and Causes of the Wealth of Nations,* Adam Smith explained how each individual's pursuit of his private good is the surest way to secure the public good:

> It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity, but to their self-love, and never talk to them of our own necessities, but of their advantages." (Smith 1776, 1.2.2).

Smith's philosophy justifies political liberalism, the doctrine that individuals should be left free to pursue the good as they understand it, by whatever means seem best to them. But it is the individuals' own good and not any secondary social good that justifies individual agents' acting on their own behalf.

The compatibility of social and individual goods is not coincidental, of course. As Aristotle observed, human beings are social animals. Self-interest does not imply antagonism towards others. The advantages of cooperation and reciprocation, of friendship and trade, are enormous. In "Nice Guys Finish Last," ethologist Richard Dawkins, drawing on Robert Trivers' analysis of "reciprocal altruism," explained how sympathy and generosity can be advantageous to individuals (Dawkins 1976, 202-233).

Rights protect the acting individual, but no individual is a social atom, isolated metaphysically from other people, like windowless monads. Individuals make their choices on the basis of values that

they have learned from the communities in which they were raised. Their personalities are formed by their relationships with friends, families, peers, and acquaintances. Jan Narveson noted the irony of the metaphor of the social atom. It suggests that people have no effect on one another, which would render social morality meaningless (Narveson 2001, 18). It also suggests that people are indistinguishable, which would make assignment of rights to particular individuals pointless.

My own version of ethical egoism owes more to neo-Darwinism than do other versions that I have encountered (neo-Darwinism is the synthesis of natural selection and Mendelian genetics; it should not be confused with social Darwinism). Neo-Darwinism is the background for my ethics, and not its framework. Human beings are a certain kind of being, and ethics is about human beings living on earth. At some point in evolution, free will supervened. Genetics does not determine what we choose to value. We can set our own goals, e.g., inventing games, creating art, enjoying sex with contraceptives, and exploring distant worlds. Most of these goals have nothing to do with survival or procreation.

This separates my ethical egoism from that of Ayn Rand, an atheist who did not accept Darwin's theory of natural selection, and that of Tibor Machan, whose ethical egoism depends on natural law,

which in turn depends on teleology. Still, I rely on aspects of Ayn Rand's metaethics in the pages that follow:

Rand began by asking not what ethics a person should have, but why a person needs ethics in the first place. She sought an objective foundation for ethics, i.e., one based on the requirements of human beings living on earth, as opposed to basing ethics on the whim of God (divine command theory), or the whim of society (cultural subjectivism), or the whim of the individual (ethical subjectivism), etc.

Rand defined ethics as a code of values to guide a person's choices and actions – the choices and actions that enable a person to set and pursue goals. An ethics is not hardwired; it must be constructed. Rand defined a value as that which someone acts to gain and/or keep. The concept *value* assumes that someone is valuing (just as the concept *dance* assumes that someone is dancing). It also assumes purposeful action.

Unlike non-living matter, living organisms face the constant alternative of life or death. Life, or continued existence, depends upon a correct course of action. To a living organism, actions that promote its continued existence are good; those that threaten its continued existence are bad. Nothing can be good or bad for non-living things; for them, continuation is not an issue.

Only living organisms are capable of self-generated, goal-directed actions. From a sunflower's heliotropism to an amoeba's assimilating nutrients to an eagle's devouring a field mouse, living creatures act to maintain their lives. If they succeed, they survive; if they fail, they die. An organism may propagate its genes without personally surviving, but that is an observation about the prevalence of particular genes from one generation to the next; as a definition of success, it exhibits the pathetic fallacy. In Aristotelian terms, life is the ultimate value, that for the sake of which instrumental values are pursued.

This can be framed as a hypothetical imperative: if we want to live, then we should act to sustain our lives; the choice is volitional. Some people, after all, choose not to live and they commit suicide. Normally, though, people do not commit suicide for the sake of oblivion; they commit suicide as a means to end pain or shame or boredom or some other unbearable mental state, or to achieve the rewards of martyrdom. Suicide itself is not a value; it is the eradication of values. The concept of value has meaning only in the service of life. This is not changed by the fact that some values do not, in the end, serve life.

For those animals possessing it, consciousness is the primary tool of their survival. Just as, empirically, sensation is the first step to

cognition, so psychologically, pleasure/pain is *the first step* (it is not infallible) to evaluation of what is good for an organism.

Plants are not conscious, presumably; the limited range of their responses to stimuli would not seem to require consciousness, and, as Aristotle noted, “Nature does nothing in vain” (Aristotle. Politics 1253a8-9). The goals of plants are automatic and innate. They can draw nutrition from the soil, and use sunlight to power photosynthesis. If plants’ very limited ability to pursue these goals fails them, then they die. Animals have much broader needs, and they can perform a wider range of actions. Their consciousness is proportionate to the range of actions required for their survival. The lower animals rely on sensations: the automatic reactions of sensory organs to stimuli. Their lives depend on positive or negative taxes (automatic movement towards or away from stimuli). If they have rudimentary consciousness, then we may say that their actions are regulated by pleasure/pain.

Sensations are the raw data of empirical experience. Higher animals can retain and integrate sensations into percepts, or awareness of entities, a process that Rand considered passive and automatic. Rand was relying on a Lockean epistemology that was discredited by the Gestalt theorists:

Rather than conceiving of sensory experience as a kind of mosaic of sensations, each correlative to a discrete stimulus, the Gestalt theorists insisted that perception is organized around configurations or ensembles of mutually reinforcing components, which often fail to correspond to individual stimuli an any direct or isomorphic way. Meaningful forms or constellations of this kind are the truly primitive elements in perception, and grasping them is neither the mere passive registration of meaningless input nor unconscious conceptual judgment, but a kind of perceptual intelligence or insight that underlies the application of concepts and inferential reasoning. The holistic structure of experience, which is a function neither of sensation nor of judgment, is evident, for instance, in the context-sensitivity of our perceptions of color and size constancy: seeing or hearing isolated colors and shapes is possible only (if at all) as an abstraction from our ordinary perceptions of natural objects, artifacts, the empty spaces between them, relations, situations, persons, and events. To suppose that we piece such things together from more immediately evident bits of sensory input is to mistake theoretical abstraction for concrete phenomena (Carmen 11).

Rand tried to isolate perception from conceptualization, regarding perception as a distinct stage of awareness. She was correct in denying that animals have conceptual faculties (whether or not

some animals can form rudimentary concepts is irrelevant to the present context). But she was wrong in regarding perception and conceptualization in humans as discrete processes. Our impressions are theoretical entities, linguistically constructed and theory-laden. They are bound up with propositional attitudes that render the act of seeing a cognitive episode involving our framework of thoughts. Even in the mere recognition of things, perception is conceptually and linguistically constituted.

> For we now recognize that instead of coming to have a concept of something because we have noticed that sort of thing, to have the ability to notice a sort of thing is already to have the concept of that sort of thing, and cannot account for it (Sellars 1956, Chapter X).

The earliest modern humans may have shared our capacities for distinction and integration, while relying on symbols instead of words to distinguish concepts. Their ability to concatenate concepts would have been limited, but their ability to negotiate their world would have been vast.

Perception, as Rand understood it, enabled the higher animals to become aware of entities. Their awareness of their environment let them learn such skills as hiding or hunting, but they could not choose their goals or values. She was right in a general way, because

choosing goals requires free will, which in turn depends on the ability to foresee the likely consequences of alternative actions. Non-human animals have not demonstrated this ability.

Alone among animals, Rand continued, humans lack innate knowledge of the requirement of their continuation. They have no automatic knowledge and no automatic course of action. Humans must discover for themselves the things that will sustain or endanger their lives. Alone among animals, humans must exercise their consciousness volitionally.

The distinctive mode of human consciousness is conceptualization. Human survival depends on values derived from conceptual knowledge . A concept is a mental abstraction combining or dividing entities or other concepts. The human ability to make distinctions and integrations is crucial. Concepts enable humans to grasp and integrate unlimited amounts of information. Concept-formation extends much farther than the ability to form simple abstractions such as *table* or *hot*. Conceptualization is a method of using one's consciousness.

> It is not a passive state of registering random impressions. It is an actively sustained process of identifying one's impressions in conceptual terms, of integrating every event and every observation into a conceptual context, of

> grasping relationships, differences, similarities in one's perceptual material and of abstracting them into new concepts, of drawing inferences, of making deductions, of reaching conclusions, of asking new questions and discovering new answers and expanding one's knowledge into an ever-growing sum. (Rand 1964, 20).

This goes beyond conceptualization, but it is an accurate description of thinking and reasoning.

Thinking is volitional. It requires the effort of focusing one's awareness. Humans are free to think or to evade the effort, but they are not free to avoid the consequences of not thinking. "To think or not to think" means "to focus or not to focus." Humans need to bring an *appropriate* level of focus to their activities. This does not mean that we need to bring all of our concentration to bear on the task of brushing our teeth. It *does* mean that we need to bring all of our concentration to bear on a decision to appease or oppose the Nazis. Focused awareness can be a life or death choice. The process is regulated by the sensations of pleasure and pain.

The sensation of hunger won't tell you how to get food or how to distinguish healthy foods from poisonous ones. Pleasure and pain are our guides. We feel good after eating healthy foods, and we feel bad after eating unhealthy or poisonous foods. A process of thought is

required to learn how to plant and grow food, to fashion weapons for hunting, or to build a fire (or to build the Large Hadron Collider). Humans have to initiate this process of thought, sustain it, and correct for errors. Although success is not guaranteed, humans must learn, discover, or produce everything that their lives require. If someone abdicates this responsibility, if he slips into a dreamy haze or relies on other people to do his thinking for him, then he puts his life in the hands of others. He abdicates his independence and he imperils his life.

Humans cannot ensure their survival by arbitrary means, nor by random motions, nor by acting upon blind urges. Guided by pleasure and pain, humans must discover how to sustain their lives. To think or not to think is our ethical imperative. Our environment is our arbiter.

This concludes my discussion of Ayn Rand's meta-ethics, as it influences my theory of rights. The discussion above is indicative, not comprehensive. Still, a commitment to its principles all but dictates some theory of ethical egoism. We humans must discover for ourselves, guided by the sensations of pleasure and pain, the values that will sustain our lives. But my own consciousness is the only one directly accessible to me.

Presented with the same stimuli, your consciousness has different qualia from mine. I am red-green colorblind; you,

presumably, have normal color sense. Most people with my limitation lead their entire lives unaware of it. They may become aware when they are rejected for the police academy or for certain schools of military training. Otherwise, they use the terms *red* and *green* about the same way that you and everybody else does. The problem is not one of private language. It is a problem of common language.

You tell me that you have a toothache, but I must take your word for it; perhaps your claim is only a play for sympathy. However much I may sympathize, your pain remains your own. It cannot tell me whether or not I am living appropriately. Only my own pleasure and pain are accessible to me. Only they can guide me, like a servo-mechanism, towards my goal.

What is good for you may be bad for me, and vice versa. I have heard people complain of "ice cream headaches," but I have never experienced one. I will continue to enjoy cold snacks on hot days, though you perhaps should not. After jogging a few miles, you report your enjoyment of a "runner's high" – a blissful state produced by the release of endorphins in your brain. The same activity would leave me in terrible pain from my arthritic knees. If I were to regard your pleasure and pain equally with my own, then pleasure and pain would cease to guide my survival.

Consciousness is a property of discreet individuals. There is no such thing as a collective consciousness. By collective consciousness, I mean a single consciousness shared by more than one body, not separate consciousnesses working collaboratively. Outside the domain of science fiction, there is no hive-mind. Even the most eusocial creatures, e.g., the order Hynenoptera, are cooperative rather than collective consciousnesses. After worker bees force drones from the hives in autumn, they are indifferent to the drones' deaths from exposure. Thomas Negal asked, "What is it like to be a bat?" We can never know what it is like to be a bat. Neither can you and I know what it is like to be each other.

Individuals may work in concert to achieve common goals, but they can never form any collective consciousness. Groups are reducible to individuals. The law allows natural persons to band together as a legal person for certain purposes, e.g., class action lawsuits, property ownership, or contracts, but this is merely a legal fiction.

I now turn to the thesis that rights are contractual agreements, entered voluntarily by moral agents. As I have contended, this undermines the cherished notion of human rights: the idea that all humans in all cultures have rights, whether or not their rights are respected. It also denies that animals, infants, and the mentally

incapacitated can be rights-holders, though it does not preclude rights-holders from adopting measures on their behalf. These conclusions follow from an understanding of the nature of rights.

Many persons claim that rights emanate from human nature, like extended phenotypes. This is an argument for moral realism. Moral realism states that moral claims, including assertions of rights, are propositions – statements that are either true or false. “Anna has the right to practice any religion she chooses.” This sentence purports to report a fact. If these facts correspond to reality, then the proposition is true. But what facts would have to correspond for this proposition to be true? Apart from positive law or contract, there is no set of facts that could make this a true proposition. Therefore, it is not a proposition at all.

Non-cognitivists and logical positivists deny that moral claims report facts; instead, they say, moral claims report only the emotions, attitudes, and interests of the claimants. Error theorists concede that moral claims report facts, but deny that any of the facts are true.

If our natures entail rights, then what are the facts about our natures that generate these rights? What is it about these facts that compels other people to constrain their actions in respect of these rights?

It has been suggested that our rationality and our ability to suffer provide grounds for rights. Each of these properties raises the nominalist problem. Fetuses, infants, mentally incapacitated adults, and most animals are not rational. Higher animals, including the great apes, cetaceans (porpoises and dolphins), and psittacoses (parrots), may demonstrate rudimentary rationality. Futurists anticipate the Singularity, when the intelligence of computers will surpass that of their human creators. If it is rationality that generates rights, then it will be impossible to delineate right-holders along species lines. Species themselves defy delineation. The earliest humans had more in common genetically with their immediate predecessor species than they have with us. DNA evidence suggests that after humans and chimpanzees diverged from a common ancestor, they interbred for 1.2 million years, producing fertile hybrids (Brown).

Can rights be based solely on an entity's ability to suffer? In his *Principles of Morals and Legislation*, Jeremy Bentham wrote,

> The day *may* come when the rest of the animal creation may acquire those rights which never could have been witholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one

> day come to be recognized that the number of the legs, the villosity of the skin, or the termination of the os sacrum are reasons equally sufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month old. But suppose they were otherwise, what would it avail? The question is not, Can they *reason*? nor Can they *talk*? but, Can they *suffer*? (Bentham 1948, 311).

Bentham's point was not that rights should be extended to dumb animals – Bentham, a utilitarian, would not extend rights even to human beings. Bentham's point was that utilitarianism, which judges the rightness or wrongness of an act by the happiness or suffering that it causes, has no basis for distinguishing between the suffering of a human and the suffering of an animal.

Traditionally, philosophers have been indifferent to, or have denied, the suffering of animals. Thomas Aquinas wrote that God gave people dominion over the animals, to use them however people saw fit. According to Aquinas, cruelty to animals is wrong mainly because it

disposes people to be cruel to one another (Aquinas. 1945, Summa Theologica 11,11,Q.64, Art. 6 and *Summa Contra Gentiles* 111,11,12).

Rene Descartes and Thomas Malebranche argued that animals were incapable of feeling pain; Descartes, because animals are soulless automata; Malebranche, because pain is a consequence of the sin of Adam, from whom people but not animals are descended.

Recently, utilitarian Peter Singer made the capacity to suffer the foundation of his entire theory of rights; by rights, he meant deserving of equal consideration. To Singer, the suffering of animals is so obvious that he devoted only seven pages of *Animal Liberation* to proving the point, and he all but apologized to his readers for his effort: “Readers whose common sense tells them that animals do suffer may prefer to skip the remainder of this section....” (Singer 1990, 10).

Singer offered three arguments. First, he noted that injured animals exhibit the same kinds of behaviors as injured people:

Nearly all of the external signs that lead us to infer pain in other humans can be seen in other species, especially the species most closely related to us – the species of mammals and birds. The behavioral signs include writhing, facial contortions, moaning, yelping or other forms of calling, attempts to avoid the source of pain,

appearance of fear at the prospect of its repetition, and so on (Ibid., 11).

Second, he noted that animals and people have similar nervous systems:

> ...animals have nervous systems very like ours, which respond physiologically as ours do when the animal is in circumstances in which we would feel pain: an initial rise of blood pressure, dilated pupils, perspiration, an increased pulse rate, and, if the stimulus continues, a fall in blood pressure (Ibid.).

Third, Singer offered an evolutionary argument:

> The nervous systems of animals evolved as our own did, and in fact the evolutionary history of human beings and other animals, especially mammals, did not diverge until the central features of our nervous systems were already in existence. A capacity to feel pain obviously enhances a species' prospects of survival, since it causes members of the species to avoid sources of injury. It is surely unreasonable to suppose that nervous systems that are virtually identical physiologically, have a common origin and a common evolutionary function, and result in similar forms of behavior in similar circumstances should operate

> in an entirely different manner on the level of subjective feelings (Ibid.).

Singer leapt to the conclusion, "...there are no good reasons, scientific or philosophical, for denying that animals feel pain" (Ibid., 15).

I am inclined to believe that animals feel pain, but Singer's arguments are not the home runs that he believes they are. Peter Harrison has analyzed Singer's arguments and found them far from conclusive. They are flawed arguments from analogy, relying on similarities between animals and human beings in order to support the claim that animals are conscious.

Harrison found the argument from "pain behaviors" the most intuitive, but the least compelling. Single-celled organisms will withdraw from harmful stimuli, yet few would argue that their simple structures could be conscious. Parent birds sometimes mimic pain behavior, feigning injury to lore predators away from their young. Sick birds often hide their symptoms, lest they appear vulnerable. If someone were to create a robot that led an independent existence, it would be necessary to program it for self-preservation. The robot would engage in apparent pain-behaviors: it would struggle to escape a fire; make noise to summon help to escape a trap, contort its face to

indicate its need for repair. But none of these behaviors would imply consciousness.

Next, Harrison examined the argument from homologous nervous systems. Pain is a mental state, not a physical state, and we do not understand the relationship between the two. Enormous difficulties surround the problem of psychophysical reductionism. Can mental states be reduced to physical states? Can mental states be projected from anatomical and physiological data? Mental states supervene on brain states, but we cannot say with confidence that brain states *cause* mental states, just as we cannot explain downward causation, the ability of mental states, e.g., exercising one's free will, to affect brain states. Our experience of pain is mediated by a complex network of the neospinothalamic projection (motivational aspects of pain), and the neocortex (overall control of sensory and motivational systems), and we share the latter structure only with other primates. Still, Harrison argues, it would be rash to try to predict the mental states of animals based on the presence or absence of certain structures, given our ignorance of the brain-mind connection. Consider the documented abilities of hypnosis and placebo drugs to block pain, and the presence of phantom pain in amputees. The presence or absence of certain organs and stimuli are not sufficient conditions to allow us to predict mental states.

Mental states may arise in the absence of appropriate structures. The brains of birds lack the visual cortex on which human sight depends, yet hawks have eyesight eight times sharper than ours. Other structures in their brains serve the same purpose as our visual cortex. But on the theory that similar organs yield similar mental experiences, we have no reason to suppose that birds' visual experience is anything like ours.

John Lorber studied a number of individuals with hydrocephalus, a congenital defect resulting in the absence of the cerebral cortex, the part of the brain that is most distinctly human. In his 1980 paper, "Is Your Brain Really Necessary?," Roger Lewin quoted Lorber's description of one individual:

> There's a young student at this university (Sheffield University) who has an IQ of 126, has gained a first-class honors degree in mathematics, and is socially completely normal. And yet the boy has virtually no brain...When we did a brain scan on him, we saw that instead of the normal 4.5 centimeter of brain tissue between the ventricals and the cortical surface, there was just a thin layer of mantle measuring a millimeter or so. His cranium is filled mainly with cerebrospinal fluid (Lewin 1980, 1232).

Apparently, other structures in the brain took over the functions normally performed by the cerebral cortex. Cases like this demonstrate how poorly we understand the relationship between brain structures and consciousness. Would it not be arrogant then, to attempt to affirm animals' putative mental states based on the structures of their brains and nervous systems?

Next, consider the phenomenon of blindsight. The visual or striate cortex is believed to be necessary for human vision. Individuals who suffer damage to this area of their brains typically lose part of their visual fields. Experimenters presented simple shapes to a patient's blind field of vision. Though the subject denied being able to see anything, he could consistently describe the shape of each object and point to it. Each time, the patient believed that his correct response was a lucky guess. Blindsight shows that there may be non-conscious experiences to which we can respond with the appropriate behaviors. Blindsighted individuals can learn to respond as if they can see, even though they have no conscious experience of seeing. This means that animals might respond to stimuli as if they were conscious of them, when they are not. Animals with no conscious experience of pain might still respond with the appropriate pain behaviors.

As Thomas Nagel showed in his paper, "What is it Like to Be a Bat," the subjective experience of other creatures is forever

closed to us. We can imagine what it would be like if *we* were bats: hanging upside down, eating mosquitoes, etc., but we can never imagine what it is like for a bat to be a bat.

For if the facts of experience – facts about what it is like for the experiencing organism – are available only from one point of view, then it is a mystery how the true character of experience could be revealed in the physical operation of that organism" (Nagel 1974, 442).

It would seem that we have no scientific or philosophic basis for asserting that animals feel pain. Harrison rightly points out that this is a much weaker claim than asserting that we have strong reasons for asserting that animals do not in fact feel pain. Why would pain have adaptive value for human beings but not for their evolutionary cousins?

Pain is a mental state and mental states require minds. Human beings need minds in order to make choices, i.e., to exercise their free wills. Animals, on the other hand, are not moral agents: they have no responsibility for making choices. Pain is a factor that humans must consider when they decide on a particular course of action. Humans will bear pain if they have good reasons for doing so. But animals, unable to foresee the consequences of their actions and unable to choose, will never find reasons for bearing pain. Animals' awareness of

pain is unnecessary. They may respond to stimuli such as burning without the mediation of consciousness. Their hardwiring may suffice for their needs.

Am I saying that animals cannot suffer? No, I am agreeing with Nagel that the question is unanswerable *in principle.*

If we accept pain behaviors as proof of mental states, then we will soon be obliged to ascribe mental states to robots programmed to exhibit pain behaviors. I recall the introduction in the 1960's of children's dolls that "cried real tears." Today, computers with artificial intelligence can beat the best human chess grandmasters at their own game. Soon, robots will be programmed to cry and moan in heartrending fashion, and their "crocodile tears" will be all but indistinguishable from our saline ones. Futurist Ray Kurzweil has predicted that computers will be able to pass the Turing Test, indicating that their intelligence is indistinguishable from that of humans, by the end of the 2020's. If we set the legal precedent that pain behaviors are sufficient to ascribe rights to animals, then we will find it very difficult to deny rights to robots whose consciousness most people will deem highly unlikely.

CHAPTER FOUR: A HISTORY OF RIGHTS

I have considered the question of animals suffering at some length, because one so frequently encounters suffering as a proposed foundation for rights. But rights as I have defined them would be meaningless to animals that cannot conceive alternatives and consequences, or to robots that are indifferent to their own continued existence.

Memes are units of culture. Richard Dawkins first suggested thinking of culture as units in his 1976 book, The Selfish Gene. Dawkins had noticed that cultural ideas such as religious beliefs, melodies, catch-phrases, fashions, and technological innovations replicate themselves in ways analogous to genetic replication, only much faster. Memes evolve by natural selection, undergo mutations, and compete with other memes for our attention and their continuation. They replicate or spread through the behaviors that they induce in their hosts.

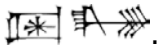
Some memes prosper in the memes marketplace, while others do not. That is, some memes propagate less successfully than others and become extinct. Some memes propagate extremely well but have short lives. Nowadays, hardly anyone remembers “who shot J.R.”, but the identity of the shooter of a fictional television character generated intense speculation for months in 1980. Some memes propagate well

and have extremely long lives, e.g., the golden rule. Some memes, such as agricultural irrigation, have great survival value, while others, such as suicide bombing, propagate despite being fatal to their hosts.

Darwinism itself is a meme that has evolved considerably. Since its introduction in 1859, *The Origin of Species* went through six editions, and its basic ideas were developed in Darwin's *The Descent of Man, The Expression of the Emotions in Man and Animals* (two editions each), and other works. Darwinism has been combined with Mendelian genetics and population genetics, and it is explained and reinforced by our growing understanding of DNA and its mechanisms.

Rights are memes. From my opening page, I have asserted that rights confer enormous advantages on societies that adopt them. For this reason, we would expect rights to appear again and again, in many times and places, just as evolutionary biologists believe that the eye has evolved independently in nature more than forty times. Why then, have rights flourished in modern western societies while they have withered almost everywhere else? The answer is that, just as genes express themselves only in combination with other genes, memes express themselves only in combination with other memes, only some of which are supportive and compatible.

Rights had many "false starts." I will describe two. Historian Stanley Noah Kramer wrote that the earliest written reference to

freedom is the twenty-fourth century B.C. Sumerian cuneiform symbol *amagi* or  .

The economy of the Sumerian city-state of Lagash was based largely on private enterprise: artisans and craftsmen, farmers and fishermen, herders and traders, and so on. Over time, the populace came to be victimized by voracious tax collectors, who demanded ever-greater tribute before allowing the citizenry to go about their business. Government bureaucrats also appropriated temple land without recompense. A Lagashian wrote,

> The inspector of the boatmen seized the boats. The cattle inspector seized the large cattle, seized the small cattle. The fisheries inspector seized the fisheries. When a citizen of Lagash brought a wool-bearing sheep to the palace for shearing, he had to pay five shekels if the wool was white. If a man divorced his wife, the *ishakku* got five shekels, and his vizier got one shekel”.... Even death brought no relief from levies and taxes. When a dead man was brought to the cemetery for burial, a number of officials and parasites made it their business to be on hand to relieve the bereaved family of quantities of barley, bread, and beer, and various furnishings. From one end of the

> state to the other… There were the tax collectors (qtd., Kramer 1959, 47-48).

Sadly, this description of a kleptocracy is all too familiar. The twenty-fourth century B.C. chronicler could be describing twenty-first century A.D. Cameroon, among many other countries.

Again according to Kramer,

> “The citizens of Lagash were conscious of their civil rights and wary of any government action tending to abridge their economic and personal freedom, which they cherished as a heritage essential to their way of life” (Ibid., 46).

Kramer, writing in 1959, probably did not appreciate the extent to which his terms were theory-laden, that is, dependent on specific political theories that would not evolve until millennia after the disappearance of Lagash.

Regardless, the Lagashians overthrew the old Ur-Nanshe dynasty and installed a new ruler, Urukagina. Urukagina restored justice to the people. He removed the inspectors of the boatmen, of the cattle, and of the fisheries. He removed the inspector who had collected money when sheep were shorn, and he halved burial costs. When a man divorced his wife, he no longer owed anything to the *ishakku* or vizier.

Urukagina undertook other social reforms, and he rid the city of criminals. Under his enlightened rule, the people of Lagash prospered ... for a while. But Urukagina's reforms did not long survive him. They were dependent on one man, bereft of supporting institutions.

In the third century B.C., a remarkable king came to power in India. Ashoka was born around 304 B.C. He became the third king of the Mauryan dynasty when he emerged victorious from a two-year war of succession that claimed the life of at least one of his brothers. Eight years later, in 262 B.C., he attacked and conquered neighboring Kalinga. Afterwards, horrified by the bloodshed that he had caused, Ashoka underwent a profound change in his personality. He renounced violence and converted to Buddhism. For the rest of his life, he devoted his reign to the material and spiritual welfare of his people, and he applied Buddhist principles to the administration of his empire.

Ashoka's principles of government and individual morality have been preserved on rocks and pillars at more than thirty locations in India, Pakistan, Nepal, and Afghanistan. Ashoka's edicts regarding government are mainly attempts to explain and justify his reforms. He tells his subjects that he regards them as his children. He apologizes for the Kalinga war, and assures neighboring states that he harbors no expansionist ambitions. Despite his enthusiasm for Buddhism, Ashoka

became the greatest champion of religious toleration that the world would know until Voltaire in the eighteenth century.

Ashoka reformed the judiciary, making it less harsh and less arbitrary. He issued stays of execution to allow condemned persons to file appeals. He undertook a series of public works projects, including the importation and cultivation of medicinal herbs, the digging of wells along main thoroughfares, and the planting of fruit and shade trees. He made *ahimsa* (non-harm) a cornerstone of his administration, and extended its concern to animals. He forbade sport-hunting and the branding of domestic animals, and he established wildlife reserves.

Ashoka's edicts regarding individual morality encourage respect towards parents and elders, teachers and friends, servants and ascetics. He encouraged generosity to the poor, to ascetics and Brahmins, and to friends and relatives. He encouraged moderation in saving and in spending. He taught that treating other people well was more important than performing rituals for good luck. Reflecting his deep spirituality, he extolled kindness, self-examination, truthfulness, gratitude, purity of heart, enthusiasm, loyalty, and self-control (Dhammika 1993, 1-5).

Ashoka was a great and admirable ruler. Aside from the edicts – all recently discovered or recently interpreted – little is known about his historical reign. We do know that Ashoka's enlightened policies

were not maintained. Emerson wrote that “institutions are the lengthened shadows of great men,” but at high noon, shadows are short. In the absence of supporting institutions, great rulers like Urukagina and Ashoka come and go, but seldom leave their marks upon history.

What types of institutions create a climate hospitable for rights? Precursors of rights sprouted at different times and places, as they did in Urukagina’s Lagash and in Ashoka’s India, but rights first took root in the Roman Empire and spread from there. A number of factors conducive to rights were present, and they were not jointly sufficient. The customs and practices to which I refer were these: the protection of property, the right to make contracts, the enforcement of contracts, the stability of the laws, and limitations on the power of government. An additional factor, equality before the law, was restricted to certain classes, but was transformative within those classes.

The protection of property is a necessary condition for rights. Property, e.g., food, shelter, and clothing, is required for our short-term survival. Property also lets us enjoy the advantages of trade. Contracts allows us to undertake long-range projects, while the enforcement of contracts lets us rely on the representations of others. The stability of laws allows us to commit only the resources necessary for projects, without setting aside large contingency reserves.

Limitations on the power of government allows us security in our persons and possessions. Equality before the law means that legislators and regulators are subject to the same laws that they impose on others -- a disincentive to the enactment of unfair or punitive laws. It also means that class or social stature should not affect litigation (an ideal that has never been fully realized).

These factors are neither all-inclusive nor comprehensive. The commentary on each could fill many library shelves…and does. But the list indicates why some states were more conducive to the development of rights than others.

Consider Lagash before Urukagina. There was no freedom of contract; coercive monopolies were awarded by the state. Enforcement of contracts depended on bribery. Property was subject to outright confiscation. The laws were unstable; the bribes or “fees” demanded by bureaucrats were capricious. There was no equality before the law; justice in the courts depended on class, caste, and freeman status. Limitation of the authority of government is a modern complaint, perhaps related to technology, but the Lagashian state repressed its own people as fully as it could.

A history of rights follows. Its purpose is two-fold: to provide a deeper understanding of the meaning of rights, and to show that each stage in the development of rights was driven by self-interest.

Our concept of rights can be traced to Roman law. Two concepts are critical to our understanding of the early evolution of rights: *dominium* and *ius*, usually translated as property and right, respectively. Over centuries, *dominium* came to be regarded as another type of *ius.* It also came to represent different incidents of ownership, for example, property subject to term limits, and property subject to restricted transmissibility. The terms *dominium* and *ius* being theory-laden, usage also changed to reflect evolving political theories. For these reasons, according to Richard Tuck, although the denotations of *dominium* and *ius* were stable for two millennia, their extensions changed:

> It was clear that what were classed as *iura* altered, but *prima facie* it looks as if that was because the meaning of *ius* within a narrower section of the theory remained relatively stable that its extension could change. For its extension not to have changed, *would* have implied a change of meaning. But by the end of the period, we have *ius* being used in a way that might lead Villey reasonably to regard it as meaning a right, while in Gaius's work we certainly do not. This reveals graphically the impossibility of talking about the meaning of a word, or about a concept, detached from the theories which are actually putting the word or concept to use (Tuck 1979, 12).

Originally, *dominium* expressed the view that a man's home is his castle, that he had complete sovereignty over his land, his slaves, his herds, his wife, and his other property. *Dominium* did not depend on anyone's agreement or permisssion. The Romans considered *dominium* the natural order of things.

Of course, every culture considers its ways the natural order of things. The Romans did not appreciate their own sophistication. Respect for property requires a belief in justice in acquisition, justice in transfer, and the rectification of justice in holdings. It requires accepted procedures for staking claims, and non-violent ways for resolving disputes. An egoistic approach to property is not the default position across societies and across centuries. Furthermore, it incorporates a component of passive rights. David Lyons distinguished active rights from passive rights. An active right is one's right to take action, without anyone's permission. A passive right is the right to be given something, or to act by someone's consent. For example, your right to walk down the street requires my non-interference.

In the seventeenth century, Samuel Pufendorf suggested that having a right meant nothing except that the right-holder was the beneficiary of someone else's duty, and that all propositions involving rights could be reduced to propositions solely involving duties. But

according to this formulation, how could anyone ever stand on her rights, or insist that they be respected (Ibid., 3)?

In the twentieth century, H.L.A. Hart proposed that a right-holder's actions imposed duties upon others. According to Tuck, any theory that emphasizes active rights will tend to support individual sovereignty and liberty. Any theory that stresses passive rights will tend to dismiss liberty and assign to other people duties to provide others with options, food, and clothing (Ibid., 6-7).

Theories that emphasize passive rights assign all of the heavy lifting to duties, and none at all to rights. They make the language of rights superfluous and the concept of rights dispensable. If rights have any rightful place in human affairs, then it will be in the realm of active rights (Ibid., 3).

It is significant that dominium implied property rights. John Locke wrote that "every man has property in his own person" (Locke 1993, 128) In the mid-twentieth century, C.B. Macpherson noted the possessive character of rights, in which men were conceived as owning their liberty and other moral attributes; this may be seen in the works of Thomas Hobbes, Michael Harrington, and John Locke. More recently, Murray Rothbard argued that all rights are reducible to property rights.

In *Power and Market: Government and the Economy*, Rothbard explained his view that "there are no rights but property rights"

(Rothbard 2002, 176). Rothbard reasoned as follows. First, everyone owns himself. Second, the exercise of all individual rights depends on property rights.

Consider freedom of speech. Where does a person have freedom of speech? Certainly, she does not have it on property on which she is trespassing. She has it only on her own property, or on the property of someone who allows her to speak there. There is no separate right to free speech; there is only a person's right to do as she wishes on her own property, or her right to make voluntary agreements with other property holders.

Now consider freedom of assembly. Where does a person have freedom of assembly? On the public streets, the police must balance assembly permits with the need to maintain traffic flow. Two groups with different purposes are contending for the same resource, and the government has no good way to decide whose will should prevail. Rothbard's answer was that the streets and all other property should be privately held. Whoever owns the streets can decide their use. This would avoid all conflicts (Ibid., 176-177).

I do not endorse Rothbard's position, though I find it intriguing. The concept of self-ownership is problematic. The infinitive "to own" is transitive. I can speak of jumping over a dog, but can I speak of jumping over myself? I can combine the words easily enough, but I

cannot form the image or idea. Rothbard may be right, but his position entails commitments that I am not yet prepared to make.

Let us resume our review of Tuck's *Natural Rights Theories*. The term *ius* is the root of the English word justice. *Ius* had multiple meanings, but it primarily meant a claim by one person on another, leaving superiority with the person who had *dominium*. A paradigm example might be a usufructuary such as a sharecropper, who was entitled to the proceeds from most of his crops, despite his not owning the land that he farmed. Not all such claims had concomitant responsibilities; for example, a boy had an *ius* to be fed by his father.

The term *ius* was also used by the early Romans to describe the verdict rendered when the gods favored one disputant over another in a trial decided by supernatural means (chance). This meant that the verdict was objectively right, and that the objectively right was discoverable (Tuck 1079, 8).

It is extremely important to understand the difference between objective right and subjective right. Something is objectively right if it should be the case, whether or not it actually *is* the case. For example, it is right that women are never abused, whether or not it is the case that women are never abused.

Subjective right is very different. It means that an individual has a right to take an action or to claim something as his property. The

terms objective right and subjective right are misleading, because they suggest that objective right refers to an existing state-of-affairs, while suggesting that subjective right is in the eye of the beholder. But the terms mean something different. William A. Edmundson explained,

> The "subject" in subjective rights is the right-holder, not the right-*be*holder. And the object in objective rights is not any particular object – natural, material, or otherwise – but is, if anything, the global object of a moral assessment or prescription (Edmundson 2004, 10).

The Romans, for all that they achieved in legal theory, never formed the concept of subjective right.

Another meaning of *ius* was an agreement between households regarding shared services, easements, etc. *Dominium* did not depend on anyone's agreement, but *iura* (the plural of *ius* with respect to rules) were agreements. The connection of *iura* to private, bilateral relations would continue for centuries (Tuck 1979, 9).

In the later Roman Empire, all property came to be interpreted as consisting of bilateral relations between the Emperor and his citizens. *Dominium* lay with the Emperor, and everyone else's property rights became *ius*. It was in this way that the definiens of each term could remain the same, while the extension changed.

While *dominium* became a kind of public *ius*, *iura* became quasi-public; things possessed by virtue of one's relationship to the state

came to resemble modern rights *in rem*. The end of the succession of Emperors in the west cut off the vocabulary from its roots (Ibid., 12).

In the twelfth century, legal scholars attempted to reconcile the legal language of the vulgar law of the late Empire and the Germanic kingdoms with the language of the newly-discovered Digest, a fifty-volume work of jurisprudence issued in the sixth century by order of the Eastern Roman Emperor Justinian (Ibid., 13).

The medieval scholars regarded all rights as claims or *iura*. Justice consisted in respecting the rightful claims of others, and assigning to each his due. An *ius ad rem* was a claim against people who had the power to allocate the benefit claimed. *Iura in re* covered situations in which someone already had possession of something. Even dominium was a kind of claim: a claim to total control against the whole world.

In the thirteenth century, Accursius distinguished *dominium directum*, which a lord possessed, from *dominium utile*, which a usufructuary possessed. Now, *dominium* meant any right *in re*: any right which could be defended against all other men, transferred, alienated, i.e., any property right and not just the right of ultimate control. All of a man's rights came to be seen as property rights. The complexity of feudal relations had reached the point at which there

was a hierarchy of *domina*. It had to be defended or *dominium* would mean nothing.

Dominium had been regarded as man's natural state, but jurists now questioned whether men might naturally have *dominium* over other men (slavery) and goods. In the *Decretum*, Gratian wrote,

> The *ius naturale* is common to all nations; it is what is received everywhere by natural instinct, and not by any convention. It includes the union of men and women, the bringing up of children, common possession of everything (*communis omnium possessio*) and freedom for everyone (qtd., Ibid., 18).

Slavery was considered a product of the *ius gentium*, men's agreement to what they found mutually advantageous. *The ius gentium* lay behind wars, national divisions, private property, land divisions, and commerce.

Under the theory of the *ius naturale*, all men originally possessed everything in common, there was no *dominium*, and men possessed at best usufructuary rights.

The difference between *dominium* and *iura* may be illuminated by A. M. Honore's twentieth century analysis of ownership. The liberal concept of full ownership comprises eleven incidents, none of which

Honore considered necessary to ownership, though he found them collectively sufficient.

The incidents of ownership are as follows:

1. "*The right to possess*, viz., to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests" (Honore 1961, 113).
2. "*The right to use*…refers to the owner's personal use and enjoyment of the thing owned" (Ibid., 116).
3. "*The right to manage* is the right to decide how and by whom the thing owned shall be used" (Ibid., 116).
4. "*The right to the income*…(fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing personal use of a thing and allowing others to use it for reward" (Ibid.,117).
5. "*The right to the capital* consists in the power to alienate the thing and the liberty to consume, waste, or destroy the whole or part of it" (Ibid., 118).
6. *The right to security* is the owner's ability "to look forward to remaining owner indefinitely if he so chooses and he remains solvent" (Ibid., 119).

7. *The incident of transmissibility* is the owner's ability to transmit his interest to his successors and so on *ad infinitum* (Ibid., 120).
8. *The incident of absence of term*. "Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live for ever, he would…be able to continue in the enjoyment of them for ever" (Ibid., 121-22).
9. *The prohibition of harmful use*. An owner's liberty to use and manage the thing owned…is subject to the condition that uses harmful to other members of society are forbidden" (Ibid.,123).
10. *Liability to execution* is "the liability of the owner's interest to be taken away from him for debt either by execution of a judgment debt or on insolvency" (Ibid.,123).
11. R*esiduary character*. "An owner has a residuary right in the thing owned." Whenever an interest right less than ownership terminates, corresponding rights vest in another person, typically the owner. For example, when a lease expires, the lessee's rights revert to the owner (Ibid.,123).

A mature legal system like ours accommodates all these incidents of ownership, but the system developing in medieval Europe struggled to identify the principles involved. Legal scholars recognized that ownership was more complicated than the right to use or dispose of something.

Just as the concept of subjective rights was beginning to take hold in the late thirteenth century, the Franciscan order of priests launched a formidable assault on property or *dominium*. The leaders of the Franciscan order proposed a systematic doctrine of apostolic poverty that would allow the priests to use the commodities necessary for their daily lives without claiming that they had *dominium* in them. The Franciscans considered alienation or exchange relationships essential to property.

According to the Franciscan Duns Scotus, when mankind was still in a state of innocence, everything was held in common, not as joint *dominium*, but as *dominium utile*, the right of a person to use only as much as he or she needed. *Dominium* would have allowed property owners to deny necessities to the poor, perhaps by violence (Tuck 1979, 21).

The stakes were high. If it were possible for some persons to live in a state of innocence, then it might be possible for all.

Pope John XXII responded in his bull *Quia Vir Reprobus*. He compared God's *dominium* over the earth to man's *dominium* over his possessions. Adam, before Eve's creation, had *dominium* over temporal things, even with no potential trading partners. According to the Pope, property is natural, inescapable, and sanctioned by divine law. He also wrote that consuming things implies property rights.

William of Ockham replied, in his *Opus Nonaginta Dierum*, that *dominium* was a product of positive law, meaningless unless enforceable by the courts, and that, as a product of human institutions, *dominium* could not have been available to natural man. Natural man had only the *ius utendi*: *ius naturale* to use commodities as seemed necessary (Ibid., 23). William's case, granting natural man *iura* but not *dominium* over material things, was unconvincing.

The result of this debate was that men, living as isolated individuals, had control over their lives that could best be described as *dominium* or property. It was not the product of social agreements or civil law. Rather, it was a basic fact about human beings, a fact on which their social and political relationships rest (Ibid., 24).

Richard Fitzralph of Armagh, writing in the 1350's, challenged the Pope's position from a different angle. If God permitted men to share in his *dominium*, he reasoned, then he did so out of his grace. *Dominium*, then, was founded on grace. Therefore, only men in God's grace could partake of *dominium*. Sinners, having forfeited God's grace, also forfeited earthly *dominium*.

Pierre D'Ailly replied that sinners could have *dominium* because the sort of grace involved was the same kind retained by an ungodly priest administering the sacraments. It was not the sort of grace

required for personal salvation; instead, it was ministerial grace (Ibid., 25).

Jean Gerson, in *De Vita Spirituali Animae* in 1402, declared that *ius* was a dispositional faculty, an ability appropriate to someone in accordance with right reason.

> An entity has *iura* equivalent to those positive qualities which constitute its identity and therefore its goodness. In this way, the sky has the *ius* to rain, the sun to shine, fire to burn, a swallow to build its nest, and every creature to do what is naturally good for it. The reason for this is obvious: all these things are appropriate to these beings following the dictate of the divine right reason, otherwise, none of them would survive. So man, even though a sinner, has a *ius* to many things, like other creatures left to their own nature (qtd. By Tuck 1979, 26).

In describing *ius* as a faculty or ability, it became possible for *ius* to subsume liberty, itself long regarded as a faculty. When God withdrew grace from a sinner, he did not withdraw the sinner's ability to do things consistent with his physical nature. Why, then, should we assume that God would withdraw *iura*? (Ibid. 27).

Tuck called Gerson's theory "the first fully fledged natural rights theory" (Ibid., 25). It merged the categories of *ius* and *dominium*. *Ius*

was simply the *dominium* to use something: private property was natural. Even one's own liberty could now be regarded as a kind of *dominium* or property. This is the root of later efforts to define and defend the concept of self-ownership.

During the Renaissance, humanist lawyers concerned themselves not with natural rights, but with human law and civil remedies. They contrasted civilized life, which they associated with cities, to the rude and barbaric life that, they believed, characterized pre-civilized life. This picture of early man would influence Hobbes' conception of the state of nature. The humanist lawyers were contemptuous of nature and its "lessons" (Ibid., 33-34). Their opinion was incompatible with the idea of natural law teaching the necessary precepts of morality to all men.

It was the power of eloquence, they believed, that delivered man from brutish state-of-nature to a cultured existence. It is eloquence, they taught, that founds cities, helps people defend themselves, restrains the violent, pacifies the tumultuous, and safeguards justice and the laws of cities (Ibid., 33-34).

They believed that the *ius naturale*, common to all animals, offers only limited instruction. Bartolus conceded the *ius naturale*, but he divided the *ius gentium* into two kinds. First, there were the *gentes* brought into being by reason, without agreement, e.g., the obligation

to keep promises. Second, there were the *gentes* brought into being by agreement, e.g., wars, imprisonment, servitude, and *dominium*. All real moral relationships were products of civilization (35).

Under the *ius gentium*, disputants could rely only on the arbitrary decisions of kings. For this reason, the *ius gentium* gave way to the *ius civile*. Everything was regulated by settled laws.

In 1540's, Francois Connan explained that the *ius naturale* relates property to the solitary man. But man's social nature has led him to associate with ever-wider groups of people, and eventually to discover the advantages of the division of labor and trade. Commerce depends on certain moral traits: fostering justice, honoring one's contracts, refraining from harming anyone, honesty, etc. This is the *ius gentium*. Whereas *ius naturale* relates to man as an animal, the *ius gentium* relates to man *qua* man, rational and wise, and fully involved with other men (Ibid., 37).

> It was inevitable that civil law would develop, through a process of cooperation. Mario Salamonio defined civil law as a contract of the people. Laws or social contracts are necessary for the survival of a society; it therefore made no sense to allow anyone to threaten that society from within. Any prince who stepped outside the law and

behaved tyrannically could be deposed or killed (Ibid., 38-39).

Developments like these left no room for the theory of natural rights. The humanist jurists reverted to the belief that nature did not give early man *dominium* in anything, only possession for the sake of use (Ibid., 40).

Charles du Moulin rejected Bartolus's idea of *dominium utile* and suggested that the usufructuary has *dominium* in the role that he plays, but not in the land itself, because no one can have *dominium* of something in which he has usufruct (41).

Francois Hotman accepted the ideas of *dominium directum* and *dominium utile*, but distinguished between the ideas of natural and *civile dominium*. Natural *dominium* is *dominium* under the *ius gentium*: every man has the ability to acquire and control property, while *civile dominium* is unique to the Roman people. Hotman believed that the best way to determine what was conferred by *the ius gentium* was to see what people everywhere had in common in their complex, conventional social relationships (Ibid., 41).

Calvinistic humanism was infused with a strong sense of God's imminence. George Buchanan maintained that man left the state of nature because God told man to do so; therefore, man's political nature is a gift from God. Hugo Grotius' impious hypothesis would later

address this concern. The Calvinists also believed that it was right for people to overthrow tyrants (Ibid., 43).

The Calvinists were not trying to propound any theory of natural rights. They were retreating from theories of natural law and natural rights. Their concern was not rights but human law (Ibid., 44).

Aristotle had distinguished between two branches of justice: distributive and commutative. Distributive justice governs things that are divided among the members of a political community: wealth, honors, etc.; they should normally be distributed according to merit. Commutative justice governs private transactions and exchanges; trade should benefit both parties.

The medieval scholastics, weighing Aristotle's ideas on justice, assumed that the distribution and exchange of *dominium* was important to both distributive and commutative justice. The sixteenth-century Catholic Spanish scholastics thought that *dominium* was important only to commutative justice. The Protestant Aristotelians, though, thought that *dominium* was important to both kinds of justice. They considered commutative justice an extension of distributive justice; they thought that it consisted of principles whereby exchange could lead to a fairer distribution of goods. They did not concern themselves with rights, and did not regard *dominium* as something that determined just distribution. For them, *dominium* was simply a

social convenience. This effectively severed the bond between Aristotelianism and rights (Ibid., 45).

Both the Catholic and Protestant Renaissance theologians were more interested in objective law than in subjective rights. Gerson and Summenhart had conflated *dominium* and *ius.* Francisco de Vitoria tried to dismiss their subjectivism with now-familiar arguments. First, in *Comentarios a la Secunda de Santo Tomas*, he wrote that a son has an *ius* to food, against his father, since he can sue him if he is denied food, but he doesn't have *dominium* over his father.

Second, he argued that persons who have legitimate possession have a kind of *ius* without necessarily having *dominium*. If someone takes something from a usufructuary, he pointed out, that is regarded as theft, even though the usufructuary lacks *dominium* (qtd. In Tuck 1979, 47). The Spanish Dominican Domingo de Soto agreed with Vitoria, equating *ius* with justice: superior to *dominium*, and with wider reference (Ibid.).

Attempts to synthesize Thomism and humanism encountered problems in discussions of natural *dominium*. Aquinas' theory of natural *dominium* depended on the concept of *dominium utile*. De Soto's/ idea of *dominium* was a person's *facultus* and *ius* in something, allowing the person to possess and use something to his benefit, subject to legal restrictions. He distinguished *dominium* from usufruct

mainly by ascribing to *dominium* the right of alienation. This left usufruct an obvious form of *dominium*: it was simply a legal way of possessing and using property.

Aquinas had taught that man by nature possessed certain limited rights, especially the right to use the bounty that he found. The humanists were convinced that man by nature was brutish, without rights or property. The source of property, they believed, was God's laws, not His grace, and that the analogy to God's *dominium* over his creation was invalid (48-49). Thomism and Renaissance humanism were incompatible.

The Dominicans tried to reconcile the two anyway, by emphasizing the limited character of man's natural rights, and their subordination to divine and human law.

For de Soto, *dominium* was a person's *facultus* and *ius* in something, letting the person possess it and use it to his benefit, subject to legal restrictions.

The Dominicans emphasized limitations on what men were free to do. The Gersonians maintained that men were free to enslave themselves, but for them it had been an academic issue. Not so for the sixteenth-century Spaniards, for whom the enslavement of black and red people was of immediate concern.

The circumstances of African enslavement were unknown to the white slave traders, who found the slaves already captured and available for trading on the coast. They chose not to inquire how the slaves had come to their wretched lot.

Luis de Molina was a champion of free will. He held that men have the right to sell themselves into slavery, and he saw no reason to suppose that the “Aethiopians” had not all volunteered for enslavement. It is ironic that many of history’s greatest proponents of subjective rights justified the institution of slavery, implicitly or explicitly.

To the Gersonians, liberty was a form of property, subject to exchange like any other. To the Vitorians, liberty was too precious to be traded for anything short of life itself. Without knowing the grounds for the slaves’ servitude, they maintained that the slave trade could not be countenanced (Ibid., 49).

The Dominicans were more concerned with men’s welfare than with men’s liberty; more concerned with distributive justice than commutative. Their discussions centered on fair distribution, and on the claims of the needy on those better off. They were returning to a claims-right theory opposed to the subjective rights of the Gersonians.

Hugo Grotius was born in the Netherlands in 1583, a product of the humanist, Calvinist, and Aristotelian traditions. His early work was

premised on the adage, “What God has shown to be his will, that is law” (qtd. in Tuck 1979, 59). He believed that we could infer God’s will from man’s natural sociability. Any stable society requires distributive and commutative justice. But he believed that commutative justice relied on a notion of the good determined by the individual trader. As Aristotle explained, “Whatever each person’s understanding has ruled for him regarding a given matter, that to him is good” (qtd. in Tuck 1979, 60). Therefore, each person is the best judge of his own good, and is entitled to act accordingly. Liberty in regard to actions is equivalent to *dominium* in regard to material things (Ibid).

Grotius believed that the meanings of *dominium* and common possession had changed since the state of nature. In Grotius’ time, *dominium* meant possession of something uniquely one’s own, and common possession meant possession shared by several parties, to the exclusion of other parties – what we today might call corporate private property. But in the state of nature, common possession meant unowned property, and *dominium* included the right to use such property (Ibid., 60-61).

In the state of nature, there was no natural *dominium* identical to later civil *dominium*. But something similar to property rights did exist in the apportionment of food and clothing for consumption. Once distributive justice has been applied and you have received your daily

cup of rice for your personal consumption, it's yours; you are entitled to eat it without argument. In the same way, some goods were apportioned on the basis of first occupation or attachment. Grotius gave the classical example of the acquisition of theater seats. Seats must be claimed by physical occupation. Once claimed, seats cannot be taken by latecomers, even if the seats have been temporarily vacated (Ibid., 61).

The institution of private property developed naturally from the basic human right to use the material world. According to Grotius, no agreement was ever necessary. All that was necessary was labor: men had to take physical possession of the material object or alter or define it in some way. "…with respect to moveables, occupancy implies physical seizure; with respect to immoveables, it implies some activity involving construction or the definition of boundaries" (qtd. in Tuck 1979, 62).

From these premises, Grotius argued that the sea was not yet private property according to modern usage, but that men did have the right to take from the sea what they wanted (Ibid., 62).

Not only did Grotius hold that natural man had a kind of natural right of *dominium*, but he also held that natural man had a natural right of punishment. Many people thought that the right of retribution belonged to the state alone, but according to Grotius, individual

citizens delegated every right that the state has. Therefore, before there was any state, individuals held the power of chastisement. Grotius also noted that the state held the power to punish foreigners, yet it could not have derived this power from their consent. The state's power to punish foreigners is derived from the law of nature.

The state possesses no rights except those delegated by atomic individuals. States are merely aggregates of individuals (Ibid., 62-63), and can have no rights apart from individuals.

Grotius claimed that human society has its origin in nature, but that civil society was deliberately designed. Men have a natural obligation and natural moral rules, but neither applies to states.

Grotius' individualism was a departure from Aristotle's Politics. Aristotle had placed the good of the state above that of the individual. Aristotle's recommendations for justice were based on whatever would strengthen the state. Aristotle was not concerned with individual liberties, nor with protecting the individual from the state. Men pursued all of their higher aims exclusively in the public sphere. Men had no private selves apart from their civic participation. For this reason, Aristotle saw no difference between the interests of the individual and the interests of the state.

Strangely, Grotius did not apply his individualistic theories to the questions of absolute sovereignty and of slavery. He believed, in

opposition to the Protestant tradition (which would execute Charles I in 1649), that nothing could justify rebellion against one's king. Also, he never challenged the institution of slavery, relying on Aristotle's theory of the natural slave rather than the humanists' theory of the voluntary slave (Ibid., 63-64).

Grotius believed, in opposition to Aristotle, that legal systems should be based on rights rather than on laws. Grotius distinguished between two kinds of rights: the objective sense (what is right) and the subjective (the will of the rights-holder). He thought that distributive justice should be based on merit.

> Right…is the relation which exists between a reasonable being and something appropriate to him by merit or property. Merit is the fitness of a reasonable being for any object of desire. Property means that something is called ours: it consists…in real rights (*jus reale*) and in personal rights (*jus personale*)….Of the justice which has regard to right, narrowly understood, the kind which takes account of merit is called 'distributive justice'; the other kind which gives heed to property is called commutative justice': the first commonly employs the rule of proportion, the second the rule of simple equality (qtd. in Tuck 1979, 67).

What Grotius was arguing is that rights are the true subject matter of justice, and that any concept of distributive justice must be based on “distributive rights,” i.e., merit.

For Grotius, the law of nature was entirely about respecting other people’s rights, whether of property or merit. He divided duty into three kinds: the duty of benevolence, the duty of keeping faith, and the duty of making amends for wrongdoing. Put simply, the law of nature says: respect one another’s rights.

In a clear break with the Protestants, Grotius held that moral qualities are independent of God; things are good or bad of their own nature. Furthermore, things that are intrinsically good are those associated with man’s social nature. Human nature inclines men to do what is right.

With regards to commutative justice, Grotius held that men are free to contract and bargain in many ways over all their property, including their personal liberty.

Grotius explained the nature of promises and contracts by tying them to speech:

> The duty of keeping faith arises from speech or anything that resembles speech. Speech is given to men alone amongst animals for the better furtherance of their common interest in order to make known what is hidden in

> the mind; the fitness whereof consists in the correspondence of the sign with the thing signified, which is called ‘truth.’ But since truth considered in itself implies nothing further than the correspondence of the language with the mind at the actual moment when the language is used, and since man’s will is from its nature changeable, means had to be found to fix that will for time to come, and such means are called ‘promise.’ (qtd. in Tuck 1979, 70)

A contract, though, is more than a promise. The person to whom something is contracted acquires a right to it. This follows from man’s free will. A man can transfer to another person ownership of his property, including a portion of his freedom (Ibid., 69).

Grotius was placing emphasis on a person’s will, rather than on the law and its prohibitions.

Grotius argued in his *Introduction to the Jurisprudence of Holland* that certain things are so essential to each man that they are inalienable: a man’s life, body, freedom, and honor. He could no longer accept the idea that people could freely and permanently renounce their liberty or trade it away. He thereby carved a liberal space within his otherwise absolutist theory (Ibid., 71).

In *De Iure Belli*, Grotius again said that the law of nature was rooted in man's sociability, but he based the content of the law not on Aristotelian principles of justice but on respect for the rights of others. Grotius listed some of these rights: "Abstaining from that which is another's, restitution of what we have of another's, or of the Profit we have made by it, the obligation of fulfilling promises, the reparation of a danger done through our own default, and the merit of punishment among men" (qtd. in Tuck 1979, 72).

Human beings are endowed with judgment that allows them to distinguish what is good for them from what is harmful, including what will be good for them or harmful in the future. With regard to their own property, they are entitled to act on their judgment by natural right. This includes the right to offer favorable terms to other people unequally.

According to Grotius, the law of nature is the obligation that people are under to preserve the social peace, and the principle condition for preserving the peace is respect for the rights of others. Grotius believed that disputes over rights were the principle cause of violence and wars. Grotius vacillated between a theory of universal rights based on natural law and egoistic contractarianism. In favor of the latter, he wrote, "…the design of society is, that everyone should

quietly enjoy his own [property], with the help, and by the united force of the whole community (qtd. in Tuck 1979, 73).

Not only was Grotius arguing against Aristotelian principles of justice, but he was also arguing against a theistic basis for law. Natural law, he believed, would maintain human society and human rights, “though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs” (qtd. in Tuck 1979, 76). This statement, known as Grotius’ Impious Hypothesis, was based on Grotius belief that natural law followed from logical necessity, to which even God was subject (Ibid.).

Here was Grotius’ argument: God, having endowed man with reason and a social nature, necessarily approved of the actions suitable to man’s nature. It is not conceptually possible to imagine a rational social being for whom the law of nature does not apply (Ibid.,76).

Grotius’ theories about the origins of private property had also evolved. Earlier, he had endorsed the common use – right to private property, when dictated by necessity. Now, he maintains that private property resulted from “a certain Compact and Agreement, either expressly, as by a Division; or else tacitly, as by a seizure” (qtd. in

Tuck 1979, 76). In other words, the right of first possession was based on *contract*.

Grotius' view of the state was also original. He saw the state as a community of rights and sovereignty: a group who had defined themselves, by a particular transfer of rights, as separate from the rest of mankind. He endorsed absolutism. Just as a man can renounce his liberty and sell himself into slavery, so can a people renounce their liberty and transfer their self-governance to a sovereign. The primary right that people transfer to a sovereign, according to Grotius, is the right of self-defense (Ibid., 78). Men also renounce their right to resist their sovereign, to whom they transfer all rights of punishment (Ibid.,79).

Grotius argued simultaneously for liberty and for absolute rule. He doubted, though, that those who first entered into civil society would have freely surrendered all of their rights of resistance to their sovereign.

Grotius' theory of rights was the strongest yet. It seems strange that his defense of individual rights could support slavery and absolute rule. Fortunately, his support of liberty was well-founded. The human mind, individually and successively, is a mighty engine of integration, assimilating ideas that conform to core beliefs and rejecting those that do not.

Grotius' individual men were fiercely egoistic and protected their liberties, even their liberty to sell themselves into slavery, yet they were simultaneously committed to sociability and distributive justice. While these ideas are not logically incompatible, their concurrence is psychologically implausible. John Seldon and Thomas Hobbes addressed this concern.

John Selden was born in 1584, just one year after Grotius. He observed that all laws are based upon the law of nature, yet laws everywhere are different. He attributed the differences to weaknesses in human reasoning. Nevertheless, he maintained that civil laws had an immutable core. Selden's critics, e.g., Richard Mountagu, argued that particular laws could deviate from natural law (85). Richard Tuck has noted what was at stake: if human laws permitted a specific practice widely, then it could be presumed that natural or divine law did not forbid the practice. If that were so, then there would be little need for recourse to divine explanation. The argument could be reduced to a discussion of civil laws (Ibid., 85-86).

Like Grotius, Selden believed that the earth had originally been common property, but that it had become private property by acts of appropriation. Unlike Grotius, Selden believed that the sea had likewise been appropriated. Far more than Grotius, Selden emphasized

the contractual nature of partitioning, and the separate status of contract within the framework of natural law (Ibid., 87).

Selden's theory of property ran as follows. First, any one could seize vacant land for his own use, and bequeath it to his heirs as he saw fit. Selden theorized that men, until then in the state of nature, must have entered into some sort of contract, binding on themselves and on their posterity. Next, Selden proposed a theory of justice in transfer. People could transfer their *dominion* in property to others, according to the recognized laws and customs of his people, and others were obliged to respect that *dominium* followed the property.

Like Grotius, Selden believed in natural rights, under the law of nature. He largely reduced objective law to the precept, "Keep your promises." But he was puzzled by the relationship between natural law and natural rights. Why should natural individuals endowed with natural rights be under laws at all? What compelled them to move from their position of natural freedom to one of obedience to laws? For Selden, the solution lay in postulating an historical event. Selden hypothesized that men originally were absolutely free. By an act of contract, they introduced law, and were now restricted in their freedoms. These restrictions were enforceable, i.e., their violations were punishable. For Selden, laws without teeth were no laws at all (Ibid., 91).

Punishment lay in store for violators of natural laws, too, but in such cases, punishments were exacted by God. Selden was a retributivist, unlike Plato and Grotius, who thought that punishment was rational only as a deterrent to future crimes. They believed that obligations could be specified independently of punishments. For Selden, breaking obligations is wrong precisely because it leads to punishments upon oneself (Ibid., 92).

According to Selden, right and wrong are arbitrary, determined by the punishments that follow certain behaviors. The Voluntarists, including most Protestant thinkers in the sixteenth and early twentieth centuries, believed that the command of a superior is the "formal cause" of a law's obligation. That is, for a law to be binding, it must be commanded by someone in authority. It cannot simply be a rational principle.

Selden wrote,

> I cannot fancy to myself what the law of nature means, but the law of God. How should I know I ought not to steal, I ought not to commit adultery, unless somebody had told me so? Surely 'tis because I have been told so. 'Tis not because I think I ought not to do them, nor because you think I ought not; if so our minds might change: Whence then comes the restraint? From a higher

> power, nothing else can bind. I cannot bind myself, for I may untie one another. It must be a superior power, even God Almighty (Table Talk, Opera III, co. 2041; qtd. in Tuck 1970, 92).

Like other versions of divine command theory, Selden traded in revealed truth, and he was prepared to accept arbitrariness on God's part. There could have been an eleventh commandment ordering us to push blind pedestrians into the paths of speeding automobiles. True, it would have carved an exception to the commandment, "Thou shalt not kill," but the Torah carves a number of exceptions to this commandment; specifying, for example, capital punishment for gathering sticks on the Sabbath (Nm 15:32).

Selden would have no way to repudiate such a commandment. More recently, Christopher Hitchens asked whether the Israelites were free to murder and steal prior to God's giving Moses the Ten Commandments on Mt. Sinai. His point was that, without ethical principles, they would never have reached Sinai. No society that tolerates murder and theft can survive, even in the short term.

Yet, the fear of punishment does not constitute the obligation. Logically, if we were to accept Selden's position, then we could abolish all civil laws and do away with their punishments at a stroke. But, I

believe, we could not so easily do away with the consequences of our actions.

Selden's extreme skepticism about the possibility of moral obligation without egoistic motivation makes him the forerunner of Hobbes (94).

Because he denied that institutions could make moral claims on people independently of the institutions' ability to punish transgressions, Selden refuted the moral authority of churches. He sought God's instruction in the Bible, and he insisted that people who broke contracts awaited divine retribution. This included contracts between sovereigns and their peoples. People could enter contracts of complete servitude and be bound by them for the rest of their lives. Selden would say that we are obliged to honor even foolish contracts at the cost of our lives (Tuck 1979, 96).

Selden reduced moral obligations to egoistic motivations, including expectations of punishments in the afterlife. He anticipated Hobbes, who dropped concerns about the afterlife out of his prudent egoistic calculations.

In the seventeenth century, Thomas Hobbes used social contract theory to justify an absolutist political philosophy. Social contract theory appeals to agreements that rational individuals would make if they were suitably enlightened. It tends to assume a single theory of

the good, and often serves as a pretext for a paternalistic politics, i.e., doing things *to* people “for their own good.” According to Hobbes, people would exercise their right to surrender their rights.

Hobbes’ goal was laudable. Having lived through the horrors of the Thirty Years War, as well as the English Civil War, Hobbes sought to lay the foundation for a lasting peace.

He was an empiricist with a rationalist’s temperament. He believed that the sciences could be arranged hierarchically according to their treatment of bodies and motion. Geometry is the first science in Hobbes’s order of demonstration. Its truths are the most general, supporting the truths of the other sciences. Next is mechanics, which considers the effects of moving bodies on each other. Next is physics, which studies how bodies operate on the senses.

Next is ethics, dependent on physics, because the motions of the mind are derived from the senses and from the imagination. When a person sees something, it causes motion in the back of the eye. This produces the visual experience, but it also excites the motions of the mind: appetite, aversion, love, benevolence, hope, fear, anger, emulation, and envy. These motions continue on to the heart, which governs vital motion by steering the entity towards pleasure and away from pain.

Hobbes recognized that pleasure and pain are not infallible indicators of what is objectively good or bad, but rather, that they are fallible indicators of what is good or bad relative to particular creatures. He also recognized that there is no ultimate good whose attainment ensures happiness. Rather, there are diverse goods for different people and even for the same people at different times. Happiness results from the continual attainment of these goods, which, in the absence of any ultimate good, cannot be called instrumental. The proximity and intensity of pleasure can mislead us to choose what is contrary to our long-term advantage. Only science, which teaches us the consequences of our actions, can overcome valuations derived from pleasure and pain. Unfortunately, science does not come easily to most people, and they are disinclined to heed its advice.

Some evils are so enormous that they are inimical to everyone's happiness. Among them is war, which should horrify any prudent person. Granted, our planet is not populated exclusively by prudent people, and some commanders have started wars for adventure's sake. For example, Frederick the Great launched the War of the Austrian Succession (1740-1748) without justification. In the end, 381,000 people (Sorokin) lost their lives for Frederick's sovereignty of Silesia. Hobbes lived through the Thirty Years War; his horror at its

casualties was partly responsible for his authoritarianism. Hobbes was right: war *should* horrify any prudent person. Yet, Hobbes believed, if everyone were to judge what is best for himself, war would inevitably follow.

No matter what good one seeks, power is necessary to its attainment. Power subsumes one's physical capacity, friendships, riches, and reputation. You can never have too much power. People compete with one another to amass power.

In the state of nature, people compete with one another to amass power in what is virtually a zero-sum game. One can never have enough power, because one's advantage can always be overcome: other people may slander someone or rob him or gang up on him. Furthermore, a moderate man cannot content himself seeking only a modest amount of power, just as he cannot afford to disadvantage himself by restricting his actions to fair play. In both cases, less scrupulous people will take advantage of him. He will live in constant insecurity that at any moment, he might be stripped of everything that makes life worthwhile. His smartest stratagem is to become an aggressor himself; the surest way to gain advantage is to disable or eliminate his opponents. All around him, his opponents are reaching the same conclusion for themselves. In this way, everyone's

pursuit of happiness leads him into a state of war against everyone else. Life becomes “solitary, poor, nasty, brutish, and short.”

Virtue won’t stay anyone’s hand. The moral virtues are discoverable but not obligatory in the state of nature. The most basic law of nature is self-preservation, and everyone has the right to judge for herself how best to achieve it. A person may reasonably believe that virtuous behavior, e.g., honoring his promises, generosity, forgiveness, would jeopardize her prospects for survival by leaving her at the mercy of persons less scrupulous than herself.

Hobbes’ solution was for everyone to delegate his rights under the law of nature to a person or persons who could offer him protection. By doing so, everyone could secure his person and his effects better than he could by his own individual action. By submitting to the sovereign, people would agree to obey the sovereign’s laws: they will restrict their actions to those permitted, and refrain from those prohibited.

The sovereign would assume dictatorial control over the affairs of state and over the personal behavior of his subjects. He would wage war and regulate trade, distribute goods and services, award honors and mete punishments. The sovereign’s powers would be limited only by his own prudence and by his subjects’ expectation that they find some benefit in the abdication of their rights. Because if the sovereign

should prove unable to protect his people, then the social contract would be dissolved and the state of nature would resume, like the jungle reclaiming an abandoned settlement.

Hobbes based his political philosophy squarely on egoism. He held that it was in everyone's interest for all to subject themselves to the will of a sovereign. The alternative, in his opinion, was a dangerous anarchy in which individuals are misled by their passions to act without appreciating the consequences. This situation, again in Hobbes' opinion, would be worse than the most awful government.

In twenty-first century America, when the federal government proposes an environmental regulation, it has the onus of showing that less onerous measures could not accomplish the same end. In *Leviathan*, Hobbes offers loaded alternatives without considering measured possibilities. It is not obvious that each individual's best ploy, from an egoistic perspective, is to surrender all his rights, nor is it obvious that protecting individual rights requires that everyone be reduced to serfdom. There is little difference between surrendering one's rights and one's never having had them at all.

While Hobbes had been a loyalist who urged support for even the most despotic governments, John Locke (1632-1704) was a radical Whig who urged their overthrow.

If we think of each man as the negotiator of the social contract, trying to get the best deal he could, then we can say that Hobbes negotiated from weakness, conceded nearly everything, and accepted the sovereign's initial all-or-nothing offer. Locke, on the other hand, negotiated from strength. He conceded only that fraction of his natural rights that was required by a legitimate, limited government. He retained the rest of his rights, including the right to abrogate the contract whenever the government fails to honor its end of the bargain, i.e., the protection of its subjects' property.

Even in Locke's day, it would have been nearly impossible to determine which functions of government are legitimate by surveying all of the government's activities. Instead, Locke imagined a time and place without government – the state of nature – and asked how necessity might bring civil government into being. This would indicate the proper role of government.

Locke defined political power as

> ….a right of making laws with penalties of death and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence [sic.] of the commonwealth from foreign injury, and all this only for the public good (Locke 1993, 116).

I will define my approach to state of nature theory by contrasting it to John Locke's. Locke's state of nature was "a state of perfect freedom" for men to "order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man" (Locke 116).

People are not free to behave capriciously, however.

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 (Ibid., 117).

The law of nature obliges us not only to preserve our own lives, but also to preserve those of our fellow men:

> Everyone as he is bound to preserve himself, and not to quit his station willfully, so by the like reason when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and 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 (Ibid.).

Locke's argument is that we are all property of God. God would not like it if some of His property damaged other of His property. By the same reasoning, we should preserve ourselves and try to preserve our fellow man. In doing so, we are looking after our owner's property. This is a departure from Hobbes, who held that in the state of nature, people have "the right" to do anything, even to kill one another. Locke's Christianity influenced his ideas about helping others in the state of nature, but it can also be asserted that helping others is self-interested behavior, since our neighbors are our trading partners and potential allies against aggressors.

> In transgressing the law of nature, the defender declares himself to live by another rule, than that of reason and common equity, which is that measure God has set to the actions of men, for their mutual security: and so he becomes dangerous to mankind, the tie, which is to secure them from injury and violence, being slighted and broken by him (Ibid., 118).

As a steward of God's property, every man in the state-of-nature has the right to punish those who hurt other people, but only in proportion to their transgressions, in order to deter, restrain, and to make reparations. "Each transgression may be punished to that degree, and with so much severity as will suffice to make it an ill

bargain to the offender, give him pause to repent, and terrify others from doing the like" (Ibid., 120).

Individuals in the state of nature may even exact the death penalty:

> …every man in a state of nature, has a power to kill a murderer, both to deter others from doing the like injury, which no reparation can compensate, by the example of the punishment that attends it from everybody and also to secure men from the attempts of a criminal, who having renounced reason, the common rule and measure, God hath given to mankind, hath by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts, with whom man can have no society nor security…. (Ibid.).

To a much greater extent than Hobbes, Locke sought justification in religion, especially for his altruistic impulses. Whether or not God exists, references to his supposed preferences have little explanatory power. Claims to know God's will rely on revealed truth, which is not a tool available to philosophy. Locke's conclusions are more appealing than his arguments. Locke was, as Blake said of

Milton, of the devil's camp (the secularists, in Locke's case) without knowing it.

Locke recognized that we are not always the best judges in personal matters:

> It is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends. And on the other side that ill nature, passion and revenge will carry them too far in punishing others" (Ibid., 121).

From these facts, Locke easily granted -- too easily, thought Robert Nozick (Nozick 1979, 10-11) -- "…that civil government is the proper remedy for the inconveniences of the state of nature" (Locke 1993, 121).

Locke is at his best when he discusses property, which to him included life and liberty. He begins by asserting that "human beings, being once born, have a right to their preservation" (Ibid., 127), that is, they have a right to take actions necessary to sustain their lives, "and consequently to meat and drink, and such other things, as nature affords for their subsistence…." (Ibid.).

The world belongs to all men in common, but common ownership is not the same as joint ownership, which is exclusive. Instead, it is available to all men "…to make use of it, to the best

advantage of life, and convenience" (Ibid.). The world is not useful until individual men appropriate parts of it for their use:

> And though all the fruits it [the earth] naturally produces and beasts it feeds, belong to mankind in common…there must of necessity be a means to appropriate them some way other before they can be of any use or at all beneficial to any particular man (Ibid., 127-128).

Property appropriation is grounded in each man's "having a property in his own person" (Ibid., 128).

> The labour of his body, and the work of his hands, we many say, are properly his. Whatsoever that he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, hath by this labour something annexed to it, that excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to it, at least where there is enough, and as good left in common for others (Ibid., 128).

What does it mean to “mix one’s labor with the soil?” It means altering the soil in order to bring human desires closer to realization. Specifically, it means performing one or more of the tasks necessary to grow food for dinner or cotton for clothing, or commodities for exchange. I can alter the soil by fencing it in, by clearing brush, by planting, fertilizing, irrigating, etc. Each of these steps brings me closer to my objective of harvesting a crop.

But Locke’s phrase suggests more than alteration of the soil. It misleads, by implying that one’s labor is somehow embedded in the soil, as carbon can be embedded in iron to make steel.

Robert Nozick criticized Locke’s metaphor:

> 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 in 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? (Nozick 1974, 174-75)

The real problem is that the mixing metaphor implies an intrinsic theory of value. Value is not a property of soil or of manufactured objects. Value exists in the human mind.

The idea that value is a property of soil or of objects led classical economists Adam Smith and David Ricardo to posit the labor theory of value. Ricardo wrote, “The value of a commodity, or the quantity of any other commodity for which it will exchange, depends on the relative quantity of labour which is necessary for its production….” (Ricardo 1817, Section I, 11).

But you may expend labor on commodities that no one wants to buy. You could fall victim to changing fashions (American men quit wearing hats in the late 1950’s), technological obsolescence (transistor radios superseded vacuum tube radios in the 1950’s), and the bursting of speculative bubbles (the price of tulip bulbs crashed in Holland in the late 1630’s). Labor does not imbue objects with value. Objects’ desirability to potential customers imbues them with value.

To demonstrate that value is not intrinsic to objects, consider a simple exchange: the purchase of a quart of milk. You would rather have the quart of milk than your dollar. The grocer would rather have your dollar than his quart of milk. In the exchange, each of you gains. There is a net increase in value, even though the intrinsic value of the traded items has not changed.

Ricardo did make an important point. Over time, prices tend to stabilize. Laborers (and their employers) seek to maximize the return on the labor that they invest. If experience teaches them that it is

more profitable per hour of labor expended to mill flour rather than to bake bricks, then laborers will mill more flour and bake fewer bricks. Before long, the oversupply of flour will drive down its price and profitability. At the same time, the undersupply of bricks will drive up their price and profitability. In response, laborers will switch from milling flour to baking bricks, until price equilibrium is restored. Over time, Ricardo's formula is predictive, but this is because labor tracks the value placed on goods and services, and not the other way around.

I embraced Ayn Rand's definition of value as "that which one acts to gain and/or keep." Rand's definition is not strictly an ethical definition. It is based on praxeology, the study of human action. The term is associated with (or was appropriated by) the Austrian school of economics, particularly Ludwig von Mises, who entitled his magnum opus *Human Action*. Rand attended seminars taught by Von Mises at NYU in the 1960's. Praxeology is the study of human action, considered separately from the psychological factors that influence behavior. Ludwig von Mises explained the content of this discipline:

> Acting is not simply giving preference. Man also shows preference in situations in which things and events are unavoidable or are believed to be so. Thus a man may prefer sunshine to rain and may wish that the sun would dispel the clouds. He who only wishes and hopes does not

> interfere actively with the course of events and with the shaping of his own destiny. But acting man chooses, determines, and tries to reach an end. Of two things both of which he cannot have together, he selects one and gives up the other. Action therefore always involves both taking and renunciation (Von Mises 1996, 12).

Praxeology assumes a subjective theory of value:

> Choosing determines all human decisions. In making his choice man chooses not only between various material things and services. All human values are offered for option. All ends and all means, both material and ideal issues, the sublime and the base, the noble and the ignoble, are ranged in a single row and subjected to a decision which picks out one thing and sets aside another. Nothing that men aim at or want to avoid remains outside of this arrangement into a unique scale of gradation and preference (Ibid., 3).

Rand's definition of a value as something one acts to gain and/or keep is based on a subjective theory of value. A beauty pageant contestant may declare that her highest value is world peace, but if she never works toward world peace, then her highest value lies

elsewhere (most beauty pageant contestants support admirable causes regardless).

The subjective theory of value is superior to the labor theory of value because it fixes value in the human mind and not in material objects, because it studies actual behavior rather than predicted behavior, and because its context is not merely economic choices but the entire range of human choices.

Locke's theory of value does not depend on his "mixing labor with the soil" metaphor. Whoever improves unowned property should reap the benefits.

For the laborer to appropriate some of God's bounty for himself, the consent of everyone else is neither necessary nor practical. His labor fixes his property rights in the fruit he has gathered and the ore he has dug, etc., and this is true irrespective of positive laws to determine property. "…The taking of this or that part, does not depend on the express consent of all the commoners" (Locke 1993, 129).

No one may appropriate more of something than he can use: "As much as anyone can make use of to any advantage of 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" (Ibid., 130). Locke thought that there was "nothing quarrelsome or contentious" about the amount one man could use, but he was writing

nearly a century before the industrial revolution, when machinery could magnify a man's labour many-fold.

For Locke, "property in land is acquired like property in fruits" (Ibid.). "As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property" (Ibid.). This is true only as long as there is "enough, and as good left in common for others."

It is not clear what uses of land Locke would count as legitimate. Recreation is an "advantage of life". Could I appropriate a large tract of the loveliest land and charge hikers and picnickers admission? In a free market, the land would eventually be claimed for its highest economic use, such as logging or mining, but its highest use could remain recreation, for which undeveloped horizons would be valuable. Locke did not address this possibility, except to say that one must leave as much and as good for others. Locke added that cultivated land yields ten times more than uncultivated land. Therefore, when I appropriate and cultivate land, I increase the common stock, since I now need only a tenth as much of what had been the common stock in order to sustain myself.

It seems to me that Locke's condition that one must leave as much and as good for others never exists. We would not bother laying claims to food or land or anything else except where economic scarcity

limits supply. With respect to land, the last parcel can never be appropriated, since it would be impossible for anyone to leave “as good left in common for others.” Since the last parcel is off limits, the penultimate parcel becomes the last, and it can never be appropriated, since it would be impossible for anyone to leave “as good left in common for others.” Now, the antepenultimate parcel becomes the last, and it can never be appropriated either, since it would be impossible for anyone to leave “as good left in common for others,” the two remaining parcels being off-limits. And so forth, until, logically, no land at all can be appropriated.

Locke speaks of God’s having given the world to men in common. But common ownership should not be confused with joint ownership. Common ownership means that land is available to anyone who will put it to use. “God gave the world to men in common…He gave it to the use of the industrious and rational…not to the fancy or covetousness of the quarrelsome and contentious” (Ibid., 131).

> …subduing or cultivating the earth, and having dominion, we see are joined together. The one gave title to the other. So that God, by commanding to subdue, gave authority so far to appropriate. And the condition of human life, which requires labour and materials to work on, necessarily introduces private possessions (Ibid.).

Surveying and land titles were introduced relatively lately in the state of nature. Fencing an area was not enough to prove that someone was making satisfactory use of land to establish one's claim. To extend Locke's metaphor, did a fence mix a worker's labour only with the land directly under the fence, or did it also mix the worker's labour with the land enclosed by the fence? That would depend on how much of the enclosed land was put to productive use.

As families increased, and industry enlarged their stocks, their possessions enlarged with the need of them; but yet it was commonly without any fixed property in the ground, till they incorporated, settled themselves together, and built cities, and then by consent, they came in time, to set out the bounds of their distinct territories, and agree on limit between them and their neighbors, and by law within themselves, settled the properties of those of the same society. (Ibid., 134)

Perhaps I digress, but I think that it is worth considering Hernando de Soto's belief that the third world is poor, not because it lacks assets, but because it lacks secure title to its assets. Among other advantages, secure title would allow third world entrepreneurs to borrow against their holdings in order to raise investment capital. Asked by the Indonesian government to help document its people's land assets, de Soto was guided by the barking of dogs. "Every time I crossed from one farm to another, a different dog barked" (Soto 2000,

162). “I told the ministers that Indonesian dogs had the basic information they needed to set up a formal property system” (Ibid.). My point is that Locke failed to recognize how advanced his society was in establishing secure titles to surveyed property, and how great an advantage secure titles confer.

Finally, Locke noted that labor, properly applied, can increase the value of property many times over:

> …and let anyone consider, what the difference is between an acre of land planted with tobacco, or sugar, sown with wheat or barley; and an acre of the same land lying in common, without any husbandry upon it, and he will find, that the improvement of labour makes the far greater part of the value” (Locke 1993, 135).

Of course, labor, improperly applied, can ruin land. Bad husbandry was the main cause of the Dust Bowl in the 1930’s – by far the worst ecological disaster that has ever befallen the United States.

Now let us review what Locke surmised about civil society. First, man is a social creature. God put him “under strong obligations of necessity, convenience, and inclination to drive him into society, as well as fitted him with understanding and language to continue and enjoy it” (Ibid.).

There are a number of levels of society that man enters, each with its own end. The first is man and wife, whose end is procreation. The second, parents and children, whose end is the children's upbringing and education. The third is between master and servants, whose end is domestic activities, and the fourth is "civil society; the chief end whereof is the preservation of property" (Ibid., 157).

Hobbes said that war is endemic in the state of nature. Locke disagreed; everyone's observing the golden rule is the norm. War is an aberration that violates natural law. The state of war arises when an aggressor tries to kill someone or otherwise violate his person or property.

Slavery puts one person under the absolute, arbitrary power of another. No one may sell himself into slavery, because no one has the power of life and death over himself. The only way in which someone can legitimately become a slave is by losing a war of aggression. The just victor can kill his conquered enemies or continue the state of war by enslaving them. Illegitimate slavery involves someone's having absolute power over another person without just cause. Absolute monarchy is a form of illegitimate slavery. Locke said that it is "inconsistent with civil society, and can be no form of civil government at all" (Ibid., 159). The whole purpose of civil government is to remedy the burdens of the state of nature by allowing people to appeal

to an impartial arbiter. But absolute monarchy imposes an arbitrary or biased arbiter.

Locke commented on household slaves:

> … who being captives taken in a just war, are by the right of nature subjected to the absolute dominium and arbitrary power of their masters. These men having, as I say, forfeited their lives, and with it their liberties, and lost their estates; and being in the state of slavery, not capable of any property, cannot in that state be considered any part of civil society…" (Ibid.,156-157)

Locke's statement is appalling on several levels. First, Locke assumes that all slaves were captured in just wars. *Ecclesiastes* 9:11 notes that "the battle is not always to the swift." Nor is the battle always to the just. Aggressors are as likely to win as victims; perhaps more so, since it is they who choose their opportunities. Second, slaves have seldom been subject to the absolute dominium and arbitrary power of their masters. *Exodus* 21: 20-21 forbids the killing of slaves: "When a man strikes his slave, male or female, and the slave dies under his hand, he shall be punished." Third, slaves in many societies, including Rome, have been allowed to acquire property and even to purchase their freedom. Locke's ignorance about the institution of slavery is as shocking as his indifference to the plight of

the slaves. Writing in the *Philadelphia Inquirer* on February 21, 2010, Craig LaBon commented on George Washington's ownership of slaves by quoting Gary B. Nash, Professor Emeritus of History at the University of California, Los Angeles: "Slavery is liberty's evil twin brother. We think of them as polar opposites, and yet they are joined at the hip."

Locke's condoning slavery saddens his present-day admirers, myself included. Still, his hypocrisy is consistent with my free rider thesis, which can be summarized, "freedom for me, but not for thee." My point will be clearer when I discuss Mancur Olson, below.

The motivation for anyone's leaving the state of nature and submitting to society, according to Locke, is *self-interest*:

> If man in the state of nature be so free, as has been said, if he be absolute lord of his own person and possessions, equal to the greatest, and subject to nobody, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and control of any other power? To which, 'tis obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others….This makes him willing to quit this condition, which however free, is full of fears and

> continual dangers: and ‘tis not without reason, that he seeks out, and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates…. (Locke 1993, 178).

People surrender their freedom in exchange for greater safety and security. This is a purely egoistic motivation. Nowhere does Locke chide people to act contrary to their own interests.

Locke understood that societies arise and evolve from earlier forms of association:

> Where a family was numerous enough to subsist by itself, and continued entire together, without mixing with others, as it often happens, where there is much land and few people, the government commonly began in the father (Ibid., 167).

Let us examine the contract, reviewing what people give up, and what they gain.

In the state of nature, every man has the executive authority to punish transgressors of the natural law:

> Man … hath by nature a power, not only to preserve his property, that is, his life, liberty and estate against the injuries and attempts of other men; but to judge of, and

> punish the breaches of that law in others, as he is persuaded the offense deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it" (Ibid., 157)

No particular society can survive without assuming this power:

> …there, and there only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that *exclude him not from appealing for protection to the law established for it (Ibid.).

Locke described civil society in idealistic terms:

> …all private judgments of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society…" (Ibid., 157-58)

Persons who delegate their authority to punish transgressors of natural law, having united into a community, subscribing to its laws, and submitting to its authorities, are in civil society with one another.

Persons who have not done so are outside the civil society, “still in the state of nature and under all the inconveniences of it” (Ibid., 160).

By his entry into civil society, a man assigns not only the executive authority to the community, but the legislative and judicial as well:

> …he authorizes the society… to make laws for him as the public good of the society shall require….And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries. (Ibid., 159)

Without an objective law or impartial judge, men would remain in the state of nature. Absolute monarchs act arbitrarily and partially. Therefore, absolute monarchy is “inconsistent with civil society, and can be no form of civil government at all.” (Ibid.)

Locke said that in joining a community, one agrees to abide by the will of the majority. Now in Locke’s time, democracies were the exceptions. He does not offer a good argument for majority rule. He assumes that everyone should work in concert towards the state’s chosen goals. I believe that Locke would be very uncomfortable with the dynamism that characterizes modern capitalist nations.

Locke did not address the question of who should have the franchise, but in his discussion of conjugal society, he referred to men as abler than women:

> But the husband and wife, though they have but one common concern, yet having different understandings, will unavoidably sometimes have different wills too; it therefore being necessary, that the last determination, i.e., the rule, should be placed somewhere, it naturally falls to the man's share, as the abler and the stronger." (Ibid., 155)

I think that it is clear that Locke would deny the franchise to women, contradicting his arguing for majority rule. Denied the right to own property, denied any say in the workings of civil society, women have few incentives to leave the state of nature and to enter Locke's civil society. It is to be hoped that they would strike a better bargain.

The legitimacy of civil society rests on the consent of the governed: "Man being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent" (Ibid., 163). Furthermore, the state has no power beyond that delegated by its individual members:

> It being but the joint power of every member of the society given up to that person, or assembly, which is legislator, it can be no more than those persons had in a state of nature before they entered into society, and gave up to the community. For nobody can transfer to another more power than he has in himself…. (Ibid., 183)

When a man enters civil society, he does more than surrender his right to punish offenses against the state of nature.

> ….he authorizes the society, or which is all one, the legislative thereof to make laws for him as the public good of the society shall require; to the execution whereof, his own assistance (as to his own decrees) is due. And this puts men out of a state of nature into that of a commonwealth…. (Ibid., 159).

Universal consent is necessary to form a political community. One's consent to join is binding and cannot be withdrawn. This lends stability to the community, where authority is determined by majority rule.

A legitimate government is one that preserves the lives, liberty, and property of its subjects, decides the severity of crimes, and imposes just penalties. It deserves its subjects' obedience.

An illegitimate government, on the other hand, tries to take the lives, liberty, and property of its people. It rules unjustly and punishes unfairly. It makes illegitimate slaves of its subjects, waging war against them. Having broken the social contract, it deserves to be overthrown. Dissolving a despotic government does not imply anarchy, though, because the people are still bound to their community, and are still subject to its majority rule (Uzgalis 2003, 8).

When a man joins civil society, he does so only in the expectation of bettering his station. He does not authorize the state to do anything more than to protect his property. This stipulation restricts the state to three legitimate functions: police protection against criminals, armed forces against foreign aggressors, and courts to settle differences between individuals.

The power of the society, or legislative constituted by them, can never be supposed to extend further than the common good; but is obliged to secure everyone's property by providing against those…defects of nature…that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the

community at home, only in the execution of such laws, or abroad to prevent or redress foreign injuries, and secure the community from inroads and invasions. And all this to be directed to no other end, but the peace, safety, and public good of the people (Ibid., 180-181).

The government exists to serve the will of the people, and to further the people's interests. Its legitimacy rests on the consent of the governed. If the government acts contrary to the people's interests, if its executive or legislature acts arbitrarily or tyrannically, then the people have the right to dissolve it:

> ….there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security (Ibid., 191).

Of course, the right to overthrow one's sovereign should not be exercised lightly. The French Revolution was bloody and horrific, and led to the dictatorship of Napoleon.

To summarize Locke's position on rights, we may say that Locke subscribed to the theory of natural rights. People had a duty to preserve their lives, and a right to take actions to sustain themselves. They had a right to live free from force or fraud by others, and a duty to refrain from initiating force or fraud themselves. The state had no rights except those delegated to it by individuals, who could reclaim their rights if the state acted contrary to their interests.

When is a social contract null and void? Unlike later theorists, Grotius considered each country's social compact not a thought experiment but an historic fact. When each people chose its form of government, it forfeited its right to control or punish its ruler, however despotic. Grotius believed in a "right of slavery" – the right to enslave vanquished people, or the right of individuals to sell themselves into slavery. Grotius reasoned that entire peoples could likewise sell themselves into slavery to a sovereign. But when an individual sold himself, it was in exchange for sustenance. When a people submitted to the yoke of a sovereign, what did they get in exchange? The ruler did not provide people with sustenance; they provided him with sustenance. The people could not count on tranquility, because the wars to which the sovereign committed them were often worse than any discord they might have created themselves. The people seem to have received nothing in the bargain, and you cannot have a legal

contract unless there is consideration on both sides. Of the “right of slavery,” Rousseau wrote,

> The words *slave* and *right* contradict each other, and are mutually exclusive. It will always be equally foolish for a man to say to a man or to a people: "I make with you a convention wholly at your expense and wholly to my advantage; I shall keep it as long as I like, and you will keep it as long as I like" (Rousseau 1947, Book 1:4).

In *Leviathan*, Thomas Hobbes conceived of the state as an artificial man, created by covenant. For the covenant to be valid, a sovereign is needed to enforce its terms. The sovereign is empowered with all the powers of all the people who agreed to the covenant, and the actions of the sovereign are the actions of the subjects. By their covenant, the subjects are the authors of the sovereign’s actions. All of the liberties that the subjects had in the state of nature are transferred to the sovereign. The sovereign has the duty to preserve itself and its subjects by any means necessary.

The subjects cannot replace the sovereign without violating the terms of the covenant. The sovereign cannot abdicate; he is duty-bound to preserve the artificial man. To protest against the actions of the sovereign would be unjust; the subjects are indirectly the authors of its actions. The sovereign is incapable of injustice; anything he does

is by the authority of all who agreed with the covenant. To accuse the sovereign of injustice would be to accuse oneself of injustice. In short, the sovereign has absolute authority over the subjects. He cannot be overthrown; he cannot abdicate; and he cannot act unjustly. The subjects retain only the liberty to defend themselves, to refuse to hurt themselves, and to refuse to incriminate themselves.

The only time when the subjects do not have to obey the sovereign is when the commonwealth collapses and the sovereign can no longer protect them. It was for this benefit that the subjects agreed to the covenant. Once the sovereign can no longer protect the people, the covenant is void.

John Locke's state resembled Hobbes', but with a lower tolerance for tyranny:

> …the power that every individual gave the society, when he entered into it, can never revert to the individuals again, as long as the society lasts, but will always remain in the community; because without this, there can be no community, no commonwealth, which is contrary to the original agreement: so also when the society hath placed the legislative in any assembly of men, to continue in them and their successors, with direction and authority for providing such successors, the legislative can never revert

> to the people whilst that government lasts: because having provided a legislative with power to continue forever, they have given up their political power to the legislative, and cannot resume it. But if they have set limits to the duration of their legislative, and made this supreme power in any person, or assembly, only temporary: or else when by the miscarriages of those in authority, it is forfeited; upon the forfeiture of their rulers, or at the determination of the time set, it reverts to the society, and the people have the right to act as the supreme, and continue the legislative in themselves, or erect a new form, or under the old form place it in new hands, as they think good (Locke 1993, 243).

Thomas Jefferson, in the “Declaration of Independence,” developed Locke’s idea that a people have the right to replace their sovereign:

> We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness -- That to secure these Rights, Governments are instituted among men, deriving their just Powers from the Consent of the

> Governed, that whenever anyForm of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness (Jefferson 1776)

David Hume criticized the idea of a trans-generational social contract. Even if “savage men” first organized themselves by means of an original contract, that contract has by now changed in thousands of ways and can no longer retain any real authority. Besides, fathers do not have the ability to bind their descendents (Hume 1987).

Roderick T. Long has criticized the idea of an implicit social contract, which “holds that by remaining in the territory controlled by some government, people give consent to be governed” (Long 2004). From this, the government supposedly derives legitimacy. But Long has argued that this is question-begging:

> I think that the person who makes this argument is already assuming that the government has some legitimate jurisdiction over this territory. And then they say, well, now, anyone who is in the territory is therefore agreeing to the prevailing rules. But they’re assuming the

> very thing they're trying to prove – namely that this jurisdiction over the territory is legitimate. If it's not, then the government is just one more group of people living in this broad general geographical territory. But I've got my property, and exactly what their arrangements are I don't know, but here I am in my property and they don't own it – at least they haven't given me any argument that they do – and so, the fact that I am living in "this country" means I am living in a certain geographical region that they have certain pretensions over – but the question is whether those pretensions are legitimate. You can't assume it as a means to proving it (Long 2004).

Let us assume that a social contract exists, to which all subjects assented personally (these are admittedly tall assumptions). When may people set aside their obligations under such a contract? This is a question for conventional jurisprudence. Defenses for not fulfilling a contract include duress (a contract made at gunpoint is unenforceable); lack of consideration (a contract that obligates only one party is unenforceable); and impossibility of performance (most contracts have Acts of God and declarations of war clauses that render a contract unenforceable).

These defenses can be summarized as follows. A contract is an exchange of promises. You can walk away from your obligations under a contract whenever it becomes clear that the other contracting party cannot or will not honor its obligations, The reasons why the other party will not fulfill its obligations – invasion, bad faith (the USSR's Helsinki Accords), insolvency – are irrelevant. From an egoist conception of rights, all that counts is that you recognize that you are not going to get that for which you bargained.

The mere avowal of rights will not bring them into existence. China's constitution guarantees freedom of speech, of the press, of assembly, of association, of demonstration, and of religion (Constitution of the People's Republic of China 1982, Articles 35 and 36). But a separate article prohibits the exercise of freedoms and rights that infringe upon the interests of the state (Ibid., Article 51). That has been interpreted to forbid dissent. Furthermore, the courts will not apply Articles 35 and 36 against the ruling Communist Party, China having no equivalent of *Marbury v Madison* (Palmer 2010). The Communist Party routinely imprisons democracy advocates such as Liu Xiaobo, the 2010 Nobel Peace Prize laureate. His "rights" are of small consolation to him as he languishes in prison.

CHAPTER FIVE: A NEW APPROACH TO RIGHTS

Natural law provided the basis for the theory of rights espoused by John Locke, which, in turn, provided the basis for the founding of the American republic. Despite its achievements, natural law has serious flaws. First, it has a supernatural component. Both Aquinas and Locke believed that natural law rested on God's providence. This led Locke to smuggle certain Christian ideas, e.g., the idea of a social safety net, into his political theory. I am not saying that a safety net cannot be justified, but I believe that it needs an independent justification. Admittedly, many modern proponents of natural law have a strictly secular orientation, but for them, natural law is equivalent to saying that we should take the actions necessary to sustain ourselves. The concept of natural law carries little weight of its own.

The supernatural component of natural law finds expression as teleology. Teleology tries to explain phenomena by assuming an ultimate purpose. This implies either an intelligent designer or the idea that a thing's future utility somehow brings about its existence by backward causation.

Teleonomy studies the apparent goal-directedness of structures and functions in living organisms, while understanding them as genetic adaptations whose success depends on natural selection. It does not regard evolution as a guiding force.

Still, this concept has the potential to mislead. Evolution is not purposeful. Teleonomy encourages us to see purpose where none exists. Any insistence on interpreting nature through filters can impair our ability to see the actual connections between different things.

The evolutionary theorist Ernst Mayr (Mayr 1988, 15) conjectured that it was an attachment to typological essentialism that postponed the discovery of natural selection for two millennia. Typological essentialism is the belief that species can be distinguished by their "types" or physical characteristics. It is traceable to Plato's theory of ideas, which held, for example, that individual dogs participate in the eternal, unchanging form *dog*. This belief was enshrined in the Linnean classification, which is now outmoded. Sympathy for this belief may be observed at dog shows, in which individual dogs are judged by their approximation to the measurements of perfect abstract representatives of their artificially selected breeds.

Modern biologists have abandoned typological thinking in favor of what Mayr called "population thinking." The groups of organisms that we call species vary considerably in their characteristics: some are longer or shorter, darker or lighter, curly-haired or straight-haired. Without this variation, natural selection would have nothing to select *for*. Species evolve gradually, and no individual is a different species

from its mother. An emerging species will continue to breed with its ancestral species for some time before differentiation prevents fertile offspring. Our species, *Homo sapiens,* evolved about 200,000 years ago, and interbred with its ancestral species during its early history. In distinguishing species, genetic lineage is much more important than homologous organs. But according to essentialism, every species is excruciatingly distinct. This leaves no room for the gradual emergence of new species.

Another misleading concept from biology is the idea that entities act for the good of their species. There is no mechanism by which entities can unselfishly act for the good of their species. They can propagate their own genes or their kin's, or they can be forced or fooled into propagating the genes of other organisms. That is all. Interpreting their behavior towards unrelated individuals as altruistic has encouraged people to believe that nature advises us to sacrifice our own interests for that of strangers.

Another instance of preconceived ideas coloring what we see involves Locke's state of nature, which, as we have seen, was deeply influenced by his Christianity.

Second, saying that something is natural does not explain anything, and it provides a dead end to critical thinking. People can find all of their expectations satisfied by natural law, without realizing

that they are engaged in circular thinking, in which their conclusions are assumed by one or more of their premises. For example, I have heard men who carry condoms in their wallets criticize homosexuality as unnatural. For them, “unnatural” denotes any conduct of which they disapprove.

What does natural law supposedly command? There have been many versions of natural law. Let us consider Aquinas’ version, described in his *Treatise on Law*. The first principle of the practical reason is that “good is to be done and pursued, and evil is to be avoided” (Aquinas 1945, Q. 94). We regard as good everything to which we are naturally inclined. Man, like every substance, “seeks the preservation of its own being, according to its nature” Next, man, like other animals, has “inclinations to sexual intercourse, education of offspring, and so forth.” Third,

> man has an inclination to good, according to the nature of his reason…thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination. (Ibid.).

This is all well and good. But to Aquinas, natural law goes on to forbid masturbation, which he called “the unnatural crime,” but which most modern readers would consider innocuous. Aquinas was one of the wisest persons who ever lived, but he found in natural law what he wanted or expected to find there. When parties disagree about the dictates of natural law, how can they resolve disagreements, even in principle?

Like Hobbes, Locke, Nozick, and others, I employ state-of-nature theory in my approach to rights. Despite this, I agree with David Hume about its limitations. In *A Treatise on Human Nature*, “Of the Origin of Justice and Property, Hume wrote,

> ’Tis utterly impossible for men to remain any considerable time in that savage condition, which precedes society; but that his very first state and situation may justly be esteem’d social. This, however, hinders not, but that philosophers may, if they please, extend their reasoning to the suppos’d state of nature; provided they allow it to be a mere philosophical fiction, which never had, and never cou’d have any reality. (Hume 1978, Book III, Part II, Section II: "Of the Origin of Justice and Property”).

Even if it cannot pretend to historical accuracy, state-of-nature can be illuminative as a thought experiment, as long as it is true to the

human condition. State-of-nature can help us to distinguish natural circumstances from human conventions. My account of the origin of rights should be understood as speculative rather than historic.

There have been many variations on state-of-nature theory. To Christians, it recalls a time of prelapsarian innocence, before scarcity necessitated economics. To Hobbes, it described the misery that would obtain if there were no political power or authority. For Locke, the state of nature had a law to govern it, reason, which obliges everyone. To Rousseau, it described man under pre-social, pre-linguistic conditions (The Social Contract).

State-of-nature theory had fallen into disuse for a century or so before it was revived by Robert Nozick in his 1974 monograph, *Anarchy, State, and Utopia.* I do not defend Nozick; his theory of property rights depends on the coincidence of three types of justice (justice in acquisition, justice in transfer, and the rectification of past injustices) that are hard to establish individually and nearly impossible to establish in combination.

According to Nozick, the fundamental question of political philosophy is not what type of state we should have, but whether we should have any state at all. If anarchy is viable, then we should prefer it to other systems, because all others involve coercion. Hobbes painted a bleak picture of man without a government. He thought that

any government, even the worst, was better than none. Hobbes' picture, though, depended on extremely pessimistic assumptions about human nature, and sanguine assumptions about governments (Nozick 1974, 4-6). Better no government, I say, than the Democratic People's Republic of Korea.

Next, Nozick wrote that

> Moral philosophy sets the background for, and boundaries of, political philosophy. What people may and may not do to one another limits what they may do through the apparatus of a state. The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state's fundamental coercive power has. (Fundamental coercive power is power not resting upon any consent of the person to whom it is applied.) (Ibid., 6).

Nozick said that state-of-nature serves explanatory purposes. There are three possible ways in which the political realm can be explained: in terms of the non-political, as emerging from the non-political (without being reducible to it), or as an independent realm. Of these three possibilities, only the first promises a fundamental explanation of politics, making it the most desirable of the three. If we can tie such an explanation to inescapable features of the human

condition, avoiding arbitrary assumptions, then our explanation could be illuminating, even if no actual state ever came into existence in exactly that way. State of nature is more than a counterfactual.

I maintain that people in the stare of nature act from self-interest, and not from selfless service to their communities. The importance of this distinction will become clearer when we discuss Mancor Olson.

Recall the baffling battery of rights presented on page 4. We can make some sense of this disparate collection by classifying rights. For example, we can identify the right holder, the object of the right, the basis of the right, and the right holder's ability to alienate her right (Wenar 2005).

1. Who is the right holder? Children, animals, employers, employees, criminal suspects, entire peoples, etc.

2. To what action, state, or object does the right apply? The right to remain silent, the right to speak, the right to carry a concealed weapon, etc.

3. How did the right holder come to have this right? By virtue of her humanity, by positive law, by someone else's promise, etc.

4. How can the right holder's actions affect her right? By waiving her right to remain silent, by releasing someone from his promise to her, etc.

Rights can be analyzed according to their components. Wesley Newcomb Hohfeld analyzed the subset of rights that were the subjects of judicial reasoning. He schematized rights as well as their correlatives and opposites (Hohfeld 1964, 35-64):

Correlatives}	right	privilege	power	immunity
	duty	no-right	liability	disability
Opposites}	right	privilege	power	immunity
	no-right	duty	disability	liability

These conceptions offer many advantages. Hohfeld's terminology is unambiguous compared to the vagueness of common language that confounds most discussions of rights. Hohfeld's fundamental legal conceptions take account of the adversarial nature of assertions and denials of rights. They provide a useful vocabulary by which to analyze complex legal relations. They provide a foundation for a powerful logic of rights; Wellman wrote, "….interpreting the ordinary language of the law in terms of fundamental legal conceptions is like translating ordinary language into the vocabulary of symbolic logic" (Wellman 1985, 12). Finally, Hohfeld's legal conceptions render explicit the practical relevance of legal rights.

The use of a controlled vocabulary such as Hohfeld's is extremely valuable whenever clarity is desired in the analysis of legal relations, where statute and *stare decisis* converge to objectify the law, to settle its meaning, so that people can know in advance whether or not some action that they are contemplating would or would not violate the law.

A *right*, in Hohfeld's strict sense, signifies one person's affirmative claim against another person. A right is best understood in relation to its correlative, a *duty*. For example, a landlord has a right to collect rent from his tenant, who has a duty to pay him. A *privilege* signifies one person's freedom from the right or claim of another. That is, she has no duty to refrain from taking a certain action, e.g., publishing an unfavorable review of a novel. A *power* is the ability to change other people's legal relations, for example, by transferring ownership of a property from one person to another. A person whose legal relations will be altered if a power is exercised is under a *liability.* Despite its name, a liability is not always a bad thing. You are under a liability that I may abandon property, which would confer on you the power to acquire it.

The opposite of a right is no-right, which implies that no one is bound by any duty. Privilege denotes the absence of duty for the person who has the privilege. Disability denotes the lack of any power

to alter the legal relations of other people. Immunity protects its holder from the exercise of power by another person.

Rights, privileges, powers, and immunities are sometimes referred to as the Hohfeldian incidents. They are what people usually mean by rights. They frequently appear in complex clusters requiring detailed analyses. Correct usage supports clarity. For example, Hobbes said that all people in the state of nature had the right to do anything, even to kill one another. But if we accept Hohfeld's schema, there is no such right because no one has any duty of action or restraint.

We may say the same of people in Locke's state of nature. Locke said that anyone had the right to punish transgressions of the natural law. But as I mete out punishment, are you bound from interfering? Suppose we disagree on the appropriate punishment. In the absence of judicial guidelines, there is room for great disagreement, which often says as much about the punishers as it says about the person being punished. In the United States, rape was a capital crime in many states as recently as 1977, based at least partly on the attitude, then common, that a woman's victimization diminished or ended her worth and desirability. Sadly, this attitude persists in many countries, including ethnic conclaves within the United States. If you saw me preparing to take the life of an alleged rapist, you would be under no duty to refrain from staying my hand. Since there is no correlative

duty on anyone's part, then I cannot be said to have a right, under Hohfeldian analysis.

Did property rights exist in Locke's state of nature? Locke took pains to prove that they did. As Rothbard showed, property rights are required in order to exercise liberty rights. And yet, contrary to the understanding of early Romans and modern Indonesian dogs, property rights are far from obvious.

Libertarians say that rights can be violated only by the initiation of physical force. But how do we recognize the initiation of force? Nowadays, many people obfuscate the difference between psychic and physical force, as if insults were blows. But when libertarians say physical force, they mean actual, mass times velocity, physical force. Rand's formulation has been widely-quoted:

> Man's rights can be violated only by the use of physical force. It is only by means of physical force that one man can deprive another of his life, or enslave him, or rob him, or prevent him from pursuing his own goals, or compel him to act against his own rational judgment (Rand 1964, 108).

Consider the following scenario: a man walks across a field. Did he violate anyone's rights?

It is hard to know where to begin to answer such a question. Who owns the land? Was the ownership claim filed anywhere that a stranger might consult? Who agreed on the ritual that establishes property claims? Were the boundaries posted, “no trespassing?” Was there justice in initial acquisition? In transfer? Did the man cross another person’s property in order to summon emergency assistance for someone who might be dying? Is there a case for adverse possession?

Was physical force involved in the man’s crossing the field? According to libertarians, the answer is “no” if the man was crossing his own field or another person’s field with its owner’s permission; “yes”, if he were trespassing. The appeal of physical force as a determinant of violations of rights lies in its simplicity and observability.

Now consider a man’s breaking into someone else’s car and driving away. This would appear to be a clear-cut case of the initiation of force. But eyewitnesses cannot distinguish a thief from a “repo man” (an agent paid to repossess vehicles for non-payment of loans). Or suppose that a theft victim recognizes and takes back his own car from someone who had purchased it in good faith. The courts would need to untangle their conflicting claims.

In my examination of Ayn Rand's version of ethical egoism, I identify violations of rights that do not involve the non-initiation of force. As a guide to justice, the principle of non-initiation of force is inadequate.

What correlative duty stops each member of the community from denying the first claim of ownership and asserting his own? No duty stops anyone. In the state of nature, anyone can claim as much land as he can hold by force.

Rights are a product of civil society. The citizens of Locke's civil society acquired rights by agreeing to restraints on their own conduct in exchange for security. The rights that they acquired comprised mutual respect for existing property, agreement on the procedures necessary to acquire additional property, communal force to defend their lives and property, and objective law. Objective law means that cases would be decided in an unbiased fashion according to rules agreed to in advance. In exchange, citizens agreed to abide by the will of the majority, to accept the verdicts of the courts, and to lend their individual force to defending the state and enforcing its will.

Rights were possible only when people agreed to respect one another's claims. Yet this was a necessary condition, but not a sufficient condition. Rights also had to promote human welfare. People could agree to eradicate members of hated minorities in their midst,

but no right to do so would emerge. The formula for rights might be as follows: agreement plus enforcement plus salubrity. They are individually necessary and jointly sufficient. The validity of particular rights could be demonstrated by forceful arguments, but would ultimately be proven by the survival of their memes.

There was never a time when humans lacked leaders. People usually recognized who was wiser, who was stronger, who enjoyed the favor of the gods, etc. The extended family was the essential social unit, next came the tribe. The ties that bound them were those of mutual assistance, mutual protection, and sexual opportunity.

This conforms to the traditional theory of group behavior, which holds that the associations and group affiliations of the present day evolved from the primitive societies that preceded them. In primitive societies, the predominate groups are primary groups, in which members have face-to-face relationships with one another, based on family or kinship. Mancur Olson quoted Talcott Parsons, "…it is well-known that in many primitive societies there is a sense in which kinship 'dominates' the social structure; there are few concrete structures in which participation is independent of kinship status" (Olson 1968, 18). Mancur Olson wrote, "Only small family or kinship type units represent the interests of the individual…Under 'primitive' conditions the small, family-type units account for all or almost all

human interaction" (Ibid.). He quoted R.M. MacIver, who wrote in the *Encyclopaedia of the Social Sciences*,

> Under more simple conditions of society the social expression of interests was mainly through caste or class groups, age groups, kin groups, neighborhood groups and other unorganized or loosely organized solidarities" (MacIver 1935, 147).

Later, "… as societies develop, there is structural differentiation: new associations emerge to take on some of the functions that the family had previously undertaken" (Olson 1968, 18). But these newer, larger associations are explicable by the same fundamental needs as the earlier, family-oriented ones.

Tribes contended for scarce resources. They attacked one another and took what they wanted, except where they feared the consequences. The most rapacious tribes became the most successful, because they had spoils to distribute. Alliances were forged. Tribes and isolate families aligned themselves with the tribes from whom they had the most security to gain. Their motivations were selfish; they wanted to obtain maximum benefits at minimum cost to themselves. Their survival depended upon such associations. A sort of minimax principle, whereby one tries to minimize the maximum possible loss, drove them. In this case, they wanted to minimize the possibility of

annihilation, such as the annihilation that Joshua visited on Jericho, or Scipio on Carthage. A selfless interest in helping the larger tribe at their own expense never entered their deliberations.

My vision of people aligning themselves with groups for mutual protection is different from Nozick's. Nozick thought that individuals who could not protect themselves from stronger adversaries would join protective associations. There would be a number of competing associations, and individuals could "shop" for the best deals. Originally, the members of an association would stand "one for one and all for all," each hurrying to the aid of his fellows to repel aggressors.

Before long, the members would tire of everyone's having to fight everyone else's battles. Also, there would be no obvious way to resolve differences between members of the same association. Some members would join a second or third protective association.

One day, my protective association and yours would come to blows. Rules for resolving disputes between members and non-members would have to be adopted. Protective services would become standardized. The extensive use of force would leave one party standing: the dominant protective association. It would be in a position to enforce its rulings. It would become a *de facto* government.

Such was Nozick's vision. In actuality, tribal identification would supersede other reasons for choosing a particular agency.

Furthermore, protective agencies tend to become protection rackets. The temptation to misuse force would be almost irresistible. Predatory practices would enable associations to keep dues low, or even to pay dividends. Warlordism would emerge, not from the collapse of a central government, as in modern Somalia, but from the ground up.

In the state of nature, there were no police for anyone to go to. People had to fend for themselves, alone or in groups. Compared to Nozick's protective associations, my tribal alliances better reflects the beginnings of modern states. I think that states probably developed as I have outlined. To be fair, we should recognize that Nozick was not guessing how things really happened; he was conducting a thought experiment.

One thing that Hobbes, Locke, and other state of nature theorists took for granted was that individuals would band together to further their common interests. This would seem to follow from individual self-interest. Just as individuals act to further their personal interests, so, it was assumed, groups of individuals would act in concert to further their common interests.

But according to Mancur Olson in The Logic of Collective Action, people do not behave this way except in small groups. Just because every individual in the group would gain if the group's objective were attained does not mean that every rational, self-interested individual

will voluntarily work towards that end, in the absence of coercion or additional incentives (Olson 1968, 2-3).

This appears counterintuitive. Why do organizations, including the state, exist, except to further the interests of their members? Aristotle wrote in Ethics viii.9.1160a,

> Men journey together with a view to particular advantage, and by way of providing some particular thing needed for the purposes of life, and similarly the political association seems to have come together originally, and to continue in existence, for the sake of the general advantages it brings.

Do not labor unions exist to work for higher wages and better working conditions for their brothers? Do not corporations exist to maximize the return on the investments of their shareholders? Do not states exist to further the welfare of their citizens? In fact, every one of these notions is open to challenge. Still, although organizations often serve purely personal interests, their primary function is to advance the common interests of groups of individuals. Purely personal interests are best pursued by individual, *disorganized* action [Olson's usage] (Olson 1968, 7).

Olson makes this point by analogy to a competitive market. The companies in a competitive industry have a common interest in higher prices for their products.

But a firm in a competitive industry also has an interest in selling as much as it can, until the cost of producing another unit exceeds the price of that unit. In this, there is no common interest; each firm's interest is directly opposed to that of every other firm, for the more the other firms sell, the lower the price and income for any given firm (Ibid., 9).

If the firms in an industry are each maximizing their profits, then the profits for the industry as a whole will be lower than they might otherwise be (Ibid., 10). True, all of the firms in the industry have a common interest in higher prices. But "it is in the interest of each firm that the other firms pay the cost – in terms of the necessary reduction in output – needed to obtain a higher price" (Ibid., 10).

Outside intervention, such as government price supports, may keep prices high. To obtain such an advantage, the producers will have to lobby. They will have to hire public relations experts and lobbying firms to convince the public and/or the legislators that their industry deserves support. Such campaigns are expensive. If they succeed, then the firms will enjoy higher profits only until they attract the attention of investors. Investors are constantly seeking the highest return on their investment capital. Soon, new entrants to the industry will share the high profits, never having contributed to the lobbying effort. Capital will flee the old firms and fortify the new ones. The old

firms will be worse off than before. This story describes dairy producers in Pennsylvania. They are not, on average, more profitable than dairy producers in Vermont and Wisconsin. But they incur the continuing costs of “Milk Boards” and advertising agencies and political action committees. Meanwhile, Pennsylvania consumers pay higher prices for milk – the so-called “tax on motherhood.”

Just as it was not rational for a particular producer to cut his output in order to raise prices on behalf of his industry, so it would not be rational for a particular producer to spend his time and money lobbying to obtain government favors for his industry. This would remain true even if every producer in the industry agreed that the government favors were desirable for all of them (Ibid., 11).

Some people might argue that a rational person will support a large organization, such as a lobbying organization, because if he does not, then other will not do so either and the effort will fail, depriving all of them of the potential benefit. To address this criticism, Olson returned to his competitive market analogy:

> …it would be quite as reasonable to argue that prices will never fall below the levels a monopoly would have charged in a perfectly competitive market, because if one firm increased its output, other firms would also, and the price would fall; but each firm could foresee this, so it would not

> start a chain of price-destroying increases in output. In fact, it does not work out this way in a competitive market; nor in a large organization. When the number of firms involved is large, no one will notice the effect on price if one firm increases its output, and so no one will change his plans because of it. Similarly, in a large organization, the loss of one dues payer will not noticeably increase the burden for any other one dues payer, and so a rational person would not believe that if he were to withdraw from an organization, he would drive others to do so (Ibid., 12).

Now consider the national state. It exists to further the interests of its citizens. The Preamble to the U.S. Constitution states,

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the Blessings of Liberty to ourselves and our posterity….

Those were very good reasons for individuals to cast their lot with the new nation. National states typically draw strength and unity from their people's patriotism, religion, ideology (such as democracy or communism), language, and cultural heritage (Olson 1968, 13).

They provide further incentive in the form of economic advantages, for example, the enforcement of contracts.

Despite these advantages to every individual, no modern state has ever survived on voluntary contributions. Compulsory taxation is always required (Ibid.). The reason that states must force members to contribute is that, like the higher prices in a competitive market, the services that the state provides must be available to everyone if they are available to anyone. It would not be feasible to deny military protection to a dispersed subgroup of the population, e.g., homosexuals, Jehovah's Witnesses, American Indians, or illegal immigrants.

Economists call such benefits "public goods." A public good is any good such that, if one person in a group receives it, then it cannot feasibly be withheld from the other members of that group. Those persons who do not purchase or pay for a public good cannot be excluded or kept from sharing in its consumption (Ibid., 14-15). A private individual who does not pay taxes will not have any noticeable effects on the situation of the state, and he can enjoy any benefits brought about by those individuals who do pay taxes.

The Free State Project is an effort to recruit 20,000 people to move to New Hampshire, provided they share the group's political philosophy that "government exists at most to protect people's rights,

and should neither provide for people nor punish them for activities that interfere with no one else" (Free State Project). Although secession is not one of the group's aims, if The Free State Project ever induced New Hampshire to secede from the United States, then New Hampshire could slash not only the taxes that New Hampshire residents pay for welfare but also the taxes that they pay for military protection. The United States would have to protect New Hampshire *gratis*, because it could not tolerate a hostile foreign army's occupying New Hampshire, which separates Maine from Massachusetts and the other contiguous states.

Rational, self-interested individuals will withhold or minimize their support for any organization if they expect others to pay the total costs. This is less of a problem in very small groups, where each individual gets a substantial portion of the total gain. There, members of the group may secure a collective good through self-interested, voluntary actions. But even then, the members will tend to provide the collective good at suboptimal levels, each wanting to restrict the collective good to the amount that he personally wants. And the larger the group, the further it will fall short of providing the optimal amount of the collective good (Olson 1968, 34-35).

In groups whose members want different amounts of a collective good, the members who want the most will pay extra so that the

group will provide the level that they desire. The members who want least will find their needs met without their having to pay anything at all. Olson calls this “the ‘exploitation’ of the great by the small” (Ibid., 35). In multinational organizations like the United Nations, the largest countries, such as the United States, typically pay a much larger share of the expenses than those paid by smaller countries. The smaller countries enjoy the membership benefits for minimal dues (Ibid.,36).

In smaller groups, where each member gets a substantial portion of the total gain, it is sometimes possible to provide a collective good by the voluntary, self-interested actions of the group members. But

> the larger the group is, the farther it will fall short of obtaining an optimal supply of any collective good, and the less likely it will act to obtain even a minimal amount of such a good. In short, the larger the group, the less it will further its common interests” (Ibid., 36).

It may be counter-intuitive to believe that parties whose very survival is threatened would wrestle over relative advantages, jeopardizing any agreement at all. But consider the failure of the United Nations Climate Conference held in Copenhagen in December 2009. For the present purpose, let us set aside any skepticism about the science behind anthropogenic global warming and the apocalyptic

consequences predicted by former Vice President Al Gore. We need only believe that the national representatives gathered in Copenhagen believed.

The goal of the conference was to draft a binding treaty that would compel all the major emitters of greenhouse gasses to cut their emissions to levels necessary to avert the most dangerous consequences of climate change. A rift quickly developed between developed and developing nations. Developed nations like the United States were unwilling to throttle their economies while trade rivals such as China, the number one emitter of greenhouse gasses, drove full steam. China and other developing nations did not want to be pinned down by any treaty; they wanted richer nations to bear all the costs. Poorer nations could not agree on whether the agreement should try to limit temperature increases to 1.5 degrees or 2 degrees Celsius. Major emitters of greenhouse gasses, such as the United States, China, and India favored the higher number, but that temperature level would cause severe draughts in Africa. The European Union offered to cut fifty percent more than it had already offered to cut if the United States and other developed countries would do likewise. The developed countries felt that they were already doing enough and declined to match the Europeans, who therefore did not offer further cuts.

Poorer countries wanted the polluters to pay all the costs of fighting climate change, while ignoring their own emission levels until they have “caught up” economically. They also demanded massive transfers of wealth to help them mitigate the effects of global warming. Lecturing the United States on its moral failings, President Robert Mugabe of Zimbabwe said, “When these capitalist gods of carbon burp and belch their dangerous emissions, it is we, the lesser mortals of the developing sphere, who gasp, starve, sink, and eventually die” (Mugabe 2009).

When the conference ended, little had been accomplished. There would be no binding agreement. Nations would set voluntary limits on their emission of greenhouse gasses; monitoring and verification were uncertain. There would be no firm targets or schedules for cutting emissions. No one pretended that the agreements, such as they were, would forestall the most serious possible consequences of climate change, which might prove irreversible (it would be hard to refreeze a polar ice cap). The developed nations pledged thirty billion dollars over the next three years to help developing nations mitigate the effects of global warming; the amount would increase to one hundred billion annually by 2020. Speaking on behalf of the G77 group of developing nations, Lumumba Stanislaus Di-Aping of Sudan accused the developed nations of throwing Africa into the furnace, and compared

their miserliness to Hitler's genocide. Dessima Williams of Grenada, representing the Alliance of Small Island States, implored Di-Aping to reconsider his conclusions and to control his emotions. The island nations have the most to lose from climate change – they could share the fate of Atlantis, if sea levels rise precipitously – and insults could make it easier for the developed nations to ignore the justice of their claims.

The conference produced The Copenhagen Accord, a non-binding agreement that signatory countries merely "agreed to take note of." Of the 192 countries represented at the conference, only 107 would make even this weak commitment. China and India initially agreed, then withdrew, then agreed again in March 2010.

Now if all of these nations agreed that cooperation was necessary to forestall mutual catastrophe, then why did they refuse to cooperate? Each hoped to ride the concessions of the others, while making few concessions itself.

I wrote that standing on one's rights is seldom the best way to resolve disputes within nuclear families. Family harmony involves compromises and mutual concern and usually, submission to a benevolent dictator at the head of the family. Now, I want to argue that rights arose from the rules laid down by extended families. I would describe this as a genetic argument for rights.

Nuclear families and extended families correspond to Olson's small groups, in which face-to-face exchanges include complex negotiations for affection, prestige, and dominance. In face-to-face exchanges, the strongest members, who have the least to gain, are often willing to contract with weaker members on equal terms.

There is a hierarchy of families, with nuclear families growing into extended families, extended families growing into clans, and clans growing into tribes. Consanguinity is always a powerful factor determining a group's affiliations. In the discussion that follows, I will use the term families to refer to all of these hierarchical levels. Families must deal with two kinds of disputes: internal and external.

Internal disputes pit family members against one another, usually to decide whose will is going to prevail with respect to some asset. In the absence of informal rules, every difference of opinion is unprecedented and potentially costly, both emotionally and materially. Rules establish norms and procedures for resolving disputes. Usually, decisions by the head of the family establish precedents. Over time, members learn to anticipate his judgments and comport themselves accordingly, within the implied norms. Eventually, members will take control or cede control of assets in familiar situations. The head of the family may decide based on favoritism or whim, but if he is inconsistent, then he will forever be called to resolve further disputes,

when he could be using his time more productively or recreationally. To be predictable, he will have to develop principles. I defined rights earlier as “contractual agreements that determine whose choice will prevail in certain contexts and under certain conditions.” By that definition, within families, rudimentary rights have come into existence.

External disputes may come from other families or from gangs vying for control of territory or other assets, or from individuals marauding outside their families. No family that did not hurry to the aid of its least members could long cohere. There would be a duty for other members to render assistance, perhaps in a determined sequence, according to a duty roster. The strongest members might be asked to perform this duty more frequently and to perform domestic chores less frequently. Naturally, the greater the attack, the greater the force that would be necessary to repel it. Presumably, there would be unpleasant consequences for “high maintenance” family members who needed frequent rescuing.

Of course, our family may as easily be the aggressor as the defender. There is no land claim office where warlords can stake their claims to neighborhoods. Prudence dictates that one should take or abandon territory based on the resources necessary to acquire or hold it, and on the anticipated return on the casualties “invested.” But in

the absence of an agreement, there is no obligation to honor the territorial claims or ambitions of another family.

Our state-of-nature families have features in common with modern-day Mafia families, which also operate outside civil law. We should not exaggerate the comparison, however, because the Mafia's activities are defined by the Mafia's opposition to civil law, and not by the absence of civil law.

In 2007, when the Italian police arrested Salvatore Lo Piccolo, the reputed boss of the Sicilian Mafia, a search of his home uncovered a code of conduct for Mafiosi:

1. No one can present himself directly to another of our friends. There must be a third person to do it.
2. Never look at the wives of friends.
3. Never be seen with cops.
4. Don't go to pubs and clubs.
5. Always being available for Cosa Nostra is a duty – even if your wife's about to give birth.
6. Appointments must absolutely be respected.
7. Wives must be treated with respect.
8. When asked for any information, the answer must be the truth.
9. Money cannot be appropriated if it belongs to others or to other families.

10. People who can't be a part of Cosa Nostra: anyone who has a close relative in the police, anyone with a two-timing relative in the family, anyone who behaves badly and doesn't hold to moral values.

Rules 2, 7, 8, and 9 are intended to minimize internal conflict. Rules 1, 3, 4, and 10 are intended to minimize external conflict. Rule 5 and 6 remind members that their primary duty is to the group.

Something like these rules must have been adopted by state-of-nature extended families or their affiliates.

If any member thinks that he would be better off starting his own family, then he would be wise to first ask permission from the head of his existing family. This is natural; families calve like icebergs from glaciers. But the departing person should have a mutual assistance pact, or at least a non-aggression pact, with his old family. New families, like other small families, are highly vulnerable to attack.

Very large families correspond to Olson's larger groups. They have less to gain than small families that are bargaining for their own survival. Large families are already secure from attack. They are accustomed to having their own way. Nonetheless, there are advantages to their affiliating with smaller families. First, smaller families represent reserve forces, should the larger families come into conflict with other large families. Second, they minimize the need for

fighting at all. Fighting, in modern business parlance, is a business expense, and any cost savings here go straight to the bottom line. If two or more families can agree to respect each others' boundaries, either territorially or economically ("We'll take the east side for gambling; you take the west side for rum-running"), then each family will need fewer fighters to enforce its claims, or the same number of fighters less frequently.

In some cases, small families may pay tribute to larger families. Both families and individual members must abide by their agreements, or promises and agreements have no meaning. Bound by an agreement, each member must respect the liberty rights exercised by the families with which their own families have contracted. Each member can stand on his rights, with respect to members of his own family or its allies.

This, I believe, is how rights originated. Families entered into agreements and adhered to agreements in order to secure their selfish ends. Individuals complied with the new rules in order to avoid sanctions or punishments from the heads of their own families, and also to avoid attacks and interference from the members of other families. As time goes by, they were able to stand on their rights with greater confidence. Family members were obliged to accept the

behavior of other family members and affiliates. They were bound by their own acceptance of the terms of their agreements.

Over time, certain rights will become widely-recognized as necessary or important for human flourishing, e.g., “Thou shalt not steal,” “Thou shalt not kill.” They will be incorporated into the “model by-laws” of societies. They will be widely-copied and become universal. Any society that did not adopt these rules would be seriously handicapped and vulnerable to takeover. We may properly refer to these principles as rights.

It is only a short step from tribes to modern nations and states. John Locke, writing shortly after Grotius first outlined the law of the sea, noted that independent states stood in relation to one another as individuals stood in the state-of-nature.

Rights do not imply equality. Inequality has been the norm in human history. In western Europe, where rights first took root, the nobility and the clergy enjoyed greater rights than those enjoyed by commoners. In the United States, rights were enshrined in the same Constitution that acknowledged slavery. In Saudi Arabia, women cannot wear western clothing or walk unescorted or marry against the wishes of their families. Yet it would be false to say that the concept *rights* had no meaning at all in these times and places.

Many factors have encouraged the propagation of rights. I will mention two. First, freedom begets freedom. Capitalism – free enterprise – enabled many clever and resourceful individuals to overcome the disadvantages of their births. Financiers and entrepreneurs accumulated vast fortunes at a time when noblemen were forbidden to engage in ignoble work, lest they forfeit their social privileges. Wherever capital accumulates, political power follows. As commoners rose to prominence, barons and earls lost their estates and their special privileges. Capitalism is a powerful force for equality (which is not to deny that there were others).

Second, the human mind is a mighty engine of conceptual integration. Over time, consciousness will tend to root out inconsistencies and arbitrary divisions. Success is not inevitable; it can be thwarted by other factors. Still, the conscious mind will search for organizing principles. In the absence of contrary influences, it will eventually question the fact that women in Saudi Arabia are forbidden to drive cars but are allowed to fly planes. It will eventually challenge the denial of women's suffrage based on the supposed fact, demonstrably false, that women are less rational than men. Businessmen will eventually tire of handicapping themselves by refusing to work with people based on non-essentials such as color, class, or ethnicity. Again, these are tendencies, not inevitabilities.

Nothing guarantees that society will embrace equality. But the mind's need to organize its world rationally will tend to push it in that direction.

Rights are based on contract, NOT on the characteristics of the rights-holder. This sidesteps the nominalist problem of determining who can be a right-holder by reference to their ability to think, to choose, or to suffer.

Contract implies voluntary action, which implies the right NOT to contract. Freedom of association means that I am not bound to extend rights to everyone who applies, let alone to entities who *cannot* apply.

With respect to persons who are capable of reciprocating rights, the only interest that compels me to extend rights to them is my self-interest. If I deny them the equal protection of the law, then I am authorizing them to act outside the law, as criminals and vigilantes, and that involves trouble that I do not need and can ill afford. This is the situation of illegal immigrants to the United States today. Denied any path to citizenship, subject to deportation, they are afraid to go to the police when they are victimized. Any justice they find comes extra-legally.

With respect to entities that cannot reciprocate rights, I do not believe that it is in my self-interest to extend rights to them. Given that they lack free will, I do not even know what it would *mean* to

extend rights to them (this does not preclude legal agency or collective action, e.g., corporations, which are reducible to individuals' exercising their rights).

In *The Realm of Rights*, Judith Jarvis Thomson wrote,

> …the concept of a right is only one among many moral concepts, and understanding what it is to have a right requires us to get a sense of how that concept is related to the others. How it is related in particular to the concept of what a person ought to do, for it is in the bearing of a person's rights on what he or she or others ought or ought not do that the importance of rights and the value of having them are to be found (Thomson 2000, 3).

Thomson offered an illuminating metaphor: "We might thing of morality as a continent and of rights as a territory or realm somewhere in it; understanding what is within the realm of rights requires getting a sense of where in the continent it lies" (Ibid.).

Denying rights to animals, infants, and mentally incapacitated adults does not mean that we should be indifferent to the welfare of these entities. It merely recognizes that these entities do not have the faculties to enter into contracts, or to adjust their behavior according to promises. It does not make sense for the courts to appoint representatives to act on their behalf. Lacking moral agency, they

have no moral standing and cannot enter into agency agreements as principals, any more than they can enter into any other kinds of contracts. In law, you cannot have a valid contract that binds only one party. Also, as we will see when we discuss H.L.A. Hart's option theory, appointed guardians cannot waive the duties owed by other people. For example, a guardian cannot waive a child's right to an education.

It should be acknowledged that infants will eventually be able to reciprocate rights; they should be conceded rights as soon as they are able to handle them. Mentally incapacitated adults *may* recover and be able to reciprocate rights; we do not know enough to say when their cases are hopeless. Regardless, we should treat them with caring and dignity, if only because other people care about their welfare, and other people are our allies and trading partners.

To summarize my own position on rights: I define rights as contractual agreements determining whose will should prevail in certain contexts and under certain conditions. As we shall see, this is approximately the same definition as Carl Wellman's, though my justification of rights is very different from his. Not all contractual agreements are rights, but they all depend on rights. Rights should be expressible as general principles, and they should be beneficial to mankind, at least in the long run. I hope that readers will assent to

this last condition, at least in the abstract. Even the longest-range historical viewpoints are contentious.

CHAPTER SIX: COMPETING THEORIES

I would like to distinguish my theory of rights from those of other libertarian theorists, such as Ayn Rand and Tara Smith. Rights are complex clusters of liberty-rights, privileges, powers, and immunities. Rand and Smith see rights exclusively as liberty-rights, which are prototypical, but hardly exclusive. Both base their theories on natural rights, a position from which I have taken pains to distance myself. Finally, both insist that rights can be violated only by physical force or the threat of physical force, a position that I have disputed. Let us look more closely at Rand's conception of physical force.

Rand said that all rights are rights to action: "The concept of a 'right' pertains only to action -- specifically to freedom of action. It means freedom from physical compulsion, coercion, or interference by other men" (Rand 1964, 94).

She proposed a single criterion by which we can determine whether or not a right has been violated:

> A right cannot be violated except by physical force. One man cannot deprive another of his life, nor enslave him, nor forbid him to pursue his happiness, except by using force against him. Whenever a man is made to act without his own free, personal, individual, voluntary consent -- his right has been violated...Therefore we can draw a clear-cut

> division between the rights of one man and those of another. It is an objective division -- not subject to differences of opinion, nor to majority decision, nor to the arbitrary decree of society. NO MAN HAS THE RIGHT TO INITIATE THE USE OF PHYSICAL FORCE AGAINST ANOTHER MAN [capitalization Rand's] (Rand, 1946, 6).

The only exceptions that Rand conceded involve what she termed "the indirect use of force," and then, only to expropriate *material* values:

> A unilateral breach of contract consists, in essence, of one man receiving the material values, goods, or services of another, then refusing to pay for them and thus keeping them by force...Fraud involves a similarly indirect use of force: it consists of obtaining material values without their owner's consent, under false pretenses or false promises. Extortion is another variant of an indirect use of force: it consists of obtaining material values, not in exchange for values, but by the threat of force, violence, or injury (Rand 1964, 111).

The first two exceptions imply force when a victim is physically prevented from reclaiming property that is rightfully hers. The concept of "indirect force" becomes problematic when a victim fails to seek

redress, either because she fails to notice the crime or because she cannot identify the perpetrator. Many forms of electronic theft fall into this category. Some involve no greater force than keystrokes, yet they violate rights as surely as armed robbery.

Rand contradicted her assertion that all rights are rights *to action* when she endorsed intellectual property rights (Rand 1967 130-134). My intellectual property right to this dissertation does not entitle me to photocopy it, publish it, or broadcast it; I would have those rights anyway. My right forbids *your* doing those things without my permission. Would you stretch the concept of physical force to cover such actions as photocopying an essay or downloading an MP3 file? If so, then you would be doing "violence" to the concept of physical force. If not, then the government retaliation that Rand invites would *itself* constitute the initiation of force.

Privacy is a non-material asset that can be violated without resort to force. On May 19, 2004, Reuters reported that a Hooters restaurant manager had been charged with secretly videotaping fourteen young female job applicants as they changed into their shorts and tank top uniforms. This offense meets Rand's definition of fraud: the manager obtained material values without the women's consent, under false pretenses, but the violations of the women's persons go far beyond the material value of the tapes.

Is there a right to privacy? A philosophic justification of privacy is beyond the scope of this essay. Still, videotaping an unsuspecting woman in a dressing room might be regarded as expropriating a performance -- a recognized type of intellectual property. After all, many women regularly strip for money, and these waitresses were denied the right to set their terms (and some of these women might have refused for *any* amount of money).

Philosopher Leonard Peikoff agrees with Rand that rights can be violated *only* by force:

> An individual can be hurt in countless ways by other men's irrationality, dishonesty, injustice...But as long as his property is not expropriated and he remains unmolested physically, the damage he sustains is essentially spiritual, not physical; in such a case, the victim alone has the power and the responsibility of healing his wounds. He remains free: free to think, to learn from his experiences, to look elsewhere for human relationships; he remains free to start afresh and to pursue his happiness. Only the crime of force is able to render its victim helpless" (Peikoff 1993, 360).

I disagree with Rand and Peikoff. Malicious attacks on *reputation* do not involve physical force, yet they have consequences that are far

from "spiritual." Suppose that I were to print flyers with your picture, address, and phone number, falsely alleging that you are a convicted sex offender, and post them around your neighborhood. Foreseeable results include your car being vandalized, your children being bullied, your person being assaulted, and your local business being ruined. Yet I have neither coerced nor constrained your actions. If I have not initiated force in posting the flyers, then any steps that you take to prevent my defaming you would themselves constitute the initiation of force, inviting government retaliation ...against *you*.

Reputation is just as important in a national or global economy, in which material and non-material assets alike are reduced to abstractions. Marxists despise the impersonality of the financial system, but the system does not reduce persons to ciphers. It *does* reduce them to FICA scores. These ratings enable people who have never heard of you or visited your state to evaluate your creditworthiness, insurance risk, and honesty; and offer you loans, life insurance, and job interviews.

Identity theft is a growing problem, apart from efforts to misappropriate funds.

Robert *Michael* Davis (Rob) is an executive recruiter in Philadelphia. Although he never attended college or served in the military, Rob considered himself intelligent and capable. He

appropriated the identity of Robert *Merle* Davis, a highly decorated Vietnam veteran and Wharton MBA graduate, who was conveniently (for Rob) working in Indonesia. Rob was defrauding the persons who trusted him for executive searches, but he was good at his job and he satisfied his clients. He did not intend harm to Robert Merle Davis, who was more stunned than angry when the *Philadelphia Inquirer* broke the story (February 7, 1990) of Rob's deception. Nonetheless, if Rob had suffered an accident and were unable to pay his bills, or if he were named in a lawsuit, then Robert Merle Davis might have been rejected for credit, his paychecks garnished, his employment jeopardized, and his tax returns audited. Rob defrauded only his clients; he had no designs on Robert Merle Davis' material assets, and he never initiated force against him. But his actions jeopardized Robert Merle Davis' reputation and thereby violated his rights.

In *Othello*, Iago never raised a hand against anyone; he never "initiated physical force," yet he is one of literature's most vicious characters. Who would maintain that his lies and innuendos never crossed the line and violated Desdemona's and Othello's rights?

If Rand was wrong in insisting that rights can be violated only by physical force, if she was wrong in allowing exceptions only where *material* values were involved, then it might be instructive to identify the source of her error. In her eagerness to identify one *visible*,

unassailable criterion by which people could determine whether or not rights had been violated, I believe that Rand was guilty of a charge that she was quick to level against others. She was being *concrete-bound*. At the very least, she was operating at a level of abstraction that was inappropriately low.

Still, Rand was no materialist. Her endorsement of intellectual property rights and her concept of indirect force suggest a way out of her difficulty. Non-material assets such as intellectual property, privacy, and reputation are real and deserving of legal protection.

Tara Smith, like Ayn Rand and myself, is an egoist and a will theorist. She focuses on general rights held by everyone, rather than on special rights held by some, such as your right to be repaid a debt. General rights are a species of moral rights. She distinguishes moral rights from legal rights, which depend on convention. She ascribes moral rights to all persons, simply by virtue of their being persons. But if there are such things as moral rights and they are unenforceable, then they do not mean much. If they are enforceable, then they are, properly, legal rights.

Smith defines rights as “individuals’ moral claims to freedom of action” (Smith 1995, 18). She grounds her position in the tradition of Grotius and Locke, and quotes Rand, H.L.A. Hart, and Carl Wellman approvingly when they say that rights pertain to freedom of action.

Unlike Rand, she professes familiarity with Hohfeld's analysis of rights; nevertheless, she chooses to focus on liberty rights.

She embraces the fact that abstractions can be the subjects of rights, more explicitly than Rand did:

> The dismissal of rights because they are invisible is grossly unwarranted. Recognition of rights reflects acceptance of moral norms concerning the freedom that people are entitled to. Acceptance of these norms is no more suspect than acceptance of any other moral prescriptions – or of many other abstract concepts that represent things whose existence is not immediately verifiable by sensory observation (e.g., a batting average, atoms, a person's pride, reputation, or memories). Whether we should actually recognize rights depends, of course, on the argument provided for doing so (Smith 1995, 28).

Smith distinguishes her justification of rights from traditional Natural Rights theory. She rejects the notion that rights exist prior to our recognizing the usefulness of such a concept. Rights are not discrete ontological entities waiting to be discovered. Smith maintains instead that "certain unalterable facts about human beings joined with the objective definition of maintaining our lives warrant the recognition of rights" (Ibid.,). Smith differs from me in distinguishing her justification

for rights from convention or agreement. I agree with her that the basis of rights is not arbitrary, but I ask what compels people to limit their own freedom and to respect the rights of others.

Smith offers a hypothetical argument: “If life is a fundamental value, and we seek to have the chance to maintain and advance our lives, then we ought to recognize individual rights as a necessary means of doing so (Ibid., 32).

Here is Smith’s argument in its entirety:

1. Human life requires productive effort.

2. Productive effort requires reasoned actions.

3. Reasoned action is individual and self-authored.

4. Reasoned action requires freedom.

5. Thus if we seek to live in a society in which individuals are to have a chance to maintain their lives, we must recognize individual rights to freedom (Ibid., 33).

From step 4 to step 5, there is a big leap from fact to value. This is not intended as a criticism; all moral philosopher make that leap, myself included. But step 5 is not incontrovertible. Smith does not consider the possibility that rights can be accorded to people selectively and not universally.

I have explained why I believe that it is advisable to grant rights to all rational people: because there appears to be no rational basis for

carving exceptions, and because dealing with people who are not bound to respect our rights would impose very high costs on us. But it would be possible to offer a restricted set of rights to certain classes of people. For example, states that allow casino gambling will not grant gaming licenses to the cousins of reputed organized crime leaders, even if the applicants have never been arrested. Rightly or wrongly, Guantanamo Bay detainees have not been granted all of the protections accorded United States citizens, including the right of habeas corpus, and the right to have an attorney present before questioning.

For Smith, the goal of life is *eudaimonia*, a term that Aristotle used in the *Nicomachean Ethics*. For Aristotle, *eudaimonia* was a person's ultimate purpose, a kind of blessedness, that for the sake of which he did everything else. Aristotle said that it was a process and not a state (1176b5), and he equated it with virtuous action. For Aristotle, *eudaimonia* is different from happiness. Happiness can be renounced in favor of something else; for example, I would be willing to suffer a great deal if, by my suffering, I could somehow cure AIDS or malaria. An artist may suffer for his art; a parent may suffer for her child.

In Greek, *eudaimonia* means "having a good guardian spirit." It is an objective state accompanying a life that the best persons in

society would approve. *Eudaimonia* is not up to us entirely; it requires the cooperation of fortune. No one suffering the afflictions of Job can happy. We can, however, choose to be virtuous, and *eudaimonia* and virtue are usually concomitant.

Smith uses the term *eudaimonia* somewhat idiosyncratically. She equates *eudaimonia* with personal happiness and fulfillment. “The only reason to recognize right,” she says, “is that freedom is necessary for individuals to achieve their highest value: their own flourishing” (Smith 1995, 67). For Smith, *eudaimonia* is more of a personal goal than it was for Aristotle.

Smith describes her rights theory as teleological, with *eudaimonia* as the telos. “Rights’ telos is a happy life, one of flourishing or well-being” (Ibid., 44). Smith identifies her version of eudaimonia with Aristotle’s, but hers is much more individualistic. Furthermore, her description of her theory as teleological invites misconceptions. She is not naively invoking Aristotelian metaphysics. She does not mean that everything naturally tends towards some end. She means that human beings can and should make their own happiness the rational purpose of their lives. Having made that choice, humans are like servomechanisms adjusting course on their way to their selected targets.

Smith argues that *eudaimonia* is always self-generated: "…insofar as flourishing is a function of one's activities, it is an end that a person must attain for himself" (Smith, Viable Values 128). She quotes John Cooper on Aristotelian eudaimonia: "…*eudaimonia* is necessarily the result of a person's own efforts" (Smith 2000, 128); and she quotes Julia Annas: "…our final good cannot be something that other people could give us; it must be something we can achieve for ourselves….it is not a thing or state of affairs that others could bring about for me" (Smith, 2000, 128). In her own words, Smith says,

> A person can only flourish for himself. Because flourishing is not a collection of external goods, it cannot be transferred from one person to another. However well-meaning , loving, and generous a person might be, he cannot make another person flourish. While one person might aid another in significant material and spiritual respects, he cannot live for another person, and he cannot impart to another the sense of satisfaction that one's own efficacy can provide. Flourishing is inescapably a function of how an individual leads his life (Ibid., 129).

This last point is very important. It is a good response to persons who claim that other people's self-reliance depends on our providing them with meaningful options.

I would have preferred that Smith avoid the Aristotelian terminology, which is somewhat misleading given her different emphases from Aristotle's.

In physics, complementarity is the concept that a phenomenon may be looked at one way or another, but not both simultaneously. For example, light can be understood as waves or as particles. The concept applies to rights, too. Rights can be understood as being based on choice or based on interests, and an argument can be made for each. But when speakers go back and forth between the incompatible justifications, the concept of rights loses its coherence.

H.L.A. Hart was a will theorist and a rule utilitarian in the positivist tradition of John Austin. There are many versions of will theories, but they have in common a belief that rights confer some special status upon the right-holder. Hart's "option theory" held that it is having a respected choice; he maintained that moral rights concern the proper distribution of freedom rather than the proper distribution of benefits. Naturally, that proper distribution was dictated by utilitarianism. Everyone was to have an equal share.

Hart disagreed with Hohfeld that the language of legal rights was ambiguous, because liberties, claims, powers, and immunities are all distinct relationships. What they have in common, what makes them all rights, is a core of one or more bilateral liberties with a protective perimeter of noninterference (Wellman 1995, 1).

In *Bentham on Legal Rights*, Hart offered the example and the metaphor of a plot of ground surrounded by a fence. Within the fence, the right-holder can take whatever actions he wishes. The fence delimits the area under his control, and prevents anyone from interfering with him. His neighbor has the liberty-right to look over the fence and observe him or, conversely, not to observe him. Each has a duty not to interfere with the other. The man within the fence can hold his neighbor to this duty or not hold him to it, i.e., he has the power to waive his neighbor's duty of noninterference and welcome him to the fenced area. The neighbor has no immunity to avoid the invitation, but he can accept or reject it. What seemed at first like a simple liberty-right is actually a complex of Hohfeldian elements (Hart 1973, 176). Hart believed that only a complex of Hohfeldian elements could capture what was unique about a right, inexpressible solely in the language of duties (Wellman 1982, 12). What all these bilateral liberties have in common is that they are legally respected choices. For

this reason, Hart's theory is commonly referred to as "the Choice Theory" of rights.

In his essay, "Are There Any Natural Rights?", Hart wrote that "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free" (Hart 1955, 175). He meant that all men are free to take any actions that do not harm anyone else, free of interference from others. This is not an absolute right; restraint may be justified by special conditions that are consistent with the equal right of all men to be free (Ibid., 176). But justification would be required.

Note that Hart's principle was conditional: "*if* there are any moral rights…." [italics mine]. There are many moral codes that are simply prescriptive, e.g., the Ten Commandments, and Indian *dharma*, that imply no recognition of rights. The reader is asked to recall Joel Feinberg's Nowheresville, described in Chapter One.

Within jurisprudence, the morality of law concerns itself with justice, fairness, rights, and obligations. According to Hart, it is congruous to employ force to secure these moral values. Indeed, the whole purpose of rights is to determine when it is legitimate for one human being to determine by his choice how another should act. Only if human beings conduct themselves in accordance with justice, fairness, rights, and obligations – even if coercion is required – will

human freedom be distributed as it should be (Hart 1955, 178). Hart would not deny that each of these moral concepts is open to interpretation.

Having an interest is an insufficient condition for having a right, Hart believed. Suppose that I promise, in exchange for some favor, to look after your aged mother in your absence. My promise generates a special right, but my obligation is to *you* and not to your mother, although it is your mother who would benefit by my performance. You have a moral claim on me, and it is only you who can waive it. You are in a position to determine, by your choice, how I should act, even though you are not the potential beneficiary (Ibid., 180). Hart elaborated,

> It is important for the whole logic of rights that, while the person who stands to benefit by the performance of a duty is discovered by considering what will happen if the duty is not performed, the person who has a right (to whom performance is *owed* or *due*) is discovered by examining the transaction or antecedent situation or relations of the parties out of which the "duty" arises" (Ibid., 181).

This has an important implication for determining who can be a right-holder: we should not extend rights to animals and babies, even

though it would be wrong to mistreat them (Ibid.). They cannot exercise choice.

Hart, we have noted, believed that a moral justification is needed for limiting another person's freedom and deciding how he should act. When someone says, "I have a right to something," they mean either that the claimant has sufficient justification for interfering with another person's freedom (I have a right to be paid for the goods that you purchased from me) or when the claimant resists or objects to someone's interfering with her without sufficient justification (I have a right to speak my mind) (Ibid., 183).

Special rights arise out of special transactions between individuals, or out of special relations between them. The obvious case of a special transaction is the act of promising, which includes entering into a contract. Your right and my obligation arise because of our voluntary transaction, and not because the promised action has any inherent moral quality. A promise can be frivolous yet morally binding, like the friendly wagers between mayors of cities whose teams are competing against each other in the World Series.

Promises are not the only kind of transaction that generates rights. Rights may come into existence by someone's authorizing another to interfere in matters in which, but for the authorization, he would be free to determine for himself (Ibid., 184).

A third way in which special rights and obligations arise is from "mutuality of restrictions," and this is especially important to our discussion, because it explains political obligation:

> ….when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted from their submission. The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative moral right to obedience (Ibid., 185).

There may be other reasons to obey the rules, for example, they may lead to good consequences, but, Hart noted, "…the obligation is due to the cooperating members of the society as such and not because they are human beings on whom it would be wrong to inflict suffering (Ibid.).

Clearly, Hart was saying that political rights arise by contract, the same conclusion that I have reached. He rejected the utilitarian justification of political rights:

> The utilitarian explanation of political obligation fails to take account of this feature of the situation both in its simple version [act utilitarianism] that the obligation exists because and only if the direct consequences of a political act of disobedience are worse than disobedience, and also in its more sophisticated version [rule utilitarianism] that the obligation exists even when this is not so, if disobedience increases the probability that the law in question or other laws will be disobeyed on other occasions when the direct consequences of obedience are better than those of disobedience (Ibid.).

Hart did not claim that political obligations or any other obligations are absolute. There are times when we recognize that we ought not to do something, even though we have an obligation to someone to do it, but we cannot simply dismiss our obligation because newly-available information suggests that better consequences would follow from our not discharging our obligation.

Hart agreed with the social contract theorists that

> …the obligation to obey the law is not merely a special case of benevolence (direct or indirect), but something which arises between members of a particular society out of their mutual relationship (Ibid., 186).

Hart classified political rights as special rights. By contrast, general rights do not arise from transactions or special relationships between people. They “are rights which all men capable of choice have in the absence of those special conditions which give rise to special rights” (Ibid., 188). General rights impose an obligation of non-interference on the part of everyone else. General rights are based on the principle that all men are equally free (Ibid.).

Having shown how special rights can arise, Hart followed a Kantian line of argumentation in asserting the existence of general rights. The general right of all men to be equally free is a necessary precondition of special rights. Gary B. Herbert elaborated,

> …one cannot with logical consistency assert that one possesses special rights without also logically presuming the existence of this more fundamental right of all people to be free. And its status as a necessary condition is enough, Hart says, for us to claim for it the status of a “natural” right (Herbert 2002, 296-297).

For Hart, a right involves a moral justification for interference or curtailment of another human being’s liberty to act as he would like to act. This is different from its being morally good to interfere, based on utilitarian calculus. Hart explained,

> If we justify interference on such grounds as we give when we claim a moral right, we are in fact indirectly invoking as our justification the principle that all men have an equal right to be free. For we are in fact saying in the case of promises or consents or authorizations that the claim to interfere with another's freedom is justified because he has, in exercise of his equal right to be free, freely chosen to create this claim, and in the case of mutual restrictions, we are in fact saying that this claim to interfere with another's freedom is justified because it is fair; and it is fair because only so will there be an equal distribution of restrictions and so of freedom among this group of men (Hart 1955, 190-191).

Hart had in mind a "pattern distribution" (to use Nozick's term) of equal freedom for all human beings. We should embrace this distribution because it is fair, and it is fair because it leads to this distribution. Hart rejected the possibility that some characteristic or behavior of some human beings, such as race or religion, could constitute a moral justification for interfering with their freedom, but these are inessential characteristics of people, outside their choice.

Could there be essential bases for restricting people's freedom unequally? I, for one, would not object to certain privileges for persons

who have served in the armed forces, protecting everyone's freedom, as compared to civilians. We restrict the right of persons from certain countries to fly commercially. In wartime, the Selective Service conscripts people on the basis of sex.

Hart contributed a great deal to our understanding of rights. He understood that rights concerned the proper distribution of human freedom, that rights imposed restrictions on human freedom, and that moral justification was required to violate rights. Hart's choice theory is one version of a will theory of rights. Will theories hold that what is distinctive about rights is that they grant preference to the will of the right-holder.

Carl Wellman is a utilitarian and a will theorist in the tradition of H.L.A. Hart. Both men maintained that a right confers a special status on the right-holder. But while Hart held that that status is to have a respected choice, Wellman holds that it is to have a sphere of dominion over some second party in some potential conflict of wills.

Like Hart, Wellman begins his theory by embracing Hohfeld's fundamental legal conceptions, and he employs them with great precision. Wellman regrets the tendency to use nouns rather than verbs when talking about rights.

Hohfeld avoided defining his terms, preferring that case law define them ostensively. Wellman defines Hohfeld's elements and

attempts to apply them not just to legal conflicts but also to moral ones. This would be no mean feat, because unlike the legal realm, where there is only one sovereign legal authority in each jurisdiction, in the moral realm, there are competing moral theories, with conflicting versions of the good and opposing recommendations for action. If the sanction for transgressing moral law is anything other than disapprobation, then it seems to be that moral law *is* legal law.

Wellman does not distance himself from second generation rights . These are typified by the rights listed in Article 25 of the United Nations' *Universal Declaration of Human Rights,* which declared, "Everyone has a 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…."

These so-called rights go quite a bit further than Locke's endorsement of a subsistence safety net. As a libertarian, I consider positive rights a contradiction in terms. All rights are negative rights, requiring only that others refrain from interfering. The provision of positive goods and services would require coercive taxation, violating the property rights of those who earned money and who would prefer to spend it according to their own priorities.

Robert Nozick agreed that all government welfare programs violate the rights of the taxpayers who are forced to support them.

Every right gives its holder a right to enforcement. “Yet rights of enforcement,” he wrote, “are themselves merely rights; that is, permissions to do something and obligations on others not to interfere” (Nozick 1974,92).

Wellman denied that positive rights could hold *in rem*, but he maintained that they may hold for each person against his society. To be a member of a society, he reasoned, is to be subject to its economic system. If someone is injured, through no fault of his own, by the operations of the economic system, then his society is morally obligated to remedy the injury it has caused.

But it is not a failure of capitalism if someone cannot make a living selling baskets that no one wants to buy, and it is not a failure of socialism if a manager declines to hire someone whom she believes would do more harm than good. Ensuring a basic standard of living to persons who cannot sustain themselves is a political and not an economic goal, and it requires a political justification.

An understanding of the nature of rights is essential to distinguishing real rights from faux. Rights imply duties. Wellman discussed a woman’s right to an abortion, established by Roe v. Wade on privacy grounds, and listed some of the questions that it left unanswered. Must state agencies fund abortions for poor women? May the state regulate the conditions under which abortions are

performed? Must a woman have her spouse's consent? Her parents'? Must a pregnant woman submit to medical treatment needed to preserve the health of the fetus in her womb? It is of the utmost importance to answer such questions, because of their practical import (Wellman 1995, 5).

In March, 2010 the United States Congress passed and President Obama signed a massive health care reform bill. During the debate, many proponents asserted a right to health care. If such a right exists, is it a right *in rem* or *in personam*? Does it impose a duty on a doctor to treat every indigent person? Does it impose a duty on society to vastly increase public funding for medical care? The answers to these questions have life or death consequences.

In *A Theory of Rights*, Wellman offered the following definition of a right:

> A legal right, such a man's legal right to look over his garden fence at his neighbor, is a complex legal advantage to which the right-holder can appeal in the event of some possible confrontation with one or more second parties. It is a legal advantage, not necessarily because its possession is beneficial to the right-holder, but in the sense that it favors the right-holder's will vis-à-vis the opposing will of any second party. A right is complex in

> that it is constituted by a number of Hohfeldian elements in addition to its defining core. It is a complex because these associated elements belong to the right only by virtue of their essential relation to that core (Wellman 1985, 91-92).

In *Real Rights*, Wellman revised his definition as follows:

> A legal right is a system of Hohfeldian positions that, if respected, confers dominion on one party in the face of some second party in a potential confrontation over a specific domain and that are implied by the legal norm or norms that constitute that system (Wellman 1995, 8).

Wellman considers the difference significant. A right is more than a set of Hohfeldian elements. It is modified by the legal system that implements it. Since Hohfeld's elements can evolve with case law, being otherwise undefined, it seems to me that Wellman's first definition is satisfactory. But I can embrace either one as my own definition.

Wellman tries to extend Hohfeld's legal conceptions to moral rights, primarily by analogy. I have expressed my doubts about this approach. Moral rules do not create moral rights on which right-holders can stand against other people, against society, or against the government.

Nonetheless, there may be moral rights that *should* be legal rights. Recognition of such rights normally precedes their becoming legal rights. For example, a slave in the antebellum south had a moral right to escape and flee northward, although he had no legal right to do so. Of course, there may also be legal rights that violate moral rights. According to the Fugitive Slave Act of 1850, law enforcement officials in free states were compelled to arrest and return alleged runaway slaves, and persons in free states who helped the runaway slaves were subjects to fines and imprisonment.

Wellman states,

> …whether or not a moral right is protected by society, it ought to be so protected. But why? Perhaps because moral rights could not serve to resolve conflicts between individuals as they ought to be resolved if it were not morally appropriate for society to intervene on the side of the possessor in any confrontation between a rightholder and a recalcitrant duty-bearer (Wellman, 1997, 5).

Wellman understands the tension between rights and utilitarianism. That is, if rights are ultimately grounded in utility, then rights should be overridden whenever greater net utility would result. Nozick's idea of rights as side constraints would be unsupportable.

To defend his theory of rights on utilitarian grounds, Wellman would have to show not only how a right is based on utility, but also how each element in the right is based ultimately on utility.

Wellman does not undertake this intricate project, but he suggests its outline:

> Space does not permit the completion of my story here, but perhaps enough has been written to make reasonable clear the kind of story that would be told. It is a thoroughly utilitarian story, although quite unlike the familiar form of act-utilitarianism or rule-utilitarianism. It might well be called a reason-utilitarianism. A moral right consists of a complex structure of moral positions, such as moral liberties or claims or powers. Since moral positions are positions under moral norms and moral norms consist of moral reasons, the proximate grounds of any moral right are constituted by a set of moral reasons. But these are morally relevant reasons because they are connected with utility and disutility in important ways. Hence, the ultimate grounds of any moral right are utilitarian (Ibid., 162).

Wellman appreciates what is at stake:

> If the public welfare consists in the aggregate well-being of all the members of the society and if, as many believe,

> moral rights cannot be grounded on social utility, then I have proposed not one but two ends for the law, goals that will sometimes conflict in practice (Ibid., 229).

Wellman's difficulty arises from his unwillingness to surrender either his utilitarianism or his belief in rights. At the heart of Wellman's system is a fundamental contradiction. Utilitarianism implies an interest-based theory of rights. There would be no point in a right-holder's assertion of dominion if he and a pretender were both ethically-bound to maximize happiness and minimize pain for all involved. Differing interpretations aside, they would have to choose identically. Rights are based on self-interest, while utilitarianism is based on distributed interest. Self-interest certainly simplifies the hedonic calculus. It is possible that rights are consistent with ethical theories other than ethical egoism, but rights and utilitarianism are diametrically opposed.

In information systems, there is an inverse relationship between retrieving all the relevant documents on a subject and retrieving extraneous documents, called "noise." In other words, I could ensure that I was retrieving all the books in Temple's Paley Library on the subject of Nietzsche by retrieving every last book in the library, but my results would contain too much noise to be useful. But if I

narrowed my search too much, say to books with the word Nietzsche in their *titles*, I would miss much worthwhile material on Nietzsche.

There is a similar problem in rights theory. Will theories of rights tend to omit many rights cherished in everyday language, such as the rights of babies and of the mentally incapacitated. Interest theories of rights tend to extends rights to more and more entities, including not only babies and the mentally-incompetent, but, in some versions, to animals, plants, forests and lakes, and even to “the planet.” These are faux rights, equivalent to noise.

While will theories of rights assert that the purpose of a right is to determine whose will should prevail under certain circumstances and conditions, interest theories assert that the purpose of a right is to protect the interests of someone by imposing societal constraints or obligations on the actions of others.

According to interest theories, every right protects some aspect of a person’s welfare. This may or may not involve aspects of the person’s freedom.

Neil MacCormick and Matthew H. Kramer are prominent proponents of interest theory. MacCormick’s essay, “Children’s Rights: A Test-Case for Theories of Right” offers a good introduction to the content and consequences of interest theory. MacCormick wrote,

> Let me start from what seems to me a simple and barely contestable assertion: at least from birth, every child has a right to be nurtured, cared for, and, if possible, loved, until such time as he or she is capable of caring for himself or herself. When I say that, I intend to speak in the first instance of a moral right. I should regard it as a plain case of moral blindness if anyone failed to recognize that every child has that right (MacCormick 1982, 154-155).

MacCormick seems to have been arguing that there exists a set of moral propositions, of which children's rights are one member, that are self-evident. In *The Realm of Rights,* Judith Jarvis Thomson relied on a similar methodology:

> I take much of the stuff of morality as given. I do not offer a recipe for constructing it out of elementary particles…For example, I will often say such things as "But surely A ought to do such and such" or "Plainly it is morally permissible for B to do so and so," and I will not even try to prove that those things are true…Moreover, I will not merely say such things; I will rest weight on them. I do not wish merely to produce a list of moral judgments that we (I hope) will agree to be true; I will draw conclusions from the supposition that those judgments are true

> conclusions, in particular about people's rights. They will serve as *data* for the theory of rights to be presented. If you think them false, than you have as serious a ground for objection to what goes on as you have if you find a mistake in my reasoning from them (Thomson 2000, 4).

I find much to disagree with in MacCormick's statement and in his and Thomson's methodology, but neither of these pre-eminent philosophers is unaware of the shortcomings in his position. My problem is that you cannot argue with someone who holds his positions beyond criticism. No doubt there are Saudi men who hold positions on grounds similar to MacCormick's and Thomson's – positions that would make both philosophers cringe. "But surely A ought to throw acid in the face of any woman with the temerity to venture outdoors with her face uncovered." The Saudi ethicist – let us describe him as a member of the Committee for the Promotion of Virtue and the Prevention of Vice – has a different data set from Thomson's. If each holds his ground, then there can be no dialogue between them, no learning from each other.

It is possible that most moralizing begins with conclusions – the time tested wisdom of one's community – and works backwards to rationalizations. I want to concede as much as possible to MacCormick. But his statement is complex: it makes love obligatory and asserts a

doctrine of positive rights, without specifying and delimiting those rights, without stating whether they are *in rem* or *in personam*, and without explaining how duty-bound persons acquired their obligations.

MacCormick recognizes that there are morally acute and clear-sighted people who would deny not the substantive moral tenet involved in ascribing that right to all children, but the appropriateness of expressing the moral tenet through the linguistic device of the noun 'a right' (MacCormick 1982, 155).

This passage seems to refer to will theorists such as H.L.A. Hart and Carl Wellman. As we have seen, these theorists would deny that babies have the attributes to exercise rights, i.e., the power to waive or enforce other people's duties. And yet, despite MacCormick's indignation, he admits that "There may be…cases in which we are much more certain that children have a right to something than we are certain about what is the right or the best way of giving effect to it" (Ibid., 163).

Matthew H. Kramer explained,

> To say that someone holds a right even though nobody yet knows what it involves is to say merely that a certain interest has been deemed worthy of moral or legal protection; to say that every child holds an unspecified "right" to an education, for example, is to say merely that

> every child's interest in receiving an education ought to enjoy moral or legal protection" (Kramer, 1988, 46).

Some will theorists, according to MacCormick, have tried to overcome the problem of children's rights by having parents or other parties act as guardians. I previously questioned the concept of agency for entities who lack standing. From whence would the agents' authority be derived? MacCormick pointed out that parents and guardians would have no power to waive duties owed to their "principals." They cannot, for example, waive their children's right to food, education, or medical care, though they could waive their own rights to such goods. They cannot, therefore, exercise actual choice on behalf of their charges. They cannot relieve anyone of the burden of caring and nurturing. If the baby's parents are incompetent or negligent in caring for their baby, someone else must be found to provide care. The right *in personam* becomes a right *in rem*.

Let us consider the broader aspects of interest theory. It is clear that every sentient being with needs and interests would like to have the satisfaction of those needs guaranteed. But how does it become my responsibility and yours to satisfy them?

Peter Singer, one of the world's most consistent utilitarians, offered the following argument:

I begin with the assumption that suffering and death from lack of food, shelter, and medical care are bad…if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it (Singer 1972, 231).

Proximity is irrelevant: “It makes no difference whether the person I can help is a neighbor’s child ten yards from me. Or a Bengali whose name I shall never know, ten thousand miles away” (Ibid., 231-32).

It is also irrelevant to me that millions of other people are equally or better situated to mitigate or prevent an evil than I, according to Singer. If I could help, then I should help, up to the point at which the suffering I bring upon myself and my dependents exceeds the suffering that I would alleviate (Ibid., 234).

I am not persuaded that needs and interests are sufficient for establishing claims. There are 6.8 billion people on earth, and most of them are impoverished. The interests of other people are boundless, and my capacity to satisfy them is limited. Every desire blossoms into a new need. Interest theory elevates rights to the status of entitlements. If the interests of others are sufficient to obligate us, then we can never hope for more than subsistence ourselves.

Immanuel Kant said that there can be no duty to perform the impossible. Rights cannot stand on a foundation of interest theory.

Furthermore, if interests were sufficient to establish rights, then the number of right-holders would be enormously greater. They would include children, mentally incapacitated adults, animals, plants, robots, and who knows what else?

In September 2008, Ecuador adopted a new constitution giving nature – its mountains and its forests, its rivers and its lakes – legally enforceable rights to "exist, flourish, and evolve" (Charman 2008).

Article 1 of Ecuador's constitution reads,

> Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution . Every person, people, community, or nationality, will be able to demand the recognition of rights for nature before the public bodies.

Under Article 1,

> …property owners are no longer allowed to interfere with the functioning of ecosystems that exist and depend upon that property for their existence and flourishing….In addition to recognizing that ecosystems possess the inalienable and fundamental right to exist and flourish, the

> Rights of Nature laws give people the legal authority to enforce those rights on behalf of ecosystems and require the governments to remedy violations of those ecosystem rights.

Let us grant, if only for argument's sake, that Ecuador has long been ravaged by multi-national corporations engaged in growing bananas, extracting natural gas, drilling oil, etc., with little regard for the countryside. Ecuador is presently involved in litigation against the Chevron oil company, which stands accused of dumping billions of gallons of crude oil and toxic wastes into the Amazon jungle, resulting in high rates of cancer for people living nearby.

Regardless, it makes no sense to ascribe rights to entities that lack free will, and whose continued existence would be a matter of indifference if they had consciousness, which they do not. The Rights of Nature are an attempt to apply interest theory to circumvent government corruption by extending government regulation, which widens opportunities for government corruption. A defender of the Rights of Nature, Legal Defense Fund executive director Tom Linzey , said that "Governments permit and legalize the discharge of certain amounts of toxics [sic.] into the environment. As a form of environmental protection, it's not working" (Charman 2008, 131). The solution to the problem that Linzey points out does not lie in restricting

property owners from using their property to meet human needs. Rather, it lies in protecting their property rights. Owners, as a rule, do not despoil their own property, any more than birds foul their own nests.

Let us compare the advantages and disadvantages of will theories and interest theories of rights. Will theories hold that “a right is a vehicle for some aspect of an individual’s self-determination or initiative” (Kramer 63). A right-holder must be competent to demand or waive the enforcement of his right. Thus, will theories only apply to claims for which enforcement or waiver is possible for the claim holder. A claim holder’s rights stand independent of his interests. The right-holder may or may not be the beneficiary of the right. For example, I may hold you to a promise to deliver a package to my niece. In that case, your obligation would be to me and not to my niece, and I alone could waive your obligation. Technically, my niece would have no rights in the matter, although she is the beneficiary.

Will theories deny rights to many entities, such as children and the mentally incompetent, to whom most of us would like to somehow extend protection. Will theories do not subsume what have been called inalienable rights, e.g., I cannot waive my right to liberty by selling myself into slavery, and I cannot waive my right not to be assaulted or my right not to be tortured.

Interest theories hold that rights protects aspects of a person's interests or welfare, regardless of his or her competence to demand or waive enforcement. It therefore can extend rights to children and the mentally incompetent, to whom most of us would like to somehow extend protection. It can also be applied to extend rights to lower animals, forests and lakes, robots, and other entities whose perceived "interests" derive from the pathetic fallacy. In fairness, though, of the interest theorists I have named, only Peter Singer, whose activism for animals rights is well known, would support these extensions of interest theory. Still, the nominalist problem rears its ugly head whenever someone tries to decide where to draw the line before potential right-holders. Certain group rights of solidarity can also be defended on interest grounds.

Kramer offered an interesting insight on Wellman's contention that the right-holder and the beneficiary of the right may be different, as when you and I contract for you to deliver my gift to my niece. Kramer stated,

> …the Will Theorists are also wrong in maintaining that the contractual party who elicits a promise for the benefit of a third party does not have an interest in the performance of the contract…A typical promisee who procures an undertaking for the good of a third party has at least two

> interests in the fulfillment of the undertaking by the promisor. One main reason for his generally wishing to see the fulfillment of the undertaking is that it constitutes the fulfillment of an undertaking *to him*." (Kramer 1998, 78-80.

Kramer said that there was another reason: the promisee has an interest in knowing that an advantage will accrue to the person that the promisee is trying to help. Kramer wrote,

> Only by disregarding the ways in which human agents sometimes harbor fellow feeling for one another and sometimes curry favor with one another and sometimes fulfill commitments by arranging goods or services for one another can the Will Theorists declare flatly that a promisee does not have any interest in the execution of a contract which he or she has made for the furtherance of someone else's projects (Ibid., 80).

When interest theories contend that rights are modes of protection for interests that are worthy of protection, it is advancing a thesis about the nature of rights, rather than advancing any criteria for the worthiness of interests (Ibid., 79). Again, the nominalists problem rears. MacCormick wrote, "That every child has a right to be educated to the limits of his or her abilities seems to me to be clear"

(MacCormick 1982, 163). But what are the limits of someone's educational abilities? If someone wants to learn to play the accordion strictly for fun or learn to speak Mandarin strictly for the challenge, who should foot the bill? MacCormick did not say. Interest theory does not offer any explanation for why some interests should be secured by law, but not others.

Another advantage of interest theory is that it clearly protects people's bodily integrity, i.e., their right not to be murdered or assaulted. Yet another advantage cited by Kramer (Kramer 1998, 78) is that some entitlements are unwaivable, e.g., interest theories can give rights to workers under minimum-wage legislation, although the individual workers cannot waive their entitlement to be paid at a certain level (whether or not this violation of freedom of contract is *actually* in the workers' interest is outside the scope of this discussion).

Before concluding our review of interest theory, it is worth noting that Kramer himself brings up what I call the white elephant problem. A "white elephant" is a valuable possession that its owner cannot sell and whose maintenance is prohibitively expensive. In southeast Asia, white elephants symbolized justice and power, peace and prosperity. To be given a white elephant by one's monarch was a great honor, but it was also a curse. One could never sell or dispose of

the animal, or put it to labor, and its housing and feeding were enormously expensive.

MacCormick wrote,

> It is not necessarily the case that each individual acquiring a right under the law should experience it as a benefit, an advantage or protection of his interests. Perhaps there are some people who have been more harmed than benefited by an inheritance. Perhaps in some cases, property inherited – e.g., slum properties subject to statutory tenancies at controlled rents – are literally more trouble than they are worth, and besides, something of an embarrassment to the proprietor. None of that is in any way inconsistent with the proposition that the function of the law is to confer what is considered to be normally an advantage on a certain class by granting to each of its members a certain legal right (MacCormick 1982, 93).

But if interests are worthy of protection, than must not the law bend to accommodate them? Kramer has offered detailed analyses of contractual obligations:

> …any person Z holds a right under a contract or norm if and only if a violation of a duty under the contract or norm can be established by simply showing that the duty-bearer

> has withheld a benefit from Z or has imposed some harm upon him. Proof of the duty-bearer's withholding of a desirable thing from Z, or proof of the duty-bearer's infliction of an undesirable state of affairs on Z, must in itself be a sufficient demonstration that the duty-bearer has not lived up to the demands of some contract. Otherwise, Z does not hold a right correlative to the obligation imposed by that requirement (Kramer 1998, 81).

But if Z's interest or need is sufficient to obligate others, then the only point of any contract is to assign the obligation *in personam*. All *in personam* obligations are money backed by the specie of *in rem* obligations. According to interest theory, Z's need is sufficient to obligate someone or everyone, just as a child's need for education obligates first his parents and then, in the event of their neglect, other persons in a cascading sequence.

But what about the rights of the persons encumbered by these unchosen obligations? Do they not have their own rights to live their lives according to their own values and aspirations? Ronald Dworkin wrote that "Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole" (Dworkin 1978, 153). Dworkin defended his

statement on utilitarian grounds. But to utilitarian interest theorists, *needs trump rights*. On utilitarian grounds, which I have rejected, they are right to do so.

In this dissertation, I have argued that rights are historically and essentially egoistic, and that rights are endangered by attempts to justify them on alternative grounds, particularly utilitarianism. I have outlined the historical development of rights, and presented a will theory of rights based on ethical egoism, which in turn is based on an individualist theory of moral agency. I have reviewed the theories of two egoist will theorists, two utilitarian will theorists, and two interest theorists. It is my sincere hope that this dissertation makes a contribution, however small, towards restoring rights to their proper foundation.

In the future, I hope to conceive of a better model for Hohfeldian rights than the solar system and molecular cluster models that have been proposed. I also hope to develop arguments for the protection of infants and the mentally incapacitated. Finally, I would like to extend my theory of rights to intellectual property.

Intellectual property is my most significant area for future investigation. In criticizing Ayn Rand's theory that rights can be violated only by the initiation of physical force, I defended copyright, privacy, and reputation. In truth, I do not know how to defend

intangible assets on contractarian terms. Intellectual property rights do not give me the right to distribute copies of this dissertation; I would have that right anyway. Intellectual property rights prevent *your* doing so. This right *in rem* imposes on everyone besides me a duty to refrain from copying. Unless they have contracted to accept this restriction in exchange for benefits to themselves, I do not know what can restrict them, except coercion, which I reject.

Intellectual property refers to products of the mind, such as music, literature, art, discoveries, and inventions. Intellectual property takes such forms as copyrights, trademarks, and patents. They are government monopolies to non-rival goods: goods that can be used by many persons simultaneously, without diminishment. For example, the heirs to the composer of “Happy Birthday,” a six-note melody written in the nineteenth century, are not limited by my singing it in a restaurant, yet they are due royalties for all public performances until 2030.

There are two issues of concern to me: first, does intellectual property warrant protection? Thomas Jefferson, co-author of the Copyright Clause in the U.S. Constitution (Art. 1, Sec. 8), expressed skepticism on this subject:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking

> power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature made them, like fire expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property (Jefferson 1903-04, 333—35).

Jefferson's misgivings notwithstanding, intellectual property rights, by providing commercial incentives, may encourage the invention of AIDS vaccines, inexpensive batteries for electric cars, and fusion reactors. But many great inventions and discoveries, e.g., the

theory of relativity, Norman Borlaug's green revolution, and the World Wide Web, were developed without concern for commercial profit. Society found other ways to reward its genius benefactors: Einstein, with a Nobel Prize for Physics; Borlaug, with a Nobel Peace Prize; Berners-Lee, with a knighthood.

And although a few philosophers have made comfortable livings from their teachings and writings, few have struck it rich since Thales of Miletus cornered the market on olive presses. Pecuniary rewards may pale beside psychic rewards.

My second concern, though, is deeper. If intellectual property does warrant protection, then it is not clear to me how contractarianism can provide that protection. Extending or supplementing contractarianism to provide protection for intellectual property will be my next endeavor.

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