CHAPTER TWO

Saving Rights Theory from Its Friends

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RIGHTS ARE AN INTEGRAL PART of the American experiment. They enjoy pride of place in the founding document of American independence, which famously proclaims

> 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.

Perhaps because securing the mere "pursuit" of happiness does not guarantee success, or perhaps because "pursuit" seems such an elastic term, some modern interpreters of this tradition of rights believe that new rights can be and are coined by the legislature. Some seem to believe that since rights are such good things, the more of them we have, the better off we are. Hence, whenever we determine that something is good—education, housing, or the general condition of well-being we refer to as "welfare"—then legislatures should recognize rights, not merely to pursue those things, but to have them. Others have perceived that rights can be "costly," precisely because they normally imply some restriction or obligation for others, and therefore that we should coin only those rights whose benefits (to

whomever) are greater than their costs. The coining of "new rights" in recent years has led to such absurdities that some have proposed a moratorium on rights talk, or even dispensing with rights talk altogether.

It has long been recognized that the subject of rights is fraught with difficulty, partly because all talk of moral obligation is difficult (the is-ought problem always raises its head) and partly because of the wide variety of existing or possible rights regimes and the difficulty of settling on just what does or does not qualify as a right. Recently to these age-old problems of moral and political philosophy have been added far more serious problems of logical coherence. As a result, it would not be too strong a statement to say that there is a crisis in rights theory.

How to straighten out the tangled knot that rights talk has become? I propose a conceptual clarification of what we mean by rights, undertaken first by means of a critique of some prominent critics of traditional rights theory and then by means of a brief excursus through the history of the concept of rights that informed the American founding. Like all concepts, discourse about rights must be guided by logic, and the use of logic may help us to arrive at a coherent and useful conception of rights. Also, like all concepts, the concept of rights has a history, and that history may help us to get straight on what rights are.

INCOHERENT RIGHTS TALK

I'll begin with a look at a work on rights by two leading legal philosophers. I do so not only because of the prominence of the work's authors but also because the problems revealed in their work are symptomatic of the current crisis in rights theory. Stephen Holmes and Cass R. Sunstein, in *The Cost of Rights: Why Liberty Depends on Taxes*, propose to achieve "enhanced clarity of focus" by considering "exclusively rights that are enforceable by politically organized com-

munities."[1] They declare, "Under American law, rights are powers granted by the political community."[2] It's not at all clear from the text what Holmes and Sunstein mean by "American law," for all of their claims are purely conceptual and have no connection with distinctly American jurisprudence or history. In addition, of course, it flies in the face of the explicit declarations of the Declaration of Independence and the Constitution of the United States of America. But let's set that aside and turn to their philosophical arguments on behalf of the idea that rights are purely creatures of the state.

Holmes and Sunstein seek in their work to eliminate even the possibility of a conceptual distinction between "negative" rights to noninterference (the right not to be murdered, for example, or the right to free exercise of religion) and "positive" or "welfare" rights (such as the right to a subsidized education or to a house built by another person). They argue that "apparently nonwelfare rights are welfare rights too" and that "all legal rights are, or aspire to be, welfare rights."[3] Thus, they see no difference between the right to the "pursuit" of happiness and the right to happiness itself (or to a house, an education, or some other benefit); all rights are "powers granted by the political community."[4]

1. Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton, 1999), p. 21. To be more precise, what Holmes and Sunstein consider are not rights that are enforce*able*, but rights that actually are enforce*d*. They combine a strong attachment to legal positivism, i.e., to the doctrine that rights are posited, with an "interest" theory of rights: "an interest qualifies as a right when an effective legal system treats it as such by using collective resources to defend it." (17) For a comparison of "interest" theories and "choice" theories of rights, see Matthew H. Kramer, Nigel Simmonds, and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford: Clarendon Press, 1998). For the working out of the different approaches in courts of law, see John Hasnas, "From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights," *Northwestern University Law Review*, 89:3 (Spring 1995), pp. 900–41.

2. Holmes and Sunstein, p. 17.

3. Holmes and Sunstein, pp. 219, 222.

4. Nowhere do Holmes and Sunstein justify this remarkable claim about the character of rights under "American law." Indeed, it would be a very difficult task to

Holmes and Sunstein identify the traditional view of rights with "opposition to government," which would be a confusion, for, as they note, "individual rights and freedoms depend fundamentally on vigorous state action."[5] More radically, "Statelessness spells rightslessness."[6] But what they intend by the term "depend fundamentally" is not

> that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or 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.

Nor do they seem to mean that

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Under the traditional conception, the people are endowed with rights, some of which (the execution of their natural rights) they give up in order to enter civil society and which they then transfer to a government in order to defend those rights they have "retained." But, apparently finding this approach incompatible with their own philosophical orientation or agenda, Holmes and Sunstein assert as a

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reconcile such a claim with the Ninth Amendment to the Constitution: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The language is quite clear: Just because some rights are enumerated does not mean that those are all there are. Indeed, the unenumerated rights are "retained" by the people, which means that they must preexist the establishment of government; otherwise, they could not be "retained."

5. Ibid., pp. 13, 14.
6. Ibid., p. 19.

truism that government creates rights *ex nihilo* and that this is a matter of "American law." These authors brush aside discussion of moral rights and consider only legal rights—those rights that a state will actually enforce—on the ground that "When they are not backed by legal force, by contrast, moral rights are toothless by definition. Unenforced moral rights are aspirations binding on conscience, not powers binding on officials."[7]

A careful look at the theory advanced by Holmes and Sunstein will go far in showing the profound conceptual and logical problems inherent in attempts to replace the traditional approach to rights articulated by and embodied in the Declaration of Independence and the United States Constitution.

Holmes and Sunstein ground their attempt to erase the distinction between negative and positive rights on a commonsense observation: All choices have costs. That is a conceptual or analytical claim, for to choose X over Y is to give up Y, which (if it is the most highly valued alternative forgone) is defined as the cost of choosing X. This is unobjectionable, thus far. They proceed to note that the act of choosing to enforce a right, like all choices, has a cost—namely, the most highly valued opportunity forgone. Combining that insight with the claim that the only rights that are meaningful are those that are actually enforced, they conclude that since the enforcement of rights has costs, rights themselves have costs. Thus the subtitle to the book: *Why Liberty Depends on Taxes.* All acts of enforcement have costs and require the mobilization of resources—police, judges, jailers, executioners, and so on—and are therefore positive claims on the expenditure of taxes (or other forms of compulsion; conscription would fill the bill as well as taxation) to secure those resources. The right not to be killed is thereby converted into the right to police protection, which entails the expenditure of resources and therefore choices among alternative uses of those resources. Thus, the allegedly

7. Ibid., p. 17.

"negative" right not to be killed is indistinguishable from the "positive" right to the expenditure of resources to hire or conscript police.

According to Holmes and Sunstein,

> Rights are costly because remedies are costly. Enforcement is expensive, especially uniform and fair enforcement; and legal rights are hollow to the extent that they remain unenforced. Formulated differently, almost every right implies a correlative duty, and duties are taken seriously only when dereliction is punished by the public power drawing on the public purse.[8]

Even "the right against being tortured by police officers and prison guards" is, contrary to traditional thinking, not a negative right against interference but a positive right to have monitors hired by the state to supervise the police officers and prison guards:

> A state that cannot arrange prompt visits to jails and prisons by taxpayer-salaried doctors, prepared to submit credible evidence at trial, cannot effectively protect the incarcerated against torture and beatings. All rights are costly because all rights presuppose taxpayer-funding of effective supervisory machinery for monitoring and enforcement.[9]

Here their theory begins to run into very serious logical difficulties, for the account of rights and obligations on which they base that theory generates an infinite regress.

Holmes and Sunstein argue that I cannot have a right not to be tortured by the police unless the police have an obligation not to

8. Ibid., p. 43. Thus, Holmes and Sunstein incorporate a principle of positive social theory into their normative account of rights, namely, that order obtains *only* when a sovereign power threatens punishment. This is hardly a self-evident claim, but it is clearly an important element of their assault on the traditional view of rights. Traditional rights theory is normally complemented by a theory of "spontaneous order," according to which order need not be the result of an ordering authority with power to punish deviations from its imposed order. That does not mean that punishment is never needed, but that the ever-present threat of punishment is not the only or even the primary force in creating social order.

9. Ibid., p. 44.

torture me, and the police can only have an obligation not to torture me if there are some taxpayer-funded persons (monitors) above the police who can punish them (since "duties are taken seriously only when dereliction is punished by the public power drawing on the public purse"). So to have a right not to be tortured by the police, I would have to have a right that the monitors exercise their power to punish the police in the event that the police torture me. But do I have a right that the monitors exercise their power to punish the police for torturing me? According to Holmes and Sunstein, I would have such a right only if the monitors had a duty to punish the police, and the monitors would have a duty to punish the police only if there were some taxpayer-funded persons above the monitors who could (and would) punish the monitors for failing to punish the police, and so on, *ad infinitum*. For there ever to be a right of any sort, by their own reasoning, there would have to be an infinite hierarchy of people threatening to punish those lower in the hierarchy. Since there is no infinite hierarchy, we are forced to conclude that Holmes and Sunstein have actually offered an impossibility theorem of rights in the logical form of *modus tollens*: If there are rights, then there must be an infinite hierarchy of power; there is not an infinite hierarchy of power, therefore there are no rights.

In working out their theory, Holmes and Sunstein generate not "clarity of focus" but logical chaos and incoherence.

The theory of liberty that Holmes and Sunstein advance also leads to strange conclusions. Holmes and Sunstein use the terms "rights" and "liberty" interchangeably, not only in the title of the book but also in the text.[10] Taking their definition of a right as an interest that "qualifies as a right when an effective legal system treats it as such by using collective resources to defend it,"[11] and treating "rights" and

10. Ibid., e.g., pp. 39, 46, 83, 93.
11. Ibid., p. 17.

"liberty" as interchangeable terms, we are justified in deducing the following:

- If I have an interest in not taking habit-forming drugs, and
- If the state uses collective resources to stop me from taking drugs, then
- I have a right that the state use collective resources to stop me from taking drugs.

Let us stipulate that the state places me in prison in order to keep me from taking drugs (and let's set aside the fact that real states have failed to keep drugs out of prison). Since to have my rights enforced is to enjoy the protection of my liberty, by putting me in prison the state is making me free. Indeed, if the state were somehow to fail to imprison me, they would be violating my rights. (But then, if the right were not actually enforced by the state, it would be no right. Trying to follow the implications of their theory is like thinking out the implications of the elevation of evil to good by the members of "The Addams Family." Ultimately, the attempt collapses into incoherence.)

Finally, the theory Holmes and Sunstein advance collapses into circularity by page 203 of the book, which contains the first consideration of "moral ideas" since the introduction, where moral rights were dismissed in order to achieve "an enhanced clarity of focus." After maintaining for over 200 pages that rights are dependent upon power, which they defined as the power to impose punishment (again, "duties are taken seriously only when dereliction is punished by the public power drawing on the public purse"), they make the following startling admission: "The dependency of rights on power does not spell cynicism because power itself has various sources. It arises not from money or office or social status alone. It also comes from moral ideas capable of rallying organized social support."[12]

12. Ibid., p. 203.

The example they give is the civil rights movement, which brought the state into protecting the civil rights of African Americans. But if moral ideas count as a form of "power," then what is the justification for the dismissal of moral rights at the outset? Could we not say that a police officer should abstain from torturing me firstly because it is a wicked and immoral thing to do—because it is a violation of my right not to be tortured—and not *merely* because the officer fears being punished by his superiors, who, in turn, must fear being punished by their superiors? Their theory becomes circular when they incorporate "moral ideas" into their definition of power, which was offered as an alternative to moral ideas in the first place.

The point of the foregoing is not merely to pummel two harmless law professors, no matter how much they may deserve it,[13] but also to illustrate the conceptual problems inherent in recent attempts to formulate theories of rights. The problem with much contemporary rights theorizing goes deeper than the logical chaos generated by Holmes and Sunstein in their attempt to jettison traditional rights thinking. It afflicts the background understandings of rights with which Holmes and Sunstein combine their claim that all rights are "powers granted by the political community." To understand those deeper problems, I turn to the work of two other distinguished contemporary theorist of rights, Joseph Raz and Ronald Dworkin.

13. It should not go unremarked that *The Cost of Rights* is extraordinarily polemical, unscholarly, and nasty in its criticisms of those with differing views. For example, immediately after gallantly conceding that "Many critics of the regulatory-welfare state are in perfectly good faith" (216), they turn around to tar all critics of the welfare state with the charge of racism: "But their claim that 'positive rights' are somehow un-American and should be replaced by a policy of nonintervention is so implausible on its face that we may well wonder why it persists. What explains the survival of such a grievously inadequate way of thinking? There are many possible answers, but inherited biases—including racial prejudice, conscious and unconscious—probably play a role. Indeed, the claim that the only real liberties are the rights of property and contract can sometimes verge on a form of white separatism: prison-building should supplant Head Start. Withdrawal into gated communities should replace a politics of inclusion." (216) Their slithery charge is not only unsubstantiated, it is beneath contempt.

In his book *The Morality of Freedom*, Raz defines a right as follows: "'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."[14] Raz rejects one of the mainstays of traditional rights theory, the thesis that rights and duties are (at least normally) correlative: "A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have a duty."[15]

Thus, for Raz, to assert a right is not necessarily to assert any duty on the part of another person, whether that duty has a negative or a positive character. Rather, asserting a right merely offers a *reason* to hold another person under a duty, but that reason may be overridden by some greater reason, and it is the balance of reasons that determines whether that person is held under a duty or not.

Similarly, the rights theorist Ronald Dworkin has defined rights as "trumps," but these "trumps" seem simply to serve as weights rather than as trumps as understood by players of card games:

> Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.[16]

Further,

> No one has a political right (on my account) unless the reasons for

14. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 166.

15. Ibid., p. 171.

16. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), p. xi.

giving him what he asks are stronger than some collective justification that normally provides a full political justification for a decision.[17]

When rights are grounded in this or a similar manner, they have, as Raz notes, "a dynamical character," that is to say, they change in often quite unpredictable ways; in particular, they change in ways unpredictable to the citizenry generally.[18] Thus, some citizens may have thought that they had the right "peaceably to assemble, and to petition the government for a redress of grievances" (First Amendment) or the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (Fourth Amendment), but, without their knowledge, something had changed such that those rights articulated in the First and Fourth Amendments no longer generated any duties on the government or on their fellow citizens to allow (or refrain from prohibiting) them to assemble peace-

17. Ronald Dworkin, *Taking Rights Seriously*, p. 365. As Anthony de Jasay remarks of this theory, "In brief, it all depends on *which* reason weighs more. But what is the good of enunciating that the heavier weight outweighs the lighter one and it all depends on which is which? Manifestly, 'rights are trumps' when the balance of benefit does not outweigh them; they are not trumps when it does. But this is saying nothing more than that a card may be stronger than some other card yet weaker than a third one. It is *not* saying that the card is a trump." Anthony de Jasay, *Choice, Contract, Consent: A Restatement of Liberalism* (London: Institute of Economic Affairs, 1991), pp. 39–40. Contrast Dworkinian "rights," a mere juridical residue or afterthought capable of justifying claims only when "a collective good is not a sufficient justification for denying them what they wish," with Joel Feinberg's description of rights, "whose characteristic use and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon. They are especially sturdy objects to 'stand upon,' a most useful sort of moral furniture. Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to 'stand up like men,' to look others in the eye, and to feel in some fundamental way the equal of anyone." Joel Feinberg, "The Nature and Value of Rights," in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980), p. 151.

18. Joseph Raz, *The Morality of Freedom*, p. 185. As Raz explains, "They are not merely the grounds of existing duties. With changing circumstances they can generate new duties" (p. 186).

ably and petition the government for a redress of grievances or to allow them to be secure in their persons, houses, papers, and effects. Let us say that some other citizens had been discovered (perhaps by the legislature) to have some new interest in overriding those rights, possibly because they were offended by the speeches given at the peaceable assemblies of their fellow citizens or because they wanted to have the persons, papers, or effects of their fellow citizens. Then, the existence of such interests might easily be construed to generate some reason(s) to hold the first group of citizens under a duty. If so, then the second group of citizens would have a right to override the rights of the first group. But even that is not a sufficient reason for the state to override the rights secured by the First and Fourth Amendments, for the balance of rights would have to be such that the rights of the second group would outweigh the first, thus generating a duty on the part of the first to submit to the second. Just as surely as interests conflict, rights will conflict, when construed in the manner of Raz, Dworkin, and their followers.

Put in more concrete terms, if I have an interest in taking your farm or in stopping you from making remarks that I consider demeaning, there is a case to be made that I have a right to take your farm or to suppress your speech, and if either the balance of reasons (Raz) or the "collective goal" (Dworkin) is weightier than your claim to your farm or to your speech, then you have a duty to submit to the confiscation of your farm or the suppression of your speech.

This might be made more clear if we consider a product of this general approach to rights, the Universal Declaration of Human Rights adopted by the United Nations in 1948. According to Article 24,

> Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

And according to Article 25,

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Let us say that Bill needs medical care and necessary social services and that Janet is a doctor. If Bill has the right to Janet's services (Article 25), but Janet has the right to rest, leisure, reasonable working hours, and periodic holidays with pay (Article 24), and those conflict (as they surely do on occasions), whose rights will be realized?[19]

One of the defenders of the "interest theory" propounded by Raz, Jeremy Waldron, rather cheerfully admits that rights construed in this manner will not only be "dynamic" but will also generate conflicts as a matter of course:

> I shall argue as follows: first, that if rights are understood along the lines of the Interest Theory propounded by Joseph Raz, then conflicts of rights must be regarded as more or less inevitable; second, that rights on this conception should be thought of, not as correlative to single duties, but as generating a multiplicity of duties; and third, that this multiplicity stands in the way of any tidy or single-minded account of the way in which the resolution of rights conflicts should be approached.[20]

Waldron takes up the challenge to such interests-as-rights (or rights-

19. It seems no accident that the penultimate article in this entire declaration of "human rights" is a statement of an obligation: "Everyone has duties to the community in which alone the free and full development of his personality is possible." That is to say, everyone has the right to have "duties to the community," a phrase normally interpreted to mean a duty to obey the state. Under this conception, one's rights evaporate into a duty to obey the state, which is the institution charged with determining which of many and varied conflicting interests will be fulfilled.

20. Jeremy Waldron, "Rights in Conflict," in Waldron, *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), p. 203.

as-interests) theories, laid down by Maurice Cranston, a defender of a more traditional liberal rights conception. According to Cranston,

> If it is impossible for a thing to be done, it is absurd to claim it as a right. At present it is utterly impossible, and will be for a long time yet, to provide 'holidays with pay' [per Article 24, Universal Declaration of Human Rights] for everybody in the world.[21]

Cranston offered the criterion of possibility as part of a critique of those who argue that leisure, income, health care, housing, and so on are "human rights"; he does not deny that we have interests in such goods, but merely notes that "ought" implies "can" and asks how something that is impossible can be considered a right. Waldron's response to Cranston's critique of such claims trades on an equivocal use of terms rather than grappling with the very real problem that Cranston raises:

> But for each of the inhabitants of these regions, it is *not* the case that his government is unable to secure holidays with pay, or medical care, or education, or other aspects of welfare, *for him*. Indeed, it can probably do so (and does!) for a fair number of its citizens, leaving it an open question who these lucky individuals are to be. For any inhabitant of these regions, a claim might sensibly be made that his interest in basic welfare is sufficiently important to justify holding the government to be under a duty to provide it, and it would be a duty that the government is capable of performing.
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> So, in each case, the putative right does satisfy the test of practicability. The problems posed by scarcity and underdevelopment only arise when we take all the claims of right together. It is not the duties in each individual case which demand the impossible . . . rather it is the combination of all the duties taken together which cannot be fulfilled.
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> But one of the important features of rights discourse is that rights

21. Maurice Cranston, "Human Rights: Real and Supposed," in D. D. Raphael, ed., *Political Theory and the Rights of Man* (Bloomington: Indiana University Press, 1967), p. 50.

> are attributed to individuals one by one, not collectively or in the aggregate.[22]

In other words, if one person could be provided with all of these goods, then every person has a right to have all of them. The error in the response is to take the idea that rights inhere in individuals and interpret it to mean that rights claims must be examined one at a time, in isolation from all other rights claims, rather than altogether. But there is nothing in the idea of individual rights that requires such an approach. The upshot of Waldron's response is that for each person whose right is respected, another must see his or her right denied, creating a "zero-sum game" of rights. But it is precisely a feature of rights that they are supposed to make social life possible, not impossible.

In John Locke's words,

> The duties of life are not at variance with one another, nor do they arm men against one another—a result which, secondly, follows of necessity from the preceding assumption, for upon it men were, as they say, by the law of nature in a state of war; so all society is abolished and all trust, which is the bond of society.[23]

Compounding the strange and unwarranted interpretation of individualism to mean claims-taken-in-isolation-and-without-regard-to-any-other-claims is the naïveté Waldron exhibits when considering as a mere detail "the open question of who these lucky individuals are to be." Does Waldron expect a lottery to be held in poor countries in which governments have the power to determine who these "lucky individuals are to be," or does he think some sort of favoritism (familial, ethnic, bribe-induced, tribal, religious, or the like) might be more likely? (The question virtually answers itself.)

Raz's and Waldron's approaches to rights effectively dispense with

22. Waldron, p. 207.

23. John Locke, "Essays on the Law of Nature," in *Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), p. 132.

rights, for a conception of rights that entails that "conflicts of rights must be regarded as more or less inevitable" still leaves us with the problem of how to decide among conflicting claims. And since each of the parties to a conflict of rights is already stipulated to have the right, then the conflict cannot be decided on the basis of rights. Some principle other than right must be invoked to resolve the conflict. In Raz's and Waldron's formulations of rights, rights become otiose, a useless ornament decorating a system of jurisprudence that seeks to order society on some other, unspecified basis.[24]

Matthew H. Kramer glosses the problems of conflict generated by such theories as follows:

> Unlike a duty to do φ and a liberty to abstain from doing φ, a duty to do φ and a duty to abstain from doing φ are not starkly contradictory. They are in conflict rather than in contradiction. Though the fulfillment of either one must rule out the fulfillment of the other, the existence of either one does not in any way preclude the existence of the other.[25]

That is to say, the two statements are not logically contradictory; only the fulfillment of the duties they enjoin is impossible. (Some) logicians may be comforted by such remarks, but the parties to social conflict probably will not be. Experience shows that political power and influence, not to mention brute force and violence, come readily to mind as likely resolutions to such conflicts, which—by stipulation—cannot be resolved on the basis of rights.

Even further along the spectrum of illiberal rights theorists is

24. "Law" and "right" are related concepts, with a complex historical connection. To reject "right" is, in effect, to reject law in favor of arbitrary will. But, as Aristotle wryly noted in *Politics*, "it is better if all these things are done in accordance with law rather than in accordance with human wish, as the latter is not a safe standard." (1272b5–8) Aristotle, *Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), p. 80.

25. Matthew H. Kramer, "Rights Without Trimmings," in Matthew H. Kramer, Nigel Simmonds, and Hillel Steiner, *A Debate over Rights: Philosophical Enquiries* (New York: Oxford University Press, 2000), p. 19.

Attracta Ingram, who presents us with a "rights" theory in which rights are not merely made otiose but are also effectively annulled altogether. In *A Political Theory of Rights*, she attempts to ground "rights" on a specific theory of autonomy and criticizes traditional liberal theory on the grounds that "it neglects to specify an ideal of the person under which a scheme of constraints is derived."[26] She appeals to the autonomy-based theory of Immanuel Kant but radically collectivizes the concept of autonomy, such that the principles that result

> are not the maxims of private acts of moral law-making, but principles that command the assent of a plurality of agents. In the absence of empirical conditions favouring impartiality we must envisage the relevant assent as hypothetical. It is the assent we would give were our motives and rationality unwarped by all those traits of personal and social character that we ordinarily regard as prejudicing the pursuit of goodness or justice.[27]

What is especially noteworthy is the radical indeterminacy of the resulting principles: They are the principles that a "plurality of moral agents" who were sufficiently "unwarped" would assent to. The radical intolerance resulting from this approach is suggested in an ominous passage of the book regarding competing substantive ideals of goodness:

> There are many conceptions of happiness. Their relative merits are disputed. From the point of view of autonomy they function as so many resources from which we can choose our conception of the good, *provided only that they fall within the range of autonomy-regarding moralities.*[28] (emphasis added)

Thus, conceptions of the good that are not "autonomy-regarding" are

26. Attracta Ingram, *A Political Theory of Rights* (Oxford: Clarendon Press, 1994), p. 117.

27. Ibid., p. 153.

28. Ibid., p. 164.

not allowed. Ingram is perhaps too embarrassed by the implications of her chilling statement to address the obvious question of whether Orthodox Judaism, Roman Catholicism, Islam, or other religious (or nonreligious) belief systems provide sufficiently "autonomy-regarding" conceptions of the good for us to be allowed to choose among them. In the name of autonomy, all personal ideals are to be regulated by the collectivity. "Since the exercise of autonomy leads to incompatible personal ideals there is no option but to regulate their claims collectively in politics."[29]

Thus, we arrive at a theory of "rights" that justifies the authoritarian or totalitarian state. Alternatives to traditional liberal (and American) conceptions of rights, as we have seen, generate contradiction and incoherence; some even explicitly aim at authoritarian or even totalitarian political structures, thus not merely discombobulating rights theory but destroying it altogether.

LOGIC AND FUNCTIONALITY

The internal logic of the theories of rights offered by advocates of welfare statism such as Raz, Waldron, Holmes, and Sunstein generates contradiction, circularity, incoherence, and, as a consequence, uncertainty and irreconcilable social conflict.

What such thinkers fail to appreciate is that rights have a social function. For one thing, they have made possible the complex civilization we see around us today. Without individual rights, such complex institutions and the extended order of modern civilization would not have been possible. Social order has its requirements, and those will have their analog in the structure and the theory of rights that accompany a social order. Just as the architectural and engineering plans for a building must not contradict mathematical and physical principles if the building is to serve its function (assuming

29. Ibid., p. 166.

that its function is not to collapse on its inhabitants), so the rules of social order, including rights, must not contain contradictions or violate basic principles of inference if the social order is to serve its function—indeed, if social *order* is to exist at all.[30]

Contrary to the assertions of extreme social constructivists who believe that all institutions and practices are "social constructions," by which they mean pure assertions of will, human nature is not infinitely plastic.[31] Objective reality, including the nature of the human being, imposes on human institutions certain constraints. Histories of institutions and of concepts can be formulated and understood precisely because reality is capable of being grasped by the mind.

To say that humans are constrained in various ways or that there are coherent patterns in human history is not the same as to make claims on behalf of a grand scheme of history, in the style of G.W.F. Hegel. Even if we reject Hegel's grandiose philosophy of history (as I do), we can still acknowledge a kind of logic that shapes human

30. The analogy of social rules to architectural principles is explored at greater length by Randy Barnett in *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998), esp. pp. 1–24. The function of laws and rules in securing social order was central to the influential approach of the seventeenth-century legal philosopher Samuel Pufendorf. As he noted, "Men are not all moved by one simple uniform desire, but by a multiplicity of desires variously combined. . . . For these reasons careful regulation and control are needed to keep them from coming into conflict with each other. . . . The conclusion is: in order to be safe, it is necessary for him to be sociable; that is to join forces with men like himself and so conduct himself towards them that they are not given even a plausible excuse for harming him, but rather become willing to preserve and promote his advantages [*commoda*]. The laws of this sociality [*socialitas*], laws which teach one how to conduct oneself to become a useful [*commodum*] member of human society, are called natural laws." Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, trans. Michael Silverthorne, ed. James Tully (Cambridge: Cambridge University Press, 1991), p. 35.

31. I criticize only "extreme" social constructivists because it is undeniable that institutions are products of human action, and sometimes even of conscious human design. The error of the extremists is to believe that because social institutions are products of human action, they can be any way we choose or want them to be.

responses to problems, a logic that the philosopher Karl Popper called the "logic of the situation."[32] Without the possibility of tracing out the logic of situations, there would be little reason, if any, to listen to the explanations of political scientists, historians, military strategists, economists, or other students of human interaction; there would be no narrative to follow, no reason why, given that X was done, Y was the consequence.

If social order and cooperation are correlative to some system or systems of rights, then a conceptual formulation of such a system or systems of rights should not entail logical chaos, for that logical chaos will show up in the world of human action as social conflict and warfare rather than as social order and cooperation.

The conflicts of rights that Waldron admits is an inevitable feature of interest theories, and the infinite regress, circularity, and incoherence that are necessary features of the theory of Holmes and Sunstein, indicate that such theories do not correspond to and are not compatible with plan coordination and peaceful cooperation.

Liberal civilization requires mutual coordination and peaceful cooperation, as F. A. Hayek explains:

> What is required if the separate actions of the individuals are to result in an overall order is that they not only do not unnecessarily interfere with one another, but also that in those respects in which the success of the action of the individuals depends on some matching action by others, there will be at least a good chance that this correspondence will actually occur."[33]

Such correspondence will not occur if rights and duties are unpredictably "dynamic," nor if they generate conflicts, nor if they rest on infinite regresses or circular reasoning.

32. See Karl Popper, *The Poverty of Historicism* (Boston: Beacon Press, 1957), pp. 149–52.

33. F. A. Hayek, *Law, Legislation, and Liberty*, vol. I, *Rules and Order* (Chicago: University of Chicago Press, 1973), pp. 98–99.

Such an order and such coordination require a system of rights over the things of the world, as Thomas Aquinas noted in offering three reasons why property "is necessary to human life":

> First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each would shirk the labor and leave to another that which concerns the community, as happens where there is a great number of servants. Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately. Thirdly, because a more peaceful state is ensured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed.[34]

The "more peaceful state" ensured to man is a function of the system of rights that accompanies it. A peaceful state requires a fundamental stability of property; it requires that rights not have Raz's "dynamic character" or generate Waldron's inevitable conflicts. As James Madison noted in *Federalist* Number 62, the effects of a "mutable policy" (for "mutable" read "dynamic") "poisons the blessings of liberty itself."

> It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?
>
> Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over

34. St. Thomas Aquinas, *Summa Theologica*, IIa, IIae, Q. 66, trans. Fathers of the English Dominican Province (Westminster, Md.: Christian Classics, 1981), vol. III, p. 1471. Thomas represents in this regard, as in many others, a great advance over Aristotle's account of property in *The Politics*, esp. Bk. 2, Chaps. 3, 4, 5, and 7.

> the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that laws are made for the *few*, not for the *many*.[35]

What I propose is to look at the history of the development of the traditional theories of rights that Raz, Waldron, and Holmes and Sunstein seek to replace and to see how it reveals a convergence of rights theory with institutions of social cooperation and coordination. By showing how liberal rights theories correspond to and support liberal civilization, we may see why and how they are superior to the proposed replacements offered by philosophical advocates of dynamic and conflicting rights.[36]

OBJECTIVE RIGHT, SUBJECTIVE RIGHT, AND LAW

It is beyond the scope of this essay to offer a detailed historical account of the development of rights, of their roots in Greek philos-

35. James Madison, "Concerning the Constitution of the Senate with Regard to the Qualifications of the Members, the Manner of Appointing Them, the Equality of Representation, the Number of the Senators, and the Duration of their Appointments," No. 62, in James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* (New York: Penguin Books, 1987), p. 368.

36. It should be remembered that recognizing that some system of rights is integral to a social order is not the same as claiming that those rights are always respected and never violated. That even broadly liberal societies still suffer from criminal aggression—both from states and from freelance criminals—is not necessarily an indictment of the liberal system of rights that seeks to outlaw such violations of rights. Some rights schemes may be unstable and self-destructive when attempts are made to put them into practice (the catastrophe of classical socialism is a good example of an unstable social order), but in general, liberal rights have shown themselves to be stable, even in the face of violations by state officials and other criminals.

ophy, Roman law, and medieval theology and philosophy, so I will offer instead a sketchy presentation of the outlines of that history, for the purpose of demonstrating the coherence of the concepts of justice and rights that emerged.

Objective right, or the right ordering of society, is intimately related to subjective right, or the rights of the individuals who make up a social order. Objective right is what we could call the right arrangement of things. It refers to how things ought to be: thus, it is right that X and Y should obtain. Subjective right refers to the rights of the acting subjects who constitute a social order: thus, it is A's right that B happen (or not happen).[37] As Brian Tierney notes in connection with the connection of objective right with subjective rights,

> to affirm a right ordering of human relationships is to imply a structure of rights and duties. In propounding a system of jurisprudence one can emphasize either the objective pattern of relationships or the implied rights and duties of persons to one another—and then again one can focus on either the rights or the duties.[38]

Objective right and subjective right are not only logically compatible, but in a well-ordered theory of justice they should also be complementary.

Whereas the approaches of Raz, Waldron, and Holmes and Sunstein would set the right ordering society (objective right) and the rights of individuals (subjective right) at odds, the classical tradition of rights thinking was premised on their unity, complementarity, or mutual implication.

One of the most significant occurrences in the history of rights theory was the fusion of Aristotelian ethical philosophy with the legal

37. These categories are related, but not reducible, to Aristotle's categories of universal and particular justice. See the discussion in Fred Miller Jr., *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Clarendon Press, 1995), esp. pp. 68–74.

38. Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997), p. 33.

categories of the Roman law, as James Gordley has brilliantly shown in his book *The Philosophical Origins of Modern Contract Doctrine*.[39]

For Aristotle, justice is understood as "that disposition which renders men apt to do just things, and which causes them to act justly and to wish what is just."[40] Justice or right is oriented to the object of action, that is, to the thing done. In contrast, the Roman law tradition emphasized not so much the thing done as the recipient's claim, as one might expect of the law of a great commercial civilization. The Roman law was transmitted to the civilizations that succeeded Rome through the *Digest of Justinian*, a codification of centuries of Roman law that was drawn up in the sixth century C.E. under the direction of the jurist Tribonian and rediscovered in the Latin west in the eleventh century.

The definition of justice offered by the Roman jurist Ulpian was prominently offered as authoritative in the *Digest*:

> Justice is a steady and enduring will to render unto everyone his right. 1. The basic principles of right are: to live honorably, not to harm another person, to render to each his own. 2. Practical wisdom in matters of right is an awareness of God's and men's affairs, knowledge of justice and injustice.[41]

In the thirteenth century C.E., Thomas Aquinas, the great synthesizer, undertook to synthesize these approaches in his *Summa Theologica*; Ulpian's definition, he stated, is compatible with Aristotle's

39. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991). Gordley focuses most of his attention on the late scholastics of the Spanish natural law school, but the movement is already perceptible in the work of Thomas Aquinas, as Annabel S. Brett notes in *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), pp. 89–97.

40. Aristotle, *Nicomachean Ethics*, V, i., 1129a8–9, trans. H. Rackham (Cambridge: Harvard University Press, 1934), p. 253.

41. *The Digest of Justinian*, trans. and ed. Alan Watson (Philadelphia: University of Pennsylvania Press, 1998), I, i, 10.

> if understood aright. For since every virtue is a habit that is the principle of a good act, a virtue must needs be defined by means of the good act bearing on the matter proper to that virtue. Now the proper matter of justice consists of those things that belong to our intercourse with other men. . . . Hence the act of justice in relation to its proper matter and object is indicated in the words, *Rendering to each one his right*, since, as Isidore says (Etym. x), *a man is said to be just because he respects the rights* (jus) *of others*.[42]

Thus, right is something due to another person, something that belongs to that person and to which he or she can make a just claim.

As Annabel Brett notes, however, although Thomas attempts to reconcile the definitions of justice offered by Aristotle and by Ulpian, "the primary and theoretically important sense of iustum in Aquinas . . . remains that of 'just action.'"[43] A theoretical formulation of subjective right remained for the Spanish Scholastics to formulate and transmit to later generations of legal theorists and practitioners.

Here it is important to stress the significance of the work of philosophers in rationalizing legal practices, for the abstract formulation of these principles helped to create the abstract order that characterizes modern society. Such abstract formulation is inherently well suited or oriented toward a normative order of universality and equality, for abstract formulations do not take account of the concrete characteristics (race, birth, color, wealth, and so on) of the persons who fit particular legal categories (buyer, seller, parent, child, and so on).

For this reason, philosophy is particularly well suited to the formulation of the principles of liberalism. The absurdities to which collectivist/communitarian philosophy has been led in recent decades shows that it is at least remarkably difficult to formulate abstractly principles that divide human beings into separated "incom-

42. Thomas Aquinas, IIa, IIae, Q. 58, p. 1429.
43. Annabel S. Brett, *Liberty, Right, and Nature*, p. 92.

mensurable" communities, classes, nations, or races, as communitarian critics of liberalism seek to do.[44]

44. One noted critic of traditional liberal principles, Michael Sandel, has argued in his *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) that selves need not be "individuated in advance," but should "comprehend a wider subject than the individual alone, whether a family or tribe or city or class or nation or people," and "to this extent they define a community in a constitutive sense." (172) In other words, rather than speaking merely of Mary and William and Tadd and Sylvia, we would speak of the "self" composed of Mary, William, Tadd, and Sylvia. What Sandel is arguing is that an epistemological principle can be transformed into an ontological principle: "this notion of community [the constitutive conception] describes a framework of self-understandings that is distinguishable from and in some sense prior to the sentiments and dispositions of individuals within the framework." (174) Because shared understandings are necessary for our self-understanding, i.e., because they are asserted to be an epistemic criterion for self-knowledge, it is asserted that these shared understandings are constitutive of our identity and that therefore "the bounds of the self are no longer fixed, individuated in advance and given prior to experience." (183) This move is unjustified. As John Haldane remarks, "even if this were granted it would not follow from it that subjects of these relationships are anything other than distinct persons. To suppose otherwise is to infer fallaciously that epistemological considerations enter into the constitution of the object known." ("Individuals and the Theory of Justice," *Ratio* XXVII 2 [December 1985]: pp. 189–96.) This is an old debate, and the outlines can be traced quite clearly in the debate between the "Latin Averroists," notably Siger of Brabant, and St. Thomas Aquinas over whether there is one "intellective soul" for all of mankind. The Averroists argued that for two individuals to know the same thing, they have to have the same form impressed by the agent intellect into the same material (or possible) intellect; to know the same form, they must share the same material intellect. See Siger of Brabant, "On the Intellective Soul," in *Medieval Philosophy: From St. Augustine to Nicholas of Cusa*, ed. John F. Wippel and Allan B. Wolter, O.F.M. (London: Collier Macmillan Publishers, 1969), pp. 358–65. As some sources note, it was reported in the thirteenth century that this thesis had radical implications for the moral responsibilities of the individual: If Peter was saved, then I will be saved too, as we share the same intellective soul. So I am free to engage in whatever sinful behavior I wish, in the knowledge that I will be saved nonetheless. Thomas responded that the impressed intelligible species is not literally the very form of the thing raised to a higher level of intelligibility but rather that *by which* we know the thing: "It is . . . one thing which is understood both by me and by you. But it is understood by me in one way and by you in another, that is, by another intelligible species. And my understanding is one thing, and yours, another; and my intellect is one thing, and yours another." Thomas Aquinas, *On the Unity of the Intellect Against the Averroists* (Milwaukee: Marquette University Press, 1968), chap. V, par. 112, p. 70. The issue is canvassed in Herbert Davidson, *Alfarabi, Avicenna, and Averroes on Intellect* (Oxford: Oxford University Press, 1994).

By attempting to substitute for individual responsibility a concept of collective responsibility, collectivists and coercive communitarians undermine the very thing they often seek to support, which is deliberative and democratic decision-making, for by erasing the distinction among persons, they eliminate at the same time the very point of deliberation, which is for numerically individuated persons to decide on a common course. Thomas pointed out the problem in concluding from the observed fact of common ideas and attachments that those who share the same ideas and attachments make up one self:

> If . . . the intellect does not belong to this man in such a way that it is truly one with him, but is united to him only through phantasms or as a mover, the will will not be in this man, but in the separate intellect. And so this man will not be the master of his act, nor will any act of his be praiseworthy or blameworthy. That is to destroy the principles of moral philosophy. Since this is absurd and contrary to human life (for it would not be necessary to take counsel or to make laws), it follows that the intellect is united to us in such a way that it and we constitute what is truly one being.[45]

Democratic deliberation requires individualism and the abstract formulation of claims of justice; to deny the latter is to deny the former.

DOMINIUM, RESPONSIBILITY, AND PROPERTY

The concepts of individualism and of responsibility have a history, and an examination of that history is likely to lead to greater understanding of the concepts themselves. The debates over property that divided the papal and imperial parties provided great opportunities for the philosophers who enlisted on one side or the other to clarify the concept of rights. The key issue was what was meant by *dominium* ("mastery" or "ownership"), a term that was to prove of great significance to the development of rights talk.

The issue of dominium figured prominently in the debates con-

45. Thomas Aquinas, *On the Unity of the Intellect Against the Averroists*, chap. II, par. 82, p. 57.

cerning the relations between the church as a corporate body and the empire, notably in the debate over "apostolic poverty"—over whether priests, and therefore the church, were required to abjure claims to property. The advocates of the imperial power were eager to argue that the church should not own lands and other wealth, and naturally the German emperors were quite happy to relieve the church of their burdens. John XXII had responded in 1322 C.E. in the bull *Ad conditorem canonum* against the arguments for apostolic poverty by pointing out the inseparability of the right of use in consumable goods (which priests, as human beings, surely enjoyed) from the right of ownership; to exercise the right to consume is necessarily to exclude, and therefore to exercise a claim of a right to exclude.[46] Marsilius of Padua responded in 1324 C.E. and in the process clarified the meaning of property or ownership (dominium): "In its strict sense, this term means the principal power to lay claim to something rightfully acquired . . . ; that is, the power of a person who . . . wants to allow no one else to handle that thing without his, the owner's, express consent, while he owns it."[47] Most notably, Marsilius grounded the entire edifice of jurisdiction over resources in the world on one's domimium over oneself:

> Again, this term "ownership" [dominium] is used to refer to the human will or freedom in itself with its organic executive or motive power unimpeded. For it is through these that we are capable of certain acts

46. See the discussion in Brian Tierney, "Marsilius on Rights," *Journal of the History of Ideas* LII, no. 1 (Jan.–March, 1991): pp. 3–17, and Brian Tierney, *The Idea of Natural Rights*, pp. 93–130. Compare the modern economist of property rights Yoram Barzel: "The ability to consume commodities, including those necessary to sustain life, implies the possession of rights over them." *Economic Analysis of Property Rights* (Cambridge: Cambridge University Press, 1989), p. 62.

47. Marsilius of Padua, *The Defender of the Peace: The Defensor Pacis*, trans. Alan Gewirth (New York: Harper and Row, 1956), discourse II, chap. XII, 13, p. 192. I have omitted from the quotation material relating to Marsilius's claim that priests have voluntarily taken vows of poverty, which was a central part of the claim of the imperial party on this matter.

> and their opposites. It is for this reason too that man alone among the animals is said to have ownership or control of his acts; this control belongs to him by nature, it is not acquired through an act of will or choice.[48]

The issue received perhaps its most clear and powerful formulation in the famous debates over the treatment of the Indians by the Spanish empire. The proto-liberal thinkers of the School of Salamanca, from whom so much liberal thinking was to emerge (including the morality of private property, the justice of the market price and of the charging of interest, the role of contracts in regulating production and exchange, and the contractual nature of political society),[49] initiated a debate over the proper status and treatment of the Indians, in the process articulating a theory of universal individual rights.[50] Much of the dispute drew on the earlier debates concerning the Crusades and whether it was just to dispossess "infidels" from their lands, wealth, and political systems. A seminal text in this context was a statement of Pope Innocent IV (issued c. 1250 C.E.) on the

48. Marsilius of Padua, discourse II, chap. XII, 16, p. 193.

49. See, for example, Joseph Schumpeter, *History of Economic Analysis* (Oxford: Oxford University Press, 1954), who highlights the significance of Luis de Molina's views on the importance of free prices, since "we are not as a rule in the habit of looking to the scholastics for the origin of the theories that are associated with nineteenth-century laissez-faire liberalism" (p. 99); Alejandro Chafuen, *Christians for Freedom: Late-Scholastic Economics* (San Francisco: Ignatius Press, 1986); and Quentin Skinner, *The Foundations of Modern Political Thought*, vol. II, *The Age of Reformation* (Cambridge: Cambridge University Press, 1978), pp. 135–73.

50. As Blandine Kriegel notes, "In his *De Indis* of 1539, Vitoria maintained that Indians had the same right to liberty and property as all other human beings and that a number of rights can be deduced logically from human nature itself." Blandine Kriegel, "Rights and Natural Law," in *New French Thought: Political Philosophy*, ed. Mark Lilla (Princeton: Princeton University Press, 1994), p. 155. Brian Tierney has suggested that Francisco de Vitoria may have been directly influenced by Marsilius, for "*the Defensor Pacis* was certainly well known at Paris in the years Vitoria studied there. One difficulty is that Catholic authors usually referred to Marsilius by name only when they intended to disagree with him. When they wanted to borrow his ideas they preferred not to mention such a questionable source." Tierney, "Marsilius on Rights," p. 5.

rights of non-Christians, in which the Pope drew inspiration from the Sermon on the Mount.

> I maintain . . . that lordship, possession and jurisdiction can belong to infidels licitly and without sin, for these things were made not only for the faithful but for every rational creature as has been said. For he makes his sun to rise on the just and the wicked and he feeds the birds of the air, Matthew c.5, c.6. Accordingly we say that it is not licit for the pope or the faithful to take away from infidels their belongings or their lordships or jurisdictions because they possess them without sin.[51]

Francisco de Vitoria, in his famous essay *De Indis*, argued that the Indian "barbarians" were "true masters" and therefore "may not be dispossessed without due cause."[52] For "if the barbarians were not true masters before the arrival of the Spaniards, it can only have been on four possible grounds," which he lists as "that they were either sinners (*peccatores*), unbelievers (*infideles*), madmen (*amentes*), or insensate (*insensati*)."[53] The first two grounds are dismissed as not sufficient to deny rights, for it was recognized that even sinners and unbelievers can have rights; the third, although a sufficient ground for denying rights (dominion), is inapplicable to the Indians, for "they

51. Innocent IV, "On *Decretales*, 3.34.8, *Quod Super*, *Commentaria* (c. 1250), fol. 429–30," in *The Crisis of Church and State, 1050–1300*, ed. Brian Tierney (Toronto: University of Toronto Press, 1988), p. 153. The primary passage cited by Innocent bears greater mention: "You have heard that it was said, 'You shall love your neighbor and hate your enemy.' But I say to you, Love your enemies and pray for those who persecute you, so that you may be sons of your Father who is in heaven; for he makes his sun rise on the evil and the good, and sends rain on the just and on the unjust. For if you love those who love you, what reward have you? Do not even the tax collectors do the same?" (Matthew 5:43, Revised Standard Version).

52. Francisco de Vitoria, "On the American Indians," in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), p. 240.

53. Ibid., p. 240.

are not in point of fact madmen, but have judgment like other men."[54] (Whether the fourth is sufficient to deny "civil rights of ownership" Vitoria leaves to "the experts on Roman law," but he denies that the Indians are mad or irrational, as shown by their cities, their laws, marriages, religion, and so on.[55])

What are most noteworthy in this context are the criteria that Vitoria sets out for being "true masters," that is, masters—or owners—of themselves and their properties.

> *Irrational creatures cannot have any dominion*, for dominion is a legal right (*dominium est ius*), as Conrad Summenhart himself admits. Irrational creatures cannot have legal rights; therefore they cannot have any dominion. The minor premise is proved by the fact that irrational creatures cannot be victims of an injustice (*inuria*), and therefore cannot have legal rights: this assumption is proved in turn by considering the fact that to deprive a wolf or a lion of its prey is no injustice against the beast in question, any more than to shut out the sun's light by drawing the blinds is an injustice against the sun. And this is confirmed by the absurdity of the following argument: that if brutes had dominion, then any person who fenced off grass from deer would be committing a theft, since he would be stealing food without its owner's permission.
>
> And again, wild animals have no rights over their own bodies (*dominium sui*); still less, then, can they have rights over other things. . . . only rational creatures have mastery over their own actions (*dominium sui actus*), as Aquinas shows . . . [a person is master of his own actions insofar as he is able to make choices between one course and another; hence, as Aquinas says in the same passage, we are not masters as regards our appetite or our own destiny, for example]. If,

54. Ibid., p. 250.

55. Ibid., pp. 249–50. Vitoria also notes that, even were it to be conceded, *arguendo*, that the Indians suffered from "mental incapacity," any power the Spaniards might exercise over them would apply only "if everything is done for the benefit and good of the barbarians, and not merely for the profit of the Spaniards" (p. 291).

then, brutes have no dominion over their own actions, they can have no dominion over other things.[56]

To have mastery over one's own actions, that is, *dominium*,[57] is to "be able to make a choice between one course and another," and this ability to choose is, in effect, what allows us to "own" our actions, that is, to have them truly attributed to us.[58] To be a "true master" is

56. Ibid., pp. 247–48. (The passage in brackets does not appear in some editions of Vitoria's works.)

57. For the complex relationship between power, right, law, and property, as expressed in the terms *dominium*, *lex*, and *ius*, see Richard Tuck, *Natural Rights Theories: Their Origins and Development* (Cambridge: Cambridge University Press, 1979), but see also the criticism in Brian Tierney, "Tuck on Rights: Some Medieval Problems," *History of Political Thought* IV, no. 3 (Winter 1983): pp. 429–39. Tierney claims that the use of *dominium* is more complex in the medieval context than Tuck believes, although this is less significant in the context of the later thinkers dealt with here; Tierney also suggests an alternative route to that sketched by Tuck for a medieval development of "a possessive theory of rights," starting with "Innocent IV's defence of the rights of infidels to property and jurisdiction, and the assertion attributed to Alexander of Hales that natural law actually dictated the institution of private property among fallen men" (p. 440). Tierney suggests a direct route to a "possessive theory of rights," starting from the declaration of Innocent IV and leading to "the Indies debates of Las Casas and Sepúlveda."

58. It is noteworthy that the idea of personal responsibility intrudes even in cases in which the self-proprietorship of the actor is denied. Consider the Roman law of noxal actions: "Noxal actions lie when slaves commit delicts—theft, robbery, loss, or contempt. The actions give the condemned owner an option to pay the damages as assessed in money or to make noxal surrender of the slave." *Justinian's Institutes*, trans. and introduction by Peter Birks and Grant McLeod (London: Duckworth, 1987), 4.8, p. 137. Ulpian noted the central role of moral responsibility for misdeeds on the part of either the master or the slave: "If a slave has killed with his owner's knowledge, the owner is liable in full; for he himself is deemed to have done the killing, but if he did not know, the action is noxal; for he should not be held liable for his slave's misdeed beyond handing him over noxally." *The Digest of Justinian*, op. cit., IX, 4, 2. The Roman law scholar Barry Nichols argues that "The liability was that of the wrongdoer, and the injured person could take vengeance on him. . . . The true character of this noxal liability is plain from the rule that it followed the wrongdoer (*noxa caput sequitur*). This meant that if the slave was, for example, manumitted before the action was brought, he himself was liable to an ordinary action; or if he were sold, the noxal action lay against his new owner." Nichols, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1991), p. 223.

to be an agent who can "own" his or her actions, that is, one to whom the actions can be attributed and who therefore can be said to be responsible for those actions and therefore entitled as a matter of justice or right to take those actions necessary to fulfill his or her moral obligations, both to others and to self (minimally, that entails self-preservation). According to Vitoria: "Every Indian is a man and thus is capable of attaining salvation or damnation"; "Every man is a person and is the master of his body and possessions"; "Inasmuch as he is a person, every Indian has free will, and, consequently, is the master of his actions"; "By natural law, every man has the right to his own life and to physical and mental integrity."[59]

The core of the arguments of Innocent IV, Vitoria, John Locke, and other pioneers of the theory of rights of self-propriety, as of their followers up to the present time, is a recognition that other humans are not simply mobile machines, automata, or insensate brutes, but acting agents to whom choice and responsibility may be attributed. The debate between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the status of the Indians revolved largely around the intellectual and moral capacities of the Indians. As Las Casas argued,

> Now if we shall have shown that among our Indians of the western and southern shores (granting that we call them barbarians and that they are barbarians) there are important kingdoms, large numbers of people who live settled lives in a society, great cities, kings, judges and laws, persons who engage in commerce, buying, selling, lending, and the other contracts of the law of nations, will it not stand proved that the Reverend Doctor Sepúlveda has spoken wrongly and viciously against peoples like these, either out of malice or ignorance of Aris-

59. These statements are drawn from a variety of Vitoria's writings and are collected in Luciano Pereña Vicente, ed., *The Rights and Obligations of Indians and Spaniards in the New World, According to Francisco de Vitoria* (Salamanca: Universidad Pontifica de Salamanca, 1992); they are to be found on p. 17 of Vicente's works.

totle's teaching, and, therefore, has falsely and perhaps irreparably slandered them before the entire world?[60]

The issue was of more than academic interest, for had it been proven that the Indians were the "natural slaves" described by Aristotle in the *Politics*,[61] then the Spaniards would have been justified in applying to them the direction that they were incapable of providing themselves. By arguing that the Indians were indeed fully human and were capable of, and indeed were actively exercising, self-direction, Las Casas, following Vitoria before him, sought to refute the claims of the Spanish slaveholders and affirm the rights of the Indians to their lives, liberties, and properties. The *proper* relationship between the Spaniards and the Indians, Vitoria and Las Casas insisted, was persuasion in religion and consent-based free trade in material affairs.[62]

60. Bartolomé de Las Casas, *In Defense of the Indians*, trans. Stafford Poole (Dekalb, Ill.: Northern Illinois University Press, 1992), p. 42. Las Casas concluded his work with a moving plea: "The Indians are our brothers, and Christ has given his life for them. Why, then, do we persecute them with such inhuman savagery when they do not deserve such treatment? The past, because it cannot be undone, must be attributed to our weakness, provided that what has been taken unjustly is restored" (p. 362).

61. See the discussion in Aristotle, *Politics*, bk. I, chaps. 4–7, pp. 39–44.

62. In his *De Unico Vocationis Modo*, Las Casas praised mutual advantage over exploitation: "Worldly, ambitious men who sought wealth and pleasure placed their hope in obtaining gold and silver by the labor and sweat, even through very harsh slavery, oppression, and death, of not only innumerable people but of the greater part of humanity. . . . And the insolence and madness of these men became so great that they did not hesitate to allege that the Indians were beasts or almost beasts, and publicly defamed them. Then they claimed that it was just to subject them to our rule by war, or to hunt them like beasts and then reduce them to slavery. Thus they could make use of the Indians at their pleasure. But the truth is that very many of the Indians were able to govern themselves in monastic, economic, and political life. They could teach us and civilize us, however, and even more, would dominate us by natural reason as the Philosopher said speaking of Greeks and barbarians." Cited in Lewis Hanke, *All Mankind Is One: A Study of the Disputation between Bartolomé de las Casas and Juan Ginés Sepúlveda on the Religious and Intellectual Capacity of the American Indians* (Dekalb, Ill.: Northern Illinois University Press, 1974), p. 157.

The common humanity of Indians and Spaniards, and therefore of any and all who might meet on a basis of unequal technological, military, or other power, provided a ground for recognition of a common set of rights. But why should a common nature entail common rights? Lobsters share a common nature, but there is no justice among lobsters, still less rights. Even if a lobster can "recognize" another creature *as* a lobster, there is no mutual recognition of moral agents, no sense that "this is an agent capable of choice, as am I," nor that "this is an agent deserving of some kind of respect." The recognition of humans as choosers, as agents who can "own" their actions and be responsible for them, and who have purposes and goals of their own, which may or may not coincide with yours, involves a special kind of recognition and comportment altogether different from that appropriate to inanimate or nonrational entities.

IDENTITY, KNOWLEDGE, RIGHTS, AND JUSTICE

The idea of dominium, of personal responsibility, of an ability to "own" our acts, is central to the development of the idea of rights, and to the extension of the concept of rights to ever-wider categories of human beings.

That idea of responsibility is ultimately founded on the idea of the dominium one has over one's body. Bodies are scarce; there is only one per person. If one person were to get more than one body, that would necessarily leave at least one person without a body. That is why referring to one's *own* body is redundant; "one's own body" denotes nothing more than "one's body" and differs from the former in connotation only by emphasis.[63]

63. In the course of this chapter, I articulate and defend a theory of personal identity that, although perhaps not superior in every respect to every other theory, provides a superior foundation for a *political* theory of justice. Various other thinkers have articulated theories of personal identity that are not dependent upon the identity or continuity of bodies. Notable among them is Derek Parfit, who, in his *Reasons*

The scarcity of bodies entails that if they are to be used or, eschewing instrumentalist language, if their spatio-temporal dispositions are to be determined, choices must be made. The law of contradiction, "the most certain of all principles,"[64] creates a problem of decision: "It is impossible for the same attribute at once to belong and not to belong to the same thing and in the same relation."[65] A body cannot be reading in the Bodleian Library at the same time that it is drinking in the King's Arms or picking corn on an Iowa farm. Scarcity arises from the transposition of the law of contradiction into the context of choice. Rights arise from the transposition of scarcity into the context of justice. Rights are the moral and legal instruments by which scarcity problems are addressed, that is, by which agents are informed as to who is entitled to the use of a scarce resource under what conditions.

The centrality of dominium to personal identity, and thus to identifying who has jurisdiction over what body, was clearly stated during the English Civil War by the Levellers, a group that exerted a great influence on later English and American political thought. One of their more eloquent leaders, Richard Overton, appealed to rights to defend religious liberty in a pamphlet of 1646:

> To every individual in nature is given an individual property by nature not to be invaded or usurped by any. For every one, as he is himself, so he has a self-propriety, *else could he not be himself*; and on this no second may presume to deprive any of without manifest violation and affront to the very principles of nature and of the rules of equity and

and Persons (1986), argues that "personal identity is not what matters" and that "what matters" is "psychological connectedness and/or continuity with the right kind of cause . . . [that] could be any kind of cause" (p. 215). My reasons for preferring a corporeal criterion of personal identity, and why such corporeal identity matters, are set forth in the course of this chapter.

64. Aristotle, *The Metaphysics*, trans. Hugh Tredennick (Cambridge: Harvard University Press, 1933), IV, iii, 9, 1005b19, p. 161.

65. Ibid., IV, iii, 9, 1005b20–23. The law of contradiction and the law of the excluded middle are, in the current context, equivalent.

> justice between man and man. Mine and thine cannot be, except this be. No man has power over my rights and liberties, and I over no man's. I may be but an individual, enjoy my self and my self-propriety and may right my self no more than my self, or presume any further; if I do, I am an encroacher and an invader upon another man's right—to which I have no right. For by natural birth all men are equally and alike born to like propriety, liberty and freedom; and as we are delivered of God by the hand of nature into this world, every one with a natural, innate freedom and propriety—as it were writ in the table of every man's heart, never to be obliterated—even so are we to live, everyone equally and alike to enjoy his birthright and privilege; even all whereof God by nature has made him free.[66] (emphasis added)

Such "self-propriety" was based on the recognition of the choice and freedom that individuals exercise over their own bodies. Notably, it served as the philosophical justification for the still current resister's strategy of "going limp" when arrested by state agents, as Overton argued in refusing to walk to prison when ordered to do so:

> My *Leggs* were borne as free as the rest of my *Body*, and therefore I

66. Richard Overton, "An Arrow Against All Tyrants and Tyranny," in *The English Levellers*, ed. Andrew Sharp (Cambridge: Cambridge University Press, 1998), p. 55. Sharp has modernized spelling, punctuation, and grammar. Interestingly, the phrase "right my self no more than my self" is "write my self no more than my self" in the excerpted version of the essay in G. E. Aylmer, ed., *The Levellers in the English Revolution* (Ithaca, N.Y.: Cornell University Press, 1975), p. 68, which has a more poetic ring to it and may be more true to Overton's style. It is worth noting that Overton is not endorsing unrestricted "egotism," or the right of each to whatever he or she can get. Rather, it is a right to equality: "No man has power over my rights and liberties, and I over no man's." On the relationship between self-proprietorship and freedom of conscience, see the discussion of Overton and other Levellers, as well as of John Locke and James Madison, in George H. Smith, "Philosophies of Toleration," in *Atheism, Ayn Rand, and Other Heresies* (Buffalo: Prometheus Press, 1991), pp. 97–129. Madison expressed the basis of property in conscience when he wrote, of every individual, that "He has a property of peculiar value in his religious opinions and the free communication of them." James Madison, "Property," *National Gazette*, March 27, 1792, in *The Papers of James Madison*, ed. R. A. Rutland and others (Charlottesville: University Press of Virginia, 1983), pp. 266–68, quotation from p. 266.

> scorne that *Leggs, or Armes, or hands of mine* should do them any *villeine-Service*, for as I am a *Freeman by birth*, so I am resolved to live and dye, both in heart word and deed, in substance and in shew.[67]

Overton was quite cruelly dragged to prison as a consequence. His remarks on this experience remind us of the clear relationship of self-propriety and moral agency:

> But in case you object, that I knew well enough, that if I would not go, they would carrie me, therefore it had been better for me to have gone, then to have exposed my selfe to their cruelty, I answer, 1. If I had known they would have hanged me, must I therefore have hanged my selfe? 2. A good conscience had rather run the hazard of cruelty then to abate an hairesbreadth of contestation and opposition against illegality, injustice, and tyranny. 3. If they had had any legall jurisdiction over my leggs, then at their Commands my leggs were bound to obey: And then, (in that case) I confesse it had been better to obey, then to have exposed my person to the cruelty of threatening mercilesse Gaolers: But being free from their Jurisdiction *from the Crowne of my head to the Soale of my foote*, I know no reason, why I should foote it for them, or in any the least dance any attendance to their *Arbitrary Warrants*; their Lordships may put up their pipes, except they will play to the *good old tune of the Law of the Land*, otherwise their Orders and Warrants are never like to have the service of my leggs or feet, for they were never bred to tread in their *Arbitrary Steps*, but I shall leave *their Orders* and *their execution to themselves*. And therefore, Sir, concerning that action of mine, I shall continue in the said esteeme thereof, till my defense be made voide, and it be legally proved, that by the Law of the Land, *I* was bound to set one legge before another in attendance to that Order.[68]

Regardless of the consequences, Overton retained the control over his own legs. His actions remained his own.

The rather better known philosopher of rights, John Locke, con-

67. Richard Overton, "The Commoner's Complaint," in *Tracts on Liberty in the Puritan Revolution, 1638–1647*, vol. III, ed. W. Haller (New York: Columbia University Press, 1943), pp. 371–95, material quoted is on p. 381.

68. Ibid., p. 382.

sidered the relation between "person" and "self" in his *Essay Concerning Human Understanding*:

> Any substance vitally united to the present thinking Being, is a part of that very *same self* which now is: Any thing united to it by a consciousness of former Actions makes also a part of the *same self*, which is the same both then and now.
>
> *Person*, as I take it, is the name for this *self*. Where-ever a Man finds, what he calls *himself*, there I think another may say is the same *Person*. It is a Forensick Term appropriating Actions and their Merit; and so only belongs to intelligent Agents capable of a Law, and Happiness and Misery. This personality extends it *self* beyond present Existence to what is past, only by consciousness, whereby it becomes concerned and accountable, owns and imputes to it self past Actions, just upon the same ground, and for the same reason, that it does the present.[69]

It is clear from his remarks in *The Second Treatise* that Locke identified the person with an animated body. After claiming that "every Man has a *Property* in his own *Person*," he immediately clarifies this by explaining that "This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."[70] Each person is an individual and the owner of his or her acts, which are the acts of an animated body. The body is the seat of one's personhood, one's personhood is achieved by the acts that one owns, and the responsibility for those acts is the foundation for one's rights, for the reason that hindering another from fulfilling his or her obligations is precisely to hinder that person from doing what is right, and therefore to act contrary to right.

Given that human beings are embodied persons, ascribing personal responsibility for one's acts means ascribing them to some*body*.

69. John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (1684; Oxford: Clarendon Press, 1975), bk. II, chap. XXVII, sec. 26, p. 346.

70. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), II, sec. 27, pp. 287–88.

One need not embrace any particular theory of the relationship of mind and body to know that, certainly under normal circumstances, each person is associated with, or embodied in, one body and one body only. Aristotle makes mention of this principle when he describes "slaves who merit being such by nature," surely a kind of person whose acquaintance he had never made:

> For the same thing is advantageous for the part and the whole and for body and soul, and the slave is a sort of part of the master—a part of his body, as it were, animate yet separate. There is thus a certain advantage—and even affection of slave and master for one another—for those [slaves] who merit being such by nature; but for those who do not merit it in this way but [who are slaves] according to law and by force, the opposite is the case.[71]

Surely Aristotle was aware that the actual slaves he knew were "according to law and by force," and, as he suggests, such slaves do not usually exhibit affection for their masters. Slaves by force are not a part of the master's body but have their own bodies, desires, wishes, and, in general, their own principles of motion. The core of what is one's own is one's body; it is the kernel around which we build our self-identity and extend our personality into the wider world of experience, through acquisition of attachments to other persons and to corporeal things, to causes, and so on. This basic core of what is "one's own" is central to the rights theory of the legal theorist Hugo Grotius; it encompasses one's life, limbs, and liberty, the last being "the power, that we have over ourselves."[72]

One's body is centrally, inescapably connected to one's identity. As *Economist* editor and political theorist Thomas Hodgskin noted,

71. Aristotle, *Politics*, 1255b10–15, p. 43.

72. Hugo Grotius, *The Rights of War and Peace*, trans. A. C. Campbell (London: M. Walter Dunne, 1901), bk. I, chap. II, 4, p. 19. Grotius's concept of the "suum"—Latin for "one's own"—is elucidated in Stephen Buckle, *Natural Law and the Theory of Property, Grotius to Hume* (Oxford: Clarendon Press, 1991), pp. 29–52.

> Mr. Locke says, that every man has a property in his own person; in fact, individuality—which is signified by the word *own*—cannot be disjoined from the person. Each individual learns his own shape and form, and even the existence of his limbs and body, from seeing and feeling them. These constitute his notion of *personal* identity, both for himself and others; and it is impossible to conceive—it is in fact a contradiction to say—that a man's limbs and body do not belong to himself: for the words him, self, and his body, signify the same material thing.
>
> As we learn the existence of our own bodies from seeing and feeling them, and as we see and feel the bodies of others, we have precisely similar grounds for believing in the individuality or identity of other persons, as for believing in our own identity. The ideas expressed by the words mine and thine, as applied to the produce of labour, are simply then an extended form of the ideas of personal identity and individuality.[73]

Recognition of this fact was central to the liberal tradition, both in Europe and in America. Thus, as Destutt de Tracy noted in a work edited by Thomas Jefferson (and endorsed by Jefferson with his "hearty prayers, that while the Review of Montesquieu, by the same author, is made with us the elementary book of instruction in the principles of civil government, so the present work may be in the particular branch of Political Economy"),

> as soon as this individual knows accurately itself, or its moral person, and its capacity to enjoy and to suffer, and to act necessarily, it sees clearly also that this self is the exclusive proprietor of the body which it animates, of the organs which it moves, of all their passions and their actions: for all this finishes and commences with this *self*, exists but by it, is not moved but by its acts, and no other moral person can employ the same instruments nor be affected in the same manner by their effects. The idea of property and of exclusive property arises then necessarily in a sensible being from this alone, that it is suscep-

73. Thomas Hodgskin, *The Natural and Artificial Right of Property Contrasted* (1832; Clifton, N.J.: Augustus M. Kelley, 1973), pp. 28–29.

tible of passion and action, and it arises in such a being because nature has endowed it with an inevitable and inalienable property, that of its individuality.[74]

Certainly there are other theories of personal identity that do not rely on an individual's perception of his limbs and body in order, in Hodgskin's words, to "constitute his notion of *personal* identity, both for himself and others."[75] But not all theories of personal identity are

74. The Count Destutt de Tracy, *A Treatise on Political Economy*, trans. Thomas Jefferson (1817; New York: Augustus M. Kelley, 1970), p. 47. Destutt relates the institution of several property, or of mine and thine, to the distinction between me and thee: "*[T]he thine* and *the mine* were never invented. They were acknowledged the day on which we could say *thee* and *me*; and the idea of *me* and *thee* or rather of *me* and something *other than me*, has arisen, if not the very day on which a feeling being has experienced impressions, at least the one on which, in consequence of these impressions, he has experienced the sentiment of willing, the possibility of acting, which is a consequence thereof, and a resistance to this sentiment and to this act. When afterwards among these resisting beings, consequently other than himself, the feeling and willing being has known that there were some feeling like *himself*, it has been forced to accord to them a *personality* other than his own, a *self* other than his own and different from his own. And it always has been impossible, as it always will be, that that which is *his* should not for him be different from that which is *theirs*" (p. 49). The "Review of Montesquieu" mentioned by Jefferson is *A Commentary and Review of Montesquieu's Spirit of Laws*, by Antoine Louis Claude Destutt de Tracy, trans. Thomas Jefferson (1811; New York: Burt Franklin, 1969).

75. See, for example, the arguments offered on behalf of psychological continuity as criterion of personal identity in Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1986), and those offered by Thomas Nagel in *The View from Nowhere* (Oxford: Oxford University Press, 1986) on behalf of "the hypothesis that I am my brain" (p. 40). The "closest continuer" view of identity and the added concept of the reflexive self-referring of the "self-synthesizing self," advanced by Robert Nozick in his *Philosophical Explanations* (Cambridge: Harvard University Press, 1981), are compatible with the view I expound in this essay, insofar as the "weighted metric" to which I appeal is one suitable to a "social matrix." As Nozick notes, "[P]roblems of overlap [in applying notions of identity to people] can arise at one time, given the different possibilities of carving up the world. If you can clump yourself along any (artificial) relations around reflexive self-referring, can your demarcation of yourself include my arms, or my whole body? Or even my capacity to reflexively self-refer? Some uniformity of delimitation is achieved in a social matrix. Rewards and punishments will lead to a boundary in a particular location along given innate salient features or dimensions. Recalcitrant individuals who act on their

or need be relevant to the formulation of a theory of rights. Theories based on strange hypotheticals and counterfactuals and on nonstandard cases, such as multiple personalities, Siamese twins, or amnesiacs, are unlikely to meet the criteria of publicity and generality necessary for a functional rights theory. "Bodily self-ascription" (to use Gareth Evans's phrase for the principle advanced here), on the other hand, has the marked advantage of "immunity to error through misidentification."[76] As Evans notes,

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deviant classifications wherein part of their own body includes someone else's arms, will be punished, institutionalized, or killed. Usually, the mutual compatibility of self-definitions occurs with less hardship" (pp. 107–8). See also the consideration of the role of personal identity in assigning responsibility and in the attribution of benefits and obligations in Eddy M. Zemach, "Love Thy Neighbor As Thyself, Or Egoism and Altruism," in *Studies in Ethical Theory*, ed. Peter A. French, Theodore E. Uehling, Jr., and Howard K. Wettstein, Midwest Studies in Philosophy, vol. III (Minneapolis: University of Minnesota Press, 1980), pp. 148–58. Zemach's approach suffers, however, from an excessively nominalist orientation, which, while allowing him to admit that "although everything in nature is, under some classification or other, a part of the agent of any given action x, there must be some parts of nature which are closer to x than others" (p. 154), keeps him from admitting substances or natural entities that are materially and numerically individuated; were he to admit such entities, individual personal responsibility would be a natural consequence of his analysis.

76. See Gareth Evans, "Self-Identification," in *Self-Knowledge*, ed. Quassim Cassam (Oxford: Oxford University Press, 1994), pp. 184–209. As Evans puts it, the judgment "*a* is F" is immune to error through misidentification if "it is based upon a way of knowing about objects such that it does not make sense for the subject to utter 'Something is F, but is it *a* that is F?' when the first component expresses knowledge which the subject does not think he has, or may have, gained in any other way" [than the normal way]. See Gareth Evans, *The Varieties of Reference*, ed. John McDowell (Oxford: Oxford University Press, 1982), pp. 189–90, quoted in a footnote in Gareth Evans, "Self-Identification," p. 194. The Stoic philosopher Epictetus considered such self-ascription the most certain kind of knowledge. In his response to the skepticism of the Pyrrhonists and the Academic philosophers, Epictetus argued, "But that you and I are not the same persons, I know very certainly. Whence do I get this knowledge? When I want to swallow something, I never take the morsel to that place, but to this." Epictetus, *The Discourses as Reported by Arrian*, vol. I, bk. I–II, trans. W. A. Oldfather (Cambridge: Harvard University Press, 1998), I.27, 18–19, p. 173.

> we have what might be described as a general capacity to perceive our own bodies, although this can be broken down into several distinguishable capacities. . . . Each of these modes of perception appears to give rise to judgments which are immune to error through misidentification. None of the following utterances appears to make sense when the first component expresses knowledge gained in the appropriate way: "Someone's legs are crossed, but is it my legs that are crossed?"; "Someone is hot and sticky, but is it I who am hot and sticky?"; "Someone is being pushed, but is it I who am being pushed?" There just does not appear to be a gap between the subject's having information (or appearing to have information), in the appropriate way, that the property of being *F* is instantiated, and his having information (or appearing to have information) that *he* is *F*; for him to have, or to appear to have, the information that the property is instantiated just is for it to appear to him that *he* is *F*.[77]

Each person is identified with one and only one body, spatiotemporally distinct from all others. Each person is a source or principle of motion for one body.[78] Each body provides demarcation of a

77. Gareth Evans, "Self-Identification," p. 198. Evans also allows certain forms of mental self-ascription to be immune from errors of misidentification, for perceptual states "must occur in the context of certain kinds of knowledge and understanding on the part of the subject" (p. 208) that will entail knowledge of a persisting self: "No judgment will have the content of a psychological self-ascription, unless the judger can be regarded as ascribing to himself a property which he can conceive as being satisfied by a being not necessarily himself—a state of affairs which he will have to conceive as involving a persisting subject of experience. He can know that a state of affairs of the relevant type obtains simply by being aware of a tree, but he must conceive the state of affairs that he then knows to obtain as a state of affairs of precisely that type. And this means that he must conceive of himself, the subject to whom the property is ascribed, as a being of the kind which he envisages when he simply envisages *someone* seeing a tree—that is to say, a persisting subject of experience, located in space and time" (p. 208).

78. As Adam Smith notes of "the man of system," "apt to be very wise in his own conceit . . . [and] . . . so enamoured with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it": "He seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider that the pieces upon the chess-board have no other principle of motion

sphere of "ownness." The values that one acts to attain or preserve are the values of materially individuated agents; they are "agent-relative." Each person is responsible for those acts in cases in which he or she "could have done otherwise." Each person is responsible for the acts of his or her own body, but not (excepting special cases, such as guardianship of minors and the mentally deficient) for the acts of the bodies of others, for these are the responsibility of other agents—those whose spheres of "ownness" are defined by those bodies.[79]

Recognizing that each person bears responsibility for his or her acts entails that each person is also obliged to act in accordance with deontic constraints on behavior. Moving from "normative solipsism" to "normative pluralism"—from the view that one is the only agent acting to achieve values in the world to a recognition that one is one among a multitude of acting agents—need not entail a move from the agent-relativity of values to the agent-neutrality of values, as some have asserted,[80] but provides the groundwork for recognition of a

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besides that which the hand impresses upon them; but that, in the great chess-board of human society, every single piece has a principle of motion of its own, altogether different from that which the legislature might chuse to impress upon it." *The Theory of Moral Sentiments* (Oxford: Oxford University Press, 1976), pp. 233–34.

79. As Hugo Grotius notes, "It is the CIVIL law . . . which makes an owner answerable for the mischief or damage done by his slave, or by his cattle. For in the eye of natural justice he is not to blame." *The Rights of War and Peace*, bk. II, chap. XVII, par. XXI, p. 201.

80. This is the claim of Thomas Nagel, regarding at least pleasure and pain, in *The View from Nowhere*, pp. 156–62. Nagel claims that the idea that "pleasure is a good thing and pain is a bad thing" (p. 159) is "self-evident" and that to deny it and to assert the agent-relativity of all values "is a very peculiar attitude to take toward the primitive comforts and discomforts of life" (p. 160). I do not find Nagel's claims convincing, although "something like it" seems to be true. That "something like it" is to be found in the principle of sympathy (most normal people are concerned about the welfare, including the pleasures and pains, of others) and in the deontic side constraints to be discussed in a moment. For a defense of the agent-relativity of all values, see Eric Mack, "Agent-Relativity of Value, Deontic Restraints, and Self-

deontic constraint on the pursuit of agent-relative values—that the spheres of ownness of others are not to be invaded or usurped in pursuit of one's own agent-relative values.[81] In recognizing that persons bear responsibility for their acts, we are *not* compelled by the structure of practical reason to adopt a special perspective that ranks all values and lives equally from a maximizing perspective, such that an aggregate of equally valid lives or values is what is to be conserved or advanced from some agent-neutral perspective,[82] but we are moved toward a constraint on behavior that affects others.[83] Some have suggested that it would be a failure of deliberative or practical rationality to fail to recognize the equal claims of others or to integrate their values into one's own, but while this is attractive, I see little warrant for it. A far stronger ground for recognizing deontic constraints on behavior is that the realm of responsibility of each individual maps precisely on to a realm of legitimate claims; the fact that each has a life to lead is coextensive in moral significance with the fact that each bears responsibility for acts in a well-delineated sphere of ownness. Each governs in his or her own body; each body has its own principle of motion; each is held by others to be responsible for what he or she

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Ownership," in *Value, Welfare, and Morality*, ed. R. G. Frey and Christopher W. Morris (Cambridge: Cambridge University Press, 1993), pp. 209–32.

81. See Eric Mack, "Personal Integrity, Practical Recognition, and Rights," *The Monist* 76, no. 1 (January 1993): pp. 101–18.

82. See the discussion of the issues related to such an agent-neutral consequentialism in Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Oxford: Clarendon Press, 1982). Scheffler attempts to integrate into an agent-neutral consequentialist approach an "agent-centred prerogative" that would allow individuals to avoid pursuing agent-neutral values in certain cases where they might violate the integrity of the agent.

83. Eric Mack, "Personal Integrity, Practical Recognition, and Rights," p. 102: "in general, in such [favorable social and material] circumstances the constraining deontic reason prevails in the sense that, although the value of the ends which the agent seeks is not denigrated, the agent is precluded from obtaining them through the contemplated course of action."

does with that body; the body demarcates that person as an identity, as the same with himself or herself and as different from others; and this body is the seat of the claim to pursue one's *own* values—those with which one identifies as an agent, which give coherence to one's life and integrate one as one person, rather than as simply a random and unintegrated conglomeration of desires.[84]

Precisely because each person has one and only one body, rights over bodies— a "property in one's person"—offer a secure foundation for the entire structure of rights, one that does not necessarily generate conflicts. The starting point is secure. It provides a foundation for a system of "compossible" rights, that is, rights that are capable of being jointly realized.[85]

If a theory of rights generates *in*compossible claims to act legitimately, as do the theories criticized earlier in this essay, that theory generates contradictions as fatal to it as are logical contradictions to a system of mathematics.[86] It is in the nature of "right" that two mutually incompatible actions cannot both be "right"; they may be understandable, or virtuous, or even noble, but both cannot be right and just at the same time and in the same respect. Recall Socrates'

84. On the role of value and project pursuit in the attainment of person identity and coherence, see Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987). As Lomasky notes, "[R]egard for someone as a rights holder is grounded in the recognizability of that being as a distinct individual. It is not *personhood* which calls for respect but rather distinct persons. Between these two conceptions there is a sharp divide, one separating an ethic in which individualism is valued from an ethic subscribing entirely to an impersonal standard of value" (p. 167). Cf. Thomas Nagel ("Equality," in Thomas Nagel, *Mortal Questions* [Cambridge: Cambridge University Press, 1979]): "The concern with what one is doing to whom, as opposed to the concern with what happens, is an important primary source of ethics that is poorly understood" (p. 115).

85. For a fuller explanation of compossibility, see Hillel Steiner, "The Structure of a Theory of Compossible Rights," *Journal of Philosophy* 74 (1977): pp. 767–75.

86. Cf. Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), p. 3: "Any justice principle that delivers a set of rights yielding contradictory judgements about the permissibility of a particular action either is unrealizable or (what comes to the same thing) must be modified to be realizable."

warning when discussing justice: "The argument is not about just any question, but about the way one should live."[87] Justice is about which acts are permissible or obligatory and which are not, and rights are the signposts that tell individuals how they may and may not act. Incompossible rights give contradictory information; they are like signposts for "North" that point in opposite direction.

A theory that recognizes the responsibilities and duties of each entails recognition of a set of corresponding rights. As Hillel Steiner notes, "A duty-holder who lacks any rights is one whose liberties are all naked and whose duties may thus be incompossible either with one another or with those of others or both."[88] In order to fulfill our duties, rights are necessary, and if our duties are equal, then these rights are equal rights. The rights to our own spheres of ownness—over that for which we are responsible—is the natural correlative to the obligations associated with the sphere of ownness.[89] And that sphere of ownness defines both rights and duties: it is the right of all persons to themselves, to their own bodies. The obligations derive from the engagement in moral discourse, from the equality involved in the giving of reasons among agents all of whom bear responsibility for their own acts and who have their own lives and purposes, rights derived both from the necessity of avoiding incompossibility of ob-

87. Plato, *The Republic*, trans. Allan Bloom (New York: Basic Books, 1968), 352d, p. 31.

88. Hillel Steiner, *An Essay on Rights*, p. 88. In justification of this claim, Steiner notes immediately before it (pp. 87–88) that "[S]ince (i) a right is entailed by a correlative duty, and (ii) a set of categorically compossible rights is entailed by a set of categorically compossible correlative duties, and (iii) such duties are ones involving the duty-holder's exercise of only his vested liberties, and (iv) vested liberties imply duties of forbearance in others, it follows that *a set of categorically compossible rights implies the presence of rights in duty-holders*: namely, rights correlative to those forbearance duties that conjunctively form the perimeter surrounding any duty-holder's vested liberties."

89. See the discussion of the relationship between duties and rights in John Locke's theory in A. John Simmons, *The Lockean Theory of Rights* (Princeton, N.J.: Princeton University Press, 1992), pp. 72–75.

ligations and duties, extensionally defined, and from the claims of all to live their lives.[90] What defines and makes possible the discharge of obligations and the enjoyment of rights is self-proprietorship, or a "property in one's person."[91]

Property in one's person provides a foundation for a system of compossible rights, which themselves are the juridical structure of a society of freedom and justice. As Kant noted, "Right is . . . the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom."[92]

Kant recognized quite clearly that what distinguishes the just from the unjust system is the ability of all of the legitimate claims to be exercised at the same time, to be compossible. Objective right has to do with the "sum total" of the acts of persons, not merely "the duties in each individual case," in Waldron's terms; in order for justice and rights (or objective and subjective right) to be complementary, the duties in each individual case can be duties only if the sum total of them yields justice or right. Kant concludes that,

90. Not all rights are directly derivable from obligations, for there are many cases in which one may assert a claim that does not prejudice others, which is neither a necessary condition for fulfilling an obligation nor a forbearance from failing to fulfill an obligation. As Locke notes, every person has from birth "*A Right of Freedom to his Person*, which no other Man has a Power over, but the free Disposal of it lies in himself." John Locke, *Two Treatises of Government*, II, sec. 190, pp. 393–94. Locke asserts that "Wherever others are not 'prejudiced,' 'every man' may consider what suits his own convenience, and follow what course he likes best." As cited in A. John Simmons, *The Lockean Theory of Rights*, p. 77. For a careful exposition and use of the distinction between intensionally described and extensionally described actions, see Hillel Steiner, *An Essay on Rights*.

91. See Steiner, *An Essay on Rights*: "The rights constituting a person's domain are . . . easily conceived as *property rights*; they are (time-indexed) rights to physical things. A set of categorically compossible domains, constituted by a set of property rights, is one in which each person's rights are demarcated in such a way as to be mutually exclusive of every other person's rights" (p. 91).

92. Immanuel Kant, "The Metaphysics of Morals," in *Political Writings*, ed. Hans Reiss (Cambridge: Cambridge University Press, 1992), p. 133.

> Every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is *right*.[93]

I have a right to those actions that are compatible with the equal freedom of all others; the sum total of those actions yields justice.[94]

CONCLUSION

Formulating theories of rights that generate logical chaos and social conflict does not advance rights or justice. Such theories tear asunder rights and justice, eliminating both and substituting for them "human wish," arbitrary power, and violence. In so doing, they undermine the very civilization that justice, law, and rights have made possible.

It is no accident that the traditional view of rights that I have sketched out (quite incompletely, to be sure) motivated the American founding and the formulation of the sets of rights articulated in the Constitution of the United States. The incompatibilities and failures (most strikingly in the case of the injustices and rights violations suffered by African slaves), although clear to some at the time of the founding, took time for their elimination. Practice did not correspond to theory but, partly through the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, were brought into closer correspondence. To this day they remain incompletely correspondent; it is in the nature of morality and justice that they are not always observed, for the simple reason of human choice, which makes possible both virtue and vice, both justice and injustice. Injustices and rights violations will never be completely eliminated, however much

93. Ibid., p. 133.

94. The one basic right, then, is the right to freedom: "Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity." Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd (New York: Macmillan Publishing Co., 1985), pp. 43–44.

we are called to eliminate them. But, unlike the rights theories criticized earlier, a compossible set of rights has the advantage that it can be realized in the most part, that it does not necessarily lead to conflicts and to the abandonment of rights as criteria for deciding conflicts of interest. It is in this way that the project initiated by the American founders—which was in fact a continuation of a wider tradition of European civilization, constitutionalism, and law—reveals its greatest wisdom. That is why the American experiment, even with all its flaws, remains an attractive model for the world.

Recall the wisdom of Aristotle: "It is better if all these things are done in accordance with law rather than in accordance with human wish, as the latter is not a safe standard."[95] The statement is no less true in the twentieth century C.E., a century washed in blood by the arbitrary power of rulers unlimited by secure principles of justice and attached instead to "dynamic," unpredictable, irreconcilable "rights."

95. Aristotle, *Politics* (1272b5–8), p. 80.