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***459** WHAT IS "PROPERTY"?

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I. INTRODUCTION

The word "property" communicates various meanings. A common dictionary entry defines property as a thing or collection of things that one owns, [FN1] whereas a frequently repeated legal definition describes property as a bundle of sticklike rights. [FN2]

Neither definition, however, is especially illuminating. The former fails because its most relevant term is not "thing(s)" (property not being a synonym for things) but "owns," and what it means to own something is not explained. The latter meaning falls short as it does not indicate what part of a bundle of separable rights, which includes, for instance, rights of possession, control, use, and exchange, is the necessary minimum to constitute property, implying that the word may have no common convention and may thus be meaningless.

Further confusion arises in the opposing and wildly varied connotations suggested by property. It connotes theft, [FN3] murder, [FN4] and slavery [FN5] to ***460** some but security and liberty to others. [FN6] Anthropologists have identified property with social relationships of power, [FN7] but philosophers have called it ***461** a "myth." [FN8] It either exploits the poor, [FN9] or protects them most of all. [FN10] Some view property as a matter of natural right [FN11] while others see it as an artificial creation of the state. [FN12] Its institution may lead to environmental ***462** degradation [FN13] or be the principal hope for preventing ecological disaster in the world's rainforests. [FN14] Legal scholars assert that property is in rem as opposed to in personam, [FN15] but to many of them the characteristics that define property are still as ambiguous as a Rorschach inkblot.

In both the theoretical and practical sense, however, "property" is an enormously significant word. The American Revolution was fought over the continuing British abridgement of colonial property, [FN16] and the ***463** communist upheavals of the twentieth century took the property right as a primary target. [FN17] There is increasing conviction that the material rise of the West during the last 300 years has been directly attributable to property's legal institution, [FN18] an institution that also establishes, not coincidentally, the foundation for modern business activity. [FN19] Property, and not capitalism, economic freedom, the private market, or big business, most ***464** clearly focuses the issues surrounding topics as varied as how to bring wealth to emerging economies, whether governments should engage in social welfare redistributions, and whether music trading over the Internet can be considered anything more than theft. Property and liberty are intertwined in theory and history, and most of the subjects of law--contract, tort, criminal prohibition, regulation, and even much constitutional interpretation--fan out like spokes from the conceptual hub of property. [FN20] The implications of these sweeping assertions both for the private market and those who study it, combined with the divergent views of property, suggest why the meaning of property requires a commonly grasped definition along with its appropri-

ate development.

This article offers such a definition and the basic contours of its development. In some respects, the definition will appear old and familiar, especially in its emphasis that property establishes private exclusivity in ***465** resources, but in other respects, principally that what property connotes is a negative, constitutional, blanket right and not a positive bundle of rights, the definition argues for a relatively unfamiliar view of property. The article then develops and defends the definition in a way that contains the invariant conceptual core, or essential convention, of the word but also admittedly expresses elements of a normative meaning for property in light of its role in history and the private market. Note that what follows is not a full legal or political investigation of, nor moral justification for, specific rules applying property to different limited resources, but a meaning for the term "property" that clarifies a continuing dialectic concerning a most misunderstood institution.

II. A DEFINITION OF PROPERTY

One of the stark facts of human life is that there are limited resources at any specific moment to secure both human survival and the perpetuation of the species through reproduction, a fact that leaves few people worldwide able to say that they have enough of what they need or want. Coupled with the reality that humans are both immensely social beings and individuals with autonomous interests and goals, the spectre of limited resources causes compelling frictions over who gets what in society. [FN21] In Western political theory, the state comes into existence in response to how individuals in society have access to limited resources. [FN22]

***466** Confronting the inevitability of limited resources--defined as whatever, limited in quantity, that humans might need or want [FN23]--the state responds with a system, or set of institutions. [FN24] These institutions may be ***467** contrived deliberately by the state, or they may grow organically out of the values, customs, and practices of the people, [FN25] but they are distinguished along a spectrum that involves the state itself to a greater or lesser degree in the actual generation of and distribution of resources, that is, the state either plans for the production and distribution of what individuals need and want or at a minimum establishes a state-supported framework within which private individuals themselves generate and distribute resources according to their plans. In fact, the state can combine its own planning with the planning of private individuals, establishing a mix of infinite variation, and the record reveals that even the most centralized state planning also enforces some private possession and use of resources. [FN26] Conversely, even societies that allow production of the most comprehensive private resources require significant state involvement in specifying which ***468** resources are (or are not) protected and in maintaining the institutions that protect these resources. [FN27]

From Roman times, the most significant word used in political and legal theory to denote the distribution of limited resources in society has been "property." The English word derives from the Latin *proprietas*, or "ownership," in turn from *proprius*, which means "own" or "proper." [FN28] Appreciating its etymology, however, does not provide an adequate definition for "property" as it is applied to limited resources, and the lack of definition results in considerable confusion in connection with important discussions involving this pervasive yet slippery word. Although "property" has a variety of connotations, [FN29] two basic meanings predominate, and they fairly reflect the confusion that the word engenders. First, property is "that which is owned," a meaning that appears in both political theory and popular usage [FN30] and which the Supreme Court has referred to as property "in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." [FN31] This usage focuses ***469** on property as "thingness," that is, as physical resources themselves, a focus that leads to philosophical discussions about how to distribute--or redistribute-

-“property” in society by taking it from the rich and greedy and giving it to the poor and needy, and Bill Gates is thought of as having accumulated more “property” than anyone else.

This first meaning has major conceptual deficiencies. [FN32] Although a moment's reflection convinces that no political or legal discussion of the right to limited resources can be advanced when property is considered not a right but the resources themselves, even lawyers and judges often use the word to refer to resources, especially land, which produces curious redundancies in case opinions such as “property owner.” [FN33] In an essential way, and not just a more technical and legal sense, property means something quite different from the resources to which it applies. It refers to the right of “ownership,” [FN34] which is the second common meaning of the word, but because property and ownership are legal equivalents, both basic meanings of property collapse in unilluminating semantic circularity: “property is that which is owned” becomes “property is property,” and ***470** “property is the right of ownership” becomes “property is the right of property.” Theorists from Cicero, St. Augustine, and St. Thomas Acquinas to John Locke, Jeremy Bentham, and Karl Marx, have used the term without adequate definition, and to some scholars it is merely considered “a contested concept and one that evolves historically.” [FN35]

Referring to property as ownership--the second meaning--does suggest that property is not an object, thing, nor resource but a right that relates people to each other in regard to limited resources. This insight is promising for if the right can be defined, the query about property's meaning will have been answered. Unfortunately, most current legal scholarship of property does not make it easy to specify this right. Indeed, the right is usually referred to not in the singular at all but “in terms of bundles of rights, obligations and interpersonal relationships” [FN36] that “have nothing in common except they are exercised by persons and enforced by the State” [FN37] and may be conditional or absolute, terminable or permanent, ***471** comprehensive or restricted, and personal or impersonal. [FN38] Property as a “bundle of stick-like rights” represents the prevailing view, which was advanced by the legal realists in the early twentieth century and embraced today by most scholars and by the Court. [FN39] The positive rights comprising ***472** this bundle include the rights to possess, to use, to manage, to generate income, to consume or destroy, to alienate, and to transmit through devise and bequeath. [FN40]

Promptly confounding this view is the rather curious fact that “property” remains even after one of the rights is removed from the bundle. When A leases possession of Blackacre to B, A continues to have property in Blackacre, [FN41] and in a very real sense, B now also has property in Blackacre-- leasehold property. The bundle of rights can be unbundled until no particular bundle or subbundle of rights adequately establishes ownership, and “property” is left even after the variously asserted positive rights of property are gone. [FN42] However, if property exists after its positive rights are ***473** gone, perhaps it is the thing--the land or car suggested by the first definition--or because the first definition has been shown to have semantic shortcomings, perhaps “property” lacks adequate enough meaning to warrant any usage.

Actually, property is neither myth nor chimera and once circularity and “thingness” have been extracted from its usage, a meaningful essence remains that reflects a conventional and functional appreciation of the word over time. From this essence, it is possible to define property as a single negative right, the right of exclusion as applied to limited resources. Property is the constitutional and legal right to exclude others--including the state--from specifiable limited resources originally possessed or acquired without coercion, deception, or theft. According to this definition, property has several characteristics. It is: (1) a constitutional right; (2) recognized and enforced by the laws of the state; (3) that excludes others from specifiable limited resources; and (4) which are originally possessed or have been acquired without coercion, theft, or deception. As the following sections

develop, these characteristics comprehend the essential meaning of property.

III. PROPERTY AS A CONSTITUTIONAL RIGHT

The significance of property goes far beyond the body of rules that flesh out the way one can lay claim to Blackacre or widgets. It is the hub of the entire legal system, and its basic aspect is constitutional. "Constitutional" refers to property's role as a very primary institution in formulating society, in explaining why we come together as a people and a nation. [FN43] The ***474** Federalist Papers maintain that "the protection of different and unequal faculties of acquiring property" is "the first object of government." [FN44] The United States Constitution in the Bill of Rights recognizes property's constitutional nature, [FN45] as do the constitutions of several other ***475** nations. [FN46] Under the takings clause of the Fifth Amendment, [FN47] the state cannot take property except for a public purpose and only upon the payment of just compensation, which is a type of forced but fair exchange: one resource for its equivalent. [FN48] Further, the right of property cannot be taken at all according to the Fifth Amendment except by "due process of law." [FN49] Both of these references to property are notable because they assume the state's response to the problem of limited resources is the institution of property; they assume the constitutional nature of property. The Fifth Amendment assumes the right of property in very much the same way that the First Amendment assumes the right of speech--by prohibiting its abridgment, and except for stylistic reasons, the takings clause might read: "Congress shall make no law abridging the freedom of property without a public purpose and just compensation."

In a day when ignorance about the significance of property as a constitutional institution is widespread, [FN50] the antidote to ignorance in the ***476** United States requires only examination of the historical facts. The Revolutionary War was fought because Great Britain insisted upon taxing resources and otherwise abridging the British colonists' right of property without due process of law, [FN51] specifically without the consent derived through parliamentary representation. [FN52] That the no-taxation-without-representation argument was familiar to the British and had been asserted against their kings prior to the American Revolution made the British colonists feel that even the minor taxes levied against their resources without their representation in Parliament threatened the constitutional right of property as inherited by all British subjects. [FN53] In the "Massachusetts Circular Letter," Samuel Adams wrote of an "essential, unalterable right in nature, engrafted into the British constitution as a fundamental law, and ever held sacred and irrevocable by the subjects within the realm, that what a man has honestly acquired is absolutely his own, which he may freely give, but cannot be taken from him without his consent." [FN54] In 1647, the ***477** British parliamentary army spokesman Henry Ireton had expressed simply, "Constitution founds property." [FN55]

The Framers of the United States Constitution, with James Madison at the helm, [FN56] assumed the existence of property as a constitutional institution and, further, had a very broad view of the resources that the term "property" protected. It certainly protected those resources such as land and goods that traded in the marketplace, but it also protected facultative resources, that is, the personal resources comprising one's talents, efforts, expressions, and practices. Madison's view is instructive:

> Property ... in its particular application means that "dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and *which leaves to everyone else a like advantage*. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has property in his opinions and the free communication of them. He

> has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. [FN57]

Importantly, neither Madison nor many other American colonists considered the "larger and juster meaning" of property to be merely a rhetorical device. [FN58] Today, it is fashionable to separate the facultative resources of the person from the nonfacultative resources externalized ***478** and traded in the marketplace and to think of the right to the former as liberty and as somehow different from, separate from, and superior to the right to the latter, which is property, but it was not so to the Constitutional Framers who appreciated property as an institution that legally specified their desired relationship to the state with regard to all kinds of limited resources, including those of the person. [FN59] Madison said that one has "a property very dear to him in the liberty of his person" and "an equal property in the free use of his faculties and free choice of the objects on which to employ them." [FN60]

***479** The Bill of Rights could have protected both facultative and nonfacultative resources with more economy of language by just asserting that Congress make "no law abridging the freedom of property" but it did not do so for several possible reasons. First, before and during the Revolutionary era, the property in nonfacultative resources was considerably more secure than that in certain facultative resources of the person. [FN61] Throughout history not all resources have been protected by property. [FN62] Citizens could own land and trade goods with greater freedom under the common law than they exercised when speaking out against established public authority or conducting preferred religious services. [FN63] Perhaps, then, the Framers of the Bill of Rights identified for protection the exclusionary right to specific facultative resources like speech not because they ***480** were considered of a more significant order of importance to the citizenry but because British law recognized their protection less. Madison may have advocated the "larger and juster" sense of property and applied it to the "free communication" of opinions, religious or otherwise, due to the constitutional significance that his fellow citizens accorded to property in non-facultative resources, a significance which he wished to remind them was also associated with the facultative resources of the person. [FN64]

A second reason that the Framers may have distinguished property in facultative resources from property in its "particular application" concerns governmental taxation and taking. A recognized concomitant of the constitutional property right is the necessity for taxation of private resources. [FN65] Recall that the Revolutionary War was fought not because the British taxed colonial resources but because they taxed these resources in a way that ***481** deprived the colonists of property (the right to exclude) without consent and representation. [FN66] To protect both facultative and nonfacultative resources with police, courts, and military from theft, coercion, deception, or foreign misappropriation and to establish public infrastructure like roads, bridges, and a post office that supports these resources is expensive and requires the public taxation of private resources that property protects. Because it is considerably more feasible to tax nonfacultative resources that have market value than it is to tax the facultative resources of the person, [FN67] it is appropriate that the Framers differentiated the broad and narrow senses of property for tax purposes. This should not be taken to mean, however, that speech freedom is more constitutionally important to the citizenry than the freedom to own land, trade widgets, or earn income. [FN68]

***482** Likewise, the takings clause of the Bill of Rights applies only to non-facultative resources like land rather than to the facultative ones like speech because there is no public purpose like road building associated with "taking" facultative resources and therefore no basis for state takings of speech and religion. [FN69] Compensation for governmental takings implies a nonfacultative resource and a market by which that taken may be

valued; the Fifth Amendment requires not "compensation" but "just compensation" for a taking, and arguably the latter applies only when a recognizable deprivation of market-based financial value has occurred. [FN70] Even as real and personal property in resources can differ in the various rules that apply it, so also nonfacultative property in land or widgets and property in "opinions and the free communication of them" [FN71] can differ in specific constitutional applications while at the same time maintaining constitutional similarity in the private exclusive nature and importance of property in both types of limited resources. Both types of resources reside within the ***483** conceptual constitutional ambit of property and both are protected by its broad exclusionary principle. At the very most, one can say that the Constitution allows a difference of treatment of the facultative and nonfacultative resources but excludes the state from expropriating either type of resource except to foster certain public purposes or to protect the resources of others from harm.

A third reason the Bill of Rights distinguishes among the several rights is that they all enjoy distinct histories and have had distinct names attached to them. The rights of property, speech, religion, assembly, bearing arms, privacy from unreasonable searches, representation by counsel, habeas corpus, trial by jury, and so forth have become significant at various times in history, and the rules of their interpretation and application reveal differing developmental emphases. However, chronological and situational differences of use should not impose blinders that prevent the perception of unity in these terms. As Madison suggests, these terms can be reduced to the "larger and juster sense" of property, and for scholars, the business community, and nation builders who seek to appreciate the unity in the constitutional origins of the U.S. legal system, a certain reductionism communicates clearly. The guarantees of the Bill of Rights all comport exclusion of the state from interfering with the broadly defined facultative and nonfacultative resources of the private person. Also, as the next section maintains, the centrality of laws implemented by the state protect the right to exclude others from an owner's resources, that is, they enforce the right of property against the general community.

IV. PROPERTY AS A RELATIONSHIP BETWEEN THE INDIVIDUAL AND THE STATE

Some commentators have described property as a relationship between an individual and an object. [FN72] Observing that a human can only have legal ***484** relationship to another human, others have asserted that property is a relationship between individuals, [FN73] which seems accurate but is incomplete because property should also be grasped basically as a legal relationship establishing a boundary between an individual and the state, [FN74] a position already suggested by the constitutional limitation against the state's taking of private resources. The emphasis in this section shifts from property's role as a basic institution of Western society in general and the United States in particular to property's formal creation and implementation under the rule of law as enforced by the state.

Property is both created and applied through law, which is the formal ordering force of the state, and as Thomas M. Cooley, one of the most influential American constitutional treatise writers of the nineteenth century, asserted "[t]hat is property which is recognized as such by law, and nothing else is or can be." [FN75] If law does not exist apart from the state, then neither does property, and if property protects the resources that are "appropriately" exclusive to an individual--that is, those that are originally possessed or acquired without coercing, stealing from, or deceiving others-- then the relationship indicated by property is one not only between individuals but also between the individual and the state. This approach to property is both definitional and historical. It partakes of the fiat of definition, but at the same time it reflects the history of property as a legal concept. [FN76] Although property in particular resources depends upon values prior to law and arises out of informal ways of ordering, there would be no need for the state to enforce property if respecting the resources held by

***485** others were entirely natural among persons. [FN77] Property establishes and preserves social order and encourages resource development by protecting private resources acquired without coercion, theft, or deception from the predations of others in the general community. Little evidence points to a specific human inclination to respect the resources of strangers absent a history of law to reinforce what is natural: a fear of how others will respond if we take the limited resources they have acquired and do not choose voluntarily to share. [FN78]

Further, formal property arises in a society that likely does not enjoy the common values and customs regarding the distribution of limited resources that are found within small bands of often-related individuals, which was the condition of the hunter-gatherers who prevailed during much of human existence. [FN79] It arises as the state's response to the problem of dealing with limited resources in a heterogeneous society of strangers, which is the condition of modern nations. [FN80] "Property" is a thoroughly artificial concept, a legal concept between individual and the state that addresses the problem of limited resources in societies where the appropriation of one's resources by those not family or in other close affinity is apt: (1) to produce conflict; (2) to focus one's efforts on protecting one's current resources and diminish the time spent on developing new resources; or (3) to reduce incentive to create, acquire, or develop new resources at all due to the inability to protect them from others or to the exorbitant costs of doing so. In short, property is meaningfully grasped not only as a ***486** constitutional principle prohibiting the state from arbitrary confiscation of private resources but also as the state's protection of individual private resources from the predations of the general community through legal recognition of exclusion. [FN81]

The state's role in the meaning of property is importantly revealed in its maintenance of a property enforcement process--primarily the police, courts, and various laws--that protects owners from the misappropriation of their resources by others and ensures confidence in the identification, acquisition, possession, and exchange of resources by private persons, enabling them when necessary to resolve disputes through a consistent, transparent forum. [FN82] During the last decade, Russia's lack of a functioning property enforcement process accounts in major part for its failure to achieve stable private markets, [FN83] and this failure underscores the assertion that the foundation of a successful private market in the modern nation is the law of property adequately enforced by the state. Without the state's rapid, certain, and equal enforcement of property law, the modern market framework for handling limited resources cannot reach its potential to generate prosperity, and as the state places legal stumbling blocks to the nonharmful uses of resources, property systems weaken.

***487** V. PROPERTY AS ENFORCING THE PRIVATE RIGHT TO EXCLUDE OTHERS

Because the reality of limited resources has sometimes led in Western history to legal relations that impose various duties and obligations against the ownership of resources to provide military or other service, to share resources with others, to allow others to use resources, and to pay taxes, it is important to appreciate that "property" is not just any set of such legal relations. At the very heart of property lies its singular conceptual core, which is the private right of exclusion. [FN84] If having "property" means ***488** anything, historically and legally, it is that the owner can exclude others from the resource owned and that others have a duty not to infringe this right. Even when "property" is used to mean the resource itself--for example, land--it is not understood to refer to any piece of land but to one from which an owner can exclude others. [FN85] As the Supreme Court has recognized, the right of exclusion represents the sine qua non of property: "The hallmark of a protected property interest is the right to exclude others." [FN86] Further, the positive "bundle" of rights like possession, use, and alienation can all be derived from the negative exclusionary right. [FN87] For ***489** example, if an owner can legally exclude others from interfering with the resources of her land, she can possess the land, use it

in a myriad of ways that leave an equal right in others to use their resources, or transfer it through sale, lease, or gift to others.

Private exclusivity of resources captures the essence of what is most controversial about property. To understand why some consider property to be “theft,” “murder,” and “exploitation,” one has only to appreciate that “property” means some in society can legally hold more resources than others have and that the state generally places a duty on the members of community to keep away from these resources no matter how sorely they may desire or need them. This private exclusivity of resources generates in some observers the images of greedy capitalist plutocrats skimming the surplus value of bent laborers, [FN88] of goutish nobles with trap guns blowing the legs off hungry villagers for poaching rabbits, [FN89] and of absentee landlords starving the families of tenant farmers to exact the last ha'penny of rent from their lands. [FN90]

The contrary and equally controversial view of property also emerges from “exclusivity” as the conceptual core of the property definition. From this view, it is precisely private exclusivity that gives greatest incentive to the acts that maximize the development of existing resources and ***490** motivates the creation of new resources like innovative technologies, more powerful medicines, better ways of growing food, and easier methods of communication, computation, and information manipulation that redound to the general welfare. [FN91] According to an increasing chorus of scholars, the dominant material rise of Western civilization during the last 300 years is attributable to the adequate institution of exclusive private resources that the state legalizes and enforces. [FN92] Further, in the Madisonian sense, the strong symbiosis between liberty and property arises because an individual enjoys private exclusivity in her speech, religious practice, and faculties even as she has private exclusivity in her nonfacultative resources of land, goods, and intangibles. Semantically, one may assert as easily a “property” of one's faculties as a “liberty” of them or a “liberty” of nonfacultative resources instead of a “property” of them, making the two exclusionary terms virtual equivalents. [FN93]

That exclusion primarily defines the property right also suggests that property is most appropriately grasped as a negative blanket right, [FN94] a ***491** conclusion with an implication that may surprise those whose familiarity with property concerns primarily the positive legal rules concerning real estate registration, warranty and quitclaim deeds, mortgages, secured transactions, bailments, fixtures, negotiable instruments, securities, and the sale of goods. [FN95] Because property is a negative right, the state in instituting property is not positively granting particular resources to anyone, [FN96] and therefore Bill Gates and Billie Worker have exactly equal “property” although the former owns a hundred-thousand times more resources than the latter. It is the failure to appreciate the negative blanket-nature of property that allows people, even legal scholars, to believe that any rich person has more property than they do. [FN97] The exclusionary right that is property permits the unequal accumulation of resources, but because it is a negative right, it leaves both generation and distribution of resources to the acquisitive talents and propensities of the private person.

Although property is an exclusionary right, it is not an absolute one. [FN98] Exclusivity does not mean, for example, that no limits can exist on ***492** the manner in which an owner may use resources, including the resources in herself, and thus even under a strong property regime that permits owners to exclude the state and others adequately from a very wide set of resources, tort and criminal laws arise that sufficiently limit an owner's exclusionary right over resource use to ensure that she does not injure the resources of other owners, [FN99] to secure public resources controlled by the state, and to protect common environmental resources like air and water. Likewise, through taxation, the state limits the exclusionary property right even under the strong regime but only to pay for protecting the resources ***493** secured for private persons through the military, law enforcement, and the courts and for investment in public infrastructure resources like roads, bridges, and dams that the

state can furnish more cheaply than private persons. [FN100] Under a weaker property regime, which is characterized by inadequate enforcement or by various restrictions and limitations applying to resource ownership that impair productive uses of resources without protecting an equal right in others, the state may tax not just to protect private resources, or for public investment purposes, but to redistribute resources. Although redistribution moves society away from individual ownership and diminishes incentive, it does not change the definition of property, which has exclusivity at its conceptual core. [FN101] Analogously, for the state to weaken property in certain resources, for example, by prohibiting sale of body organs or sexual favors, does not alter the meaning of the term, only its application. [FN102]

***494** Importantly, the holding of resources through tenancies in common or corporations also does not contradict the private exclusivity established by property. The general political distinction recognized by property is between private versus state production and distribution of limited resources not in whether individuals alone own resources instead of owning them jointly or having agents manage individual interests in them. “Property” refers etymologically to the ownership that is “appropriate” or “proper” to a person, but as long as the collectivity of the state does not require common or public resource holding or prohibit the private use and transfer of resources, whatever joint arrangements persons privately and voluntarily arrive at for holding resources warrant the definition of “property” as long as the holdings are exclusive against the state and the rest of society.

Some authorities argue that the corporate holding of resources should not be considered the subject of traditional property because an individual owner is not personally managing the resources; instead, there exists a new form of “collective” ownership of private resources that is exercised by corporate top management. [FN103] Concerns of these authorities ***495** reflect the views that oppose property in the factors of production and express conviction that workers do not obtain the full measure of their just dessert from labor because of the power business owners and managers wield over them. [FN104] These concerns, however, have little to do with an adequate definition of “property,” which includes both solitary ownership and the ownership of undivided interests in corporations that are managed by agents. The solitary management of resources is merely one of the things an owner can do with them; private exclusivity--not individual management--is the conceptual core of property, and in any event an owner can certainly exclude others from her stock in a corporation. [FN105] The real concerns of many authorities are not with the definition of property as an exclusionary right but with whether property should apply to productive resources and their organized development.

A necessary aspect of exclusivity is that resources have specifiable boundaries, boundaries that are capable of being identified, enforced, and ***496** protected. Without a boundary, a resource cannot be subject to property because there is nothing objective from which others can be excluded. With tangible resources like automobiles, boundary problems are not likely to arise because easily recognizable physical contours establish boundaries, [FN106] but intangible resources more often present difficulties of boundary specification. For example, a business owner can have a property in certain forms of information only as long as she takes reasonable steps to keep them secret. [FN107] The boundary lies in the efforts the owner makes in excluding others from knowledge of customer lists, research and marketing plans, formulas, procedures, and so forth. Similarly, an owner can maintain a property in a trademark only by keeping a recognition boundary established in the minds of the public so that the mark indicates a certain producer and does not become a generic term of reference. [FN108] The necessity for asserting recognizable and observable boundaries also explains why the law does not prohibit nonowners from the view of an owner's land or the melodious sound of an owner's original music that is heard in the street. Violation of the exclusionary right of others in such cases would be completely involuntary and unavoidable if sights and sounds themselves were considered protected by property. The only way to establish control over sights and sounds is for an owner to assert the recognizable boundaries in something--such as land or a

copyright--as a basis for excluding others. Nonowners trespass when they enter the boundaries of an owner's land to see a view, and they infringe when they violate the boundaries of an owner's copyright in order to hear music, that is, they abridge the exclusive right of property.

Finally, the exclusivity of property implies its application only to limited resources, that is, those that are exhaustible. No reason exists in civil ***497** society to apply the property right to inexhaustible resources [FN109] nor is there substantial evidence that it ever has been. Although this essay does not attempt to justify the application of property to any given resources, the very purpose for a distinction between publicly common resources and privately exclusive resources lies in the fact that the latter exist only because their availability is limited. For instance, debate currently rages over whether property should be recognized in the use of the "spectrum" resource of the Internet's architecture, and a focal point concerns whether or not this particular resource is inexhaustible, the argument being that it does not necessitate the protection of property unless spectrum use is "rivalrous" because its availability is limited. [FN110] In general the resources created by applied creative effort and intellectual endeavor, such as those that patent and copyright law protect, are exhausted only in the context of their limited market value. The "fair use" doctrine, which does not extend the exclusionary right to certain uses of another's copyrighted creation, implies that these uses do not significantly affect the creation's limited resource potential.

VI. PROPERTY AS APPLIED ONLY TO RESOURCES ACQUIRED IN CERTAIN WAYS

Under the rule of law, property addresses the reality of limited resources in society through careful attention to the equal exclusionary right of others. [FN111] Even as the concept of property does not allow a person absolute freedom to use resources without restriction, so also it places limits on how one is permitted to acquire resources. Basically, this means that property does not protect resources acquired by coercion, theft, or ***498** deception, [FN112] allowing victims of such acquisition to pursue the acquirer with civil remedies while the state exercises criminal enforcement sanctions. As an institution, property has no role outside of social structure, and in a democratic community based on equality of rights and the rule of law the logic of property in dealing with limited resources in society requires that persons not acquire resource ownership through abridging the equal right of others to their resources.

Stated positively, the common ways accepted for acquiring ownership in a property system include gift, exchange (or contract), accession, confusion, and first possession. [FN113] The delivery of resources that identifies a gift, the principles of contract that set the framework for voluntary exchange of resources, and the instantiation of property over previously unowned or abandoned resources through accession, confusion, and first possession are relatively well-understood by legal scholars and lawyers. Although these rules for legally acquiring resources in a property system may show cultural variation, what is important is that the rules not be confused with the concept of property itself, which is the right to exclude others from the resources acquired. [FN114] Both facultative and nonfacultative resources can be acquired under these rules. X can gift her facultative efforts to Y in the construction of the latter's house, with Y coming to own the results of the efforts so acquired. Likewise, in house construction or any other area of the private market, X and Y may exchange facultative efforts for nonfacultative compensation (employment) with each coming to own the resources acquired from the other. Importantly, when property is ***499** understood not as "resources" but as the legal right to exclude others from resources, it becomes clear that not only acquisitions of nonfacultative resources through sales of goods but also acquisitions of human facultative resources through service and employment contracts are property transactions enabling the very existence of sophisticated private markets.

Finally, in a way familiar to the era of the American colonists and still argued by contemporary theorists, individuals own themselves, [FN115] such self ownership being acquired through original possession and constituting the central organizing principle behind most of what are traditionally considered "human rights." From the beginning, individuals own their faculties and the expressions of these resources in all activities of life that do not harm others. Ownership of originally possessed resources is closely analogous to Madison's property in rights, which meshes almost seamlessly with the historical meaning of liberty. Nor is it strongly tenable that free expression of one's originally possessed resources through speech or worship is somehow more sustaining to society than their free expression through activity in the private market where the resources necessary to life itself are generated. An institution that balances resource acquisition with the equal right of others-- that in Madison's words leaves "*to everyone else a like advantage*," [FN116] property connotes both liberty and the basis for acquiring a prosperous human society.

VII. CONCLUSION

Lawyers and philosophers alike are apt to continue shouting at trespassers "Get off my property!" when they mean "Get off my land!," and even the ***500** Constitution refers to the taking of "private property" when more meaningfully it should say "private resources subject to property." The importance to people of the limited resources they need or want when combined with centuries of ambiguous equivalence between "resources" and "property," and added to the effects of the sometimes inadequate or corrupt implementation and enforcement of the right of property have significantly affected the popular, philosophical, and legal views of this foundational institution of Western legal systems. Many legal scholars will likely continue to criticize "property" without adequately defining the term, perhaps because they believe that property is a mere bundle of whatever the powerful define as "rights" in order to deprive the poor of their needed resources, yet even from the confusion surrounding property may be distilled the essential understanding that property is really neither the resources it protects nor a bundle of uses of a thing disguised as various "rights." Property is the single legal right to tell others--even the state--to get off, to stay away, to leave alone, not to interfere, that is, it is the right to exclude.

At the conceptual core of property lies what Blackstone termed in exaggeration the "total exclusion of the right of any other person in the universe." [FN117] Once a society understands what property is, it may wish to tax the resources property protects, or deny it altogether as applying to certain facultative or nonfacultative resources. The society may hold more to Marx than to Madison in the values that justify property in various resources, but for the sake of clarity in thought, the definition of property should convey a single convention of meaning. Property is an exclusionary blanket right that at a reductionary level in most Western nations is constitutive of the institutional relationship between "We the People" and the state. Some of these nations have comparatively strong property systems that allow owners effectively to exclude their neighbors and the state from an almost infinite set of private resources. Other nations weaken the property right through corrupt or negligible enforcement, heavy redistributive taxations, and inhibiting restrictions on resource use and development. Even within specific property systems, complicated rules of real estate, mortgage, bailment, secured transactions, negotiable instruments, and contract apply the property right with varying degrees of exclusion to different resources. But whether a property system is stronger or weaker and ***501** without regard to the multitude of rules that facilitate or inhibit its application and enforcement, the definitional essence of the term "property" as the right to exclude remains--or should remain--semantically invariant.

Clarifying the definition of property provides several advantages. First, it brings coherence to the understanding of the entire legal system, which is now seen as a wheel with property at its center and the spokes of

the property system--including contract, tort, criminal law, regulation, and constitutional interpretation--radiating from the hub. Second, although the definition of property itself justifies no particular resource distribution, it illuminates a most important term for the continuing debates over who gets what limited resources in society. Third, it solidifies the U.S. Supreme Court's apprehension that the state's interference with the constitutional right to exclude is analytically basic in applying the takings clause. Finally, although understanding the definition of property advanced may be unnecessary to the routine legal selling and buying of Blackacre, widgets, or computer programs-- the specific rules of land registration, sales law, and patent/copyright sufficing--such understanding is absolutely necessary for the business community, nation builders, and others to grasp how the legal institution of property provides the necessary framework for the private market and underscores the primacy of law in supporting modern business practice. It places law alongside economics as foundational for studying the wealth of nations.

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[FN1]. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1818 (Philip Babcock Gove ed. 1986) (defining property pertinently as “something that is or may be owned or possessed: WEALTH, GOODS; *specif*: a piece of real estate”); s*ee also infra* notes 30-33 and accompanying text.

[FN2]. *See infra* notes 36-42 and accompanying text.

[FN3]. Most associate the accusation that property is “ theft” with Proudhon. *See* PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 14 (Donald R. Kelley & Bonnie G. Smith trans., 1993) (1840). Those holding Proudhon's view may have believed that there was a time in nature when everyone had a common use of all physical resources, and when the state privatized resources for an individual through property--thus depriving everyone else of the common use of resources--a type of theft resulted.

[FN4]. *See* KENNETH PATCHEN, THE JOURNAL OF ALBION MOONLIGHT 25 (1941) (“It has been said that property is theft: I say that property is murder.”).

[FN5]. One of the more unfortunate associations of the word “property” is with slavery, as though the legal concept of property somehow facilitates or promotes human slavery. Although people owned slaves, slavery is actually antithetical to the ownership of one's rights and faculties--essentially ownership of one's self--that James Madison termed the “larger and juster meaning” of property. *See infra* note 57 and accompanying text. Slavery usually constitutes a type of robbery because it deprives individuals by force of the facultative resources they have in themselves and abolishes the legal right they have to exclude others from involuntarily employing these resources. Going back to the Greeks, various discussions of political society have recognized and accepted the existence of slavery, but they have done so only by the assumption that slaves are materially different from citizens--often that they are less than human--and do not enjoy the right to exclude others from themselves. RICHARD SCHLATTER, PRIVATE PROPERTY, THE HISTORY OF AN IDEA 19 (1951) (“[T]hey [Plato and Aristotle] went on to say that some men were natural slaves--beings in human form but without reason, more like animals than men-- who could with justice be used as the instruments of another's good. The proper economic function of the rulers is to consume property and that of the slave to produce it.”). In short, because slaves lack property in themselves, they can be objects of property to others. In U.S. history, abolitionists as well as supporters of slavery argued their points of view from a property perspective. *Id*. at 203 (quoting the Anti-Slavery Convention of 1883 that “every man has a right to his own body” and “to the products of his own la-

bour"). *But see id*. (maintaining that "[t]he most effective Southern argument was that interference with slavery was interference with property").

[FN6]. *See* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 31-32 (1986) ("The seventeenth-century English constitutional maxim making liberty depend on security in private rights to property may be the most familiar legal doctrine identified by historians of that period."); *id*. at 33 ("There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property."). Briefly, in the classical republican justification of property, the ownership of resources, specifically land, freed one (gave one liberty) from dependency on the state and secured one against state power. In still another view, reflected in the analysis of this essay and suggested by Madison, the security of property and liberty are operationally synonymous, both referencing a constitutional and legal right to exclude others, including the state, from important resources such as one's land, widgets, or faculties, practices, expressions, and privacy. *See infra* note 57 and accompanying text.

[FN7]. *See* C. M. Hann, *Introduction: The Embeddedness of Property*, *in* PROPERTY RELATIONS, RENEWING THE ANTHROPOLOGICAL TRADITION 3 (C. M. Hann ed., 1998) (asserting that property relations comprehend "issues of political power and control over the distribution of 'things' in society"). Others, including legal scholars, also assert the property-as-power view:

> If ... somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.

Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927); s*ee also* Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, *in* NOMOS XXII: PROPERTY 3, 5 (J. Roland Pennock & John W. Chapman eds., 1980) ("The ownership of Wildfell Hall [Blackacre], it often seems, is a form of power that allows us to exploit other people. ..."); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 697 (1938) (distinguishing between "property for use" such as "personal consumption" and "property for power" that "involves control over the means of production"); *cf*. NEDELSKY, *infra* note 8. The view of property as social relations of power is decidedly Marxian.

[FN8]. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 260 (1990) ("[T]he myth of property is pernicious because it hides a structure of power and insulates it from democratic debate."); Hann, *supra* note 7, at 2 ("To a large extent, it ['the liberal paradigm of property'] is a myth."); s*ee generally* JOHN CHRISTMAN, THE MYTH OF PROPERTY, TOWARD AN EGALITARIAN THEORY OF OWNERSHIP (1994). To treat property as a "myth," however, depends upon the view disputed in this article that property is a finite system of known objects which persons own. The demythologizers then point out that the objects which are property in fact have changed some in the last several hundred years; thus, property is not a system of known objects but is a myth of power relations. This article argues that instead of being a number of finite objects, property is essentially a legal right to exclude others from a relatively stable but slowly evolving system of both facultative and nonfacultative objects. A stable right to exclude, not the objects of exclusion, is the hallmark of property.

[FN9]. *See* PROUDHON, *supra* note 3, at 197 ("Property is the exploitation of the weak by the strong.").

[FN10]. *See* TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 202 (1998) ("[I]f property laws are applied equally, they will work above all to the advantage of the poor."). The gist of this assertion is that the wealthy in society can often protect their resources, through force if

necessary, whereas the poor need state assistance through well-enforced property law to enable them to exclude others. *Cf.* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 131 (1999) ("[Property] is a system for ordering economic relations that greatly benefits all members of society."); CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 210 (1997) ("[P]roperty rights help create wealth, and greater wealth will often benefit the most vulnerable as well. Time and again it has been shown that economic growth can often do more than welfare and employment programs to benefit the disadvantaged.").

[FN11]. Natural law views property as a right arising out of the logic of nature. It precedes civil society and is independent of it, an inviolable first principle that the state cannot legitimately alienate. *See generally* DAVID HUME, A TREATISE OF HUMAN NATURE (L. A. Selby-Bigge & P. H. Nidditch eds., 1978) (1740); s*ee* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 18-30 (C. B. Macpherson ed., 1980) (1690). The civil law tradition also emphasized property as a natural right. *See, e.g.*, SCHLATTER, *supra* note 5, at 233 (quoting Portalis, one of the most significant architects of the Code of Napoleon, that "the principle of the [property] right is in us; it is not the result of a human convention or a positive law; it is in the very constitution of our being").

[FN12]. That the state, not nature, creates and institutes the right of property derives from utilitarianism, which regards Locke's view otherwise as "nonsense upon stilts." *See* Jeremy Bentham, *Anarchical Fallacies*, *in* NONSENSE UPON STILTS 46, 53 (Jeremy Waldron ed., 1987) (1791). Blackstone wrote of property variously as both a natural right and a conventional civil right, and "[h]e stands convicted of contradicting himself and confusing his readers." SCHLATTER, *supra* note 5, at 167.

[FN13]. If the institution of property creates a prosperity based in part on pollution of the environment, it is certainly fair to conclude that the right of property may induce environmental degradation. *Compare* AL GORE, EARTH IN THE BALANCE 287 (1992) (stating that large Brazilian landowners pursue "short-term profits" at the expense of "long-term ecological tragedy"), *with* Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927, 931 (2000) (discussing "the pervasive and pathological effects of property norms on land and water use, natural resource allocation, and ecosystem management").

[FN14]. *See, e.g.*, FRANCES CAIRNCROSS, COSTING THE EARTH 142 (1992) (asserting that the primary factor in environmental abuse in the tropical climates is that "rain forests have no clear owners"); *cf.* Lee Hoskins & Ana I. Eiras, *Property Rights; the Key to Economic Growth*, *in* 2002 INDEX TO ECONOMIC FREEDOM 37, 45 (Gerald P. O'Driscoll Jr. et al. eds., 2002). ("Property plays an important role in preserving the environment. Assigning property rights to the use of environmental resources usually encourages both conservation and the efficient use of natural resources."); Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 912-13 (1993) ("Because they do not bear the direct cost, polluters [of public resources like air and water] lack an incentive to limit their polluting activity. This system creates a built-in tendency toward excessive pollution levels."). Property deters this "tragedy of the commons."

[FN15]. In civil procedure, an action in rem is one instituted against a thing instead of a person, in contradistinction to an action in personam, which is against a person. BLACK'S LAW DICTIONARY 711, 713 (5th ed. 1979). An in rem right is one that a person may exercise against the entire world--one can exclude all others from the object of an in rem right, which exclusion essentially defines property. On the other hand, an in personam right is one that is enforceable only between parties to certain relationships, for example, relationships established by contract.

[FN16]. The colonists and the British fought the American Revolution over whether or not the colonists would have parliamentary representation--a type of due process--in determining the taxation of the resources they owned. REID, *supra* note 6, at 40 ("Not only was the security of property the purpose of government, it was the very definition of government by law, for a government that failed to protect property ceased to be a government. It was, in fact, a definition encompassing the entire American constitutional case against parliamentary taxation."); SCHLATTER, *supra* note 5, at 188 ("Behind the slogan, 'no taxation without representation,' stood the Lockean theory of property."). The "first slogan of the American revolution" was "*Liberty, property, and no stamps!*" CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 70 (1966).

[FN17]. *E.g.*, Karl Marx & Frederich Engels, *Manifesto of the Communist Party, in* GREAT BOOKS OF THE WESTERN WORLD 415, 425 (Robert Maynard Hutchins ed., 1952) vol. 50 (1888) ("[T]he theory of the Communists may be summed up in a single sentence: abolition of private property."). Actually, the *Communist Manifesto* meant only to advocate abolition of property in land and productive resources, which Marx and Engels intended should initially be held and managed by the state for the common good. The Communists did not object to property in personal items, a belief reflected in the Soviet Constitution. *See infra* note 26.

[FN18]. *See generally infra* note 24 and accompanying text. In quick summary, the relatively strong property systems of the Western nations (1) provide maximum incentive for new resource development because they allow private persons to keep the increase from their efforts; (2) allow landholders to work outside their homes by protecting land and housing from seizure by others; (3) facilitate the generation of development capital from land and other resources by enabling these resources to be put up to secure loans; and (4) make resources easily divisible so that those who value them most highly can transfer them by contract. *See infra* note 24 and accompanying text. As Professor Olson explains: "[T]he large differences in per capita income across countries cannot be explained by differences in access to the world's stock of productive knowledge or to its capital markets, by differences in the ratio of population to land or natural resources, or by differences in the quality of marketable human capital or personal culture." Mancur Olson Jr., *Distinguished Lecture on Economics in Government*, J. ECON. PERSP. 3, 19 (Sept. 1996). The presence in wealthier nations of "institutions that make property rights secure over the long run," including "the institutions that enforce contracts impartially," and the corresponding absence of these institutions in poorer nations explain these differences. *Id*. at 22.

[FN19]. The large-scale generation and distribution of goods and services through the private market cannot take place if the state does not recognize and enforce the right of private owners to exclude others from the goods and services they hope to trade in that market. In the absence of property, those who hold resources have no recognized right to them and thus no legal expectation that the state will prevent others from taking them. In such a case, not only will there be no criminal laws to prevent theft and trespass, there will also be no legal concepts of theft, tort law, or contract law to enforce future performance of promises regarding transfer of resources, including the repayment of debts. Rather than being used to generate additional production, private owners will have to expaend substantial resources to secure remaining resources. *Cf.* JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 350 (Donald Winch ed., Penguin Classics 1988) (1848).

> Even what a person has produced by his individual toil, unaided by any one, he cannot keep, unless by the permission of society. Not only can society take it from him, but individuals could and would take it from him, if society remained passive; if it did not either interfere *en masse*, or employ and pay people for the purpose of preventing him from being disturbed in the possession.

[FN20]. *See, e.g.*, BETHELL, *supra* note 10, at 20 ("Since Roman times, property has been the most important subdivision of the field of law."); PETER STEIN & JOHN SHAND, LEGAL VALUES IN WESTERN SOCI-

ETY 207 (1974) ("[P]roperty became the central concept of developing legal systems."); *infra* notes 59-60 and accompanying text. For example, the important civil law *Commentaries* of Hugues Doneau (1527-1591) divided "the substance of private law ... into two categories, what is truly and properly ours and what is owed to us." *Id.* at 81. Both categories are conceptualized as "rights belonging to us," *id.*, that is, in the broad sense advanced in this essay, as "property." As for the common law, fanning out like radial spokes from the hub of property are the other divisions of law. Thus, contract concerns the rules for transferring resources that people own, and tort establishes duties not to trespass on and to render compensation for wrongful harm done to such resources. Many criminal laws punish offenses against an owner's resources, and the law of business organizations establishes rules for the joint private holding of resources. Even much constitutional interpretation focuses on property. *Cf.* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN vii (1985) (asserting that the traditional areas of the common law--property, contract, and tort--have an "abiding intellectual unity") ("Property law governs acquisition of the rights persons have in external things and even in themselves. Torts govern protection of the things reduced to private ownership. Contracts governs transfer of the rights so acquired and protected."); MILL, *supra* note 19, at 369 ("The right of property includes, then, the freedom of acquiring by contract."); J. E. PENNER, THE IDEA OF PROPERTY IN LAW 74 (1997) ("We ... find that many of the most fundamental constitutive features of the law of property are actually found in the law of wrongs, both civil and criminal."). As to constitutional law arising from property, *see infra* notes 54-71 and accompanying text.

Many legal scholars reject the idea that property creates a hub for Western legal systems, and those that do support it are often tentative. *See generally* Carol M. Rose, *Propter Honoris Respectum: Property As The Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996). The rejection of property as an organizational hub or the tentativeness of support for it relate to a misunderstanding of the meaning of "property" and confusion between the definition of the term and certain distributional effects and conditions that likely relate not to the right of property but to abuses arising from weak and poorly administered property systems.

[FN21]. These frictions, which James Madison wrote about in the *Federalist* papers, create factional groups that threaten to undermine property through the democratic process as the poorer majority vote themselves the resources of the wealthier minority. *See* THE FEDERALIST No. 10 131 (James Madison) (Benjamin Fletcher Wright ed., 1961) (asserting that "the most common and durable source of factions has been the various and unequal distribution of property."). Madison believed that "[t]he latent causes of faction are thus sown in the nature of man," and he maintained that the "regulation of these various interfering interests forms the principal task of modern legislation." *Id.*

[FN22]. This response occurs in Western political theory whether it urges a property system or a redistributionist system like socialism. *See* HUME, *supra* note 11, at 491 (asserting that "the convention for the distinction of property, and for the stability of possession, is of all circumstances the most necessary to the establishment of human society"); *see also* LOCKE, *supra* note 11, at 69 (asserting that "[t]he great end of men's entering into society" is "the enjoyment of their properties in peace and safety"); REID, *supra* note 6, at 33 (quoting John Davies, an attorney general of Ireland in the early 1600s: "The first and principal cause of making kings was to maintain property and contracts ...."); ADAM SMITH, *An Inquiry into the Nature and Causes of the Wealth of Nations, in* 39 GREAT BOOKS OF THE WESTERN WORLD 1, 311 (Robert Maynard Hutchins ed., 1952) (1776) ("Civil government ... is instituted for the security of property ...."). For the central focus of socialist theory on limited resources, see, for example, Marx & Engels, *supra* note 17, at 416 (attributing to Marx "the fundamental proposition" of the *Manifesto*: "That in every historical epoch the prevailing mode of economic production and exchange, and the social organization necessarily following from it, form the basis upon which is

built up, and from which alone can be explained, the political and intellectual history of that epoch ..."). Marx and Engels hoped for the withering away of the state as producer and distributor of limited resources but appreciated the initial necessity for the state in that regard. *See id*.

Not everyone believes Western political theory primarily involves "who gets what, when, and how." *See* SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY AND CAPITALISM 10 (1986) (asserting that "[s]ince World War II, the political lives of the advanced ... industrial societies ... have increasingly been shaped by popular movements" that "identify with such social needs as sexual and racial equality, environmental protection, nuclear disarmament, and world peace" and "share a novel aspect: their dissatisfactions and aspirations are not only distributional, they are moral and cultural as well"). Although this point is worth pondering, in the end most of these movements express important concerns about the use and abuse of equal rights to acquire and hold limited facultative and nonfacultative resources.

[FN23]. Most accurately, resources are not things but various specifiable uses of things that satisfy needs and wants. For instance, what is important to human life about land is not the describable physical solidity of it but the myriad uses that one can put land to, such as growing food, hunting, mining, timbering, erecting buildings, raising families, securing privacy, and conducting businesses. "Land," then, describes a type of boundary for establishing property in limited resources. Further consider that it is not the corn that the owner grows on the land that is the resource but the nourishing potential of the corn, the use of its oil as a fuel, or the display of its ears as ornaments.

As to exactly which resources the right of property attaches is in application an issue but in definition should be a nonissue. In application, whether the right of property should apply to the sale of body parts and sexual favors, the consumption of currently illegal drugs, or the uses of land and the factors of production excites heated discussion. To which resources property attaches definitionally should be a nonissue in that no legal meaning of property can realistically contain within its term an a priori specification of every resource to which one could construe it to apply. Interpretation and application of general legal concepts is a major and noncontroversial reason that courts exist in a legal system. For example, over the years the private resources that the Fifth Amendment requires just compensation for taking have been substantially fleshed out in numerous cases, yet still land owners bring new cases. The not-so-deep subtext surrounding the real controversy over property's definition almost always concerns whether the government or the private market should plan for resource production and whether or not the government should redistribute the resources produced by individual effort for benefit of the entire community.

[FN24]. Not all Western governments were formed intentionally and specifically to deal with the problems of limited resources. Most such governments in fact began as autocratic and monarchial rule, but in the West much political and legal theory has focused on the justifications for and practicalities of how society handles limited resources. In the last several centuries, various institutions have emerged both from theory and practice that emphasize the importance of the state's concern for the problems of limited resources. Arguably, the institutions of state support for the right of property have been more successful in promoting incentives to wealth formation than have the institutions of government planning, production, and distribution of resources. Concerning the property institutions that the state must implement to establish the conditions for general prosperity. *See generally* BETHELL, *supra* note 10; HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973); MANCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS (2000); NATHAN ROSENBERG & L. E. BIRDZELL JR., HOW THE WEST GREW RICH (1986).

[FN25]. That the state responds to the situation of limited resources through creating and implementing various institutions does not mean that these institutions have no relationship to customs, values, and practices that have emerged organically out of the past. In fact, state institutions that are *not* based on societal values are likely to fail, or only strong, nondemocratic coercion can maintain them. *Cf.* LEARNED HAND, THE SPIRIT OF LIBERTY 190 (1953) ("Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it. ..."). The same may be said of property. *See generally* CULTURE MATTERS, HOW VALUES SHAPE HUMAN PROGRESS (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); FRANCIS FUKUYAMA, TRUST, THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995).

[FN26]. Article 10 of the Soviet Constitution of 1936 provided that "the personal property right of citizens in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law." (Konst. RF) (1936), *quoted* in STEIN & SHAND, *supra* note 20, at 216. The main difference between capitalist and communist economies seems that the latter do not permit a property in the factors of private production and exchange, whereas the former do.

[FN27]. *See* Sunstein, *supra* note 14, at 930 ("[A] system of private property has to be created rather than merely recognized .... Markets depend for their existence not on passivity, but on active governmental choices."). Property is a right created and enforced by the state in various resources. The resources of your land are subject to the right of property because the state legalizes your exclusion of others from them through police and the courts.

[FN28]. Charles Donahue Jr., *The Future of the Concept of Property Predicted from Its Past*, NOMOS XXII: PROPERTY 28, 35 (J. Roland Pennock & John W. Chapman eds., 1980) ("Our word 'property' comes either directly or through French *propriete* from Latin *proprietas* which means 'the peculiar nature or quality of a thing' and (in post-Augustan writing) 'ownership'. *Proprietas* is itself derived from *proprius*, an adjective, equally applicable to physical things or qualities meaning, 'own' or 'peculiar,' as opposed to *communis*, 'common,' or *alienius*, 'another's."').

[FN29]. Such connotations include that property is "power" and "social relationships." *See supra* note 7.

[FN30]. Thomas C. Grey, *The Disintegration of Property*, NOMOS XXII 69 (J. Roland Pennock & J. W. Chapman eds., 1980) ("Most people, including most specialists in their unprofessional moments, conceive of property as *things* that are *owned by persons*."); JAMES GRUNEBAUM, THE OXFORD COMPANION TO PHILOSOPHY 723 (Ted Honderich ed., 1995) (stating that the entry defining *property* begins: "What is owned."). This conception also predominates today throughout the civil law countries that derive their legal systems from the Code of Napoleon and thus from Roman law. STEIN & SHAND, *supra* note 20, at 216 ("The civil law tradition, reflected in the Codes of France, Germany, Switzerland, Italy, and even the Soviet Union, tends to identify ownership with the thing owned, and to limit its definition of things to moveable or immovable property, as opposed to more abstract rights.").

[FN31]. United States v. Gen. Motors Corp., 323 U.S. 373, 377 (1945).

[FN32]. It is not that the meaning of property as the "thing owned" is somehow semantically impermissible. It is just deficient in the sense that it does not explain well to nationbuilders in poor property-weak countries what the operational significance of the word is. Referring to land, a car, or Microsoft stock as "property" does not help one grasp what it is about these things that makes them property. This is an omission that is especially glar-

ing when developed nations urge emerging economies to adopt a strong property system in order to produce more resources and enhance per capita income, and what "property" means is ambiguous.

[FN33]. For example, a search of the LEXIS "State Court Cases, All" file on March 4, 2002 returned 4764 results in a scant two-month period for the search "property owner and date after 2001." If "property" and "ownership" are both synonymous, then "property owner" means "ownership owner," and the phrase is nonexplicatively redundant. An unfortunate likelihood, suggested by the prevalence of "property owner" in the case opinions, is that many judges are confusing "property" with "things," especially with land.

[FN34]. LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 18 (1977) ("Property rights, as I shall use the term, are the rights of ownership."). Note that Professor Becker is not asserting that property is that which someone owns; he is equating property with ownership. *See id*. Not everyone agrees that property and ownership are synonymous. *E.g.*, GRUNEBAUM, *supra* note 30 (asserting that "'property' is sometimes misused as a synonym for private ownership so that people only have property in what they privately own"). The argument is that "[f]irst and principally, the word 'property' seems to connote something in the thing or object rather than the idea that ownership is a relation between persons with respect to things." *Id*. at 3. To the contrary, this article maintains that "property" is not "something in the thing or object" but is precisely "a relation between persons with respect to things," namely the specific right of X to exclude Y and others from things. Thus, property is synonymous with ownership, and the misusage is to confuse property with a thing (or resource).

[FN35]. MARGARET JANE RADIN, REINTERPRETING PROPERTY 245 n.45 (1993); *cf*. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 359 (1954) (quoting Walter Hamilton that "[p]roperty is a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth"); Philbrick, *supra* note 7, at 696 ("In short, the concept of property never has been, is not, and never can be of definite content. The paradigm of a Sanskrit verb of a thousand forms could not approach in diversities the phases of that concept in any single time and place."). These authorities incorrectly equate the meaning of the term "property" with the desirability of applying property to various specific resources. For example, Professor Radin maintains the importance of applying property strongly to certain resources close to individuals and associated with their personhoods (that is, by recognizing an owner's very broad right to exclude) but weakening the right as applied to the impersonal resources of production (that is, by encumbering the right to exclude with duties the owner owes to others and through taxation). *See* RADIN, *supra note 35*, at 245 n.45. In both instances, however, the meaning of property remains singular: it is the right to exclude. What is "contested" is not the meaning of property but to which resources the state should apply this legal right.

[FN36]. STEIN & SHAND, *supra* note 20, at 216. Asserting that property is merely a bundle of different rights confuses the rules that apply property to various resources with the unifying principle of property itself. Just as one can use the word "contract" meaningfully although there are a variety of different contract rules, so too can one adequately define "property," considering its level of abstraction.

[FN37]. STEIN & SHAND, *supra* note 20, at 216. This legal realist view derives from the same impetus that deconstructed Professor Langdell's attempt in the latter half of the nineteenth century to unify disparate aspects of commercial transactions into the law of contracts. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974). Yet, as "contract" is still a meaningful general term that refers to the legally binding nature of formal agreements, so also is "property" a meaningful term that recognizes the private exclusion of resources

from most claims of the state and the general community. In fact, "property," not "contract," was one of the absolute rights guaranteed by common law, and in this light it has a better legal and historical provenance than "contract." *See infra* note 63.

[FN38]. *Cf.* R. H. TAWNEY, THE ACQUISITIVE SOCIETY 54 (1920) ("[Property rights] may be conditional like the grant of patent rights, or absolute like the ownership of ground rents, terminable like copyright, or permanent like a freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a gold-mine or rubber plantation."). There is a conceptual core to these multitudinous "rights" set forth by Tawney. They are all aspects of the single negative right to exclude, and they represent different ways of using limited resources when one has a property interest in them. For example, when one owns (has property in) land and can thus exclude others from its resources, one can rent the land for a short or long duration and place conditions on its use, subdivide it, incorporate it and sell shares to others, give an easement on it, devise it, exchange it for a rubber plantation, or simply live on it. That the duration of property in a resource may be long or short, or that the owner may fractionate or recombine the resource under the protective property blanket, does not change the meaning of "property" as the right to exclude. Likewise, that various legal rules apply the exclusionary right somewhat differently to different resourceful uses does not change the definition of "property;" it affects only the specific resources to which property applies. Nor is it important to the definition of property (only to its justification) that some people with few or no resources have little influence over others whereas those who own many resources may influence others greatly.

[FN39]. Among lawyers and judges, there is "near unanimous" agreement on the bundle-of-rights analysis. CURTIS J. BURGER & JOAN C. WILLIAMS, PROPERTY, LAND OWNERSHIP AND USE 4 (4th ed. 1997). The U.S. Supreme Court first used "bundle of rights" in 1937 in reference to property. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 581 (1937) ("Indeed, ownership itself ... is only a bundle of rights and privileges invested with a single name."). The phrase "bundle of rights" (or, alternatively, bundle of "sticks" in which the property sticks are "rights") possibly dates to 1888. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY 455 n.40 (1997) (citing his earliest found usage in JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN 43 (1888)). In the analysis of legal realism, the "jural relations" approach of Wesley Hohfeld advanced the concept of property as a bundle of legal rights. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). More specifically, Hohfeld asserted that property is a congery of rights, duties, privileges, powers, liabilities, disabilities, and immunities that courts interpret in disputes. A good explanation is found in Arthur L. Corbin, *Jural Relations and Their Classification*, 30 YALE L.J. 226, 226-29 (1921). Hohfeldian analysis is also the basic approach that the *Restatement* takes. *See generally* RESTATEMENT (THIRD) OF PROPERTYYY (2000).

Hohfeldian analysis is circular and has its share of critics. *See, e.g.*, Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938); Roy L. Stone, *An Analysis of Hohfeld*, 48 MINN. L. REV. 313 (1963). Both in ordinary jurisprudence and in political theory, it is meaningful to speak of property not as a bundle of rights but as a single blanket right to exclude others from limited resources acquired without coercion, theft, or fraud.

[FN40]. This list of the positive bundle of property rights comes from A. M. Honore, *Ownership, in* OXFORD ESSAYS IN JURISPRUDENCE 107, 113-20 (A. G. Guest ed., 1st ser., 1961). Omitted from this recitation of his list are what Honore includes as "the prohibition of harmful use," which asserts the connection of tort law to the meaning of property; the "right to security," which is immunity from expropriation; the "liability to execution," which acknowledges that creditors may claim an owner's resources to satisfy debts and taxes; and the

"incident of residuarity" and the "absence of term," both of which confuse "resources" with "things,"--these alleged aspects of property associate it with a thing which might be returned at a later date instead of a resource with ownership measured according to duration. *Id.* at 119-24. These concepts do not belong in a positive bundle of rights, and the "right to security," when extended to include security from the predations of the general community, not just from expropriation by the state, is synonymous with the negative exclusionary right that lies at the conceptual heart of property. Basically, what Professor Honore has done with his bundle approach is to attempt to list the general resourceful uses one might make of a thing and to call this "property." His approach further promotes the confusion of property with things that people own. Applying Hohfeld's jural relations approach to Honore's list raises confusion about property by a factorial power because to each right must be applied correlatives and opposites, and the analysis must be extended beyond rights to duties, privileges, powers, liabilities, disabilities, and immunities. *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasonings, supra* note 39, at 16.

[FN41]. That a resource can be subdivided with the ownership right following both a present use and a future reversion becomes obvious when one conceptualizes property as a singular blanket right that allows an owner to exclude others from interfering with the great variety of ways that resources can be used.

[FN42]. The conclusion that one may draw from this linguistic perplexity is actually rather semantically pedestrian: Property is the single negative right to exclude and not at all a series of positive rights. *See infra* note 84. The so-called positive rights like possession and consumption are instead resourceful uses to which physical resources like land can be put. They are themselves resources which property covers protectively when one acquires them acquired without coercion, fraud, or deception. When X leases Blackacre from Y, X has a present property (right to exclude) and Y has a future reversionary property (right to exclude) in the land. *See supra* note 41. That one can subdivide one's resources within describable boundaries and that the state covers these subdivisions with the exclusionary blanket right of property is conceptually straightforward.

[FN43]. *See, e.g.*, JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 645 n.87 (1996) (quoting Thomas Jefferson that "the true foundation of republican government is the equal right of every citizen, in his person and property"). Not every nation is so constituted around a broad property right. In communist nations, for example, the state plans both the general production and distribution of resources. It allows private individuals to exclude others from only a relatively minor set of personal things, establishing that, in terms of degree, property is a much weaker constitutional aspect of the communist society. In still other societies, the relationship between the people and the state may not center at all on the distribution of limited resources but instead on obedience to religious principles (certain current Islamic states) or the maintenance of harmonious social relations (certain former Confucian states).

[FN44]. THE FEDERALIST NO. 10, *supra* note 21, at 131 (citing a statement by James Madison). Madison is likely using "property" in this context to refer to things that people own, but the essence of the usage is the exclusionary right, that is, the right to exclude others from the resources acquired through "unequal faculties." Throughout this essay, I quote the term "property" in contexts in which it refers to things that people own but where, when analyzed, the essential convention of the term refers to the right to exclude others from the resources rather than identifying the resources themselves.

[FN45]. Indeed, the primary purpose of the U.S. Constitution was to protect property. *See* CHARLES A. BEARD, THE ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 324 (1935) ("The Constitution was essentially an economic document based upon the concept that the fundamental

private rights of property are anterior to government and morally beyond the reach of popular majorities."). However, from Beard's, perspective the Constitution's Framers were acting to protect their own personal resource holdings, a conclusion rejected by other historians. *See generally* FORREST MCDONALD, WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958). More likely, the Framers simply and deeply believed in the concept of property and its significance for a free society. *See* Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WISC. L. REV. 1135, 1136 (1980) ("Perhaps the most important value [of the Framers of the Constitution] was their belief in the necessity of securing property rights."). Specifically, the Framers feared that the states would abridge property by reneging on debts they incurred during the Revolutionary War. According to Alexander Hamilton:

> [T]he sacred rights of private property have been too frequently sported with from a too great facility in admitting exceptions to the maxims of public faith, and the general rules of property. A Desire to escape from this evil was a principle cause of the Union which took place among good men to establish the National Government.

Id. at 1142. Referring to specific constitutional clauses that secure private resources from state action, Bruchey observes: "It is not by accident that the constitution prohibits the states from coining money, emitting bills of credit, making anything but gold and silver coin a tender in payment of debt, and passing any law impairing the obligation of contract." *Id*. at 1142. The privileges and immunities clause also supports property's constitutional establishment. BERNARD H. SIEGAN, PROPERTY RIGHTS 2 (2001) ("For although these rights ["property rights"] were not enumerated in the original U.S. Constitution, they formed an essential part of its meaning and spirit. They were secured in Article IV, Section 2, as the 'Privileges and Immunities of Citizens in the several States,' a provision which Alexander Hamilton referred to as 'the basis of the Union."'). Early Supreme Court opinions, especially those written by Chief Justice Marshall, attributed the contract clause to the constitutional concern over state weakening of the property right. In *Sturges v. Crowninshield*, Marshall asserted that "the prevailing evil of the times, which produced this [contract] clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant installments." 17 U.S. 122, 199 (1819); *see also* Ogden v. Saunders, 125 U.S. 213, 355 (1827) (Marshall, C. J., dissenting) ("The power of changing the relative situation of debtor and creditor, of interfering with [the property obligation of] contracts ... had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man."). For a discussion of the general economic and political conditions that induced the Framers of the Constitution to protect the right of property, see Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987).

[FN46]. *See* RICHARD PIPES, PROPERTY AND FREEDOM 240 (1999) (asserting that "from the Middle Ages on, the sanctity of private property was a fundamental principle of Western Europe's unwritten constitutions"). For an analysis of the written constitutional property clauses of seventeen nations, see A. J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES, see A COMPARATIVE ANALYSIS (1999).

[FN47]. *See* U.S. CONST. amend. V (stating "nor shall private property be taken for public use, without just compensation").

[FN48]. The Supreme Court has ruled that an exercise of eminent domain under the Takings Clause requires that the owner receive "a full and exact equivalent." Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[FN49]. U.S. CONST. amend. V (stating “nor shall any person ... be deprived of life, liberty, or property, without due process of law”).

[FN50]. For instance, many think that freedom of speech is the most basic constitutional right without appreciating that the exclusionary right of free speech closely resembles the exclusionary right of property and in its genesis, the claim of free speech relied on the older and more established concept of property for its support. For an explanation of how free speech relates to property, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996). The more basic concept that one has a property in oneself and thus in one's speech, faculties, and practices is attributable to James Madison, John Locke, and other seventeenth and eighteenth-century thinkers. *See infra* note 116; Pipes, *supra* note 46, at xii (“The whole complex of modern ideas connected with human rights has its source in ... an extensive definition of property.”). In short, “[p]roperty is a constitutive principle.” KURT BURCH, “PROPERTY” AND THE MAKING OF THE INTERNATIONAL SYSTEM 38 (1998).

[FN51]. *See* P. J. Marshall, *Parliament and Property Rights in the Late Eighteenth Century British Empire, in* EARLY MODERN CONCEPTIONS OF PROPERTY 533 (John Brewer & Susan Staves eds., 1995). (“[V]irtually every grievance identified by the colonists could be defined as either the endangering or the loss of a property right. ... At every stage in the controversy to 1776 and beyond, Americans claimed to be defending property rights.”).

[FN52]. REID, *supra* note 6, at 45 (maintaining that Revolutionary era Americans made “the repeated claim that if, in just the smallest amount, they were taxed without their consent they would have ‘no property’ to call their own”). Voices on the other side of the Atlantic also recognized the justice of this claim. *See id*. at 45. (quoting John Wilkes, Lord Mayor of London: “If we can tax the Americans without their consent, they have no property, nothing they can call their own.”). Professor Reid asserts that until the nineteenth century the security of property was “the essence of English constitutionalism.” *Id*. at 35.

[FN53]. *See id*. at 45 (asserting that “the colonial whig case against parliamentary taxation was the same case that Parliament once made against the prerogative taxation of Charles I”).

[FN54]. Samuel Adams, *Massachusetts Circular Letter, quoted in* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 254 (1991).

[FN55]. REID, *supra* note 6, at 31. By this statement, Ireton meant that property was of human, rather than divine, creation; humans constituted property. However, it is no great leap to assume he believed that society and the state formed around the hub of property.

[FN56]. As early as 1827, John Quincy Adams called Madison the “father of the Constitution.” Douglas Adair, *The Tenth Federalist Revisited*, 8 WILLIAM & MARY Q. 48, 51 (3d ser., Jan. 1951).

[FN57]. James Madison, *Property*, THE NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., 1906). Madison's view of having a property in one's rights is decidedly Lockean. *See, e.g.*, LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 252 (1999) (“At least four times in his *Second Treatise*, Locke used the word *property* to mean all that belongs to a person, especially the rights he wished to preserve.”).

[FN58]. REID, *supra* note 6, at 104-05.

> [E]ighteenth century constitutional theorists who utilized the [property-in-rights] concept did not think it a fiction. Rights were incorporeal, but still property. To say they were owned was no more a legal fiction than to say today that to sell a copyright is to transfer ownership, or to say that a chose in action is property.

Id. A closely related meaning to that of having a property in the rights of speech, religion, or privacy is to have property in one's personal faculties. Madison's essay supports both meanings. *See supra* note 57 and accompanying text (asserting that one has a "property in his rights" and a "property in the free use of his faculties"). A French thinker admired and translated by Thomas Jefferson had a similar broad view of property. *See* COUNT DESTUTT TRACY, A TREATISE ON POLITICAL ECONOMY 53 (Thomas Jefferson trans., reprint Augustus M. Kelly 1970) (1817) (maintaining that individuals "have each one the inalienable, incommutable, and inevitable property, in their individuality and its faculties"). For a nineteenth-century view that the internal facultative resources as well as the external nonfacultative resources should be considered the object of property, consider the statement of legal scholar/economist John McCulloch:

> It must not ... be imagined that the security of property is violated only when a man is not allowed to enjoy or dispose at pleasure of the fruits of his industry: it is also violated, and perhaps in a still more unjustifiable manner, when he is prevented from using the powers given him by nature, in any way, not injurious to others. ... Of all the species of property a man can possess, the faculties of his mind and the powers of his body are most particularly his own; and these he should be permitted to enjoy, that is, to use or exert, at his discretion.

JOHN R. MCCULLOCH, THE PRINCIPLES OF POLITICAL ECONOMY 28-29 (5th ed., reprinted Augustus M. Kelly 1965) (1864); *cf*. MILL, *supra* note 19, at 371 (asserting that property implies "the right of each to his (or her) own faculties").

[FN59]. Property constituted a political worldview in the era of the Revolution. *See* REID, *supra* note 6, at 40 ("The concept of property and security of property were civil rights that encompassed a view of the world that defined for eighteenth-century English-speaking people the meaning of law, liberty, and constitutional government."). In one sense, property was "the source of liberty" because it secured the resources necessary for the individual to have autonomy from the state. JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 72 (1988). In another sense, liberty was "inherited or purchased property" of the English and the American colonists so that "[t]he defense of property meant the defense of liberty, not merely the preservation of material possessions." *Id*. at 25.

[FN60]. *See supra* note 57 and accompanying text. It would certainly be a mistake to believe that Madison's view about the connection of property and liberty was isolated or unrepresentative in the early constitutional era. *E.g.*, 6 THE WORKS OF JOHN ADAMS 280 ("Property must be secured, or liberty cannot exist."); REID, *supra* note 6, at 33 (quoting colonial diplomat Arthur Lee: "The right of property ... is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty," and quoting from the *Boston Gazette*, Feb. 22, 1768: "*Liberty* and Property ... are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other."). In more recent times some still articulate the connection between property and liberty. *See, e.g.*, Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.").

[FN61]. For example, when British printers asserted that they enjoyed a freedom of speech that was secure against the king's licensing censors, they claimed that the Crown was interfering with the property right to their

printing presses. *See* McGinnis, *supra* note 50, at 60-61. For American colonial examples illustrating that "the right to property was considered more important and was accorded priority over the right to personal liberty," see REID, *supra* note 6, at 29.

[FN62]. For example, property at one time did not apply to the invention of new devices nor to the copying of musical and literary works. Now, it does. However, this does not mean that the definition of property has changed or becomes less knowable; only the specific application of the right of exclusion has changed.

[FN63]. According to Blackstone, the common law recognized three "absolute" rights "inherent in every Englishman." II BLACKSTONE'S COMMENTARIES (St. George Tucker ed., 1969) (1803). The first was "personal security," which "consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation." *Id*. at 129. The second was "personal liberty," which "consists in the power of loco-motion, of changing situation, of moving one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint." *Id*. at 134. The third right was "property." *Id*. at 138. Blackstone asserts that these absolute rights "are usually summed up in one general appellation and denominated *the natural liberty of mankind*." *Id*. at 124 (emphasis added). He did not include speech utterance and religious practice as part of this "natural liberty," thus it is fair to say that common law protected property more firmly as an individual right than it did speech and religious practice. As to the importance of property, Blackstone observed: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property. ..." *Id*. at 1.

[FN64]. For example, Madison presumes in his property essay that people form government to protect "particular" resources like land while believing that he has to argue by association that government must protect "the rights of individuals," the bridge being the term "property": "Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses." Madison, *supra* note 57, at 102. He concludes his essay with the statement, "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights." *Id*. at 103. Had Madison believed that his fellow citizens valued the "particular application" of property less than the "property in rights" (facultative liberties), he would not have paired the latter with the former in the order and manner that he did. He likely recognized that many Americans agreed with John Taylor of Carolina that "the rights of man include life, liberty and property. The last right is the chief hinge upon which social happiness depends," *quoted* in SMITH, *supra* note 43; *cf*. NEDELSKY, *supra* note 8, at 68 (summarizing the views of Gouverneur Morris to the point: "Whatever their intrinsic values, life and liberty were not the reasons men joined together in societies and formed governments. It was only for the sake of property that men gave up the greater freedom of the state of nature and submitted themselves to the constraints of society and government.").

[FN65]. Taxation is necessary so the state can implement, enforce, and defend the property system--including the repayment of governmental debts--and provide an infrastructure for the generation of limited resources. *See* Jean Jacques Rousseau, *A Discourse on Political Economy*, *in* GREAT BOOKS OF THE WESTERN WORLD 380 (Robert Maynard Hutchins ed., 1952) (1755) ("It should be remembered that the foundation of the social compact is property; and its first condition, that every one should be maintained in the peaceful possession of what belongs to him. It is true that, by the same treaty, every one binds himself, at least tacitly, to be accessed toward the public wants ...."). According to Rousseau, specific taxation depends "on a general will, decided by a vote of a majority, and on the basis of a proportional rating which leaves nothing arbitrary in the imposition of the tax." *Id*. at 381. The Constitution recognizes the taxing authority of the United States in Article I, Section 8:

"The Congress shall have the Power to lay and collect Taxes. ..." U.S. CONST. art. I, § 8.

[FN66]. Charles I was deposed and beheaded for engaging in taxation without consent of the people through parliamentary act. His taxation without representation violated the Magna Carta and subsequent statutes of Parliament, amounting to arbitrary confiscation and denying due process of law. As loyal British subjects, the American colonists believed that the Britsh government similarly abridged their property right when the government taxed them without their consent. *See generally* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX 373 n.37, (1987) (quoting a 1753 resolution of the Virginia Burgesses: "The Rights of the Subjects are so secured by Law, that they cannot be deprived of the least Part of their Property, but by their own consent. ...") *Id*. at 144-45 (quoting a 1765 resolution of the New York Assembly: "Resolved, ... that the imposing and levying of any monies upon her Majesty's subjects of this colony, under any pretense or colour whatever, without consent in General Assembly, is a grievance and violation of the people's property.").

[FN67]. An alternative might be a head tax, a tax on facultative resources, payable pro rata without reference to the nonfacultative resources that effort, talent, luck, or birth generate. As collection of a head tax presents a difficulty of payment--namely, that the poor will not be able to afford it--not present with the traditional taxes on nonfacultative resources like income, real estate, and various "personal property," the taxation on nonfacultative resources seems preferable to that of a head tax once a recognition of resource ownership is in place. *Cf.* ROSENBERG & BIRDZELL, *supra* note 24, at 113 (asserting in a discussion of economically valued [nonfacultative] resources that "the change of governmental revenue systems from discretionary expropriation to systematic taxation" was "a change closely linked to the development of the institution of private property").

[FN68]. By the same token, speech related to the private market and its resource exchanges may be as constitutionally important as political discussion. *Cf.* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."). It also stands to reason that if the primary purpose for the existence of the state concerns the system by which it handles limited resources--and the system relies on the property right--that the property right at a minimum would be as important to the citizenry as speech about resources.

[FN69]. U.S. CONST. amend. V. (stating "nor shall private property be taken for public use, without just compensation"). Actually, in an important analogous sense, the state can "take" speech from individuals, the test being whether or not the government has a "compelling state interest" in doing so. *See, e.g.*, Carey v. Brown, 447 U.S. 455, 461-62 (1980) (stating that the government may regulate content-based speech, but is subject to "strict scrutiny" and must be "necessary to serve a compelling state interest"). In further analogy, just as an incidental regulation of one's propertied resource is not a "taking," so too an incidental state restriction on one's speech does not "abridge" it. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) ("[A] sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

[FN70]. U.S. CONST. amend. V. Although the Constitution itself does not establish the requirement of just compensation for state deprivation of facultative resources, Congress in a significantly related way has. Section 1983 of the Civil Rights Act of 1871 creates tort liability for public officials or public employees who deprive a person of any constitutionally guaranteed rights, including the facultative ones:

> Every person who, under color of any statute, [or] ordinance ... of any State ..., subjects, or causes to

> be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding in redress.

42 U.S.C. § 1983 (2000). Legal scholars are used to thinking of just compensation as rather different from damages in tort, but a student, diplomat, or nationbuilder from a property-weak country trying to grasp the distinction between the two may be left with little significant sense of practical difference.
[FN71]. Madison, *supra* note 57, at 101.

[FN72]. *E.g.*, ADOLPH A. BERLE JR., POWER WITHOUT PROPERTY 60 (1959) ("Property is in essence relationship between an individual ... and a tangible or intangible thing."); BURCH, *supra* note 50, at 26 ("[T]he concept of property ... stipulates an (appropriate) relation between an individual and an external object."); Frank Snare, *The Concept of Property*, 9 AM. PHIL. Q. 200 (Apr. 1972) ("[W]e are concerned here with the special relationship which may hold between a person and a physical object called 'owning' in virtue of which the latter may be called 'personal property'. ...").

[FN73]. *See* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 3 (2d ed. 1993) ("'[P]roperty' is comprised of legal relations between persons with respect to 'things.'"); RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 96 (1914) ("The essence of property is in the relations among men arising out of their relations to things [emphasis omitted].").

[FN74]. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) ("The institution called property guards the troubled boundary between individual man and the state.").

[FN75]. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 327 (Alexis C. Angell ed., Weisman Publications 2d ed. 1998) (1891). It is, of course, arguable that the right to exclude others from certain resources is a moral right, but "property" in the jurisprudence of the modern era is the legalization of that moral right. Law creates property.

[FN76]. In other words, "property" is a defined term, but the specific resources to which we apply property have an historical content.

[FN77]. *Cf.* JAMES MILL, ESSAYS ON GOVERNMENT; JURISPRUDENCE, LIBERTY OF THE PRESS, AND LAW OF NATIONS 9 (Augustus M. Kelley ed., 1967) (1825) ("That one human being will desire to render the person and property of another subservient to his pleasures, notwithstanding the pain or loss of pleasure which it may occasion that other individual, is the foundation of Government.").

[FN78]. *Cf.* Cohen, *supra* note 35, at 386 ("Taking mutton out of the jaws of hungry fellow wolves might be a difficult and dangerous operation.").

[FN79]. *See* O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 447-50 (2001).

[FN80]. *See id.* at 450-51. In a strict sense, the institution of property is not advantageous merely to large heterogeneous societies, and even relatively small tribal groups employ it. For example, "Thou shalt not steal," which is prominent in the biblical Ten Commandments of the ancient tribes of Israel, implies the establishment and recognition of property in those things, the taking of which would be stealing.

[FN81]. *See infra* notes 84-110. For an interesting economic view of the state's protection of the property right as a type of "product," see Frederic C. Lane, *The Role of Governments in Economic Growth in Early Modern Times*, 35 J. ECON. HIST. 8, 9 (1975).

[FN82]. *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 733 (1998) ("[T]here is ... a consensus that property cannot exist without some institutional structure that stands ready to enforce it."). In English law, the development of the centralized property enforcement process began at least as early as the twelfth century:

> [T]he development of a central system of royal justice from which the modern English legal system directly developed, occurred ... in 1166, for it was in that year that a 'decree went forth which gave to every man dispossessed of his freehold a remedy to be sought in a *royal* court, a French-speaking court.

STEIN & SHAND, *supra* note 20, at 207. By the eighteenth century, Blackstone was writing of English law's enforcement of property: "Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." II BLACKSTONE'S COMMENTARIES, *supra* note 63, at 141.
[FN83]. *See* Reed, *supra* note 79, at 466-72 & nn.61-65.

[FN84]. For example, Hobbes asserted: "[T]he Propriety which a subject hath in his lands, consisteth in a right to exclude all other subjects from the use of them. ..." THOMAS HOBBES, LEVIATHAN 297 (C. B. Macpherson ed., Penguin Classics 1985) (1651). Blackstone defined property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." IV BLACKSTONES COMMENTARIES, *supra* note 63. In Blackstone's era, the Lord Mayor of London also wrote: "The very idea of property excludes the right of another's taking any thing from me without my consent, otherwise I cannot call it my own." REID, *supra* note 6, at 45. In France at this time, a civil law thinker asserted: "[O]ur idea of property is private and exclusive: it imports the idea that the thing possessed appertains to a sensible being, and appertains to none but him, to the exclusion of all others." TRACY, *supra* note 58, at unpaginated preface.

Today the essential convention of property is still that it is a right to exclude others, including the government except under limited circumstances, from a resource. Although the application of the right to particular resources over the years has strengthened or weakened somewhat--strengthening, for example, through patent and copyright laws, and weakening through zoning regulations and redistributive taxation--the meaning of property as the right to exclude others has remained unchanged. *See generally* Merrill, *supra* note 82, at 730 ("Give someone the right to exclude others from valued resources, i.e., a resource that is scarce relative to human demand for it, and you give them property. Deny someone the exclusion right and they do not have property."); *see also* John Brewer & Susan Staves, *Introduction, in* EARLY MODERN CONCEPTIONS OF PROPERTY (John Brewer & Susan Staves eds., 1996) ("[P]roperty rights are rights 'against' other people, rights to exclude them from the use and enjoyment of the thing owned."); Cohen, *supra* note 7 ("[T]he essence of private property is always the right to exclude others."); ELY, *supra* note 73, at 100 ("Objects over which the rights of property extend are objects conceived of as taken out of the mass of free goods and brought under the exclusive control of a person, and this control is called property.") (emphasis omitted); EPSTEIN, *supra* note 20, at 65 ("The idea of property embraces the absolute right to exclude."); PENNER, *supra* note 20, at 72 ("The exclusion thesis is a statement of the driving analysis of property in legal systems."); *cf.* Cohen, *supra* note 35, at 374 ("[T]hat is property to which the following label can be attached. To the world: Keep off x unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state."); *see generally* O. LeeReed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 VAND. J. TRANSNAT'L

L. 673 (2003).

The eminent sociologist Emile Durkheim sought a cross-cultural criterion for the recognition of property and settled upon exclusion. *See* EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 142 (Cornelia Brookfeld trans., 1958) ("[T]he right of property is the right of a given individual to exclude other individual and collective entities from the usage of a given thing. The sole exception is the State ... whose right of usage can, however, not be exercised except in special circumstances, provided for by law.").

[FN85]. In a strict sense, an owner excludes others not only from the physical soil of the land but from an almost infinite set of resources in the land, resources that the owner can sell, lease, or gift to others in various subdivisions, making it perfectly possible to have more than one individual owner in the various resources of the "same" land. Actually, in such a situation the original owner simply has fewer resources within the describable boundaries of the land than before he sold, leased, or gifted the resources, and the new owner has more.

[FN86]. College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999); *see also* Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1918) (Holmes, J., concurring) ("Property depends upon exclusion by law from interference. ..."); *cf.* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (referring to "one of the most essential sticks in the bundle of rights that are commonly characterized as property--the right to exclude others"); *Int'l News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."). A rigorous analysis of "property" suggests the conclusion that exclusion is not "*one* of the most essential sticks" or "*an* essential element" of ownership but *the* defining quality from which all other qualities are derivable and secondary. *See infra* note 87.

[FN87]. Merrill, *supra* note 82, at 740 ("[I]f one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusion right."); *cf.* BECKER, *supra* note 34 ("*The right to possess* ... may be understood ... simply as the right to exclude others from the use or other benefits of the thing."); PENNER, *supra* note 20, at 74 ("[T]he owner's power to share and even transfer his property [resources] is part and parcel of the right of exclusive use."). Similarily, X, a driver, may control or use a car, but if Y, the passenger, owns (has property in) the car, Y can legally exclude X from control, possession, and so forth. The so-called positive rights of property like possession, control, and use are--in a manner of speaking--not property "rights" at all but resources that one can engage within describable boundaries and which are common types of resources that are objects of the exclusionary right.

One scholar recently published a vigorous disagreement with the exclusion thesis. *See* Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003). Professor Mossoff maintains that exclusion is merely "the formal means by which Anglo-American legal rules identify and protect the substantive core of rights that constitute property," which he identifies as "the rights of acquisition, use, and disposal." *Id.* at 396. Ultimately, his modified-bundle theory is unpersuasive, although publication constraints do not permit the lengthy rebuttal that his thoughtful arguments deserve.

[FN88]. In particular, observers associate Marx with this view. *See* STEIN & SHAND, *supra* note 20, at 215.

> Marx's argument was directed especially at the fact that under capitalism it is not the maker of the product but others who are entitled to it. He thus echoed the doctrine of the natural lawyers, such as Locke, that a man should have no right of property that is not the fruit of his labour.

Id.

[FN89]. *Cf. id*. at 212 (“According to Sydney Smith, Mr. Justice Best in the early nineteenth century considered spring guns ‘lawfully applicable to the protection of every species of property against unlawful trespassers'.”). Justice Best later denied having maintained this view. *Id*. at 217. And, today, the law usually prohibits one from injuring another merely because that person is a trespasser or has even taken one's nonfacultative resources.

[FN90]. *See, e.g.*, BETHELL, *supra* note 10, at 248-56. Observers termed “torturously high” rents as “rack” rents in reference to the torture device. *Id*. at 251.

[FN91]. Note that in the preceding text paragraph the examples given that suggest property permits unconscionable human abuse are quite specific, whereas the support for property proffered in this paragraph is of the “general welfare” or “common good” variety. This dichotomy between specific and general effects often shows up practice in those who reject or embrace a strong property system. *See, e.g.*, ARTHUR TWINING HADLEY, ECONOMICS 17 (1877):

> The difference between individualists [who support the exclusive nature of property] and socialists [who oppose this exclusivity in resources] is largely a matter of temperament. It comes from a difference in constitution which leads the individualist to calculate the large and remote consequences of any measure and ignore the immediate details, while the socialist feels the immediate details so strongly that he distrusts the somewhat abstract lines of thought which the individualist is prone to follow.

Id. The fact is that a strong property system may stimulate society to the greatest potential for the generation of maximum resources but at the same time allow specific individuals (and those dependent on them) to fail in securing resources adequate to their support.

[FN92]. *See supra* note 24.

[FN93]. *See supra* notes 57-60 and accompanying text. Compare the definition of property in the Austrian Civil Code, quoted in ELY, *supra* note 73, at 105: “[P]roperty is the liberty to do with the substance and uses of a thing according to one's wants and desires and to exclude every other person therefrom.”

[FN94]. In this sense, property is a negative exclusionary right in the same way that freedom of speech is.

[FN95]. In other words, the rules that implement the right to exclude are not in themselves “property.”

[FN96]. This assertion is not completely correct. For example, under the homesteading laws, Congress gave specific resources--the uses of land--to private persons. Homestead Act of 1891, ch. 561, sec. 161, 26 Stat. 1097 (repealed 1976). However, because these public holdings entered the private realm of property, they have remained private, and it is generally accurate to claim that through “property” implementation and enforcement the government does not positively grant resources. Instead, facultative human efforts and imagination that is also called “labor,” generate resources.

[FN97]. Conceive property as a metaphorical blanket that protectively covers the limited resources that people need or want. Underneath the blanket, persons possess, use, trade, gift, and, significantly, create and produce new resources. Covered by that blanket, some persons acquire, create, and produce more resources than others, and as long as they do so without coercion, theft, or deception, the state protects them, allowing them to exclude both others and the state itself from these resources. Understanding property as a protective exclusionary blanket emphasizes that it is a right equally covering everyone and prevents the cardinal confusion of property itself with the resources that property protects.

[FN98]. For example, although Blackstone referred to property as a right of "absolute dominion," he did not mean that there could be no limits imposed on private resources. Rather, he describes property as consisting of one's "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land*." II BLACKSTONE'S COMMENTARIES, *supra* note 63, at 137 (emphasis added). In his view of property as "absolute dominion," Blackstone was likely reflecting on the Magna Carta right that certain the government could not take resources from him (especially by the monarch) except through "due process," or rather according to the "laws of the land" that were sovereign even over the monarch. Other laws of the land could also limit the legal right of property. See the famous opinion of Lord Chancellor Charles Pratt in *Entick v. Carrington*, 19 Howells St. Trials 1029, 1066 (1765) ("The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, *where it has not been taken away or abridged by some public law for the good of the whole*." (emphasis added)). *Cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 87 (1921) ("Property, like liberty, though immune under the Constitution from destruction, is not immune from regulation essential for the common good."). These statements recognize that property has no meaning outside of society because the right to exclude implies a society of others to excluded. The limitations on property suggested by phrases like "the common good" or "the good of the whole" do not, however, suggest redistribution regulation, which defeats property's purpose of generating prosperity and freedom. Instead, the limitations are those necessary to protect the equal property right of others to their resources (nuisance regulation for example) and for taxation to support the broad property system.

[FN99]. The Constitutional Framers agreed that the meaning of property implies that the equal right of others limits a person's property right. *See, e.g.*, Madison, *supra* note 57 (asserting that in property's "larger and juster meaning, it embraces everything to which a man may attach a value and have a right and *which leaves to everyone else a like advantage*"); SCHLATTER, *supra* note 5, at 197-98 (quoting Jefferson that "a right to property is founded in our natural wants, in the means with which we were endowed to satisfy those wants, and the right to what we acquire by those means *without violating the similar rights of other sensible beings*" (emphasis added)). Contemporary property theorists also recognize "like advantage" limits appropriate to the very definition of "property." *See* BECKER, *supra* note 34, at 15 (referring to "robust" property systems that "make guarantees only that people are entitled to the produce of their labors *if* they can labor without trespassing on property [resources] previously acquired by others"); *see also* PENNER, *supra* note 20, at 72 ("The [exclusionary] thesis is not a denial of the fact that an owner's use of property may be circumscribed in various ways, for example by planning restrictions on land use, or by speed limits on highways."); STEIN & SHAND, *supra* note 20, at 208 (quoting John Erskine's *Institutes of the Law of Scotland* that "the law interposes so far for the public interest that it suffers no person to use his property wantonly to his neighbour's prejudice"); Cohen, *supra* note 35, at 362 ("[I]f any property owner could really do anything he pleased with his own property, the rights of all his neighbors would be undermined .... In fact, private property as we know it is always subject to limitations based on the rights of other individuals in the universe."). That a strong property system also allows the state "to secure public resources" means only that it may be necessary for the state to prevent private individuals from using their resources to harm the general environment or other public assets.

[FN100]. The American Constitutional Framers probably held this view of a strong property regime, but it dates back to at least 1603. *See* SCHLATTER, *supra* note 5, at 110 (paraphrasing the *Politica Methodice Digesta* of Johannes Althusius, "perhaps the greatest of Calvinist political theorists," that "the ruler is not the owner, but the defender of his subjects' goods, and he may take in taxes only the sum required to provide for the public necessities").

[FN101]. In other words, the more the state forces individuals to share their resources with the community, the

less comprehensively the exclusive right of property applies to the various resources in society, but the meaning of "property" does not change. It remains the right to exclude others from specifiable private resources. In emotional content, "property" is a powerful word, and it may be understandable from a political standpoint that those who support resource redistribution have attempted to ally the word with their favored redistributions. Thus, Charles Reich advocated making welfare transfers into "property." *See* Reich, *supra* note 74. Whether or not these redistributions of resources would advance justice or promote the common good is debatable, but it hardly serves the purposes of adequate definition to call them "property," certainly not in considering the essential core content of the word.

[FN102]. Those who reject the "commodification" of certain resources--those who oppose the selling and buying of particular aspects of one's body or one's work as dehumanizing objectifications of life--are not rejecting the definition of property, only property's *application* to specific resources. For anticommodification views, *see* DAVID P. ELLERMAN, PROPERTY AND CONTRACT IN ECONOMICS (1992) (comparing the employee status to slavery and arguing that human actions should not be transferable like the services of things); *see also* MARGARET JANE RADIN, CONTESTING COMMODITIES (1996) (maintaining that government should not be permit the private market sale of sex and body parts). Note that according to these views, property still exists in body parts and human services in the sense that the owner can partially exclude others from them, but the property right has been weakened in that the owners of these resources are no longer able to exclude others from interfering with the exchange of these resources in the private market. The objections to property in the exchange of these resources are moral rather than definitional.

[FN103]. *See* JOHN MCDERMOTT, CORPORATE SOCIETY: CLASS, PROPERTY, AND CONTEMPORARY CAPITALISM 75, 78-79 (1991):

> [N]o individual holds those [property] rights nor can their ownership be ultimately traced to any family or families. They are exercised by a collectivity, top management, which to all intents and purposes exercises the classic rights of property over those relationships .... Collective property forms [as exist in modern corporations] are not really reducible to private property. In other words, by analyzing backward from owned property through the owning relationships we do not eventually find individuals exercising individual property rights as the ultimate basis for the whole structure."

Id. McDermott's view of corporate holding of resources as changing the nature of property due to managerial control has a long lineage. *See, e.g.*, ADOLF A. BERLE JR. & GARDNER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6-7 (1933) (asserting that "the quasi-public corporation may fairly be said to work a revolution. It has destroyed the unity that we commonly call property--has divided ownership into nominal ownership and the power formerly joined to it."). McDermott does not think that the legal duty owed by top management to please the shareholders at the risk of losing their jobs keeps top management from effectively owning the resources of the corporation. MCDERMOTT, *supra* note 103, at 87. He believes that the essence of property is power and that because management of large corporate resources gives managers a powerful influence over employees, managers have the effective property in the corporation. The analogous Marxist expression of this view considers employees so influenced to be "wage slaves," themselves the objects of the power that is property. On the other hand, the property-as-exclusionary-right analysis observes that agent-managers had better please the shareholders or get fired (be excluded from the salaries, stock options, and other amenities of their jobs). McDermott responds that "[t]he idea that the stockholders control the business has long since been dropped by most knowledgeable observers." *Id*. The reader should take notice that stockholder-controlled boards of directors annually fire numerous top managers of the nation's largest companies. *Cf*. Keith Naughton, *The CEO Party is Over*, NEWSWEEK, Dec. 30, 2002, at 55 ("There will be more CEO firings this

year as previously passive corporate boards get tough with the boss predict ... corporate governance experts."). The abuse of shareholder resources by the managers of Enron, Worldcom, and others simply shows the need to strengthen the property shareholders have in these resources.

[FN104]. From the perspective of a strong property system--one in which all persons have a well-enforced exclusionary right in both facultative and nonfacultative resources--in an instance when workers feel abused by organized corporate investors or their agents, their obvious response should be to quit or to organize the resources in which they have property--themselves, into a powerful organized counterpoint to the corporation, that is, the union. In a strong property system, both investors and employees can organize their resources, and if employees choose not to do so, the most reasonable assumption is that they accept as satisfactory their property relations with the corporation, the socialist protestation of "false consciousness" notwithstanding.

[FN105]. *Cf.* PIPES, *supra* note 46, at 235.

> The modern holder of one hundred shares in a billion-dollar corporation is part owner of that corporation, even if to an infinitesimal degree, because he can at a moment's notice sell the shares on the open market. The notion that ownership requires personal management is as erroneous as would be the notion that democracy demands of each citizen personally to participate in legislation. ...

Id.

[FN106]. However with physical things that flow freely, resource boundaries can be difficult to establish, and the right to exclude may not exist. Thus, oxygen in the atmosphere is generally not subject to the property right, whereas oxygen in a bottle for scuba diving or use as a propellant in an aerosol can is subject to property. Property rules relating to accretion and confusion also illustrate ways of setting boundaries for establishing ownership regarding fluid or amorphous resources. For a different view of the necessity for resource boundaries, see Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165 (1999) ("Hidden within the law ... is a boundary principle that limits the right to subdivide private property into wasteful fragments.").

[FN107]. *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK & RELATED STATE DOCTRINES 124-25 (4th ed. 1997).

[FN108]. *See id.* at 244-48.

[FN109]. *Cf.* BECKER, *supra* note 34, at 7 ("Indeed, many writers on property ... begin with remarks to the effect that, were it not for scarcity, there would be no need for the institution of ownership."). Becker also asserts that "exhaustibility" plays "a very large consideration in specific justifications" for instituting property in a resource. *Id.* at 109; *cf.* Cohen, *supra* note 34, at 364 ("[I]f we could create a situation in which no man lacked for bread, bread would cease to be an object of property. ..."). Exhaustibility is in fact a de facto if not a de jure characteristic of a resource subject to property.

[FN110]. *See* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 218-33 (2001).

[FN111]. *See supra* note 99.

[FN112]. *E.g.*, MILL, *supra* note 19, at 370 ("According to the fundamental idea of property, indeed, nothing ought to be treated as such, which has been acquired by force or fraud, or appropriation in ignorance of a prior title vested in some other person. ..."). When a property system seems to permit such wrongful acquisition, it is

not due to the concept of property but to an imperfect or corrupt enforcement of it.

[FN113]. *E.g.*, HENRY R. CHEESEMAN, CONTEMPORARY BUSINESS LAW 844-47 (3d ed. 2000). When disputes arise concerning the chronology of ownership, the doctrines of prescription and adverse possession also assist in identifying who has properly acquired resources and may legally exclude others. *See id*. at 871, 874.

[FN114]. In other words, the definition of property need not specify which of an apparently limitless set of resources property will protect. To insist that it do so is just another manifestation of the confusion of "property" with "resources," or "thingness." Instead, the issue is how property applies to various resources, the issue historically involving whether it is more desirable for individuals to be as equal as possible in the nonfacultative resources available to them or for society generally to be as prosperous as possible in terms of such resources.

[FN115]. Thomas Hobbes claimed: "Of things held in propriety, those that are dearest to a man are his own life, & limbs. ..." HOBBES, *supra* note 84, at 382-83. John Locke wrote of being a "proprietor of his own person." LOCKE, *supra* note 11, at 27; *cf*. GRUNEBAUM, *supra* note 30 ("In private ownership each person owns himself or herself; that is, each person has the right to decide how he or she is to labour, and has the right to exchange his or her labour for goods or money with whoever will pay."). For support of the view that property applies to the self, see generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); MURRAY ROTHBARD, THE ETHICS OF LIBERTY (1982). For rejection of self-ownership, see generally C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962); Alan Ryan, *Self-Ownership, Autonomy, and Property Rights*, 11 SOC. PHILO. & POL'Y 241 (1994). The arguments for and against self-ownership presented in these works chiefly focus on the justifications for property in various resources rather than property's definition, and they go beyond the purview of this essay.

[FN116]. Madison, *supra* note 57, at 101.

[FN117]. IV BLACKSTONES COMMENTARIES, *supra* note 63, at 1.

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Essay

*339 NOZICK: A UTILITARIAN REFORMULATION

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I. Introduction

Robert Nozick's Anarchy, State, and Utopia [FN1] is a forceful libertarian polemic against income redistribution. [FN2] One striking aspect of this famous book is that it purports to rely not at all on considerations of social utility. [FN3] I will contend, however, that Nozick's polemic can usefully be seen as a utilitarian response to arguments for redistribution, and in particular as a utilitarian response to the utilitarian case for redistribution. [FN4]

The utilitarian case for redistribution is founded on the diminishing marginal utility of money. [FN5] The poor, it is argued, need money more than the rich do. Moreover, it is claimed, the poor gain more in well-being from redistribution than the rich lose. [FN6] Therefore, redistribution increases aggregate well-being, at least up to a point. [FN7]

***340** This essay discusses the means by which Nozick implicitly denies the conclusion that redistribution increases aggregate well-being. Part I shows how Nozick exaggerates the burden that redistribution places on the rich. Part II shows how he minimizes the needs of the poor, and further minimizes the suffering his system could cause. [FN8] Part III compares Nozick's implicit utilitarian arguments against redistribution with Jeremy Bentham's explicit reservations about redistribution.

Of course, Nozick is not a utilitarian. He would object to redistribution even if it relieved enormous suffering among the poor and imposed only the most negligible of burdens on the rich. But Nozick does not describe redistribution in these terms, even hypothetically. He describes it instead as immensely burdensome and as not providing very great benefits. He thus tries to enlist utilitarian sentiments in support of his polemic, even while abjuring and indeed attacking utilitarianism. [FN9]

It is a tired conceit of philosophers that the views of others must implicitly conform to their own views in order to have any appeal. [FN10] As I will be indulging this conceit with respect to Nozick and my own utilitarian views, I should perhaps offer something by way of justification. First, Nozick does not tell us the origin of the stringent rights on which he relies; he admits in his preface that he “does not present a precise theory of the moral basis of individual rights.” [FN11] The closest Nozick comes to a statement of the origin of rights is a brief and vague passage in which he suggests that constraints against ill-treatment are “connected with that elusive and difficult notion: the meaning of life.” [FN12] Nozick's failure to tell us the origin of his rights opens the door somewhat to an argument that the appeal of those rights is ultimately based on considerations of aggregate

well-being.

***341** Second, Nozick himself is willing to look behind the explicit arguments of his opponents. Nozick claims that envy is at the root of egalitarian theories, [FN13] and in particular John Rawls' theory. [FN14] To those who say that egalitarian principles are "separately justifiable" without regard to "disreputable psychology," Nozick replies in part by noting the "great ingenuity with which people dream up principles to rationalize their emotions . . . ." [FN15] As Nozick is willing to find hidden elements in opposing theories, he cannot in principle complain when I do the same to his theory. And I am more charitable than Nozick. He considers the imputation of envy to be an insult; I consider the imputation of concern with aggregate well-being to be a compliment.

II. Exaggerating the Burdens of Redistribution

A. WHAT DO THE RICH LOSE?

Nozick subscribes to what he calls the "classical liberal" view that the right of people to control their own bodies and actions is a property right, the right of self-ownership. [FN16] He claims that a redistributive system invades that right, making others "a part-owner of you . . .giv[ing] them a property right in you." [FN17] A redistributive system, according to Nozick, institutes partial "ownership by others of people and their actions and labor." [FN18] In a similar vein, Nozick argues that taxation of labor income is "on a par with forced labor." [FN19]

The idea of self-ownership, as conventionally understood, has two important and related connotations: self-ownership is very valuable, and it is not easily divisible. [FN20] Because of these powerful connotations, Nozick's claim that redistribution violates self-ownership poses an implicit utilitarian challenge to the utilitarian case for redistribution outlined above. The utilitarian case for redistribution assumes something like a hierarchy of value in property, with respect to the contribution that property makes to well-being. The least valuable property, dollar for dollar, is money that represents the superfluities or luxuries of the rich. Higher in value per ***342** dollar are the comforts of the middle class, and still higher are the basic necessities of people who are poor, but living above subsistence level. Highest of all in value are the material resources needed for subsistence. The consequence, of course, is that redistributing income from rich to poor takes from the rich what is low in value and gives to the poor what is high in value.

But what is the place of self-ownership in this hierarchy of value in property? Under a conventional conception, its place is very high. Some might even value self-ownership more than a subsistence income; presumably, this ranking of preferences would be revealed by their refusal to sell themselves into slavery in order to survive. In any case, it seems that self-ownership would be among the most valuable of property rights.

In claiming that redistribution violates self-ownership, therefore, Nozick attempts to telescope the hierarchy of value in property that supports the utilitarian case for redistribution. Instead of taking from the rich the least valuable type of property, he implies, redistribution takes from them what is most valuable. Redistribution does not impose only a minor burden on the rich, it strikes at the core of their being.

1. Redistribution of Spouses

In aid of his attempt to show that redistribution of income takes something very valuable from the rich, Nozick compares income redistribution to other, more fanciful types of redistribution that would in fact take something very valuable. One of Nozick's favorite examples, which he uses no less than four times, is the redistribution of spouses, or of the right to choose one's spouse. [FN21] Redistribution of spouses would have the features that Nozick would like to impute to redistribution of money. Such redistribution would take from each spouse something of very high value: there is no greater tragedy, for many, than to lose one's wife or husband. Redistribution of spouses would also subject the redistributed spouse to a kind of slavery, forcing him or her into the most intimate of relationships. And of course, spouses are not readily divisible; it is hard even to conceive of taking the least valuable part of a spouse and redistributing that part to someone who needs it more. It is easy to see why Nozick would like to use the redistribution of spouses as a model for the redistribution of money. One begins to have visions of money, when it is separated from its former rich owner, declaiming, “Unhand me, you fiend, . . . I swear, I will someday be reunited with my beloved!”

***343** 2. First Money, Then Spouses and Body Parts

Nozick's repeated references to the redistribution of spouses also point to another element of his portrayal of redistribution. He attempts to fan insecurity about redistribution by suggesting that even if the money a redistributive system takes from the rich taxpayer is not enormously valuable to him, theories of distributive justice that permit redistribution of money could also permit redistribution of more valuable things, such as spouses. Thus, if redistribution of property is allowed, as under a Rawlsian system, there is no security against “forceable redistribution of bodily parts.” [FN22] Or again, if we allow interpersonal utility comparisons to argue for redistribution, we all risk being sacrificed in the maw of “utility monsters,” those “who get enormously greater gains in utility from any sacrifice of others than these others lose.” [FN23] These horrific images can be seen as the second line of an implicit utilitarian defense against redistribution. Despite Nozick's other arguments, we might still be convinced that we should redistribute money from the rich, who do not really need it, to the poor, who really do need it. But we had best not attempt any such redistribution, lest the utility monster gobble us all up.

B. MISTREATING WILT CHAMBERLAIN'S FANS

Yet another way in which Nozick portrays redistribution as decreasing aggregate well-being is by suggesting that it frustrates the desires not only of the rich taxpayer, but also of those who have chosen to transact with the rich taxpayer. In his famous Wilt Chamberlain example, Nozick asks the proponent of redistribution to imagine a distribution of holdings that comports with justice. Against the background of this distribution, Nozick continues, imagine that Wilt Chamberlain has a contract with his team under which fans must pay twenty-five cents out of each admission ticket directly to him. Suppose that one million fans cheerfully pay this quarter directly to Wilt Chamberlain, “and Wilt Chamberlain winds up with $250,000, a much larger sum than the average income and larger even than anyone else has.” [FN24] Under these circumstances, Nozick asks, isn't the new distribution just? Moreover, he means to ask, wouldn't it be unjust to redistribute money from Wilt Chamberlain to poorer citizens? After all, Nozick observes:

> ***344** [e]ach of [the fans] chose to give twenty-five cents of their money to Chamberlain. They could have spent it on going to the movies, or on candy bars, or on copies of Dissent magazine, or of Monthly Review. But they all, at least one million of them, converged on giving it to Wilt Chamberlain in exchange for watching him play basketball. [FN25]

Nozick intends the Wilt Chamberlain example as a refutation of what he calls “patterned” conceptions of

distributive justice, including utilitarianism. The example itself, I believe, does not actually undercut the utilitarian case for redistribution. To the utilitarian, just social rules are those that tend to maximize well-being. A rule permitting private exchange is just because private exchange promotes well-being. Even better, however, is a system that combines private exchange and some degree of redistribution. Thus, the redistribution of a percentage of Wilt Chamberlain's income is fair and just for precisely the same reason thatthe exchanges that increased Wilt Chamberlain's income are fair and just: both are effected pursuant to social rules that increase well-being.

Although the Wilt Chamberlain example does not undercut the utilitarian case for redistribution, it does have a certain force. I believe its force partly derives from Nozick's suggestion that by taxing Wilt Chamberlain, the government is harming not merely him, but the people who have transacted with him. Nozick somehow makes it seem as though Wilt Chamberlain's fans have not only chosen to pay him to see him play basketball, but have also chosen that the money they pay him will not be redistributed to the poor. He somehow makes it seem as though taxing Wilt Chamberlain would interfere with the relationship between Wilt Chamberlain and his fans, not merely the relationship between Wilt Chamberlain and his money. This is once again a reversal of the conventional utilitarian conception of redistribution. Under the conventional conception, redistribution can help many more people than it hurts. The tax receipts from one millionaire can feed hundreds of hungry people. Nozick would like to suggest that it is the other way around: redistribution hurts more people than it helps.

II. Minimizing the Need of the Poor

The implicit utilitarianism of Nozick's argument against redistribution can also be seen when we move to the other side of the redistribution ***345** ledger. Not only does Nozick portray the harm done to the rich taxpayer as monumental, he also minimizes the need of the poor. Further, he minimizes the misery his own system could permit.

A. STARVATION

The question that comes immediately to mind when one learns of Nozick's absolute opposition to redistribution is whether Nozick is prepared to see people starve to death. Evidently, Nozick is indeed prepared to tolerate starvation if the only alternative is redistribution, but he does not squarely confront this issue. The closest he comes is a glancing reference to starvation in the midst of a fable about Robinson Crusoes:

> If there were ten Robinson Crusoes, each working alone for two years on separate islands, who discovered each other and the facts of their different allotments by radio communication via transmitters left twenty years earlier, could they not make claims on each other, supposing it were possible to transfer goods from one island to the next? Wouldn't the one with least make a claim on ground of need, or on the ground that his island was naturally poorest, or on the ground that he was naturally least capable of fending for himself? Mightn't he say that justice demanded he be given some more by the others, claiming it unfair that he should receive so much less and perhaps be destitute, perhaps starving?. Rather than its being the case that no one will make such claims in the situation lacking social cooperation, perhaps the point is that such claims clearly would be without merit. [FN26]

Nozick is arguing here against Rawls. He is taking the position that social cooperation does not “create the problem of distributive justice.” [FN27] It is revealing, however, that Nozick is only willing to consider the pos-

sibility that someone will starve for want of redistribution after he has thoroughly stacked the deck against redistribution. In the Robinson Crusoe fable, there is no state in existence, not even the minimal state favored by Nozick. It is unclear how redistribution can be effected, by whom and at what cost. Therefore, it is hard to conceive of redistribution as a solution for starvation and need. Nevertheless, even with the deck thus stacked, Nozick is not at all successful, as I see it, in extinguishing the utilitarian intuition that ***346** redistribution, if it could somehow be accomplished, would be justified to prevent one of the Robinson Crusoes from starving.

B. SLAVERY AND WORSE

Nozick is similarly understated in confronting two other miserable consequences that could plausibly result from his system: slavery and horrific debt collection practices. The casual reader of Anarchy, State and Utopia will notice that Nozick believes that redistribution, in some metaphorical sense, is akin to slavery. The casual reader may not notice, however, that Nozick is prepared to tolerate real slavery, as long as the slave has contracted to be a slave. [FN28] Nozick believes that people own themselves fully. It follows, according to Nozick, that people can sell themselves into slavery, possibly in exchange for food, and that the state should enforce such contracts. But Nozick does not explicitly announce his condonation of contractual slavery until page 331 of Anarchy, State and Utopia, in a digression from his discussion of utopia. Even then, he sugar-coats the message:

> The comparable question about an individual is whether a free system will allow him to sell himself into slavery. I believe that it would. (Other writers disagree.) It also would allow him permanently to commit himself never to enter into such a transaction. [FN29]

Note how Nozick diverts attention from his condonation of slavery by implying that the reader can reject that particular position while accepting all of the rest of Nozick's arguments.

Actually, slavery may not even be the most horrible contractual relationship that Nozick condones. He evidently would also accept loan agreements in which the creditor has the right to do unspeakable things to the debtor if the debtor does not and cannot pay. [FN30] That is the upshot of a footnote in which Nozick makes an elliptical reference to Shakespeare's Merchant of Venice:

> Lacking other avenues of redress, one may trespass on another's land to get what one is due from him or to give him what he deserves, provided that he refuses to pay or ***347** to make himself easily available for punishment. B does not violate A's property right in his wallet by touching it, or by opening its seal if A refuses to do so, in the course of extracting money A owes him yet refuses to pay or transfer over; A must pay what he owes; if A refuses to place it in B's possession, as a means to maintaining his rights, B may do things he otherwise would not be entitled to do. Thus the quality of Portia's reasoning is as strained in holding that Shylock is entitled to take exactly one pound of flesh but not to shed a drop of Antonio's blood as is the quality of her mercy as she cooperates in requiring that to save his life Shylock must convert to Christianity and dispose of his property in a way hateful to him. [FN31]

Evidently, then, Nozick is prepared to see the creditor take a pound of flesh from his debtor, or boil the latter in oil, or do whatever else the loan agreement may provide as a remedy for nonpayment. But this view is cached in a convoluted sentence of an obscure footnote, and might therefore escape the casual reader.

In the Preface to Anarchy, State, and Utopia, Nozick writes that “intellectual honesty demands that, occasionally at least, we go out of our way to confront strong arguments opposed to our views.” [FN32] In his discussion of Rawls, Nozick insists that we “try out principles in hypothetical microsituations.” [FN33] Nozick appears to violate both of these strictures. He goes out of his way to conjure up fantastical counterexamples to op-

posing theories. However, he fails to confront squarely the suffering that plausibly could exist under his system, as the result of starvation, slavery and horrific debt collection practices.

III. Loss and Insecurity in Bentham and Nozick

The foregoing may suggest that while Nozick presents an implicit utilitarian response to the utilitarian case for redistribution, that response is completely false. Nozick is simply wrong, it may be thought, to pretend that the rich lose more from redistribution than the poor gain. In fact, Nozick's account, while grossly exaggerated, draws on the force of valid utilitarian reservations about redistribution.

***348** Jeremy Bentham, the father of modern utilitarianism, was not a big fan of income redistribution. Bentham accepted, of course, that money has diminishing marginal utility. However, Bentham was concerned about two aspects of the redistributive experience which suggested to him that those whose property is taken to support the poor might nevertheless lose more than the poor gain. First, losses hurt more than gains help. Second, and more importantly, redistribution attacks security. In view of these aspects of redistribution, as well as its negative effect on work incentives, Bentham thought that support for the poor should be limited to providing them with the means of subsistence. [FN34]

In redistribution, the rich lose while the poor gain. Therefore, Bentham realized, it is not enough to compare the utility a richer individual derives from a dollar possessed with the utility a poorer individual derives from a dollar possessed; we must compare the utility a richer individual loses from a dollar lost with the utility a poorer individual gains from a dollar gained. Bentham believed that losses are more salient in their effect on happiness than are gains. All else being equal, "[i]t is worse to lose than simply not to gain." [FN35] In recent years this insight of Bentham's has found empirical validation in the work of experimental psychologists. Experiments have shown that people are more concerned with avoiding losses than with obtaining gains, beyond even what the diminishing marginal utility of money would suggest. [FN36]

In describing the "pain of loss," Bentham foreshadows Nozick's image of redistribution as an invasion of bodily integrity:

> Every thing which I actually possess, or which I ought to possess, I consider in my imagination as about to belong to me for ever: I make it the foundation of my expectation of the expectation of those who depend upon me, and the support of my plan of life . . . our property may become, as it were, part of ourselves, and cannot be taken from us without wounding us to the quick. [FN37]

***349** The greater salience of losses over gains is a reason to be cautious in the redistribution of income. A related and even more important reason for caution, in Bentham's view, is that redistribution attacks security. Bentham thought that if the rich were subjected to redistributive taxation beyond what was necessary to provide subsistence to the poor, the rich would be consumed with fear that their entire fortunes would be confiscated. In a manner that again foreshadows Nozick, Bentham raises the specter of constant and unsettling state intervention to achieve redistribution:

> In consulting the grand principle of security, what ought the legislator to direct with regard to the mass of property which exists?
>
> He ought to maintain the distribution which is actually established . . . . For how shall a different distribution be made, without taking from some one what he possesses? How shall one party be stripped, without attacking the security of all? When your new distribution shall be disarranged, which it will be

> the day after its establishment, how will you be able to avoid making a second? Why should you not correct this also? and, in the meantime, what becomes of security? of happiness? of industry? [FN38]

The modern experience of the welfare state has shown Bentham's concerns about redistribution to be somewhat overblown. Tax rates are relatively predictable; they vary from year to year only within a narrow range. The rich in developed countries face no real risk of losing their entire fortunes (to the government, at any rate), and they know it. And one should also not ignore the extent to which welfare-state redistributive programs have provided additional security to the poor and the middle class.

However, it is one thing to conclude that concerns about loss and insecurity are overblown, or have been successfully addressed by the welfare state, and quite another to ignore such concerns altogether. Unfortunately, modern utilitarian economists sometimes convey the impression that security is not even a value, that the only considerations relevant to achieving ***350** optimum income redistribution are the diminishing marginal utility of money and the incentive effects of taxes and transfers. [FN39] This approach gives false appeal to natural-rights theories of distributive justice such as Nozick's. To the extent that utilitarianism appears to abandon security as a value, natural rights theories that appear to safeguard security can have a free ride on utilitarian intuitions.

Conclusion

Previous commentators have observed that Nozick's apocalyptic depictions of redistribution are strained. [FN40] It is not often recognized, however, that one conclusion toward which Nozick seems to be straining is that redistribution decreases aggregate well-being. [FN41] This implicit utilitarian argument against redistribution pervades Nozick's examples, whether he is exaggerating the burdens of redistribution or minimizing the pain that a rule against redistribution could cause. Nozick is not a utilitarian, but he deceptively draws on the intuitive appeal of utilitarianism in constructing his anti-utilitarian political philosophy.

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[FN1]. Robert Nozick, Anarchy, State, and Utopia (1974).

[FN2]. Nozick, like his fellow political philosophers Rawls and Dworkin, has had a significant impact on the legal academy. See, e.g., Donna M. Byrne, Progressive Taxation Revisited, 37 Ariz. L. Rev. 739, 782-86 (1995); John Stick, Turning Rawls into Nozick and Back Again, 81 Nw. U. L. Rev. 363 (1987); Richard A. Posner, Utilitarianism, Economics and Legal Theory 8 J. Legal Stud. 103, 131 (1979).

[FN3]. Indeed, in responding to Richard Epstein's claim that natural-rights theories owe a considerable debt to utilitarianism, Erick Mack has pointed to Nozick as a theoretician who owes little if anything to utilitarianism. See Erick Mack, Comment: A Costly Road to Utilitarianism, 12 Harv. J.L. & Pub. Pol'y 753, 755 (1989); Richard A. Epstein, The Utilitarian Foundations of Natural Law, 12 Harv. J.L. & Pub. Pol'y 713 (1989).

[FN4]. Utilitarianism seeks to maximize the aggregate well-being or happiness in society. For a fuller definition of utilitarianism, from one of its most astute critics, see Amartya Sen, On Ethics and Economics 39 (1987).

[FN5]. For a classic modern statement of this case, see Abba P. Lerner, The Economics of Control 26-32 (1944).

[FN6]. Some have denied that money has diminishing marginal utility. See Walter J. Blum & Harry Kalven Jr.,

The Uneasy Case for Progressive Taxation, 19 U. Chi. L. Rev. 417 (1952). I do not find this position persuasive. See Mark S. Stein, Diminishing Marginal Utility of Income and Progressive Taxation: A Critique of the Uneasy Case, 12 N. Ill. U. L. Rev. 373 (1992).

[FN7]. The negative incentive effects of redistribution must also be considered, such as its effect on the work effort of both poor and rich.

[FN8]. The world is not divided into rich and poor, but this essay is so divided, for the sake of simplicity.

[FN9]. Interestingly, Nozick makes scant reference to the negative incentive effects of redistribution. His implicit utilitarian repudiation of redistribution is more fundamental.

[FN10]. Dworkin has previously claimed that Nozick's theory has intuitive appeal only to the extent that it approximates Dworkin's own conception of equality of resources. See Ronald Dworkin, What is Equality? Part 2: Equality of Resources, 10 Phil. and Public Affairs 283, 336 (1981). But Dworkin offers little more than bald assertion in support of his claim. I will try to offer arguments in support of mine.

[FN11]. Nozick, supra note 1, at xiv.

[FN12]. Id. at 50. If Nozick means here that rights exist because they serve or promote meaningful lives, his argument is unpersuasive: will the rich be unable to lead meaningful lives if some part of their superfluities are redistributed to the poor? And if Nozick does not mean that rights serve or promote meaningful lives, it is unclear how the capacity to live a meaningful life generates rights.

[FN13]. Id. at 240.

[FN14]. Id. at 229.

[FN15]. Id. at 240.

[FN16]. Id. at 171-72.

[FN17]. Id. at 172.

[FN18]. Id.

[FN19]. Id. at 169.

[FN20]. Nozick does not necessarily accept these connotations, but he makes use of them through his imagery.

[FN21]. Nozick, supra note 1, at 237, 263, 269, 282.

[FN22]. Id. at 206.

[FN23]. Id. at 41.

[FN24]. Nozick, supra note 1, at 161.

[FN25]. Id.

[FN26]. Id. at 185.

[FN27]. Id.

[FN28]. Id. at 58-59, 331. For a striking example of the type of contractual slavery permitted under Nozick's system, see Thomas W. Pogge, Realizing Rawls 49-50 n. 50 (1989).

[FN29]. Nozick, supra note 1, at 331 (emphasis added).

[FN30]. Id. at 55.

[FN31]. Id. at 55 (2nd footnote).

[FN32]. Id. at x.

[FN33]. Id. at 204.

[FN34]. Jeremy Bentham, Principles of the Civil Code, in The Works of Jeremy Bentham (John Bowring ed., Edinburgh, 1838-43)[hereinafter Bowring], vol. I at 316. In his famous Panoptican project, Bentham would have provided more than simple subsistence, but the Panoptican residents would have been required to work. Panoptican is not an example of redistribution from rich to poor, so it is not treated here.

[FN35]. Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, preface at 3 (J.H. Burns & H.L.A. Hart eds., 1996).

[FN36]. Amos Tversky & Daniel Kahneman, Rational Choice and the Framing of Decisions, 59 J. Of Bus. S251, s258 (1986).

[FN37]. Bentham, supra note 34, vol. 1 at 310.

[FN38]. Id. at 311. Kelly argues that this passage is “not representative of Bentham's considered opinions,” P.J. Kelly, Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law 159 (1990). To the extent that the passage suggests an absolutist opposition to all redistribution, Kelly is of course correct. However, it is representative in the sense that Bentham always sees security as a powerful consideration militating against redistribution. See, e.g., Jeremy Bentham, Pannomial Fragments, in Bowring supra note 34, vol. III at 230.

[FN39]. See Joel Slemrod, Optimal Taxation and Optimal Tax Systems, 4 J. Econ. Perspectives 157 (1990) (survey of optimal tax theory). One major economist has even suggested, on utilitarian grounds, that a random element be introduced into the tax rate schedule, an idea that surely sent Bentham spinning in his grave. See Joseph E. Stiglitz, Utilitarianism and Horizontal Equity: The Case for Random Taxation, 18 J. Pub. Econ. 1 (1982).

[FN40]. See, e.g., Thomas Scanlon, Rights, Liberty, and Property, in Reading Nozick: Essays on Anarchy, State and Utopia 111 (Jeffrey Paul Ed., 1981). “Nozick tries to make such measures seem more alarming to us by tying them to more extreme forms of intervention.” Id.

[FN41]. Positions somewhat similar to mine, but considerably more moderate, are expressed in Ian Shapiro, The Evolution of Rights in Liberal Theory 151-203 (1986), and P.J. Kelly, supra note 38, at 9.

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Contemporary Political Theory and Private Law

Essay

*1391 PRIVATE ORDER AND PUBLIC JUSTICE: KANT AND RAWLS

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Introduction

PRIVATE law has a peculiar status in recent political philosophy. It is often said that the law of property and contract establishes basic, pre-political rights that must constrain the activities of states. This broadly Lockean view takes legitimate public law to be nothing more than private law in disguise: your relation to the state is modeled on the relation with any other person or organization that you might hire, alone or in combination with others. It is subject to the same norms of justice, and the same forms of criticism. The state can only make people pay for the services that it provides to those who request or freely accept them. Any other form of taxation is an unjust interference with property rights. This approach is embraced most avidly by libertarians, but it also occupies an important place in the public political discourse of the United States.

No less often, it is said that private law is just one of the activities of states, to be assessed in the same way as any other exercise of state power. Although this second approach has its roots in the utilitarian thought of Jeremy Bentham and John Stuart Mill, in recent decades non-utilitarians have also embraced it. John Rawls famously criticized utilitarianism for ignoring "the distinction between persons." [FN1] Many of his most ardent admirers in the academy have sought to put his social contract theory forward as an alternative***1392** to utilitarianism, while accepting the basic utilitarian perspective on private law as "public law in disguise." [FN2] Thus, they have sought to carry the structure of Rawls's theory into the minutiae of the law of tort and contract, and to deploy it against seemingly more ambitious conceptions of property. [FN3]

My aim in this Essay is to provide an alternative to these two prominent views. Each of them is right about something. Private rights protect an important kind of freedom. They are not simply bestowed on citizens by the state so as to increase prosperity or provide incentives. At the same time, their enforcement is an exercise of political power, for which society as a whole must take responsibility. If two inconsistent claims are both true, we are faced with what Immanuel Kant called an "antinomy." [FN4] The only way to overcome an antinomy is through a critique of the broader premise that thesis and antithesis share. [FN5] In this case, the source of the difficulty is that both the Lockean and utilitarian/egalitarian theories are based on the broader premise that law is an instrument for achieving moral ends that could, in a happier world, have been achieved without it. Both positions go wrong by supposing that the basic demands of political morality make no reference to institutions. The

Lockean view regards law as a remedy for the "inconveniences" of a state of nature; [FN6] the utilitarian and egalitarian typically regard it as a remedy for some combination of imperfect ***1393** information, selfishness, and high transaction costs. [FN7] Defenders of corrective justice have criticized instrumental theories of private law for their failure to capture the transactional structure of private law; [FN8] my aim is to broaden those criticisms. [FN9]

As my use of the term "antinomy" suggests, the alternative I will develop draws on Kant. As the title of this Essay reveals, I will draw on John Rawls as well. I will articulate Kant's account of the nature and significance of private ordering in relation to freedom. I will use this Kantian idea of private ordering to explain the place of private law in what Rawls has described as the "division of responsibility" between society and the individual. According to Rawls, society has a responsibility to provide citizens with adequate rights and opportunities; each citizen, in turn, is responsible for what he or she makes of his or her own life in light of those resources and opportunities. [FN10] I will argue that private law is the form of interaction through which a plurality of separate persons can each take up this special responsibility for their own lives, setting and pursuing their own conceptions of the good in a way consistent with the freedom of others to do the same. Private law draws a sharp distinction between nonfeasance and misfeasance: unless you owe a duty to another person, the effects of your conduct on that person ***1394** are irrelevant. I will explain this distinction in terms of an idea of voluntary cooperation. By focusing on the ways in which private law reconciles the capacity of separate persons to pursue their own purposes, I then will explain why private law is an essential part of what, for Rawls, is the fundamental subject of justice--the coercive structure of society.

I have made some of these arguments about private law elsewhere, [FN11] and will not rehearse them in their full detail here, because the other side of the division of responsibility is at least as important: if private order is a realm of freedom, how can the state be entitled to do anything, unless private persons hire it to do so? The main part of my argument will be concerned with showing why private ordering requires public justice. Drawing again on Kant, I will argue that private law is only a system of reciprocal limits on freedom, provided that those limits are general in the right way. Specifically, although the rule of law is often presented as a sort of instrumental good that provides various benefits, either to persons or societies, [FN12] I will argue that it is more than that. I will argue that the rule of law is a prerequisite both to enforceable rights being consistent with individual freedom and, more broadly, to a reconciliation of individual freedom among a plurality of persons. The use of force subjects one person to the choice of another, unless its use issues from a public standpoint that all can share. Turning once more to Rawls, I will argue that the best way to think about his emphasis on public provision of adequate rights and opportunities is in parallel terms: they are essential conditions to the very possibility of enforceable rights, because they are the moral prerequisites for a shared public sphere. The account I will develop draws out the implications of these Kantian and Rawlsian ideas, but its details are not explicitly developed in either of them.

***1395** I. Private Law, Moral Powers, and the Division of Responsibility

Widely accepted views in recent political philosophy make private law seem puzzling. In his brief characterization of corrective justice, Aristotle notes that a judge seeking to resolve a private dispute pays no attention to the wealth or virtues of the parties, but only to the particular transaction between them. [FN13] If a poor person wrongs a wealthy one, the poor one must pay the wealthy one. This suggestion that forcibly taking money from a poor person to give to a wealthy one could be a matter of justice strikes many people as bizarre, or incoherent. Both tort and property protect what people happen to have, without any thought about how they got it or what

they should have from a moral point of view. The law attends to the form of the transaction or holding, rather than the needs or interests of the parties to it.

The formality of private law stands in stark tension with prominent understandings of distributive justice. Rawls asks what parties in the original position would want by way of all-purpose means and opportunities, to enable them to exercise their moral powers over a complete life. [FN14] Amartya Sen focuses on capabilities and the functionings that means and opportunities make possible--again, asking what is required if people are to be able to achieve certain kinds of worthwhile ends. [FN15] Ronald Dworkin, in his theory of equality of resources, invites readers to imagine an auction in which all resources are allocated to the highest bidder, but then he introduces various forms of insurance against disastrous outcomes. [FN16] The insurance argument is, again, the introduction of a content-based conception. For all the many differences between Rawls, Sen, and Dworkin, they share a focus on substantive questions of what is needed to enable choice. Utilitarians focus instead on substantive questions about the good to be promoted, or the best means of ***1396** promoting it. All of these theories focus on how much each person needs, has, or can expect to have--all measures of what a person should have. That focus makes it difficult to see how any further demand of justice could require the state to change a person's distributive share.

As I shall now proceed to show, the entire puzzle is the product of a misunderstanding. In Social Unity and Primary Goods, Rawls introduces the idea of a "division of responsibility" between society and the individual. Rawls writes:

> [S]ociety, the citizens as a collective body, accepts the responsibility for maintaining the equal basic liberties and fair equality of opportunity . . . while citizens (as individuals) . . . accept the responsibility for revising and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation. This division of responsibility relies on the capacity of persons to assume responsibility for their ends and to moderate the claims they make on their social institutions in accordance with the use of primary goods. Citizens' claims to liberties, opportunities and all-purpose means are made secure from the unreasonable demands of others. [FN17] ***1397** Although the division of responsibility had attracted comparatively little attention from Rawls's commentators and critics, it is central to his vision of justice. The division of responsibility captures the distinctive place of individual responsibility in thinking about justice. [FN18] In his Reply to Alexander and Musgrave, Rawls says that the division of responsibility is "[i]mplicit in the use of primary goods" as the basis for distributive shares. [FN19] The entire problem of distribution is given by the idea that persons have private lives as well as public ones, and will take account of their entitlements as they pursue their separate purposes.

The idea that you have a special responsibility for your own life highlights two implicit contrasts. The first is the contrast between your responsibility for what you make of your life, and the responsibility of the state to ensure that you have the opportunity to pursue a successful life, by some measure or other. For example, a utilitarian might suppose that the responsibility of the state is to see to it that as many people as possible have happy lives, however exactly that is conceived. An advocate of theocracy might suppose that the state has a special responsibility to see to it that I have a life worthy of salvation, or at least that as many people as possible have that sort of life. One could imagine many such examples of worthwhile lives that fix the responsibility of the state for each person's life. Rawls is thinking of something very different. The two aspects of the division are parts of a single package: the state has a responsibility to see to it that people have the resources and opportunities necessary in order for each of them to take responsibility for their own lives. What they then go on to make of those lives is entirely up to them: provided that they do not interfere with the ***1398** choices of others, or the capacity

of others to make such choices, the state takes no interest in any particular person's decisions about how to live his or her life. That is the sense in which Rawlsian liberalism is “neutral” with respect to conceptions of the good. Neutrality is the consequence of a commitment to human freedom, rather than a premise in some argument in favor of granting freedoms.

By articulating the distinction between public and private in this way, the division of responsibility presupposes a further distinction within the private realm between the things for which I am responsible, and those for which some other private person is responsible. That division of responsibility among individuals is the concern of private law. If the pursuits of separate persons taking up their responsibility for their own lives come into conflict, the dispute is essentially a private one between the parties in question. Instrumental theories of private law take private disputes as a sort of windfall opportunity for achieving such broader social purposes as economic redistribution or the fine-tuning of optimal economic incentives. [FN20] Under the division of responsibility, insofar as such social aims are legitimate public purposes, they can be pursued by society as whole. Private disputes must be resolved between the parties in ways that preserve each party's special responsibility for his or her own life. The formal aspect of private law gives expression to a distinctive way of thinking about human freedom and independence. [FN21]

***1399** This second distinction reflects the relation between the two moral powers that Rawls emphasizes: first, the capacity to set and pursue a conception of the good and, second, the sense of justice. The latter is to be understood in terms of the readiness to assert my own claims, coupled with the readiness to acknowledge the equivalent ability of others to do the same. [FN22]

The two moral powers that Rawls makes central are both aspects of what Kant describes as the innate “right of humanity” in one's own person. [FN23] Kant describes this as the right to be free, where freedom is understood in terms of independence from another person's choice. The power to set and pursue your own conception of the good is Kant's right to independence: you, rather than any other person, are the one who determines which purposes you will pursue. The sense of justice, as Rawls describes it, is the capacity to recognize the rights of others, and, just as importantly, to stand up for your own rights. Kant describes this aspect of innate right in terms of what he calls “[r]ightful honor”--the principle of which is that you must never allow yourself to be used by another as a mere means. [FN24] For Rawls, as for Kant, citizens could not consent to a social world in which they were subject to the choices of others, or a world in which other citizens were entitled to determine their life prospects.

These constraints apply on both sides of the division of responsibility between society and the individual. Each person's special responsibility for his or her own life requires that each person be free to take up that responsibility, and not be subject to the choices of another. Society's responsibility for providing appropriate rights and opportunities***1400** requires that social life not create new relations of dependence, but instead guarantee that all can enjoy their freedoms together. [FN25] The ***1401** two moral powers thus limit the means available to the state in pursuit of public purposes. [FN26]

The two moral powers map onto Rawls's Kantian distinction between the rational and the reasonable. Rational persons are capable of taking up means to pursue their ends. In contrast, “[r]easonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others.” [FN27] The core idea of the reasonable is a limit on the means that a person would use in pursuit of his or her ends. As with the moral powers, the rational and the reasonable show up on both sides of the division of responsibility: I

can only be responsible for my own life if I am capable of taking up means to set and pursue my own purposes, but, as we shall see, my responsibility for my life demands that I accept constraints on the means I may use. Rawls explicitly mentions one such constraint: I may not demand extra resources from society on the grounds of the superiority of my conception of the good. But there are other, equally important limits on the means that I can use.

My capacity to set and pursue my own purposes must be rendered consistent with your ability to set and pursue yours. We cannot be required to reconcile our actual pursuits. Any such requirement would violate one or the other of our claims to set and pursue our own conceptions of the good by requiring one of us to adapt our pursuits to help some other person achieve his or her purposes. Instead, we avoid interfering with each other's person and property, and any cooperative interaction between us must be fully voluntary. I cannot use your person or property for my purposes without your consent, and you cannot use mine. We also need to take appropriate steps to avoid injuring each other. If either of us ***1402** violates either of these constraints, we force the other to bear some of the costs imposed by our choices.

II. Private Law, Nonfeasance, and Misfeasance

In order to apply the idea that each person has a special responsibility for their own life to transactions between private parties, we need some way of articulating the idea of interfering with another person, as well as the idea of taking advantage of another person. Both of these can, I will argue, be spelled out through the basic categories of private law, as they can be found in Roman law and modern civil law and common law systems.

The basic categories of private law serve to define and protect rights to person and to whatever property a person happens to have. Rights to person and property are essential to a specific conception of human freedom. Rawls makes this conception explicit when he talks about the moral power to "form, to revise, and to pursue a conception of the good, and to deliberate in accordance with it." [FN28] The idea of pursuing a conception of the good contrasts with the very different idea, central to non-liberal thought, of achieving the good. The Rawlsian emphasis on both pursuit and "a conception" of the good reflect his distinctive notion of how choice matters to interpersonal interactions. Rawls's language here echoes the distinction, introduced by Aristotle and developed by Kant, between wish and choice. [FN29] To wish for something is to desire that it should be so; to choose it is to take up means to achieve some particular or general outcome. To make this choice, you must first of all be able to conceive of it--hence talk about conception--and second, you must take yourself to have means adequate to achieving it. Secure means, and the ability to entertain possible uses for them and choose among them, marks off choice from mere wish. Setting and revising a conception of the good sounds like something someone might hope to do all in their head, quite independently of anything that goes on in the world or any actions by others. Rawls is after something different, not least because merely entertaining a conception of the good does not, in and of itself, raise any questions of justice between persons. It is only if you pursue your ***1403** conception of the good that questions of justice are engaged, because pursuit requires the availability of at least some means. The good, as you see it, may not be good for you; it may not be good at all. Nonetheless, setting and pursuing your own conception of the good is the most important exercise of your freedom, because you are the person who sets your own path in life. No other person can take it upon themselves to choose for you, precisely because it is your life. From the inside, as you set and pursue particular purposes, you think of them as being not just your conception of the good, but good. Rawlsian liberalism does not dispute that characterization but simply reserves for you the right to be the one who makes the judgment about which ends you will pursue. [FN30]

Rawls, like Kant, is silent about the worth of various ends, not because he supposes that they do not matter, but because the idea that each person has a special responsibility for his or her own life requires a focus not on the ends that people pursue, but on the means they use to pursue them. [FN31] The key idea of the division of responsibility is that private persons may only use their own means for setting and pursuing their purposes, and society as a whole may only use such means as are consistent with the freedom of separate persons.

Independence from another person's choice is important not because it is thought of as the best way of promoting successful choice, but rather because it implies the more general idea of reconciling the purposiveness of separate persons--each of whom has a special responsibility for his or her own life--through a set of reciprocal restraints. It is not put forward as an empirical hypothesis ***1404** about what is most likely to enable people to have control over their lives. [FN32] That is a problem with no general, systematic, or reciprocal solution. How much actual control you have over your life depends on the context in which you find yourself, and the particular things that you want. You might have a high degree of control over your life if you turn out to want exactly those things that are easiest for you to get. Instead, your independence from the choices of others is to be understood as your entitlement to be the one who decides which purposes you will pursue with the means that are at your disposal.

The idea that particular means are at your disposal introduces two further contrasts: First, between something being subject to your choice, and it being subject to some other person's choice. Second, there is a contrast between the means that are subject to your choice and the context in which you use them. The context in which you use your means is made up largely of the choices of other people, and the consequences of those choices. I am not entitled to compel another person to use his or her means in the way that best suits my use of my own means. I cannot compel you to refrain from opening a restaurant in order to make my use of my premises as a restaurant more successful; you cannot compel me to put up a fence to reduce your air-conditioning bills, or tear one down to protect your garden. Each of us is free to use our powers for our purposes, which means that neither can compel the other to use them in a particular way so as to provide a favorable context for ourselves. Instead, as I will explain in more detail below, any cooperation between us must be voluntary. That is the only way in which each of us can take up our own responsibility for our own lives in ways consistent with the ability of others to do the same. Independence from all of the effects of the choices of others as such is both an unappealing and unrealizable ideal. It is unappealing because it would preclude cooperative activities that require the agreement of both parties. It would be impossible because persons always use their means in a context that is shaped in part by other ***1405** people's choices. Independence as separateness and voluntary cooperation is both appealing and realizable.

The idea that each person has responsibility for his or her own life limits the means people are able to use for their purposes. In particular, my special responsibility for my life is only consistent with your special responsibility for yours if each of us is required to forbear from using the other, or from using means belonging to the other, in pursuit of our purposes. That is the very thing that the familiar departments of private law articulate. Thomas Hobbes and David Hume described private law as the law of “Mine and Thine.” [FN33] In our terms, it is the law of who has dominion over which means, in relation to others. Articulating those relations requires an account of how people can have means of their own, consistent with the independence of each person from the others. That is just what the law of contract, tort, and property do. I will not go through full detail, but rather simply point to the structure of contract, property, and tort in order to make this point. The analysis I offer will be brief, and will draw heavily on parts of Kant's division of “private right” in his Doctrine of Right. [FN34]

Kant's account provides the basis for an understanding of the remedial aspects of private law, but it is not, in

the first instance, a theory of liability rules, compensation, damages, or even duties of repair. Instead it is in the first instance an account of obligations: norms of conduct governing the interactions of free and equal persons. Those norms are relevant to the resolution of disputes, but the remedial norms of corrective justice follow the primary norms of conduct. It is thus not a backward-looking account that seeks to assign liability on the basis of past events, but a forward-looking one that guides the conduct of persons by delimiting the means available to them as against other private persons. [FN35]

Kant approaches private law through its relationship to freedom, understood as independence from the choices of others. [FN36] The idea ***1406** that there can be a system of equal freedom has fallen from favor in recent years, but Kant provides a corrective to such intellectual fashion by providing a clear and systematic explication of the distinctive ways in which free persons can interact, consistent with their freedom. In so doing, he provides an alternative to the familiar idea that private law can only be understood and evaluated in terms of its "functions," where these are understood as the benefits it is thought to provide. On the Kantian analysis, private law does not determine the optimal level of injury, encourage transactions, or even protect people from harm. [FN37] It creates and demarcates a system of equal independence of each person from the choices of others.

Kant's basic insight is that there are three ways in which private persons can interact, corresponding to the three basic forms of private legal obligations. [FN38] First, separate persons can pursue their separate purposes separately; those pursuits are consistent provided that each person forbears from using means that belong to others, and controls the side-effects of their own activities to avoid damaging means that belong to others. This form of interaction is protected by the negative rights that each person has against all others to security of person, and exclusive possession and use of property. This interaction finds legal expression in the law of tort, which protects person and property against injury through damage-based torts such as negligence and nuisance, as well as against use by others through intentional torts such as trespass and battery. Rights to person and to property differ in important ways, but they are alike in giving the right-bearer the right to security against others and the right to exclude others. [FN39]

***1407** Second, separate persons can pursue their separate purposes interdependently and consensually. In saying that their purposes remain separate, I do not mean to suggest that two people cannot actively share purposes, but rather that it is up to both of them to decide whether to share. People enter into cooperative arrangements which give rise to binding rights between the parties to them. The law of contract gives effect to these private rights, enabling people to engage in voluntary cooperative activities by transferring their powers to each other. Most of the law of contract is concerned with future transfers in a way that might misleadingly suggest that it gives legal effect to the moral obligation to keep promises. On the Kantian analysis, however, the fundamental structure of a contract is already contained in a present transfer of goods or services: one person gives another person a right to a deed. Future transfers are more familiar because so many significant forms of cooperative activity take place across time. As Rawls once remarked, planning is in large part scheduling. [FN40] They are conceptually no different from present transfers: in each case, one person acquires a right to the deed of another.

Third, separate persons can pursue their separate purposes interdependently but non-consensually. In such cases, whether consent is normatively impossible (as in the case of guardians of minor children), or factually impossible with respect to particulars (as in relationships of agency), or some mix of the two, one party is required to act on behalf of the non-consenting one, and is precluded from profiting from the relationship. In such cases, the beneficiary has something stronger than a contractual right, and the form is that of a right to a person, rather than merely against one. This is the realm of fiduciary obligation, the realm in which one party is required to act

on behalf of another.

Kant's account provides a distinctive way of understanding the nature of private interaction. These categories are meant to be exhaustive, but rather than explain that aspect of his argument here, [FN41] I want to draw attention to the overall structure that this conception of private law imposes: people are required to forbear from interfering with each other. Provided they do so, the only grounds of ***1408** cooperation are voluntary. You are free to enter into cooperative arrangements with others, but nobody can compel you to cooperate with them. This focus on voluntary cooperation is essential to the capacity to set and pursue your own conception of the good. Your powers are available to you to use as you see fit, but you do not need to make them available to others to suit their preferred pursuit of their own purposes. If you did, then you would be compelled to pursue, or aid in the pursuit, of a purpose that you did not set for yourself. In Rawlsian terms, you would thus be blocked in the exercise of your first moral power.

This same idea of voluntary cooperation gives rise to the familiar distinction between nonfeasance and misfeasance. Private law, through tort and property, protects people in whatever they already happen to have. It secures their property against use and interference by others. Negative obligations do nothing, however, to provide people with means that they need, or to compel others to provide them with those means. The law of contract requires affirmative actions, but they need to be voluntarily undertaken. Fiduciary obligations can be broader, and exit from them more onerous, but they too must be voluntarily undertaken. [FN42] Nobody can impose an affirmative private obligation on you as a result of their need, no matter how pressing it may be.

The basic apparatus of private law reflects these Kantian distinctions. Most notably, the absence of a private law duty to rescue is itself an expression of the idea of voluntary cooperation and the accompanying distinction between nonfeasance and misfeasance. [FN43] You never need to make your means or powers available to another person, even in the rare case in which life itself is at issue. This does not reflect a distinction between acts and omissions, or any distinctive theses about the nature of causation. Instead, its normative basis is just the requirement that all cooperation is voluntarily undertaken. If nobody has undertaken to provide me with a benefit, then I have no standing to complain against any other particular person that I lack it. In the same way, the familiar tort doctrine barring recovery for pure economic loss follows from the ***1409** idea of voluntary cooperation. In a classic example, the defendant damages something, such as a bridge, to which the plaintiff has a contractual right, but no property right. The plaintiff has no property right in the bridge, thus he has no legal standing to exclude the defendant from using or damaging it. [FN44] The bridge-owner, however, can recover from the defendant, and the plaintiff may be able to recover from the bridge-owner, depending upon the terms of their contract. [FN45] The plaintiff cannot proceed directly against the defendant, however, because he does not have a right against all others to the bridge. The plaintiff's only right is a contractual right against the person who transferred it--that is, the bridge-owner. The defendant is a stranger to the contract between the plaintiff and the owner of the bridge, so they cannot, through their voluntary cooperation, impose any obligations on the defendant that he did not already have. Thus, the contract imposes no obligations on the defendant.

Cast in Rawlsian terms, private law as a whole secures for private persons the exercise of their first moral power, the capacity to set and pursue a conception of the good, in the face of the equally valid claims of all other private persons to do the same. Its role is constitutive, rather than instrumental, in relation to this moral power. The claim is not that, standing behind a Rawlsian veil of ignorance, rational and fully informed persons would predict that a system of private law would best improve their prospects of exercising this moral power. Those concerned with maximizing their prospects of success might choose prudently to disregard the distinction between nonfeasance and misfeasance, or to apply it only selectively, based on the particular interests that are at

stake and their estimation of the circumstances in which they are likely to find themselves. For example, from the standpoint of maximizing ***1410** the capacity to set and pursue his own purposes, an individual's interest in continuing to live is important enough that he might agree to a scheme of mutual aid, allowing a greater risk to offset a lesser one. That is not the place of private law in the division of responsibility. Instead, its role is partially constitutive: the special responsibility that each person has for his or her own life is not the conclusion of the contract argument, but rather the premise that gives it its entire moral point. Persons are entitled to use their powers as they see fit, consistent with the ability of others to do the same.

If the choice of private law rules or systems is treated as a decision for parties to make in the original position, in light of their expected interests, the contract argument simply collapses into a form of consequentialism, as parties look at their expected advantage under competing systems. [FN46] Aside from all of the difficulties with utilitarianism that are captured in Rawls's famous claim that it "ignores the distinction between persons," the core difficulty with such a consequentialist understanding of private law is that it renders it inconsistent with the division of responsibility, and the special responsibility that each person has for his or her own life. The distinction between nonfeasance and misfeasance is invisible from a consequentialist perspective precisely because that distinction is just the distinction that persons apply to their private interactions. If an article of tort law is chosen on the basis of its expected consequences, then persons are held to account based not on their own choices but rather on the aggregate advantages that will flow to others. [FN47]

***1411** Private law protects people in what they have, and gives them an entitlement to decide how they will respond to the incentives offered by others. Nobody needs to cooperate with others if they do not wish to do so. This dual focus on protecting what people already happen to have and allowing them to decide how their powers will be used provides an explanation of the formality of private law, and also of its relationship to freedom. Private law is formal because it governs the relations between persons with respect to the means they have, independently of any inquiries into the particular means that a particular person happens to have. The division of responsibility also explains why private law must be part of the coercive structure of Rawlsian justice: its obligations are the protections that enable the reciprocal exercise of the first moral power.

This focus on voluntary cooperation might invite the thought that private law is the only type of justice that is consistent with individual freedom. In particular, the state presents itself as a form of mandatory cooperation, in a way that might appear to be in tension with the idea of freedom. Next, I will argue that private law requires public justice.

III. The Other Side of the Division: Public Right

Private law demarcates a sphere of individual freedom and voluntary cooperation. You are free to use your resources as you see fit, consistent with the right of others to use theirs. You do not ***1412** have to cooperate with anyone unless you choose to do so. Those limits are not self-policing or self-enforcing, and any enforcement of them needs to be done in a way that is consistent with the equal freedom of all.

Rawls describes the state as a form of social cooperation, in a way that might, misleadingly, suggest that it is like other forms of social cooperation, such as a baseball league, a neighborhood picnic, [FN48] an orchestra, [FN49] or, to use Hume's famous example, two men rowing across the pond, working their oars in unison. [FN50] These idyllic pictures of social cooperation provide poor models for the type of cooperation involved in the state. State action is not just a more complex version of a group of people getting together, sorting out a division of labor, and setting to work to achieve their common purpose. States exercise powers that few people

would ever grant to the other members of their baseball league or orchestra. For one thing, they claim powers of enforcement and redistribution. The schnorer who eats heartily but never contributes anything to the annual neighborhood picnic may behave unfairly, but few people would think that his neighbors are entitled to let themselves into his pantry to seize food for the picnic. The curmudgeonly neighbor who skips the picnic cannot be forced to come join in the fun. By contrast, states make people pay for benefits whether they want them or not. States also claim to be entitled to issue binding laws and to force people to do as they are told. They claim to be entitled to do so within their territory (and sometimes even outside it), so that participation in this form of social cooperation is not voluntary. In these ways, state action is fundamentally different from the type of voluntary social cooperation that is at the heart of private ordering. [FN51]

***1413** There are a number of strategies for denying or bridging these differences. The first two correspond to the two ways of collapsing the distinction between public and private law that I mentioned in my opening paragraph. Utilitarians and egalitarians who deny the normative integrity and significance of private law can say that the voluntariness of such interaction is only incidental to the benefits that private law provides, and that its rules must be selected on the basis of their expected effects. [FN52] This way of understanding public powers is just the converse of the rejection of a distinctive account of private order. [FN53]

The other familiar way of collapsing the distinction is through a Lockean interpretation of the metaphor of a social contract, complete with the doctrine of consent, to argue that states are only legitimate when they are genuinely voluntary forms of cooperation. The Lockean understands relations between the individual and the state no differently than relations between private individuals: they are legitimate only if fully voluntary. Locke's invocation of the concept of tacit consent blunts some of the force of this equivalence, but the structure of the strategy is clear: only private ordering is consistent with freedom. The Lockean strategy collapses ***1414** public justice into private law by denying the normative significance of the most significantly obvious public aspect of private right, the resolution of disputes through public procedures for applying antecedently articulated laws governing all citizens--in short, the rule of law. Locke argued that rational persons would prefer the rule of law to the state of nature, that they would adopt it for instrumental purposes. [FN54] But the rule of law carries no independent normative weight according to his account. Just as the utilitarian sees private law as merely instrumental in relation to one set of goals, so the Lockean sees the public aspects of the rule of law as merely instrumental to a different set of goals.

The third strategy, which can be found in Kant and Rawls, supposes that the state has a distinctive set of powers, which can only be exercised legitimately from a distinctively public perspective. [FN55] The existence of such a public perspective is a prerequisite to any legitimate exercise of force. In Kant's preferred vocabulary, it takes the form of a “united will”; [FN56] in Rawls's “the citizens as a collective body” act together. [FN57] A central task of political philosophy is to articulate the distinctive features and requirements of such a public perspective. That is the strategy that I will explore here.

The Kantian strategy articulates the public nature of the enforcement of rights, and in so doing reveals the broader demands of public justice. Just as Kant's argument about private rights is non-instrumental, so too is his argument about public justice. It makes no appeal to factual claims about the likelihood of conflict or its lack of resolution in a state of nature in which private parties would be left to their own devices for enforcement. Kant would not have denied that the “warped wood” [FN58] would lead to conflict, but such factual claims play no part in his argument, because he focuses on the normative inadequacies of private enforcement. Private***1415** enforcement, for Kant, is not merely unreliable, inefficient, or likely to escalate. Even if good fortune were to prevent these problems from arising, the underlying problem would remain. The idea of a private “executive

right” of enforcement is inconsistent with the underlying ideas of freedom and equality that make private rights and voluntary cooperation seem so compelling. Private enforcement is always unilateral enforcement, always a right of the stronger.

IV. Private Enforcement

It is a commonplace of political philosophy that private enforcement of rights is biased and unreliable. Private enforcement is likely to exacerbate the effects of disputes, and make disagreements escalate. From this observation, Locke concludes that prudent people would leave the state of nature and delegate their executive power to the state for it to be exercised on everyone's behalf.

On the surface, Kant's account is similar, but at root it is fundamentally different because it denies that there could be an executive right to enforce rights without impartial institutions of adjudication and enforcement. The Lockean account moves from the true premise that freedom-based rights necessarily set limits on the legitimate use of force, and its corollary that rights are presumptively enforceable, to the further claim that each person has an “executive right” to enforce his rights in the absence of institutions and procedures. Locke writes:

> For the Law of Nature would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a Power to Execute that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so. For in that State of perfect Equality, where naturally there is no superiority or jurisdiction of one, over another, what any may do in Prosecution of that Law, every one must needs have a Right to do. [FN59] ***1416** Locke's observation about unenforceable rights is perfectly sound, but the further implication he hopes to draw from it is in tension with the more general requirement that different people's rights form a consistent set. My right ends where yours begins, and more generally, a system of rights sets reciprocal limits on freedom--no person is entitled to limit the freedom of another unilaterally. As I shall now explain, if private rights are understood as systematic in this way, then nobody could have a private right to enforcement consistent with others enjoying the same rights. Instead, people could have a right to have fair procedures govern the enforcement of any rights. [FN60] The correct conclusion from Locke's sound observation about the difficulties of unenforceable rights is that the only way in which anyone can have the right is if everyone has the right together--it belongs to the citizens considered as a ***1417** collective body, rather than to any one considered as an individual. [FN61]

I want to make this point by briefly considering the Lockean image of persons in a state of nature transferring their rights of private enforcement to the state in order to better secure the advantages that come from uniform and consistent enforcement. The core of Kant's argument is that the right to enforce rights cannot be enjoyed in a state of nature. The right that Locke imagines people trading away is one that can only be enjoyed through the rule of law.

On Kant's understanding, a right is both a title to coerce and a part of a system of rights. The only rights that we can have are those that are consistent with others having the same rights in a system of equal freedom through equal rights. The right to enforce your rights is no different: it too must be part of a system of equal rights.

The right to enforce is remedial: it addresses a private wrong in a way that is consistent with the underlying right. On Kant's analysis, private wrongdoing is always a matter of one person being subject to the choice of another. If I deprive you of means that are rightfully yours--perhaps I carelessly bump you, and injure your body,

or damage your property--I have interfered with your right to be the one who determines how your means will be used, your right to continue having the means that you have. Because it is a right, it is only binding against other persons. You have no standing, as a matter of private right, to complain if a hailstone injures you or damages your property, because there is nobody for you to complain about. [FN62] You have every right to complain--to me and about me--if I cause the same damage. In wronging you, I upset our respective independence from each other; the limits on our choice are no longer reciprocal, but subject to my unilateral choice. Your remedy against me is supposed to give you back what you were entitled to all along. From the point of view of our freedom, it is as though the wrong never happened, even though, from the point of view of my assets, it is as though I squandered them. Your right of ***1418** enforcement against me is a right to make me restore you to the position you would have had if I never wronged you. Your right survives my wrong in the form of a remedy; the remedy serves to undo the unilateral aspect of my deed. [FN63]

Kant's insight is that just as primary rights to freedom must be subject to reciprocal limits, so too must secondary rights to enforcement. Your right to a remedy in response to my wrongdoing upholds your right, and so, in a sense, guarantees that it survives my wrong, because it gives you an entitlement to means equivalent to the ones of which I deprived you. Yet your act of enforcement looks like it has the same problem as did my deed--specifically, your act is purely unilateral. For all of the reasons that neither of us can be subject to the choice of the other with respect to our deeds, neither of us can be subject to the choice of the other with respect to the undoing of any wrongs that have been committed.

In Kant's preferred vocabulary, rights are a matter of “freedom in accordance with universal laws.” [FN64] In exactly the same way, enforcement must be done in a way that is consistent with freedom in accordance with universal laws. Private rights are presumptively enforceable, because any violation of them is inconsistent with equal freedom, and any enforcement of them merely repairs that inconsistency. But freedom must be repaired in a way that itself preserves equal freedom rather than subverting it.

Just as Kant's argument about private rights focuses on the formality of primary rights, so his argument about enforcement draws out the parallel formal difficulty of unilateral enforcement. He contends that rights can never be secure in a state of nature no matter how “law-abiding and good men might be” because the problem is with one person's entitlement to decide, not with the likelihood or consequences of abuse of that entitlement. [FN65] Private enforcement is not merely inconvenient: it is inconsistent with justice because it is ultimately the rule of the stronger. [FN66]

***1419** Kant's treatment of private rights shows that reciprocal limits on freedom can be articulated at a high level of abstraction, but at the more detailed level at which actual people interact, the formal categories of private law do not apply themselves. People acting in good faith might disagree about what they require in a particular case. If you and I cannot agree about whether your injury was a foreseeable consequence of my conduct, or whether we had completed a contract, or which aspects of my loss are within the scope of your wrong, our disagreement can survive an agreed statement of the facts and agreement about the general principles that should govern our interactions. Perhaps there is a perspective from which it might be said our answers must be equally good, so that neither of us has any reason to stand by our claims. Neither of us has any reason to take such a perspective, however, because each of us has what we regard as a good argument for our own position. I may think that you should recognize that our positions are equally defensible, and so endorse mine as a just solution to our dispute. You may think that I should endorse your solution. That is exactly our problem. All we can do is act on our own best judgment. Why back down if you believe that justice is on your side, even if it is not uniquely on your side? Your sense of justice demands that you accept the claims of others, but not that you always abandon

your own.

If we are left to resolve our dispute on our own, one of us will probably be willing to back down, or perhaps we will reach some sort of compromise. The readiness to either back down or compromise reflects good sense on both of our parts, but it is also the rule of the stronger, because whether one of us will back down or we will compromise depends on who we find ourselves arguing against, not on our perception of the merits of the case. If I am bigger***1420** than you, you will have incentive to compromise, but then again, if I seem like a pushover, you will be less likely to do so.

Private enforcement by the person who happens to prevail might work to your advantage, either because you prevail, or the person who prevails agrees with you. But someone is always subject to someone else's choice, and who wins depends on factors that the loser should regard as arbitrary. Even if, acting in good faith, neither of us resorts to our threat advantage, charm, or stubbornness, the party who concedes a point in the face of disagreement does so in light of factors that he or she believes to be arbitrary in relation to the merits of the case. Our disagreement survives our separate articulations of what is relevant to the merits. Any grounds that one of us has for making a concession is strategic in the narrow sense that our acceptance of it depends upon something other than the perceived merits of the dispute. That arbitrariness means that the loser is subject to the winner's choice. [FN67] Perhaps neither of us ***1421** will back down and we will fight it out, introducing the right of the stronger in a more parochial sense.

Having the resolution of our dispute depend on these factors is not only irrelevant from the standpoint of justice; it is contrary to it because such a resolution is inconsistent with the idea that we are subject to the same limits on our freedom, that our rights are identical in form. The person who backs down in such a situation may do better than she would have done had she stood on her rights, but she will still be subject to the other person's will.

The solution to this problem is the rule of law: impartial dispute resolution, subject to general rules that bind everyone. Impartiality is a requirement of a court, even though it is not a requirement of private parties towards each other. In setting and pursuing our own respective conceptions of the good, we do not need to treat our own purposes and those of others impartially. You are entitled to be partial to your own conception of the good and indifferent to mine. Impartiality matters to a court because its task is to resolve disputes in a way that is consistent with the freedom of the parties before it. When a plaintiff comes before a court, alleging that the defendant has wronged her, she demands a remedy to make good that wrong. The plaintiff is asking the court to grant her a remarkable power: the power to exact a claim against the defendant's resources, and thus to interrupt the defendant's power to use those resources as he or she sees fit. The grant of such a power can only be consistent with a defendant's freedom provided that the forum granting the power is suitably impartial. [FN68]

***1422** V. Two Kinds of Disputes

On the Kantian account, legal institutions provide publicity in two overlapping ways, reflecting the differences between two distinct types of disputes about private rights. In one class of cases, a court simply provides an impartial forum for a dispute that has a completely determinate answer at the level of private right. Sometimes, the defendant wins because the plaintiff has failed to state a cause of action: if everything happened just as the plaintiff contends it did, the plaintiff has failed to allege that the defendant violated any right of hers. When a stranger to a contract seeks consequential damages for the breach of that contract, there is no issue ***1423** for a court to decide. Violating a right against one person does not, taken simply as such, engage the

rights of third parties. Conversely, sometimes the existence of the wrong is beyond dispute, as when the defendant breaches the explicit terms of a contract, or trespasses against the plaintiff's person or property. Even in such cases, a public forum of dispute resolution is required in order for the rights in question to be enforceable. Absent such a forum, the plaintiff's avenue for self-help would be nothing more then a unilateral imposition of force.

There is another class of cases in which public institutions of justice are required. These are the cases in which positive law is required to fix the precise contours of private right. Such disputes are more familiar. [FN69] In them, the role of the legal system is to provide a common answer to disputes about private right, rather than to declare an antecedent answer.

Even the most straightforward disputes generate a problem of unilateral enforcement, however, because a juridical principle of private right is only as good as the objects to which it applies. If I complain about a wrong in relation to property, for example, I can only stand on my rights provided that I can establish secure title to the property in question. My title to what I have presupposes a resolution to both types of issues. Ownership requires some sort of affirmative act to establish it--I must acquire it from an unowned condition, or receive it from some other person or agency that has the right to give it to me. Whatever the requisite affirmative act might be, it is my act, and not yours. As my act, it may raise issues of determinacy: if I take possession of a piece of land, how much of it have I acquired? My physical movements do not dictate a single determinate answer. [FN70] Nor can my intentions. This brings us to the second difficulty. My unilateral act (or bilateral act of acquisition through contract) is supposed to bear on the rights of others, who ***1424** were not parties to it, by putting them under an obligation to refrain from using what is mine. At the heart of private right, however, is the principle that you can only be bound by a private transaction if you are a party to it--that is why you and I cannot get together to deprive a third person of her rights. If my claim to my property is supposed to apply to others, then there needs to be a public perspective from which the others are somehow party to my act of acquisition.

I want to illustrate the role of the legal system in demarcating private rights, and thereby making them into the system of reciprocal limits on freedom, by considering one of Kant's own examples: the law of adverse possession. [FN71] The law of adverse possession is a familiar landmark in all legal systems descended from Roman law. It is also a standard puzzle for the theory of property. The dominant academic view is that its rationale lies in its incentive effects: land will go to a more productive use if subject to “the use it or lose it” rule. [FN72] Such an explanation can be given either a utilitarian or a Lockean spin. Locke subjected property rights to the law of “waste” on the grounds that the earth was given to mankind for mankind's preservation. Land that was not used for purposes of self-preservation must become available for others to use it for their own self-preservation. The utilitarian tells the same basic story, but he emphasizes the more general idea of productive use rather than the particular use of self-preservation. Presumably, the utilitarian would also want those independent criteria to cover the prescriptive period, so as to better map on to the underlying purposes of self-preservation or productive use.

Neither the utilitarian nor the Lockean rationale fits the positive law of adverse possession. Under that law, a trespasser can become an owner without using the land productively, and an owner can retain rights against a trespasser merely by entering the land periodically, or even by licensing the trespasser, thereby depriving the latter of the claim to possess the land in a way that is hostile to the ***1425** owner's title to it. Most strikingly, the clock on possession runs when the trespasser first enters the land, not when the prior owner stops taking care of it. You can only claim “wasted” land by occupying it, and you can do the same even if it is not wasted. The

owner can reclaim the land simply by returning before the prescriptive period has run, because you get no credit for the earlier period of disuse. It is open to either the utilitarian or the Lockean to claim that these features of the law are merely marks of administrative convenience, or to demand that the positive law be changed so as to conform better to their independent moral criteria. [FN73] It is not my purpose here to show that they cannot develop such an account, [FN74] but to lay out an alternative way of understanding why a system of equal freedom must allow the possibility that an act that is presumptively wrong can sometimes establish a right.

Kant provides a fundamentally different explanation of this familiar doctrine. The law of adverse possession has nothing to do with incentives or the preservation of the species. It provides closure. People can only have full proprietary rights to things provided that they can have them conclusively, that is, such that it is not open to anyone further to dispute their title. The need for closure requires that the mere fact of continuous occupation of a piece of property give rise to a right to it, and that that right be superior to any earlier claim. If, after the requisite amount of time has passed, the previous owner could come back and assert a superior claim, closure would be impossible, because it would always be possible for some still earlier owner to assert an earlier, and thus superior, claim. The only way the claims can be conclusive is if closure is imposed by long use.

Kant's analysis shows the familiar legal doctrine to be a systematic requirement of private right: if rights are to form a single system***1426** of reciprocal limits on freedom, the law must enforce closure on disputes about title. A system of adverse possession can do so in a way that a system of title registration could not. Without the doctrine of adverse possession, any such system would be vulnerable to claims about ownership prior to the introduction of the registry. A registry cannot impose closure with respect to such claims-- but that is just Kant's point.

All of the familiar features of the doctrine of adverse possession follow from this rule: the ways in which owner and trespasser use the land are irrelevant; the prescriptive period begins when the trespasser enters the land; the trespasser's use must be hostile to the owner's claim; and when the period expires, the person who was to all appearances a trespasser turns out to have been the owner from the moment he or she entered the land. These are not introduced on the basis of instrumental considerations about what would best achieve closure. Instead, they are expressions of the idea that systemic closure with respect to title requires closure with respect to the possible grounds of proof of title. That is just another manifestation of the more general requirement that procedures for fixing rights be public, not private.

The one thing the need for closure does not fix is the length of the prescriptive period. So, even if everyone in an imagined “state of nature” could see its importance, they would have no basis for agreement on it. Or rather, any basis for agreement, including epistemic salience, or conventional understanding, would only be accepted on strategic or prudential grounds, [FN75] and so would be an acknowledgement of the costs of conflict, and thus of the right of the stronger. Only a lawmaking institution can provide an answer with a claim to being more than strategic (even if people ultimately comply with it purely on instrumental grounds, they are complying with something that is consistent with equal freedom). Whatever length of time the institution selects will be consistent with reciprocal limits on freedom. But it needs to choose one, because failing to do so would leave rights indeterminate.

***1427** Thus, the Kantian account avoids the familiar charge that natural law theories of property negate all current holdings because a single illicit transaction in the chain of owners undermines the legitimacy of all subsequent transactions. [FN76] The Kantian account shows that the possibility of secure title is a precondition of the systematic enjoyment of property rights. It also bridges the gap between the views that property is pre-

institutional or post-institutional by showing the sense in which it is both. The possibility of people having external powers subject to their choice is a basic structure of free interaction. It can only be secured, and so only realized consistent with the freedom of all, through institutions.

These remarks about private enforcement do more than show difficulties in the Lockean argument. They also show that the use of force is only legitimate provided that it issues from a public perspective, so that it is not simply the exercise of one person's power over another. Instead, it needs to be in accordance with law and procedures.

The need for procedure underwrites the existence of a public perspective, distinct from the perspective of private persons, but consistent with the integrity of their separate standpoints. Public institutions to make, apply, and enforce law need to have powers that no private person could have; this distinctively public character makes the use of force consistent with equal freedom. Anything else would be a merely unilateral use of force. [FN77]

***1428** Recall my earlier example of a good faith dispute about rights, in which I offered inconsistent, though not unreasonable, applications of the relevant principles to agreed facts. [FN78] I suggested that there is a perspective from which our competing positions were equally good, but that there was no basis for either of us to occupy that perspective, since it had no claim to superiority over our separate perspectives. The public standpoint is a perspective that can claim superiority. If there is a way in which procedures and institutions can decide to act on behalf of everyone, then the fact that the public institution has selected one or the other of our competing answers provides us with a reason to accept that, namely that its interpretation of how the law applies to the agreed facts is not just yours or mine, but ours. [FN79]

Kant borrows Rousseau's vocabulary of a social contract and a “general will” to describe the nature of the public perspective. The contract metaphor is potentially misleading, because it might seem to suggest that the people transfer something that they already fully possessed in order to gain some benefit. For Kant, the whole point of the united will is to make it possible for people to have things conclusively at all, in a way that is consistent with others having the same rights. So there is nothing that they have that they then transfer away. Entering what Kant calls “a civil condition” [FN80] is not a private transaction at all, but a public one that makes private transactions enforceable. It is an act of what Rawls describes as ***1429** “the citizens as a collective body” [FN81] that makes private transactions enforceable. That is why it is a mandatory form of cooperation: unlike a binding legal contract, nobody is entitled to refuse to be bound, because that would subject others to his unilateral choice.

VI. Public Right

The fundamental principle of public right is that practices can be enforced--that mandatory forms of social cooperation can exist--only if they issue from a public standpoint that all can authorize.

Even if the public realm is distinctive in this way, it might be wondered whether it provides merely a conceptual victory against the libertarian. After all, the rationale for public institutions is precisely to preserve, or perhaps complete, a system of private rights by making them enforceable. As such, the Kantian argument might seem insufficient to gain the familiar powers that states claim. I now want to argue, however, that it does. This is not the place to consider the Kantian argument for “republican government” and a separation of powers between the legislature, executive, and judiciary, or his account of the power to regulate commerce and land. Those central aspects of the modern state are peripheral to the main themes of contemporary political philosophy, and I will

not attempt to reintroduce them here. I will focus instead on the division of responsibility, that is, the relation between the nature of a public standpoint and the responsibility of the "citizens as a collective body," acting through the state, to provide citizens with adequate resources and opportunities.

My argument once again draws on Kant. Kant argues that provision for the poor follows directly from the very idea of a united will. He remarks that the idea of a united law-giving will requires that citizens regard the state as existing "in perpetuity." By this, he does not mean to impose an absurd requirement that people live forever, but rather that the basis of the state's unity--the ability of the state to speak and act for everyone--survives changes in its membership. You are the same person you were a year ago because your same principle of organization has stayed the same ***1430** through changes in the matter making you up; [FN82] a flame preserves its form as matter and energy pass through it. In the same way, the state must sustain its basic principle of organization through time, even as some members die or move away and new ones are born or move in. Otherwise, any use of force that it made would be unilateral action on the part of those who were there first. The alternative is to have a self-sustaining system that guarantees that all citizens stand in the right relation to each other--in particular, that they do not stand in any relation inconsistent with their sharing a united will.

The most obvious way in which people could fail to share such a will is through relations of private dependence. Kant's own example remains sadly relevant: poverty. Kant does not analyze the problem of poverty through the category of need, but rather through that of dependence. The problem of poverty, on Kant's analysis, is that the poor are completely subject to the choice of those in more fortunate circumstances. Although Kant does not deny that there is an ethical duty to give to charity, [FN83] he argues that dependence on private charity is inconsistent with the united will that is required for people to live together in a rightful condition. The difficulty is that the poor are subject to the choices of those who have more: the affluent are entitled to use their powers as they see fit, and so their decisions on whether to give to those in need, or how much to give, or to whom to give, is entirely discretionary. [FN84] Kant's argument is that such discretion is inconsistent with people ***1431** sharing a united will. This claim echoes Rousseau's argument in The Social Contract that extremes of poverty and wealth are inconsistent with people acting together to give laws to themselves. [FN85] Where Rousseau might be taken to be making a factual claim about political sociology, Kant's claim is normative: a social world in which one person has the power of life and death over another is inconsistent with a united will, no matter how the first came to have that power over the second.

Poverty poses a problem for a united general will because it is supposed to make the enforcement of private rights consistent with the freedom of all. Most significant of the private rights, in this case, are property rights, generally understood as rights that allow a person to exclude others. Free persons can authorize enforceable property rights, because those rights are a way of enabling them to exercise their respective freedom. Yet they could not authorize rights up to the point that they made some people entirely subject to the discretion of others, because such powers would be inconsistent with the freedom of those who were dependent in this way. Without an institutional solution to this problem, those who are in need could not regard themselves as authorizing the general will at all. As a result, the enforcement of property rights would be exactly what critics of property accuse it of being: a unilateral power exercised by the strong against the weak. Need is a natural problem, but dependence on the goodwill of others is a problem of justice.

This institutional problem requires an institutional solution: taxation to provide for those in need. Taxation is consistent with the freedom of those who are taxed because their wealth consists entirely in their entitlement to exclude others from their goods, which in turn is consistent with equal freedom only when it is consistent with the general will.

This argument for economic redistribution is internal to the idea that disputes must be resolved though public procedures that can be accepted by all. The public nature of dispute resolution is both the source of the problem and its solution. Absent institutions of public justice, the rich person's claim to exclude the poor one from ***1432** his or her property would just be a unilateral imposition of force. Those who have property have the right to exclude others, provided that their holdings of property are consistent with a united general will shared by all, that the system of private rights really is part of a system of equal independence of free persons. Where that system turns into a system of dependence, it loses its public character. So, to preserve the public character, it must be subject to limits that make its enforcement consistent with equal freedom.

The Kantian argument is formal and procedural rather than substantive. In particular, it does not specify the level of social provision, whether it covers merely biological needs, or if it extends to the preconditions of full citizenship. Nor does it provide a detailed analysis of the nature of wrongful dependence: whether, for example, severe inequalities of bargaining power between employers and workers could qualify as forms of dependence. Although Kant focuses on the example of support for the poor, the force of his argument is concerned with the structure of the general will. As a result, it requires actual institutions to give effect to it--to set appropriate levels and mechanisms of aid, and introduce forms of regulation where necessary. As a philosophical account, it is supposed to show what means are available to the state, consistent with the freedom of all; it is not supposed to micromanage social policy. Just as questions about the limitations period for adverse possession or the standard of care in the law of negligence can only be answered through the exercise of determinative judgment by a properly constituted public authority, so too can these questions only be so answered. The requirements of a general will constrain the form of possible answers, but not their substance. Any answers need to be consistent with equal freedom, so they cannot introduce mandatory forms of cooperation merely on the grounds that they will produce an aggregate increase in welfare. Nor can they use private rights as a bulwark against the claims of the general will. But, within the appropriate structure, the answers must be imposed by the people themselves.

Just as it echoes Rousseau, the Kantian argument foreshadows Rawls: redistribution is a precondition of the citizens as a collective body, placing themselves under coercive laws consistent with the freedom of all. The Kantian argument is not the precise argument Rawls makes, but, like Rawls's argument, it is political rather than ***1433** metaphysical. It addresses the question of economic redistribution in the terms that the question presents itself: by what right does the state forcibly claim things from some people and transfer them to others, given that the state enforces those claims to those things? The answer is entirely in terms of the legitimate use of force and the distinctively public nature of the state. Both focus on the special responsibility that each citizen has for his or her own life, and each citizen's entitlement to exercise it through interaction with other private citizens and associations, and on the coercive structure of the state. The citizens as a collective body must guarantee adequate resources and opportunities to all, in order to fulfill the state's claim to secure each person in his or her private claims as against other private persons, in a way consistent with the freedom and equality of all.

This twin focus on public right and the use of force distances the Kantian argument from more familiar contemporary approaches to economic redistribution. One familiar argument defends redistributive taxation on the grounds that wealth is a social product, rather than an individual one. [FN86] As a result, society as a whole is said to have a claim on the social product, having generated it. This view incorporates a social version of the Lockean idea that a person's claim to an object depends upon the toil he or she has exerted in creating or acquiring it. Rather than saying that you own this apple because you have picked it off the tree through the sweat of your brow, we say instead that we, as society, own everything because***1434** we have produced it. It is also like the Lockean position in that it supposes that society acquires a sort of absolute dominion over the things it has produced.

The Kantian approach must reject such an argument, both because it seeks to establish a right of ownership on the basis of effort expended, rather than a system of equal freedom, and, more significantly, because it treats the state as a private party, free to dispose of its assets as it sees fit. This not only generates some doubt about the specific claim to use that wealth to achieve a just distribution--if the state has a claim on wealth because it produced it, it might just as well use it for some other publicly selected purpose, instead of for redistribution. This state's claim to redistribute does not come from the fact that all property belongs to it to begin with, but rather from the fact that the right to exclude generates potential relations of dependence, which are inconsistent with the existence of a united general will. Put in Rawls's preferred vocabulary, the right to participate in a system of enforceable private transactions must work to the advantage of all, in order for the citizens considered as a collective body to enforce the private claims of individual citizens against each other.

Its emphasis on the public nature of the united general will also distances the Kantian account of economic redistribution from the "luck-egalitarian" position that has been prominent in recent philosophy. For luck-egalitarians, justice requires the elimination of the effects of luck. People can be made to bear the costs of their choices, but not of their unchosen circumstances, whether social or natural. Expensive needs must be met, but expensive tastes are, according to this view, the responsibility of the people who choose to develop them. [FN87]

From a Kantian standpoint, the fundamental difficulty with luck-egalitarianism is not the implausible implications that many people have pointed to, [FN88] but its inadequate conception of political society.***1435** [FN89] For the luck-egalitarian, society's basic moral purpose is to eliminate chance from the world. It conceives of people primarily as recipients of the just society and sees the state as just one of several agents that might contribute to this endeavour. [FN90] Individuals and institutions alike are supposed to contribute to this end. The Kantian approach, with its focus on the general will, regards people as the authors of the laws that bind them. That is what it means for the standpoint to be public: the use of force is always legitimated by the fact that everyone has authorized it together, so that in using force, the state acts on behalf of everyone. A public version of the familiar distinction between nonfeasance and misfeasance applies to its acts: as authors of the laws, citizens are responsible for what the state does, but not for what merely happens. As always, the contrast turns on the means available to society as a whole in pursuing its public purposes. [FN91]

***1436** The same distinction between nonfeasance and misfeasance applies to the contract argument at the level of public right. People choosing institutions are concerned with protecting their own rightful honor, or, in Rawls's vocabulary, their two moral powers. As such, they will not trade away their independence so as to better advance their own interests. Rather, they will set up institutions so as to prevent natural inequalities from generating social domination. Relations of dependence that arise as a result of the coercive structure of society pose a special problem for the general will, precisely because they implicate the general will's own creation of the right to exclude. They bring the general will into potential tension with itself, and so they must be addressed. Natural inequalities and unchosen circumstances, simply as such, are not public acts and so generate no such tension. They may result in relations of dependence, but if they do, it is the relations of dependence that are the problem, not their source. [FN92]

***1437** Luck egalitarians have criticized Rawls for his focus on socially generated inequalities, but the Kantian account reveals that Rawls has the better of the argument. Rawls insists that the basic structure must not magnify the effects of natural inequalities, not that it must eliminate them. [FN93] In its most abstract formulation, the difference principle requires that the legal and political institutions not compromise the ability of citizens to exercise their two moral powers, so that the existence of social cooperation works to the benefit of all.

[FN94] That is a distinctive way of developing Kant's basic insight: the enforcement of rights is justified because it alone makes it possible for a plurality of persons to realize their freedom together, but such enforcement must realize the freedom of everyone. For both Kant and Rawls, the coercive structure of society is the basic subject of political philosophy because it implicates independence as nothing else does, and coercion is only legitimate if it does not create relations of dependence.

The basic structure of society is not important merely because it exerts a tremendous influence on people's life prospects. It is also important because the use of force needs to be rendered consistent with the independence of each person from others. Mandatory forms of social cooperation--notably the state-- are justified only if they serve to create and sustain conditions of equal freedom in which ordinary forms of social cooperation are fully voluntary.

***1438** Conclusion

I want to close by touching on one other issue that has been prominent in contemporary political philosophy: the dispute about whether individuals and institutions are subject to the same normative principles. Throughout his career, John Rawls argued that individuals have a duty to create just institutions, and denied that they owe each other direct duties to realize the difference principle. [FN95] Critics of this view, most prominently, G.A. Cohen [FN96] and Liam Murphy, [FN97] have assailed Rawls for this “dualism” and argued that private persons are under the same duties of justice as social institutions are. Cohen connects this point to a claim about the relative insignificance of the coercive structure of society, emphasizing the importance of the social ethos in determining both the sizes of social shares and the relative life prospects of different persons in a society. Both Cohen and Murphy assail dualism from a progressive and redistributive perspective, but the same arguments might just as easily be found in the hands of libertarians, who share their belief that the social institutions can only be assessed in terms of their efficacy in achieving moral outcomes that could, in principle, be realized without them. This assumption that morality is complete without any institutions, and that the state and law enter merely as instruments, enters both libertarian and egalitarian thought as an undefended and, indeed, unexamined assumption. The division of responsibility shows how just institutions, both public and private, enable free persons to be independent together.

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[FN1]. John Rawls, A Theory of Justice 24 (rev. ed. 1999) [hereinafter Rawls, Theory of Justice].

[FN2]. Leon Green, Tort Law: Public Law in Disguise, 38 Tex. L. Rev. 257, 269 (1960).

[FN3]. See, e.g., Gregory C. Keating, Rawlsian Fairness and Regime Choice in the Law of Accidents, 72 Fordham L. Rev. 1857, 1858 (2004); Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48

Stan. L. Rev. 311, 312-13, 340-49 (1996); Kevin A. Kordana & David H. Tabachnick, On Belling the Cat: Rawls and Corrective Justice, 92 Va. L. Rev. 1279, 1306 (2006) [hereinafter Kordana & Tabachnick, Belling the Cat]; Kevin A. Kordana & David H. Tabachnick, Rawls and Contract Law, 73 Geo. Wash. L. Rev. 598, 599-600 (2005); Kevin A. Kordana & David H. Tabachnick, Tax and the Philosopher's Stone, 89 Va. L. Rev. 647, 654, 665 (2003) (reviewing Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice (2002)); Anthony T. Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 472, 474-75 (1980).

[FN4]. See Immanuel Kant, Critique of Pure Reason 410 (Paul Guyer & Allen W. Wood eds. & trans., Cambridge Univ. Press 1998) (1787).

[FN5]. See id. at 467.

[FN6]. John Locke, Two Treatises of Government 370 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

[FN7]. Henry Sidgwick's discussion of justice in The Methods of Ethics remains the clearest and most forceful statement of the view that law and justice impose general rules in order to achieve a moral good that makes no reference whatsoever to anything rule-like. Henry Sidgwick, The Methods of Ethics 264-94 (7th ed. 1907). Sidgwick's argument explicitly animates recent economic analysis, including, notably, that by Louis Kaplow and Steven Shavell. Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2002). The Lockean position is subtly different, in that it supposes that the complete statement of morality makes no essential reference to institutions, but is formulated in terms of rules and natural rights.

[FN8]. See, e.g., Ernest J. Weinrib, The Idea of Private Law 49 (1995).

[FN9]. The idea that law partially forms morality is a central theme in the natural law tradition, starting from Aquinas. See Saint Thomas Aquinas, Summa Theologica IaIIae96, art. 4, in Political Writings 137, 143-44 (R.W. Dyson ed. & trans., 2002) (1273). A more recent expression can be found in Tony Honoré, The Dependence of Morality on Law, 13 Oxford J. Legal Stud. 1, 2 (1993) (arguing that a “viable” morality must have an independent legal component). Kant's version of this thesis is more ambitious than that found in Aquinas or Honoré, because the morality in question requires promulgation as law even on those rare occasions in which it is fully determinate. See Immanuel Kant, The Metaphysics of Morals 78-86, (Mary Gregor ed. & trans., 1996) (1797) [hereinafter Kant, Metaphysics of Morals].

[FN10]. John Rawls, Social Unity and Primary Goods, in Utilitarianism and beyond 159, 170 (Amartya Sen & Bernard Williams eds., 1982) [hereinafter Rawls, Social Unity].

[FN11]. Arthur Ripstein, The Division of Responsibility and the Law of Tort, 72 Fordham L. Rev. 1811 (2004) [hereinafter Ripstein, Division of Responsibility].

[FN12]. A particularly forceful statement of this position can be found in Joseph Raz, The Rule of Law and its Virtue, in The Authority of Law: Essays on Law and Morality 210, 219-21 (1979) (describing the rule of law as useful for curbing forms of arbitrary power, creating a predictable environment in which a person can fix long-term goals and effectively pursue them, and acting as a necessary--but not sufficient--step towards respecting human dignity).

[FN13]. See Aristotle, Nicomachean Ethics 120-21 (Martin Oswald trans., The Liberal Arts Press 1962).

[FN14]. Rawls, Social Unity, supra note 10, at 170.

[FN15]. Amartya Sen, Equality of What?, in The Tanner Lectures on Human Values, 197, 218-19 (Sterling M. McMurrin ed., 1980).

[FN16]. Ronald Dworkin, Sovereign Virtue 65-83 (2000); see also Arthur Ripstein, Liberty and Equality, in Ronald Dworkin (Arthur Ripstein ed., forthcoming 2007) [hereinafter Ripstein, Liberty and Equality].

[FN17]. Rawls, Social Unity, supra note 10, at 170; see also T.M. Scanlon's gloss on the division of responsibility in What We Owe to Each Other:

> The idea is this. The "basic structure" of society is its legal, political, and economic framework, the function of which is to define the rights and liberties of citizens and to determine a range of social positions to which different powers and economic rewards are attached. If a basic structure does this in an acceptable way--if citizens have no reasonable complaint about their access to various positions within this framework or to the package of rights, liberties, and opportunities for economic reward that particular positions present them with--then that structure is just. It is up to individuals, operating within this framework, to choose their own ends and make use of the given opportunities and resources to pursue those ends as best they can. How successful or unsuccessful, happy or unhappy they are as a result is their own responsibility.

T.M. Scanlon, What We Owe to Each Other 244 (1998). Scanlon's gloss might appear either crass or confused from the standpoint of recent discussions of responsibility in political philosophy, which typically analyze questions of responsibility in terms of a person's control over, or identification with, a particular choice. The Rawlsian picture, as Scanlon emphasizes, situates responsibility in the framework of fair interaction. A person can be held to account for those things for which free and equal persons can hold each other to account. For a discussion of this issue, see Michael Blake & Matthias Risse, Two Models of Equality and Responsibility 21-22 (May 18, 2006) (unpublished manuscript, on file with the Virginia Law Review Association).

[FN18]. Ronald Dworkin has recently explained his account of responsibility in distributive justice as expressing a similar "division of responsibility between the community and its individual members so that the community is responsible for distributing the resources people need to make successful lives, and individuals for deciding what lives to try to make of those resources, that is, what lives to count as successful." Ronald Dworkin, Ronald Dworkin Replies, in Dworkin and his Critics 340, 391 n.18 (Justine Burley ed., 2004). Dworkin's account requires operating markets, and so presupposes some account of private law.

[FN19]. John Rawls, Reply to Alexander and Musgrave, in Collected Papers 232, 241-42 (Samuel Freeman ed., 1999) (1974) [hereinafter Rawls, Reply to Alexander and Musgrave].

[FN20]. See Weinrib, supra note 8, at 46-48.

[FN21]. I will not directly take issue with the alternative hypothesis, according to which the formality of private law is merely apparent; that private law is, as Richard Epstein puts it, a matter of a set of "[s]imple rules for a complex world." Richard A. Epstein, Simple Rules for a Complex World 21 (1995). For Epstein, these rules are chosen on utilitarian grounds. There are ample utilitarian reasons to keep them simple. Simplicity, in turn, makes them formal in their day-to-day operation, and demands that decisionmakers have incentives to focus on their formality. This is put forward as a series of empirical claims, with very little hard evidence to support them. Whatever its strengths or weaknesses as an explanatory account of the structure of private law, it is an extreme manifestation of the assumption that I mean to call into question, because it supposes that the moral purpose served by private law can be stated without any reference to any rules.

In Political Liberalism, Rawls makes some brief remarks that some have offered as evidence that he takes a

similar view of the rules of private law. Specifically, Rawls refers to the rules governing "transactions and agreements between individuals and associations (the law of contract, and so on)," and writes that "[t]he rules relating to fraud and duress, and the like, belong to these rules, and satisfy the requirements of simplicity and practicality." John Rawls, The Basic Structure as Subject, in Political Liberalism 257, 268 (expanded ed. 2005) [hereinafter Rawls, Basic Structure as Subject]. Although this passage suggests a "simple rules" approach, the next sentence suggests a more constitutive role for rules of private ordering: "[t]hey are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints." Id. The notion of freedom to act effectively is best understood in terms of reconciling the capacities of a plurality of persons to set and pursue their ends, rather than any aggregate notion of efficiency. It is also worth noticing that Rawls focuses on the pursuit of ends, not their achievement. This reveals the identity between the first moral power and a Kantian conception of purposiveness.

[FN22]. See John Rawls, Justice as Fairness: A Restatement 6-7 (Erin Kelly ed., 2001) [hereinafter Rawls, Justice as Fairness].

[FN23]. See Kant, Metaphysics of Morals, supra note 9, at 30.

[FN24]. See id. at 29.

[FN25]. I am aware that reading Rawls in this Kantian way will be controversial in at least two ways. As Stephen Perry has suggested in response to an earlier version of this argument, "Kant's own methodology... is essentially conceptual in character, and it makes strong metaphysical assumptions.... Rawls introduced the notion of the original position precisely in order to avoid these aspects of Kant's approach...." Stephen Perry, Ripstein, Rawls, and Responsibility, 72 Fordham L. Rev. 1845, 1848 (2004). Kevin Kordana and David Tabachnick wonder whether the claim that the division of responsibility presupposes principles of private right is consistent with the Rawlsian claim that:

> [T]he original position... incorporates pure procedural justice at the highest level. This means that whatever principles the parties select from the list of alternative conceptions presented to them are just. Put another way, the outcome of the original position defines, let us say, the appropriate principles of justice.

See John Rawls, Kantian Constructivism in Moral Theory, in Collected Papers, supra note 19, at 303, 310-11, quoted in Kordana & Tabachnick, Belling the Cat, supra note 3, at 1283 n.13.

Although it is not my main purpose to belabor fine points of Rawls's interpretation here, a few brief remarks are in order. First, Rawls's argument, like Kant's, is normative, not conceptual. This Kantian account carries none of the "strong metaphysical assumptions" with which Perry seeks to discredit it. It is not surprising that he gives no examples of such assumptions, because the only assumptions in Kant's account of private right are normative ones about freedom and equality. Both Kant and Rawls stand out in the history of political philosophy for endorsing the claim that the coercive structure of society is the sole subject of the theory of justice, as well as the broader claim that the demands of justice are in the first instance institutional rather than individual. This emphasis on the coercive structure is baffling from the point of view of the prominent idea that political philosophy is a branch of applied moral philosophy, but makes perfect sense from the standpoint of a focus on freedom understood as independence--that is, Kant's "rightful honor" or Rawls's "two moral powers." These are preinstituional components of the theory of justice, in the sense that they are the premises of the contract argument. The choice of a metric of primary goods has the same place in the Rawlsian theory--it is a normative premise based on the moral importance of the two moral powers. The division of responsibility has the same place in the theory: it is presupposed by the contract argument, not a product of it. So does the idea that the coercive structure is the topic, and the related focus on social as opposed to natural inequalities. Rawls makes it clear that the

contract device serves to facilitate comparisons between competing conceptions of justice. He writes, “Each aspect of the contractual situation can be given supporting grounds.” Rawls, Theory of Justice, supra note 1, at 19. The idea of Rawlsian justice is not that people somehow enter into a pre-contractual contract to agree about what their moral powers will be, what set of goods will govern their decision, or what falls within its purview. These are all antecedent to any possible contract--parties in the “original position” could never begin to consider alternatives unless those questions were set by the conception of persons as free and equal, each with a special responsibility for his or her own life. A system of private law works up and reconciles these presuppositions of the original position into the thesis that citizens are able to take up that special responsibility, using their own “all purpose means” to set and pursue their own conceptions of the good, either independently or cooperatively, as they see fit. So I am not attributing a “preinstituional” theory of private law to Rawls (or Kant for that matter), but rather a theory of the institutional place of private law: it resolves private disputes between free and equal persons in a way that is consistent with their freedom and equality, against the background of just institutions charged with the responsibility of the citizens considered as a collective body.

[FN26]. I discuss this in more detail, infra note 77.

[FN27]. John Rawls, Powers of Citizens and Their Representation, in Political Liberalism, supra note 21, at 47, 50.

[FN28]. Id. at 72.

[FN29]. Aristotle, supra note 13, at 59; Kant, Metaphysics of Morals, supra note 9, at 13.

[FN30]. Sometimes this idea is cast in skeptical, pluralistic, or epistemological terms. Some say that we create our own good. Others say that different people have different goods, and each person should pursue what is good for them, rather than trying to pursue what is good. Still others insist that there really is an answer to the question of what is best in life, but we turn out not to know it. Rawlsian liberalism contrasts with all of these views, because it is at bottom a theory of entitlements: you are the person who is entitled to make your own way of life, and nobody else has standing to take it upon themselves to decide for you. Your entitlement follows from your two moral powers as a human person, capable of setting your own purposes, not from any kind of empirical evidence, or even hypothesis, that your life is likely to go best if you make your own way, nor because we think there is no determinate answer until you have made one up.

[FN31]. John Rawls, Lectures on the History of Moral Philosophy 231 (Barbara Herman ed., 2000).

[FN32]. As a result, it does not succumb to John G. Bennett's criticism that private law might not have such effects. See John G. Bennett, Freedom and Enforcement: Comments on Ripstein, 92 Va. L. Rev. 1439, 1439-40 (2006).

[FN33]. Thomas Hobbes, Leviathan 90 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); see David Hume, A Treatise of Human Nature 489 (L. Amherst Selby-Bigge ed., 1978) (1739).

[FN34]. Kant, Metaphysics of Morals, supra note 9, at 37.

[FN35]. I explain this in more detail in As If It Had Never Happened, 48 Wm. & Mary L. Rev. (forthcoming Apr. 2007) (manuscript on file with the Virginia Law Review Association).

[FN36]. Kant, Metaphysics of Morals, supra note 9, at 30.

[FN37]. I examine the broader irrelevance of harm to legal and political philosophy in Beyond the Harm Principle, 34 Phil. & Pub. Aff. 215 (2006).

[FN38]. I elaborate these distinctions in more detail in Authority and Coercion, 32 Phil. & Pub. Aff. 2, 11 (2004) [hereinafter Ripstein, Authority and Coercion].

[FN39]. For Rawls, property straddles both the two principles of justice and the division of responsibility. In A Theory of Justice, he says that the choice between capitalism and socialism is to be made on the basis of deciding which best implements the difference principle. Rawls, Theory of Justice, supra note 1, at 247-48. In later works, however, he clarifies that the right to hold personal property is a basic liberty, governed by the first principle, though he also advocates what he calls "property-owning democracy" as the preferred economic system. Rawls, Justice as Fairness, supra note 22, at 138. The analysis of property referred to here applies to whatever property private persons and associations have in order to pursue their private purposes.

[FN40]. See Rawls, Theory of Justice, supra note 1, at 360.

[FN41]. I do so in Authority and Coercion, supra note 38, at 6-22.

[FN42]. Constructive trusts are only an apparent exception to this claim, as they are remedial responses to wrongdoing.

[FN43]. I discuss this issue in more detail in Three Duties to Rescue: Civil, Moral, and Criminal, 19 L. & Phil. 751, 753, 756-62 (2000).

[FN44]. See, e.g., Rickards v. Sun Oil Co., 41 A.2d 267, 269 (N.J. 1945) (denying recovery because injury was not foreseeable and, therefore, the person occasioning the loss did not owe a duty, arising from contract or otherwise, to the person sustaining the loss); Weller & Co. v. Foot & Mouth Disease Research Inst., (1966) 1 Q.B. 569, 587 (same); cf.Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51 (1st Cir. 1985) (denying recovery for purely financial harm caused by negligence, even where the injury was foreseeable).

[FN45]. See, e.g., Barber Lines A/S, 764 F.2d at 54 (defending decision to deny recovery because, among other reasons, the financially injured party could have contracted in advance for insurance or alternative compensation).

[FN46]. I explain this in more detail in Division of Responsibility, supra note 11, at 1821.

[FN47]. It is possible to generate an apparent tension between any account of private disputes and the Rawlsian focus on justice in distribution. Kordana and Tabachnick do so by characterizing that focus as committing Rawls to the implausible idea that his difference principle generates an ideal of moment-by-moment distributive shares for everyone, and sets out rules of private law to approximate this ideal in the aggregate. Kordana & Tabachnick, Belling the Cat, supra note 3, at 1280 n.4 and accompanying text. Rawls's arguments point in a very different direction, because he contends that the difference principle does not govern distributions as such, but rather expectations as generated by social institutions. See Rawls, Theory of Justice, supra note 1, at 64. As citizens take up responsibility for their own lives, they, either individually or through associations, can use or dispose of their distributive shares as they see fit. In Political Liberalism, Rawls is explicit that the aggregate effects of private transactions must not be allowed to generate injustices. See Rawls, Basic Structure as Subject, supra note 21, at 266. Implicit in this claim is the assumption that the micro-effects of particular choices do not, as such,

generate any injustices. Rawls's claim does not imply that, while a small distributive imbalance is generated every time someone makes a purchase or damages his or her own property, it is inefficient to correct the imbalance because of an extrinsic reason, such as high transaction costs. Instead, permissible private transactions raise no such issues. Each person has a claim against society as a whole to a just basic structure, and claims as against other citizens to justice in individual transactions. To borrow a helpful distinction from Stephen Perry, Rawls offers a dynamic rather than static account of distributive justice. Stephan R. Perry, On the Relationship between Corrective and Distributive Justice, in Oxford Essays in Jurisprudence 237, 245 (Jeremy Horder ed., Fourth Series 2000). Kantian "private right" is simply a demarcation of the boundaries of legitimate private transactions.

The idea that a concern for the expectations of the worst-off must yield an account of momentary shares is a residue of the assumption that morality is complete without institutions, so that institutions should be designed so as to approximate a result that can be specified without reference to them. See supra text accompanying note 7. This is not Rawls's view.

[FN48]. See A. John Simmons, Fair Play and Political Obligation: Twenty Years Later, in Justification and Legitimacy: Essays on Rights and Obligations 27, 29-31; A. John Simmons, The Principle of Fair Play, in Justification and Legitimacy, supra, at 1, 11, 23, 26.

[FN49]. See Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 20 (1996).

[FN50]. Hume, supra note 33, at 490.

[FN51]. This question does not concern either the existence of a moral obligation to obey the law, apart from its moral merits, or the attitude that citizens should take to the law. Those are interesting questions, but they are not my question. Instead, I am concerned only with the question of legitimacy: under what conditions can a society force its members to conform to its requirements, both in the form of first-order requirements on conduct, and through designated forums for dispute resolution in cases of conflict? The question of a state's title to coerce differs from another idea, familiar in constitutional theory, according to which a constitutional order is only legitimate if ordinary citizens willingly accept it as a source of moral obligation. Social life might well be impossible if most people do not willingly comply with the demands of law, but acceptance of legal obligations is not sufficient for legitimacy. In the same way, different political regimes might be evaluated in terms of their success at protecting important rights, but the question of legitimacy is the question of the entitlement to use force to do so.

[FN52]. See, e.g., Ronald Dworkin, Law's Empire 276-312 (1986); Ronald Dworkin, Sovereign Virtue: The Theory and Practice of Equality 157 (2000); Richard A. Posner, The Problems of Jurisprudence 360 (1990). See generally Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis 16, 24-34 (1970); Kaplow & Shavell, supra note 7, at xvii; William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 4-5 (1987); Kordana & Tabachnick, Belling the Cat, supra note 3, at 1287-88; Kronman, supra note 3, at 474. Dworkin is prepared to grant some independent significance to the law of contract, but none to tort. I examine this issue in Liberty and Equality, supra note 16.

[FN53]. The idea, familiar in economic analysis, that voluntary exchanges are preferable underscores this point: the claim is that they produce a net increase in wealth. Even when this claim is taken to be an analytical definition rather than an empirical discovery, economic analysis, like the utilitarianism to which it is heir, evaluates voluntariness in terms of its effects.

[FN54]. Locke, supra note 6, at 368.

[FN55]. See Kant, Metaphysics of Morals, supra note 9, at 89-113; John Rawls, Reply to Habermas, in Political Liberalism, supra note 21, at 372, 393.

[FN56]. See Kant, Metaphysics of Morals, supra note 9, at 91.

[FN57]. See Rawls, Social Unity, supra note 10, at 170.

[FN58]. See Immanuel Kant, Idea for a Universal History with a Cosmopolitan Purpose, in Kant: Political Writings 41, 46 (Hans Reiss ed., 1991). Isaiah Berlin's translation, referring to the “crooked timber of humanity” is more familiar. Isaiah Berlin, The Pursuit of the Ideal, in The Crooked Timber of Humanity: Chapters in the History of Ideas 1, 19 (Henry Hardy ed., 1990).

[FN59]. Locke, supra note 6, at 289-90.

[FN60]. John Simmons provides the most plausible defense of the idea of a Lockean right to punish in a state of nature: “[i]nsofar as there are objective moral rules (defining rights) under which all persons (originally) stand, and protection under the rules depends on others' obedience to them, then, a proportional forfeiture of moral rights may be a necessary consequence of infringing the moral rights of others.” A. John Simmons, The Lockean Theory of Rights 153 (1992). Putting aside any other difficulties this argument may have, it does not lead to a right to punish, but to a right to be punished subject to public procedures.

Simmons suggests that Locke combines natural law arguments with theological and rule-utilitarian ones to generate his account of natural rights. Although this is not the place to examine those arguments fully, it is worth noting that the basic premises of both the theological and rule-utilitarian arguments are in the same tension with the idea of an executive right in a state of nature, as is the Kantian account defended here. The theological argument that the world was given to mankind in common presupposes that the rights generated through this act of divine grace form a consistent set, something which executive rights in a state of nature do not do. The rule-utilitarian argument seeks to justify private rights on the grounds that they are the most advantageous set of overall limits on conduct. The empirical question cannot be examined, however, without also raising the question of enforcement. Given the “inconveniences” of private enforcement that Locke catalogues, Locke, supra note 6, at 368-71, the best overall rule cannot be one that generates rights that come into conflict in this way. Instead, the difficulties of private enforcement must enter into the evaluation of the consequences of any proposed set of rights. Here again, it seems that a right to a fair procedure would be the rule-utilitarian solution. The natural law arguments operate somewhat differently. In them, the root of the problem is clearest: if natural rights are to be a genuine alternative to divine right theories of government, they must begin with the idea that persons are free and equal--which is the very idea that the rights of different persons, both primary and executive, must form a consistent set.

[FN61]. I am grateful to Jonathan Wolff for suggesting this way of making the point.

[FN62]. Unless someone breaches a contractual obligation to protect your property (for example, your car).

[FN63]. I explain this in more detail in As If It Had Never Happened, supra note 35, at 19-24.

[FN64]. Kant, Metaphysics of Morals, supra note 9, at 25, 145-46.

[FN65]. See id. at 90.

[FN66]. The same point can be made about private rights of action: your primary right to be free of interference

from others, and to have others satisfy their obligations to you, generates a remedial right to repair if others violate your rights. See Benjamin Zipursky, The Philosophy of Private Law, in The Oxford Companion to Jurisprudence & the Philosophy of Law 624, 643-44 (Jules Coleman & Scott Shapiro eds., 2002). Your right of action is consistent with the rights of others only if there is a fair procedure in place for determining the precise contours of your respective rights and the application of those contours to the concrete situation. If I do something that you think violates your rights and you exercise "self-help," claiming one of my cattle or tearing down my fence, and I think I have done no wrong, or a lesser wrong, then things are likely to escalate, as I seek reparation for what I believe to be your wrong against me. Escalation is a symptom of the normative problem: if we both stand on what we take to be our rights, we stand in inconsistent places, and our conduct is not subject to reciprocal limits.

[FN67]. Kant traces this problem and its solution to what he calls the innate "right of humanity" in your own person. Kant, Metaphysics of Morals, supra note 9, at 29. The right is innate because it does not require an affirmative act to establish it. It is at once the right to freedom and equality, that is, the right to only be bound by others in the same ways that they are bound by you and, at the same time, the right to be "beyond reproach." He makes the connection between the two in a surprising way: first, he says there is only one innate right. Id. at 30. He then goes on to insist that it "contains" the right to be beyond reproach. The containment follows from the plausible claim (for which Kant mounts an explicit defense) that rights are coercively enforceable. The first aspect of the innate right of humanity, the right to freedom consistent with the freedom of others, governs the basic norms of interaction. They must be norms of equal freedom, guaranteeing that no person is subject to another's choice. Kant's account of private right articulates the structure of independent interaction. The second aspect of the same innate right of humanity governs the enforcement of rights, via the application of those primary norms of conduct to particular cases. Just as each person's freedom needs to be limited by the freedom of others so as to form a consistent set, so too each person's right to enforce in case of disputes about rights needs to be part of a consistent set so that the remedial process for resolving disputes does not turn into the subjection of one person to another person's choice. Kant makes this point explicit when he notes that the right to be beyond reproach is the basis of the burden of proof: a person is entitled to be presumed to have done nothing wrong. Id. The burden of proof is often thought of as a pragmatic or administrative matter, through which institutions allocate burdens to make their tasks easier, or to discourage frivolous litigation. Kant offers a fundamentally different account: the burden of proof lies with the plaintiff because no person is allowed to exercise force against another person (or call on the state to do so) simply on his or her own say so. The same normative structure that gives rise to private rights thus gives rise to a right to fair procedures governing the application of those rights. Every aspect of remedial rights is a right to a procedure, not forbearance on the part of others. If private wrongdoing is taking unfair advantage of others, then so is private enforcement.

[FN68]. The objection to private enforcement in a "state of nature" is that it subjects one person to the choice of another, so that whether your claim against me prevails depends upon how credible your powers of enforcement seemed to me or, if I am more fair-minded and our state of nature more Lockean, on how convincing I find your arguments. It might be thought that institutions solve this part of this problem, only to replace it with another. It may be that, if we have set up courts with honest and competent police powers to enforce their judgments, the success of your claim against me will not depend directly on our respective physical strength. It might be thought to depend upon how good an advocate you are, or how good an advocate you are able to hire, and so, ultimately, on how convincing the decisionmaker finds your argument as presented. Even if the force of argument is less violent than the argument of force, you might complain that the resolution of our dispute depends upon what the decisionmaker decides. The real world of legal procedure might erode your confidence further, because

it is a familiar fact that procedure is expensive, and those with the money to delay proceedings can simply price their opponents out of the system. These are contemporary reminders of Locke's observation that:

> Absolute Monarchs are but Men, and if Government is to be the Remedy of those Evils, which necessarily follow from Mens being Judges in their own Cases, and the State of Nature is therefore not to be endured, I desire to know what kind of Government that is, and how much better it is than the State of Nature.

See Locke, supra note 6, at 294. Locke's immediate concern is the power of an absolute monarch to be judge in his own case, a problem which can be solved through a separation of powers. The more general concern is that the decisionmaker will still have to decide somehow, possibly, so it might be feared, by bringing in irrelevant factors.

Nonetheless, the Kantian point here is not about the empirical dependence on a decisionmaker's decision. The problem is not that somebody decides, as if somehow in an ideal world, there would not be a human decisionmaker involved. The rule of law requires that someone decide in these cases, because there is no just answer without a determinative judgment. Nonetheless, the making of the judgment needs to be consistent with the freedom of all, which requires that the authorization to make the judgment must be in some important sense something that comes from everyone. This contrast is important even if the result in a case is exactly the same as would have occurred in the state of nature. Even if we have reason to suppose that its content would be exactly the same, it would issue from the wrong standpoint. The disappointed party could have only strategic or pragmatic reasons for accepting it. In a rightful condition, by contrast, the disappointed party would have a moral reason for accepting it, that is, that accepting the authority of the duly authorized courts and officials is the only way to reconcile his freedom with that of others. The notion of reconciling freedom at issue here is not empirical. It is not that he makes some calculation about the likelihood of favorable outcomes across time, in the way that Lockean persons are supposed to reason about exiting a state of nature. Instead, it is the only way in which the parties can enjoy their freedom together, and thus the only way in which the disappointed party can enjoy his or her freedom rightfully. The alternative is what Kant, following Rousseau, calls “wild, lawless freedom.” See Kant, Metaphysics of Morals, supra note 9, at 93.

[FN69]. I do not say that such disputes are more frequent because this would be very hard to know. If plaintiffs have competent legal counsel, cases in which plaintiffs fail to state a cause of action (i.e., cases in the former category) get litigated much less frequently.

[FN70]. As Robert Nozick points out, “[b]uilding a fence around a territory presumably would make one the owner of only the fence (and the land immediately underneath it).” Robert Nozick, Anarchy, State and Utopia 174 (1974). Nozick considerably understates the difficulty: why the land under the fence, rather than under the posts? Why not just the posts? Why not the area outside the fence?

[FN71]. Kant considers a series of further examples, including wills, contracts without consideration, contracts to lend an object, recovery of a stolen object, and conclusive presumptions of fact. In each case, Kant explains the role of determinate procedure in rendering individual rights systematically consistent. See Kant, Metaphysics of Morals, supra note 9, at 78-84.

[FN72]. See, e.g., Robert Cooter & Thomas Ulen, Law and Economics 155 (4th ed. 2003).

[FN73]. Again, a libertarian might propose the abolition of the law of adverse possession on the grounds that a property right can only be extinguished through a voluntary act of the owner. See generally Richard A. Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 Wash. U. L.Q. 667 (1986).

[FN74]. It is worth noting, however, that the idea that the positive law must be purely accidental from the point of view of morality reflects the more general bias of both Lockeans and utilitarians. They exclude the possibility that any part of morality requires law as such, allowing it instead only indirectly because of human foibles and frailties. Both view law as at best an empirically effective tool for realizing values that might, in happier circumstances, have been realized differently.

[FN75]. On the role of salience in generating conventional understandings, see David Gauthier, David Hume: Contractarian, 88 Phil. Rev. 3, 5-7 (1979). Unsurprisingly, Gauthier explicitly represents the acceptance of the rules of justice as purely strategic.

[FN76]. Robert Nozick, a leading defender of a Lockean account, concedes that he knows of no "thorough or theoretically sophisticated treatment of such issues." Nozick, supra note 70, at 152.

[FN77]. Public institutions of dispute resolution can be thought of as the solution to a certain kind of abstract coordination problem: everyone needs to arrive at a single determinate answer. But the argument to show that they are legitimate does not presuppose any more general claims about the legitimate enforcement of solutions to coordination problems. In particular, the fact that something could be done much more efficiently if people were to coordinate does not show that someone has standing to force others to participate in the system of coordination. The enforcement of private rights is a special case, precisely because the non-voluntary nature of the public institutions is consistent with the freedom that will result because such enforcement secures the freedom of all, by providing public fora to reconcile conflicting freedoms. Other coordination problems are a problem from the standpoint of particular desires particular people happen to have, and so are not binding on those who lack the desires. Freedom is binding on all. (Of course, once a state is in place, it also has standing to solve some coordination problems.)

[FN78]. See supra note 67 and accompanying text.

[FN79]. Dan Markovits has reminded me that the need for a shared standpoint could at least sometimes be solved through our joint selection of a third person as arbitrator, in particular, through our precommitment to such arbitration, a familiar feature of transnational contracting by large corporations. With respect to a particular contractual dispute, this solution is unobjectionable, or rather, only objectionable if, as might be the case, there could be a question about whether a particular dispute fell within the confines of the arbitration clause in question. That, of course, gets us back to the issue of closure. But the issue of closure presents itself even more robustly with respect to property. As a matter of the positive law of every modern nation, including, strikingly, even the former Soviet Union, property rights are rights as against all other private persons. See Anthony M. Honoré, Ownership, in Oxford Essays on Jurisprudence 107, 112 (Anthony G. Guest ed., 1961). Not all such systems meet the demands of justice, but the general point still applies to them: procedures for demarcating proprietary claims must be shared as between all of the people that they purport to bind. Thus a broader "omnilateral" basis is required to justify their enforcement.

[FN80]. Kant, Metaphysics of Morals, supra note 9, at 89.

[FN81]. Rawls, Social Unity, supra note 10, at 170.

[FN82]. In the Critique of Pure Reason, Kant introduces what he calls "Ideas of Reason" through the example of a republican constitution. Ideas of reason are not given an experience, and no experience can be fully adequate to them, but they nonetheless organize our thinking about experience. Kant, supra note 4, at 396-97. His other

examples of Ideas of Reason include plants and animals, that is, living things that are subject to a principle of organization that survives changes in their matter, and to which no particular example will be entirely adequate. Id. at 397-98. Horses have four legs, even if some particular horse loses one or more of those legs, and the female mayfly lays thousands of eggs even though most female mayflies never survive to reproduce. The formal principle governs the empirical particulars.

[FN83]. Immanuel Kant, Groundwork for the Metaphysics of Morals 224 (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., Oxford Univ. Press 2002) (1785)

[FN84]. That is why Kant describes the duty to give to charity as an "imperfect" duty: although you have an obligation to make meeting the needs of others one of your ends, it is up to you to decide which people, which needs, and to what extent you will meet them.

[FN85]. Jean Jacques Rousseau, The Social Contract 46-48 (Charles Frankel ed., Hafner Publ'g Co. 1947) (1762).

[FN86]. See Murphy & Nagel, supra note 3, at 32-33:

There is no market without government and no government without taxes; and what type of market there is depends on laws and policy decisions that government must make. In the absence of a legal system supported by taxes, there couldn't be money, banks, corporations, stock exchanges, patents, or a modern market economy--none of the institutions that make possible the existence of almost all contemporary forms of income and wealth.

It is therefore logically impossible that people should have any kind of entitlement to all their pretax income. All they can be entitled to is what they would be left with after taxes under a legitimate system, supported by legitimate taxation--and this shows that we cannot evaluate the legitimacy of taxes by reference to pretax income.

They continue: "Property rights are the product of a set of laws and conventions, of which the tax system forms a part." Id. at 74. As a reductio ad absurdum of the Lockean claim that entitlement follows causation, such an argument is beyond reproach. The proper way to repair the failings of the Lockean argument is to reject the idea that rights are grounded in the causation of valuable object.

[FN87]. See Will Kymlicka, Contemporary Political Philosophy: An Introduction 75 (1990); Richard J. Arneson, Equality and Equal Opportunity for Welfare, 56 Phil. Stud. 77, 79 (1989); G. A. Cohen, On the Currency of Egalitarian Justice, 99 Ethics 906, 923 (1989).

[FN88]. See Elizabeth S. Anderson, What Is the Point of Equality?, 109 Ethics 287, 288-89 (1999); Samuel Scheffler, What is Egalitarianism?, 31 Phil. & Pub. Aff. 5, 5-6 (2003); Jonathan Wolff, Fairness, Respect, and the Egalitarian Ethos, 27 Phil. & Pub. Aff. 97, 113-15 (1998).

[FN89]. Perhaps the luck-egalitarian position can be developed in a different direction, as suggested by Daniel Markovits, How Much Redistribution Should There Be?, 112 Yale L.J. 2291, 2298-99, 2323 (2003) (rejecting the notion that one can simultaneously secure the non-subordination of people as free choosers rather than as recipients of luck, and arguing that the former is preferable to the latter). My remarks here focus only on the main thrust of luck-egalitarian writing.

[FN90]. See G. A. Cohen, If You're an Egalitarian, How Come You're So Rich? 3-6 (2000).

[FN91]. The Kantian focus on the unavailability of certain means, which I claim animates Rawls's understanding of the sense of justice, is a central feature of constitutional jurisprudence in many modern democracies. Consider the remarks by President Aharon Barak of the Israel Supreme Court in a decision involving the legality of interrogation practices:

We are aware that this decision does not make it easier to deal with [the] reality [of fighting terrorism]. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Gov't of Israel [1999] IsrSC 53(4) 817, 845. President Barak's comments were endorsed by Justices Iacobucci and Arbour of the Supreme Court of Canada in Application Under Section 83.28 of the Criminal Code (Re), [2004] 2 S.C.R. 248. They have also been endorsed in speeches by leading constitutional jurists, including by Justice Ruth Bader Ginsburg, A Decent Respect to the Opinions of [Human]kind:The Value of a Comparative Perspective in Constitutional Adjudication, Address at the Annual Meeting of the American Society of International Law (Apr. 1, 2005), http://www.asil.org/events/AM05/ginsburg050401.html, and by the English Law Lord Johan Steyn, Guantanamo Bay: The Legal Black Hole, 53 Int'l & Comp. L.Q. 1, 15 (2004). Similar concerns arise in the recent decision by the German constitutional court voiding §14.3 of the Aviation Security Act, governing the authorization to shoot down hijacked civilian aircraft to prevent them from "doing further damage." See Bundesverfassungsgericht [BVerfG] [federal constitutional court] Feb. 15, 2006, 1 BvR 357/05, (F.R.G.), available at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html. The court's rationale was that:

Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.

Id.

[FN92]. In two recent influential articles, Thomas Pogge has argued that the Rawlsian social contract collapses into a form of consequentialism, because the parties in the original position are simply concerned to advance their own interests, and regard themselves only as recipients of the principles of political order, rather than authors. See Thomas Pogge, Equal Liberty for All?, 28 Midwest Stud. in Phil. 266, 271-73 (2004); Thomas W. Pogge, Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions, 12 Soc. Phil. & Pol'y 241, 243-44 (1995) [hereinafter Pogge, Three Problems]. On the Kantian reading of Rawls defended here, the charge has no purchase, because the entire point of the social contract is to guarantee that the citizens are the authors of the laws that bind them, so that the use of force is consistent with their freedom and equality. They could not authorize a system in which people were held accountable for things they had not done. Nor could they accept draconian punishments on the basis of their expected advantages in fighting crime. As always, certain means are unavailable. Instead, they would choose the institutions that place the burden of proof on the state, and guarantee that coercive action is a response to individual responsibility.

Pogge's sole textual evidence for his reading of Rawls is a brief passage in which Rawls appears to endorse H.L.A. Hart's conception of responsibility. See Pogge, Three Problems, supra, at 258. The passage is unrepresentative in several respects, however. First, Rawls is talking about emergency powers, to be invoked only to prevent the breakdown of civil society. It is not clear that the contract methodology applies to such a situation. If it

does, much more argument would be needed to show that the reasoning that it yields generalizes to other cases as Pogge suggests. It is also inconsistent with the division of responsibility that Rawls later saw to be the central presupposition of his work.

[FN93]. Rawls, Theory of Justice, supra note 1, at 74.

[FN94]. It is worth remembering that Rawls introduces the difference principle through a discussion of offices within social institutions, rather than in relation to wealth, considered as such. See John Rawls, Justice as Fairness, in Collected Papers, supra note 19, at 47, 50.

[FN95]. See Rawls, Theory of Justice, supra note 1, at 53-54; Rawls, Basic Structure as Subject, supra note 21, at 283.

[FN96]. See Cohen, supra note 90, at 6.

[FN97]. Liam B. Murphy, Institutions and the Demands of Justice, 27 Phil. & Pub. Aff. 251, 254-55 (1998).

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*267 RESPONDING TO RAWLS: TOWARD A CONSISTENT AND SUPPORTABLE THEORY OF DISTRIBUTIVE JUSTICE

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I. Introduction

Distributive justice is concerned with the question of how benefits and burdens, and in particular how economic resources, should be allocated. Contemporary discussions of distributive justice are dominated by Rawlsian methodology, which proceeds from the presumption that talents and social position are undeserved and cannot support claims of entitlement. While the distribution of such attributes is itself neither just nor unjust, the justice inherent in a society is measured by the extent to which it is willing to neutralize such morally arbitrary factors in determining the distribution of economic resources. Nevertheless, as material incentives are ordinarily required in order to encourage productive economic activity, a balance must be struck between the demands of equality and those of efficiency. The question is where to strike that balance. [FN1]

John Rawls argued that positions that people take with regard to questions of distributive justice may be influenced by their knowledge of how they themselves would fare under various structures. He therefore proposed investigating what principles would be adopted by individuals unaware of their own talents or social status--what he referred to as the "original position"-- so that they would not be able accurately to predict how any particular structure would affect them. [FN2] Behind this "veil of ***268** ignorance," Rawls claimed, risk aversion would overcome all other considerations: one would not risk the little he might have in order to increase what he would receive were he one of the wealthy. [FN3] The result would, therefore, be the adoption of principles maximizing the welfare level of the least well-off ("the difference principle"). [FN4]

The difference principle is not, however, the only possible outcome of Rawlsian methodology. In particular, the degree of risk aversion that the participants would display might arguably range anywhere from the extreme of zero, in which case participants would presumably adopt welfare-maximizing principles conforming with classic utilitarianism, to the overwhelming role that Rawls assumed it would play. [FN5] The greater the risk aversion, the less willing the participants would be to sacrifice equality for greater total welfare. [FN6]

The evident truth of the proposition that individuals do not deserve, in a moral sense, the attributes which determine their distributive shares of social goods [FN7] and the apparently inexorable reasoning from that point forward seem to indicate that, while the difference principle itself might be disputable, some type of Rawlsian redistribution is morally required. In fact, the Rawlsian methodology is so powerful that, as Nozick himself claimed, today's political philosophers must "either work within Rawls's ***269** theory or explain why not." [FN8] Therefore, in conformity with Nozick's dictate, I will first explain why I find Rawls's theory unacceptable.

Rawlsian methodology, if applied consistently, appears to require a redistribution of economic resources, not only among members of a given society, but also internationally. Nationality, after all, is no less arbitrary than other attributes, yet it plays a significant role in determining an individual's life chances. Therefore, Rawlsianism would seem to imply cosmopolitanism, or the application of Rawlsian principles of justice without regard to national boundaries. Nevertheless, most social philosophers, including Rawls himself, reject cosmopolitanism and hold that Rawlsian principles are only applicable to, or can be limited to, the citizens or residents of a given society. [FN9] It should be noted that Rawls was willing to concede that wealthy societies do have a minimal obligation toward societies whose level of material wealth is insufficient to allow them to become "well ordered." [FN10] He rejected, however, any notion of international redistribution that was more comprehensive. [FN11]

A number of arguments have been raised by proponents of what I shall refer to as "domestic Rawlsianism" to explain why Rawlsian principles are inapplicable internationally. [FN12] Nevertheless, if these arguments fail, and if one is unwilling to embrace the concept of a global Rawlsian redistribution, then one would be left with no alternative but to reject Rawlsianism itself. In other words, the dismissal, on intuitive grounds, of cosmopolitanism requires a similar dismissal of Rawlsianism.

Nevertheless, rejecting Rawlsianism does not necessarily imply retreating into libertarianism. [FN13] Libertarians avoid the conflict between ***270** domestic justice and international justice by denying that justice demands redistribution, even domestically. However, this approach does not conform to what many would deem to be our considered judgments. [FN14] There is something not quite right with a world in which some individuals literally have more than they know what to do with, while others, no less deserving, lack basic sustenance. Libertarianism, I believe, fails to take into account most people's fundamental belief that vast discrepancies in material wealth cannot be completely ignored, especially when it is conceded that the rich do not have any desert-based claim to their holdings.

For a theory of justice to be acceptable, it needs to be both internally consistent and in conformance with our considered judgments. [FN15] I believe that domestic Rawlsianism fails on the first count and that cosmopolitanism and libertarianism fail on the second. Thus, in addition to being internally consistent, an acceptable theory would have to occupy the ideological middle ground between cosmopolitanism and libertarianism. [FN16]

If limiting the application of distributive justice to the domestic arena proves impossible, the only other approach appears to be to argue for a conception of justice that is more limited in intensity yet more extensive ***271** geographically. One may posit that justice is satisfied by something less than a Rawlsian redistribution, but that the demands of justice--limited as they are--are universal. Nevertheless, while the demands of justice are universal, a state, in regulating its internal affairs, might go beyond the demands of distributive justice and effect a more extensive redistribution, provided certain conditions are met. The theory of justice proposed in this Article is such an approach: a model of distributive justice that focuses on needs and their fulfillment and on redistribution beyond the dictates of distributive justice.

Part II of the Article explores the relationship between Rawlsianism and cosmopolitanism. It shows how Rawlsianism logically leads into cosmopolitanism and examines the various arguments which have been raised to avoid this result. The analysis will show that the arguments are ultimately unsuccessful and that domestic Rawlsianism must be rejected as internally inconsistent. This Part further argues that unless one is willing to embrace cosmopolitanism, one must reject Rawls's position that human society is under a positive moral obligation to neutralize the admitted unfairness inherent in nature.

As an alternative to Rawlsianism, Part III introduces a needs-based model of distributive justice. Although admitting that the natural distribution is unfair, this model does not view the inequality itself as imposing any moral duty on those who have more to share the wealth with those who have less. Rather it argues that where a person is in need and another person or group of persons is capable of satisfying that need at a non-prohibitive cost, there is a moral obligation to do so. This Part also discusses some of the differences between inequality-based justice and needs-based justice and attempts to show why the consequences of needs-based justice conform better to our considered judgments.

Part IV considers the implications of needs-based justice for domestic redistribution. Whatever duties are imposed by the terms of distributive justice must be applicable globally: needs-based justice requires that both the needs of compatriots and the needs of foreigners be addressed. It would seem to follow that, having satisfied those needs--or, more accurately, having gone as far in acting to satisfy needs as the terms of justice require--distributive justice can impose no further obligation to enact a more comprehensive domestic redistribution. If distributive justice requires a more comprehensive redistribution, then it is unclear why foreigners should not be entitled to benefit from it. If, on the other hand, distributive justice does not demand more than needs satisfaction, it is unclear how a more extensive domestic redistribution can be justified. Part IV addresses this issue and--in what is a mirror image of the analysis of Part II--examines possible arguments for a ***272** more extensive domestic redistribution. The conclusion reached in Part IV is that distributive justice is incapable of imposing different obligations in the domestic and international arenas. This Part next examines whether it is possible to justify a more comprehensive domestic redistribution on a form of transactional justice embodied in benefit theory. Classic attempts to do so, which rely on the supposed greater benefit derived by the wealthy from government, are unconvincing. Part IV, however, argues that concern for the fate of compatriots, while insufficient either to limit or to expand the obligations of distributive justice, can justify the imposition of taxation for the purpose of improving the welfare of the less well-off beyond merely satisfying their needs. Finally, this Part considers some implications of the proposed model.

II. Rawls and Cosmopolitanism

If morally arbitrary factors are truly improper criteria on which to stake distributive claims, justice would appear to require an international Rawlsian redistribution. Ostensibly, an individual's nationality would appear to be as arbitrary an attribute as that individual's race, gender, social position, or natural talents. Each of these attributes is part of the “natural lottery,” the results of which should, according to Rawls, be neutralized as far as possible when determining distributive shares. [FN17] There would, therefore, be no reason to halt the redistributive process at national borders. Redistributing wealth among those who happen to be citizens or residents of a certain country and ignoring the claims of those located beyond its borders, merely on the basis of their inherited status as outsiders, would appear to be as morally arbitrary as redistributing wealth only among those of a certain racial or ethnic background, or only among members of a given social class and ignoring the claim of those not so classified. [FN18]

Reasonable individuals behind the veil of ignorance who were unaware of their national affiliation would not agree to allow their life chances to be determined by such affiliation any more than they would allow them to be determined by their natural talents. It is therefore surprising to discover that many social philosophers who adopt a Rawlsian conception of justice hold that the requirement to redistribute wealth is fully applicable only within the borders of a state and that the ***273** claims of outsiders to participate in the redistribution may be justifiably ignored or, at the least, that a lesser level of redistribution is required to satisfy their claims. [FN19] This, in

fact, was the position taken by Rawls himself. The only obligations of international distributive justice that Rawls recognized were those of richer states, vis-à-vis poorer states, to guarantee that the latter are able to reach the level of material prosperity necessary to sustain a well-ordered society. [FN20] Beyond that minimum level, Rawls argued that there is no moral obligation to redistribute wealth, even if an alternative distribution of the world's economic resources would be more advantageous to the world's worst-off persons or group of persons. [FN21]

The question which needs to be addressed is whether domestic Rawlsianism is a viable position or whether it suffers from a fatal internal inconsistency, deriving from the fact that the fundamental principle underlying Rawlsianism-- that morally arbitrary attributes cannot ground entitlement--seems to lead inexorably toward cosmopolitanism. Saving domestic Rawlsianism from inconsistency, however, cannot be achieved by adjusting or "fine tuning" the fundamental Rawlsian principle so as to avoid cosmopolitanism unless the rephrased principle itself conforms to our considered judgments. For example, one may rephrase Rawls's fundamental principle in the following manner: the effects of morally arbitrary factors that impact an individual's welfare should be neutralized as far as possible, with the single exception of national affiliation, which, although just as arbitrary from a moral point of view, may legitimately determine what an individual is able to achieve in his or her life. This rephrased principle avoids cosmopolitanism, but at the cost of creating a conflict with our considered judgments. Why should humanity not attempt to neutralize, as far as possible, the effects of a person's national affiliation, when national affiliation is just as arbitrary, from a moral point of view, as are other factors whose effects Rawls argues should be neutralized?

***274** Is it possible to restrict the application of principles of distributive justice to the internal affairs of a state and to ignore claims of foreigners who would like to participate in the redistribution? Non-cosmopolitan commentators who wrestle with the problem of the internationalization of justice have raised a number of arguments in their attempts to justify domestic Rawlsianism. The major justification attempts may be referred to as the benefit apportionment argument, the national association argument, the original position argument, and the functionality and practicality argument.

A. Benefit Apportionment Argument

Rawls introduced his analysis of justice as fairness by pointing out that human society is both cooperative and competitive. Through cooperation, people can collectively achieve a higher level of welfare than through individual effort. Nevertheless, he stated, although social cooperation is marked by an identity of interests, the interests of individuals conflict when it comes to distributing the benefits of that cooperation. As the benefit of social cooperation is finite, each individual's interest in taking for himself as much of that benefit as possible is incompatible with the interests of others. Justice, Rawls claimed, involves the fair distribution of this benefit, and his theory of justice as fairness was his attempt to describe how society should go about distributing the benefits of social cooperation. [FN22]

From Rawls's perspective, social cooperation appears to be both a necessary and a sufficient condition for social justice. Where social cooperation is lacking, the concept of justice is meaningless. Justice has meaning only within the framework of a cooperative society. [FN23]

However, this line of reasoning would imply that in a state of nature, individuals would be entitled to whatever level of welfare they were able to achieve and that no one would have any legitimate claims to the wealth produced by others. Thus Rawls, according to the benefit apportionment argument, accepts the Lockean

perspective that, in such a state, each individual has exclusive rights in his or her own labor and in the product of that labor. [FN24] This in turn implies that each individual has ***275** the exclusive right to benefit from his or her own talents. On the other hand, the difference principle is premised on the assumption that individuals are not morally entitled to benefit from the talents they happen to possess by virtue of the "natural lottery." [FN25] Thus the contention that justice is applicable in a state of nature would appear to undermine the entire logical structure upon which the difference principle is based.

Furthermore, natural talents by themselves are insufficient to produce the necessities of life. A person, no matter how talented, cannot produce food, clothing, or shelter without integrating a physical component. Locke, therefore, argued that when a person combines his labor with a part of the physical world, the rights of exclusive ownership that the person had in his or her labor flows into the physical component, and the person acquires exclusive rights to the product. According to Locke, the labor necessary to ground a claim of ownership in a part of the physical world can range from gathering nuts in the forest to cultivating a plot of land. [FN26]

This rationale for exclusive ownership does not flow directly from the first contention regarding the rights of each individual to his endowment. One might accept the latter and yet argue that because the product contains elements of both privately owned labor and the commonly owned physical world, rights in the product should be apportioned accordingly. The rest of humanity would therefore have a claim to a proportionate part of the product. [FN27]

Nevertheless, the benefit apportionment argument appears to indicate that Rawls accepts even this more controversial contention, based on the benefit apportionment argument: as combining one's labor with the physical world is not an act of social cooperation, no one can legitimately raise any claim based on justice to share in the wealth created. In fact, Rawls's position may be even more deferential to the natural right of ownership than was Locke's. While allowing a person to combine his labor with that of the natural world and claim exclusive ownership in the product, Locke was careful to add the proviso that the laborer leave for others "as much and as good" as he took for himself. [FN28] Where resources are limited and the appropriation by one would negatively impact the ability of others to act similarly, the Lockean proviso would act to deny the laborer's claim to exclusive rights in the product. Locke, therefore, limited the right to expropriate scarce natural resources for private use.

***276** On the other hand, Rawls is considerably less restrictive with regard to the expropriation for exclusive use of part of the natural world. When considering the international arena, Rawls avers that each state has exclusive rights to the natural resources in its territory and is not required to share with other nations the wealth derived from its exploitation of those natural resources. [FN29] Rawls does not require that a state must leave for other states "as much and as good" as it took for itself. A state, according to Rawls, may legitimately claim exclusive rights to extremely scarce, and consequently valuable, resources. [FN30]

Introducing social cooperation changes Rawls's position dramatically. From advocating a position that is perhaps even more deferential to the possibility of acquiring private property than that of Locke, Rawls argues that wealth should be drastically redistributed in accordance with the difference principle where there is social cooperation involved. The following hypothetical examines whether these two positions are, in fact, compatible.

Consider the case of two shipwrecked sailors, Mary and Paul, on a deserted island. For whatever reason, they go their separate ways, and each one fends for himself or herself. Assume that Mary turns out to be an excellent hunter-gatherer. She enjoys lavish meals and comfortable clothing; she is even able to stash away extra food and other resources for the proverbial rainy day. Paul, on the other hand, is a mediocre hunter-gatherer. He

is unable to acquire much more than what he needs for bare subsistence and is therefore unable to accumulate anything for the future. According to Rawls, Mary is under no moral obligation to share her wealth with Paul. Each is operating completely independent of the other, and in the absence of social cooperation, there are no operative rules of distributive justice. [FN31]

***277** Mary and Paul now consider the possibility of joining forces. A day or two of experimentation convinces them that together they can hunt and gather more effectively than they can separately; their joint take is greater than their separate takes combined. It would, therefore, be rational for them to continue their cooperation. As Rawls points out, however, while the two of them have a mutual interest in cooperating, their interests diverge when it comes to distributing the benefits of that cooperation. [FN32] Being rational, they will most likely bargain for the surplus wealth attributable to the cooperation. As the cooperation of each is a necessary condition for obtaining the surplus wealth, and each is equally capable of refusing to cooperate, they might end up splitting the surplus evenly between them, so that each would be entitled to what he or she would have acquired by working on his or her own plus half of the remainder. Alternatively, Paul may recognize Mary's superior skills and agree that the surplus be divided proportionally; if, for example, Mary's average take in the absence of cooperation was three times that of Paul's, then Mary might get three-quarters of the cooperative take.

Of course, the situation might be different if Mary and Paul were to marry, and especially if they were to raise a family together. In those circumstances, it would no longer be necessary to negotiate the price of social cooperation if, due to mutual affection and shared interest in the fate of their children, each of them has as his or her goal the welfare of the family unit. The couple might very well adopt Rawlsian principles in distributing their resources. Not only would the benefit of cooperation be shared, but so would each person's original endowment.

However, where Mary and Paul are independent actors negotiating for economic cooperation, it would not be reasonable to demand that Mary allow Paul to keep the entire surplus to compensate him for his relatively poor hunting and gathering skills. Doing so might be commendable on Mary's part, but it is unclear why justice would demand such action. In the same way, Mary might be commended for coming to Paul's aid before the commencement of cooperation between them, and yet Rawls would have imposed upon her no moral duty to do so.

Nevertheless, once Paul and Mary begin cooperating in the production of wealth, Rawls goes even further than vesting in Paul the right to the entire surplus wealth. As the worst off individual in the society, Paul would apparently have a claim to half of the entire take and, moreover, to half of the wealth stashed away in Mary's cave. [FN33] In such a ***278** situation the various arguments raised by Rawls to justify the difference principle would come into play. Mary does not deserve her exceptional skill in any morally meaningful way. She does not have any claim of moral desert to the wealth attributable to her natural talent. In Rawls's original position, Mary and Paul would not have agreed to allow the wealth to accrue to the one who happened to be in possession of the necessary skills.

But is the quantum leap from the justice-free realm of individual action to the difference principle-dominated realm of social cooperation justified? Mary's entitlement, in a state of nature, to whatever material level of well-being her natural talents allow her to achieve implies exclusive rights in the natural talents she happens to possess. These rights would, presumably, include the right to sell or trade the use of those talents and to retain for her exclusive use whatever she received in exchange.

From the perspective of justice as fairness, as subsequently developed by Rawls, the problem with denying the applicability of justice in a state of nature is that even in the absence of social cooperation, the welfare level that an individual is able to achieve is the result of factors that, in Rawlsian terminology, are arbitrary from a moral point of view. [FN34] As Rawls so strongly argues, the unequal distribution of talents is a fact. It is neither just nor unjust. What is just or unjust is the extent to which it is allowed to influence the distribution of primary social goods. [FN35] If it is assumed that a person deserves his natural talents, then the possession of those talents might ground an entitlement claim to the wealth which those talents produced. However, if, as Rawls claims, a person does not deserve her natural talents, it would not appear that she has any moral claim to the material wealth that those talents are able to produce, whether she exploited those talents within the framework of social cooperation or in a state of nature. [FN36] In other words, if a person has exclusive rights to her talents and to the wealth which they produce, she should be entitled to whatever she receives in exchange for exploiting them. If, on the other hand, she does not have exclusive rights to her ***279** natural talents, then it is unclear why she should have exclusive rights to what they enable her to produce in the absence of social cooperation.

The same principles that were in play with regard to Mary and Paul apply in a more sophisticated market setting as well. Individuals negotiate for cooperation in their joint ventures. Those who own factors of production--such as laborers, lenders, property owners, and entrepreneurs--distribute among themselves the benefit of their cooperation in accordance with the value of their contributions. The ability of each owner of a factor of production to withhold her contribution should ensure that each owner receives a share commensurate with the marginal value of that contribution. The principles of transactional justice, assuming they are applied in practice, will ensure that no one is deprived of her fair share of the cooperative product through fraud, deceit, coercion, or the like. Again, if each individual has the exclusive rights to her own endowment--as the inapplicability of distributive justice in the absence of social cooperation would seem to indicate--then each individual has, by implication, the exclusive rights to the value of her contribution to the joint enterprise. Whatever she receives in exchange for that contribution is hers by right.

In contrast, the case for a Rawlsian distribution is premised on the argument that an individual has no intrinsic right to the wealth she produces. The absence of any prior claim of an individual to the wealth she produces enables society to redistribute that wealth in accordance with the difference principle. To posit otherwise would result in redistribution being tantamount to theft, as is argued, in fact, by libertarians.

Thus, the attempt to base domestic Rawlsianism on the benefit apportionment argument is impaled on the horns of a dilemma. If one posits that redistribution is inapplicable in a state of nature and that individuals in such a state are entitled to benefit from morally arbitrary factors, it follows that they would also be entitled to retain whatever they received in exchange for agreeing to cooperate in the joint production of wealth. Redistribution would be unjustifiable. On the other hand, if one posits that justice requires the neutralization of the effects of morally arbitrary factors even in the absence of social interaction, then, regardless of the existence or extent of international cooperation, the redistribution would need to be global in scope.

Arguing both for a natural right to the product of one's labor--or, more broadly, of the return from the use of any of one's means of production--and for a redistribution is not necessarily contradictory. In fact, my own position, as will be developed further on, incorporates both of these elements. The position presented here is merely that such a ***280** natural right is inconsistent with a Rawlsian redistribution.

B. National Association Argument

Another attempt to restrict the application of Rawlsian redistribution is the argument that national association is what creates the rights and obligations associated with distributive justice. Without the ties implied by such association, goes the argument, the rules of distributive justice are inapplicable. However, this claim raises an important question: why is distributive justice inapplicable in the absence of national association, or, contrapositively, why is national association a necessary condition for distributive justice?

1. Sympathy

One attempt to support the national association argument is based on the claim that people naturally feel close to those with whom they share a common bond and a common destiny. Co-nationalists meet these criteria and evoke, therefore, a certain degree of altruistic concern. Thus people are usually willing to share their wealth with their compatriots beyond the extent to which they are willing to share with others with whom they do not share these common bonds. [FN37]

I see no reason to dispute the factual basis of this claim, which is evidenced, for example, by the press coverage of a natural disaster or an act of war or terrorism. The news services of a given country usually devote disproportionate attention to the fate of victims who happen to be nationals of that country. Presumably, the extent of this coverage results from the fact that the public is, or is assumed to be, particularly interested in the welfare of its compatriots. One may assume that people ***281** will be more receptive to sharing their wealth with their fellow nationals than with others with whom they do not feel this common bond. [FN38]

Nevertheless, feelings of closeness cannot ground claims of distributive justice. More pointedly, lack of these feelings cannot ground a denial of claims to distributive justice. A person's willingness to share his or her wealth with another individual or group of individuals, while perhaps laudable, is altruistic, and altruism is a concept considerably different from distributive justice. Justice is the set of principles which delineate those things to which an individual has a moral claim. Altruism is a selfless act by an individual after all claims of justice have been satisfied; it involves the voluntary waiver of just claims, or the voluntary and unreciprocated transfer, for the benefit of others, of justly held economic resources. [FN39]

Justice is not altruism. One who gives another his due is no more altruistic than a trustee who transfers trust property to the beneficiary. If for whatever reason legitimate claims of justice are not legally enforceable, then voluntarily satisfying those claims is laudable; it is not, however, altruistic. Returning lost property to its rightful owner, when that person does not know what happened to his property and is thus unable to take action to enforce his rights, is laudable. However, it is laudable precisely because it involves satisfying a claim of justice which would otherwise go unsatisfied. No altruism is involved aside from the effort exerted in returning the item, assuming the actor was not compensated for this effort. In order for the act to be considered truly altruistic, the actor must have a legitimate option to use the item in his possession for his own benefit. An altruistic act is an act beyond the call of moral duty. Sharing one's wealth with those of one's choosing is legitimate with regard to altruism, but it is not true with regard to justice. Claims of justice must be satisfied without regard to one's feelings toward those to whom one owes moral duties. Not liking someone is not a legitimate reason to steal from him; it is a legitimate reason not to give him a gift.

Sympathy with the fate of one's compatriots, like sympathy with the fate of the members of one's family, clan, or ethnic group, cannot, therefore, affect the just claims of outsiders. “I cannot give to you that to which you are entitled because I prefer to give it to someone close to me” is not justice; it is embezzlement. The idea

that national feelings can somehow limit justice and confine it to the boundaries of a state must, ***282** therefore, be rejected.

2. Possession of talents

A second attempt to ground the national association argument is the claim that the talents of a society and the wealth derived from those talents belong to members of that society and are, therefore, theirs to dispose of and to distribute as they see fit. [FN40] This claim is, in some ways, similar to the benefit apportionment argument considered above. They both proceed from the assumption that those who are not part of the economic institutions concerned have no right to share in the distribution. On the other hand, the emphasis of each argument is different. The benefit apportionment argument proceeds from Rawls's claim that justice concerns the fair distribution of the benefits of social cooperation. The claim presently being considered is that the country possessing the talents has the intrinsic right to distribute the product of these talents as it sees fit.

However, talents are most immediately possessed by individuals. Indeed, when individuals with talents belong to a society, the talents may be said, as a factual matter, to be possessed by that society. However, in the same way, when those individuals are part of the human race, it may be said that the talents are possessed by humanity. If the possessor of talents is entitled to distribute the economic advantage derivable therefrom, then identifying the possessor of the talents would appear to entail far-reaching consequences. Asserting that the individual possesses the talents and the right to benefit from them undermines Rawlsian redistribution and leads toward libertarianism. Identifying humanity as the possessor leads to cosmopolitanism. Thus, it appears arbitrary to claim that the country possesses the talents and is free to distribute the benefits as it sees fit. [FN41]

However the problem with this particular claim, which proceeds from the assumption that a talent-possession society has the right to exclude outsiders from benefiting from them, goes deeper. The proposition is Nozickian in nature and appears to undermine not only ***283** cosmopolitanism, but domestic Rawlsian distribution as well. If mere possession creates entitlement, as Nozick argued, [FN42] then, just as the country has an entitlement vis-à-vis the rest of the world, the individual would have an entitlement vis-à-vis the rest of society. In other words, were a given society to say to other societies that it has the right to exclude them from benefiting from the talents it possesses, then, when the society in question came to distribute internally the resources at its disposal, it would be open to a compelling claim by the individual in whom those talents resided that he has the right to exclude his compatriots from benefiting from his talents. Of course, countering this argument by pointing out that the particular individual possesses those talents by mere happenstance and that as a consequence he has no moral claim to the wealth which those talents generate exposes the society in question to a similar claim by foreigners. The result, again, is that rejecting cosmopolitanism leads to libertarianism and rejecting libertarianism leads to cosmopolitanism. The present argument thus fails to provide a coherent doctrine capable of rejecting both libertarianism and cosmopolitanism in favor of the middle position of domestic Rawlsianism.

3. Associative obligations

Some commentators have argued that the very act or circumstance of association creates among its members rights and corresponding obligations, the nature of which depend upon the type of organization. These mutually held rights and obligations are not necessarily dependant upon an individual voluntarily joining the association or consenting to the others joining. The mere circumstance of membership in the association is enough to create a bond of rights and obligations which does not exist vis-à-vis non-members. [FN43]

When the association concerned is a state, the rights and obligations concerned include those of distributive

justice. Wealthy members of the society have an obligation of concern towards less well-off members and, consequently, are required to share their wealth with them. The wealthy of country A, however, lacking any associative relationship with the poor of country B, have no duty of concern for them. [FN44]

The problem with this argument, however, is that it assumes the very proposition which it purports to prove. The question of why involuntary ***284** association creates rights and obligations--and in particular why national association creates the rights and obligations inherent to distributive justice--is left unexplained.

Voluntary association in an institution often involves the assumption of certain obligations. These obligations may be explicit or implicit, legal or moral, long-term or temporary. A group of individuals who meet once a week to play basketball may take upon themselves, through their behavior, the obligation to play at a certain level of seriousness, and to inform each other of a change in time or venue. Membership in a trade union implies cooperation for the sake of achieving the best working conditions for all. The obligations of friendship are more complicated and depend to a great extent on the degree of friendship and the terms implicitly agreed upon through the behavior of the parties. In all these cases, however, the obligations are consensual. A person is not obligated to more than the terms of association warrant. The mere fact of association, even voluntary association, does not imply rights and duties of distributive justice.

Certain associations, it is true, are founded upon terms which simulate distributive justice. For example, membership in a classic kibbutz requires the individual to accept principles of economic and social cooperation based upon the Marxist concept of "[f]rom each according to his ability, and to each according to his needs." [FN45] Nevertheless, the source of these obligations is not the moral duties of abstract distributive justice, but rather the contractual relationship among the members.

National association--in contrast to the relationships defined by friendship or by membership in a trade union or a kibbutz--is by and large involuntary. [FN46] For most individuals, nationality is determined by the place of their birth or by the nationality of their parents. Because of the dearth of choice with respect to nationality, imposing the obligations of ***285** distributive justice because of nationality cannot be seen as resulting from any obligation undertaken by an individual when joining the association. The question of why the happenstance of national association creates such obligations remains unanswered.

Supporters of the national association argument may, nevertheless, claim that a person does not choose his family and yet the obligations a person has towards other members of his family are perhaps the most intense of any obligatory duty. Analogizing from the family to the country, a person may have obligations merely by being a member of a country whether or not he chose that status. [FN47] This argument merits serious attention. Nevertheless, it must fail. The fact that family attachment imposes certain obligations does nothing to further the national association argument.

The first problem with extrapolating from obligations toward one's family to obligations toward one's compatriots is that the moral source of obligations toward one's relatives is itself not clear. With regard to one's spouse and one's children--those individuals toward whom one is normally assumed to have the most intense obligations--the question can be sidestepped by noting that in almost all cases, marriage and parenthood are the result of voluntary acts. By marriage or by procreation a person explicitly or implicitly accepts the obligations inherent in the consequent relationship.

The obligations of children toward their parents are much more limited and might be grounded in terms of reciprocity. That is, children may have duties toward their parents in view of the support which they themselves

received, even though their parents, by the very act of begetting children, unconditionally accepted upon themselves the obligation to support their progeny. [FN48] With regard to other relatives, however, both the scope and the grounding of one's obligation are far from clear. What is the nature and extent of one's obligations toward one's sibling, uncle, aunt, niece, nephew, cousin, or more distant relation, merely by dint of the family connection? [FN49] Why is one so obliged? These questions warrant analysis beyond the scope of the present work. However--and this is the essential point-- analogizing from a type of obligation whose scope and grounding are themselves so ***286** unclear is difficult at best and useless at worse.

Second, even if obligations based upon family relationship were sufficiently clear to show that involuntary associations could create mutual rights and obligations, it certainly would not show that every involuntary association actually does so. [FN50] The question of whether or not the mere fact of citizenship or residency in a given country constitutes the type of involuntary association entailing mutual rights and obligations cannot be satisfactorily resolved by a claim, however well founded, that it is not impossible for involuntary association to do so.

Third, even assuming that the analogy with the family is sufficiently convincing to permit the conclusion that national association does entail mutual rights and obligations, such an analogy could not successfully ground the associative obligation argument. It must be convincingly demonstrated that national association not only entails mutual rights and obligations, but it must also be shown that these rights and obligations include Rawlsian distributive justice. To the best of my knowledge, no supporter of domestic Rawlsianism has offered such a proof. Furthermore, it would appear that such a demonstration would be highly unlikely. The specific entitlements and responsibilities vis-à-vis relatives outside of the nuclear family may not be entirely clear; however, what may be stated with a fair degree of certainty is that they are not normally considered to include Rawlsian distributive justice. Such being the case, it appears impossible to derive obligations of national distributive justice from the mutual rights and obligations of the non-nuclear family.

4. National association argument: Concluding thoughts

While perhaps striking a certain intuitive chord, the national association argument cannot be accepted on a priori grounds, but requires a demonstration of what exactly there is about national association that grounds claims of justice. In my opinion, claims advanced to support this thesis fail the test of serious analysis. In fact, even proponents of the argument often admit the weakness of the claims they themselves advance. [FN51]

Why, then, does the national association argument continue to be raised? It may be that its true source is the intuitively based assumption that rules of distributive justice do not apply to foreigners or, alternatively, that obligations and rights of distributive justice are somehow less binding, or are secondary to, rights and obligations ***287** towards compatriots. National association seems to many to be both a necessary and a sufficient condition for the operation of distributive justice. Nevertheless, when the conclusion is subject to rigorous analysis, it is found wanting. Despite the fact that every explanation proposed to justify it fails to do so, the argument spawns an ipso facto life of its own and becomes self-sustaining. National association is offered forth as its own proof of validity. [FN52] It does not require a great deal of training in the art of rhetoric to spot the weakness of this attempt to ground the argument.

C. Original Position Argument

One attempt to justify domestic Rawlsianism posits that individuals in Rawls's “original position” would opt

for institutions designed to distribute a society's resources in accordance with Rawlsian principles but would refrain from cross-border redistribution. [FN53] Rational, self-serving individuals who knew that they would be members of a prosperous society would want to mitigate or eliminate the risk that they would be among the least well-off in that society and would therefore presumably adopt an internal Rawlsian redistribution of wealth. Knowing that they were to be members of a well-to-do society, rational self-interest would indicate that they would refrain from sharing their wealth with less fortunate foreigners.

The problem with this argument is that the only method by which to achieve a consensus for domestic Rawlsianism would be to limit participation in the mechanism of the original position to individuals who knew that they would be members of a prosperous society. [FN54] Completely risk-averse individuals who knew that they had only one life to live and who knew that there existed the possibility that they would be among the world's poorest would not agree to a scheme whereby rich countries would be entitled to redistribute wealth internally and to ignore the condition of those located outside their borders. Nor would they agree to a scheme whereby individuals residing in a given country would have any sort of prior claim to the wealth which happened to be located in or ***288** produced by that country. [FN55]

Limiting participation to members of a given society begs the question of the justification for such a limitation. Since national affiliation is undeserved and therefore arbitrary from a moral point of view, it is unclear why only the views of those known to be nationals of a given country should be taken into account in deciding issues of justice. One could similarly convene an assembly of individuals who knew that they were going to be members of a particular ethnic group or of a certain social class. The principles of distributive justice which would emerge from such conventions would differ radically from the principles which would emerge were the participants put in a “pure” original position, in which they would be given no information about their condition. In fact, by carefully screening participation in the convention and by monitoring the information given to the participants, one could probably compel the adoption of just about any theory of distributive justice one chose.

Thus the original position argument does not appear to have any basis in Rawlsian philosophy. Lifting the veil of ignorance by allowing certain individuals, who know which society they are to be members of, to determine how resources are to be allocated is inconsistent with the principles underlying the use of the original position to establish principles of justice. [FN56]

D. Functionality and Pragmatic Arguments

1. Domestic redistribution as furthering international redistribution

Another attempt to justify domestic Rawlsianism is the argument that cosmopolitanism is best achieved by each country implementing a Rawlsian redistribution within its own borders. Were each country to do so individually, it is argued, the result would be a global Rawlsian redistribution. Furthermore, the argument states that adoption of a regime of domestic redistribution is not inconsistent with cosmopolitanism; rather, domestic redistribution supports and furthers the aim of cosmopolitanism. [FN57]

However, a global difference principle would require that resources ***289** be distributed first to foreigners when they are worse off than the worst-off compatriots. Recall that for Rawls, the preferred distribution is that in which the distributive shares of the worst-off are maximized, even where overall or average utility is sacrificed. [FN58] Therefore, even if logistic difficulties mean that fewer foreigners than locals would be helped or that more of the resources would be used for the expenses of the distribution process itself, the difference prin-

ciple would nevertheless require that the wealth be redistributed internationally so as to maximize the welfare of the worst off.

2. Ineffectiveness of international redistribution

A related claim, which simply takes the functionality argument to an extreme, is that the mechanism for international redistribution is nonexistent. [FN59] Given the institutions presently available, a state, try as it might, is simply incapable of doing anything to ease the plight of poor individuals outside its borders. Resources which it attempts to devote to international redistribution are, in essence, merely being thrown away. [FN60]

The difference principle holds that when the welfare level of the worst-off is the same under alternative distributions, the favored distribution will be the one in which the welfare of the next worse off is maximized and so forth. [FN61] It would seem to follow that if the state's redistribution policy can have no effect on the welfare of certain individuals, then the welfare of the least well-off who can be affected should be maximized.

By the terms of the functionality argument, the welfare of those outside the state's borders is unaffected by any action the state may take. Even if those located in foreign countries include the world's worst-off individuals, their fate should be effectively ignored when determining the ideal distribution. Thus, when foreigners cannot be affected by a state's redistribution policies, implementation of a scheme of domestic Rawlsianism would in fact be the most the state could do to further a global Rawlsian redistribution.

However, this argument proceeds from a faulty factual premise. It is true that the institutions of the developed world are ordinarily vastly more efficient than corresponding institutions in underdeveloped ***290** countries or than international institutions, assuming they exist at all. It is, therefore, true that domestic redistribution is ordinarily easier than international redistribution and that the costs of the distributive process itself are considerably less. Nonetheless, it is not accurate to claim that international redistribution is realistically impossible. Developed countries, as evidenced by their actions, do not apparently believe so either. Most, after all, do give some amount of foreign aid. One may assume that they would not do so unless they were convinced of its potential effectiveness. [FN62]

Furthermore, to the extent that the argument is true and that attempts at international redistribution are doomed to failure for lack of an institutional structure to support them, the conclusion should not be that justice is satisfied by domestic Rawlsianism. Instead, the conclusion should be that the international institutions as presently construed are unjust, hardly an earth-shattering revelation. [FN63]

Finally, consider the case of individuals living in developed countries, where the means of distribution are relatively efficient. Why should the wealthy of one country be obliged to share their wealth with disadvantaged members of their own society to a greater extent than they are obliged toward disadvantaged members of the other country? [FN64] The argument that there are no effective means of redistributing wealth is certainly not applicable, especially considering that the well-off of each country are expected, under a Rawlsian model, to share their wealth with their own society's disadvantaged.

***291** 3. Lack of support for international redistribution

Another claim raised under the banner of pragmatic arguments is that the voters in the wealthy countries would never accept anything close to cosmopolitanism and that seekers of international justice should therefore moderate their demands in order to have any hope of success. [FN65] This claim, however, is perhaps the least

valid of all. If wealthy countries are not morally entitled to their holdings, then the question of whether or not the voters in those countries are willing to share the wealth they possess is immaterial. If analogies are appropriate here, consider the unwillingness of the aristocracy to waive their feudal privileges; the long-standing refusal of the South African government, representing the majority of white voters, to grant suffrage to the rest of the population; or the decision by a hypothetical thieves' guild to reject the concept of restitution. In each case, the possessors of a social good desire to continue holding on to it. They may even have the physical or political power to reject competing claims. Nevertheless, possession, desire, and power do not justify a claim.

It is true that a reformer might, for practical reasons, choose those battles which she feels she may be able to win. Perhaps it is better to work, with some chance of success, for a slightly less unjust world than to labor futilely for a much more just one. Nevertheless, the degree to which those in possession of the social good respond to pleas for justice cannot in itself be a factor in determining whether their holdings are theirs by right.

E. The Failure of Domestic Rawlsianism

Rawls's contention that the natural distribution is unfair and that people do not deserve their talents, their social position, or their good or bad luck has considerable persuasive force. [FN66] When confronted with those who are not fortunate enough to possess the talents necessary to achieve a lifestyle easily attainable by others, it is difficult to deny the arbitrariness inherent in nature's selection of whom to favor. [FN67]

Rawls's subsequent claim, regarding a positive moral duty to ***292** neutralize the effects of nature's unfairness, [FN68] is more contentious. One might accept the arbitrariness of the natural distribution without agreeing that human society has an obligation to do anything about it. The maxim “life is unfair” is both an admission of the capriciousness of nature and an admonition to ignore the unfairness. It may be argued that a psychologically healthy individual will focus on what he has and on doing the best he can with it, rather than dwelling on the unfairness of life.

National affiliation would appear to be one of those arbitrary attributes whose impact upon an individual's life chances should, from a Rawlsian viewpoint, be neutralized. However, even those social philosophers who ostensibly view wealth redistribution as a primary demand of justice do not, in general, ascribe to the internationalization of domestic distributive principles. Some simply refuse to consider international aspects of redistribution, indicating their hesitation to extend the principles they extol to cover those living outside the borders of the state; others, including Rawls himself, go to great lengths to justify either limiting the scope of redistribution to the domestic arena or adopting different standards of justice for domestic and international redistribution.

Where a principle leads inexorably towards a result contrary to ordinary intuition, one is faced with the choice of abandoning the principle or rejecting the intuition. If, as most social philosophers appear to believe, the intuitive rejection of an international Rawlsian redistribution is well founded, the most obvious conclusion is that the basic tenet of Rawlsianism itself is somehow flawed. Perhaps the idea of a positive moral obligation to neutralize the effects of nature's arbitrariness does not conform to our considered judgments after all.

The rejection of cosmopolitanism, in other words, implies a rejection of the underlying principle from which it flows: that morally arbitrary attributes cannot serve as the basis for claims of entitlement. This is the same principle upon which all of Rawlsian methodology ultimately rests. Thus, unless one is willing to embrace cosmopolitanism, one must reject Rawlsianism.

***293** III. Needs-Based Justice

Rejecting Rawlsianism does not require retreating into a libertarian worldview. The fact that human society may not be required to mitigate the unfairness inherent in nature does not imply that people are relieved of all responsibility for the plight of fellow members of their species. This Article proposes that the duty to act arises when one individual is in need of some good and another is able to satisfy that need at a non-prohibitive cost to himself. Imagine, for instance, a desert traveler who encounters an individual dying of thirst. Assuming that the traveler is carrying with her more than enough water to meet her own needs, does she have a moral obligation to give the other some water and thus to save his life? The proposed duty to act suggests that she does have a moral obligation to share her water. Additionally, were she, out of either apathy or maliciousness, to ignore the other's needs and do nothing, she would be acting immorally.

At this point, some may question the source of the traveler's moral obligation to come to the other's assistance. As the other would be no better off had the traveler never existed, the argument could be made that the other has no claim to the traveler's assistance, assuming that the traveler is in no way responsible for the other's predicament and is not preventing anyone else from coming to the rescue. The traveler, it may be argued, might help if she desires to do so--and such an act might be commendable--but she is under no moral obligation to act. I would reject this argument and instead contend that the source of the traveler's obligation to assist in this situation is rooted simply in her own humanity. [FN69] Although she is in no way responsible for the other's predicament, failure to act would nevertheless constitute a breach of her moral duty. Furthermore, it would appear that this position reflects most people's common understanding of their moral obligations.

Note that the moral obligation of the traveler is not based on inequality. It is not grounded on the fact that her possession of a sufficient supply of water is the result of factors--foresight, luck, and so forth--that are ultimately arbitrary from a moral point of view and that she is thus undeservedly better off than the other. [FN70] Were she to encounter another person who was simply less wealthy, she would be ***294** under no obligation to share her undeserved good fortune. Her obligation to assist is based on the other's needs and on her ability to satisfy those needs at a non-prohibitive cost to herself. [FN71]

Consider now the situation in which the traveler's supply of water is barely enough to meet her own needs, such that giving some of her water to the person she encountered would involve risking her own life. In such a situation, she does not have a moral duty to share her water. One is not obliged to satisfy the needs of another when the cost or the risk to oneself is too great. Herein lies the distinction between moral duty and heroism. Heroism involves satisfying the needs of others above and beyond the call of moral duty. One who saves another at no risk to himself has merely fulfilled a moral duty, whereas one who risks himself to save another has acted heroically.

Saving another at no risk to oneself may be commendable, but the commendation would be the equivalent of commending a person for driving for years without committing a traffic offence. Although a person should not, perhaps, be commended simply for fulfilling his legal obligations, the fact is that most of us do occasionally violate traffic laws. One who refrains from doing so may, therefore, deserve some commendation. The commendable character of the heroic act, however, is qualitatively different. If saving the victim involves the assumption of sufficient risk, then ignoring the needs of the victim would be a morally legitimate course of action. The commendation in this situation is not for failure to violate a moral duty, but for acting when no moral duty existed in the first place.

Moral duty comes into play when one is confronted with another person in need and the costs or risks of providing that need are not prohibitive. Needs, however, must be distinguished from wants. The fact that another individual wants something that I have the power to provide at little or not cost to myself imposes upon me no moral duty to supply that want, unless that want can be classified as a need. Nevertheless, and notwithstanding the centrality of the distinction between needs and wants, this Article does not attempt to demarcate a line between them. Reasonable people can differ with regard to what is a need and what is merely a want. [FN72] As a bare minimum, though, anything necessary for the ***295** sustaining of life could be universally recognized as a need.

Similarly, this Article does not delineate exactly what cost or what risk might be considered prohibitive. Again, reasonable people might come to different conclusions. However, at least in the extreme cases, it should be possible to reach universal consensus. For example, where one is capable of saving another's life at a cost that would not seriously affect the welfare level of the actor, failing to act is an abrogation of moral duty.

The next step is to apply this conception of moral obligation to the traditional realm of distributive justice. Any definition of material needs, as opposed to wants, would have to include those goods and services necessary for physical survival. Reasonable persons may, of course, argue that material needs include more than mere sustenance, that an individual requires the means not just to live but also to make life worthwhile. [FN73] Nevertheless, this Article focuses on sustenance because basic sustenance would certainly be included in any reasonable basket of material needs. It would be hard to argue that a person only wants, but does not need, enough food to avoid starvation; that he only wants, but does not need, access to a potable water supply; or that he only wants, but does not need, some protection from the elements. [FN74] Such being the case, it would follow that people, individually and collectively, who know that others are lacking basic sustenance and who are capable of satisfying that need have the moral obligation to do so, provided that the cost of providing such needs is not prohibitive.

Because needs-based justice limits claims of justice to the satisfaction of needs, it is more restrictive than inequality-based justice. The mere fact that individual A undeservedly has more of X than does individual B is not sufficient grounds under needs-based justice to impose a duty, even a prima facie duty, to redistribute. Needs-based justice, while recognizing the arbitrariness of the natural distribution, does not oblige humanity to right the wrongs of Mother Nature. [FN75] Thus, the “merely rich” would have no claim of distributive justice against the “super rich,” even though their difference in wealth is presumably undeserved. An inequality-based argument for redistribution, on the other hand, would hold that because one has more than the other, despite ***296** the lack of desert, a claim for redistribution would ostensibly arise. [FN76]

A. Choice and Responsibility

With regard to the role of choice and responsibility in determining the demands of justice, the obligations of needs-based justice are broader than those of inequality-based justice. For inequality-based claims to redistribution, a time slice comparison is patently inappropriate. The fact that, at a given moment in time, one individual is wealthier than another cannot serve as the basis of a claim for mitigating the inequality. Assume, for example, that at time t_0, two individuals are similarly situated by whatever criteria are considered appropriate. At time t_1, individual A consumes part of his material holdings while individual B chooses to delay consumption until time t_3. A time slice comparison of the two individuals at time t_2 would show that that individual B is better off than is individual A. [FN77] Nevertheless, it does not appear that this time-slice difference in well-being could justify

an inequality-based claim to redistribution. While it is true that at time t_2, B is better off than A, it is also true, and more significantly so, that the two of them are, in fact, similarly situated over the time interval t_0-t_3. Forcibly transferring resources from B to A at time t_2 would actually be creating inequality, not mitigating it. [FN78]

Another way of analyzing the situation just described is to note that at time t_0, A and B were both faced with similar choice sets. Each was able to choose consumption at time t_1 or to delay consumption until time t_3. Because both individuals were equally wealthy at time t_0, neither could complain that he was treated unfairly, even if his wealth was less than that of the other at a later point in time. [FN79]

Comparing various individuals' distributive shares in terms of ***297** similar choice sets is not necessarily equivalent to comparing their well-being over time. Consider, for example, the case of three similarly situated individuals who are faced with the opportunity to gamble. Individual A refrains from gambling, individual B gambles and wins, individual C gambles and loses. Whether one compares their situations on a time-slice perspective immediately after the payout or whether one compares their situations over a time interval which begins before the gamble and continues until A and B have both consumed their additional resources, the situations of the three individuals concerned are not equal. Having gambled successfully, B is by any reasonable measure better off materially than either A or C. Having refrained from gambling, A is, again by any reasonable measure, better off materially than C. If inequality itself were grounds for redistribution, C would appear to have a claim against both A and B, while A would have a claim against B.

Nevertheless, this inequality cannot be traced to any arbitrariness in the natural distribution. Each individual concerned was faced with equivalent choice sets. Neither A nor C can legitimately claim that that it is unfair that he has less resources at his disposal than does B, nor can C legitimately claim that it is unfair that he has less than does A. [FN80] Because C chose to gamble and A chose to refrain from gambling, any claim of unfairness voiced by either of them would appear to be disingenuous. In fact, from a choice-set perspective, the three are similarly situated. An approach to justice which views redistribution as a means of mitigating the arbitrary inequality inherent in the natural distribution--in other words, a choice-set, inequality-based approach to justice--would, therefore, see no need to redistribute resources from A or B to C or from B to A.

Although choice sets and equality over time are central to inequality-based justice, they are irrelevant from the perspective of a needs-based approach to justice. An individual's needs and her ability to meet those needs are relevant for needs-based justice. It does not matter how the individual concerned came to be needy.

Recall, for instance, the situation discussed above in which individual A consumed his resources at time t_1, while individual B, similarly situated to A at time t_0, delayed consumption until time t_3. Even though B is better off than A at time t_2, they are equal over time or over choice-sets, such that B would have no obligation towards A under an inequality-based system of justice. Nonetheless, if at time t_2 A is needy and B is in a position to help, a needs-based justice would impose upon B ***298** a moral obligation to come to A's assistance. B may not shirk his moral responsibility by pointing to the fact that A consumed excessively at time t_1 while B saved for the future.

Admittedly, this aspect of needs-based justice may be counterintuitive. A, after all, has no one but himself to blame for his predicament. He could have saved for the future, but he chose not to. By calling upon B to come to his assistance at time t_2, A is in effect asking B to subsidize his prior consumption at time t_1, when B was frugally ferreting away his wealth for the proverbial rainy day.

Responding to this argument requires consideration of the role of desert in a needs-based approach as opposed to its role in an inequality-based approach. Desert appears to play little or no role in either. Under a merit-based system, desert plays a central role: people get exactly what they deserve. Inequality-based and needs-based approaches, in contrast, consider obligations of distributive justice without reference to desert. Nevertheless, the position of desert in a needs-based approach is different, if only subtly, from its position in an inequality-based approach.

Ostensibly, desert is irrelevant for inequality-based systems of justice, which reject the concept that wealth and poverty are deserved and therefore seek to mitigate unequal distribution of resources. Nonetheless, desert occupies, in some ways, as important a position in inequality-based approaches as it does in merit-based approaches to justice. Inequality-based approaches go to great lengths to prove that distributional inequality is unrelated to any type of moral desert. They rest on the premise that because talents and social position are arbitrary from a moral point of view, distributive shares ascribable thereto are undeserved. They conclude that, with no claim of desert to material holdings, no one may legitimately object to their redistribution.

Ironically, this line of reasoning begins with a discussion of desert. Even though the discussion sets out to prove that notions of desert are inapplicable to distributive justice, striving so hard to do so merely emphasizes their significance. Were desert really immaterial, the question of whether or not talents and social positions were deserved would be irrelevant. By basing their arguments on the claim that no single person deserves his wealth, inequality-based theories appear to accept the meritocratic position that where claims of desert are substantiated, distributive share should follow. Egalitarianism is thus merely a special case of meritocracy, where desert claims are equal.

In needs-based justice, desert is a non-factor. Under needs-based justice, an individual who, although not needy, is worse off than another has no claim to share in that other person's wealth. Again, the reason is ***299** not that his level of well-being is deserved; questions of desert are simply irrelevant. However, when a person is in need, others who are able to come to his aid at a non-prohibitive cost to themselves, yet ignore the need out of apathy or antipathy, are not fulfilling their moral duty. Here, too, the entitlement of the needy individual to assistance is not dependent upon the undeserved nature of his need; as before, desert is irrelevant.

Assume, therefore, that the person encountered by the desert traveler is there without water due to his own gross negligence. May the traveler, where the risk involved in saving the other is not prohibitive, choose inaction on the premise that the other has no one to blame but himself for the predicament in which he finds himself? Needs-based justice suggests that ignoring the victim's needs and letting him die would be immoral. When considering whether or not the desert traveler is morally obliged to save another person who is in desperate need of water, the responsibility of the victim for his predicament is not relevant. [FN81] Needs-based justice would therefore require the rendering of assistance, regardless of how it came to be that the individual concerned found herself in a state of neediness. If an individual is in need and cannot satisfy those needs, any other individual able to help is morally obligated to do so.

B. Limitations on Needs-Based Justice Claims

As previously noted, one exception to the moral imperative of assisting the needy is that an individual is not required to assist when the risks or costs involved are prohibitive. In addition to this exception, there are two other conditions for entitlement to assistance worth noting.

The first condition of qualifying for assistance under a needs-based justice scheme is that the person concerned is incapable of meeting those needs through his own efforts. A person who could work and earn enough money to supply his needs but chooses not to has no claim on others, including those who could supply those needs at little or no cost to themselves. This condition might, at first glance, appear to contradict the earlier assertion that desert is irrelevant for need-based justice: Part III.A contended that a person's responsibility for his own predicament ***300** does not bar his redistributive claim, and this section contends that no one has the right to rely on others when he could rely upon himself. Nevertheless, the two situations are quite distinct.

A needy person is one who is incapable of supplying his own needs. Thus, by definition, one who is so capable is not needy. On the other hand, the fact that a person could have supplied his own needs had he acted differently in the past does not disqualify him from being needy, provided that at the present time he is no longer capable of supplying his own needs. Individuals have some measure of control over the present and the future; we cannot change the past. Our inability to affect the past manifests itself, for purposes of this discussion, in two ways. First, the needs to which needs-based justice refers are limited to present or future needs. A person's past state of well-being might be relevant for inequality-based approaches to justice, but it is irrelevant for needs-based justice. Needs-based justice can only operate in the present, incapable as we are of supplying past needs. Past needs cannot ground a claim for needs-based redistribution.

Secondly, an individual's past capability to provide for his future does not mean that that person is not needy in the present. Past conduct can ground an argument of culpability for present needs, but culpability is not relevant for needs-based justice and can be ignored. Assume, for example, that a person is earning a salary sufficient to supply his needs. At this point in time, he obviously cannot claim to be needy. If he quits his job, cutting off his only source of income, would he now be considered needy? The answer depends on the circumstances. Assuming that he could either get his old job back or find a new job, he does not meet the criteria of neediness. True, he has needs; but as long as he is capable of supplying those needs, he is not needy. Others who know of his predicament are under no obligation, individually or collectively, to come to his aid. If, however, he is incapable of supporting himself, he would meet the criteria. It might be observed that his lack of a job is his own fault, as he voluntarily gave up the job he had. In fact, assume that he had no justification for quitting his previous job and, furthermore, that he did so with full knowledge that he would not be able to get another one. In other words, for the sake of argument, assume that he is fully culpable for his present predicament. Nevertheless, at this stage, there is nothing he can do about it ex hypothesi. Thus, even if he is fully culpable for being in a position where he can no longer meet his own needs, he would nevertheless be entitled to assistance.

The second condition is that even one who is in need and is incapable of supplying that need himself has no needs-based claim unless his needs are capable of being supplied. Although this condition may ***301** appear too obvious to mention, it will prove necessary for our future discussion.

C. “Lazy or Crazy”

The theory of justice hitherto described is strongly rooted in widely-held intuitive conceptions of moral duty. To demonstrate, let us consider the reactions people typically have to the problem of homelessness and, specifically, what they consider their own obligations toward the homeless to be.

People who are not homeless often feel uncomfortable with the idea of homelessness. The discomfort may be rooted in a conflict between what people believe to be right and what they perceive to be in their own self-interest.

On the one hand, people instinctively feel that, individually or collectively, they should do something about the problem of homelessness. The feeling that one should help the homeless is rooted in the idea of needs-based justice. Homeless people have needs which are not being met, and many people intuitively feel that although they are not personally responsible for the plight of the homeless, they have a responsibility, if they can, to come to the aid of the homeless. This feeling of responsibility is not based on the urge to mitigate economic inequality; rather, it is based on their sense of morality

On the other hand, helping out the homeless often operates against what people perceive as their own economic self-interest. They may, therefore, intentionally avoid those areas where they are likely to confront homeless people. Additionally, they often rationalize their inaction, and these rationalizations may help expose their underlying belief structure. The possibility that the homeless person is simply someone who is down on his luck is the greatest psychological challenge to those attempting to rationalize inaction and is consequently rejected out of hand. Homeless people, it is often claimed, are “either lazy or crazy.” Thus, the rationalization for not coming to the aid of the homeless is that people who are lazy are not really needy; they can help themselves, so there is no need for others to come forth and help them. People who are crazy are beyond help; there is nothing we can do to help them because whatever we give them will be squandered anyway.

This “lazy or crazy” rationalization reveals some important points regarding the underlying belief structure. Firstly, someone who is in need deserves help. Were this not the case, no rationalization would be necessary. Secondly, the only good reasons for not coming to the aid of one in need are either (a) he is not truly needy, as he is capable of ***302** supplying his own needs, or (b) he is beyond help, such that attempting to supply needs is a waste of effort.

The “lazy” part of the rationalization does not indicate that desert intuitively plays an important role in issues of justice. The emphasis is on the fact that the individual concerned is, at present, capable of doing something about his situation and that he therefore has no right to ask others to supply his needs. As previously noted, the difference between denying aid because the person is capable of supplying his own needs and denying aid because the person is responsible for his own predicament has demonstrable consequences when referring to past actions.

Assume that an individual is incapable of working to supply his own needs because he was seriously injured in a skiing accident. Assume further that the individual was uninsured and undertook the risk in full knowledge of the potential consequences. The person concerned is both needy and responsible for his state. An inequality-based or choice-based approach to justice might deny him any relief on the grounds that he is not entitled to compensation from those who refrained from skiing or who purchased insurance to protect them in case of an accident--in other words, those who refused to gamble--or from those who, although uninsured, enjoyed the skiing and escaped the injury--those who gambled and won. Nevertheless, the rationalizations for refusing to aid the needy do not normally include such sentiments as “he gambled and lost.” People are ordinarily willing to allow the consequences of gambles to affect well-being, but not to the point of denying people their needs.

People's attitude toward the homeless, including the justifications they adopt for refusing to render assistance, provide convincing evidence that needs-based justice is strongly rooted in our intuitive sense of what is right. We instinctively feel that neediness, whatever its cause, must be addressed.

D. Economic Effects

Until now, this Article has ignored the possible economic side effects of granting assistance to the needy. When considering the simplified cases of individual A, who is in need, and individual B, who is capable of satisfying that need, economic effects are irrelevant. The concept of neediness, as previously noted, excludes those who are capable themselves of satisfying their needs. Thus, describing A as needy is operating under the assumption that A is incapable of satisfying his own needs, whether or not B comes to his assistance. B could not therefore justify his refraining from rendering the requisite aid on the grounds that ***303** lending aid would discourage A from helping himself. Thus, the only possible scenarios are (1) B helping to meet A's needs and (2) A's needs being unmet.

Institutionalizing such a scheme, however, might encourage individuals to take greater chances than they ordinarily would and to rely on the safety net of needs-based justice to limit their risk. Of course, this is not to say that all or even most individuals would dramatically change their behavior in response to the institutionalizing of the principles of needs-based justice. People whose welfare level is considerably above the level of neediness will most likely act to protect themselves from falling to that level. They have a strong incentive to allocate the necessary funds for medical insurance, retirement, and so forth in order to avoid neediness. Their knowledge of the existence of the safety net might not play a serious role when the level to which they will be allowed to fall before being entitled to assistance is considerably below the level to which they have been accustomed.

On the other hand, for individuals who are barely above the level of neediness, the limitation on risk might significantly affect their decision-making process. When calculating the possible outcomes and the chances of the various outcomes occurring, the fact that their needs will always be met may encourage some individuals to undertake a particular course of action that would not otherwise be worth the risk. This is particularly true with regard to insurance and savings. Where the option of relying on the safety net is real, the incentive to insure or to save is correspondingly reduced.

The extent to which the institutionalizing of needs-based justice would actually affect behavior is an empirical question beyond the scope of the present discussion; the normative issue, however, can be discussed. Assuming that the institutionalization of needs-based justice would, in fact, cause an increase in the number of individuals who would not be able to take care of their own needs, the normative question is how this fact might affect the obligations inherent in needs-based justice. These obligations, as previously discussed, can only be limited if (a) the individual concerned is capable of providing for his needs and is therefore not truly needy, (b) the needs of the individual concerned are incapable of being met, or (c) the risk or cost involved are prohibitively high. [FN82] The mere fact that providing for the needy is likely to lead to an ***304** increase in the number of individuals who are incapable of satisfying their own needs would not, therefore, be relevant unless such increase could trigger one or more of the specified conditions.

If the increase in the number of needy individuals is moderate, such that others could continue, albeit at a greater cost to themselves, to supply those needs, the obligation to assist is irresistible. In other words, human society cannot say to needy individual A, “I refuse to come to your assistance, even though you are needy and we are capable of supplying those needs, because if we were to do so, individual B might soon become needy too and would also require assistance,” provided that society is, in fact, capable of supplying the needs both of A and of B. The fact that a third party may decide to modify his behavior in a way inimical to the interests of one who is called upon to fulfill his moral duty cannot justify a breach of that duty. [FN83]

However, the situation may be qualitatively different when the economic effects are more severe. Consider a scenario in which the institutionalization of needs-based justice would encourage a great number of individuals

to gamble away their ability to satisfy their own future needs. Assume further that the projected number of individuals who would become needy as the result of such a disincentive is so great that the total assistance required would be prohibitively costly and that at least some of the needy will not have their needs met. Society would then confront the dilemma of satisfying present needs at the cost of meeting future needs. Society simply would not be able to provide for all needs, whether present or future. In such a case, society could decide that not supplying present needs is the lesser of two evils.

Even in such circumstances, though, the extent to which assistance is withheld from the needy must be kept to a minimum. Every denial of assistance to an ostensibly entitled individual must contribute to prevention of more neediness in the future. Thus, it might be legitimate in such cases to discriminate between those who bear responsibility for their present state of neediness--in other words, those whose present state of neediness is the result of their own past actions--and those who could not have reasonably prevented it. The reason is not that those who ***305** bear responsibility for their neediness are any less needy or that they deserve their neediness. The reason that assistance may be denied is strictly utilitarian: the disincentive effects of providing assistance can only impact those for whom positioning themselves to be able to satisfy their own needs in the future is a realistic possibility. Thus, if it is known that only those not responsible for their predicament will be entitled to assistance, individuals capable of securing the means to satisfy their own needs will not be encouraged to neglect their future needs. Distinguishing between the two may, of course, prove impossible in practice.

It should be emphasized, however, that denying assistance to the needy must be considered a last resort. If, for example, society's resources are threatened with being stretched beyond capacity, it would be preferable to continue to provide for the needs of all the present needy and to announce that all those whose future actions or omissions--or, better yet, specified acts or omissions--render them needy will not receive assistance or will be entitled to a reduced level of assistance. If such a declaration of intent is credible, it may be able to avoid the disincentive effects and still allow the satisfaction of present needs. [FN84] Alternatively, it might be reasonable to institute a mandatory social security scheme, which would insure individuals against neediness due to injury or retirement.

An additional economic effect that must be taken into account is the impact of the redistributive scheme on the behavior of those who would be called upon to render the assistance. Supplying the needs of those incapable of doing so themselves would presumably be financed through taxation. Higher taxes, however, serve as a disincentive to productive economic activity, and reduced economic activity means fewer resources available for assisting the needy. In other words, the heavier the tax burden, the more quickly the cost of providing for the needy is likely to prove prohibitive.

Thus, in determining whether the costs of providing assistance are prohibitively high, the question of how the granting of assistance will affect people's future behavior cannot be ignored. If institutionalizing a scheme of assistance would, in time, overwhelm society's capacity to assist the needy, limiting the circumstances in which aid is rendered would be justified. The imperative of providing for present needs must ***306** be balanced against the threat of not being able to meet future needs.

E. Justice and Altruism

An important point to consider is whether the implementation of needs-based justice would exhaust human capacity to create a better world. Ostensibly, the answer to this query would be negative. Consider a world in which the principles of needs-based justice were fully realized. The distribution of wealth might still be very un-

equal. Assume, therefore, that a relatively wealthy individual decides to distribute some of his wealth to those less fortunate than he. Needs-based justice does not require him to do so, as ex hypothesi, all satisfiable needs have already been met. Nevertheless, he recognizes that he is no more deserving of wealth than others and wants to share what he has. Alternatively, he may feel that although he does deserve his wealth, others, due to the presumed decreasing marginal utility of material goods, [FN85] might derive greater benefit from his holdings than he could.

Most people would probably feel that the action described would be admirable. Most people would probably feel that a world in which wealthy people were more generous and more willing to share their wealth with others less well-off would be a better place to live. In fact, most people would probably feel that a world in which wealth were more equally distributed would be better than one in which it were distributed less evenly. In fact, it is difficult, with the framework of modern philosophy, to argue that unequal distribution of wealth is a goal that society should pursue. [FN86] Such being the case, it would seem that even after the principles of needs-based justice had been fully implemented, there might still be room for improvement as far as distribution of economic resources are concerned. Why, therefore, should we consider the demands of distributive justice to be satisfied when needs are satisfied? Why not include within the demands of justice whatever would make the world a better place in which to live?

The reason to prefer a less extensive definition of justice is that there is a fundamental difference between aspiring to a better world and using the coercive power of government to achieve that end. Working toward a world in which people are more generous, kind, compassionate, and caring is an eminently worthwhile goal. Most people would prefer a world in which such virtues were prevalent. But legislating generosity ***307** and kindness is an exercise in futility. Coercion can only help in regulating the most blatant violations of those virtues. Assault, trespass, theft, and libel can be legally proscribed, unfriendliness cannot. Therefore, the fact that a certain act is widely considered desirable or admirable does not mean that requiring the performance of that act against the will of the individual concerned is necessarily a step in the right direction. [FN87]

The inability to coerce what is generally perceived as positive behavior is not confined to needs-based justice. It is endemic to most, if not all, conceptions of distributive justice. To demonstrate the limits of coercion, consider Rawls's difference principle, the most extensive rational redistribution scheme possible. [FN88] As inequality is permitted only to the extent that it serves the interests of the worst-off; any further equalization of wealth beyond that which is dictated by the difference principle would be detrimental to those very interests that the redistribution was meant to promote.

Nevertheless, the difference principle could still result in vast discrepancies in wealth. For example, where the imposition of high rates of tax on highly skilled individuals would result in them curtailing their activities to the detriment of society as a whole--and to the detriment of the worst-off members of society in particular--Rawls would condone allowing them to retain a greater than average share of wealth.

Furthermore, in the likely case that it would prove impossible to determine the marginal net compensation which would induce the optimal exploitation of each particular individual's talents, the difference principle would presumably allow whole classes of individuals to retain disproportionately large distributive shares, as long as increasing the tax rate on that class of persons would impact negatively on society's worst-off members. Despite the resulting, potentially vast, inequality of wealth, no state-imposed scheme of redistribution could be more protective of the interests of the least well-off.

Assume now that members of a well-off class decide to donate some of their relatively extensive wealth to those not as well-off. Most people, including Rawls, would probably view such an altruistic act positively. Besides being generous and fostering a sense of community, it would create a distribution of resources superior, from a Rawlsian perspective, ***308** even to that which could be brought about by the implementation of the difference principle itself. Society, of course, cannot require such behavior. Due to the overall economic effects, it would be counterproductive to do so. [FN89] Society can do no more than simply stand on the sidelines and applaud when individuals, from their own inner convictions, perform acts of altruism voluntarily.

Thus, the difference principle, as extensive as it is, is not the last word in redistribution. No distributive principle can be. Any distributive principle must leave room for voluntary acts of redistribution beyond the limits of what justice can rationally impose.

IV. Going Beyond the Requirements of Justice

Requirements of justice know no geographic boundaries. If justice requires the alleviation of need, then alleviation of need is required wherever it may be found. Except where the existence of an international border poses an impediment to assistance, its existence is irrelevant for purposes of justice.

The question which now arises is whether, in regulating its internal affairs, a country may go beyond the requirements of justice. It may not, of course, adopt a regime which falls short of satisfying the requirements of justice, which are as applicable within a country's borders as they are without. Those who are needy are entitled to assistance from all who are able to supply it. The question is whether, having satisfied both its internal and external obligations, a country may adopt a tax regime whose purpose is to redistribute wealth domestically beyond what justice demands.

An individual, having satisfied the obligations imposed upon him by justice and being free to do with his holdings as he pleases, who decides to go beyond the demands of justice by transferring part of his holdings to others less well-off would be considered heroic and his act commendable. It might, therefore, appear that a nation that exceeds the demands of justice by instituting an internal redistribution scheme should be commended for doing so. However, when an individual goes beyond the demands of justice, he is choosing to waive his own use of resources for the purpose of benefiting others, even though he is not obliged to do so. Thus, were every individual in the country to participate voluntarily in the redistribution, there would be no question as to the legitimacy of the scheme. Yet redistribution is rarely a voluntary scheme. Redistribution ordinarily involves the forcible transfer of wealth from ***309** some individuals to others. Thus, it is necessary to determine from what source a country derives the right to take from some of its citizens in order to give to others.

A. National Cohesion

An argument can be raised that redistribution contributes to national cohesion and fosters a sense of interdependence: compatriots, whether they like it or not, share a common political destiny. [FN90] The fates of all individuals and of all groups in a society are ultimately intertwined. Furthermore, the nation is an essential vehicle for the creation and transmission of culture, and national affiliation is central to most individuals' self-definition.

It might be claimed that excessive inequality weakens the bonds which hold a society together. Redistribution of wealth reinforces feelings of solidarity and allows the state to serve as a vehicle for promoting the eco-

nomic, cultural, and social interests of its members. Furthermore, when a country finds itself in conflict with other countries, national cohesion can be crucial to achieving national goals.

Nevertheless, the question remains as to why redistribution is legitimate. However lofty the goals of internal redistribution and whatever its contribution to generating feelings of national fraternity, why demand that the cost of establishing such interdependence fall on some when the advantages are to all? Even assuming that redistribution would positively impact national cohesion and further national goals, simply pointing out the overall benefits of a certain course of action cannot justify the imposition of a tax to transfer the wealth of some to others. If the benefits of national cohesion accrue to the nation as a whole, then it would seem that the cost should similarly be borne by all.

B. Relative and Absolute Need

When defining their needs, people are affected by their knowledge of what others have. What is considered a need in one part of the world might be classified as a want, a luxury, or even an extravagant overindulgence in another part of the world. Thus, it might be argued that a "need" is not an absolute but rather a relative concept. Accordingly, international justice might be thought of as requiring the satisfaction of only basic needs, and countries whose local definition of need is higher would be tasked with instituting internal redistribution.

***310** The relative need argument, attractive as it is, appeals to conceptions of inequality-based justice and not needs-based justice. The fact that others having more might make one dissatisfied with what one has is an argument for redistribution based upon inequality or, perhaps more precisely, perceptions of inequality. It does not, however, substantiate a contention that one who is faced with a higher standard of comparison is more needy than one who is not. In needs-based justice, alleviation of envy is not considered a need. Under a needs-based approach to justice, the "merely rich" do not have a claim of redistribution against the "super rich." The fact that the standard of comparison established by the super rich may cause feelings of inadequacy, envy, and dissatisfaction among the merely rich is irrelevant.

People's tendency to compare their own standard of living with that of others around them is, in any case, a problematic justification for redistribution that would be required, not by the inequality per se, but by awareness of the inequality. Ignorance could, therefore, substitute for redistribution, and hiding the standard of living enjoyed by the wealthy would apparently satisfy claims of justice. Consider also what would happen if the lifestyles of the wealthy, despite their attempts to avoid exposure, were revealed to the less well-off public. Who would be responsible for the ensuing dissatisfaction: the wealthy, whose standard of living is the focus of the dissatisfaction, or those who brought it to the attention of the public at large? [FN91]

What others have, or the perception of what others have, cannot serve as basis for claims under needs-based justice.

C. Benefit Theory

Benefit theory--the idea that the tax an individual pays should reflect the benefit he derives from public services--has served as an attempted justification for a redistributive tax structure. [FN92] It is claimed that because one of the primary functions of government is the protection of wealth, the wealthy should bear the greatest share of the costs of providing those services.

***311** Tax theory, however, has long recognized that relying on benefit theory to justify a progressive tax structure is problematic. It would require proof, not only that the rich receive greater benefit from government services, but also that the benefit increases at a greater rate than does their wealth. It is far from obvious that this is actually the case. John Stuart Mill, for example, contended that benefit theory would result in a regressive tax structure, with the weakest elements of society being the most dependent upon government protection. [FN93]

A related problem concerns financing assistance to the poor. Henry Simons, for example, argued that using benefit theory to allocate the cost of redistribution is a contradiction in terms. [FN94] Financing transfer payments by charging the recipients would, of course, undermine the purpose of the exercise. Similarly, if the government were to establish soup kitchens to feed the poor and then charge each person who entered an amount equal to the benefit received, it would no longer be providing welfare services but simply operating a commercial diner.

In effect, benefit theory is founded on the principle that anyone who benefits from government services without paying for them is unjustly enriched at the expense of his fellow taxpayers. Its goal is to prevent any disturbance of the pre-existing distribution. Benefit theory is, therefore, the antithesis of redistribution.

Another benefit theory argument for redistribution is based on the contention that the true motive for redistribution is not concern for the welfare of the poor but, rather, a desire to protect the privileges of the wealthy. [FN95] To enjoy their holdings, the wealthy require social stability, which could be threatened when vast disparities in wealth create wide-scale dissatisfaction with the socio-economic structure. The rich thus have an interest in redistributing wealth to the extent necessary to keep discontent below the threshold of civil unrest. [FN96]

While the argument presented is not, perhaps, unfounded, it is ***312** nevertheless problematic. As already noted, benefit theory is fundamentally anti-redistribution. Only after all legitimate claims have been satisfied could benefit theory be called upon to prevent a disruption of what would now be a just distribution. Thus, in order to consider benefit theory, it must be assumed that all just claims to redistribution have already been satisfied. Given this assumption, the threat to disrupt the present distribution is inherently unjust. It is a threat to take by force the legitimate holdings of another.

Paying another person not to use illegitimate force to threaten one's holdings is the moral equivalent of succumbing to a protection racket. While yielding to the threat may be the most prudent course of action, a more principled response--and one which could prove more cost-efficient in the long run--might be to defend oneself by allocating more resources to the protection of life, liberty, and property. [FN97] Ostensibly it is those whose lives, liberty, and property are at risk who should bear the costs of the protection. Those who pose the threat gain no benefit from measures undertaken to defend against it.

Nevertheless, the conclusion that only those who desire protection should pay for it is questionable, as it would seem to follow that criminals, deriving no benefit from law enforcement, would be relieved of the burden of paying for it through special tax breaks, a result which is patently absurd. [FN98] In fact, compensatory justice would seem to demand the opposite result. Whereas criminals are the ones who create the necessity for law enforcement on the rest of society, they, more than anyone else, should pay for it. Similarly, if one group in society is illegitimately threatening the well-being of another, it would seem that the cost of defending against that threat should be borne by the former. Thus, applying this reasoning to the welfare benefits, the cost of maintaining the social order would apparently need to be paid for by the less well-off, who are ostensibly threatening the legitimate wealth of the rich.

***313** While traditional attempts to ground redistribution on the benefits supposedly received by the wealthy from the existence of the state or from its protection of their fortunes are unconvincing, benefit theory should not be disparaged of in this context. It is possible to construct a benefit theory type of argument to justify a relatively extensive domestic redistribution.

D. Benefit Theory and Sentiment

As discussed earlier, more concern is ordinarily shown for the fate of compatriots than for the fate of foreigners. The reason for this unbalanced concern might be found in humanity's tribal origins and its primitive survival mechanisms. Whatever the cause, people do tend to care more about their compatriots than they do about foreigners and are ordinarily more willing to lend a hand when the well-being of their compatriots is concerned.

Let us therefore assume that raising the welfare level of the less well-off members of a given society--even if the needs of the worst-off have already been met--is something members of that society would tend to view favorably. [FN99] Assume, in other words, that people would prefer to live in a society in which economic resources are distributed more fairly. In such a case, raising the welfare level of the less well-off and mitigating economic inequality would constitute a psychological benefit to the members of that society. By the terms of benefit theory, imposing a tax to finance the provision of that benefit is, therefore, wholly justified.

Of course, one may question why it would be necessary to impose a tax in order to finance the redistribution if all members of the society concerned were interested in mitigating inequality beyond the strict requirements of justice. Why could the society not achieve the desired state of affairs through voluntary transfer payments? After all, when sentiment moves one to give gifts to family members or to friends, one simply does so; the impulse driving such sentiments does not need to be enforced by government action.

However, relying on voluntary contributions to finance action, the benefits of which cannot reasonably be limited to contributors, raises issues of both efficiency and fairness. This Article has assumed that all members of the society concerned are interested in the mitigation of economic inequality beyond the dictates of distributive justice. Nevertheless, one would have no economic incentive to contribute, ***314** unless he were convinced that the redistribution would be fundamentally curtailed without his contribution. The psychological advantage of living in a more equal society accrues to all, whether or not they contribute to the redistribution. [FN100] In a society as large as a modern country, where the impact of any single individual's contribution is negligible, no one would have an economic incentive to contribute. Although the project might be economically efficient--in other words, the cost to each individual could be set at less that the psychological benefit that would accrue to him--the inability to exclude free riders from enjoying the advantages of the redistribution would prevent what could have been a Pareto improvement. [FN101] Even if it were possible to finance the project through voluntary contributions, it seems unfair to allow some to rely on the civic-mindedness of others and, despite not contributing to the cause, to enjoy the same benefits as those who did contribute. While a variety of reasonable formulae for imposing financial burdens may be proposed, it would appear that distribution of the burden in accordance with a person's level of social consciousness is not among them.

Redistribution beyond the supplying of needs can therefore be justified not in terms of distributive justice but, rather, in terms of transactional justice. The dictates of global distributive justice are satisfied when essential needs are met. In acting to promote the goal of redistribution beyond what is required by the dictates of justice, the government is providing a service that the market is incapable of doing efficiently. Imposing a tax to finance the redistribution is merely charging taxpayers for the psychological benefits accruing to them.

Admittedly, no taxpayer contracted with the government to receive the service in exchange for a fee. Strictly speaking, then, there is no transaction and no place for transactional justice in the classic sense of the term. However, benefit theory steps in to fill in the gap. Where the market is incapable of operating efficiently, benefit theory holds that the government may provide the service and then charge each taxpayer according to the benefit he or she derived from that service. [FN102]

Until now, this Article has assumed that all members of the society ***315** in question are interested in redistribution beyond the dictates of distributive justice. Assume now that some individuals are indifferent to the issue of economic inequality and that mitigating inequality or improving the lot of the worst-off does not accord any psychological benefit to some members of the relevant society. These individuals could argue that because they derive no benefit from such activity, and because we are not dealing with alleviating needs, the government has no right, under the terms of either transactional or distributive justice, to require them to help pay for it.

The real issue is one of quantifying the benefits each individual receives, and allowing that some members of society derive zero satisfaction is merely a limiting case. According to benefit theory, one who derives great pleasure from the service should pay a lot, one who benefits less should pay correspondingly less, and one who derives no benefit should not be called upon to contribute at all. However, quantifying benefits will often prove impossible in practice. [FN103] For example, how much does any particular individual benefit from public parks? [FN104] How much does any particular individual benefit from a parade down Main Street? How much does any particular individual benefit from knowing that the society of which he is a member is concerned with the welfare of the disadvantaged? There seems to be no realistic alternative to estimating, based on objective criteria, the extent to which individuals will benefit or have benefited from government-supplied services.

Implementing benefit theory, whether with regard to national defense, environmental protection, or welfare assistance, necessarily involves a great deal of estimation, much of which is probably inaccurate. Nevertheless, unless one is willing to abandon benefit theory altogether, acting on conjecture is unavoidable. Therefore, where it seems reasonable to assume that most of those members of society who would be net givers under a proposed scheme of welfare assistance would derive psychological benefit from its implementation, benefit theory can be relied upon to justify the imposition of tax to ***316** finance that assistance. [FN105]

E. The Limits and Consequences of Benefit Theory Redistribution

What happens when there is little or no interest in an economically more equal society? In other words, what happens when the cost of providing assistance beyond the level of need is greater than the total psychological benefit which comes from living in a society which takes better care of its worst-off members than is morally required? In the situation described, redistribution would be unjustified. Distributive justice has already been satisfied. Transactional justice would not permit the redistribution, since the price the government proposes charging the taxpayer for the service is presumed to be greater than the expected benefit.

Redistribution is, of course, not an all or nothing affair. Willingness to fund up to but not beyond a certain level can be traced to the familiar convergence of two economic trends: diminishing marginal return and increasing marginal cost. From the perspective of the net donors, the psychological benefit of redistribution may be subject to the law of diminishing marginal utility because doubling the assistance given to the poor may not produce twice the amount of satisfaction for the net donors. Furthermore, taxes extracted to fund the redistribution are likely to impose an increasingly heavy burden on the taxpayer. At some point, the cost of funding the redistribution will equal and then outweigh the psychological benefit it brings. Until that point, benefit theory can

provide the basis for a system of tax and transfer. Beyond that point, taxing for the purpose of redistribution is no longer legitimate.

The extent of redistribution, determined by the caprice of society's "haves," may appear at first glance strange or even demeaning. Why should the distributive shares of society's disadvantaged depend upon the generosity felt by their more affluent compatriots? Could it be that the obligations of redistribution will vary from society to society merely due ***317** to the personal preferences of the wealthier among them? Would it not be more intellectually compelling to propose a rule delineating the extent of redistribution that members of a society would be morally obliged to follow, whatever the personal preferences of the wealthier among them?

To be sure, there cannot exist an objective set of criteria for internal redistribution. For argument's sake, assume that it were possible to formulate a rule for internal distribution that every society was bound to follow. The rule would specify the extent to which economic inequality would be subject to mitigation. It might adopt a strict Rawlsian approach that mandated, for example, that inequality should be mitigated to the extent that any further equalization would adversely affect the well-being of the least well-off. It might simply delineate the rate of taxation which should be imposed for the purpose of funding transfer payments and/or the provision of services to the less well-off. In any event, the same degree of inequality mitigation would almost certainly result in a greater absolute benefit to the less well-off in wealthier countries than in poorer countries. In other words, the primary beneficiaries of any "share the wealth" program would likely be those poor individuals who happen to live in rich countries. Similarly situated individuals living in poor countries would benefit less, simply because there would be less wealth to share.

Nationality is, as discussed previously, an undeserved and morally arbitrary attribute which cannot substantiate a claim to distributive shares. Any such claim must be nationality-neutral. And yet, any rule providing for an internal sharing of the wealth would necessarily differentiate on the basis of nationality and apportion claims accordingly. Similarly situated individuals could fare very differently in different countries; one might be a net receiver of transfer payments while the other was a net donor, simply because one occupied a lower than average economic position in his country, while the other, with identical absolute wealth, occupied an above-average position in hers. As our previous discussions have shown, no rule of justice could dictate the allocation of distributive shares merely on the basis of nationality. [FN106] Therefore, internal redistribution must be based not on any rule of justice, but upon feelings of national fraternity prevalent in that society. The level of justifiable redistribution would be dictated by the degree of fraternity.

***318** Predilections can, of course, change. People may sometimes be more willing to share their wealth than they are at other times, as evidenced in democratic countries by election results that indicate varying levels of sympathy for redistributive efforts. The degree of internal redistribution that a country institutes will likely fluctuate over time, reflecting public attitudes to the extent to which a society's policymaking process incorporates those attitudes. Under the rules of distributive justice, such shifts cannot be considered normative. They can only be viewed as moving society closer to or farther away from some ideal distributive model. [FN107] When society recognizes its moral obligations and acts accordingly, the institutions will approach the ideal. [FN108] When distributive obligations are ignored due to ignorance, greed, or other factors, the gap between what institutions do and what they are supposed to do will widen.

In accordance with needs-based justice, both national and international institutions are required to operate so as to satisfy needs where doing so is not prohibitively risky or expensive. A society acts illegitimately if it does not establish the institutions necessary to satisfy its obligations towards either its own needy members or to-

wards foreigners, regardless of whether the failure to do so is a result of ignorance of its obligations or because of an unwillingness, for whatever reason, to fulfill them. Whatever its procedures for determining how it acts, it has no more right to decide to refrain from fulfilling those obligations than it has the right to decide to take by force wealth which legitimately belongs to others.

However, once obligations of distributive justice have been satisfied and further redistribution proceeds under the jurisdiction of benefit theory, there is nothing anomalous about the adaptation of institutions to the prevailing political opinions. In fact, ignoring the change in attitude and continuing on with a program which was formerly appropriate might no longer be legitimate. What is normatively required is not a particular set of institutions or even a particular degree of redistribution, but rather the adaptation of institutions to people's attitudes toward redistribution.

An important distinction between redistribution based upon principles of distributive justice and redistribution based upon principles ***319** of benefit theory may be the extent to which the granting of benefits to the less well-off may be conditional. Where justice requires a redistribution, the ability of those in possession of the wealth to impose conditions on its redistribution is restricted; they can no more impose restrictions on the redistribution of wealth in their possession than can the possessor of lost or stolen property place conditions on the property's return to its rightful owner. Redistribution undertaken based upon the terms of benefit theory is different, in that the extent of justifying redistribution is a function of society's willingness to assist its least well-off persons. It may, therefore, impose conditions on the granting of that assistance.

However, conditions may be imposed in practice, even when assistance is granted within the context of needs-based justice. Provided that the condition is reasonable, one who refuses to satisfy the condition would no longer meet the criteria of neediness. Assume, for example, that aid to the needy is conditional upon their entering a job training program or undergoing treatment for whatever condition is responsible for creating or perpetuating their state of neediness. Provided that the condition to receiving assistance is reasonable, its imposition would not violate the distributive obligations of those who are in a position to help. As previously mentioned, anyone who is presently capable of supplying his own needs should not be classified as needy. As long as the opportunity remained available and the conditions remained reasonable, there would be no duty to assist those who, due to an unwillingness to meet the conditions, declined the proffered assistance.

F. Benefit Theory, Distributive Justice, and the Terms of Public Debate

Would debates over public policy be affected by viewing the question of redistribution as one to be discussed under the terms of benefit theory as opposed to under the terms of distributive justice? One might argue that the effect would be minimal. As a practical matter, each participant in the public policy debate attempts to convince her audience that the views she espouses are preferable to the alternatives. The political process then judges the effectiveness of the arguments raised on all sides and adopts an appropriate position. The procedure appears to be similar whether the arguments are based upon criteria of distributive justice or benefit theory. Nevertheless, there would be significant differences between the two.

Where the debate is held under the terms of distributive justice, each participant argues that his position is the correct one and is mandated by considerations of justice. The attitude of his audience is inconsequential ***320** for the purpose of determining the moral value of his arguments. If his arguments are correct, then justice requires their adoption. A proponent of the difference principle, for example, would presumably argue that the only just course of action for society to take is to establish institutions which implement that principle. The fact

that the vast majority of society might reject the Rawlsian model would in no way affect the fact that it is morally required. The job of the would-be molder of public opinion is simply to convince his audience of society's moral obligation. The audience, in fact, is only important for procedural reasons. It is only because they hold the key to implementing the proposed model that they need to be convinced.

Furthermore, members of the target audience need not be convinced that they are happy with the proposed redistribution scheme. It is enough that they feel it to be their obligation. For example, there is nothing anomalous about a person responding to a justice-based argument by saying, “I do not like the idea of sharing so much of my hard-earned wealth with others, and I wish that I did not have to do so, but it appears to be my moral duty.”

When, on the other hand, the debate over public policy is held within the framework of benefit theory, the target audience plays a substantive, rather than merely a procedural role in shaping social institutions, as public opinion determines not just what will most likely happen, but what ought to happen. The justification, under benefit theory, for instituting a more extensive redistribution than is required by the dictates of distributive justice is that by providing transfer payments to the less well-off, the government provides a service to those who prefer living in a more economically equal society. The government is therefore justified in redistributing wealth to the extent and only to the extent necessary to satisfy that preference.

When the mood of the public changes, the degree of redistribution that is justifiable will also change. For example, when members of the public are less interested in redistribution than they were previously, the government would not be entitled to continue charging them for a service which they were no longer interested in receiving. Redistribution would need to be scaled back, although the minimum level of redistribution necessary to satisfy the demands of distributive justice would, of course, have to be maintained in any case. When, on the other hand, public support for redistribution increases, a course of action which may not have been legitimate in the past might become justified.

Thus, convincing the target audience of the need for a more extensive redistribution, for example, is not a means to a just result under the benefit theory. Without the public's support, a more extensive ***321** redistribution is not just politically impossible, it is actually unjust. Convincing others to share one's personal preferences could therefore affect not just what the government will do, but what it ought to do. [FN109]

V. Conclusion

The international arena must be considered when testing proposed principles of distributive justice. If applying those principles in the international context conflicts with one's considered judgments regarding moral duty, the conflict might indicate a need to rethink the principles. Furthermore, an examination of considered judgments regarding moral duty in the international context might show them to be relevant for the domestic arena as well.

Many social philosophers signal their discomfort with the international implications of the principles they espouse simply by ignoring the international arena. Recently, however, scholars have begun to examine the international implications of principles that have been developed domestically. While some are willing to apply those principles globally, most who consider the issue are hesitant to do so and have ***322** therefore sought out justifications to avoid extensive international redistribution.

Rawls contended that morally arbitrary factors are inappropriate criteria by which to determine distributive shares. [FN110] Those who are less favored by nature, he claimed, have an equal moral claim to primary goods, the only justification for unequal distribution of resources being economic efficiency. [FN111] Yet, if morally arbitrary factors are indeed inappropriate criteria by which to determine distributive shares, it would seem to follow that allowing nationality to determine who is entitled to what is problematic.

If justice requires a Rawlsian redistribution, it must demand that the same principles be applied to all, without regard to race, religion, gender, caste, natural talents, social position, or nationality. If, on the other hand, nationality is a legitimate factor in determining distributive shares, it is unclear why other, equally arbitrary characteristics could not be legitimate factors also. The former premise leads to cosmopolitanism and the latter leads to libertarianism. Capturing the middle ground between cosmopolitanism and libertarianism requires adopting a position that recognizes, on the one hand, that morally arbitrary factors do in fact determine distributive shares and does not impose upon human society the obligation to neutralize the effects of those factors, and yet, on the other hand, does not dismiss redistribution as an essential element of distributive justice.

Needs-based justice does not impose any duty to mitigate economic inequality per se. [FN112] It does, however, require the proffering of assistance to those in need when the cost and risk involved in doing so are not prohibitive. However, when organizing its internal affairs, a state may, in certain circumstances, go beyond the strict requirements of distributive justice. Where members of the society are interested in a more extensive internal redistribution, the state may provide some of the wants of the less well-off members and charge the others for the service provided. The extent of redistribution permissible under such a scheme would be established not by any philosophically determinable formula, but rather by the actual predilections of the particular society concerned at any given moment in time.

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[FN1]. John Rawls, A Theory of Justice 67-72 (1971). The impact of Rawls's work on political theory in general, and distributive justice in particular, cannot be overstated. “A Theory of Justice is a powerful, deep, subtle, wide-ranging, systematic work in political and moral philosophy which has not seen its like since the writings of John Stuart Mill, if then.... Even those who remain unconvinced after wrestling with Rawls' systematic vision will learn much from closely studying it.” Robert Nozick, Anarchy, State, and Utopia 183 (1974).

[FN2]. Rawls, supra note 1, at 18-19.

[FN3]. Id. at 152-53.

[FN4]. Id. at 75-78. Drawing on the terminology of game theory, Rawls described the difference principle as the “maximin solution to the problem of social justice.” Id. at 152.

[FN5]. Benjamin R. Barber, Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls, in

Reading Rawls: Critical Studies of A Theory of Justice 292, 297-98 (Norman Daniels ed., 1975); see also Nicholas Rescher, Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution 25-38 (1966) (discussing relationship between maximizing total welfare and distribution of welfare). Interestingly, Rawls assumed that one of the things that individuals in the original position would be unaware of would be their aversion to risk. Rawls, supra note 1, at 137. It might also be noted that individuals in the real world are, in fact, willing to take risks. A person who chooses, for instance, a risky career path, indicates by her behavior that the possibility of great reward should she be successful is sufficient to offset the chance that she will end up with a lesser share of social goods than a safer career path promises. Although she knows, as does an individual in the original position, that she has but one life to live, she nevertheless is willing to risk being less well-off than otherwise if the chances of being better-off are sufficiently attractive.

[FN6]. See Menahem E. Yaari, A Controversial Proposal Concerning Inequality Measurement, 44 J. Econ. Theory 381, 382 (1988) (presenting "equality-mindedness" in the real world as conceptually equivalent to risk aversion behind the veil of ignorance).

Throughout this Article, any principle of distributive justice that can be derived from Rawlsian methodology will be referred to as "Rawlsian," whether or not it conforms to the difference principle. Any redistribution necessary to advance a Rawlsian conception of distributive justice will be referred to as a "Rawlsian redistribution."

[FN7]. This truth is so evident that even Robert Nozick, libertarianism's prime spokesman and Rawls's ideological arch opponent, was forced to accept it. Nozick, supra note 1, at 225 ("[C]orrectly, we describe people as entitled to their natural assets even if it's not the case that they can be said to deserve them.").

[FN8]. Id. at 183.

[FN9]. Margaret Canovan, Nationhood and Political Theory 28-29 (1996); John Rawls, Political Liberalism 11-12 (1993); John Rawls, The Law of Peoples 115-20 (1999) [hereinafter Rawls, Law of Peoples]; Yael Tamir, Liberal Nationalism 121 (1993); Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 31 (1983); Michael Sandel, The Procedural Republic and the Unencumbered Self, in Communitarianism and Individualism 12, 22-24 (Shlomo Avineri & Avner De-Shalit eds., 1992).

[FN10]. Rawls, Law of Peoples, supra note 9, at 106 ("Burdened societies... lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered. The long-term goal of (relatively) well-ordered societies should be to bring burdened societies... into the Society of well-ordered Peoples."). Assisting burdened societies to become well-ordered involves emphasizing human rights and teaching them to manage their own affairs. Id. at 106-12. In some cases, although not in all, wealth transfer may be necessary. Id. at 108-09.

[FN11]. Id. at 119-20.

[FN12]. See infra Part II.

[FN13]. While accepting that attributes such as talents and social position are ultimately undeserved, see e.g, Nozick, supra note 1, at 225, libertarians nevertheless argue that individuals are entitled to whatever they receive in market exchanges or as gifts. Redistribution is inappropriate, they claim, because there never was a distribution in the first place. An individual's holdings are achieved though a myriad of exchanges and transfers over which no one person or institution has any overriding control. Friedrich August von Hayek, 'Social' or Dis-

tributive Justice, in The Essence of Hayek 63, 68-70 (Chiaki Nishiyama & Kurt R. Leube eds., 1984); see also Nozick, supra note 1, at 149-50.

[FN14]. “Considered judgments” is a phrase coined by Rawls and defined by him as “those judgments in which our moral capacities are most likely to be displayed without distortion.... For example, we can discard those judgments made with hesitation, or in which we have little confidence[,]... those given when we are upset or frightened, or when we stand to gain one way or the other....” Rawls, supra note 1, at 47. Nevertheless, the source of our considered judgments--even those we retain after taking the proverbial deep breath and neutralizing whatever personal interest we may have--presents a serious problem in discussions of distributive justice. Our most powerful and unshakable basic attitudes are molded by historical and sociological forces of which we are ordinarily unaware. See Jeremy Rifkin, Entropy: A New World View 5-6 (1980). Building philosophical castles on clouds of considered judgments may, therefore, merely serve to perpetuate accepted prejudices.

[FN15]. Rawls implicitly assumes that the considered judgments of all reasonable people would be similar. Without necessarily relying on such a premise, the arguments presented in this Article will assume that certain basic conceptions of right and wrong are common to most people. It may be conceded that those who do not will not find the arguments presented here compelling.

[FN16]. What Rawls refers to as “the liberal conception,” the position that environmentally arbitrary factors should be neutralized and that distribution should accord to natural talents, occupies the appropriate middle ground. Rawls, supra note 1, at 73. Nevertheless, liberalism fares no better than Rawlsianism in its attempt to avoid inconsistency. The first problem with liberalism, as pointed out by Rawls, is that natural talents are no more arbitrary than environmental factors and are no more deserved from a moral point of view. Id. at 75. The second problem is that national affiliation would appear to be one of those environmentally arbitrary factors which need to be neutralized. Liberalism, like Rawlsianism, would thus imply cosmopolitanism.

[FN17]. Rawls, supra note 1, at 74.

[FN18]. See Loren Lomasky, Toward a Liberal Theory of Natural Boundaries, in Boundaries and Justice: Diverse Ethical Perspectives 55, 56-60 (David Miller & Sohail H. Hashmi eds., 2001).

[FN19]. See infra Part II.A-D. Some political philosophers who advocate extensive redistribution simply ignore, explicitly or implicitly, the possible international ramifications of the positions they espouse. See John Christman, The Myth of Property: Toward an Egalitarian Theory of Ownership 170-74 (1994) (discussing what a just state must provide its citizens with no mention of the international arena); Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice 41 (2002) (arguing that the framework for discussion of tax policy is the state and explicitly ignoring questions of global justice and international taxation); Eric Rakowski, Equal Justice 19 (1991) (discussing different notions of how a just state treats its citizens while ignoring international ramifications); see also Jeremy Waldron, John Rawls and the Social Minimum, in Liberal Rights: Collected Papers 1981-1991, at 250-51 (1993) (discussing people's entitlement to an equal share of social wealth or to a minimum provision without considering the position of those people who are not members of the society).

[FN20]. Rawls, Law of Peoples, supra note 9, at 106.

[FN21]. Id. at 119-20.

[FN22]. Rawls, supra note 1, at 4.

[FN23]. “I concede that a criterion of justice for domestic institutions would be sufficient if modern states were indeed closed schemes. In this case there simply would not be a global basic structure for principles of global justice to apply to.” Thomas W. Pogge, Realizing Rawls 240 (1989); see also Charles R. Beitz, Political Theory and International Relations 136-69 (1979).

[FN24]. John Locke, Two Treatises of Government §27, at 287-88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[FN25]. Rawls, supra note 1, at 73-74.

[FN26]. Locke, supra note 24, §28, at 288, §32, at 290-91.

[FN27]. Nozick, supra note 1, at 174-75.

[FN28]. Locke, supra note 24, §27, at 288.

[FN29]. Rawls, Law of Peoples, supra note 9, at 116-17.

[FN30]. Note also that, according to Rawls, the mere presence of natural resources in the state's territory is sufficient to ground claims of ownership to those resources, even before the state exerts any effort to add value to those resources by combining them with its labor. Thus, while Locke held that ownership results from the combination of labor with part of the natural world, Rawls's position apparently was that a state may claim rights to resources in its territory, without having added an iota of economic value. Id. at 117 (“[T]he arbitrariness of the distribution of natural resources causes no difficulty.”)

The acquisition of territory by a state is analogous to the acquisition of territory or other natural resources by an individual or group of individuals in a state of nature. A state may be viewed in this context as a group of individuals operating in a state of nature vis-à-vis other states and acquiring territory either through first possession or by conquest. See Thomas Hobbes, Leviathan 244 (Cambridge Univ. Press 1991) (1651) (“[T]he law of nations, and the law of nature, is the same thing.”). Interestingly, Rawls, when discussing the rights of a state to natural resources in its territory, does not consider how it came to possess the territory in question.

[FN31]. Rawls, it might be added, would apparently release Mary from any moral obligation to share her good fortune with Paul even if it turned out that Mary's success resulted simply from her half of the island being easier to hunt and gather in. Rawls, Law of Peoples, supra note 9, at 116-17.

[FN32]. Rawls, supra note 1, at 4.

[FN33]. Rawls would only allow Mary a greater share of the take if doing so were necessary in order to induce her to continue hunting and gathering for Paul's benefit.

[FN34]. Rawls, supra note 1, at 72.

[FN35]. Id. at 102.

[FN36]. Of course, a state of nature would, by definition, lack any mechanism by which to enforce redistributive claims. This, however, does not detract from the legitimacy of those claims. Indeed one of the main problems with a state of nature is the lack of enforceability of any natural right. Thus, natural right theory maintains, individuals establish governments in order to enforce their natural rights of life, liberty and property. If, as posited,

their property rights include a portion of the wealth produced through the talents of others, governments would be charged with enforcing those rights too.

[FN37]. Daniel Bell, Communitarianism and Its Critics 150 n.33 (1993) (“That our sense of solidarity is strongest where ‘us' means something smaller and more local than the human race provides a strong argument against the feasibility of a world-wide system of distributive justice....”); Canovan, supra note 9, at 28-29 (observing that social justice theorists implicitly take for granted that demands for distributive justice are applicable within a community of members committed to sharing social goods); Ronald Dworkin, Law's Empire 207 (1986) (noting that political obligations are dependent upon fraternity among members of the political community); Will Kymlicka, Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship 225 (2001) (observing that people are willing to sacrifice for others only when there is a “sense of common identity and common membership uniting donor and recipient, such that sacrifices being made for anonymous others are still, in some sense, sacrifices for ‘one of us”’); Avishai Margalit, The Ethics of Memory 74-76 (2002) (arguing that a nation can be an ethical community, but it is unreasonable to expect that all of humanity can be one, as caring requires contrast); Richard Rorty, Contingency, Irony, and Solidarity 190-91 (1989) (noting that moral obligations are toward those with whom we feel a sense of solidarity); Tamir, supra note 9, at 121 (“The ‘others' whose welfare we ought to consider are those we care about....”).

[FN38]. In fact, the apparent greater willingness to share with compatriots will be an important element in the position I will develop later on.

[FN39]. Where the recipient is less well-off than the donor, and the donor's motivation in making the gift is to mitigate inequality, the act might be described as heroic. See infra Part IV.F.

[FN40]. David Miller, On Nationality 84-85 (1995) (arguing that social justice occurs mainly within national communities and that each community is entitled to the resources created by its own members); Sandel, supra note 9, at 20-24 (describing, and rejecting, Rawls's argument that talents are the property of the community).

[FN41]. Imagine, for example, that particular talents are located in an individual who is part of an ethnic community in a given country. Are the talents possessed by (a) the individual, (b) the ethnic community, (c) the country, or (d) humanity? Choice (c), the only answer which would justify domestic Rawlsianism, is not incorrect; it is simply not more correct than any other answer. Reliance on that answer to justify domestic Rawlsianism is hardly compelling.

[FN42]. Nozick, supra note 1, at 225-26.

[FN43]. Dworkin, supra note 37, at 197-98; Miller, supra note 40, at 83; Walzer, supra note 9, at 31.

[FN44]. Tamir, supra note 9, at 100-01.

[FN45]. Karl Marx, Marginal Notes to the Programme of the German Workers' Party, in Critique of the Gotha Programme 17 (Foreign Languages Press, Peking. 1st ed. 1972) (1875); see Naama Sabar, Kibbutzniks in the Diaspora 7 (2000) (noting the relationship of the traditional purposes of the kibbutz and Marx's communist ideal, in that “[t]he kibbutz was traditionally based on the premise that the individual contributes to the collective according to his/her ability and in return the kibbutz provides for all his/her needs”).

[FN46]. Where national association is voluntary, one might view the obligations implicit in such association as

contractual. For example, a person who voluntarily immigrates to, and is naturalized in, a socialist country might be considered as having taken upon herself the terms of association of that country. Her subsequent complaints regarding the high level of taxes imposed to finance public services and transfer payments could be more easily ignored than similar complaints by one born in the country. In the same way, a person who voluntarily immigrated to a traditional, strongly patriarchal society would have considerably less standing to object to the structure of that society than would a native-born individual. In both instances, the immigrant chose to live under those terms. The inherent justice in the structure is therefore less relevant as far as she is concerned.

[FN47]. Dworkin, supra note 37, at 201; Walzer, supra note 9, at 41 ("[S]tates are like families... for it is a feature of families that their members are morally connected to people they have not chosen....").

[FN48]. For this reason most people, for example, would probably feel that a child abandoned by his parents has little or no obligation toward them.

[FN49]. Relatives may, of course, also be friends, and in those cases the obligations of friendship and of family--neither of which is in any case explicitly delineated--would commingle. The text, however, is considering obligations based merely on the family relationship.

[FN50]. The fact that membership in certain associations bestows some benefit cannot support a claim to Rawlsian redistribution. See supra Part II.A.

[FN51]. See, e.g., Tamir, supra note 9, at 117-21.

[FN52]. Id. at 121 (rejecting arguments based on sympathy and associative obligations, nevertheless concluding that "[t]he 'others' whose welfare we ought to consider are those... who are relevant to our associative identity," and "the community-like nature of the nation-state is particularly well suited, and perhaps even necessary, to the notion of the liberal welfare state").

[FN53]. Id. at 113.

[FN54]. Rawls, Law of Peoples, supra note 9, at 26, 30-32, 82-83; see also Rawls, supra note 1, at 377-78 (principles of justice apply to societies as units and are agreed upon by members of those societies in the original position).

[FN55]. See Pogge, supra note 23, at 242.

[FN56]. Rawls, supra note 1, at 12 (noting that the veil of ignorance "ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances").

[FN57]. Canovan, supra note 9, at 34; Miller, supra note 40, at 51-53 (referring to ethical obligations in general and not specifically to Rawlsian redistribution).

[FN58]. Rawls, supra note 1, at 76-78.

[FN59]. See Amy Gutmann, Liberal Equality 171-72 (1980); Samuel Freeman, Introduction: John Rawls - An Overview, in The Cambridge Companion to Rawls 1, 50-51 (Samuel Freeman ed., 2003).

[FN60]. For example, donor countries have few means at their disposal to ensure that the funds they contribute actually reach the most needy in the poorer countries.

[FN61]. Rawls, supra note 1, at 83.

[FN62]. The argument presented is not that countries necessarily give foreign aid out of a sense of moral duty as opposed, for example, to altruism. The point is that, whatever their motives, their actions indicate an acknowledgement on their part that transfer payments to underdeveloped countries can be effective, even considering the inefficiency of the institutions involved.

[FN63]. Kok-Chor Tan, Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism 26 (2004) (stating that international institutions are often accomplices in the exploitation of weaker states).

[FN64]. It is interesting to note the following comment by John Arthur and William H. Shaw:

> [D]isparity of wealth itself cannot be the source of... injustice. (Only in a cosmic or poetic sense is it unjust for me to thrive on my Iowa farm while you barely eke out an existence in the Yukon.) If we are to speak of justice at all, there must be some relation between the parties by virtue of which a right is violated or an unfairness done.

John Arthur & William H. Shaw, On the Problem of Economic Justice, in Justice and Economic Distribution 5 (John Arthur & William H. Shaw eds., 2d ed. 1991). Note that the authors refer to the lack of obligation of a resident of Iowa toward a resident of the Yukon and not, for example, toward a resident of Alaska.

[FN65]. Charles Jones, Global Justice: Defending Cosmopolitanism 77 (1999) (referring to such views); Kymlicka, supra note 37, at 225.

[FN66]. Even where talents are diligently developed over a long period of time and might therefore be considered to have an element of desert attached to them, the industriousness and patience which enabled their development were themselves not deserved.

[FN67]. As noted earlier, even Nozick felt obliged to concede the point. Nozick, supra note 1, at 225.

[FN68]. Rawls, supra note 1, at 102.

[FN69]. It is admittedly difficult to substantiate this position other than to rely on an intuitive sense of what is right. I concede that one who sees nothing wrong with allowing the individual encountered to die of thirst in the circumstances described would probably not find the arguments presented in this Article compelling.

[FN70]. Nor, I might add, is it grounded on any claim of transactional or compensatory injustice. Again, we assume that the traveler is in no way responsible for the predicament of the other.

[FN71]. Cf. Walzer, supra note 9, at 33 (stating that among strangers, positive assistance is required if it is needed urgently by one of the parties and the risks and costs of giving it are relatively low for the other party).

[FN72]. See Kate Soper, On Human Needs: Open and Closed Theories in a Marxist Perspective 6-18 (1981) (arguing that the distinction between needs and wants is a political issue); Waldron, supra note 19, at 264; David Wiggins, Needs, Values, Truth: Essays in the Philosophy of Value 2-17 (1987) (discussing different ways of distinguishing between needs and wants and focusing on the degree of harm envisioned if the need or want is not met).

[FN73]. Even among those accepting such a premise, the question of what it takes to make life worth living--or, more specifically, what are the material resources which would enable a person to make his life worth living--is obviously debatable.

[FN74]. Rawls, who seems to adopt a needs-based approach to international justice, similarly does not define basic needs. Rawls, Law of People, supra note 9, at 119.

[FN75]. Or, more accurately, to mitigate nature's unfairness, as nature cannot be judged in terms of right and wrong. Rawls, supra note 1, at 102.

[FN76]. This is not to say that other approaches to distributive justice would completely ignore the difference between needs and wants. Presumably, for example, a utilitarian would place primary emphasis on needs over wants, simply because the pleasure associated with the satisfaction of a need is quantitatively greater than the pleasure derivable from the satisfaction of a mere want. For needs-based justice, on the other hand, the distinction is not merely quantitative but qualitative; only needs are the basis of positive moral duties. While one is certainly permitted to consider other individuals' wants and to act so as to satisfy them, doing so would be considered, not the fulfillment of one's moral duty, but the performance of an heroic act.

[FN77]. For the purpose of this analysis, I will ignore such factors as individual A's pleasant memories of his past consumption or his regret at having indulged his desire for immediate gratification and the psychological effects of individual B's anticipation or impatience.

[FN78]. Ronald Dworkin, What Is Equality? Part 2: Equality of Resources, 10 Phil. & Pub. Aff. 283, 285-93 (1981). I will assume that the choice to consume immediately was reasonable under the circumstances.

[FN79]. Julian Le Grand, Equity and Choice: An Essay in Economics and Applied Philosophy 87 (1991).

[FN80]. Here, too, I am assuming that the decision to gamble was not unreasonable and that a reasonable person could have chosen to gamble the same as he could have chosen to refrain from gambling.

[FN81]. For example, the past fiscal behavior of elderly individuals who are no longer capable of taking care of their own needs--where “taking care of their own needs” refers not to their physical state but to their economic state--would be irrelevant.

The irrelevance of desert for needs-based justice and the obligation to assist those in need whatever responsibility they bear for their own predicament is perhaps an argument for limiting the scope of needs and classifying anything much above sustenance level as a want. On the other hand, the fact that desert is irrelevant might be an argument in favor of expanding the definition of needs, as those who, through no fault of their own, are able to supply their own needs and nothing more are not entitled, under a needs-based approach, to redistribution.

[FN82]. Could there not be other concerns, outside these three limitations, which would justify a refusal to assist? While it is ordinarily difficult to prove an assertion that there are no other legitimate concerns, it nevertheless appears to me that these are the only limitations which needs-based justice could support. If someone is needy (limitation (a)) and his needs are capable of being met (limitation (b)) at a non-prohibitive cost (limitation (c)), it is contended that assistance must be rendered.

[FN83]. Recall the case of the desert traveler. Assume that giving water to those who need it would encourage

others to wander in the desert without sufficient water supplies. As long as the traveler has enough water to supply her own needs, refusing to come to the aid of those in need would still be immoral.

However, as the text goes on to argue, where the amount of water carried by the traveler and by others like her is likely to prove insufficient to meet the needs of all those they encounter wandering in the desert without water and where the only way to prevent people from putting themselves is such a predicament is to refuse water to those who need it, the refusal might be considered a moral course of action.

[FN84]. Of course, there will still be individuals who will continue to risk their ability to care for their own needs where the potential reward is, in their mind, sufficiently great, or where the chance of losing the gamble seems sufficiently small. Under the hypothetical of stretched resources, the denial of assistance to those individuals will be necessary to maintain the credibility of the institutional mechanism.

[FN85]. It is normally presumed that the more material goods one has, the less satisfaction one derives from a given increment.

[FN86]. Cf. Henry C. Simons, Personal Income Taxation 3-4 (1938) (explaining the tax structure in pre-Revolutionary France).

[FN87]. Cf. Alexander McCall Smith, The Duty to Rescue and the Common Law, in The Duty to Rescue: The Jurisprudence of Aid 55, 55 (Michael A. Menlowe & Alexander McCall Smith eds., 1993) (“[T]here are many moral precepts which are not legally enforceable.” (quoting Malone v. Metro. Police Comm'r, (1979) 2 W.L.R. 700 (Ch.)).

[FN88]. Rawls's difference principle, it should be noted, is not synonymous with domestic Rawlsianism. As discussed in supra Part II, limiting a redistribution to the inhabitants of a single country cannot be justified in terms of the difference principle.

[FN89]. Rawls, supra note 1, at 151.

[FN90]. Tamir, supra note 9, at 117.

[FN91]. I am assuming that the wealth referred to was acquired legitimately, so that, aside from establishing a basis for comparison, it is unobjectionable. By way of comparison, one who divulges that the wealth of an individual or of a class of individuals was acquired in violation of the norms of transactional or compensatory justice does not contribute in any way to the injustice; ignorance of injustice cannot serve as a remedy. A world in which victims of transactional or compensatory injustice are ignorant of the violation of their rights is not more just than a world in which they are aware of the facts. The situation described in the text is different. The claim being considered is that knowledge of the lifestyles of others is what creates the injustice.

[FN92]. Edwin R.A. Seligman, Progressive Taxation in Theory and Practice 190-202 (2d ed. 1908).

[FN93]. John Stuart Mill, Principles of Political Economy and Chapters on Socialism 156-57 (Jonathan Riley ed., Oxford Univ. Press 1994) (1848); see also Seligman, supra note 92, at 156-202 (indicating that benefit theory has been used to justify progressive, proportional and regressive taxation).

[FN94]. Simons, supra note 86, at 4.

[FN95]. Frances Fox Piven & Richard A. Cloward, Regulating the Poor: The Functions of Public Welfare 20-21,

38 (2d ed. 1993) (1971).

[FN96]. But see John Stuart Mill, Utilitarianism, Liberty, and Representative Government 73 (E.P Dutton & Co. 1951) (1861) ("[In accordance with some conceptions of benefit theory,] all should pay an equal capitation tax for the protection of their persons (these being of equal value to all), and an unequal tax for the protection of their property, which is unequal."). Note also that very wealthy individuals often have the means to protect themselves and thus benefit less from redistribution than do members of the middle class, who are often the first victims of a breakdown of the social order.

[FN97]. Waldron, supra note 19, at 265.

[FN98]. The question of whether the profits of criminal activity should be subject to taxation was, in the past, a subject of controversy. See James v. United States, 366 U.S. 213 (1961); Rutkin v. United States, 343 U.S. 130 (1952); Commissioner v. Wilcox, 327 U.S. 404 (1946), overruled in part by James, 366 U.S. 213. To the best of my knowledge, however, no one has ever raised the claim that criminals should be exempt from taxation because they derive no benefit from law enforcement.

[FN99]. In Part IV.E infra, I will consider what happens when this assumption is relaxed.

[FN100]. Although we have assumed that everyone supports the goal of a more economically equal society, we may also assume, human nature being what it is, that most people would prefer that somebody else pay for it.

[FN101]. A Pareto improvement is a change which leaves at least one individual better off and leaves no one worse off: Vilefredo Pareto, Manuel d'Economie Politique 617-18 (1909), translated in T.W. Hutchison, A Review of Economic Doctrines, 1870-1929, at 225 (1953).

[FN102]. Cf. Nozick, supra note 1, at 93-95 (Even if a person benefits from a service, he is not obliged to contribute toward its maintenance unless he agreed to do so. "One cannot, whatever one's purposes, just act so as to give people benefits and then demand (or seize) payment. Nor can a group of persons do this.").

[FN103]. It may be difficult or impossible even to estimate the overall benefit to society. In many cases, therefore, we simply estimate the benefit, compare it to the cost, and proceed accordingly. The democratic political process may be viewed, in part, as an admittedly very crude way of estimating the benefits of proposed actions relative to their costs. The greater the number of people who favor a certain course of action, the more likely it may be that the benefits to be derived from that course of action exceed the cost.

[FN104]. I am not including here situations in which it is possible to fund the activity through user fees, such as by charging admission to public parks. I am referring to situations where it is unrealistic to charge for admittance or where even those who do not actually enter the park nevertheless benefit from its existence.

[FN105]. To forestall an objection that taking from those who genuinely oppose the policy would nevertheless be tantamount to theft, it might be helpful to phrase the argument in procedural terms. Consider the civil justice system. The possibility that the plaintiff will unjustly succeed is an accepted facet of the system. In ordinary cases, for example, all that is required to succeed is a preponderance of evidence. Nevertheless, lacking the omniscience necessary to determine who is entitled to what, we have no option but to rely on the available evidence, incomplete as it may be. Furthermore, the presentation of evidence may be barred when the cost or potential harm of doing so is significant enough.

Similarly, the principle that only those who support a policy should have to pay for it may be considered a substantive rule whose implementation is subject to procedural criteria. Where a good faith effort is made to determine people's actual predilections, any inaccuracy may be regarded simply as a regrettable consequence of our lack of omniscience.

[FN106]. This is not, of course, meant to imply that nationality could never be a factor in determining distributive shares. For instance, were geographical or political obstacles to prevent the rendering of assistance to residents of a particular country, refraining from rendering such assistance might not be unjust. Nevertheless, the nationality of the individuals who would otherwise be entitled to assistance is not the controlling factor. While it may be true that the objective obstacles may only apply to individuals of a particular nationality, justice condones the withholding of assistance, not because of the nationality, but because of those objective obstacles.

[FN107]. I am not referring here to adaptations of a given model to changing circumstances. Having adopted a particular distributive model, a country may find that changes in overall wealth or in wealth distribution require, for example, a modification of tax rates to obtain the same results which the previous tax rates had formerly been able to achieve. What I am concerned with, in other words, is the phenomenon of shifting goals which a society sets for itself, not the adaptation of the means by which it achieves those goals.

[FN108]. One of the functions of the social philosopher, on this view, is to show people what their moral obligations are in the field of distributive justice.

[FN109]. In order to highlight the differences between public policy debates in the framework of distributive justice as opposed to those held in the framework of benefit theory, consider the implications of circumventing public opinion and attempting to influence decision-making by a direct appeal to those with actual decision-making power. Where issues of distributive justice are concerned, such an appeal would, ostensibly, be justified. The fact that the decision does not conform to what the public wants is irrelevant, as the decision conforms to what the public is morally required to do. Where, on the other hand, the issue is one of benefit theory, convincing the public is necessary in order to justify the implementation of one's own predilections.

The approach suggested here may be helpful, for example, in formulating the principles concerning the appropriate role of the judiciary in matters of fiscal policy. The courts, on this view, may be a legitimate venue for addressing issues of distributive justice. Distributive justice, after all, addresses the fundamental question of what belongs to whom, and what belongs to whom is a question which courts routinely address.

When a dispute arises as to property rights, the substantive issue before the court is not usually the question of who presently possesses the property, but rather who is entitled to possession. An argument that the court's function must be limited to determining who is in actual physical possession and that opining on who is entitled to possession is beyond the court's mandate would, of course, be summarily rejected. The job of the court is to determine the right of possession, and if the party with the right to possess the property is not the party in actual possession, to act so as to rectify the situation. Their ruling on issues of distributive justice would be no more an overstepping of the bounds of their authority than are their rulings on issues of transactional, compensatory, or punitive justice.

Beyond the strict requirements of distributive justice, however, a court would have no authority to determine the proper distribution of wealth in society. Whether or not the society in question desires to go beyond the requirements of distributive justice and institute a more extensive redistribution of resources is an issue for the members of that society, acting through the political process, to determine.

This brief note does not, of course, constitute a complete analysis of the role the courts should play, and of their relationship vis-à-vis the legislature, in formulating social policy. Nevertheless, it may be helpful in con-

sidering what that role should be.

[FN110]. Rawls, supra note 1, at 72-75.

[FN111]. Id. at 151.

[FN112]. Rawls's own conception of international obligations strongly resembles needs-based justice. See Rawls, Law of Peoples, supra note 9, at 117.

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Articles

HAYEK'S RELEVANCE: A COMMENT ON RICHARD A. POSNER'S HAYEK, LAW, AND COGNITION

Donald J. Boudreaux [FNa1]

Frankness demands that I open my comment on Richard Posner's essay [FN1] on F.A. Hayek by revealing that I blog at Café Hayek [FN2] and that the wall-hanging displayed most prominently in my office is a photograph of Hayek. I have long considered myself to be not an Austrian economist, not a Chicagoan, not a Public Choicer, not an anything--except a Hayekian. So much of my vision of reality, of economics, and of law is influenced by Hayek's works that I cannot imagine how I would see the world had I not encountered Hayek as an undergraduate economics student.

I do not always agree with Hayek. I don't share, for example, his skepticism of flexible exchange rates. But my world view--my weltanschauung--is solidly Hayekian.

I have also long admired Judge Posner's work. (Indeed, I regard Posner's Economic Analysis of Law [FN3] as an indispensable resource.) Like so many other people, I can only admire--usually with my jaw to the ground-- Posner's vast range of knowledge, his genius, and his ability to spit out fascinating insights much like I imagine Vesuvius spitting out lava.

And so it is with some trepidation that I dissent from Judge Posner's tepid evaluation of Hayek's importance. But dissent I do.

I. Custom, Law, and Legislation

Most fundamentally, I dissent from Judge Posner's skepticism of evolved law. Hayek--along with scholars such as Bruce Benson, [FN4] Lon Fuller, [FN5] and Bruno Leoni [FN6]--made a powerful case that law need not spring from the barrel of a gun or from the mind of a law-giver. Law can and often does evolve from the actions and expectations--the customs--of ordinary people going about their daily business. So far, Judge Posner would agree. But Posner is far more skeptical than Hayek (and I) that this evolved law is optimal (that is, the best that we can reasonably hope for). In Posner's opinion, Hayek

> is insufficiently critical of the limitations of custom as a normative order. He puts too much weight on evolution, neglecting the fact that, lacking a teleology, evolution cannot be assumed to lead to normatively attractive results. [FN7]

Posner's examples on this point are weak. He says, for instance, that “manufacturers could be expected to evolve a custom of ignoring the pollution they create; that custom could not be made the basis of environmental

law." [FN8] Indeed, if manufacturers had to contend only with each other, then the law that evolved out of custom might have been one that permitted manufacturers to dump waste willy-nilly into the air and water. From early on, however, manufacturers had to contend with surrounding landowners. Once this fact is realized, it is no longer so clear that we would expect manufacturers to "evolve a custom of ignoring the pollution they create."

So what happened? In fact, the common law did evolve legal rules to protect landowners from water pollution produced by factories. [FN9] Indeed, this common law arguably protected against water pollution more reliably than did the statutory regime that superseded it. [FN10]

With respect to air pollution, contrary to Posner's reading, Hayek would concede [FN11] (as would I, although less readily) that legislative intervention might improve matters. It is important to be aware, however--as Hayek always was [FN12]--of the breadth of details to consider when evaluating outcomes.

I have little doubt that legislation has improved air quality; today's air is probably cleaner than it would be without the Clean Air Act [FN13] and other statutes and administrative regulations aimed at reducing air pollution. But was the pre-statutory common law inefficient? Did legislative intervention improve matters overall? Perhaps, but how would we know? Given the political distortions that inevitably infect legislative rule-making and enforcement, and the limitations on legislators' and regulators' knowledge, how do we know that today's air isn't so clean that the costs of achieving it through legislative intervention outweigh its benefits?

Most readers (and Posner, too, I suspect) [FN14] will find these questions silly, but why? Can we be sure that we aren't paying too high a price for pollution reduction? The classic case for government intervention to deal with problems such as pollution is straightforward, but it is also surprisingly self-destructive.

The classic case is the familiar one of public goods, externalities, and free-rider problems: If some desirable outcome, once produced, cannot easily be withheld from those who contribute nothing to produce it, then it is a safe prediction that a suboptimal quantity of such a "public good" will be produced. It is not worth paying for something if others will free-ride off of your payments, or if you can get it by free-riding on others' payments. [FN15]

Pollution reduction is a classic public good. If each individual could purchase his own pollution reduction from nearby factories, then there would be no problem, and thus no case for government regulation. Of course, such individualized escape from air pollution is very difficult. So the case for government regulation--for collective action--is vibrant.

II. Government Failure

Government, however, creates its own collective-action and free-rider problems. The very act of voting gives each voter a say in determining the amount of taxes that other people pay and the extent to which other people will be subjected to government regulation. This say is not conditioned, as are market exchanges, upon a tit exchanged voluntarily for a tat. Instead, the say that each voter has over the lives of third parties is free, given to a voter simply by virtue of his or her being a citizen of voting age. Anyone eligible to vote has a say in the way other people will live their lives. Thus, casting ballots in democratic elections is akin to emitting pollutants into the atmosphere, insofar as voting and polluting involve the voter/polluter choosing and acting without being obliged to take account of the consequences that his choices and actions have on third parties.

This argument might be countered by saying that, because everyone has a vote, each person has a say in the collective outcome and, therefore, the outcome of each election is internalized on all citizens (or at least on all voters). The fact that everyone has a vote, though, is irrelevant. Each voting choice is made by each individual voter. To determine its economic integrity-- that is, how likely it is that a vote is cast in an informed, non-free-riding manner--requires investigating the constraints and opportunities facing each voter as he or she casts a ballot. Because each voter enjoys the privilege of voting in every election by virtue of being a voting-age citizen, each voter is unconstrained in casting ballots for candidates and policies that will worsen others' lives. Furthermore, because no single voter expects his vote to determine the outcome of the election, each voter has little incentive to consider the consequences that any election outcome will have on even his own material well-being. [FN16]

Nothing about the voting situation compels any voter to modify his views in light of other people's preferences, or to take careful account of the ways that his vote and the collective outcome of the election will affect other people or even himself. In short, voters have little incentive not to behave as uninformed, careless busybodies.

Because nearly every voter expresses free-of-charge opinions on how other people will live their lives, and because losing coalitions are forced to live by the rules imposed by the winning coalition, electoral outcomes are infused with externalities.

The situation is similar for elected representatives. While the legislative process differs from the citizen-voting process in a number of important ways-- for example, legislation is often the product of logrolling [FN17]--the fundamental fact remains that representatives are not obliged to take account of the consequences their decisions have on every individual these decisions affect. A member of Congress, for example, who believes that voting for higher taxes will improve his re-election prospects need pay little attention to the negative consequences that higher taxes have on the individuals who pay those taxes. Likewise, consider a member of Congress pondering how to vote on the question of whether or not to open the Alaskan National Wildlife Reserve to oil drilling. If the people negatively affected by such drilling are politically disorganized, this member of Congress can safely ignore the negative consequences that drilling in ANWR might have on them.

The bottom line is that market failures are not necessarily more prevalent or more onerous than government failures. Indeed, the number and intensity of government failures is likely greater than that of market failures given that majoritarian politics inherently involves winning coalitions forcibly imposing their wills upon losing coalitions. To assume, as Posner (like so many others) does, that legislation will more likely than not improve a market failure is unjustified.

So we come back to Hayek's sophisticated recognition of the superiority of customs and laws forged from decentralized human experiences and then incorporated into expectations. Nothing about Hayek's case for “law” over “legislation” rests on the assumption that decentralized law is ideal. The question instead is: How ought we achieve any available improvements? Hayek warned against a too-ready resort to legislation and counseled instead a reliance upon the imperfect, often slow means of discovering law through decentralized trial and error.

III. Hayek, Posner, and the U.S. Constitution

Judge Posner's penchant for slipping into legal positivism reveals itself most starkly when he remarks that “Hayek's disapproval of law founded on ‘constructivist rationalism’ rather than on custom is in considerable ten-

sion with his great admiration for the Constitution of the United States." [FN18]

Not at all. The U.S. Constitution is not a code of law; it is a framework of government. Originally, it was a compact among different polities (the states), each with much de facto plenary power. The leaders of these political units sought a better, mutually advantageous arrangement for confederating than what they had under the Articles of Confederation. The delegates to the Philadelphia Constitutional Convention of 1787 did not seek to create all or even most law de novo; they did not seek to replace wholesale one set of laws with another. The evolved common law rooted in English experience and modified by the more recent experience in the colonies [FN19] remained the law of the land. This law governed property, contract, commercial, tort, and criminal matters; the Constitution only modestly impacted this body of law. What Hayek admired about the U.S. Constitution was that it instituted a national government of limited, enumerated powers, all in a framework aimed at keeping the powers of this national government in check. Indeed, Hayek's admiration for the limitations-by-design aspect of the Constitution was probably intensified by his recognition that a national government kept relatively small and limited is less likely to upend the common-law rules and processes that he so respected.

Conclusion: Is Hayek Relevant?

So is Hayek relevant today? Judge Posner, while applauding the power of Hayek's criticisms of Soviet-style central planning, [FN20] finds Hayek's scholarship to be of little relevance to today's issues. [FN21] One reason, I suspect, that Posner overlooks Hayek's relevance is that he cannot escape the presumption that good law is ultimately the product of conscious decisions and conscious designs by legislators and judges. As long as lawmakers don't overreach by trying to plan entire economies, Posner believes that the smaller tasks confronting judges and legislators are not only doable, but essential. Legislatures--and judges applying legislation--correct an externality here, adjust the application of Rule 10(b)(5) there, and generally nudge society along toward a more optimal state of affairs. Without such tinkering, Posner seems to think, society would drift aimlessly into deeper and choppier waters in the sea of suboptimality.

Hayek dissented from this widely held opinion. For Hayek, legislation is a last resort, not a tool for fine-tuning society. But today, of course, legislation is the chief daily business of government. Today's frequent legislative interventions into every nook and cranny of our lives are built on a "pretense of knowledge" [FN22] that misleads people to imagine that legislation is a panacea for many real (and many merely perceived) imperfections.

Are prices in the aftermath of natural disasters too high? Legislate them down. Might children encounter unsavory programming on television? Legislate decency in broadcasting. Worried that too few people will save adequately for retirement? Legislate forced saving. The list goes on and on. Hayek's criticisms of piecemeal interventions such as these would differ little from those offered by mainstream economics, especially the Chicago variety.

But the central-planning mindset has not been completely defeated and replaced by "mixed-economy" interventions. Consider, for example, the loud and frequent calls today from the American left for nationalization of healthcare. [FN23] While not as ambitious as nationalization of the entire economy, nationalization of the single largest sector of the U.S. economy--constituting about 15 percent of U.S. GDP [FN24]--would create many of the very same problems that Hayek identified with central planning. Likewise with rebuilding the city of New Orleans and the Gulf coast region destroyed in 2005 by hurricanes Katrina and Rita. The amount of knowledge that government officials would have to acquire, process, and act upon in order to run a nationalized healthcare

system successfully, or to rebuild a city according to a conscious plan, boggles the mind.

The problems with such massive interventions run much deeper than increased corruption, the failure of markets to clear, and other problems that mainstream economists attribute to routine interventions like rent control. Massive interventions pose precisely the sort of problems that Hayek warned would inevitably result from central planning. These problems spring from centralized, administrative control of massive amounts of resources--a situation that denies even the brightest and best-intentioned of bureaucratic agencies sufficient knowledge about how best to structure economic arrangements. If Hayek indeed was, as Posner says, "prescient" [FN25] in understanding and explaining the problems that plague central planning, then surely Hayek's work remains relevant for understanding the problems that are ignored by champions of nationalized health care and other massive government programs--including rebuilding New Orleans here in the U.S. and "building" nations abroad. [FN26]

I sincerely wish that Judge Posner were correct that Hayek's work is no longer relevant. But the blitheness with which so many very smart people today call not only for routine legislative interventions but also for massive, centralized government action to solve this or that Big Problem is striking evidence of the importance that Hayek's work still holds for us today.

[FNa1]. Chairman and Professor, Department of Economics, George Mason University. B.A. Nicholls State University, Ph.D. Auburn University, J.D. University of Virginia. I thank Karol Boudreaux for very useful comments on an earlier draft.

[FN1]. Richard A. Posner, Hayek, Law, and Cognition, 1 NYU J. L. & Liberty 147 (2005).

[FN2]. http://www.cafehayek.com (last visited July 26, 2006).

[FN3]. Richard A. Posner, Economic Analysis of Law (5th ed. 1998).

[FN4]. The Enterprise of Law (1990).

[FN5]. The Morality of Law (1964).

[FN6]. Freedom and the Law (1961).

[FN7]. Posner, supra note 1, at 151 (citations omitted).

[FN8]. Id.

[FN9]. See Roger E. Meiners & Bruce Yandle, Constitutional Choice for the Control of Water Pollution, 3 Const. Pol. Econ. 262 (1992).

[FN10]. Id.

[FN11]. 1 F.A. Hayek, Law, Legislation, and Liberty 124-126 (1973).

[FN12]. See, e.g., F.A. Hayek, Individualism: True and False, in Individualism and Economic Order 1 (1948).

[FN13]. 42 U.S.C. §§ 7401-7661 (2005).

[FN14]. Posner identifies as a “danger” the possibility that “economists inclined by temperament or life experience to favor a weak and passive government will overlook opportunities for fruitful government interventions. It is difficult to believe for example that the entire problem of pollution can be left to be sorted out by the market, or even by the market plus the common law of nuisance.” Richard A. Posner, Overcoming Law 414 (1995).

[FN15]. A clear and concise review of public goods and externalities is Tyler Cowen, Public Goods and Externalities, The Concise Encyclopedia of Economics, http://www.econlib.org/library/Enc/PublicGoodsandExternalities.html (last visited July 26, 2006).

[FN16]. Geoffrey Brennan & Loren Lomasky, Democracy and Decision (1993); Bryan Caplan, The Myth of the Rational Voter: Why Democracies Choose Bad Policies (forthcoming 2007).

[FN17]. See James M. Buchanan & Gordon Tullock, The Calculus of Consent 134-145 (1962).

[FN18]. Posner, supra note 1, at 151.

[FN19]. Paul Samuel Reinsch, English Common Law in the Early American Colonies (1970) (explaining how English common law took root in Britain's North American colonies and then evolved over the years to reflect the unique circumstances of life and commerce in colonial America).

[FN20]. Posner, supra note 1, at 148.

[FN21]. Id. at 161 (“A mixed system is what we and our peer nations have; what help Hayek's thought offers to someone trying to evaluate such a system is unclear.”).

[FN22]. This is the title of Hayek's 1974 Nobel Prize lecture. F.A. Hayek, The Pretense of Knowledge, reprinted in New Studies in Philosophy, Politics, Economics, and the History of Ideas 23 (1978).

[FN23]. Economist and New York Times columnist Paul Krugman is among the most vocal proponents for nationalized health care. See, e.g., http:// www.nybooks.com/articles/18802 (last visited July 26, 2006).

[FN24]. http://www.rand.org/pubs/corporate_pubs/CP484.1/index.html (last visited July 26, 2006).

[FN25]. Posner, supra note 1, Hayek, at 148.

[FN26]. Hayek's insights into the problems with central planning are also relevant to recent discussions about using contingent-valuation studies as economically informed means of determining the value of various aspects of the natural environment. See Donald J. Boudreaux, Roger E. Meiners & Todd J. Zywicki, Talk is Cheap: The Existence Value Fallacy, 29 Envtl. L. 765 (1999).

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RERUM NOVARUM

ENCYCLICAL OF POPE LEO XIII
ON CAPITAL AND LABOR

To Our Venerable Brethren the Patriarchs,
Primates, Archbishops, Bishops, and other ordinaries
of places having Peace and Communion with the Apostolic See.

Rights and Duties of Capital and Labor

1. That the spirit of revolutionary change, which has long been disturbing the nations of the world, should have passed beyond the sphere of politics and made its influence felt in the cognate sphere of practical economics is not surprising. The elements of the conflict now raging are unmistakable, in the vast expansion of industrial pursuits and the marvellous discoveries of science; in the changed relations between masters and workmen; in the enormous fortunes of some few individuals, and the utter poverty of the masses; the increased self reliance and closer mutual combination of the working classes; as also, finally, in the prevailing moral degeneracy. The momentous gravity of the state of things now obtaining fills every mind with painful apprehension; wise men are discussing it; practical men are proposing schemes; popular meetings, legislatures, and rulers of nations are all busied with it - actually there is no question which has taken deeper hold on the public mind.

2. Therefore, venerable brethren, as on former occasions when it seemed opportune to refute false teaching, We have addressed you in the interests of the Church and of the common weal, and have issued letters bearing on political power, human liberty, the Christian constitution of the State, and like matters, so have We thought it expedient now to speak on the condition of the working classes.(1) It is a subject on which We have already touched more than once, incidentally. But in the present letter, the responsibility of the apostolic office urges Us to treat the question of set purpose and in detail, in order that no misapprehension may exist as to the principles which truth and justice dictate for its settlement. The discussion is not easy, nor is it void of danger. It is no easy matter to define the relative rights and mutual duties of the rich and of the poor, of capital and of labor. And the danger lies in this, that crafty agitators are intent on making use of these differences of opinion to pervert men's judgments and to stir up the people to revolt.

3. In any case we clearly see, and on this there is general agreement, that some opportune remedy must be found quickly for the misery and wretchedness pressing so unjustly on the majority of the working class: for the ancient workingmen's guilds were abolished in the last century, and no other protective organization took their place. Public institutions and the laws set aside the ancient religion. Hence, by degrees it has come to pass that working men have been surrendered, isolated and helpless, to the hardheartedness of employers and the greed of unchecked competition. The mischief has been increased by rapacious usury, which, although more than once condemned by the Church, is nevertheless, under a different guise, but with like injustice, still practiced by covetous and grasping men. To this must be added that the

hiring of labor and the conduct of trade are concentrated in the hands of comparatively few; so that a small number of very rich men have been able to lay upon the teeming masses of the laboring poor a yoke little better than that of slavery itself.

4. To remedy these wrongs the socialists, working on the poor man's envy of the rich, are striving to do away with private property, and contend that individual possessions should become the common property of all, to be administered by the State or by municipal bodies. They hold that by thus transferring property from private individuals to the community, the present mischievous state of things will be set to rights, inasmuch as each citizen will then get his fair share of whatever there is to enjoy. But their contentions are so clearly powerless to end the controversy that were they carried into effect the working man himself would be among the first to suffer. They are, moreover, emphatically unjust, for they would rob the lawful possessor, distort the functions of the State, and create utter confusion in the community.

5. It is surely undeniable that, when a man engages in remunerative labor, the impelling reason and motive of his work is to obtain property, and thereafter to hold it as his very own. If one man hires out to another his strength or skill, he does so for the purpose of receiving in return what is necessary for the satisfaction of his needs; he therefore expressly intends to acquire a right full and real, not only to the remuneration, but also to the disposal of such remuneration, just as he pleases. Thus, if he lives sparingly, saves money, and, for greater security, invests his savings in land, the land, in such case, is only his wages under another form; and, consequently, a working man's little estate thus purchased should be as completely at his full disposal as are the wages he receives for his labor. But it is precisely in such power of disposal that ownership obtains, whether the property consist of land or chattels. Socialists, therefore, by endeavoring to transfer the possessions of individuals to the community at large, strike at the interests of every wage-earner, since they would deprive him of the liberty of disposing of his wages, and thereby of all hope and possibility of increasing his resources and of bettering his condition in life.

6. What is of far greater moment, however, is the fact that the remedy they propose is manifestly against justice. For, every man has by nature the right to possess property as his own. This is one of the chief points of distinction between man and the animal creation, for the brute has no power of self direction, but is governed by two main instincts, which keep his powers on the alert, impel him to develop them in a fitting manner, and stimulate and determine him to action without any power of choice. One of these instincts is self preservation, the other the propagation of the species. Both can attain their purpose by means of things which lie within range; beyond their verge the brute creation cannot go, for they are moved to action by their senses only, and in the special direction which these suggest. But with man it is wholly different. He possesses, on the one hand, the full perfection of the animal being, and hence enjoys at least as much as the rest of the animal kind, the fruition of things material. But animal nature, however perfect, is far from representing the human being in its completeness, and is in truth but humanity's humble handmaid, made to serve and to obey. It is the mind, or reason, which is the predominant element in us who are human creatures; it is this which renders a human being human, and distinguishes him essentially from the brute. And on this very account - that man alone among the animal creation is endowed with reason - it must be within his right to possess things not merely for temporary and momentary use, as other

living things do, but to have and to hold them in stable and permanent possession; he must have not only things that perish in the use, but those also which, though they have been reduced into use, continue for further use in after time.

7. This becomes still more clearly evident if man's nature be considered a little more deeply. For man, fathoming by his faculty of reason matters without number, linking the future with the present, and being master of his own acts, guides his ways under the eternal law and the power of God, whose providence governs all things. Wherefore, it is in his power to exercise his choice not only as to matters that regard his present welfare, but also about those which he deems may be for his advantage in time yet to come. Hence, man not only should possess the fruits of the earth, but also the very soil, inasmuch as from the produce of the earth he has to lay by provision for the future. Man's needs do not die out, but forever recur; although satisfied today, they demand fresh supplies for tomorrow. Nature accordingly must have given to man a source that is stable and remaining always with him, from which he might look to draw continual supplies. And this stable condition of things he finds solely in the earth and its fruits. There is no need to bring in the State. Man precedes the State, and possesses, prior to the formation of any State, the right of providing for the substance of his body.

8. The fact that God has given the earth for the use and enjoyment of the whole human race can in no way be a bar to the owning of private property. For God has granted the earth to mankind in general, not in the sense that all without distinction can deal with it as they like, but rather that no part of it was assigned to any one in particular, and that the limits of private possession have been left to be fixed by man's own industry, and by the laws of individual races. Moreover, the earth, even though apportioned among private owners, ceases not thereby to minister to the needs of all, inasmuch as there is not one who does not sustain life from what the land produces. Those who do not possess the soil contribute their labor; hence, it may truly be said that all human subsistence is derived either from labor on one's own land, or from some toil, some calling, which is paid for either in the produce of the land itself, or in that which is exchanged for what the land brings forth.

9. Here, again, we have further proof that private ownership is in accordance with the law of nature. Truly, that which is required for the preservation of life, and for life's well-being, is produced in great abundance from the soil, but not until man has brought it into cultivation and expended upon it his solicitude and skill. Now, when man thus turns the activity of his mind and the strength of his body toward procuring the fruits of nature, by such act he makes his own that portion of nature's field which he cultivates - that portion on which he leaves, as it were, the impress of his personality; and it cannot but be just that he should possess that portion as his very own, and have a right to hold it without any one being justified in violating that right.

10. So strong and convincing are these arguments that it seems amazing that some should now be setting up anew certain obsolete opinions in opposition to what is here laid down. They assert that it is right for private persons to have the use of the soil and its various fruits, but that it is unjust for any one to possess outright either the land on which he has built or the estate which he has brought under cultivation. But those who deny these rights do not perceive that they are defrauding man of what his own labor has produced. For the soil which is tilled and cultivated with toil and skill utterly changes its condition; it was wild before, now it is

fruitful; was barren, but now brings forth in abundance. That which has thus altered and improved the land becomes so truly part of itself as to be in great measure indistinguishable and inseparable from it. Is it just that the fruit of a man's own sweat and labor should be possessed and enjoyed by any one else? As effects follow their cause, so is it just and right that the results of labor should belong to those who have bestowed their labor.

11. With reason, then, the common opinion of mankind, little affected by the few dissentients who have contended for the opposite view, has found in the careful study of nature, and in the laws of nature, the foundations of the division of property, and the practice of all ages has consecrated the principle of private ownership, as being pre-eminently in conformity with human nature, and as conducing in the most unmistakable manner to the peace and tranquillity of human existence. The same principle is confirmed and enforced by the civil laws-laws which, so long as they are just, derive from the law of nature their binding force. The authority of the divine law adds its sanction, forbidding us in severest terms even to covet that which is another's: "Thou shalt not covet thy neighbour's wife; nor his house, nor his field, nor his man-servant, nor his maid-servant, nor his ox, nor his ass, nor anything that is his."(2)

12. The rights here spoken of, belonging to each individual man, are seen in much stronger light when considered in relation to man's social and domestic obligations. In choosing a state of life, it is indisputable that all are at full liberty to follow the counsel of Jesus Christ as to observing virginity, or to bind themselves by the marriage tie. No human law can abolish the natural and original right of marriage, nor in any way limit the chief and principal purpose of marriage ordained by God's authority from the beginning: "Increase and multiply."(3) Hence we have the family, the "society" of a man's house - a society very small, one must admit, but none the less a true society, and one older than any State. Consequently, it has rights and duties peculiar to itself which are quite independent of the State.

13. That right to property, therefore, which has been proved to belong naturally to individual persons, must in like wise belong to a man in his capacity of head of a family; nay, that right is all the stronger in proportion as the human person receives a wider extension in the family group. It is a most sacred law of nature that a father should provide food and all necessaries for those whom he has begotten; and, similarly, it is natural that he should wish that his children, who carry on, so to speak, and continue his personality, should be by him provided with all that is needful to enable them to keep themselves decently from want and misery amid the uncertainties of this mortal life. Now, in no other way can a father effect this except by the ownership of productive property, which he can transmit to his children by inheritance. A family, no less than a State, is, as We have said, a true society, governed by an authority peculiar to itself, that is to say, by the authority of the father. Provided, therefore, the limits which are prescribed by the very purposes for which it exists be not transgressed, the family has at least equal rights with the State in the choice and pursuit of the things needful to its preservation and its just liberty. We say, "at least equal rights"; for, inasmuch as the domestic household is antecedent, as well in idea as in fact, to the gathering of men into a community, the family must necessarily have rights and duties which are prior to those of the community, and founded more immediately in nature. If the citizens, if the families on entering into association and fellowship, were to experience hindrance in a commonwealth instead of help, and were to find their rights attacked instead of being upheld, society would rightly be an

object of detestation rather than of desire.

14. The contention, then, that the civil government should at its option intrude into and exercise intimate control over the family and the household is a great and pernicious error. True, if a family finds itself in exceeding distress, utterly deprived of the counsel of friends, and without any prospect of extricating itself, it is right that extreme necessity be met by public aid, since each family is a part of the commonwealth. In like manner, if within the precincts of the household there occur grave disturbance of mutual rights, public authority should intervene to force each party to yield to the other its proper due; for this is not to deprive citizens of their rights, but justly and properly to safeguard and strengthen them. But the rulers of the commonwealth must go no further; here, nature bids them stop. Paternal authority can be neither abolished nor absorbed by the State; for it has the same source as human life itself. "The child belongs to the father," and is, as it were, the continuation of the father's personality; and speaking strictly, the child takes its place in civil society, not of its own right, but in its quality as member of the family in which it is born. And for the very reason that "the child belongs to the father" it is, as St. Thomas Aquinas says, "before it attains the use of free will, under the power and the charge of its parents."(4) The socialists, therefore, in setting aside the parent and setting up a State supervision, act against natural justice, and destroy the structure of the home.

15. And in addition to injustice, it is only too evident what an upset and disturbance there would be in all classes, and to how intolerable and hateful a slavery citizens would be subjected. The door would be thrown open to envy, to mutual invective, and to discord; the sources of wealth themselves would run dry, for no one would have any interest in exerting his talents or his industry; and that ideal equality about which they entertain pleasant dreams would be in reality the levelling down of all to a like condition of misery and degradation. Hence, it is clear that the main tenet of socialism, community of goods, must be utterly rejected, since it only injures those whom it would seem meant to benefit, is directly contrary to the natural rights of mankind, and would introduce confusion and disorder into the commonweal. The first and most fundamental principle, therefore, if one would undertake to alleviate the condition of the masses, must be the inviolability of private property. This being established, we proceed to show where the remedy sought for must be found.

16. We approach the subject with confidence, and in the exercise of the rights which manifestly appertain to Us, for no practical solution of this question will be found apart from the intervention of religion and of the Church. It is We who are the chief guardian of religion and the chief dispenser of what pertains to the Church; and by keeping silence we would seem to neglect the duty incumbent on us. Doubtless, this most serious question demands the attention and the efforts of others besides ourselves - to wit, of the rulers of States, of employers of labor, of the wealthy, aye, of the working classes themselves, for whom We are pleading. But We affirm without hesitation that all the striving of men will be vain if they leave out the Church. It is the Church that insists, on the authority of the Gospel, upon those teachings whereby the conflict can be brought to an end, or rendered, at least, far less bitter; the Church uses her efforts not only to enlighten the mind, but to direct by her precepts the life and conduct of each and all; the Church improves and betters the condition of the working man by means of numerous organizations; does her best to enlist the services of all classes in discussing and endeavoring to further in the most practical way, the interests of the working

classes; and considers that for this purpose recourse should be had, in due measure and degree, to the intervention of the law and of State authority.

17. It must be first of all recognized that the condition of things inherent in human affairs must be borne with, for it is impossible to reduce civil society to one dead level. Socialists may in that intent do their utmost, but all striving against nature is in vain. There naturally exist among mankind manifold differences of the most important kind; people differ in capacity, skill, health, strength; and unequal fortune is a necessary result of unequal condition. Such unequality is far from being disadvantageous either to individuals or to the community. Social and public life can only be maintained by means of various kinds of capacity for business and the playing of many parts; and each man, as a rule, chooses the part which suits his own peculiar domestic condition. As regards bodily labor, even had man never fallen from the state of innocence, he would not have remained wholly idle; but that which would then have been his free choice and his delight became afterwards compulsory, and the painful expiation for his disobedience. "Cursed be the earth in thy work; in thy labor thou shalt eat of it all the days of thy life."(5)

18. In like manner, the other pains and hardships of life will have no end or cessation on earth; for the consequences of sin are bitter and hard to bear, and they must accompany man so long as life lasts. To suffer and to endure, therefore, is the lot of humanity; let them strive as they may, no strength and no artifice will ever succeed in banishing from human life the ills and troubles which beset it. If any there are who pretend differently - who hold out to a hard-pressed people the boon of freedom from pain and trouble, an undisturbed repose, and constant enjoyment - they delude the people and impose upon them, and their lying promises will only one day bring forth evils worse than the present. Nothing is more useful than to look upon the world as it really is, and at the same time to seek elsewhere, as We have said, for the solace to its troubles.

19. The great mistake made in regard to the matter now under consideration is to take up with the notion that class is naturally hostile to class, and that the wealthy and the working men are intended by nature to live in mutual conflict. So irrational and so false is this view that the direct contrary is the truth. Just as the symmetry of the human frame is the result of the suitable arrangement of the different parts of the body, so in a State is it ordained by nature that these two classes should dwell in harmony and agreement, so as to maintain the balance of the body politic. Each needs the other: capital cannot do without labor, nor labor without capital. Mutual agreement results in the beauty of good order, while perpetual conflict necessarily produces confusion and savage barbarity. Now, in preventing such strife as this, and in uprooting it, the efficacy of Christian institutions is marvellous and manifold. First of all, there is no intermediary more powerful than religion (whereof the Church is the interpreter and guardian) in drawing the rich and the working class together, by reminding each of its duties to the other, and especially of the obligations of justice.

20. Of these duties, the following bind the proletarian and the worker: fully and faithfully to perform the work which has been freely and equitably agreed upon; never to injure the property, nor to outrage the person, of an employer; never to resort to violence in defending their own cause, nor to engage in riot or disorder; and to have nothing to do with men of evil principles, who work upon the people with artful promises of great results, and excite foolish

hopes which usually end in useless regrets and grievous loss. The following duties bind the wealthy owner and the employer: not to look upon their work people as their bondsmen, but to respect in every man his dignity as a person ennobled by Christian character. They are reminded that, according to natural reason and Christian philosophy, working for gain is creditable, not shameful, to a man, since it enables him to earn an honorable livelihood; but to misuse men as though they were things in the pursuit of gain, or to value them solely for their physical powers - that is truly shameful and inhuman. Again justice demands that, in dealing with the working man, religion and the good of his soul must be kept in mind. Hence, the employer is bound to see that the worker has time for his religious duties; that he be not exposed to corrupting influences and dangerous occasions; and that he be not led away to neglect his home and family, or to squander his earnings. Furthermore, the employer must never tax his work people beyond their strength, or employ them in work unsuited to their sex and age. His great and principal duty is to give every one what is just. Doubtless, before deciding whether wages axe fair, many things have to be considered; but wealthy owners and all masters of labor should be mindful of this - that to exercise pressure upon the indigent and the destitute for the sake of gain, and to gather one's profit out of the need of another, is condemned by all laws, human and divine. To defraud any one of wages that are his due is a great crime which cries to the avenging anger of Heaven. "Behold, the hire of the laborers... which by fraud has been kept back by you, crieth; and the cry of them hath entered into the ears of the Lord of Sabaoth."(6) Lastly, the rich must religiously refrain from cutting down the workmen's earnings, whether by force, by fraud, or by usurious dealing; and with all the greater reason because the laboring man is, as a rule, weak and unprotected, and because his slender means should in proportion to their scantiness be accounted sacred. Were these precepts carefully obeyed and followed out, would they not be sufficient of themselves to keep under all strife and all its causes?

21. But the Church, with Jesus Christ as her Master and Guide, aims higher still. She lays down precepts yet more perfect, and tries to bind class to class in friendliness and good feeling. The things of earth cannot be understood or valued aright without taking into consideration the life to come, the life that will know no death. Exclude the idea of futurity, and forthwith the very notion of what is good and right would perish; nay, the whole scheme of the universe would become a dark and unfathomable mystery. The great truth which we learn from nature herself is also the grand Christian dogma on which religion rests as on its foundation - that, when we have given up this present life, then shall we really begin to live. God has not created us for the perishable and transitory things of earth, but for things heavenly and everlasting; He has given us this world as a place of exile, and not as our abiding place. As for riches and the other things which men call good and desirable, whether we have them in abundance, or are lacking in them-so far as eternal happiness is concerned - it makes no difference; the only important thing is to use them aright. Jesus Christ, when He redeemed us with plentiful redemption, took not away the pains and sorrows which in such large proportion are woven together in the web of our mortal life. He transformed them into motives of virtue and occasions of merit; and no man can hope for eternal reward unless he follow in the blood-stained footprints of his Saviour. "If we suffer with Him, we shall also reign with Him."(7) Christ's labors and sufferings, accepted of His own free will, have marvellously sweetened all suffering and all labor. And not only by His example, but by His grace and by the hope held forth of everlasting recompense, has He made pain and grief more easy to endure; "for that which is at present momentary and light of our tribulation, worketh for us above measure

exceedingly an eternal weight of glory."(8)

22. Therefore, those whom fortune favors are warned that riches do not bring freedom from sorrow and are of no avail for eternal happiness, but rather are obstacles;(9) that the rich should tremble at the threatenings of Jesus Christ - threatenings so unwonted in the mouth of our Lord(10) - and that a most strict account must be given to the Supreme Judge for all we possess. The chief and most excellent rule for the right use of money is one the heathen philosophers hinted at, but which the Church has traced out clearly, and has not only made known to men's minds, but has impressed upon their lives. It rests on the principle that it is one thing to have a right to the possession of money and another to have a right to use money as one wills. Private ownership, as we have seen, is the natural right of man, and to exercise that right, especially as members of society, is not only lawful, but absolutely necessary. "It is lawful," says St. Thomas Aquinas, "for a man to hold private property; and it is also necessary for the carrying on of human existence."" But if the question be asked: How must one's possessions be used? - the Church replies without hesitation in the words of the same holy Doctor: "Man should not consider his material possessions as his own, but as common to all, so as to share them without hesitation when others are in need. Whence the Apostle with, 'Command the rich of this world... to offer with no stint, to apportion largely.'"(12) True, no one is commanded to distribute to others that which is required for his own needs and those of his household; nor even to give away what is reasonably required to keep up becomingly his condition in life, "for no one ought to live other than becomingly."(13) But, when what necessity demands has been supplied, and one's standing fairly taken thought for, it becomes a duty to give to the indigent out of what remains over. "Of that which remaineth, give alms."(14) It is a duty, not of justice (save in extreme cases), but of Christian charity - a duty not enforced by human law. But the laws and judgments of men must yield place to the laws and judgments of Christ the true God, who in many ways urges on His followers the practice of almsgiving - 'It is more blessed to give than to receive";(15) and who will count a kindness done or refused to the poor as done or refused to Himself - "As long as you did it to one of My least brethren you did it to Me."(16) To sum up, then, what has been said: Whoever has received from the divine bounty a large share of temporal blessings, whether they be external and material, or gifts of the mind, has received them for the purpose of using them for the perfecting of his own nature, and, at the same time, that he may employ them, as the steward of God's providence, for the benefit of others. "He that hath a talent," said St. Gregory the Great, "let him see that he hide it not; he that hath abundance, let him quicken himself to mercy and generosity; he that hath art and skill, let him do his best to share the use and the utility hereof with his neighbor."(17)

23. As for those who possess not the gifts of fortune, they are taught by the Church that in God's sight poverty is no disgrace, and that there is nothing to be ashamed of in earning their bread by labor. This is enforced by what we see in Christ Himself, who, "whereas He was rich, for our sakes became poor";(18) and who, being the Son of God, and God Himself, chose to seem and to be considered the son of a carpenter - nay, did not disdain to spend a great part of His life as a carpenter Himself. "Is not this the carpenter, the son of Mary?"(19)

24. From contemplation of this divine Model, it is more easy to understand that the true worth and nobility of man lie in his moral qualities, that is, in virtue; that virtue is, moreover, the common inheritance of men, equally within the reach of high and low, rich and poor; and that

virtue, and virtue alone, wherever found, will be followed by the rewards of everlasting happiness. Nay, God Himself seems to incline rather to those who suffer misfortune; for Jesus Christ calls the poor "blessed";(20) He lovingly invites those in labor and grief to come to Him for solace;(21) and He displays the tenderest charity toward the lowly and the oppressed. These reflections cannot fail to keep down the pride of the well-to-do, and to give heart to the unfortunate; to move the former to be generous and the latter to be moderate in their desires. Thus, the separation which pride would set up tends to disappear, nor will it be difficult to make rich and poor join hands in friendly concord.

25. But, if Christian precepts prevail, the respective classes will not only be united in the bonds of friendship, but also in those of brotherly love. For they will understand and feel that all men are children of the same common Father, who is God; that all have alike the same last end, which is God Himself, who alone can make either men or angels absolutely and perfectly happy; that each and all are redeemed and made sons of God, by Jesus Christ, "the first-born among many brethren"; that the blessings of nature and the gifts of grace belong to the whole human race in common, and that from none except the unworthy is withheld the inheritance of the kingdom of Heaven. "If sons, heirs also; heirs indeed of God, and co-heirs with Christ."(22) Such is the scheme of duties and of rights which is shown forth to the world by the Gospel. Would it not seem that, were society penetrated with ideas like these, strife must quickly cease?

26. But the Church, not content with pointing out the remedy, also applies it. For the Church does her utmost to teach and to train men, and to educate them and by the intermediary of her bishops and clergy diffuses her salutary teachings far and wide. She strives to influence the mind and the heart so that all may willingly yield themselves to be formed and guided by the commandments of God. It is precisely in this fundamental and momentous matter, on which everything depends that the Church possesses a power peculiarly her own. The instruments which she employs are given to her by Jesus Christ Himself for the very purpose of reaching the hearts of men, and drive their efficiency from God. They alone can reach the innermost heart and conscience, and bring men to act from a motive of duty, to control their passions and appetites, to love God and their fellow men with a love that is outstanding and of the highest degree and to break down courageously every barrier which blocks the way to virtue.

27. On this subject we need but recall for one moment the examples recorded in history. Of these facts there cannot be any shadow of doubt: for instance, that civil society was renovated in every part by Christian institutions; that in the strength of that renewal the human race was lifted up to better things-nay, that it was brought back from death to life, and to so excellent a life that nothing more perfect had been known before, or will come to be known in the ages that have yet to be. Of this beneficent transformation Jesus Christ was at once the first cause and the final end; as from Him all came, so to Him was all to be brought back. For, when the human race, by the light of the Gospel message, came to know the grand mystery of the Incarnation of the Word and the redemption of man, at once the life of Jesus Christ, God and Man, pervaded every race and nation, and interpenetrated them with His faith, His precepts, and His laws. And if human society is to be healed now, in no other way can it be healed save by a return to Christian life and Christian institutions. When a society is perishing, the wholesome advice to give to those who would restore it is to call it to the principles from which it sprang; for the purpose and perfection of an association is to aim at and to attain that

for which it is formed, and its efforts should be put in motion and inspired by the end and object which originally gave it being. Hence, to fall away from its primal constitution implies disease; to go back to it, recovery. And this may be asserted with utmost truth both of the whole body of the commonwealth and of that class of its citizens-by far the great majority - who get their living by their labor.

28. Neither must it be supposed that the solicitude of the Church is so preoccupied with the spiritual concerns of her children as to neglect their temporal and earthly interests. Her desire is that the poor, for example, should rise above poverty and wretchedness, and better their condition in life; and for this she makes a strong endeavor. By the fact that she calls men to virtue and forms them to its practice she promotes this in no slight degree. Christian morality, when adequately and completely practiced, leads of itself to temporal prosperity, for it merits the blessing of that God who is the source of all blessings; it powerfully restrains the greed of possession and the thirst for pleasure-twin plagues, which too often make a man who is void of self-restraint miserable in the midst of abundance;(23) it makes men supply for the lack of means through economy, teaching them to be content with frugal living, and further, keeping them out of the reach of those vices which devour not small incomes merely, but large fortunes, and dissipate many a goodly inheritance.

29. The Church, moreover, intervenes directly in behalf of the poor, by setting on foot and maintaining many associations which she knows to be efficient for the relief of poverty. Herein, again, she has always succeeded so well as to have even extorted the praise of her enemies. Such was the ardor of brotherly love among the earliest Christians that numbers of those who were in better circumstances despoiled themselves of their possessions in order to relieve their brethren; whence "neither was there any one needy among them."(24) To the order of deacons, instituted in that very intent, was committed by the Apostles the charge of the daily doles; and the Apostle Paul, though burdened with the solicitude of all the churches, hesitated not to undertake laborious journeys in order to carry the alms of the faithful to the poorer Christians. Tertullian calls these contributions, given voluntarily by Christians in their assemblies, deposits of piety, because, to cite his own words, they were employed "in feeding the needy, in burying them, in support of youths and maidens destitute of means and deprived of their parents, in the care of the aged, and the relief of the shipwrecked."(25)

30. Thus, by degrees, came into existence the patrimony which the Church has guarded with religious care as the inheritance of the poor. Nay, in order to spare them the shame of begging, the Church has provided aid for the needy. The common Mother of rich and poor has aroused everywhere the heroism of charity, and has established congregations of religious and many other useful institutions for help and mercy, so that hardly any kind of suffering could exist which was not afforded relief. At the present day many there are who, like the heathen of old, seek to blame and condemn the Church for such eminent charity. They would substitute in its stead a system of relief organized by the State. But no human expedients will ever make up for the devotedness and self sacrifice of Christian charity. Charity, as a virtue, pertains to the Church; for virtue it is not, unless it be drawn from the Most Sacred Heart of Jesus Christ; and whosoever turns his back on the Church cannot be near to Christ.

31. It cannot, however, be doubted that to attain the purpose we are treating of, not only the Church, but all human agencies, must concur. All who are concerned in the matter should be

of one mind and according to their ability act together. It is with this, as with providence that governs the world; the results of causes do not usually take place save where all the causes cooperate. It is sufficient, therefore, to inquire what part the State should play in the work of remedy and relief.

32. By the State we here understand, not the particular form of government prevailing in this or that nation, but the State as rightly apprehended; that is to say, any government conformable in its institutions to right reason and natural law, and to those dictates of the divine wisdom which we have expounded in the encyclical *On the Christian Constitution of the State*.(26) The foremost duty, therefore, of the rulers of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as of themselves to realize public well-being and private prosperity. This is the proper scope of wise statesmanship and is the work of the rulers. Now a State chiefly prospers and thrives through moral rule, well-regulated family life, respect for religion and justice, the moderation and fair imposing of public taxes, the progress of the arts and of trade, the abundant yield of the land-through everything, in fact, which makes the citizens better and happier. Hereby, then, it lies in the power of a ruler to benefit every class in the State, and amongst the rest to promote to the utmost the interests of the poor; and this in virtue of his office, and without being open to suspicion of undue interference - since it is the province of the commonwealth to serve the common good. And the more that is done for the benefit of the working classes by the general laws of the country, the less need will there be to seek for special means to relieve them.

33. There is another and deeper consideration which must not be lost sight of. As regards the State, the interests of all, whether high or low, are equal. The members of the working classes are citizens by nature and by the same right as the rich; they are real parts, living the life which makes up, through the family, the body of the commonwealth; and it need hardly be said that they are in every city very largely in the majority. It would be irrational to neglect one portion of the citizens and favor another, and therefore the public administration must duly and solicitously provide for the welfare and the comfort of the working classes; otherwise, that law of justice will be violated which ordains that each man shall have his due. To cite the wise words of St. Thomas Aquinas: "As the part and the whole are in a certain sense identical, so that which belongs to the whole in a sense belongs to the part."(27) Among the many and grave duties of rulers who would do their best for the people, the first and chief is to act with strict justice - with that justice which is called *distributive* - toward each and every class alike.

34. But although all citizens, without exception, can and ought to contribute to that common good in which individuals share so advantageously to themselves, yet it should not be supposed that all can contribute in the like way and to the same extent. No matter what changes may occur in forms of government, there will ever be differences and inequalities of condition in the State. Society cannot exist or be conceived of without them. Some there must be who devote themselves to the work of the commonwealth, who make the laws or administer justice, or whose advice and authority govern the nation in times of peace, and defend it in war. Such men clearly occupy the foremost place in the State, and should be held in highest estimation, for their work concerns most nearly and effectively the general interests of the community. Those who labor at a trade or calling do not promote the general welfare in such measure as this, but they benefit the nation, if less directly, in a most important manner. We

have insisted, it is true, that, since the end of society is to make men better, the chief good that society can possess is virtue. Nevertheless, it is the business of a well-constituted body politic to see to the provision of those material and external helps "the use of which is necessary to virtuous action."(28) Now, for the provision of such commodities, the labor of the working class - the exercise of their skill, and the employment of their strength, in the cultivation of the land, and in the workshops of trade - is especially responsible and quite indispensable. Indeed, their co-operation is in this respect so important that it may be truly said that it is only by the labor of working men that States grow rich. Justice, therefore, demands that the interests of the working classes should be carefully watched over by the administration, so that they who contribute so largely to the advantage of the community may themselves share in the benefits which they create-that being housed, clothed, and bodily fit, they may find their life less hard and more endurable. It follows that whatever shall appear to prove conducive to the well-being of those who work should obtain favorable consideration. There is no fear that solicitude of this kind will be harmful to any interest; on the contrary, it will be to the advantage of all, for it cannot but be good for the commonwealth to shield from misery those on whom it so largely depends for the things that it needs.

35. We have said that the State must not absorb the individual or the family; both should be allowed free and untrammelled action so far as is consistent with the common good and the interest of others. Rulers should, nevertheless, anxiously safeguard the community and all its members; the community, because the conservation thereof is so emphatically the business of the supreme power, that the safety of the commonwealth is not only the first law, but it is a government's whole reason of existence; and the members, because both philosophy and the Gospel concur in laying down that the object of the government of the State should be, not the advantage of the ruler, but the benefit of those over whom he is placed. As the power to rule comes from God, and is, as it were, a participation in His, the highest of all sovereignties, it should be exercised as the power of God is exercised - with a fatherly solicitude which not only guides the whole, but reaches also individuals.

36. Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it. Now, it is to the interest of the community, as well as of the individual, that peace and good order should be maintained; that all things should be carried on in accordance with God's laws and those of nature; that the discipline of family life should be observed and that religion should be obeyed; that a high standard of morality should prevail, both in public and private life; that justice should be held sacred and that no one should injure another with impunity; that the members of the commonwealth should grow up to man's estate strong and robust, and capable, if need be, of guarding and defending their country. If by a strike of workers or concerted interruption of work there should be imminent danger of disturbance to the public peace; or if circumstances were such as that among the working class the ties of family life were relaxed; if religion were found to suffer through the workers not having time and opportunity afforded them to practice its duties; if in workshops and factories there were danger to morals through the mixing of the sexes or from other harmful occasions of evil; or if employers laid burdens upon their workmen which were unjust, or degraded them with conditions repugnant to their dignity as human beings; finally, if health were endangered by excessive labor, or by work unsuited to sex or age - in such cases, there can be no question but that, within certain limits, it would be right to invoke the aid and authority of the law. The

limits must be determined by the nature of the occasion which calls for the law's interference - the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.

37. Rights must be religiously respected wherever they exist, and it is the duty of the public authority to prevent and to punish injury, and to protect every one in the possession of his own. Still, when there is question of defending the rights of individuals, the poor and badly off have a claim to especial consideration. The richer class have many ways of shielding themselves, and stand less in need of help from the State; whereas the mass of the poor have no resources of their own to fall back upon, and must chiefly depend upon the assistance of the State. And it is for this reason that wage-earners, since they mostly belong in the mass of the needy, should be specially cared for and protected by the government.

38. Here, however, it is expedient to bring under special notice certain matters of moment. First of all, there is the duty of safeguarding private property by legal enactment and protection. Most of all it is essential, where the passion of greed is so strong, to keep the populace within the line of duty; for, if all may justly strive to better their condition, neither justice nor the common good allows any individual to seize upon that which belongs to another, or, under the futile and shallow pretext of equality, to lay violent hands on other people's possessions. Most true it is that by far the larger part of the workers prefer to better themselves by honest labor rather than by doing any wrong to others. But there are not a few who are imbued with evil principles and eager for revolutionary change, whose main purpose is to stir up disorder and incite their fellows to acts of violence. The authority of the law should intervene to put restraint upon such firebrands, to save the working classes from being led astray by their maneuvers, and to protect lawful owners from spoliation.

39. When work people have recourse to a strike and become voluntarily idle, it is frequently because the hours of labor are too long, or the work too hard, or because they consider their wages insufficient. The grave inconvenience of this not uncommon occurrence should be obviated by public remedial measures; for such paralysing of labor not only affects the masters and their work people alike, but is extremely injurious to trade and to the general interests of the public; moreover, on such occasions, violence and disorder are generally not far distant, and thus it frequently happens that the public peace is imperiled. The laws should forestall and prevent such troubles from arising; they should lend their influence and authority to the removal in good time of the causes which lead to conflicts between employers and employed.

40. The working man, too, has interests in which he should be protected by the State; and first of all, there are the interests of his soul. Life on earth, however good and desirable in itself, is not the final purpose for which man is created; it is only the way and the means to that attainment of truth and that love of goodness in which the full life of the soul consists. It is the soul which is made after the image and likeness of God; it is in the soul that the sovereignty resides in virtue whereof man is commanded to rule the creatures below him and to use all the earth and the ocean for his profit and advantage. "Fill the earth and subdue it; and rule over the fishes of the sea, and the fowls of the air, and all living creatures that move upon the earth."(29) In this respect all men are equal; there is here no difference between rich and poor, master and servant, ruler and ruled, "for the same is Lord over all."(30) No man may with impunity outrage that human dignity which God Himself treats with great reverence, nor stand

in the way of that higher life which is the preparation of the eternal life of heaven. Nay, more; no man has in this matter power over himself. To consent to any treatment which is calculated to defeat the end and purpose of his being is beyond his right; he cannot give up his soul to servitude, for it is not man's own rights which are here in question, but the rights of God, the most sacred and inviolable of rights.

41. From this follows the obligation of the cessation from work and labor on Sundays and certain holy days. The rest from labor is not to be understood as mere giving way to idleness; much less must it be an occasion for spending money and for vicious indulgence, as many would have it to be; but it should be rest from labor, hallowed by religion. Rest (combined with religious observances) disposes man to forget for a while the business of his everyday life, to turn his thoughts to things heavenly, and to the worship which he so strictly owes to the eternal Godhead. It is this, above all, which is the reason arid motive of Sunday rest; a rest sanctioned by God's great law of the Ancient Covenant-"Remember thou keep holy the Sabbath day,"(31) and taught to the world by His own mysterious "rest" after the creation of man: "He rested on the seventh day from all His work which He had done."(32)

42. If we turn not to things external and material, the first thing of all to secure is to save unfortunate working people from the cruelty of men of greed, who use human beings as mere instruments for money-making. It is neither just nor human so to grind men down with excessive labor as to stupefy their minds and wear out their bodies. Man's powers, like his general nature, are limited, and beyond these limits he cannot go. His strength is developed and increased by use and exercise, but only on condition of due intermission and proper rest. Daily labor, therefore, should be so regulated as not to be protracted over longer hours than strength admits. How many and how long the intervals of rest should be must depend on the nature of the work, on circumstances of time and place, and on the health and strength of the workman. Those who work in mines and quarries, and extract coal, stone and metals from the bowels of the earth, should have shorter hours in proportion as their labor is more severe and trying to health. Then, again, the season of the year should be taken into account; for not unfrequently a kind of labor is easy at one time which at another is intolerable or exceedingly difficult. Finally, work which is quite suitable for a strong man cannot rightly be required from a woman or a child. And, in regard to children, great care should be taken not to place them in workshops and factories until their bodies and minds are sufficiently developed. For, just as very rough weather destroys the buds of spring, so does too early an experience of life's hard toil blight the young promise of a child's faculties, and render any true education impossible. Women, again, are not suited for certain occupations; a woman is by nature fitted for home-work, and it is that which is best adapted at once to preserve her modesty and to promote the good bringing up of children and the well-being of the family. As a general principle it may be laid down that a workman ought to have leisure and rest proportionate to the wear and tear of his strength, for waste of strength must be repaired by cessation from hard work.

In all agreements between masters and work people there is always the condition expressed or understood that there should be allowed proper rest for soul and body. To agree in any other sense would be against what is right and just; for it can never be just or right to require on the one side, or to promise on the other, the giving up of those duties which a man owes to his God and to himself.

43. We now approach a subject of great importance, and one in respect of which, if extremes are to be avoided, right notions are absolutely necessary. Wages, as we are told, are regulated by free consent, and therefore the employer, when he pays what was agreed upon, has done his part and seemingly is not called upon to do anything beyond. The only way, it is said, in which injustice might occur would be if the master refused to pay the whole of the wages, or if the workman should not complete the work undertaken; in such cases the public authority should intervene, to see that each obtains his due, but not under any other circumstances.

44. To this kind of argument a fair-minded man will not easily or entirely assent; it is not complete, for there are important considerations which it leaves out of account altogether. To labor is to exert oneself for the sake of procuring what is necessary for the various purposes of life, and chief of all for self preservation. "In the sweat of thy face thou shalt eat bread."(33) Hence, a man's labor necessarily bears two notes or characters. First of all, it is personal, inasmuch as the force which acts is bound up with the personality and is the exclusive property of him who acts, and, further, was given to him for his advantage. Secondly, man's labor is *necessary;* for without the result of labor a man cannot live, and self-preservation is a law of nature, which it is wrong to disobey. Now, were we to consider labor merely in so far as it is personal, doubtless it would be within the workman's right to accept any rate of wages whatsoever; for in the same way as he is free to work or not, so is he free to accept a small wage or even none at all. But our conclusion must be very different if, together with the personal element in a man's work, we consider the fact that work is also necessary for him to live: these two aspects of his work are separable in thought, but not in reality. The preservation of life is the bounden duty of one and all, and to be wanting therein is a crime. It necessarily follows that each one has a natural right to procure what is required in order to live, and the poor can procure that in no other way than by what they can earn through their work.

45. Let the working man and the employer make free agreements, and in particular let them agree freely as to the wages; nevertheless, there underlies a dictate of natural justice more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage-earner. If through necessity or fear of a worse evil the workman accept harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice. In these and similar questions, however - such as, for example, the hours of labor in different trades, the sanitary precautions to be observed in factories and workshops, etc. - in order to supersede undue interference on the part of the State, especially as circumstances, times, and localities differ so widely, it is advisable that recourse be had to societies or boards such as We shall mention presently, or to some other mode of safeguarding the interests of the wage-earners; the State being appealed to, should circumstances require, for its sanction and protection.

46. If a workman's wages be sufficient to enable him comfortably to support himself, his wife, and his children, he will find it easy, if he be a sensible man, to practice thrift, and he will not fail, by cutting down expenses, to put by some little savings and thus secure a modest source of income. Nature itself would urge him to this. We have seen that this great labor question cannot be solved save by assuming as a principle that private ownership must be held sacred and inviolable. The law, therefore, should favor ownership, and its policy should be to induce as many as possible of the people to become owners.

47. Many excellent results will follow from this; and, first of all, property will certainly become more equitably divided. For, the result of civil change and revolution has been to divide cities into two classes separated by a wide chasm. On the one side there is the party which holds power because it holds wealth; which has in its grasp the whole of labor and trade; which manipulates for its own benefit and its own purposes all the sources of supply, and which is not without influence even in the administration of the commonwealth. On the other side there is the needy and powerless multitude, sick and sore in spirit and ever ready for disturbance. If working people can be encouraged to look forward to obtaining a share in the land, the consequence will be that the gulf between vast wealth and sheer poverty will be bridged over, and the respective classes will be brought nearer to one another. A further consequence will result in the great abundance of the fruits of the earth. Men always work harder and more readily when they work on that which belongs to them; nay, they learn to love the very soil that yields in response to the labor of their hands, not only food to eat, but an abundance of good things for themselves and those that are dear to them. That such a spirit of willing labor would add to the produce of the earth and to the wealth of the community is self evident. And a third advantage would spring from this: men would cling to the country in which they were born, for no one would exchange his country for a foreign land if his own afforded him the means of living a decent and happy life. These three important benefits, however, can be reckoned on only provided that a man's means be not drained and exhausted by excessive taxation. The right to possess private property is derived from nature, not from man; and the State has the right to control its use in the interests of the public good alone, but by no means to absorb it altogether. The State would therefore be unjust and cruel if under the name of taxation it were to deprive the private owner of more than is fair.

48. In the last place, employers and workmen may of themselves effect much, in the matter We are treating, by means of such associations and organizations as afford opportune aid to those who are in distress, and which draw the two classes more closely together. Among these may be enumerated societies for mutual help; various benevolent foundations established by private persons to provide for the workman, and for his widow or his orphans, in case of sudden calamity, in sickness, and in the event of death; and institutions for the welfare of boys and girls, young people, and those more advanced in years.

49. The most important of all are workingmen's unions, for these virtually include all the rest. History attests what excellent results were brought about by the artificers' guilds of olden times. They were the means of affording not only many advantages to the workmen, but in no small degree of promoting the advancement of art, as numerous monuments remain to bear witness. Such unions should be suited to the requirements of this our age - an age of wider education, of different habits, and of far more numerous requirements in daily life. It is gratifying to know that there are actually in existence not a few associations of this nature, consisting either of workmen alone, or of workmen and employers together, but it were greatly to be desired that they should become more numerous and more efficient. We have spoken of them more than once, yet it will be well to explain here how notably they are needed, to show that they exist of their own right, and what should be their organization and their mode of action.

50. The consciousness of his own weakness urges man to call in aid from without. We read in the pages of holy Writ: "It is better that two should be together than one; for they have the

advantage of their society. If one fall he shall be supported by the other. Woe to him that is alone, for when he falleth he hath none to lift him up."(34) And further: "A brother that is helped by his brother is like a strong city."(35) It is this natural impulse which binds men together in civil society; and it is likewise this which leads them to join together in associations which are, it is true, lesser and not independent societies, but, nevertheless, real societies.

51. These lesser societies and the larger society differ in many respects, because their immediate purpose and aim are different. Civil society exists for the common good, and hence is concerned with the interests of all in general, albeit with individual interests also in their due place and degree. It is therefore called a public society, because by its agency, as St. Thomas of Aquinas says, "Men establish relations in common with one another in the setting up of a commonwealth."(36) But societies which are formed in the bosom of the commonwealth are styled *private*, and rightly so, since their immediate purpose is the private advantage of the associates. "Now, a private society," says St. Thomas again, "is one which is formed for the purpose of carrying out private objects; as when two or three enter into partnership with the view of trading in common."(37) Private societies, then, although they exist within the body politic, and are severally part of the commonwealth, cannot nevertheless be absolutely, and as such, prohibited by public authority. For, to enter into a "society" of this kind is the natural right of man; and the State has for its office to protect natural rights, not to destroy them; and, if it forbid its citizens to form associations, it contradicts the very principle of its own existence, for both they and it exist in virtue of the like principle, namely, the natural tendency of man to dwell in society.

52. There are occasions, doubtless, when it is fitting that the law should intervene to prevent certain associations, as when men join together for purposes which are evidently bad, unlawful, or dangerous to the State. In such cases, public authority may justly forbid the formation of such associations, and may dissolve them if they already exist. But every precaution should be taken not to violate the rights of individuals and not to impose unreasonable regulations under pretense of public benefit. For laws only bind when they are in accordance with right reason, and, hence, with the eternal law of God.(38)

53. And here we are reminded of the confraternities, societies, and religious orders which have arisen by the Church's authority and the piety of Christian men. The annals of every nation down to our own days bear witness to what they have accomplished for the human race. It is indisputable that on grounds of reason alone such associations, being perfectly blameless in their objects, possess the sanction of the law of nature. In their religious aspect they claim rightly to be responsible to the Church alone. The rulers of the State accordingly have no rights over them, nor can they claim any share in their control; on the contrary, it is the duty of the State to respect and cherish them, and, if need be, to defend them from attack. It is notorious that a very different course has been followed, more especially in our own times. In many places the State authorities have laid violent hands on these communities, and committed manifold injustice against them; it has placed them under control of the civil law, taken away their rights as corporate bodies, and despoiled them of their property, in such property the Church had her rights, each member of the body had his or her rights, and there were also the rights of those who had founded or endowed these communities for a definite purpose, and, furthermore, of those for whose benefit and assistance they had their being.

Therefore We cannot refrain from complaining of such spoliation as unjust and fraught with evil results; and with all the more reason do We complain because, at the very time when the law proclaims that association is free to all, We see that Catholic societies, however peaceful and useful, are hampered in every way, whereas the utmost liberty is conceded to individuals whose purposes are at once hurtful to religion and dangerous to the commonwealth.

54. Associations of every kind, and especially those of working men, are now far more common than heretofore. As regards many of these there is no need at present to inquire whence they spring, what are their objects, or what the means they imply. Now, there is a good deal of evidence in favor of the opinion that many of these societies are in the hands of secret leaders, and are managed on principles ill - according with Christianity and the public well-being; and that they do their utmost to get within their grasp the whole field of labor, and force working men either to join them or to starve. Under these circumstances Christian working men must do one of two things: either join associations in which their religion will be exposed to peril, or form associations among themselves and unite their forces so as to shake off courageously the yoke of so unrighteous and intolerable an oppression. No one who does not wish to expose man's chief good to extreme risk will for a moment hesitate to say that the second alternative should by all means be adopted.

55. Those Catholics are worthy of all praise-and they are not a few-who, understanding what the times require, have striven, by various undertakings and endeavors, to better the condition of the working class by rightful means. They have taken up the cause of the working man, and have spared no efforts to better the condition both of families and individuals; to infuse a spirit of equity into the mutual relations of employers and employed; to keep before the eyes of both classes the precepts of duty and the laws of the Gospel - that Gospel which, by inculcating self restraint, keeps men within the bounds of moderation, and tends to establish harmony among the divergent interests and the various classes which compose the body politic. It is with such ends in view that we see men of eminence, meeting together for discussion, for the promotion of concerted action, and for practical work. Others, again, strive to unite working men of various grades into associations, help them with their advice and means, and enable them to obtain fitting and profitable employment. The bishops, on their part, bestow their ready good will and support; and with their approval and guidance many members of the clergy, both secular and regular, labor assiduously in behalf of the spiritual interest of the members of such associations. And there are not wanting Catholics blessed with affluence, who have, as it were, cast in their lot with the wage-earners, and who have spent large sums in founding and widely spreading benefit and insurance societies, by means of which the working man may without difficulty acquire through his labor not only many present advantages, but also the certainty of honorable support in days to come. How greatly such manifold and earnest activity has benefited the community at large is too well known to require Us to dwell upon it. We find therein grounds for most cheering hope in the future, provided always that the associations We have described continue to grow and spread, and are well and wisely administered. The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust itself into their peculiar concerns and their organization, for things move and live by the spirit inspiring them, and may be killed by the rough grasp of a hand from without.

56. In order that an association may be carried on with unity of purpose and harmony of

action, its administration and government should be firm and wise. All such societies, being free to exist, have the further right to adopt such rules and organization as may best conduce to the attainment of their respective objects. We do not judge it possible to enter into minute particulars touching the subject of organization; this must depend on national character, on practice and experience, on the nature and aim of the work to be done, on the scope of the various trades and employments, and on other circumstances of fact and of time - all of which should be carefully considered.

57. To sum up, then, We may lay it down as a general and lasting law that working men's associations should be so organized and governed as to furnish the best and most suitable means for attaining what is aimed at, that is to say, for helping each individual member to better his condition to the utmost in body, soul, and property. It is clear that they must pay special and chief attention to the duties of religion and morality, and that social betterment should have this chiefly in view; otherwise they would lose wholly their special character, and end by becoming little better than those societies which take no account whatever of religion. What advantage can it be to a working man to obtain by means of a society material well-being, if he endangers his soul for lack of spiritual food? "What doth it profit a man, if he gain the whole world and suffer the loss of his soul?"(39)This, as our Lord teaches, is the mark or character that distinguishes the Christian from the heathen. "After all these things do the heathen seek . . . Seek ye first the Kingdom of God and His justice: and all these things shall be added unto you."(40)Let our associations, then, look first and before all things to God; let religious instruction have therein the foremost place, each one being carefully taught what is his duty to God, what he has to believe, what to hope for, and how he is to work out his salvation; and let all be warned and strengthened with special care against wrong principles and false teaching. Let the working man be urged and led to the worship of God, to the earnest practice of religion, and, among other things, to the keeping holy of Sundays and holy days. Let him learn to reverence and love holy Church, the common Mother of us all; and hence to obey the precepts of the Church, and to frequent the sacraments, since they are the means ordained by God for obtaining forgiveness of sin and fox leading a holy life.

58. The foundations of the organization being thus laid in religion, We next proceed to make clear the relations of the members one to another, in order that they may live together in concord and go forward prosperously and with good results. The offices and charges of the society should be apportioned for the good of the society itself, and in such mode that difference in degree or standing should not interfere with unanimity and good-will. It is most important that office bearers be appointed with due prudence and discretion, and each one's charge carefully mapped out, in order that no members may suffer harm. The common funds must be administered with strict honesty, in such a way that a member may receive assistance in proportion to his necessities. The rights and duties of the employers, as compared with the rights and duties of the employed, ought to be the subject of careful consideration. Should it happen that either a master or a workman believes himself injured, nothing would be more desirable than that a committee should be appointed, composed of reliable and capable members of the association, whose duty would be, conformably with the rules of the association, to settle the dispute. Among the several purposes of a society, one should be to try to arrange for a continuous supply of work at all times and seasons; as well as to create a fund out of which the members may be effectually helped in their needs, not only in the cases of

accident, but also in sickness, old age, and distress.

59. Such rules and regulations, if willingly obeyed by all, will sufficiently ensure the well being of the less well-to-do; whilst such mutual associations among Catholics are certain to be productive in no small degree of prosperity to the State. Is it not rash to conjecture the future from the past. Age gives way to age, but the events of one century are wonderfully like those of another, for they are directed by the providence of God, who overrules the course of history in accordance with His purposes in creating the race of man. We are told that it was cast as a reproach on the Christians in the early ages of the Church that the greater number among them had to live by begging or by labor. Yet, destitute though they were of wealth and influence, they ended by winning over to their side the favor of the rich and the good-will of the powerful. They showed themselves industrious, hard-working, assiduous, and peaceful, ruled by justice, and, above all, bound together in brotherly love. In presence of such mode of life and such example, prejudice gave way, the tongue of malevolence was silenced, and the lying legends of ancient superstition little by little yielded to Christian truth.

60. At the time being, the condition of the working classes is the pressing question of the hour, and nothing can be of higher interest to all classes of the State than that it should be rightly and reasonably settled. But it will be easy for Christian working men to solve it aright if they will form associations, choose wise guides, and follow on the path which with so much advantage to themselves and the common weal was trodden by their fathers before them. Prejudice, it is true, is mighty, and so is the greed of money; but if the sense of what is just and rightful be not deliberately stifled, their fellow citizens are sure to be won over to a kindly feeling towards men whom they see to be in earnest as regards their work and who prefer so unmistakably right dealing to mere lucre, and the sacredness of duty to every other consideration.

61. And further great advantage would result from the state of things We are describing; there would exist so much more ground for hope, and likelihood, even, of recalling to a sense of their duty those working men who have either given up their faith altogether, or whose lives are at variance with its precepts. Such men feel in most cases that they have been fooled by empty promises and deceived by false pretexts. They cannot but perceive that their grasping employers too often treat them with great inhumanity and hardly care for them outside the profit their labor brings; and if they belong to any union, it is probably one in which there exists, instead of charity and love, that intestine strife which ever accompanies poverty when unresigned and unsustained by religion. Broken in spirit and worn down in body, how many of them would gladly free themselves from such galling bondage! But human respect, or the dread of starvation, makes them tremble to take the step. To such as these Catholic associations are of incalculable service, by helping them out of their difficulties, inviting them to companionship and receiving the returning wanderers to a haven where they may securely find repose.

62. We have now laid before you, venerable brethren, both who are the persons and what are the means whereby this most arduous question must be solved. Every one should put his hand to the work which falls to his share, and that at once and straightway, lest the evil which is already so great become through delay absolutely beyond remedy. Those who rule the commonwealths should avail themselves of the laws and institutions of the country; masters and wealthy owners must be mindful of their duty; the working class, whose interests are at

stake, should make every lawful and proper effort; and since religion alone, as We said at the beginning, can avail to destroy the evil at its root, all men should rest persuaded that main thing needful is to re-establish Christian morals, apart from which all the plans and devices of the wisest will prove of little avail.

63. In regard to the Church, her cooperation will never be found lacking, be the time or the occasion what it may; and she will intervene with all the greater effect in proportion as her liberty of action is the more unfettered. Let this be carefully taken to heart by those whose office it is to safeguard the public welfare. Every minister of holy religion must bring to the struggle the full energy of his mind and all his power of endurance. Moved by your authority, venerable brethren, and quickened by your example, they should never cease to urge upon men of every class, upon the high-placed as well as the lowly, the Gospel doctrines of Christian life; by every means in their power they must strive to secure the good of the people; and above all must earnestly cherish in themselves, and try to arouse in others, charity, the mistress and the queen of virtues. For, the happy results we all long for must be chiefly brought about by the plenteous outpouring of charity; of that true Christian charity which is the fulfilling of the whole Gospel law, which is always ready to sacrifice itself for others' sake, and is man's surest antidote against worldly pride and immoderate love of self; that charity whose office is described and whose Godlike features are outlined by the Apostle St. Paul in these words: "Charity is patient, is kind, . . . seeketh not her own, . . . suffereth all things, . . . endureth all things."(41)

64. On each of you, venerable brethren, and on your clergy and people, as an earnest of God's mercy and a mark of Our affection, we lovingly in the Lord bestow the apostolic benediction.

Given at St. Peter's in Rome, the fifteenth day of May, 1891, the fourteenth year of Our pontificate.

LEO XIII

REFERENCES:

1). The title sometimes given to this encyclical, *On the Condiction of the Working Classes*, is therefore perfectly justified. A few lines after this sentence, the Pope gives a more comprehensive definition of the subject of Rerum novarum. We are using it as a title.

2). Deut. 5:21.

3). Gen. 1:28.

4). *Summa theologiae*, IIa-IIae, q. x, art. 12, Answer.

5). Gen. 3:17.

6). James 5:4.

7). 2 Tim. 2:12.

8). 2 Cor. 4:17.

9). Matt. 19:23-24.

10). Luke 6:24-Z5.

11). *Summa theologiae*, IIa-IIae, q. lxvi, art. 2, Answer.

12). Ibid.

13). Ibid., q. xxxii, a. 6, Answer.

14). Luke 11:41.

15). Acts 20:35.

16). Matt.25:40.

17). *Hom. in Evang.,* 9, n. 7 (PL 76, 1109B).

18). 2 Cor. 8:9.

19). Mark 6:3.

20). Matt.5:3.

21). Matt. 11:28.

22). Rom. 8:17.

23). 1 Tim. 6:10.

24). Acts 4:34.

25). *Apologia secunda*, 39, (*Apologeticus*, cap. 39; PL1, 533A).

26). See above, pp. 161-184.

27). *Summa theologiae*, IIa-Ilae, q. lxi, are. l, ad 2m.

28). Thomas Aquinas, *On the Governance of Rulers*, 1, 15 *(Opera omnia*, ed. *Vives*, Vol. 27, p. 356).

29). Gen.1:28.

30). Rom. 10:12.

31). Exod.20:8.

32). Gen. 2:2.

33). Gen. 3:19.

34). Eccle.4:9-10.

35). Prov.18:19.

36). *Contra impugnantes Dei cultum et religionem*, Part 2, ch. 8 (*Opera omnia*, ed. *Vives*, Vol. 29, p. 16).

37). Ibid.

38). "Human law is law only by virtue of its accordance with right reason; and thus it is manifest that it flows from the eternal law. And in so far as it deviates from right reason it is called an unjust law; in such case it is no law at all, but rather a species of violence." Thomas Aquinas, *Summa theologiae*, Ia-Ilae, q. xciii, art. 3, ad 2m.

39). Matt. 16:26.

40). Matt. 6:32-33.

41). I Cor. 13:4-7.

CENTESIMUS ANNUS

ENCYCLICAL LETTER ADDRESSED BY THE SUPREME PONTIFF JOHN PAUL II TO HIS VENERABLE BROTHERS IN THE EPISCOPATE THE PRIESTS AND DEACONS FAMILIES OF MEN AND WOMEN RELIGIOUS ALL THE CHRISTIAN FAITHFUL AND TO ALL MEN AND WOMEN OF GOOD WILL ON THE HUNDREDTH ANNIVERSARY OF RERUM NOVARUM

Venerable Brothers, Beloved Sons and Daughters, Health and the Apostolic Blessing!

INTRODUCTION

1. The Centenary of the promulgation of the Encyclical which begins with the words "Rerum novarum",(1) by my predecessor of venerable memory Pope Leo XIII, is an occasion of great importance for the present history of the Church and for my own Pontificate. It is an Encyclical that has the distinction of having been commemorated by solemn Papal documents from its fortieth anniversary to its ninetieth. It may be said that its path through history has been marked by other documents which paid tribute to it and applied it to the circumstances of the day.(2)

In doing likewise for the hundredth anniversary, in response to requests from many Bishops, Church institutions, and study centres, as well as business leaders and workers, both individually and as members of associations, I wish first and foremost to satisfy the debt of gratitude which the whole Church owes to this great Pope and his "immortal document".(3) I also mean to show that the vital energies rising from that root have not been spent with the passing of the years, but rather have increased even more. This is evident from the various initiatives which have preceded, and which are to accompany and follow the celebration, initiatives promoted by Episcopal Conferences, by international agencies, universities and academic institutes, by professional associations and by other institutions and individuals in many parts of the world.

2. The present Encyclical is part of these celebrations, which are meant to thank God — the origin of "every good endowment and every perfect gift" (Jas 1:17) — for having used a document published a century ago by the See of Peter to achieve so much good and to radiate so much light in the Church and in the world. Although the commemoration at hand is meant to honour Rerum novarum, it also honours those Encyclicals and other documents of my Predecessors which have helped to make Pope Leo's Encyclical present and alive in history, thus constituting what would come to be called the Church's "social doctrine", "social teaching" or even "social magisterium".

The validity of this teaching has already been pointed out in two Encyclicals published during my Pontificate: Laborem exercens on human work, and Sollicitudo rei socialis on current problems regarding the development of individuals and peoples.(4)

3. I now wish to propose a "re-reading" of Pope Leo's Encyclical by issuing an invitation to "look back" at the text itself in order to discover anew the richness of the fundamental principles which it formulated for dealing with the question of the condition of workers. But this is also an invitation to "look around" at the "new things" which surround us and in which we find ourselves caught up, very different from the "new things" which characterized the final decade of the last century. Finally, it is an invitation to "look to the future" at a time when we can already glimpse the third Millennium of the Christian era, so filled with uncertainties but also with promises — uncertainties and promises which appeal to our imagination and creativity, and which reawaken our responsibility, as disciples of the "one teacher" (cf. Mt 23:8), to show the way, to proclaim the truth and to communicate the life which is Christ (cf. Jn 14:6).

A re-reading of this kind will not only confirm the permanent value of such teaching, but will also manifest the true meaning of the Church's Tradition which, being ever living and vital, builds upon the foundation laid by our fathers in the faith, and particularly upon what "the Apostles passed down to the Church"(5) in the name of Jesus Christ, who is her irreplaceable foundation (cf. 1 Cor 3:11).

It was out of an awareness of his mission as the Successor of Peter that Pope Leo XIII proposed to speak out, and Peter's Successor today is moved by that same awareness. Like Pope Leo and the Popes before and after him, I take my inspiration from the Gospel image of "the scribe who has been trained for the kingdom of heaven", whom the Lord compares to "a householder who brings out of his treasure what is new and what is old" (Mt 13:52). The treasure is the great outpouring of the Church's Tradition, which contains "what is old" — received and passed on from the very beginning — and which enables us to interpret the "new things" in the midst of which the life of the Church and the world unfolds.

Among the things which become "old" as a result of being incorporated into Tradition, and which offer opportunities and material for enriching both Tradition and the life of faith, there is the fruitful activity of many millions of people, who, spurred on by the social Magisterium, have sought to make that teaching the inspiration for their involvement in the world. Acting either as individuals or joined together in various groups, associations and organizations, these people represent a great movement for the defence of the human person and the safeguarding of human dignity. Amid changing historical circumstances, this movement has contributed to the building up of a more just society or at least to the curbing of injustice.

The present Encyclical seeks to show the fruitfulness of the principles enunciated by Leo XIII, which belong to the Church's doctrinal patrimony and, as such, involve the exercise of her teaching authority. But pastoral solicitude also prompts me to propose an analysis of some events of recent history. It goes without saying that part of the responsibility of Pastors is to give careful consideration to current events in order to discern the new requirements of evangelization. However, such an analysis is not meant to pass definitive judgments since this does not fall per se within the Magisterium's specific domain.

I. CHARACTERISTICS OF "RERUM NOVARUM"

4. Towards the end of the last century the Church found herself facing an historical process which had already been taking place for some time, but which was by then reaching a critical point. The determining factor in this process was a combination of radical changes which had taken place in the political, economic and social fields, and in the areas of science and technology, to say nothing of the wide influence of the prevailing ideologies. In the sphere of politics, the result of these changes was a new conception of society and of the State, and consequently of authority itself. A traditional society was passing away and another was beginning to be formed — one which brought the hope of new freedoms but also the threat of new forms of injustice and servitude.

In the sphere of economics, in which scientific discoveries and their practical application come together, new structures for the production of consumer goods had progressively taken shape. A new form of property had appeared — capital; and a new form of labour — labour for wages, characterized by high rates of production which lacked due regard for sex, age or family situation, and were determined solely by efficiency, with a view to increasing profits.

In this way labour became a commodity to be freely bought and sold on the market, its price determined by the law of supply and demand, without taking into account the bare minimum required for the support of the individual and his family. Moreover, the worker was not even sure of being able to sell "his own commodity", continually threatened as he was by unemployment, which, in the absence of any kind of social security, meant the spectre of death by starvation.

The result of this transformation was a society "divided into two classes, separated by a deep chasm".(6) This situation was linked to the marked change taking place in the political order already mentioned. Thus the prevailing political theory of the time sought to promote total economic freedom by appropriate laws, or, conversely, by a deliberate lack of any intervention. At the same time, another conception of property and economic life was beginning to appear in an organized and often violent form, one which implied a new political and social structure.

At the height of this clash, when people finally began to realize fully the very grave injustice of social realities in many places and the danger of a revolution fanned by ideals which were then called "socialist", Pope Leo XIII intervened with a document which dealt in a systematic way with the "condition of the workers". The Encyclical had been preceded by others devoted to teachings of a political character; still others would appear later.(7) Here, particular mention must be made of the Encyclical Libertas praestantissimum, which called attention to the essential bond between human freedom and truth, so that freedom which refused to be bound to the truth would fall into arbitrariness and end up submitting itself to the vilest of passions, to the point of selfdestruction. Indeed, what is the origin of all the evils to which Rerum novarum wished to respond, if not a kind of freedom which, in the area of economic and social activity, cuts itself off from the truth about man?

The Pope also drew inspiration from the teaching of his Predecessors, as well as from the many documents issued by Bishops, from scientific studies promoted by members of the laity, from the work of Catholic movements and associations, and from the Church's practical achievements in the social field during the second half of the nineteenth century.

5. The "new things" to which the Pope devoted his attention were anything but positive. The first paragraph of the Encyclical describes in strong terms the "new things" (rerum novarum) which gave it its name: "That the spirit of revolutionary change which has long been disturbing the nations of the world should have passed beyond the sphere of politics and made its influence felt in the related sphere of practical economics is not surprising. Progress in industry, the development of new trades, the changing relationship between employers

and workers, the enormous wealth of a few as opposed to the poverty of the many, the increasing self-reliance of the workers and their closer association with each other, as well as a notable decline in morality: all these elements have led to the conflict now taking place".(8)

The Pope and the Church with him were confronted, as was the civil community, by a society which was torn by a conflict all the more harsh and inhumane because it knew no rule or regulation. It was the conflict between capital and labour, or — as the Encyclical puts it — the worker question. It is precisely about this conflict, in the very pointed terms in which it then appeared, that the Pope did not hesitate to speak.

Here we find the first reflection for our times as suggested by the Encyclical. In the face of a conflict which set man against man, almost as if they were "wolves", a conflict between the extremes of mere physical survival on the one side and opulence on the other, the Pope did not hesitate to intervene by virtue of his "apostolic office",(9) that is, on the basis of the mission received from Jesus Christ himself to "feed his lambs and tend his sheep" (cf. Jn 21:15-17), and to "bind and loose" on earth for the Kingdom of Heaven (cf. Mt 16:19). The Pope's intention was certainly to restore peace, and the present-day reader cannot fail to note his severe condemnation, in no uncertain terms, of the class struggle.(10) However, the Pope was very much aware that peace is built on the foundation of justice: what was essential to the Encyclical was precisely its proclamation of the fundamental conditions for justice in the economic and social situation of the time.(11)

In this way, Pope Leo XIII, in the footsteps of his Predecessors, created a lasting paradigm for the Church. The Church, in fact, has something to say about specific human situations, both individual and communal, national and international. She formulates a genuine doctrine for these situations, a corpus which enables her to analyze social realities, to make judgments about them and to indicate directions to be taken for the just resolution of the problems involved.

In Pope Leo XIII's time such a concept of the Church's right and duty was far from being commonly admitted. Indeed, a two-fold approach prevailed: one directed to this world and this life, to which faith ought to remain extraneous; the other directed towards a purely other-worldly salvation, which neither enlightens nor directs existence on earth. The Pope's approach in publishing Rerum novarum gave the Church "citizenship status" as it were, amid the changing realities of public life, and this standing would be more fully confirmed later on. In effect, to teach and to spread her social doctrine pertains to the Church's evangelizing mission and is an essential part of the Christian message, since this doctrine points out the direct consequences of that message in the life of society and situates daily work and struggles for justice in the context of bearing witness to Christ the Saviour. This doctrine is likewise a source of unity and peace in dealing with the conflicts which inevitably arise in social and economic life. Thus it is possible to meet these new situations without degrading the human person's transcendent dignity, either in oneself or in one's adversaries, and to direct those situations towards just solutions.

Today, at a distance of a hundred years, the validity of this approach affords me the opportunity to contribute to the development of Christian social doctrine. The "new evangelization", which the modern world urgently needs and which I have emphasized many times, must include among its essential elements a proclamation of the Church's social doctrine. As in the days of Pope Leo XIII, this doctrine is still suitable for indicating the right way to respond to the great challenges of today, when ideologies are being increasingly discredited. Now, as then, we need to repeat that there can be no genuine solution of the "social question" apart from the Gospel, and that the "new things" can find in the Gospel the context for their correct understanding and the proper moral perspective for judgment on them.

6. With the intention of shedding light on the conflict which had arisen between capital and labour, Pope Leo XIII affirmed the fundamental rights of workers. Indeed, the key to reading the Encyclical is the dignity of the worker as such, and, for the same reason, the dignity of work, which is defined as follows: "to exert oneself for the sake of procuring what is necessary for the various purposes of life, and first of all for self-preservation".(12) The Pope describes work as "personal, inasmuch as the energy expended is bound up with the personality and is the exclusive property of him who acts, and, furthermore, was given to him for his advantage".(13) Work thus belongs to the vocation of every person; indeed, man expresses and fulfils himself by working. At the same time, work has a "social" dimension through its intimate relationship not only to the family, but also to the common good, since "it may truly be said that it is only by the labour of working-men that States grow rich".(14) These are themes that I have taken up and developed in my Encyclical Laborem exercens.(15)

Another important principle is undoubtedly that of the right to "private property".(16) The amount of space devoted to this subject in the Encyclical shows the importance attached to it. The Pope is well aware that private property is not an absolute value, nor does he fail to proclaim the necessary complementary principles, such as the universal destination of the earth's goods.(17)

On the other hand, it is certainly true that the type of private property which Leo XIII mainly considers is land ownership.(18) But this does not mean that the reasons adduced to safeguard private property or to affirm the right to possess the things necessary for one's personal development and the development of one's family, whatever the concrete form which that right may assume, are not still valid today. This is something which must be affirmed once more in the face of the changes we are witnessing in systems formerly dominated by collective ownership of the means of production, as well as in the face of the increasing instances of poverty or, more precisely, of hindrances to private ownership in many parts of the world, including those where systems predominate which are based on an affirmation of the right to private property. As a result of these changes and of the persistence of poverty, a deeper analysis of the problem is called for, an analysis which will be developed later in this document.

7. In close connection with the right to private property, Pope Leo XIII's Encyclical also affirms other rights as inalienable and proper to the human person. Prominent among these, because of the space which the Pope devotes to it and the importance which he attaches to it, is the "natural human right" to form private associations. This means above all the right to establish professional associations of employers and workers, or of workers alone.(19) Here we find the reason for the Church's defence and approval of the establishment of what are commonly called trade unions: certainly not because of ideological prejudices or in order to surrender to a class mentality, but because the right of association is a natural right of the human being, which therefore precedes his or her incorporation into political society. Indeed, the formation of unions "cannot ... be prohibited by the State", because "the State is bound to protect natural rights, not to destroy them; and if it forbids its citizens to form associations, it contradicts the very principle of its own existence".(20)

Together with this right, which — it must be stressed — the Pope explicitly acknowledges as belonging to workers, or, using his own language, to "the working class", the Encyclical affirms just as clearly the right to the "limitation of working hours", the right to legitimate rest and the right of children and women(21) to be treated differently with regard to the type and duration of work.

If we keep in mind what history tells us about the practices permitted or at least not excluded by law regarding the way in which workers were employed, without any guarantees as to working hours or the hygienic conditions of the work-place, or even regarding the age and sex of apprentices, we can appreciate the Pope's severe statement: "It is neither just nor human so to grind men down with excessive labour as to stupefy their minds and wear out their bodies". And referring to the "contract" aimed at putting into effect "labour relations" of this sort, he affirms with greater precision, that "in all agreements between employers and workers there is always the condition expressed or understood" that proper rest be allowed, proportionate to "the wear and tear of one's strength". He then concludes: "To agree in any other sense would be against what is right and just".(22)

8. The Pope immediately adds another right which the worker has as a person. This is the right to a "just wage", which cannot be left to the "free consent of the parties, so that the employer, having paid what was agreed upon, has done his part and seemingly is not called upon to do anything beyond".(23) It was said at the time that the State does not have the power to intervene in the terms of these contracts, except to ensure the fulfilment of what had been explicitly agreed upon. This concept of relations between employers and employees, purely pragmatic and inspired by a thorough-going individualism, is severely censured in the Encyclical as contrary to the twofold nature of work as a personal and necessary reality. For if work as something personal belongs to the sphere of the individual's free use of his own abilities and energy, as something necessary it is governed by the grave obligation of every individual to ensure "the preservation of life". "It necessarily follows", the Pope concludes, "that every individual has a natural right to procure what is required to live; and the poor can procure that in no other way than by what they can earn through their work".(24)

A workman's wages should be sufficient to enable him to support himself, his wife and his children. "If through necessity or fear of a worse evil the workman accepts harder conditions because an employer or contractor will afford no better, he is made the victim of force and injustice".(25)

Would that these words, written at a time when what has been called "unbridled capitalism" was pressing forward, should not have to be repeated today with the same severity. Unfortunately, even today one finds instances of contracts between employers and employees which lack reference to the most elementary justice regarding the employment of children or women, working hours, the hygienic condition of the work-place and fair pay; and this is the case despite the International Declarations and Conventions on the subject(26) and the internal laws of States. The Pope attributed to the "public authority" the "strict duty" of providing properly for the welfare of the workers, because a failure to do so violates justice; indeed, he did not hesitate to speak of "distributive justice".(27)

9. To these rights Pope Leo XIII adds another right regarding the condition of the working class, one which I wish to mention because of its importance: namely, the right to discharge freely one's religious duties. The Pope wished to proclaim this right within the context of the other rights and duties of workers, notwithstanding the general opinion, even in his day, that such questions pertained exclusively to an individual's private life. He affirms the need for Sunday rest so that people may turn their thoughts to heavenly things and to the worship which they owe to Almighty God.(28) No one can take away this human right, which is based on a commandment; in the words of the Pope: "no man may with impunity violate that human dignity which God himself treats with great reverence", and consequently, the State must guarantee to the worker the exercise of this freedom.(29)

It would not be mistaken to see in this clear statement a springboard for the principle of the right to religious freedom, which was to become the subject of many solemn International Declarations and Conventions,(30) as well as of the Second Vatican Council's well-known Declaration and of my own repeated teaching.(31) In this regard, one may ask whether existing laws and the practice of industrialized societies effectively ensure in our own day the exercise of this basic right to Sunday rest.

10. Another important aspect, which has many applications to our own day, is the concept of the relationship between the State and its citizens. Rerum novarum criticizes two social and economic systems: socialism and liberalism. The opening section, in which the right to private property is reaffirmed, is devoted to socialism. Liberalism is not the subject of a special section, but it is worth noting that criticisms of it are raised in the treatment of the duties of the State.(32) The State cannot limit itself to "favouring one portion of the citizens", namely the rich and prosperous, nor can it "neglect the other", which clearly represents the majority of society. Otherwise, there would be a violation of that law of justice which ordains that every person should receive his due. "When there is question of defending the rights of individuals, the defenceless and the poor have a claim to special consideration. The richer class has many ways of shielding itself, and stands less in need of help from the State; whereas the mass of the poor have no resources of their own to fall back on, and must chiefly depend on the assistance of the State. It is for this reason that wage-earners, since they mostly belong to the latter class, should be specially cared for and protected by the Government".(33)

These passages are relevant today, especially in the face of the new forms of poverty in the world, and also because they are affirmations which do not depend on a specific notion of the State or on a particular political theory. Leo XIII is repeating an elementary principle of sound political organization, namely, the more that individuals are defenceless within a given society, the more they require the care and concern of others, and in particular the intervention of governmental authority.

In this way what we nowadays call the principle of solidarity, the validity of which both in the internal order of each nation and in the international order I have discussed in the Encyclical Sollicitudo rei socialis,(34) is clearly seen to be one of the fundamental principles of the Christian view of social and political organization. This principle is frequently stated by Pope Leo XIII, who uses the term "friendship", a concept already found in Greek philosophy. Pope Pius XI refers to it with the equally meaningful term "social charity". Pope Paul VI, expanding the concept to cover the many modern aspects of the social question, speaks of a "civilization of love".(35)

11. Re-reading the Encyclical in the light of contemporary realities enables us to appreciate the Church's constant concern for and dedication to categories of people who are especially beloved to the Lord Jesus. The content of the text is an excellent testimony to the continuity within the Church of the so-called "preferential option for the poor", an option which I defined as a "special form of primacy in the exercise of Christian charity".(36) Pope Leo's Encyclical on the "condition of the workers" is thus an Encyclical on the poor and on the terrible conditions to which the new and often violent process of industrialization had reduced great multitudes of people. Today, in many parts of the world, similar processes of economic, social and political transformation are creating the same evils.

If Pope Leo XIII calls upon the State to remedy the condition of the poor in accordance with justice, he does so because of his timely awareness that the State has the duty of watching over the common good and of ensuring that every sector of social life, not excluding the economic one, contributes to achieving that good, while respecting the rightful autonomy of each sector. This should not however lead us to think that Pope Leo expected the State to solve every social problem. On the contrary, he frequently insists on necessary limits to the State's intervention and on its instrumental character, inasmuch as the individual, the family and society are prior to the State, and inasmuch as the State exists in order to protect their rights and not stifle them.(37)

The relevance of these reflections for our own day is inescapable. It will be useful to return later to this important subject of the limits inherent in the nature of the state. For now, the points which have been emphasized (certainly not the only ones in the Encyclical) are situated in continuity with the Church's social teaching, and in the light of a sound view of private property, work, the economic process, the reality of the State and, above all,

of man himself. Other themes will be mentioned later when we examine certain aspects of the contemporary situation. From this point forward it will be necessary to keep in mind that the main thread and, in a certain sense, the guiding principle of Pope Leo's Encyclical, and of all of the Church's social doctrine, is a correct view of the human person and of his unique value, inasmuch as "man ... is the only creature on earth which God willed for itself".(38) God has imprinted his own image and likeness on man (cf. Gen 1:26), conferring upon him an incomparable dignity, as the Encyclical frequently insists. In effect, beyond the rights which man acquires by his own work, there exist rights which do not correspond to any work he performs, but which flow from his essential dignity as a person.

II. TOWARDS THE "NEW THINGS" OF TODAY

12. The commemoration of Rerum novarum would be incomplete unless reference were also made to the situation of the world today. The document lends itself to such a reference, because the historical picture and the prognosis which it suggests have proved to be surprisingly accurate in the light of what has happened since then.

This is especially confirmed by the events which took place near the end of 1989 and at the beginning of 1990. These events, and the radical transformations which followed, can only be explained by the preceding situations which, to a certain extent, crystallized or institutionalized Leo XIII's predictions and the increasingly disturbing signs noted by his Successors. Pope Leo foresaw the negative consequences — political, social and economic — of the social order proposed by "socialism", which at that time was still only a social philosophy and not yet a fully structured movement. It may seem surprising that "socialism" appeared at the beginning of the Pope's critique of solutions to the "question of the working class" at a time when "socialism" was not yet in the form of a strong and powerful State, with all the resources which that implies, as was later to happen. However, he correctly judged the danger posed to the masses by the attractive presentation of this simple and radical solution to the "question of the working class" of the time — all the more so when one considers the terrible situation of injustice in which the working classes of the recently industrialized nations found themselves.

Two things must be emphasized here: first, the great clarity in perceiving, in all its harshness, the actual condition of the working class — men, women and children; secondly, equal clarity in recognizing the evil of a solution which, by appearing to reverse the positions of the poor and the rich, was in reality detrimental to the very people whom it was meant to help. The remedy would prove worse than the sickness. By defining the nature of the socialism of his day as the suppression of private property, Leo XIII arrived at the crux of the problem.

His words deserve to be re-read attentively: "To remedy these wrongs (the unjust distribution of wealth and the poverty of the workers), the Socialists encourage the poor man's envy of the rich and strive to do away with private property, contending that individual possessions should become the common property of all...; but their contentions are so clearly powerless to end the controversy that, were they carried into effect, the working man himself would be among the first to suffer. They are moreover emphatically unjust, for they would rob the lawful possessor, distort the functions of the State, and create utter confusion in the community".(39) The evils caused by the setting up of this type of socialism as a State system — what would later be called "Real Socialism" — could not be better expressed.

13. Continuing our reflections, and referring also to what has been said in the Encyclicals Laborem exercens and Sollicitudo rei socialis, we have to add that the fundamental error of socialism is anthropological in nature. Socialism considers the individual person simply as an element, a molecule within the social organism, so that the good of the individual is completely subordinated to the functioning of the socio-economic mechanism. Socialism likewise maintains that the good of the individual can be realized without reference to his free choice, to the unique and exclusive responsibility which he exercises in the face of good or evil. Man is thus reduced to a series of social relationships, and the concept of the person as the autonomous subject of moral decision disappears, the very subject whose decisions build the social order. From this mistaken conception of the person there arise both a distortion of law, which defines the sphere of the exercise of freedom, and an opposition to private property. A person who is deprived of something he can call "his own", and of the possibility of earning a living through his own initiative, comes to depend on the social machine and on those who control it. This makes it much more difficult for him to recognize his dignity as a person, and hinders progress towards the building up of an authentic human community.

In contrast, from the Christian vision of the human person there necessarily follows a correct picture of society. According to Rerum novarum and the whole social doctrine of the Church, the social nature of man is not completely fulfilled in the State, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups which stem from human nature itself and have their own autonomy, always with a view to the common good. This is what I have called the "subjectivity" of society which, together with the subjectivity of the individual, was cancelled out by "Real Socialism".(40)

If we then inquire as to the source of this mistaken concept of the nature of the person and the "subjectivity" of society, we must reply that its first cause is atheism. It is by responding to the call of God contained in the being of things that man becomes aware of his transcendent dignity. Every individual must give this response, which constitutes the apex of his humanity, and no social mechanism or collective subject can substitute for it. The denial of God deprives the person of his foundation, and consequently leads to a reorganization of the social order without reference to the person's dignity and responsibility.

The atheism of which we are speaking is also closely connected with the rationalism of the Enlightenment, which views human and social reality in a mechanistic way. Thus there is a denial of the supreme insight concerning man's true greatness, his transcendence in respect to earthly realities, the contradiction in his heart between the desire for the fullness of what is good and his own inability to attain it and, above all, the need for salvation which results from this situation.

14. From the same atheistic source, socialism also derives its choice of the means of action condemned in Rerum novarum, namely, class struggle. The Pope does not, of course, intend to condemn every possible form of social conflict. The Church is well aware that in the course of history conflicts of interest between different social groups inevitably arise, and that in the face of such conflicts Christians must often take a position, honestly and decisively. The Encyclical Laborem exercens moreover clearly recognized the positive role of conflict when it takes the form of a "struggle for social justice";(41) Quadragesimo anno had already stated that "if the class struggle abstains from enmities and mutual hatred, it gradually changes into an honest discussion of differences founded on a desire for justice".(42)

However, what is condemned in class struggle is the idea that conflict is not restrained by ethical or juridical considerations, or by respect for the dignity of others (and consequently of oneself); a reasonable compromise is thus excluded, and what is pursued is not the general good of society, but a partisan interest which replaces the common good and sets out to destroy whatever stands in its way. In a word, it is a question of transferring to the sphere of internal conflict between social groups the doctrine of "total war", which the militarism and imperialism of that time brought to bear on international relations. As a result of this doctrine, the search for a proper balance between the interests of the various nations was replaced by attempts to impose the absolute domination of one's own side through the destruction of the other side's capacity to resist, using every possible means, not excluding the use of lies, terror tactics against citizens, and weapons of utter destruction (which precisely in those years were beginning to be designed). Therefore class struggle in the Marxist sense and militarism have the same root, namely, atheism and contempt for the human person, which place the principle of force above that of reason and law.

15. Rerum novarum is opposed to State control of the means of production, which would reduce every citizen to being a "cog" in the State machine. It is no less forceful in criticizing a concept of the State which completely excludes the economic sector from the State's range of interest and action. There is certainly a legitimate sphere of autonomy in economic life which the State should not enter. The State, however, has the task of determining the juridical framework within which economic affairs are to be conducted, and thus of safeguarding the prerequisites of a free economy, which presumes a certain equality between the parties, such that one party would not be so powerful as practically to reduce the other to subservience.(43)

In this regard, Rerum novarum points the way to just reforms which can restore dignity to work as the free activity of man. These reforms imply that society and the State will both assume responsibility, especially for protecting the worker from the nightmare of unemployment. Historically, this has happened in two converging ways: either through economic policies aimed at ensuring balanced growth and full employment, or through unemployment insurance and retraining programmes capable of ensuring a smooth transfer of workers from crisis sectors to those in expansion.

Furthermore, society and the State must ensure wage levels adequate for the maintenance of the worker and his family, including a certain amount for savings. This requires a continuous effort to improve workers' training and capability so that their work will be more skilled and productive, as well as careful controls and adequate legislative measures to block shameful forms of exploitation, especially to the disadvantage of the most vulnerable workers, of immigrants and of those on the margins of society. The role of trade unions in negotiating minimum salaries and working conditions is decisive in this area.

Finally, "humane" working hours and adequate free-time need to be guaranteed, as well as the right to express one's own personality at the work-place without suffering any affront to one's conscience or personal dignity. This is the place to mention once more the role of trade unions, not only in negotiating contracts, but also as "places" where workers can express themselves. They serve the development of an authentic culture of work and help workers to share in a fully human way in the life of their place of employment.(44)

The State must contribute to the achievement of these goals both directly and indirectly. Indirectly and according to the principle of subsidiarity, by creating favourable conditions for the free exercise of economic activity, which will lead to abundant opportunities for employment and sources of wealth. Directly and according to the principle of solidarity, by defending the weakest, by placing certain limits on the autonomy of the parties who determine working conditions, and by ensuring in every case the necessary minimum support for the unemployed worker.(45)

The Encyclical and the related social teaching of the Church had far-reaching influence in the years bridging the nineteenth and twentieth centuries. This influence is evident in the numerous reforms which were introduced in the areas of social security, pensions, health insurance and compensation in the case of accidents, within the framework of greater respect for the rights of workers.(46)

16. These reforms were carried out in part by States, but in the struggle to achieve them the role of the workers' movement was an important one. This movement, which began as a response of moral conscience to unjust and harmful situations, conducted a widespread campaign for reform, far removed from vague ideology and closer to the daily needs of workers. In this context its efforts were often joined to those of Christians in order to improve workers' living conditions. Later on, this movement was dominated to a certain extent by the Marxist ideology against which Rerum novarum had spoken.

These same reforms were also partly the result of an open process by which society organized itself through the establishment of effective instruments of solidarity, which were capable of sustaining an economic growth more respectful of the values of the person. Here we should remember the numerous efforts to which Christians made a notable contribution in establishing producers', consumers' and credit cooperatives, in promoting general education and professional training, in experimenting with various forms of participation in the life of the work-place and in the life of society in general.

Thus, as we look at the past, there is good reason to thank God that the great Encyclical was not without an echo in human hearts and indeed led to a generous response on the practical level. Still, we must acknowledge that its prophetic message was not fully accepted by people at the time. Precisely for this reason there ensued some very serious tragedies.

17. Reading the Encyclical within the context of Pope Leo's whole magisterium,(47) we see how it points essentially to the socio-economic consequences of an error which has even greater implications. As has been mentioned, this error consists in an understanding of human freedom which detaches it from obedience to the truth, and consequently from the duty to respect the rights of others. The essence of freedom then becomes self-love carried to the point of contempt for God and neighbour, a self-love which leads to an unbridled affirmation of self-interest and which refuses to be limited by any demand of justice.(48)

This very error had extreme consequences in the tragic series of wars which ravaged Europe and the world between 1914 and 1945. Some of these resulted from militarism and exaggerated nationalism, and from related forms of totalitarianism; some derived from the class struggle; still others were civil wars or wars of an ideological nature. Without the terrible burden of hatred and resentment which had built up as a result of so many injustices both on the international level and within individual States, such cruel wars would not have been possible, in which great nations invested their energies and in which there was no hesitation to violate the most sacred human rights, with the extermination of entire peoples and social groups being planned and carried out. Here we recall the Jewish people in particular, whose terrible fate has become a symbol of the aberration of which man is capable when he turns against God.

However, it is only when hatred and injustice are sanctioned and organized by the ideologies based on them, rather than on the truth about man, that they take possession of entire nations and drive them to act.(49) Rerum novarum opposed ideologies of hatred and showed how violence and resentment could be overcome by justice. May the memory of those terrible events guide the actions of everyone, particularly the leaders of nations in our own time, when other forms of injustice are fuelling new hatreds and when new ideologies which exalt violence are appearing on the horizon.

18. While it is true that since 1945 weapons have been silent on the European continent, it must be remembered that true peace is never simply the result of military victory, but rather implies both the removal of the causes of war and genuine reconciliation between peoples. For many years there has been in Europe and the world a situation of non-war rather than genuine peace. Half of the continent fell under the domination of a Communist dictatorship, while the other half organized itself in defence against this threat. Many peoples lost the ability to control their own destiny and were enclosed within the suffocating boundaries of an empire in which efforts were made to destroy their historical memory and the centuries-old roots of their culture. As a

result of this violent division of Europe, enormous masses of people were compelled to leave their homeland or were forcibly deported.

An insane arms race swallowed up the resources needed for the development of national economies and for assistance to the less developed nations. Scientific and technological progress, which should have contributed to man's well-being, was transformed into an instrument of war: science and technology were directed to the production of ever more efficient and destructive weapons. Meanwhile, an ideology, a perversion of authentic philosophy, was called upon to provide doctrinal justification for the new war. And this war was not simply expected and prepared for, but was actually fought with enormous bloodshed in various parts of the world. The logic of power blocs or empires, denounced in various Church documents and recently in the Encyclical Sollicitudo rei socialis,(50) led to a situation in which controversies and disagreements among Third World countries were systematically aggravated and exploited in order to create difficulties for the adversary.

Extremist groups, seeking to resolve such controversies through the use of arms, found ready political and military support and were equipped and trained for war; those who tried to find peaceful and humane solutions, with respect for the legitimate interests of all parties, remained isolated and often fell victim to their opponents. In addition, the precariousness of the peace which followed the Second World War was one of the principal causes of the militarization of many Third World countries and the fratricidal conflicts which afflicted them, as well as of the spread of terrorism and of increasingly barbaric means of political and military conflict. Moreover, the whole world was oppressed by the threat of an atomic war capable of leading to the extinction of humanity. Science used for military purposes had placed this decisive instrument at the disposal of hatred, strengthened by ideology. But if war can end without winners or losers in a suicide of humanity, then we must repudiate the logic which leads to it: the idea that the effort to destroy the enemy, confrontation and war itself are factors of progress and historical advancement.(51) When the need for this repudiation is understood, the concepts of "total war" and "class struggle" must necessarily be called into question.

19. At the end of the Second World War, however, such a development was still being formed in people's consciences. What received attention was the spread of Communist totalitarianism over more than half of Europe and over other parts of the world. The war, which should have re-established freedom and restored the right of nations, ended without having attained these goals. Indeed, in a way, for many peoples, especially those which had suffered most during the war, it openly contradicted these goals. It may be said that the situation which arose has evoked different responses.

Following the destruction caused by the war, we see in some countries and under certain aspects a positive effort to rebuild a democratic society inspired by social justice, so as to deprive Communism of the revolutionary potential represented by masses of people subjected to exploitation and oppression. In general, such attempts endeavour to preserve free market mechanisms, ensuring, by means of a stable currency and the harmony of social relations, the conditions for steady and healthy economic growth in which people through their own work can build a better future for themselves and their families. At the same time, these attempts try to avoid making market mechanisms the only point of reference for social life, and they tend to subject them to public control which upholds the principle of the common destination of material goods. In this context, an abundance of work opportunities, a solid system of social security and professional training, the freedom to join trade unions and the effective action of unions, the assistance provided in cases of unemployment, the opportunities for democratic participation in the life of society — all these are meant to deliver work from the mere condition of "a commodity", and to guarantee its dignity.

Then there are the other social forces and ideological movements which oppose Marxism by setting up systems of "national security", aimed at controlling the whole of society in a systematic way, in order to make Marxist infiltration impossible. By emphasizing and increasing the power of the State, they wish to protect their people from Communism, but in doing so they run the grave risk of destroying the freedom and values of the person, the very things for whose sake it is necessary to oppose Communism.

Another kind of response, practical in nature, is represented by the affluent society or the consumer society. It seeks to defeat Marxism on the level of pure materialism by showing how a free-market society can achieve a greater satisfaction of material human needs than Communism, while equally excluding spiritual values. In reality, while on the one hand it is true that this social model shows the failure of Marxism to contribute to a humane and better society, on the other hand, insofar as it denies an autonomous existence and value to morality, law, culture and religion, it agrees with Marxism, in the sense that it totally reduces man to the sphere of economics and the satisfaction of material needs.

20. During the same period a widespread process of "decolonization" occurred, by which many countries gained or regained their independence and the right freely to determine their own destiny. With the formal re-acquisition of State sovereignty, however, these countries often find themselves merely at the beginning of the journey

towards the construction of genuine independence. Decisive sectors of the economy still remain de facto in the hands of large foreign companies which are unwilling to commit themselves to the long-term development of the host country. Political life itself is controlled by foreign powers, while within the national boundaries there are tribal groups not yet amalgamated into a genuine national community. Also lacking is a class of competent professional people capable of running the State apparatus in an honest and just way, nor are there qualified personnel for managing the economy in an efficient and responsible manner.

Given this situation, many think that Marxism can offer a sort of short-cut for building up the nation and the State; thus many variants of socialism emerge with specific national characteristics. Legitimate demands for national recovery, forms of nationalism and also of militarism, principles drawn from ancient popular traditions (which are sometimes in harmony with Christian social doctrine) and Marxist-Leninist concepts and ideas — all these mingle in the many ideologies which take shape in ways that differ from case to case.

21. Lastly, it should be remembered that after the Second World War, and in reaction to its horrors, there arose a more lively sense of human rights, which found recognition in a number of International Documents(52) and, one might say, in the drawing up of a new "right of nations", to which the Holy See has constantly contributed. The focal point of this evolution has been the United Nations Organization. Not only has there been a development in awareness of the rights of individuals, but also in awareness of the rights of nations, as well as a clearer realization of the need to act in order to remedy the grave imbalances that exist between the various geographical areas of the world. In a certain sense, these imbalances have shifted the centre of the social question from the national to the international level.(53)

While noting this process with satisfaction, nevertheless one cannot ignore the fact that the overall balance of the various policies of aid for development has not always been positive. The United Nations, moreover, has not yet succeeded in establishing, as alternatives to war, effective means for the resolution of international conflicts. This seems to be the most urgent problem which the international community has yet to resolve.

III. THE YEAR 1989

22. It is on the basis of the world situation just described, and already elaborated in the Encyclical Sollicitudo rei socialis, that the unexpected and promising significance of the events of recent years can be understood. Although they certainly reached their climax in 1989 in the countries of Central and Eastern Europe, they embrace a longer period of time and a wider geographical area. In the course of the 80s, certain dictatorial and oppressive regimes fell one by one in some countries of Latin America and also of Africa and Asia. In other cases there began a difficult but productive transition towards more participatory and more just political structures. An important, even decisive, contribution was made by the Church's commitment to defend and promote human rights. In situations strongly influenced by ideology, in which polarization obscured the awareness of a human dignity common to all, the Church affirmed clearly and forcefully that every individual — whatever his or her personal convictions — bears the image of God and therefore deserves respect. Often, the vast majority of people identified themselves with this kind of affirmation, and this led to a search for forms of protest and for political solutions more respectful of the dignity of the person.

From this historical process new forms of democracy have emerged which offer a hope for change in fragile political and social structures weighed down by a painful series of injustices and resentments, as well as by a heavily damaged economy and serious social conflicts. Together with the whole Church, I thank God for the often heroic witness borne in such difficult circumstances by many Pastors, entire Christian communities, individual members of the faithful, and other people of good will; at the same time I pray that he will sustain the efforts being made by everyone to build a better future. This is, in fact, a responsibility which falls not only to the citizens of the countries in question, but to all Christians and people of good will. It is a question of showing that the complex problems faced by those peoples can be resolved through dialogue and solidarity, rather than by a struggle to destroy the enemy through war.

23. Among the many factors involved in the fall of oppressive regimes, some deserve special mention. Certainly, the decisive factor which gave rise to the changes was the violation of the rights of workers. It cannot be forgotten that the fundamental crisis of systems claiming to express the rule and indeed the dictatorship of the working class began with the great upheavals which took place in Poland in the name of solidarity. It was the throngs of working people which foreswore the ideology which presumed to speak in their name. On the basis of a hard, lived experience of work and of oppression, it was they who recovered and, in a sense, rediscovered the content and principles of the Church's social doctrine.

Also worthy of emphasis is the fact that the fall of this kind of "bloc" or empire was accomplished almost everywhere by means of peaceful protest, using only the weapons of truth and justice. While Marxism held that only by exacerbating social conflicts was it possible to resolve them through violent confrontation, the protests which led to the collapse of Marxism tenaciously insisted on trying every avenue of negotiation, dialogue, and

witness to the truth, appealing to the conscience of the adversary and seeking to reawaken in him a sense of shared human dignity.

It seemed that the European order resulting from the Second World War and sanctioned by the Yalta Agreements could only be overturned by another war. Instead, it has been overcome by the non-violent commitment of people who, while always refusing to yield to the force of power, succeeded time after time in finding effective ways of bearing witness to the truth. This disarmed the adversary, since violence always needs to justify itself through deceit, and to appear, however falsely, to be defending a right or responding to a threat posed by others.(54) Once again I thank God for having sustained people's hearts amid difficult trials, and I pray that this example will prevail in other places and other circumstances. May people learn to fight for justice without violence, renouncing class struggle in their internal disputes, and war in international ones.

24. The second factor in the crisis was certainly the inefficiency of the economic system, which is not to be considered simply as a technical problem, but rather a consequence of the violation of the human rights to private initiative, to ownership of property and to freedom in the economic sector. To this must be added the cultural and national dimension: it is not possible to understand man on the basis of economics alone, nor to define him simply on the basis of class membership. Man is understood in a more complete way when he is situated within the sphere of culture through his language, history, and the position he takes towards the fundamental events of life, such as birth, love, work and death. At the heart of every culture lies the attitude man takes to the greatest mystery: the mystery of God. Different cultures are basically different ways of facing the question of the meaning of personal existence. When this question is eliminated, the culture and moral life of nations are corrupted. For this reason the struggle to defend work was spontaneously linked to the struggle for culture and for national rights.

But the true cause of the new developments was the spiritual void brought about by atheism, which deprived the younger generations of a sense of direction and in many cases led them, in the irrepressible search for personal identity and for the meaning of life, to rediscover the religious roots of their national cultures, and to rediscover the person of Christ himself as the existentially adequate response to the desire in every human heart for goodness, truth and life. This search was supported by the witness of those who, in difficult circumstances and under persecution, remained faithful to God. Marxism had promised to uproot the need for God from the human heart, but the results have shown that it is not possible to succeed in this without throwing the heart into turmoil.

25. The events of 1989 are an example of the success of willingness to negotiate and of the Gospel spirit in the face of an adversary determined not to be bound by moral principles. These events are a warning to those who, in the name of political realism, wish to banish law and morality from the political arena. Undoubtedly, the struggle which led to the changes of 1989 called for clarity, moderation, suffering and sacrifice. In a certain sense, it was a struggle born of prayer, and it would have been unthinkable without immense trust in God, the Lord of history, who carries the human heart in his hands. It is by uniting his own sufferings for the sake of truth and freedom to the sufferings of Christ on the Cross that man is able to accomplish the miracle of peace and is in a position to discern the often narrow path between the cowardice which gives in to evil and the violence which, under the illusion of fighting evil, only makes it worse.

Nevertheless, it cannot be forgotten that the manner in which the individual exercises his freedom is conditioned in innumerable ways. While these certainly have an influence on freedom, they do not determine it; they make the exercise of freedom more difficult or less difficult, but they cannot destroy it. Not only is it wrong from the ethical point of view to disregard human nature, which is made for freedom, but in practice it is impossible to do so. Where society is so organized as to reduce arbitrarily or even suppress the sphere in which freedom is legitimately exercised, the result is that the life of society becomes progressively disorganized and goes into decline.

Moreover, man, who was created for freedom, bears within himself the wound of original sin, which constantly draws him towards evil and puts him in need of redemption. Not only is this doctrine an integral part of Christian revelation; it also has great hermeneutical value insofar as it helps one to understand human reality. Man tends towards good, but he is also capable of evil. He can transcend his immediate interest and still remain bound to it. The social order will be all the more stable, the more it takes this fact into account and does not place in opposition personal interest and the interests of society as a whole, but rather seeks ways to bring them into fruitful harmony. In fact, where self-interest is violently suppressed, it is replaced by a burdensome system of bureaucratic control which dries up the wellsprings of initiative and creativity. When people think they possess the secret of a perfect social organization which makes evil impossible, they also think that they can use any means, including violence and deceit, in order to bring that organization into being. Politics then becomes a "secular religion" which operates under the illusion of creating paradise in this world. But no political society — which possesses its own autonomy and laws(55) — can ever be confused with the Kingdom of God. The Gospel parable of the weeds among the wheat (cf. Mt 13:24-30; 36-43) teaches that it is for God alone to

separate the subjects of the Kingdom from the subjects of the Evil One, and that this judgment will take place at the end of time. By presuming to anticipate judgment here and now, man puts himself in the place of God and sets himself against the patience of God.

Through Christ's sacrifice on the Cross, the victory of the Kingdom of God has been achieved once and for all. Nevertheless, the Christian life involves a struggle against temptation and the forces of evil. Only at the end of history will the Lord return in glory for the final judgment (cf. Mt 25:31) with the establishment of a new heaven and a new earth (cf. 2 Pt 3:13; Rev 21:1); but as long as time lasts the struggle between good and evil continues even in the human heart itself.

What Sacred Scripture teaches us about the prospects of the Kingdom of God is not without consequences for the life of temporal societies, which, as the adjective indicates, belong to the realm of time, with all that this implies of imperfection and impermanence. The Kingdom of God, being in the world without being of the world, throws light on the order of human society, while the power of grace penetrates that order and gives it life. In this way the requirements of a society worthy of man are better perceived, deviations are corrected, the courage to work for what is good is reinforced. In union with all people of good will, Christians, especially the laity, are called to this task of imbuing human realities with the Gospel.(56)

26. The events of 1989 took place principally in the countries of Eastern and Central Europe. However, they have worldwide importance because they have positive and negative consequences which concern the whole human family. These consequences are not mechanistic or fatalistic in character, but rather are opportunities for human freedom to cooperate with the merciful plan of God who acts within history.

The first consequence was an encounter in some countries between the Church and the workers' movement, which came about as a result of an ethical and explicitly Christian reaction against a widespread situation of injustice. For about a century the workers' movement had fallen in part under the dominance of Marxism, in the conviction that the working class, in order to struggle effectively against oppression, had to appropriate its economic and materialistic theories.

In the crisis of Marxism, the natural dictates of the consciences of workers have re-emerged in a demand for justice and a recognition of the dignity of work, in conformity with the social doctrine of the Church.(57) The worker movement is part of a more general movement among workers and other people of good will for the liberation of the human person and for the affirmation of human rights. It is a movement which today has spread to many countries, and which, far from opposing the Catholic Church, looks to her with interest.

The crisis of Marxism does not rid the world of the situations of injustice and oppression which Marxism itself exploited and on which it fed. To those who are searching today for a new and authentic theory and praxis of liberation, the Church offers not only her social doctrine and, in general, her teaching about the human person redeemed in Christ, but also her concrete commitment and material assistance in the struggle against marginalization and suffering.

In the recent past, the sincere desire to be on the side of the oppressed and not to be cut off from the course of history has led many believers to seek in various ways an impossible compromise between Marxism and Christianity. Moving beyond all that was short-lived in these attempts, present circumstances are leading to a reaffirmation of the positive value of an authentic theology of integral human liberation.(58) Considered from this point of view, the events of 1989 are proving to be important also for the countries of the Third World, which are searching for their own path to development, just as they were important for the countries of Central and Eastern Europe.

27. The second consequence concerns the peoples of Europe themselves. Many individual, social, regional and national injustices were committed during and prior to the years in which Communism dominated; much hatred and ill-will have accumulated. There is a real danger that these will re-explode after the collapse of dictatorship, provoking serious conflicts and casualties, should there be a lessening of the moral commitment and conscious striving to bear witness to the truth which were the inspiration for past efforts. It is to be hoped that hatred and violence will not triumph in people's hearts, especially among those who are struggling for justice, and that all people will grow in the spirit of peace and forgiveness.

What is needed are concrete steps to create or consolidate international structures capable of intervening through appropriate arbitration in the conflicts which arise between nations, so that each nation can uphold its own rights and reach a just agreement and peaceful settlement vis-à-vis the rights of others. This is especially needed for the nations of Europe, which are closely united in a bond of common culture and an ageold history. A great effort is needed to rebuild morally and economically the countries which have abandoned Communism. For a long time the most elementary economic relationships were distorted, and basic virtues of economic life,

such as truthfulness, trustworthiness and hard work were denigrated. A patient material and moral reconstruction is needed, even as people, exhausted by longstanding privation, are asking their governments for tangible and immediate results in the form of material benefits and an adequate fulfilment of their legitimate aspirations.

The fall of Marxism has naturally had a great impact on the division of the planet into worlds which are closed to one another and in jealous competition. It has further highlighted the reality of interdependence among peoples, as well as the fact that human work, by its nature, is meant to unite peoples, not divide them. Peace and prosperity, in fact, are goods which belong to the whole human race: it is not possible to enjoy them in a proper and lasting way if they are achieved and maintained at the cost of other peoples and nations, by violating their rights or excluding them from the sources of well-being.

28. In a sense, for some countries of Europe the real post-war period is just beginning. The radical reordering of economic systems, hitherto collectivized, entails problems and sacrifices comparable to those which the countries of Western Europe had to face in order to rebuild after the Second World War. It is right that in the present difficulties the formerly Communist countries should be aided by the united effort of other nations. Obviously they themselves must be the primary agents of their own development, but they must also be given a reasonable opportunity to accomplish this goal, something that cannot happen without the help of other countries. Moreover, their present condition, marked by difficulties and shortages, is the result of an historical process in which the formerly Communist countries were often objects and not subjects. Thus they find themselves in the present situation not as a result of free choice or mistakes which were made, but as a consequence of tragic historical events which were violently imposed on them, and which prevented them from following the path of economic and social development.

Assistance from other countries, especially the countries of Europe which were part of that history and which bear responsibility for it, represents a debt in justice. But it also corresponds to the interest and welfare of Europe as a whole, since Europe cannot live in peace if the various conflicts which have arisen as a result of the past are to become more acute because of a situation of economic disorder, spiritual dissatisfaction and desperation.

This need, however, must not lead to a slackening of efforts to sustain and assist the countries of the Third World, which often suffer even more serious conditions of poverty and want.(59) What is called for is a special effort to mobilize resources, which are not lacking in the world as a whole, for the purpose of economic growth and common development, redefining the priorities and hierarchies of values on the basis of which economic and political choices are made. Enormous resources can be made available by disarming the huge military machines which were constructed for the conflict between East and West. These resources could become even more abundant if, in place of war, reliable procedures for the resolution of conflicts could be set up, with the resulting spread of the principle of arms control and arms reduction, also in the countries of the Third World, through the adoption of appropriate measures against the arms trade.(60) But it will be necessary above all to abandon a mentality in which the poor — as individuals and as peoples — are considered a burden, as irksome intruders trying to consume what others have produced. The poor ask for the right to share in enjoying material goods and to make good use of their capacity for work, thus creating a world that is more just and prosperous for all. The advancement of the poor constitutes a great opportunity for the moral, cultural and even economic growth of all humanity.

29. Finally, development must not be understood solely in economic terms, but in a way that is fully human.(61) It is not only a question of raising all peoples to the level currently enjoyed by the richest countries, but rather of building up a more decent life through united labour, of concretely enhancing every individual's dignity and creativity, as well as his capacity to respond to his personal vocation, and thus to God's call. The apex of development is the exercise of the right and duty to seek God, to know him and to live in accordance with that knowledge.(62) In the totalitarian and authoritarian regimes, the principle that force predominates over reason was carried to the extreme. Man was compelled to submit to a conception of reality imposed on him by coercion, and not reached by virtue of his own reason and the exercise of his own freedom. This principle must be overturned and total recognition must be given to the rights of the human conscience, which is bound only to the truth, both natural and revealed. The recognition of these rights represents the primary foundation of every authentically free political order.(63) It is important to reaffirm this latter principle for several reasons:

a) because the old forms of totalitarianism and authoritarianism are not yet completely vanquished; indeed there is a risk that they will regain their strength. This demands renewed efforts of cooperation and solidarity between all countries;
b) because in the developed countries there is sometimes an excessive promotion of purely utilitarian values, with an appeal to the appetites and inclinations towards immediate gratification, making it difficult to recognize and respect the hierarchy of the true values of human existence;

c) because in some countries new forms of religious fundamentalism are emerging which covertly, or even openly, deny to citizens of faiths other than that of the majority the full exercise of their civil and religious rights, preventing them from taking part in the cultural process, and restricting both the Church's right to preach the Gospel and the rights of those who hear this preaching to accept it and to be converted to Christ. No authentic progress is possible without respect for the natural and fundamental right to know the truth and live according to that truth. The exercise and development of this right includes the right to discover and freely to accept Jesus Christ, who is man's true good.(64)

IV. PRIVATE PROPERTY AND THE UNIVERSAL DESTINATION OF MATERIAL GOODS

30. In Rerum novarum, Leo XIII strongly affirmed the natural character of the right to private property, using various arguments against the socialism of his time.(65) This right, which is fundamental for the autonomy and development of the person, has always been defended by the Church up to our own day. At the same time, the Church teaches that the possession of material goods is not an absolute right, and that its limits are inscribed in its very nature as a human right.

While the Pope proclaimed the right to private ownership, he affirmed with equal clarity that the "use" of goods, while marked by freedom, is subordinated to their original common destination as created goods, as well as to the will of Jesus Christ as expressed in the Gospel. Pope Leo wrote: "those whom fortune favours are admonished ... that they should tremble at the warnings of Jesus Christ ... and that a most strict account must be given to the Supreme Judge for the use of all they possess"; and quoting Saint Thomas Aquinas, he added: "But if the question be asked, how must one's possessions be used? the Church replies without hesitation that man should not consider his material possessions as his own, but as common to all...", because "above the laws and judgments of men stands the law, the judgment of Christ".(66)

The Successors of Leo XIII have repeated this twofold affirmation: the necessity and therefore the legitimacy of private ownership, as well as the limits which are imposed on it.(67) The Second Vatican Council likewise clearly restated the traditional doctrine in words which bear repeating: "In making use of the exterior things we lawfully possess, we ought to regard them not just as our own but also as common, in the sense that they can profit not only the owners but others too"; and a little later we read: "Private property or some ownership of external goods affords each person the scope needed for personal and family autonomy, and should be regarded as an extension of human freedom ... Of its nature private property also has a social function which is based on the law of the common purpose of goods".(68) I have returned to this same doctrine, first in my address to the Third Conference of the Latin American Bishops at Puebla, and later in the Encyclicals Laborem exercens and Sollicitudo rei socialis.(69)

31. Re-reading this teaching on the right to property and the common destination of material wealth as it applies to the present time, the question can be raised concerning the origin of the material goods which sustain human life, satisfy people's needs and are an object of their rights.

The original source of all that is good is the very act of God, who created both the earth and man, and who gave the earth to man so that he might have dominion over it by his work and enjoy its fruits (Gen 1:28). God gave the earth to the whole human race for the sustenance of all its members, without excluding or favouring anyone. This is the foundation of the universal destination of the earth's goods. The earth, by reason of its fruitfulness and its capacity to satisfy human needs, is God's first gift for the sustenance of human life. But the earth does not yield its fruits without a particular human response to God's gift, that is to say, without work. It is through work that man, using his intelligence and exercising his freedom, succeeds in dominating the earth and making it a fitting home. In this way, he makes part of the earth his own, precisely the part which he has acquired through work; this is the origin of individual property. Obviously, he also has the responsibility not to hinder others from having their own part of God's gift; indeed, he must cooperate with others so that together all can dominate the earth.

In history, these two factors — work and the land — are to be found at the beginning of every human society. However, they do not always stand in the same relationship to each other. At one time the natural fruitfulness of the earth appeared to be, and was in fact, the primary factor of wealth, while work was, as it were, the help and support for this fruitfulness. In our time, the role of human work is becoming increasingly important as the productive factor both of non-material and of material wealth. Moreover, it is becoming clearer how a person's work is naturally interrelated with the work of others. More than ever, work is work with others and work for others: it is a matter of doing something for someone else. Work becomes ever more fruitful and productive to the extent that people become more knowledgeable of the productive potentialities of the earth and more profoundly cognisant of the needs of those for whom their work is done.

32. In our time, in particular, there exists another form of ownership which is becoming no less important than land: the possession of know-how, technology and skill. The wealth of the industrialized nations is based much more on this kind of ownership than on natural resources.

Mention has just been made of the fact that people work with each other, sharing in a "community of work" which embraces ever widening circles. A person who produces something other than for his own use generally does so in order that others may use it after they have paid a just price, mutually agreed upon through free bargaining. It is precisely the ability to foresee both the needs of others and the combinations of productive factors most adapted to satisfying those needs that constitutes another important source of wealth in modern society. Besides, many goods cannot be adequately produced through the work of an isolated individual; they require the cooperation of many people in working towards a common goal. Organizing such a productive effort, planning its duration in time, making sure that it corresponds in a positive way to the demands which it must satisfy, and taking the necessary risks — all this too is a source of wealth in today's society. In this way, the role of disciplined and creative human work and, as an essential part of that work, initiative and entrepreneurial ability becomes increasingly evident and decisive.(70)

This process, which throws practical light on a truth about the person which Christianity has constantly affirmed, should be viewed carefully and favourably. Indeed, besides the earth, man's principal resource is man himself. His intelligence enables him to discover the earth's productive potential and the many different ways in which human needs can be satisfied. It is his disciplined work in close collaboration with others that makes possible the creation of ever more extensive working communities which can be relied upon to transform man's natural and human environments. Important virtues are involved in this process, such as diligence, industriousness, prudence in undertaking reasonable risks, reliability and fidelity in interpersonal relationships, as well as courage in carrying out decisions which are difficult and painful but necessary, both for the overall working of a business and in meeting possible set-backs.

The modern business economy has positive aspects. Its basis is human freedom exercised in the economic field, just as it is exercised in many other fields. Economic activity is indeed but one sector in a great variety of human activities, and like every other sector, it includes the right to freedom, as well as the duty of making responsible use of freedom. But it is important to note that there are specific differences between the trends of modern society and those of the past, even the recent past. Whereas at one time the decisive factor of production was the land, and later capital — understood as a total complex of the instruments of production — today the decisive factor is increasingly man himself, that is, his knowledge, especially his scientific knowledge, his capacity for interrelated and compact organization, as well as his ability to perceive the needs of others and to satisfy them.

33. However, the risks and problems connected with this kind of process should be pointed out. The fact is that many people, perhaps the majority today, do not have the means which would enable them to take their place in an effective and humanly dignified way within a productive system in which work is truly central. They have no possibility of acquiring the basic knowledge which would enable them to express their creativity and develop their potential. They have no way of entering the network of knowledge and intercommunication which would enable them to see their qualities appreciated and utilized. Thus, if not actually exploited, they are to a great extent marginalized; economic development takes place over their heads, so to speak, when it does not actually reduce the already narrow scope of their old subsistence economies. They are unable to compete against the goods which are produced in ways which are new and which properly respond to needs, needs which they had previously been accustomed to meeting through traditional forms of organization. Allured by the dazzle of an opulence which is beyond their reach, and at the same time driven by necessity, these people crowd the cities of the Third World where they are often without cultural roots, and where they are exposed to situations of violent uncertainty, without the possibility of becoming integrated. Their dignity is not acknowledged in any real way, and sometimes there are even attempts to eliminate them from history through coercive forms of demographic control which are contrary to human dignity.

Many other people, while not completely marginalized, live in situations in which the struggle for a bare minimum is uppermost. These are situations in which the rules of the earliest period of capitalism still flourish in conditions of "ruthlessness" in no way inferior to the darkest moments of the first phase of industrialization. In other cases the land is still the central element in the economic process, but those who cultivate it are excluded from ownership and are reduced to a state of quasi-servitude.(71) In these cases, it is still possible today, as in the days of Rerum novarum, to speak of inhuman exploitation. In spite of the great changes which have taken place in the more advanced societies, the human inadequacies of capitalism and the resulting domination of things over people are far from disappearing. In fact, for the poor, to the lack of material goods has been added a lack of knowledge and training which prevents them from escaping their state of humiliating subjection.

Unfortunately, the great majority of people in the Third World still live in such conditions. It would be a mistake, however, to understand this "world" in purely geographic terms. In some regions and in some social sectors of that world, development programmes have been set up which are centered on the use not so much of the material resources available but of the "human resources".

Even in recent years it was thought that the poorest countries would develop by isolating themselves from the world market and by depending only on their own resources. Recent experience has shown that countries which did this have suffered stagnation and recession, while the countries which experienced development were those which succeeded in taking part in the general interrelated economic activities at the international level. It seems therefore that the chief problem is that of gaining fair access to the international market, based not on the unilateral principle of the exploitation of the natural resources of these countries but on the proper use of human resources.(72)

However, aspects typical of the Third World also appear in developed countries, where the constant transformation of the methods of production and consumption devalues certain acquired skills and professional expertise, and thus requires a continual effort of re-training and updating. Those who fail to keep up with the times can easily be marginalized, as can the elderly, the young people who are incapable of finding their place in the life of society and, in general, those who are weakest or part of the so-called Fourth World. The situation of women too is far from easy in these conditions.

34. It would appear that, on the level of individual nations and of international relations, the free market is the most efficient instrument for utilizing resources and effectively responding to needs. But this is true only for those needs which are "solvent", insofar as they are endowed with purchasing power, and for those resources which are "marketable", insofar as they are capable of obtaining a satisfactory price. But there are many human needs which find no place on the market. It is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish. It is also necessary to help these needy people to acquire expertise, to enter the circle of exchange, and to develop their skills in order to make the best use of their capacities and resources. Even prior to the logic of a fair exchange of goods and the forms of justice appropriate to it, there exists something which is due to man because he is man, by reason of his lofty dignity. Inseparable from that required "something" is the possibility to survive and, at the same time, to make an active contribution to the common good of humanity.

In Third World contexts, certain objectives stated by Rerum novarum remain valid, and, in some cases, still constitute a goal yet to be reached, if man's work and his very being are not to be reduced to the level of a mere commodity. These objectives include a sufficient wage for the support of the family, social insurance for old age and unemployment, and adequate protection for the conditions of employment.

35. Here we find a wide range of opportunities for commitment and effort in the name of justice on the part of trade unions and other workers' organizations. These defend workers' rights and protect their interests as persons, while fulfilling a vital cultural role, so as to enable workers to participate more fully and honourably in the life of their nation and to assist them along the path of development.

In this sense, it is right to speak of a struggle against an economic system, if the latter is understood as a method of upholding the absolute predominance of capital, the possession of the means of production and of the land, in contrast to the free and personal nature of human work.(73) In the struggle against such a system, what is being proposed as an alternative is not the socialist system, which in fact turns out to be State capitalism, but rather a society of free work, of enterprise and of participation. Such a society is not directed against the market, but demands that the market be appropriately controlled by the forces of society and by the State, so as to guarantee that the basic needs of the whole of society are satisfied.

The Church acknowledges the legitimate role of profit as an indication that a business is functioning well. When a firm makes a profit, this means that productive factors have been properly employed and corresponding human needs have been duly satisfied. But profitability is not the only indicator of a firm's condition. It is possible for the financial accounts to be in order, and yet for the people — who make up the firm's most valuable asset — to be humiliated and their dignity offended. Besides being morally inadmissible, this will eventually have negative repercussions on the firm's economic efficiency. In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business.

We have seen that it is unacceptable to say that the defeat of so-called "Real Socialism" leaves capitalism as the only model of economic organization. It is necessary to break down the barriers and monopolies which

leave so many countries on the margins of development, and to provide all individuals and nations with the basic conditions which will enable them to share in development. This goal calls for programmed and responsible efforts on the part of the entire international community. Stronger nations must offer weaker ones opportunities for taking their place in international life, and the latter must learn how to use these opportunities by making the necessary efforts and sacrifices and by ensuring political and economic stability, the certainty of better prospects for the future, the improvement of workers' skills, and the training of competent business leaders who are conscious of their responsibilities.(74)

At present, the positive efforts which have been made along these lines are being affected by the still largely unsolved problem of the foreign debt of the poorer countries. The principle that debts must be paid is certainly just. However, it is not right to demand or expect payment when the effect would be the imposition of political choices leading to hunger and despair for entire peoples. It cannot be expected that the debts which have been contracted should be paid at the price of unbearable sacrifices. In such cases it is necessary to find — as in fact is partly happening — ways to lighten, defer or even cancel the debt, compatible with the fundamental right of peoples to subsistence and progress.

36. It would now be helpful to direct our attention to the specific problems and threats emerging within the more advanced economies and which are related to their particular characteristics. In earlier stages of development, man always lived under the weight of necessity. His needs were few and were determined, to a degree, by the objective structures of his physical make-up. Economic activity was directed towards satisfying these needs. It is clear that today the problem is not only one of supplying people with a sufficient quantity of goods, but also of responding to a demand for quality: the quality of the goods to be produced and consumed, the quality of the services to be enjoyed, the quality of the environment and of life in general.

To call for an existence which is qualitatively more satisfying is of itself legitimate, but one cannot fail to draw attention to the new responsibilities and dangers connected with this phase of history. The manner in which new needs arise and are defined is always marked by a more or less appropriate concept of man and of his true good. A given culture reveals its overall understanding of life through the choices it makes in production and consumption. It is here that the phenomenon of consumerism arises. In singling out new needs and new means to meet them, one must be guided by a comprehensive picture of man which respects all the dimensions of his being and which subordinates his material and instinctive dimensions to his interior and spiritual ones. If, on the contrary, a direct appeal is made to his instincts — while ignoring in various ways the reality of the person as intelligent and free — then consumer attitudes and life-styles can be created which are objectively improper and often damaging to his physical and spiritual health. Of itself, an economic system does not possess criteria for correctly distinguishing new and higher forms of satisfying human needs from artificial new needs which hinder the formation of a mature personality. Thus a great deal of educational and cultural work is urgently needed, including the education of consumers in the responsible use of their power of choice, the formation of a strong sense of responsibility among producers and among people in the mass media in particular, as well as the necessary intervention by public authorities.

A striking example of artificial consumption contrary to the health and dignity of the human person, and certainly not easy to control, is the use of drugs. Widespread drug use is a sign of a serious malfunction in the social system; it also implies a materialistic and, in a certain sense, destructive "reading" of human needs. In this way the innovative capacity of a free economy is brought to a one-sided and inadequate conclusion. Drugs, as well as pornography and other forms of consumerism which exploit the frailty of the weak, tend to fill the resulting spiritual void.

It is not wrong to want to live better; what is wrong is a style of life which is presumed to be better when it is directed towards "having" rather than "being", and which wants to have more, not in order to be more but in order to spend life in enjoyment as an end in itself.(75) It is therefore necessary to create life-styles in which the quest for truth, beauty, goodness and communion with others for the sake of common growth are the factors which determine consumer choices, savings and investments. In this regard, it is not a matter of the duty of charity alone, that is, the duty to give from one's "abundance", and sometimes even out of one's needs, in order to provide what is essential for the life of a poor person. I am referring to the fact that even the decision to invest in one place rather than another, in one productive sector rather than another, is always a moral and cultural choice. Given the utter necessity of certain economic conditions and of political stability, the decision to invest, that is, to offer people an opportunity to make good use of their own labour, is also determined by an attitude of human sympathy and trust in Providence, which reveal the human quality of the person making such decisions.

37. Equally worrying is the ecological question which accompanies the problem of consumerism and which is closely connected to it. In his desire to have and to enjoy rather than to be and to grow, man consumes the resources of the earth and his own life in an excessive and disordered way. At the root of the senseless destruction of the natural environment lies an anthropological error, which unfortunately is widespread in our

day. Man, who discovers his capacity to transform and in a certain sense create the world through his own work, forgets that this is always based on God's prior and original gift of the things that are. Man thinks that he can make arbitrary use of the earth, subjecting it without restraint to his will, as though it did not have its own requisites and a prior God-given purpose, which man can indeed develop but must not betray. Instead of carrying out his role as a co-operator with God in the work of creation, man sets himself up in place of God and thus ends up provoking a rebellion on the part of nature, which is more tyrannized than governed by him.(76)

In all this, one notes first the poverty or narrowness of man's outlook, motivated as he is by a desire to possess things rather than to relate them to the truth, and lacking that disinterested, unselfish and aesthetic attitude that is born of wonder in the presence of being and of the beauty which enables one to see in visible things the message of the invisible God who created them. In this regard, humanity today must be conscious of its duties and obligations towards future generations.

38. In addition to the irrational destruction of the natural environment, we must also mention the more serious destruction of the human environment, something which is by no means receiving the attention it deserves. Although people are rightly worried — though much less than they should be — about preserving the natural habitats of the various animal species threatened with extinction, because they realize that each of these species makes its particular contribution to the balance of nature in general, too little effort is made to safeguard the moral conditions for an authentic "human ecology". Not only has God given the earth to man, who must use it with respect for the original good purpose for which it was given to him, but man too is God's gift to man. He must therefore respect the natural and moral structure with which he has been endowed. In this context, mention should be made of the serious problems of modern urbanization, of the need for urban planning which is concerned with how people are to live, and of the attention which should be given to a "social ecology" of work.

Man receives from God his essential dignity and with it the capacity to transcend every social order so as to move towards truth and goodness. But he is also conditioned by the social structure in which he lives, by the education he has received and by his environment. These elements can either help or hinder his living in accordance with the truth. The decisions which create a human environment can give rise to specific structures of sin which impede the full realization of those who are in any way oppressed by them. To destroy such structures and replace them with more authentic forms of living in community is a task which demands courage and patience.(77)

39. The first and fundamental structure for "human ecology" is the family, in which man receives his first formative ideas about truth and goodness, and learns what it means to love and to be loved, and thus what it actually means to be a person. Here we mean the family founded on marriage, in which the mutual gift of self by husband and wife creates an environment in which children can be born and develop their potentialities, become aware of their dignity and prepare to face their unique and individual destiny. But it often happens that people are discouraged from creating the proper conditions for human reproduction and are led to consider themselves and their lives as a series of sensations to be experienced rather than as a work to be accomplished. The result is a lack of freedom, which causes a person to reject a commitment to enter into a stable relationship with another person and to bring children into the world, or which leads people to consider children as one of the many "things" which an individual can have or not have, according to taste, and which compete with other possibilities.

It is necessary to go back to seeing the family as the sanctuary of life. The family is indeed sacred: it is the place in which life — the gift of God — can be properly welcomed and protected against the many attacks to which it is exposed, and can develop in accordance with what constitutes authentic human growth. In the face of the so-called culture of death, the family is the heart of the culture of life.

Human ingenuity seems to be directed more towards limiting, suppressing or destroying the sources of life — including recourse to abortion, which unfortunately is so widespread in the world — than towards defending and opening up the possibilities of life. The Encyclical Sollicitudo rei socialis denounced systematic anti-childbearing campaigns which, on the basis of a distorted view of the demographic problem and in a climate of "absolute lack of respect for the freedom of choice of the parties involved", often subject them "to intolerable pressures ... in order to force them to submit to this new form of oppression".(78) These policies are extending their field of action by the use of new techniques, to the point of poisoning the lives of millions of defenceless human beings, as if in a form of "chemical warfare".

These criticisms are directed not so much against an economic system as against an ethical and cultural system. The economy in fact is only one aspect and one dimension of the whole of human activity. If economic life is absolutized, if the production and consumption of goods become the centre of social life and society's only value, not subject to any other value, the reason is to be found not so much in the economic system itself as in

the fact that the entire socio-cultural system, by ignoring the ethical and religious dimension, has been weakened, and ends by limiting itself to the production of goods and services alone.(79)

All of this can be summed up by repeating once more that economic freedom is only one element of human freedom. When it becomes autonomous, when man is seen more as a producer or consumer of goods than as a subject who produces and consumes in order to live, then economic freedom loses its necessary relationship to the human person and ends up by alienating and oppressing him.(80)

40. It is the task of the State to provide for the defence and preservation of common goods such as the natural and human environments, which cannot be safeguarded simply by market forces. Just as in the time of primitive capitalism the State had the duty of defending the basic rights of workers, so now, with the new capitalism, the State and all of society have the duty of defending those collective goods which, among others, constitute the essential framework for the legitimate pursuit of personal goals on the part of each individual.

Here we find a new limit on the market: there are collective and qualitative needs which cannot be satisfied by market mechanisms. There are important human needs which escape its logic. There are goods which by their very nature cannot and must not be bought or sold. Certainly the mechanisms of the market offer secure advantages: they help to utilize resources better; they promote the exchange of products; above all they give central place to the person's desires and preferences, which, in a contract, meet the desires and preferences of another person. Nevertheless, these mechanisms carry the risk of an "idolatry" of the market, an idolatry which ignores the existence of goods which by their nature are not and cannot be mere commodities.

41. Marxism criticized capitalist bourgeois societies, blaming them for the commercialization and alienation of human existence. This rebuke is of course based on a mistaken and inadequate idea of alienation, derived solely from the sphere of relationships of production and ownership, that is, giving them a materialistic foundation and moreover denying the legitimacy and positive value of market relationships even in their own sphere. Marxism thus ends up by affirming that only in a collective society can alienation be eliminated. However, the historical experience of socialist countries has sadly demonstrated that collectivism does not do away with alienation but rather increases it, adding to it a lack of basic necessities and economic inefficiency.

The historical experience of the West, for its part, shows that even if the Marxist analysis and its foundation of alienation are false, nevertheless alienation — and the loss of the authentic meaning of life — is a reality in Western societies too. This happens in consumerism, when people are ensnared in a web of false and superficial gratifications rather than being helped to experience their personhood in an authentic and concrete way. Alienation is found also in work, when it is organized so as to ensure maximum returns and profits with no concern whether the worker, through his own labour, grows or diminishes as a person, either through increased sharing in a genuinely supportive community or through increased isolation in a maze of relationships marked by destructive competitiveness and estrangement, in which he is considered only a means and not an end.

The concept of alienation needs to be led back to the Christian vision of reality, by recognizing in alienation a reversal of means and ends. When man does not recognize in himself and in others the value and grandeur of the human person, he effectively deprives himself of the possibility of benefitting from his humanity and of entering into that relationship of solidarity and communion with others for which God created him. Indeed, it is through the free gift of self that man truly finds himself.(81) This gift is made possible by the human person's essential "capacity for transcendence". Man cannot give himself to a purely human plan for reality, to an abstract ideal or to a false utopia. As a person, he can give himself to another person or to other persons, and ultimately to God, who is the author of his being and who alone can fully accept his gift.(82) A man is alienated if he refuses to transcend himself and to live the experience of selfgiving and of the formation of an authentic human community oriented towards his final destiny, which is God. A society is alienated if its forms of social organization, production and consumption make it more difficult to offer this gift of self and to establish this solidarity between people.

Exploitation, at least in the forms analyzed and described by Karl Marx, has been overcome in Western society. Alienation, however, has not been overcome as it exists in various forms of exploitation, when people use one another, and when they seek an ever more refined satisfaction of their individual and secondary needs, while ignoring the principal and authentic needs which ought to regulate the manner of satisfying the other ones too.(83) A person who is concerned solely or primarily with possessing and enjoying, who is no longer able to control his instincts and passions, or to subordinate them by obedience to the truth, cannot be free: obedience to the truth about God and man is the first condition of freedom, making it possible for a person to order his needs and desires and to choose the means of satisfying them according to a correct scale of values, so that the ownership of things may become an occasion of growth for him. This growth can be hindered as a result of manipulation by the means of mass communication, which impose fashions and trends of opinion through

carefully orchestrated repetition, without it being possible to subject to critical scrutiny the premises on which these fashions and trends are based.

42. Returning now to the initial question: can it perhaps be said that, after the failure of Communism, capitalism is the victorious social system, and that capitalism should be the goal of the countries now making efforts to rebuild their economy and society? Is this the model which ought to be proposed to the countries of the Third World which are searching for the path to true economic and civil progress?

The answer is obviously complex. If by "capitalism" is meant an economic system which recognizes the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative, even though it would perhaps be more appropriate to speak of a "business economy", "market economy" or simply "free economy". But if by "capitalism" is meant a system in which freedom in the economic sector is not circumscribed within a strong juridical framework which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative.

The Marxist solution has failed, but the realities of marginalization and exploitation remain in the world, especially the Third World, as does the reality of human alienation, especially in the more advanced countries. Against these phenomena the Church strongly raises her voice. Vast multitudes are still living in conditions of great material and moral poverty. The collapse of the Communist system in so many countries certainly removes an obstacle to facing these problems in an appropriate and realistic way, but it is not enough to bring about their solution. Indeed, there is a risk that a radical capitalistic ideology could spread which refuses even to consider these problems, in the a priori belief that any attempt to solve them is doomed to failure, and which blindly entrusts their solution to the free development of market forces.

43. The Church has no models to present; models that are real and truly effective can only arise within the framework of different historical situations, through the efforts of all those who responsibly confront concrete problems in all their social, economic, political and cultural aspects, as these interact with one another.(84) For such a task the Church offers her social teaching as an indispensable and ideal orientation, a teaching which, as already mentioned, recognizes the positive value of the market and of enterprise, but which at the same time points out that these need to be oriented towards the common good. This teaching also recognizes the legitimacy of workers' efforts to obtain full respect for their dignity and to gain broader areas of participation in the life of industrial enterprises so that, while cooperating with others and under the direction of others, they can in a certain sense "work for themselves"(85) through the exercise of their intelligence and freedom.

The integral development of the human person through work does not impede but rather promotes the greater productivity and efficiency of work itself, even though it may weaken consolidated power structures. A business cannot be considered only as a "society of capital goods"; it is also a "society of persons" in which people participate in different ways and with specific responsibilities, whether they supply the necessary capital for the company's activities or take part in such activities through their labour. To achieve these goals there is still need for a broad associated workers' movement, directed towards the liberation and promotion of the whole person.

In the light of today's "new things", we have re-read the relationship between individual or private property and the universal destination of material wealth. Man fulfils himself by using his intelligence and freedom. In so doing he utilizes the things of this world as objects and instruments and makes them his own. The foundation of the right to private initiative and ownership is to be found in this activity. By means of his work man commits himself, not only for his own sake but also for others and with others. Each person collaborates in the work of others and for their good. Man works in order to provide for the needs of his family, his community, his nation, and ultimately all humanity.(86) Moreover, he collaborates in the work of his fellow employees, as well as in the work of suppliers and in the customers' use of goods, in a progressively expanding chain of solidarity.

Ownership of the means of production, whether in industry or agriculture, is just and legitimate if it serves useful work. It becomes illegitimate, however, when it is not utilized or when it serves to impede the work of others, in an effort to gain a profit which is not the result of the overall expansion of work and the wealth of society, but rather is the result of curbing them or of illicit exploitation, speculation or the breaking of solidarity among working people.(87) Ownership of this kind has no justification, and represents an abuse in the sight of God and man.

The obligation to earn one's bread by the sweat of one's brow also presumes the right to do so. A society in which this right is systematically denied, in which economic policies do not allow workers to reach satisfactory levels of employment, cannot be justified from an ethical point of view, nor can that society attain social

peace.(88) Just as the person fully realizes himself in the free gift of self, so too ownership morally justifies itself in the creation, at the proper time and in the proper way, of opportunities for work and human growth for all.

V. STATE AND CULTURE

44. Pope Leo XIII was aware of the need for a sound theory of the State in order to ensure the normal development of man's spiritual and temporal activities, both of which are indispensable.(89) For this reason, in one passage of Rerum novarum he presents the organization of society according to the three powers — legislative, executive and judicial — , something which at the time represented a novelty in Church teaching.(90) Such an ordering reflects a realistic vision of man's social nature, which calls for legislation capable of protecting the freedom of all. To that end, it is preferable that each power be balanced by other powers and by other spheres of responsibility which keep it within proper bounds. This is the principle of the "rule of law", in which the law is sovereign, and not the arbitrary will of individuals.

In modern times, this concept has been opposed by totalitarianism, which, in its Marxist-Leninist form, maintains that some people, by virtue of a deeper knowledge of the laws of the development of society, or through membership of a particular class or through contact with the deeper sources of the collective consciousness, are exempt from error and can therefore arrogate to themselves the exercise of absolute power. It must be added that totalitarianism arises out of a denial of truth in the objective sense. If there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people. Their self-interest as a class, group or nation would inevitably set them in opposition to one another. If one does not acknowledge transcendent truth, then the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others. People are then respected only to the extent that they can be exploited for selfish ends. Thus, the root of modern totalitarianism is to be found in the denial of the transcendent dignity of the human person who, as the visible image of the invisible God, is therefore by his very nature the subject of rights which no one may violate — no individual, group, class, nation or State. Not even the majority of a social body may violate these rights, by going against the minority, by isolating, oppressing, or exploiting it, or by attempting to annihilate it.(91)

45. The culture and praxis of totalitarianism also involve a rejection of the Church. The State or the party which claims to be able to lead history towards perfect goodness, and which sets itself above all values, cannot tolerate the affirmation of an objective criterion of good and evil beyond the will of those in power, since such a criterion, in given circumstances, could be used to judge their actions. This explains why totalitarianism attempts to destroy the Church, or at least to reduce her to submission, making her an instrument of its own ideological apparatus.(92)

Furthermore, the totalitarian State tends to absorb within itself the nation, society, the family, religious groups and individuals themselves. In defending her own freedom, the Church is also defending the human person, who must obey God rather than men (cf. Acts 5:29), as well as defending the family, the various social organizations and nations — all of which enjoy their own spheres of autonomy and sovereignty.

46. The Church values the democratic system inasmuch as it ensures the participation of citizens in making political choices, guarantees to the governed the possibility both of electing and holding accountable those who govern them, and of replacing them through peaceful means when appropriate.(93) Thus she cannot encourage the formation of narrow ruling groups which usurp the power of the State for individual interests or for ideological ends.

Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person. It requires that the necessary conditions be present for the advancement both of the individual through education and formation in true ideals, and of the "subjectivity" of society through the creation of structures of participation and shared responsibility. Nowadays there is a tendency to claim that agnosticism and sceptical relativism are the philosophy and the basic attitude which correspond to democratic forms of political life. Those who are convinced that they know the truth and firmly adhere to it are considered unreliable from a democratic point of view, since they do not accept that truth is determined by the majority, or that it is subject to variation according to different political trends. It must be observed in this regard that if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.

Nor does the Church close her eyes to the danger of fanaticism or fundamentalism among those who, in the name of an ideology which purports to be scientific or religious, claim the right to impose on others their own concept of what is true and good. Christian truth is not of this kind. Since it is not an ideology, the Christian faith does not presume to imprison changing socio-political realities in a rigid schema, and it recognizes that human

life is realized in history in conditions that are diverse and imperfect. Furthermore, in constantly reaffirming the transcendent dignity of the person, the Church's method is always that of respect for freedom.(94)

But freedom attains its full development only by accepting the truth. In a world without truth, freedom loses its foundation and man is exposed to the violence of passion and to manipulation, both open and hidden. The Christian upholds freedom and serves it, constantly offering to others the truth which he has known (cf. Jn 8:31-32), in accordance with the missionary nature of his vocation. While paying heed to every fragment of truth which he encounters in the life experience and in the culture of individuals and of nations, he will not fail to affirm in dialogue with others all that his faith and the correct use of reason have enabled him to understand.(95)

47. Following the collapse of Communist totalitarianism and of many other totalitarian and "national security" regimes, today we are witnessing a predominance, not without signs of opposition, of the democratic ideal, together with lively attention to and concern for human rights. But for this very reason it is necessary for peoples in the process of reforming their systems to give democracy an authentic and solid foundation through the explicit recognition of those rights.(96) Among the most important of these rights, mention must be made of the right to life, an integral part of which is the right of the child to develop in the mother's womb from the moment of conception; the right to live in a united family and in a moral environment conducive to the growth of the child's personality; the right to develop one's intelligence and freedom in seeking and knowing the truth; the right to share in the work which makes wise use of the earth's material resources, and to derive from that work the means to support oneself and one's dependents; and the right freely to establish a family, to have and to rear children through the responsible exercise of one's sexuality. In a certain sense, the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's transcendent dignity as a person.(97)

Even in countries with democratic forms of government, these rights are not always fully respected. Here we are referring not only to the scandal of abortion, but also to different aspects of a crisis within democracies themselves, which seem at times to have lost the ability to make decisions aimed at the common good. Certain demands which arise within society are sometimes not examined in accordance with criteria of justice and morality, but rather on the basis of the electoral or financial power of the groups promoting them. With time, such distortions of political conduct create distrust and apathy, with a subsequent decline in the political participation and civic spirit of the general population, which feels abused and disillusioned. As a result, there is a growing inability to situate particular interests within the framework of a coherent vision of the common good. The latter is not simply the sum total of particular interests; rather it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately, it demands a correct understanding of the dignity and the rights of the person.(98)

The Church respects the legitimate autonomy of the democratic order and is not entitled to express preferences for this or that institutional or constitutional solution. Her contribution to the political order is precisely her vision of the dignity of the person revealed in all its fulness in the mystery of the Incarnate Word.(99)

48. These general observations also apply to the role of the State in the economic sector. Economic activity, especially the activity of a market economy, cannot be conducted in an institutional, juridical or political vacuum. On the contrary, it presupposes sure guarantees of individual freedom and private property, as well as a stable currency and efficient public services. Hence the principle task of the State is to guarantee this security, so that those who work and produce can enjoy the fruits of their labours and thus feel encouraged to work efficiently and honestly. The absence of stability, together with the corruption of public officials and the spread of improper sources of growing rich and of easy profits deriving from illegal or purely speculative activities, constitutes one of the chief obstacles to development and to the economic order.

Another task of the State is that of overseeing and directing the exercise of human rights in the economic sector. However, primary responsibility in this area belongs not to the State but to individuals and to the various groups and associations which make up society. The State could not directly ensure the right to work for all its citizens unless it controlled every aspect of economic life and restricted the free initiative of individuals. This does not mean, however, that the State has no competence in this domain, as was claimed by those who argued against any rules in the economic sphere. Rather, the State has a duty to sustain business activities by creating conditions which will ensure job opportunities, by stimulating those activities where they are lacking or by supporting them in moments of crisis.

The State has the further right to intervene when particular monopolies create delays or obstacles to development. In addition to the tasks of harmonizing and guiding development, in exceptional circumstances the State can also exercise a substitute function, when social sectors or business systems are too weak or are just getting under way, and are not equal to the task at hand. Such supplementary interventions, which are

justified by urgent reasons touching the common good, must be as brief as possible, so as to avoid removing permanently from society and business systems the functions which are properly theirs, and so as to avoid enlarging excessively the sphere of State intervention to the detriment of both economic and civil freedom.

In recent years the range of such intervention has vastly expanded, to the point of creating a new type of State, the so-called "Welfare State". This has happened in some countries in order to respond better to many needs and demands, by remedying forms of poverty and deprivation unworthy of the human person. However, excesses and abuses, especially in recent years, have provoked very harsh criticisms of the Welfare State, dubbed the "Social Assistance State". Malfunctions and defects in the Social Assistance State are the result of an inadequate understanding of the tasks proper to the State. Here again the principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.(100)

By intervening directly and depriving society of its responsibility, the Social Assistance State leads to a loss of human energies and an inordinate increase of public agencies, which are dominated more by bureaucratic ways of thinking than by concern for serving their clients, and which are accompanied by an enormous increase in spending. In fact, it would appear that needs are best understood and satisfied by people who are closest to them and who act as neighbours to those in need. It should be added that certain kinds of demands often call for a response which is not simply material but which is capable of perceiving the deeper human need. One thinks of the condition of refugees, immigrants, the elderly, the sick, and all those in circumstances which call for assistance, such as drug abusers: all these people can be helped effectively only by those who offer them genuine fraternal support, in addition to the necessary care.

49. Faithful to the mission received from Christ her Founder, the Church has always been present and active among the needy, offering them material assistance in ways that neither humiliate nor reduce them to mere objects of assistance, but which help them to escape their precarious situation by promoting their dignity as persons. With heartfelt gratitude to God it must be pointed out that active charity has never ceased to be practised in the Church; indeed, today it is showing a manifold and gratifying increase. In this regard, special mention must be made of volunteer work, which the Church favours and promotes by urging everyone to cooperate in supporting and encouraging its undertakings.

In order to overcome today's widespread individualistic mentality, what is required is a concrete commitment to solidarity and charity, beginning in the family with the mutual support of husband and wife and the care which the different generations give to one another. In this sense the family too can be called a community of work and solidarity. It can happen, however, that when a family does decide to live up fully to its vocation, it finds itself without the necessary support from the State and without sufficient resources. It is urgent therefore to promote not only family policies, but also those social policies which have the family as their principle object, policies which assist the family by providing adequate resources and efficient means of support, both for bringing up children and for looking after the elderly, so as to avoid distancing the latter from the family unit and in order to strengthen relations between generations.(101)

Apart from the family, other intermediate communities exercise primary functions and give life to specific networks of solidarity. These develop as real communities of persons and strengthen the social fabric, preventing society from becoming an anonymous and impersonal mass, as unfortunately often happens today. It is in interrelationships on many levels that a person lives, and that society becomes more "personalized". The individual today is often suffocated between two poles represented by the State and the marketplace. At times it seems as though he exists only as a producer and consumer of goods, or as an object of State administration. People lose sight of the fact that life in society has neither the market nor the State as its final purpose, since life itself has a unique value which the State and the market must serve. Man remains above all a being who seeks the truth and strives to live in that truth, deepening his understanding of it through a dialogue which involves past and future generations.(102)

50. From this open search for truth, which is renewed in every generation, the culture of a nation derives its character. Indeed, the heritage of values which has been received and handed down is always challenged by the young. To challenge does not necessarily mean to destroy or reject a priori, but above all to put these values to the test in one's own life, and through this existential verification to make them more real, relevant and personal, distinguishing the valid elements in the tradition from false and erroneous ones, or from obsolete forms which can be usefully replaced by others more suited to the times.

In this context, it is appropriate to recall that evangelization too plays a role in the culture of the various nations, sustaining culture in its progress towards the truth, and assisting in the work of its purification and enrichment.(103) However, when a culture becomes inward looking, and tries to perpetuate obsolete ways of

living by rejecting any exchange or debate with regard to the truth about man, then it becomes sterile and is heading for decadence.

51. All human activity takes place within a culture and interacts with culture. For an adequate formation of a culture, the involvement of the whole man is required, whereby he exercises his creativity, intelligence, and knowledge of the world and of people. Furthermore, he displays his capacity for self-control, personal sacrifice, solidarity and readiness to promote the common good. Thus the first and most important task is accomplished within man's heart. The way in which he is involved in building his own future depends on the understanding he has of himself and of his own destiny. It is on this level that the Church's specific and decisive contribution to true culture is to be found. The Church promotes those aspects of human behaviour which favour a true culture of peace, as opposed to models in which the individual is lost in the crowd, in which the role of his initiative and freedom is neglected, and in which his greatness is posited in the arts of conflict and war. The Church renders this service to human society by preaching the truth about the creation of the world, which God has placed in human hands so that people may make it fruitful and more perfect through their work; and by preaching the truth about the Redemption, whereby the Son of God has saved mankind and at the same time has united all people, making them responsible for one another. Sacred Scripture continually speaks to us of an active commitment to our neighbour and demands of us a shared responsibility for all of humanity.

This duty is not limited to one's own family, nation or State, but extends progressively to all mankind, since no one can consider himself extraneous or indifferent to the lot of another member of the human family. No one can say that he is not responsible for the well-being of his brother or sister (cf. Gen 4:9; Lk 10:29-37; Mt 25:31-46). Attentive and pressing concern for one's neighbour in a moment of need — made easier today because of the new means of communication which have brought people closer together — is especially important with regard to in the search for ways to resolve international conflicts other than by war. It is not hard to see that the terrifying power of the means of destruction — to which even medium and small-sized countries have access — and the ever closer links between the peoples of the whole world make it very difficult or practically impossible to limit the consequences of a conflict.

52. Pope Benedict XV and his Successors clearly understood this danger.(104) I myself, on the occasion of the recent tragic war in the Persian Gulf, repeated the cry: "Never again war!". No, never again war, which destroys the lives of innocent people, teaches how to kill, throws into upheaval even the lives of those who do the killing and leaves behind a trail of resentment and hatred, thus making it all the more difficult to find a just solution of the very problems which provoked the war. Just as the time has finally come when in individual States a system of private vendetta and reprisal has given way to the rule of law, so too a similar step forward is now urgently needed in the international community. Furthermore, it must not be forgotten that at the root of war there are usually real and serious grievances: injustices suffered, legitimate aspirations frustrated, poverty, and the exploitation of multitudes of desperate people who see no real possibility of improving their lot by peaceful means.

For this reason, another name for peace is development.(105) Just as there is a collective responsibility for avoiding war, so too there is a collective responsibility for promoting development. Just as within individual societies it is possible and right to organize a solid economy which will direct the functioning of the market to the common good, so too there is a similar need for adequate interventions on the international level. For this to happen, a great effort must be made to enhance mutual understanding and knowledge, and to increase the sensitivity of consciences. This is the culture which is hoped for, one which fosters trust in the human potential of the poor, and consequently in their ability to improve their condition through work or to make a positive contribution to economic prosperity. But to accomplish this, the poor — be they individuals or nations — need to be provided with realistic opportunities. Creating such conditions calls for a concerted worldwide effort to promote development, an effort which also involves sacrificing the positions of income and of power enjoyed by the more developed economies.(106)

This may mean making important changes in established life-styles, in order to limit the waste of environmental and human resources, thus enabling every individual and all the peoples of the earth to have a sufficient share of those resources. In addition, the new material and spiritual resources must be utilized which are the result of the work and culture of peoples who today are on the margins of the international community, so as to obtain an overall human enrichment of the family of nations.

VI. MAN IS THE WAY OF THE CHURCH

53. Faced with the poverty of the working class, Pope Leo XIII wrote: "We approach this subject with confidence, and in the exercise of the rights which manifestly pertain to us ... By keeping silence we would seem to neglect the duty incumbent on us".(107) During the last hundred years the Church has repeatedly expressed her thinking, while closely following the continuing development of the social question. She has certainly not done this in order to recover former privileges or to impose her own vision. Her sole purpose has

been care and responsibility for man, who has been entrusted to her by Christ himself: for this man, whom, as the Second Vatican Council recalls, is the only creature on earth which God willed for its own sake, and for which God has his plan, that is, a share in eternal salvation. We are not dealing here with man in the "abstract", but with the real, "concrete", "historical" man. We are dealing with each individual, since each one is included in the mystery of Redemption, and through this mystery Christ has united himself with each one for ever.(108) It follows that the Church cannot abandon man, and that "this man is the primary route that the Church must travel in fulfilling her mission ... the way traced out by Christ himself, the way that leads invariably through the mystery of the Incarnation and the Redemption".(109)

This, and this alone, is the principle which inspires the Church's social doctrine. The Church has gradually developed that doctrine in a systematic way, above all in the century that has followed the date we are commemorating, precisely because the horizon of the Church's whole wealth of doctrine is man in his concrete reality as sinful and righteous.

54. Today, the Church's social doctrine focuses especially on man as he is involved in a complex network of relationships within modern societies. The human sciences and philosophy are helpful for interpreting man's central place within society and for enabling him to understand himself better as a "social being". However, man's true identity is only fully revealed to him through faith, and it is precisely from faith that the Church's social teaching begins. While drawing upon all the contributions made by the sciences and philosophy, her social teaching is aimed at helping man on the path of salvation.

The Encyclical Rerum novarum can be read as a valid contribution to socio-economic analysis at the end of the nineteenth century, but its specific value derives from the fact that it is a document of the Magisterium and is fully a part of the Church's evangelizing mission, together with many other documents of this nature. Thus the Church's social teaching is itself a valid instrument of evangelization. As such, it proclaims God and his mystery of salvation in Christ to every human being, and for that very reason reveals man to himself. In this light, and only in this light, does it concern itself with everything else: the human rights of the individual, and in particular of the "working class", the family and education, the duties of the State, the ordering of national and international society, economic life, culture, war and peace, and respect for life from the moment of conception until death.

55. The Church receives "the meaning of man" from Divine Revelation. "In order to know man, authentic man, man in his fullness, one must know God", said Pope Paul VI, and he went on to quote Saint Catherine of Siena, who, in prayer, expressed the same idea: "In your nature, O eternal Godhead, I shall know my own nature".(110)

Christian anthropology therefore is really a chapter of theology, and for this reason, the Church's social doctrine, by its concern for man and by its interest in him and in the way he conducts himself in the world, "belongs to the field ... of theology and particularly of moral theology".(111) The theological dimension is needed both for interpreting and solving present-day problems in human society. It is worth noting that this is true in contrast both to the "atheistic" solution, which deprives man of one of his basic dimensions, namely the spiritual one, and to permissive and consumerist solutions, which under various pretexts seek to convince man that he is free from every law and from God himself, thus imprisoning him within a selfishness which ultimately harms both him and others.

When the Church proclaims God's salvation to man, when she offers and communicates the life of God through the sacraments, when she gives direction to human life through the commandments of love of God and neighbour, she contributes to the enrichment of human dignity. But just as the Church can never abandon her religious and transcendent mission on behalf of man, so too she is aware that today her activity meets with particular difficulties and obstacles. That is why she devotes herself with ever new energies and methods to an evangelization which promotes the whole human being. Even on the eve of the third Millennium she continues to be "a sign and safeguard of the transcendence of the human person",(112) as indeed she has always sought to be from the beginning of her existence, walking together with man through history. The Encyclical Rerum novarum itself is a significant sign of this.

56. On the hundredth anniversary of that Encyclical I wish to thank all those who have devoted themselves to studying, expounding and making better known Christian social teaching. To this end, the cooperation of the local Churches is indispensable, and I would hope that the present anniversary will be a source of fresh enthusiasm for studying, spreading and applying that teaching in various contexts.

In particular, I wish this teaching to be made known and applied in the countries which, following the collapse of "Real Socialism", are experiencing a serious lack of direction in the work of rebuilding. The Western countries, in turn, run the risk of seeing this collapse as a one-sided victory of their own economic system, and thereby

failing to make necessary corrections in that system. Meanwhile, the countries of the Third World are experiencing more than ever the tragedy of underdevelopment, which is becoming more serious with each passing day.

After formulating principles and guidelines for the solution of the worker question, Pope Leo XIII made this incisive statement: "Everyone should put his hand to the work which falls to his share, and that at once and straightway, lest the evil which is already so great become through delay absolutely beyond remedy", and he added, "in regard to the Church, her cooperation will never be found lacking".(113)

57. As far as the Church is concerned, the social message of the Gospel must not be considered a theory, but above all else a basis and a motivation for action. Inspired by this message, some of the first Christians distributed their goods to the poor, bearing witness to the fact that, despite different social origins, it was possible for people to live together in peace and harmony. Through the power of the Gospel, down the centuries monks tilled the land, men and women Religious founded hospitals and shelters for the poor, Confraternities as well as individual men and women of all states of life devoted themselves to the needy and to those on the margins of society, convinced as they were that Christ's words "as you did it to one of the least of these my brethren, you did it to me" (Mt 25:40) were not intended to remain a pious wish, but were meant to become a concrete life commitment.

Today more than ever, the Church is aware that her social message will gain credibility more immediately from the witness of actions than as a result of its internal logic and consistency. This awareness is also a source of her preferential option for the poor, which is never exclusive or discriminatory towards other groups. This option is not limited to material poverty, since it is well known that there are many other forms of poverty, especially in modern society—not only economic but cultural and spiritual poverty as well. The Church's love for the poor, which is essential for her and a part of her constant tradition, impels her to give attention to a world in which poverty is threatening to assume massive proportions in spite of technological and economic progress. In the countries of the West, different forms of poverty are being experienced by groups which live on the margins of society, by the elderly and the sick, by the victims of consumerism, and even more immediately by so many refugees and migrants. In the developing countries, tragic crises loom on the horizon unless internationally coordinated measures are taken before it is too late.

58. Love for others, and in the first place love for the poor, in whom the Church sees Christ himself, is made concrete in the promotion of justice. Justice will never be fully attained unless people see in the poor person, who is asking for help in order to survive, not an annoyance or a burden, but an opportunity for showing kindness and a chance for greater enrichment. Only such an awareness can give the courage needed to face the risk and the change involved in every authentic attempt to come to the aid of another. It is not merely a matter of "giving from one's surplus", but of helping entire peoples which are presently excluded or marginalized to enter into the sphere of economic and human development. For this to happen, it is not enough to draw on the surplus goods which in fact our world abundantly produces; it requires above all a change of life-styles, of models of production and consumption, and of the established structures of power which today govern societies. Nor is it a matter of eliminating instruments of social organization which have proved useful, but rather of orienting them according to an adequate notion of the common good in relation to the whole human family.

Today we are facing the so-called "globalization" of the economy, a phenomenon which is not to be dismissed, since it can create unusual opportunities for greater prosperity. There is a growing feeling, however, that this increasing internationalization of the economy ought to be accompanied by effective international agencies which will oversee and direct the economy to the common good, something that an individual State, even if it were the most powerful on earth, would not be in a position to do. In order to achieve this result, it is necessary that there be increased coordination among the more powerful countries, and that in international agencies the interests of the whole human family be equally represented. It is also necessary that in evaluating the consequences of their decisions, these agencies always give sufficient consideration to peoples and countries which have little weight in the international market, but which are burdened by the most acute and desperate needs, and are thus more dependent on support for their development. Much remains to be done in this area.

59. Therefore, in order that the demands of justice may be met, and attempts to achieve this goal may succeed, what is needed is the gift of grace, a gift which comes from God. Grace, in cooperation with human freedom, constitutes that mysterious presence of God in history which is Providence.

The newness which is experienced in following Christ demands to be communicated to other people in their concrete difficulties, struggles, problems and challenges, so that these can then be illuminated and made more human in the light of faith. Faith not only helps people to find solutions; it makes even situations of suffering humanly bearable, so that in these situations people will not become lost or forget their dignity and vocation.

In addition, the Church's social teaching has an important interdisciplinary dimension. In order better to incarnate the one truth about man in different and constantly changing social, economic and political contexts, this teaching enters into dialogue with the various disciplines concerned with man. It assimilates what these disciplines have to contribute, and helps them to open themselves to a broader horizon, aimed at serving the individual person who is acknowledged and loved in the fullness of his or her vocation.

Parallel with the interdisciplinary aspect, mention should also be made of the practical and as it were experiential dimension of this teaching, which is to be found at the crossroads where Christian life and conscience come into contact with the real world. This teaching is seen in the efforts of individuals, families, people involved in cultural and social life, as well as politicians and statesmen to give it a concrete form and application in history.

60. In proclaiming the principles for a solution of the worker question, Pope Leo XIII wrote: "This most serious question demands the attention and the efforts of others".(114) He was convinced that the grave problems caused by industrial society could be solved only by cooperation between all forces. This affirmation has become a permanent element of the Church's social teaching, and also explains why Pope John XXIII addressed his Encyclical on peace to "all people of good will".

Pope Leo, however, acknowledged with sorrow that the ideologies of his time, especially Liberalism and Marxism, rejected such cooperation. Since then, many things have changed, especially in recent years. The world today is ever more aware that solving serious national and international problems is not just a matter of economic production or of juridical or social organization, but also calls for specific ethical and religious values, as well as changes of mentality, behaviour and structures. The Church feels a particular responsibility to offer this contribution and, as I have written in the Encyclical Sollicitudo rei socialis, there is a reasonable hope that the many people who profess no religion will also contribute to providing the social question with the necessary ethical foundation.(115)

In that same Encyclical I also addressed an appeal to the Christian Churches and to all the great world religions, inviting them to offer the unanimous witness of our common convictions regarding the dignity of man, created by God.(116) In fact I am convinced that the various religions, now and in the future, will have a preeminent role in preserving peace and in building a society worthy of man.

Indeed, openness to dialogue and to cooperation is required of all people of good will, and in particular of individuals and groups with specific responsibilities in the areas of politics, economics and social life, at both the national and international levels.

61. At the beginning of industrialized society, it was "a yoke little better than that of slavery itself" which led my Predecessor to speak out in defence of man. Over the past hundred years the Church has remained faithful to this duty. Indeed, she intervened in the turbulent period of class struggle after the First World War in order to defend man from economic exploitation and from the tyranny of the totalitarian systems. After the Second World War, she put the dignity of the person at the centre of her social messages, insisting that material goods were meant for all, and that the social order ought to be free of oppression and based on a spirit of cooperation and solidarity. The Church has constantly repeated that the person and society need not only material goods but spiritual and religious values as well. Furthermore, as she has become more aware of the fact that too many people live, not in the prosperity of the Western world, but in the poverty of the developing countries amid conditions which are still "a yoke little better than that of slavery itself", she has felt and continues to feel obliged to denounce this fact with absolute clarity and frankness, although she knows that her call will not always win favour with everyone.

One hundred years after the publication of Rerum novarum, the Church finds herself still facing "new things" and new challenges. The centenary celebration should therefore confirm the commitment of all people of good will and of believers in particular.

62. The present Encyclical has looked at the past, but above all it is directed to the future. Like Rerum novarum, it comes almost at the threshold of a new century, and its intention, with God's help, is to prepare for that moment.

In every age the true and perennial "newness of things" comes from the infinite power of God, who says: "Behold, I make all things new" (Rev 21:5). These words refer to the fulfilment of history, when Christ "delivers the Kingdom to God the Father ... that God may be everything to everyone" (1 Cor 15:24,28). But the Christian well knows that the newness which we await in its fulness at the Lord's second coming has been present since the creation of the world, and in a special way since the time when God became man in Jesus Christ and brought about a "new creation" with him and through him (2 Cor 5:17; Gal 6:15).

In concluding this Encyclical I again give thanks to Almighty God, who has granted his Church the light and strength to accompany humanity on its earthly journey towards its eternal destiny. In the third Millennium too, the Church will be faithful in making man's way her own, knowing that she does not walk alone, but with Christ her Lord. It is Christ who made man's way his own, and who guides him, even when he is unaware of it.

Mary, the Mother of the Redeemer, constantly remained beside Christ in his journey towards the human family and in its midst, and she goes before the Church on the pilgrimage of faith. May her maternal intercession accompany humanity towards the next Millennium, in fidelity to him who "is the same yesterday and today and for ever" (cf. Heb 13:8), Jesus Christ our Lord, in whose name I cordially impart my blessing to all.

Given in Rome, at Saint Peter's, on 1 May, the Memorial of Saint Joseph the Worker, in the year 1991, the thirteenth of my Pontificate.
JOHN PAUL II

Notes

1. Leo XIII, Encyclical Letter Rerum Novarum (May 15, 1891): Leonis XIII P.M. Acta, XI, Romae 1892, 97-144.
2. Pius XI, Encyclical Letter QuadragesimoAnno (May 15,1931): AAS 23 (1931),177-228; Pius XII, Radio Message of June 1, 1941: AAS 33 (1941), 195-205; John XXIII, Encyclical Letter Mater et Magistra (May 15, 1961): AAS 53 (1961), 401-464; Paul VI, Apostolic Epistle Octogesima Adveniens (May 14, 1971): AAS 63 (1971), 401-441.
3. Cf. Pius XI, Encyclical Letter QuadragesimoAnno, III, loc. cit., 228. 4. Encyclical Letter Laborem Exercens (September 14, 1981): AAS 73 (1981), 577-647; Encyclical Letter Sollicitudo Rei Socialis (December 30, 1987): AAS 80 (1988), 513-586.
5. Cf. St. Irenaeus, Adversus Haereses, I, 10, 1; III, 4, 1: PG 7, 549f.; 855f.; S. Ch. 264, 154f.; 211, 44-46.
6. Leo XIII, Encyclical Letter Rerum Novarum: loc. cit., 132.
7. Cf., e.g., Leo XIII, Encyclical Epistle Arcanum Divinae Sapientiae (February 10,1880): Leonis XIII P.M. Acta, II, Romae 1882, 10-40; Encyclical Epistle Diuturnum Illud (June 29, 1881): Leonis XIII P.M. Acta, II, Romae 1882, 269-287; Encyclical Letter Libertas Praestantissimum (June 20, 1888): Leonis XIII P.M. Acta, VIII, Romae 1889, 212-246; Encyclical Epistle Graves de communi (January 18, 1901): Leonis XIII P.M. Acta, XXI, Romae 1902, 320.
8. Encyclical Letter Rerum Novarum: loc. cit., 97.
9. Ibid.: loc. cit., 98.
10. Cf. ibid.: loc. cit., 109f.
11. Cf. ibid.: description of working conditions; 44: anti-Christian workers' associations: loc. cit., 110f.; 136f.
12. Ibid.: loc. cit., 130; cf. also 114f.
13. Ibid.: loc. cit., 130.
14. Ibid.: loc. cit., 123.
15. Cf. Encyclical Letter Laborem Exercens, 1, 2, 6: loc. cit., 578-583; 589-592.
16. Cf. Encyclical Letter Rerum Novarum: loc. cit., 99-107.
17. Cf. ibid.: loc. cit., 102f.
18. Cf. ibid.: loc. cit., 101-104.
19. Cf. ibid.: loc. cit., 134f.; 137f.
20. Ibid.: loc. cit., 135.
21. Cf. Ibid.: loc. cit., 128-129.
22. Ibid.: loc. cit., 129.
23. Ibid.: loc. cit., 129.
24. Ibid.: loc. cit., 130f.
25. Ibid.: loc. cit., 131.
26. Cf. Universal Declaration of Human Rights.
27. Cf. Encyclical Letter Rerum Novarum: loc. cit., 121-123.
28. Cf. ibid.: loc. cit., 127.
29. Ibid.: loc. cit., 126f.
30. Cf Universal Declaration of Human Rights; Declaration on the elimination of every form of intolerance and discrimination based on religion or convictions.
31. Second Vatican Ecumenical Council, Declaration on Religious Freedom Dignitatis Humanae; John Paul II, Letter to Heads of State (September 1, 1980): AAS 72 (1980), 1252-1260; Message for the 1988 World Day of Peace (January 1, 1988): AAS 80 (1988), 278-286.
32. Cf. Encyclical Letter Rerum Novarum: 42: loc. cit., 99-105; 130f.; 135.
33. Ibid.: loc. cit., 125.
34. Cf. Encyclical Letter Sollicitudo Rei Socialis, 38-40: loc. cit., 564-569; cf. also John XXIII, Encyclical Letter Mater et Magistra, loc. cit., 407.

35. Cf. Leo XIII, Encyclical Letter Rerum Novarum: loc. cit., 114-116; Pius XI, Encyclical Letter Quadragesimo Anno, III, loc. cit., 208; Paul VI, Homily for the Closing of the Holy Year (December 25,1975): AAS 68 (1976), 145; Message for the 1977 World Day of Peace (January 1, 1977): AAS 68 (1976), 709.
36. Encyclical Letter Sollicitudo Rei Socialis, 42: loc. cit., 572.
37. Cf. Encyclical Letter RerumNovarum: loc. cit., 101f.; 104f.; 130f.; 136.
38. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 24.
39. Encyclical Letter Rerum Novarum: loc. cit., 99.
40. Cf. Encyclical Letter Sollicitudo Rei Socialis, 15, 28: loc. cit., 530; 548ff.
41. Cf. Encyclical Letter Laborem Exercens, 11-15: loc. cit., 602-618.
42. Pius XI, Encyclical Letter Quadragesimo Anno, III, 113: loc. cit., 213.
43. Cf. Encyclical Letter Rerum Novarum: loc. cit., 121-125.
44. Cf. Encyclical Letter Laborem Exercens, 20: loc. cit., 629-632; Discourse to the International Labor Organization (I.L.O.) in Geneva (June 15, 1982): Insegnamenti V/2 (1982), 2250-2266; Paul VI, Discourse to the same Organization (June 10, 1969): AAS 61 (1969), 491-502.
45. Cf. Encyclical Letter Laborem Exercens, 8: loc. cit., 594-598.
46. Cf. Pius XI, Encyclical Letter Quadragesimo Anno, 14: loc. cit., 178-181.
47. Cf. Encyclical Epistle Arcanum Divinae Sapientiae (February 10, 1880): Leonis XIII P.M. Acta, II, Romae 1882, 10-40; Encyclical Epistle Diuturnum Illud (June 29, 1881): Leonis XIII P.M. Acta, II, Romae 1882, 269287; Encyclical Epistle Immortale Dei (November 1, 1885): Leonis XIII P.M. Acta, V, Romae 1886, 118-150; Encyclical Letter Sapientiae Christianae (January 10, 1890): Leonis XIII P.M. Acta, X, Romae 1891,10-41; Encyclical Epistle Quod Apostolici Muneris (December 28,1878): Leonis XIII P.M. Acta, I, Romae 1881, 170-183; Encyclical Letter Libertas Praestantissimum (June 20, 1888): Leonis XIII P.M. Acta, VIII, Romae 1889, 212-246.
48. Cf. Leo XIII, Encyclical Letter Libertas Praestantissimum, 10: loc. cit., 224-226.
49. Cf. Message for the 1980 World Day of Peace: AAS 71 (1979),1572-1580.
50. Cf. Encyclical Letter Sollicitudo Rei Socialis, 20: loc. cit., 536f.
51. Cf. John XXIII, Encyclical Letter Pacem in Terris (April 11, 1963), III: AAS 55 (1963), 286-289.
52. Cf. Universal Declaration of Human Rights, issued in 1948; John XXIII, Encyclical Letter Pacem in Terris, IV: loc. cit., 291-296; "Final Act" of the Conference on Cooperation and Security in Europe, Helsinki, 1975.
53. Cf. Paul VI, Encyclical Letter Populorum Progressio (March 26, 1967), 61-65: AAS 59 (1967), 287-289.
54. Cf. Message for the 1980 World Day of Peace: loc. cit., 1572-1580.
55. Cf. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 36; 39.
56. Cf. Apostolic Exhortation Christifideles Laici (December 30, 1988), 32-44: AAS 81 (1989), 431-481.
57. Cf. Encyclical Letter Laborem Exercens, 20: loc. cit., 629-632.
58. Cf Congregation for the Doctrine of the Faith, Instruction on Christian Freedom and Liberation Libertatis Conscientia (March 22, 1986): AAS 79 (1987), 554-599.
59. Cf. Discourse at the Headquarters of the E.C.W.A. on the occasion of the Tenth Anniversary of the "Appeal for the Sahel" (Ouagadougou, Burkina Faso, January 29, 1990): AAS 82 (1990), 816-821.
60. Cf. John XXIII, Encyclical Letter Pacem in Terris, III: loc. cit., 286-288.
61. Cf. Encyclical Letter Sollicitudo Rei Socialis, 27-28: loc. cit., 547-550; Paul VI, Encyclical Letter Populorum Progressio, 43-44: loc. cit., 278f.
62. Cf. Encyclical Letter Sollicitudo Rei Socialis, 29-31: loc. cit., 550-556.
63. Cf. Helsinki Final Act and Vienna Accord; Leo XIII, Encyclical Letter Libertas Praestantissimum, 5: loc. cit., 215-217.
64. Cf. Encyclical Letter Redemptoris Missio (December 7, 1990), 7: L'Osservatore Romano, January 23, 1991.
65. Cf. Encyclical Letter Rerum Novarum: loc. cit., 99-107; 131-133.
66.Ibid., 111-113f.
67. Cf. Pius XI, Encyclical Letter Quadragesimo Anno, II; loc. cit., 191; Pius XII, Radio Message on June 1,1941: loc. cit., 199; John XXIII, Encyclical Letter Mater et Magistra: loc. cit., 428-429; Paul VI, Encyclical Letter Populorum Progressio, 22-24: loc. cit., 268f.
68. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 69; 71.
69. Cf. Discourse to Latin American Bishops at Puebla (January 28, 1979), III, 4: AAS 71 (1979), 199-201; Encyclical Letter Laborem Exercens, 14: loc. cit., 612-616; Encyclical Letter Sollicitudo Rei Socialis, 42: loc. cit., 572-574.
70. Cf. Encyclical Letter Sollicitudo Rei Socialis, 15: loc. cit., 528-531.
71. Cf. Encyclical Letter Laborem Exercens, 21: loc. cit., 632-634.
72. Cf. Paul VI, Encyclical Letter Populorum Progressio, 33-42: loc. cit., 273-278.
73. Cf. Encyclical Letter Laborem Exercens, 7: loc. cit., 592-594.
74. Cf. ibid., 8: loc. cit., 594-598.

75. Cf. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 35; Paul VI, Encyclical Letter Populorum Progressio, 19: loc. cit., 266f.
76. Cf. Encyclical Letter Sollicitudo Rei Socialis, 34: loc. cit., 559f.; Message for the 1990 World Day of Peace: AAS 82 (1990), 147-156.
77. Cf. Apostolic Exhortation Reconciliatio et Poenitentia (December 2,1984),16:AAS 77 (1985), 213-217; Pius XI, Encyclical Letter Quadragesimo Anno, III: loc. cit., 219.
78. Encyclical Letter Sollicitudo Rei Socialis, 25: loc. cit., 544.
79. Cf. ibid., 34: loc. cit., 559f.
80. Cf. Encyclical Letter Redemptor Hominis (March 4,1979),15: AAS 71 (1979), 286-289.
81. Cf. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 24.
82. Cf. ibid., 41.
83. Cf. ibid., 26.
84. Cf. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 36; Paul VI, Apostolic Epistle Octogesima Adveniens, 2-5: loc. cit., 402-405.
85. Cf. Encyclical Letter Laborem Exercens, 15: loc. cit., 616-618.
86. Cf. ibid., 10: loc. cit., 600-602.
87. Ibid., 14: loc. cit., 612-616.
88. Cf. ibid., 18: loc. cit., 622-625.
89. Cf. Encyclical Letter Rerum Novarum: loc. cit., 126-128.
90. Ibid., 121 f.
91. Cf. Leo XIII, Encyclical Letter Libertas Praestantissimum: loc. cit., 224-226.
92. Cf. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 76.
93. Cf. ibid., 29; Pius XII, Christmas Radio Message on December 24, 1944: AAS 37 (1945), 10-20.
94. Cf. Second Vatican Ecumenical Council, Declaration on Religious Freedom Dignitatis Humanae.
95. Cf. Encyclical Letter Redemptoris Missio, I I : L'OsservatoreRomano, January 23, 1991.
96. Cf. Encyclical Letter Redemptor Hominis, 17: loc. cit., 270-272.
97. Cf. Message for the 1988 World Day of Peace: loc. cit., 1572-1580; Message for the 1991 World Day of Peace: L'OsservatoreRomano, December 19, 1990; Second Vatican Ecumenical Council, Declaration on Religious Freedom Dignitatis Humanae, 1-2.
98. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 26.
99. Cf. ibid., 22.
100. Pius XI, Encyclical Letter Quadragesimo Anno, I : loc. cit., 184-186.
101. Cf. Apostolic Exhortation Familiaris Consortio (November 22, 1981), 45: AAS 74 (1982), 136f.
102. Cf. Discourse to UNESCO (June 2, 1980): AAS 72 (1980), 735-752.
103. Cf. Encyclical Letter Redemptoris Missio, 39; 52 L'Osservatore Romano, January 23, 1991.
104. Cf. Benedict XV, Exhortation Ubi Primum (September 8, 1914): AAS 6 (1914), 501f.; Pius XI, Radio Message to the Catholic Faithful and to the entire world (September 29, 1938): AAS 30 (1938), 309f.; Pius XII, Radio Message to the entire world (August 24, 1939): AAS 31 (1939), 333-335; John XXIII, Encyclical Letter Pacem in Terris, III: loc. cit., 285-289; Paul VI, Discourse at the United Nations (October 4, 1965): AAS 57 (1965), 877-885.
105. Cf. Paul VI, Encyclical Letter Populorum Progressio, 76-77: loc. cit., 294f.
106. Cf. Apostolic Exhortation Familiaris Consortio, 48: loc. cit., 139f.
107. Encyclical Letter Rerum Novarum: loc. cit., 107.
108. Cf. Encyclical Letter Redemptor Hominis, 13: loc. cit., 283.
109. Ibid., 14: loc. cit., 284f.
110. Paul VI, Homily at the Final Public Session of the Second Vatican Ecumenical Council (December 7, 1965): AAS 58 (1966), 58.
111. Encyclical Letter Sollicitudo Rei Socialis, 41: loc. cit., 571.
112. Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the World of Today Gaudium et Spes, 76; cf. John Paul II, Encyclical Letter Redemptor Hominis, 13: loc. cit., 283.
113. Encyclical Letter Rerum Novarum: loc. cit., 143.
114. Ibid., 107.
115. Cf. Encyclical Letter Sollicitudo Rei Socialis, 38: loc. cit., 564566.
116. Ibid., 47: loc. cit., 582.

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Rethinking Redistribution: Tax Policy in an Era of Rising Inequality

*1745 THE POLITICAL PSYCHOLOGY OF REDISTRIBUTION

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Welfare economics suggests that the tax system is the appropriate place to effect redistribution from those with more command over material resources to those with less: in short, to serve "equity." Society should set other mechanisms of private and public law, including public finance systems, to maximize welfare: in short, to serve "efficiency." The populace, however, may not always accept first-best policies. Perspectives from cognitive psychology suggest that ordinary citizens react to the purely formal means by which social policies are implemented, and thus may reject welfare-improving reforms.

This Article sets out the general background of the problem. We present the results of original experiments that confirm that the means of implementing redistribution affect its acceptability. Effects range from such seemingly trivial matters as whether tax burdens are discussed in dollars or in percentage terms, to more substantial matters such as how many different individual taxes there are, whether the burden of taxes is transparent, and the nature and level of the public provision of goods and services. The findings suggest a deep and problematic tension between the goals of equity and efficiency in public finance.

***1746** Introduction

How should society redistribute wealth? In particular, what role should tax systems play in redistribution?

The two welfare theorems of neoclassical economics suggest a certain, definitive answer. The first theorem holds, in essence, that free markets reach welfare maximizing or, equivalently, pareto optimal allocations of resources. [FN1] This means that, left to their own devices in normally functioning markets, people will trade and produce until wealth--the social "pie," as it is often called--is as large as possible. The second theorem holds that a suitable distribution or redistribution of entitlements can lead to different positions along the social optimum or, equivalently, paretian frontier. [FN2] This means that once society has the larger pie, it can be divided differently. Practitioners of law and economics, most extensively Louis Kaplow and Steven Shavell, have used these two theorems to develop a comprehensive agenda for law reform. [FN3] Optimal "welfare economics" legal policy has two parts. One, laws should be arranged so as to maximize social welfare, that is, to serve "efficiency." Two, the tax system should be used to redistribute social resources so as to maximize the sum of individual well-being, that is, ***1747** to serve "equity." [FN4] The two-part approach satisfies a paretian constraint: The greater social pie facilitated by the first step can be used in the second step's redistribution to assure that no one is harmed by any reform.

Kaplow, Shavell, and other scholars toiling in this vein of welfare economics have devoted their efforts principally to the field of private law-- matters of property, contracts, and torts. Our research project follows from the insight that the analysis can apply to public finance as well. Public finance concerns the economic actions of the government, most importantly, its tax and spending functions. [FN5] The two-part approach to welfare economics suggests that government fiscal actions should be limited to allocative measures that wealth-maximize, on the one hand, and to redistributive measures that move around social wealth, [FN6] on the other. The larger social pie enabled by government intervention (or nonintervention) can be redistributed through the tax system to meet the paretian constraint.

More specifically, allocatively oriented government fiscal interventions ought to be limited to correcting for market failures, where, by definition, the free market has failed to reach a pareto optimum allocation of resources. Within the spirit of neoclassical economics, government fiscal actions can only increase welfare if there is such a market failure, and only then if the government action is well designed. [FN7] Examples include public goods, such ***1748** as national defense or clean air; [FN8] informational asymmetries leading to sub-optimal private ordering, such as in social insurance programs; [FN9] and excess market power, as in the case of monopolies. In such cases, government intervention can increase net social welfare. Using the second welfare theorem and prong of the Kaplow-Shavell analysis, equity or fairness can then be served by redistributing via the tax system from the greater social pie.

This optimal welfare economics approach depends on a simple, stark contrast between the redistributive and allocative functions of government, with efficiency norms serving as the sole guide to the allocative functions. Whatever one chooses as an optimal distribution of end-state resources to serve the equity goal--whatever the social welfare function is--collective well being can only improve by following the two prongs.

So it is in theory. But we do not live in theory.

In this Article, we question whether optimal welfare-enhancing public finance systems can obtain in the real world, as currently constituted. There are many impediments standing between theory and practice today. [FN10] We are concerned with a particular set of problems, ones that reside in the minds of ordinary citizens. Cognitive psychology or "behavioral economics" in the tradition of Daniel Kahneman and Amos Tversky has long demonstrated that people do not always perceive economic and other matters in a logically consistent fashion. [FN11] We all suffer from many "heuristics and biases" in our perceptions. Everybody likes her glass half full; no one likes it half empty. Our research project lies at the intersection of behavioral economics and public finance. We ask whether misperceptions characterize

***1749** the ordinary citizen's understanding of public finance systems. What might these misconceptions be? Will citizens accept pareto-improving reforms, however alien they appear? Or does the form of public finance systems matter, such that citizens will choose more or less efficiency, and/or more or less redistribution, depending on the purely formal properties of tax and spending systems--on how they are worded, or presented to them? [FN12] Absent citizen education or other institutional reforms, can we trust the system to get the level of redistribution down "right" ? [FN13]

The answers to these questions lie at the heart of what we mean by the "political psychology of redistribution." We argue that public finance systems have a psychological dimension, such that ordinary citizens will react inconsistently based on a system's appearance. Sometimes the manipulation may seem trivial. For example, under the metric effect discussed below, ordinary citizens prefer more redistribution when tax systems are discussed in percentage rather than in dollar terms. Other cases are more troubling. For example, widespread cognitive psychological tendencies can lead people to prefer hidden over transparent taxes, even if the former are less efficient. In such cases, the first prong of the optimal welfare economics approach cannot be followed because a wealth-enhancing tax option is not chosen. Real wealth is left on the table, an homage to our cognitive illusions. In other cases, people will accept more redistribution with the public than with the private provision of goods and services, even if public provision is not efficient. In these cases, the second prong of the welfarist approach cannot be followed independently of the first prong; equity is pitted against efficiency. In a wide range of cases, the extent of governmental redistribution will depend on the form of public finance systems, contrary to the stark logic of the optimal welfare economics approach. [FN14] Reformers, just like successful politicians, must therefore pay attention to the polity's psychological tendencies.

***1750** These possibilities raise troubling issues for normative welfare economics in the public sphere. In this Article, drawing largely on our original experiments, we set out the problems. We also note some paths towards a better future.

I. Method

To both illustrate and substantiate our main concerns, we conducted a series of experiments over several years, testing how ordinary subjects perceive matters of tax and public finance. The results we discuss here cluster around a common theme: The nature and extent of redistribution that people support depends on the purely formal properties of public finance. If we were to measure the degree of inequality in society by some constant, objective measure, such as Gini coefficients, [FN15] this measure would vary with such factors as the size of the public sector, what goods and services it provides, and how many tax systems are in place. This pattern is in contrast to strict logical necessity, and counter to the spirit of the two-part approach to welfare enhancing reforms: How much inequality or redistribution people tolerate should not depend on the allocative matters of what the government does or does not do, or how it performs its functions. Contrary to standard rational choice social theory, however, we find that individual preferences over end-state distributions of wealth are not invariant to the purely formal properties of the relevant choice sets.

There are three connected elements supporting our general conclusions: prior theory, our experiments, and real-world observations. In sum, prior theory generated hypotheses, our experiments for the most part confirmed them, and a look to reality bore out their significance.

A. Theory

We draw on two bodies of theory: behavioral economics and public finance in a welfare economics tradition. The key finding of behavioral economics ***1751** is that ordinary people are inconsistent in their judgment and decisionmaking. [FN16] They react to the form of a choice or decision problem, even where the substance is held constant. Preferring

a half-full to a half-empty glass is a canonical example of a framing effect. Other common traits are loss aversion, the endowment effect or status quo bias, and overgeneralized heuristics. [FN17] In each instance, people reach inconsistent decisions, violating the simplest axioms of the rational choice model, such as preference invariance and transitivity. [FN18] A simple application of loss aversion, for example, is penalty aversion. People will act to avoid penalties but not necessarily to obtain bonuses in rhetorically different presentations of the same underlying facts. As Richard Thaler noted in a real-world observation, when a gas station charged a "penalty" for using credit cards ($2.00 versus $1.90, say), people paid cash; when a gas station across the street gave a "bonus" for using cash ($1.90 versus $2.00), people used credit cards. [FN19]

Many findings in the heuristics and biases literature have a common element, which we (and others) call an isolation effect (also called a focusing effect). [FN20] People tend to isolate or focus on a narrow choice problem before them, ignoring relevant information and otherwise failing to integrate their logically connected judgments and decisions into a coherent whole. An early example of this in the literature is Thaler's "mental accounts." [FN21] Thaler found that many, perhaps most people treat the source of funds as relevant to their use, even though money is fungible. People who are normally frugal and even risk averse would spend lottery proceeds on luxury items or ***1752** binge purchases. In doing so, they viewed their windfall gains in isolation and failed to integrate their newfound wealth with all their liabilities and assets.

The isolation effect is central to our findings on the political psychology of redistribution. We found that subjects are hard pressed to integrate multiple tax systems, in the disaggregation bias discussed below, or to integrate the tax and spending dimensions of public finance to achieve constant levels of redistribution, in the privatization effect that we also discuss. The seemingly harmless tendency to separate out matters in one's mind can lead to disturbing anomalies in one's acceptance of global public finance systems.

Public finance in a welfare economics tradition provides the second prong of our approach. It is important to note as a threshold matter that taxes, however much hidden, have real effects, and that these effects have implications for actual welfare. Taxes can be more or less efficient, creating more or less "deadweight loss," and the gains from efficiency generate real resources to be used. Traditional public finance can demonstrate the costs of the choices that behavioral biases generate. We draw on an understanding of current public finance systems in advanced democracies, such as the United States, and on basic economics principles, such as incidence and efficiency analysis, in our experimental designs. [FN22] The relevant ideas are set out below as they relate to individual experiments.

B. Experiments

We followed a similar procedure in all our experiments. About 50-200 subjects, depending on the study, completed a questionnaire on the World Wide Web. Subjects were paid three or four dollars each. Subjects came to the studies through postings on various web sites or Usernet news groups, or through prior participation in other studies. Subjects were paid by check (after some minimum amount was accumulated) after they registered their address and (for U.S. residents) their Social Security number. Subjects identified themselves only with e-mail addresses after they registered, and these e-mail addresses were stored separately from the data to assure privacy and anonymity.

Individual studies or experiments were programmed in Java-Script so that one case was presented on one web page or screen, and subjects were required to answer all questions appropriately before proceeding to the next ***1753** screen. After a brief introductory description and explanatory page, including pertinent background, subjects saw between 24 and 32 screens asking for their responses. Although our experiments typically considered complex issues in a realistic manner, the screens that the subjects saw presented the material in clear, simple formats. We recorded the time spent on

each response, and we usually eliminated subjects who went noticeably faster than everyone else (outliers, typically 2-3 percent). Many of our experiments had internal checks to assure that subjects understood the questions, and answered in the appropriate range. We found that an overwhelming percentage of subjects acted reasonably within objective parameters.

Consistent with standard methods in cognitive psychology, our experimental designs were all within-subject. [FN23] That is, we tested the same people and asked the same question in different ways, using different frames or formal manipulations to change how the facts were presented. We wanted to see if subjects would react differently--whether they like their glasses half full, but dislike them half empty. In almost all cases, our null hypothesis was simply that subjects should be consistent--and we found repeatedly that they were not, with strong statistical significance. [FN24] Problems such as selection bias, common in across- or between-subject analysis--the standard method of public opinion research--were not of much concern to us. Our interest was in the existence and nature of inconsistencies in individual judgment and decisionmaking. In most cases, we found inconsistencies heavily tilted in one direction and consistent with the predictions of prior theory: Subjects preferred policies described as "bonuses" to the self-same policies described as "penalties," preferred hidden to transparent taxes, tended to be affected by starting points, and failed to integrate their judgments across relevant fields of data. Because the evidence converged with well established theory, we can assert with some confidence that these biases are likely widespread in the population--all the more so because they predict features actually evident in the U.S. tax system, as discussed below. As it happens, our subject pool was roughly representative of the adult U.S. population in terms of income, age, and education, but not in terms of sex, because (for unknown reasons) women predominated in our respondent pool. [FN25]

***1754** Within-subject inconsistency is especially germane to the subject of redistribution. Unlike the case with the first prong of the welfare-economics analysis, where some policies can be shown to increase or decrease the social pie in an objectively observable manner, there is no universally agreed on benchmark for the "right," "just," or "fair" degree of redistribution. Importantly, we did not impose a benchmark for "appropriate" redistribution in our experiments. Rather, we intended to show that the same people, asked about what level of redistribution they supported in differently framed but substantively equivalent choice problems, reached inconsistent results. If society were to base the appropriate level of redistribution on some aggregation of individual preferences (as in common voting procedures), these preferences themselves would be affected by the choice setting.

In terms of our experiments, the various choice settings include how large the government sector happened to be, what goods and services it provided, and how many tax systems there were. Generally, we found that the average subject favored some redistribution--some taking from the rich to give to the poor. [FN26] A common finding of the polling literature is that subjects fall into three roughly equal pools: those favoring no progression (that is, flat taxes), those favoring moderate progression, and those favoring steep progression, with the moderate middle holding the swing vote. [FN27] But, again, calculating the "correct" or even the "desired" level of redistribution is not our concern. Rather we show that what even counts as "moderate" redistribution depends on the form of public finance systems; subjects' preferences for progressivity or redistribution change with the setting.

C. Reality

The final aspect of our analysis is to show that our experimental results can explain real-world anomalies such as why hidden taxes persist, why payroll taxes keep rising, and why the income tax is salient. Our experiments were designed to reflect such anomalies, after all, so this should be possible. We did not take off-the-shelf findings from the psychology of judgments and decisions. Rather, we looked for extensions of the psychological approach that fit the

problems we saw outside the experimental laboratory. One obvious danger of this approach is that "the problems we see" are affected by our own political leanings. Thus, for example, we worry about ***1755** redistribution, so many of our experiments concern it. There are other dimensions of public finance well worth studying; others are free to use our methods to study different problems.

II. Results

This part canvasses seven broad sets of results that show how the form of public finance systems affects the understanding of and support for redistribution: (1) the metric effect; (2) penalty aversion; (3) tax aversion; (4) hidden tax bias; (5) disaggregation bias; (6) privatization effect; and (7) the "starve-the-beast" phenomenon.

A. Metric Effect

We begin with a rather simple, and seemingly minor, application of our general theme: that people are inconsistent in their reactions to public finance issues, on account of focusing or isolation effects. Throughout our experiments, we found interesting interactions between subjects' perceptions of and desire for progressivity--expecting the better-able to pay more, in absolute or percentage terms--and the form of the question. The interactions might relate to some basic ambiguity or uncertainty over what "progression" even means. For example, subjects gave systematically different answers based on whether the question was asked using dollars or percents, in what we call a metric effect. [FN28] Subjects consistently wanted more progressivity when the matters were framed in percentage rather than in dollar terms. There is, after all, a sort of progressivity illusion when a question about tax burdens is framed in dollars, because the high income pay more, in absolute dollars, even under a flat percentage tax. At a constant 20 percent rate, for example, a $100,000 household pays $20,000 in taxes, whereas a $20,000 household pays $4000. The tax appears progressive when stated in dollar terms, even though it is not progressive when phrased in percentage terms. This result is an example of an isolation effect, because the subjects seem to have a norm--to tax the rich more than the not-rich--but they react quickly to the salient optics of the choice set, failing to translate their judgments back into a single, consistent metric. They apply the norm blindly, as it were. The effect is analogous to the finding that subjects--even experienced clinical psychology professionals--make different ***1756** decisions when considering risk data stated in probability as opposed to frequency metrics. [FN29] In tax, the metric effect can lead to confusion.

The first two tables come from an experiment in which we asked subjects about their attitudes about both the level of taxation (Table A) and the slope of its distribution (Table B). [FN30] The experiment was concerned primarily with how subjects accommodated for marriage and children, but it also gives a good look at the metric effect. There were four types of taxpayers: single persons, married equal-earner couples with incomes presented on a per person basis (Equal 1), married equal-earner couples with incomes presented per couple (Equal 2), and married one-earner couples, all with and without children. [FN31]

We asked subjects simply to fill in blanks for how much they thought each household/couple ought to pay in taxes at four income levels: $25,000, $50,000, $100,000 and $200,000. Sometimes we asked the subjects to use dollars, others times percents. Table A gives the mean responses across all income categories for the various household types. We converted subjects' answers originally given in dollars into percent, so that the metric effect is eliminated from our presentation of the results.

Table A

Mean Overall Level of Tax (in Percent) as a Function of Household Type and Metric Frame

Answer in Dollars

	Single	Equal 1	Equal2	One-earner
No child	14.7	14.0	13.8	13.4
Child	12.4	13.3	12.5	11.9

Answer in Percent

	Single	Equal 1	Equal2	One-earner
No child	17.5	17.6	17.3	16.5
Child	15.1	17.4	15.2	14.7

***1757** Note that the levels are consistently and significantly higher when subjects gave their answers in a percentage metric.

Table B shows that the slope of desired progression is also higher when the question was asked in percent. There is a progressivity illusion when the values are given in dollars.

Table B

Mean Fair Taxes (in Percent) as a Function of Income and Metric Frame

	$25,000	$50,000	$100,000	$200,000
Dollars	9.3	11.7	15.2	16.8
Percent	9.2	13.0	18.8	24.6

Tables A and B demonstrate that people support both higher and more steeply progressive taxes when they are think-

ing about taxes in percentage as opposed to in dollar terms. This finding suggests that the optics of progressive marginal rates might lead to instability in tax systems, or to an undue premium on rhetoric as opposed to reality in political portrayals of public finance. For example, candidates who favor progressive taxes ought to talk in percentage terms, and those who favor flatter taxes in dollar terms. [FN32]

B. Penalty Aversion and the Schelling Effect

There are more troubling applications of cognitive psychology to redistribution. For example, people do not like "penalties" but they do like "bonuses." In standard economics, however, these are simply two sides of the same coin: A bonus is the absence of a penalty, a penalty the absence of a bonus. Yet whether one describes an issue as a bonus or as a penalty can have dramatic effects on its evaluation. This problem abounds in tax. A child bonus is a childless penalty, a marriage bonus is a singles penalty, and so on. We hypothesized that subjects would have a more positive impression of a policy stated in its bonus than in its penalty frame.

Following a classroom demonstration from Thomas Schelling, [FN33] and drawing on our own knowledge of the metric effect, we also suspected that ***1758** this penalty aversion would be exacerbated by progressive rates. Schelling asked his students if they thought that there should be a larger child bonus for the rich or for the poor. Students predictably answered that there should be a larger child bonus for the poor. Schelling next pointed out that this rule presumed a childless default; if we start with the assumption that people have children, what is needed is a childless penalty to achieve the same result. Should a childless penalty be steeper for rich or for poor? Students predictably reversed their preferences, opining that the penalty should be higher on the rich. We dub this result the Schelling effect, an interaction of penalty aversion and a certain progressivity illusion. This is another instance of an isolation effect, because we can surmise that subjects were thinking about the extent of the bonus in the bonus frame, and the magnitude of the penalties in the penalty frame, not noticing that there were bonuses and penalties in all cases--not paying attention to the offstage, logical converse of the perspective they were confronting.

In our experiments, we found several instances of both penalty aversion and the Schelling effect, involving penalties and bonuses for marriage (or nonmarriage) as well as for children (or childlessness). [FN34] We presented items like the following:

> A married couple with one income of $25,000 pays $3,000 in taxes. The same income earner, if not married, would pay a surcharge of $2,000.

A married couple with one income of $100,000 pays $30,000 in taxes. The same income earner, if not married, would pay a surcharge of $6,000. [FN35] For each item of this sort, another item presented exactly the reverse situation, in which the taxes of the unmarried earners were $5000 and $36,000, respectively, and the bonuses for married earners were $2000 and $6000, respectively. In both cases, married couples with children paid $3000 or $30,000, depending on income level; childless couples paid $5000 or $36,000. What varied was whether or not the question looked at the movement from high to low taxes (a bonus) or from low to high taxes (a penalty).

We asked the subjects about both the fairness of the bonus or the penalty, and about its allocation or magnitude. The results confirmed our hypotheses. In every case, far more subjects showed the predicted pattern than the reverse. First, they judged bonuses as fairer than penalties, even though they were identical but simply described using different baselines (married or single, with or without children). Second, like Schelling's ***1759** students, they judged the bonus as too high for high income and too low for low income, but they judged the surcharge (penalty) as too low for high income and too high for low income. We thus confirmed the existence of both penalty aversion and the Schelling effect in tax. The conjunction of penalty aversion with progressive rates gives a good look at the compounding effects of complexity

and biases in perceptions of tax and fiscal systems.

C. Tax Aversion

Penalty aversion is related to classic biases studied in the psychology literature, such as loss aversion: Penalties seem like losses measured or evaluated from a status quo baseline (from $30,000 to $36,000 in taxes), whereas bonuses seem like gains from a different status quo baseline (from $36,000 to $30,000). We suspected that people are also affected simply by what things are called, without any change in reference point. Labeling the very same monetary charge as a "tax" versus a "fee" changes neither the starting point nor the ending point in terms of an individual's finances. For some people, however, and for some kinds of programs, we hypothesized that the label "tax" would be enough to arouse a negative reaction, with everything else held constant. The word "tax" itself implies a burden.

We did an experiment to assess the effect of simply calling something a tax. [FN36] We asked how people thought payments should be made for fifteen various services and goods, including: primary and secondary education; basic health care; services of a fire department; and social security (basic pensions). We asked subjects about two types of cases that were otherwise identical in their beginning and ending financial states. We contrasted cases where a service was funded by government through a tax with cases where the users of the service paid its provider directly without the government's acting as an intermediary. We also asked subjects about various factors: the status quo in their home jurisdiction; whether the services are provided more efficiently by government or others; the subject's perceived self-interest; and the extent to which the subject thought that the rich should pay more, that people differ greatly in their use of the service, or that the case involved "public goods."

***1760** Questions differed in whether the way of raising funds was called a "tax" or a "payment," and in whether the distributive properties of the tax/payment were lump sum (same for everyone), progressive (based on ability to pay), or based on use of the service in question.

We found that labels mattered. Subjects reacted differently to levies called a tax than to those called payments, even where the economics were identical. In one particular experiment combining tax and spending programs, we found no overall preference for or against "taxes." However, different goods and services differed in whether subjects favored taxes to pay for them. In some cases, such as social security, subjects may have considered that the very nature of the service varied with the payment mechanism. Those services significantly favorable for "tax" were fire, education, and social security. Least favorable were phone service and theft insurance. Regressing across factors that we asked subjects about, we found that the status quo--how the good or service was paid for in the subject's local jurisdiction--was highly significant. Thus, subjects seem to accept "taxes" as compared to "user fees" for items already being paid for by taxes, but to prefer user fees to taxes where there were presently no taxes in place. Hence "tax aversion" might better be understood as a no new taxes heuristic, as we have heard it said. [FN37]

In other experiments reported below, we found that subjects have an aversion to the income tax, even when they favor redistribution. [FN38] We also found-- consistent with much polling data--that given a general, abstract choice, subjects prefer to cut both taxes and spending to fairly low levels. When confronted with particular spending programs, however, they are unable to make aggregate cuts. [FN39] A recent experiment by Catherine Eckel, Phil Grossman, and Rachel Johnston [FN40] has shown that there are different reactions to an exaction labeled as a "tax" and an unlabeled exaction. Eckel and her colleagues set up a "dictator" game for subjects, where individuals were handed an envelope containing a set amount of money and ***1761** given the chance to contribute some, all, or none of it to a specific charity. In all cases, the subjects were given fifteen dollars and told that the charity had been given five dollars. In half the cases, the subjects were told that they had started with twenty dollars, which had been "taxed" with five dollars given to the

charity; in the other cases, nothing was said. When subjects were told that they had been “taxed,” the researchers noted a crowding out effect: Subjects reduced their voluntary contributions to offset the tax. [FN41] When the same values were simply taken from their pay in an unlabeled manner and sent to charity, crowding out did not occur.

In sum, labels matter, and “tax” tends to be a bad one.

D. Hidden Tax Bias

If people are tax averse, especially vis-à-vis new taxes, then governments have an incentive to hide taxes in various ways. One way is to call them something else, for example, “user fees” or “surcharges,” as we have just discussed. Another approach is to get a third party nominally to pay the tax so that it becomes an indirect tax on individuals. We hypothesized that people would prefer such hidden taxes in part because they would not think through to the next step in economic equilibrium, in which they bore the true incidence or burden of the tax. This would be another instance of an isolation effect.

The relevant principles of public finance are not profound. When a business pays a tax, the money must come from somewhere: Businesses are not real people, so they cannot pay real taxes but must pass them on. [FN42] Yet ordinary people seem not to think this many steps ahead. Hidden taxes nonetheless have real effects on prices. Suppose that hidden taxes are relatively regressive compared to subjects' own preferences. There is reason to believe that people, having chosen hidden taxes in the first place, will not then adjust other, more transparent taxes to offset the regressivity. This result will occur, in part, because the people have not thought through to understand the relative regressivity in the first place. Again, this is a result of isolation effects.

Taxes can be hidden partially or fully. [FN43] The incidence of partially hidden taxes is known or easily knowable, but hidden from the payor's direct view. For example, the employer's “share” of social security contributions ***1762** works this way. The ultimate incidence of a fully hidden tax, in contrast, is not easily known or knowable; in fact, leading experts debate exactly who bears the real incidence of the tax. Corporate or business taxes of all forms are examples of fully hidden taxes. Standard findings in prospect theory [FN44] and the endowment effect [FN45] predict that subjects will prefer such hidden taxes to direct levies. Subjects will not feel as if they are “losing” wealth because they never felt they that were entitled to it in the first place. Behavioral economics suggests that partially or fully hiding taxes is a good move for a government that wants to maximize its revenue while minimizing its subjects' hedonic pain.

We conducted several experiments to test some related hypotheses. [FN46] Consistent with the general behavioral economics literature, we expected subjects to focus on what was being asked in the most direct way, ignoring indirect or long-term effects. We expected subjects to prefer hidden to transparent taxes, and, in particular, to ignore negative indirect effects unless these were made salient. [FN47]

We examined the two classic dimensions of public finance: tax and spending. We looked at raising money (Raise) and payment (Pay) for four different types of insurance that could be provided either privately or by the government. [FN48] To assess the Raise aspect, we compared raising money by an income tax with raising it by a payroll or a business tax. We hypothesized that people would tend to oppose an income tax both because of tax aversion and its greater salience, until they thought about its redistributive effects from rich to poor, as our educational prompting led them to do. Conversely, we suspected that subjects might favor a business tax until they thought about its effects on workers, consumers, managers, and owners, as our prompts suggested.

To analyze the Pay aspect, we compared payment through tax deductions with payment through tax credits or direct

government payment. Given a progressive income tax structure, paying through tax deductions is regressive: All things being equal, the higher income earners get more benefit. Direct payments or tax credits--that do not depend on one's income--are not regressive. We ***1763** hypothesized that people would favor deductions until they thought about their redistributive effects, helping the rich more than the other two methods.

Subjects were sorted into two groups. Each group received six screens about each of the four types of insurance, with the Raise questions in the odd positions (1, 3, 5) and the Pay questions in the even positions (2, 4, 6). All subjects saw the same baseline condition on screens 1 and 2, followed by two educational prompts. The order of the prompts was counterbalanced: Group 1 got a prompting screen in position 3 (for Raise) and 6 (for Pay); Group 2 got a prompting screen in position 5 (for Raise) and 4 (for Pay). The educational prompting consisted of asking questions about the distributive effects of the tax options, and explaining the distributive consequences of using deductions. The intent was to get subjects to consider that, on the revenue-raising side, income taxes are progressive, while payroll and business taxes are not. On the expenditure side, we wanted subjects to see that paying through a progressive income tax, using deductions, is regressive; conversely, the use of direct payments or tax credits is not.

Our main hypotheses concerned attitudes toward raising the money through income taxes (versus payroll or business taxes) and attitudes against paying through deductions (versus direct payments or tax credits). We call these “favorable” attitudes, because they are favorable toward redistribution--a point of view that most subjects adopted. Once again, an income tax is redistributive when it is being used to raise revenues, but not when it is being used to subsidize private spending. Note that the only variables in this experiment were the form of tax or payment mechanism, and its distributive consequences. Whether or not the good or service was to be provided, and at what level, were not issues subjects faced. Thus, logically and optimally, subjects should have focused on the distributive consequences of the policies: who paid and who benefited. Instead, subjects focused on the form of the tax or the payment.

Figure 1 shows the proportion of favorable attitudes, where “favorable” means supportive of the poor or lower income--a perspective that most subjects took when asked separately about their attitudes--plotted against the sequence of trials. There are separate lines for Pay and Raise, and also separate lines for the two groups of subjects, which differed in where the prompting came in the ordering, as shown by the circled items. In general, attitudes were more “favorable” in the trial where subjects read the educational prompt than in the most comparable control conditions. However, the overall effect of these educational prompts was very slight and did not much endure to subsequent trials.

***1764** Figure 1

“Favorable” Attitudes Toward Redistributive Policy as a Function of Where Debiasing Occurred

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Note that subjects on the whole did not support raising the money through an income tax; the Raise responses are generally below 0 percent pro-redistribution. Notably, the income tax is the least hidden of all taxes. Contrary to our initial expectations, on Pay, subjects preferred direct payments or credits to using the income tax system to pay for services even before the educational prompting, although they were happy enough to further abandon the income tax as a spending system after that debiasing. What is most striking in Figure 1 is that subjects were inconsistent when it comes to redistribution, favoring it in the Pay condition but not overall in the Raise condition, but consistent in opposing the income tax. The subjects simply did not like the income tax as a vehicle to raise ***1765** or to spend money as a matter of substance. An aversion to the income tax--a formal matter--seemed to trump a desire for redistribution. [FN49]

E. Disaggregation Bias

Our next two results concern the splitting of public finance systems into parts, where the isolation effect is in full view and the subject matter of redistribution is central. These effects work with the hidden tax bias just discussed, because they suggest that subjects generally will not use one system to offset the properties of another. Thus, for example, subjects will not counteract the effects of relatively regressive tax and spending systems elsewhere in reforming the income tax system. We begin with the tax system writ large, split in two.

One of the striking features of the U.S. tax system in the last half century has been the rise of Social Security and Medicare contributions, or payroll taxes. [FN50] Such taxes now account for roughly 80 percent as much government revenue as personal income taxes. The fact that the payroll tax is flat, even regressive, has led to an increasing number of criticisms and suggestions that the system should be integrated with the income tax.

Were people fully rational, however, it should not matter that any particular tax in a multitax system is regressive. Any level of regressivity in the payroll tax can be counterbalanced by changes in the income tax. As long as a policymaker has full degrees of freedom in one tax having the same base as another tax, she can effect the same global distribution of tax burdens as if she had control over the whole. It should not matter that taxes are split in two.

Yet it does matter. Our experiments showed that subjects were apt to focus on the one tax they were asked to evaluate, not factoring in a parallel tax easily available to their recall. These results strongly confirm the isolation effect and demonstrate the relevance of the political psychology of redistribution.

In the experiment, [FN51] we simply asked subjects to fill in the blanks. After an initial page in which we gave instructions, stipulating that the bases of the "income" and the "payroll" taxes were identical, we presented a series of screens. Sometimes we listed a payroll tax, other times an income tax. For ***1766** each tax, we had four levels and rates of graduation, across households with $20,000, $40,000, $80,000, $160,000, and $320,000, including one "no tax" (0) option. In half the cases, we asked subjects to set a total distribution; in the other half, we asked them to set only the "other" tax. In half the cases, we asked for the answers in dollars, and in the other half we asked for the answer in percent.

This design generated 32 screens: 2 taxes given x 4 levels and rates x 2 (other/total) x 2 (dollars/percent). Note that there was no rational reason for the bottom-line responses--the overall tax system--to vary. Subjects easily could have adjusted what they could adjust to effect the same overall tax in each case. But the bottom lines did vary, and dramatically so.

Table C lists the mean overall tax rates, across income levels, converted into percent and total (where we were asking in dollars and/or about the "other" tax alone), to get the presentation into a common metric.

Table C

Overall Level of Taxes (in Percent) as a Function of Multiple Frames

Given Rates					Response		Mean
$20k	$40k	$80k	$160k	$320k	Dollars	Percent	

					Total	Other	Total	Other	
Payroll Tax Given, Income Tax Response									
0	0	0	0	0	14.97	14.60	17.56	16.90	16.01
0	5	10	15	20	14.89	21.13	17.60	23.68	19.32
5	10	15	15	15	15.25	21.68	17.20	24.28	19.60
10	10	10	5	5	15.28	18.84	17.55	22.51	18.54
Income Tax Given, Payroll Tax Response									
0	0	0	0	0	15.66	13.24	17.02	16.15	15.52
0	5	10	15	20	15.44	20.35	17.13	22.01	18.73
0	8	16	24	32	16.00	24.13	17.79	27.36	21.32
10	10	10	10	10	14.75	18.71	16.92	22.11	18.12
				Mean	15.28	19.09	17.35	21.87	

Table C reveals that the frames (other versus total, dollars versus percent) and the starting points mattered. As hypothesized, the overall level or magnitude of taxation was higher when responses were in terms of the "other tax" than when they were in terms of the total tax. Except for the case in which the given tax was set at zero, the aggregation frame mattered: Subjects did not add. [FN52] ***1767** The metric frame also mattered, as the level of taxation was higher when responses were in percent than in dollars.

Additionally, subjects were insufficiently responsive to changes in the given rates. They anchored on whatever rates they were given and did not adjust to make all the rows the same. In particular, total taxes were lower when the given rate was zero than when it was not (compare the first and fifth rows versus the mean of the others).

Table D shows graduation. We define this as the slope of the percent tax as a function of income step, with each income step (that is, each doubling of income) defined as one unit. Graduation is logically independent of the level of taxation, shown in the prior table.

Table D

Graduation (Tax Change for Each Income Level Step) as a Function of Multiple Frames

Given Rates					Response				Mean
$20k	$40k	$80k	$160k	$320k	Dollars		Percent		
					Total	Other	Total	Other	
Payroll Tax Given, Income Tax Response									
0	0	0	0	0	3.73	4.47	5.99	5.99	5.05
0	5	10	15	20	3.89	7.38	5.85	9.20	6.58
5	10	15	15	15	3.83	5.75	6.03	7.16	5.69
10	10	10	5	5	3.80	2.70	6.05	5.43	4.50
Income Tax Given, Payroll Tax Response									
0	0	0	0	0	4.46	3.74	6.11	5.61	4.98
0	5	10	15	20	4.26	6.53	5.85	8.33	6.24
0	8	16	24	32	4.30	9.20	5.76	10.95	7.55
10	10	10	10	10	3.76	3.31	5.67	5.68	4.60

Mean	4.00	5.39	5.91	7.30

Once again, the frames mattered. Subjects could have--and to be consistent, should have--adjusted what they could to produce the same level of graduation in each instance. They did not. Graduation rates were higher for percent than for dollars, showing the effect of the metric frame. As hypothesized, subjects were also insufficiently sensitive to the extent to which the given "other" tax was graduated. Subjects appeared to focus only on what they were asked to judge. A clear comparison to illustrate this effect is between the sixth and eighth rows of the table, where the overall rate of the given ***1768** income tax was the same, despite the difference in its graduation. [FN53] Given a flat rate tax in the eighth row, subjects ended up with a relatively flatter tax, overall.

This experiment revealed several biases. The metric effect is manifest in the fact that the mean levels (in Table C) and the slopes (in Table D) are all higher in the percent columns than in the dollar ones. The disaggregation bias is evident in the fact that the "other" columns in Table D, for both dollars and percent, are higher than the "total" columns. And an anchor and adjustment process--whereby subjects "anchor in" on a starting point and under-adjust it to their preferred end result [FN54]--is evident in the significant variation across the rows, and their correlation with the left-hand, "offstage" tax. Counter to logic, the disaggregation bias suggests that ordinary people will have a difficult time accepting a steeply progressive tax system, even if it is simply to compensate for other relatively regressive elements of public finance that are offstage.

The wider series of experiments we conducted in this vein [FN55] revealed several related matters of interest to real-world tax system design. For example, subjects seem willing to consider higher taxes if there are more smaller taxes. Additionally, negative tax brackets in one tax to offset positive brackets in others (as under the earned income tax credit in U.S. law) [FN56] are salient and disfavored. Finally, the total progression of a tax system may be a function of its size and constituent parts. We pick up several of these themes in the next series of experiments.

F. Privatization Effect

Just as tax systems can be combined or torn asunder, so too can the two broad functions of government: allocation and redistribution, tax and spending. Recall the two-part welfare-economics analysis that forms a rational-choice baseline for our analysis. In choosing if and how much to intervene in the economy, the government can in the first instance relentlessly ***1769** pursue an efficiency or wealth-maximizing agenda. The government can then use the tax system in a second stage to achieve the level of end-state distribution that it considers fair or just. Specifically, decisions such as whether to have public provision of a good or service should be decided on the basis of efficiency alone, to make the "pie" as big as possible. In the limiting case, the government would do nothing in affecting allocative matters because private markets are efficient. But even then the government can still redistribute through the tax system, which would serve a pure, "zero sum" redistributive tax and transfer function. Not only are the two functions logically separate, but by thinking about them differently and discretely, social welfare can be maximized while the paretian constraint is met. Yet once again we ask: Do ordinary people ordinarily think in a way consistent with this approach?

After looking at a single tax system split into two (payroll and income), we turned next to tax and spending systems. When governments raise taxes by a progressive tax scheme and then pay to provide services that benefit rich and poor alike, the net effect is to redistribute income, a "cross-subsidy" through the provision of the good. The rich pay more, the poor less, but both income classes benefit the same. This is a paradigm example of the "bundling" together of two distinct governmental actions, allocation (providing the good or service in the first place) and redistribution. Were

the government simply to "privatize" or otherwise cut government services, without continuing the redistribution effected through the tax and spending program, a greater burden would fall on those who are relatively poor--redistribution as well as allocation would be affected. Yet, logically, the government could continue to redistribute resources through the tax system without the provision of the good or service. The disaggregation and more general isolation effect, however, suggest that subjects may not support a consistent level of redistribution independent of government provision of goods or services.

To test our hypothesis, we asked subjects to imagine that their national government could provide five basic services, spending equal amounts on each: defense, education, health care, social security, and "everything else." [FN57] We presented sixteen cases in which government provided all possible combinations of the first four. In each case, we asked subjects to choose the fairest level of progressiveness, and we gave subjects the option of choosing negative taxes for the poorest taxpayers. Using actual ***1770** government statistics, we divided taxpayers into three groups, each supplying a third of the national income (hence there were far more taxpayers in the bottom third, because of the far lower per capita income levels), and listed the median income for each group. The baseline, a flat percent tax, had a tax level of 25 percent for each group. Each cut of a good or service lowered the baseline by 5 percent. Subjects could adjust progressivity up or down. Consistent with our prior research on disaggregation effects, we anticipated that subjects would not maintain the same level of redistribution-- would not fully take into account or integrate the effects of the service cuts on household welfare--and hence would choose less overall redistribution with fewer services. We were correct.

Six subjects always chose the least progressive distribution, which was equal percentage rates for all three groups--a flat percent tax--and 2 subjects always chose the most progressive. The mean choice was 3.42, on a 1-6 scale, with 6 being the most progressive. The mean choice amounted to a difference in tax rate of 24.2 percent (in absolute percentage terms) between the high and low income groups: the difference, say, between a 15 percent and a 39.2 percent effective tax rate.

For each subject, we calculated the mean effect of each cut on progressiveness, first ignoring the effect of cuts on out-of-pocket costs. The mean effects in the change in percentage difference between high and low groups were 1.1 percent for defense, -0.1 percent for health care, 0.4 percent for education, and -0.4 percent for social security, where a positive effect indicates less progressiveness with the cut than without it. Of these means, only the defense item was statistically significant. The mean of all these effects combined was not significantly positive, and the four services were not significantly different. Thus, subjects basically maintained the same degree of progressiveness without taking into account the effect of the cuts on out-of-pocket cost. That is, subjects continued to view the remaining, residual tax system in isolation of the privatization effects they were witnessing, and they had a sense of what a good tax system, in isolation, should look like.

But cuts do affect out-of-pocket costs both in the experiment and in the real world, at least for three of the goods of interest: health care, education, and social security. The relevant data for social well-being therefore includes the effects of these cuts in public services on net--after public tax and spending--household welfare. Do subjects use the tax system to compensate for the effects of public spending cuts? If so, they would increase the progressiveness of taxes when any or all of these three goods were cut.

***1771** We found that for all three of the cost-yielding cuts (health care, education, social security), subjects corrected far less than would be required even to get close to maintaining constant redistribution across conditions. While some subjects attempted to offset the cost-increasing effects of cuts, on average the attempt fell far short of what was needed to maintain progression.

Figure 2 shows the mean response of subjects, using the same type of graph they saw, in the absence of any cuts and in the presence of three cuts. The lowest panel represents the results of including out-of-pocket costs.

Figure 2

Mean and Inferred Responses for Tax Rates in Presence and Absence of Health Care, Education, and Social Security

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Figure 2 gives an excellent look at the isolation effect or disagreggation bias, as it played out in a unified tax and spending system. Subjects preferred at least moderate progressivity in the baseline, global condition (Panel A), with government provision of all five sets of goods and services. With three major private-cost items removed from the mix of public goods (Panel B), ***1772** subjects continued to choose a tax system reflecting moderate progressivity, even accepting a negative tax bracket for the poor. But when realistic private replacement costs were built back in, showing a global tax and out-of-pocket effect, the overall system then looked regressive (Panel C). Compared to the subjects' own chosen baselines, the bottom line reflected a steep cut in costs (taxes plus out-of-pocket) for the upper income level, a slight drop for the middle income level, and a dramatic (230 percent) rise in effective burdens on the lowest income level. By focusing on the "optics" of taxes alone, a preference reversal in the bottom-line effects followed.

Note that aversion to progressivity cannot explain the results, given that subjects (on average) consistently chose progressive taxes, as Panel A illustrates. Nor can ignorance of the financial effects of public spending cuts explain the results. We asked subjects a test question about the extra cost per household caused by cuts. Subjects made mistakes, but the most common error seemed to be simply to count the number of cuts, including defense cuts, which (by specification) should have had no effect on household spending. Ninety-five percent of the subjects gave the correct answer or chose a larger effect than we had posited. The mean answer to the test question was 2.53 on a scale from 1-4, where the mean correct answer was 2.5. In sum, subjects did not underestimate the effects of public spending cuts on net household costs. And for good measure, we calculated that the results were essentially unchanged when we examined only the subjects who estimated cost correctly, or overestimated it, on the average.

What can explain the results is the disaggregation bias or isolation effect. Even though they knew about the effects of service cuts on households, subjects looked only (or primarily) at the tax system when adjusting the tax system. They did not adequately factor in the effect of public spending cuts on the slope of progressivity in the remaining tax system. The result was that effective progressivity decreased as the number of cuts increased--disappearing altogether with enough "downsizing" of government. [FN58]

***1773** G. The "Starve-the-Beast" Phenomenon

Our final example of heuristics and biases affecting ordinary judgments about public finance is the most dynamic and systematic, because it shows how government policy over time can have effects. Specifically, we examined the "starve-the-beast" strategy proffered by some current reformers: The idea is to cut taxes now, as a means of cutting spending later. [FN59] This example allows us to pull together many of the effects found in isolation (pun intended) above.

As background, consider a familiar debate about government. Politicians, social scientists, and citizens disagree sharply about the appropriate size of government. The issue captures perhaps the major fault line between parties in two-party democracies. Some argue that big government is bad, but that people can be led to support it because they do not

think about long-term issues and thus desire overly generous present programs. [FN60] Others argue that government is if anything too small, because of pressure for low taxes, which appeal to citizens on the basis of narrow and myopic self-interest. A common element between the two extremes is the perception that there is a disconnect between the present and the future; there is an implicit understanding that citizens will fail to integrate their beliefs and actions over time. Anti-government partisans fear that citizens will want programs now, neglecting their long-term costs, and then will be reluctant to cut these programs later, such that a bloated Leviathan results. Social Security and Medicare in the United States are leading case studies for such critics. Pro-government partisans fear that citizens will support tax cuts now, ignoring the long-term effects of any resulting deficit (or diminished surplus) on the ability of the government to continue to provide public goods and services in the future.

The predicates of both of these sets of attitudes stand in stark contrast to the "rational choice" or "rational expectations" model of politics, where citizens properly integrate their actions over time. Thus, Robert Barro has argued that government deficits may not even matter, because forward-looking citizens in an overlapping generations framework will rationally ***1774** save today in anticipation of increased taxes tomorrow. [FN61] Conversely, surpluses today can lead to greater private debt in anticipation of lower taxes tomorrow.

Where does the truth lie? How do ordinary citizens really think? Standard findings in cognitive psychology, most notably prospect theory and the endowment effect, [FN62] support the popular understanding that the timing of issues and decisions matters. Once a government program is in place, it will become part of the status quo and can be hard to cut. Thus, the thumb is on the side of continued government growth. On the other hand, citizens are averse to taxes, a phenomenon that itself has cognitive psychological dimensions. People react disproportionately to salient taxes and fail to consider the offsetting benefits of government programs. [FN63] People are also likely to believe that a tax increase is a loss, making it difficult to raise taxes.

A psychologically savvy political strategy, used by those who favor smaller government, is called "starve the beast." [FN64] The idea is to cut taxes before cutting spending, then use the resulting deficit as a political argument to reduce spending or to reject new spending. Most commentators agree that this strategy has been used by both former President Reagan and the current president, George W. Bush. In both cases, large deficits resulted from fiscal policies. Although spending was not cut concurrently with taxes, government may have grown less than it would have without the tax cuts because the baseline for future judgments changed.

Can the "starve-the-beast" strategy gain public support? Will people support tax cuts now, even with no specified spending cuts, because of a failure to think through what will happen--that is, because the bifurcation of tax and spending has created an isolation effect, between tax and spending programs? In our experiments, we presented people with information about current levels of taxation and spending, and we asked them to adjust both levels to what they would prefer. We tested three hypotheses about why citizens might accept tax cuts in the absence of spending cuts.

Our first hypothesis was that people simply might not be bothered by deficits. They might prefer lower taxes and higher spending. When people are asked to adjust rates of taxation and spending, they will tend to choose lower levels of taxation and higher levels of spending.

***1775** Second, people might think excessively or even exclusively about the short-term. They neglect the fact that deficits must be covered in the future. More generally, they engage in a kind of optimism bias, [FN65] believing that matters will work out in the end. In this case, they would favor budget deficits in the short-term and respond differently when asked about the future than when asked about the present.

Third, people might think differently about tax cuts and spending cuts because public discussion tends to focus on

taxation as a single large category and on spending as a set of specific programs. When spending is presented as a single total category, people prefer spending cuts to match tax cuts. When the spending cuts are unpacked, however, people will oppose cuts in spending on particular programs. [FN66] Deficits result. We tested this instance of an isolation effect by asking about spending in the abstract and cuts in particular programs.

Overall, we also considered whether responses to the adjustment question are influenced by the starting point. Did people have an ideal government size in mind? Or were they influenced by the status quo? If people do not adjust to the same ideal level, then once deficits (or surpluses) are in place, people will not be inclined to remove them immediately.

In our first experiment on point, we presented people with hypothetical government budgets in which taxes and spending varied independently, leading to deficits, surpluses, or balanced budgets. Taxes and spending levels were set at 15, 20, or 25 percent of GDP in all nine possible permutations (so that tax at 15, spend at 25 would have a large deficit, and so on). We then asked people for their preferences about taxes and spending in the long-term and short-term. We compared subjects' preferred levels to the starting levels they were given, and we also considered whether subjects would adjust completely so as to maintain a constant balance and size of government. Conversely, we considered whether they would anchor and under-adjust, failing to correct surpluses and deficits. [FN67]

***1776** Figure 3

Preferred Levels of Taxation and Spending

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(The diagonal line--the one at the 45° angle--represents no change from starting point)

Figure 3 shows subjects' preferred levels of taxation and spending as a function of the starting levels of each. Three features of the results are especially interesting.

One, subjects preferred lower taxes, reflecting once again a general tax aversion. In the high (25 percent) and medium (20 percent) initial tax conditions, subjects lowered the tax rate. In the low (15 percent) initial tax condition, they supported a slight but insignificant tax increase, although it is worth noting that the introductory page had set a current condition default at 20 percent, so subjects might indeed have taken this particular starting point as a tax cut.

Two, subjects generally favored a surplus over a deficit. Preferred levels of taxation were higher than preferred levels of spending by an average of 1.3 percent of GDP. Surpluses were created because the subjects cut spending ***1777** by more than they cut taxes. There was no significant difference between the short-term and long-term conditions. The optimism-bias hypothesis received no support, nor did any other hypothesis holding that people prefer deficits. No subject showed a significant pro-deficit inclination across the eighteen cases. [FN68]

Three, subjects adjusted their responses to the posited current balance of spending and taxation, although it was trivial not to do so. This recalls the disagregation and anchor-and-adjustment biases discussed above. [FN69] Subjects easily could have maintained a constant level of tax and spending independent of the artificially set initial conditions, but they did not. Responses depended on the starting levels of both spending and of taxation. But subjects did not go far enough to maintain a constant level of taxes, spending, or the balance between them, showing once again an anchor and under-adjustment effect. The upshot was that their preferences led to significant surpluses when surpluses were already present or even when the budget was balanced. When deficits already existed, however, they were maintained.

This experiment revealed that subjects are generally tax averse but are also deficit averse. Given free rein, people generally support cutting taxes but aim to balance the budget by cutting general levels of spending even more. They are not naively optimistic, but are influenced by initial conditions, however thinly framed or presented.

A second experiment in this vein tested the specific hypothesis that people prefer spending cuts in the abstract but not in particular. The second experiment was similar to the first, except that we removed the short-term condition because we found no short-term/long-term divergence. We also added a new condition for subjects to make particular judgments about categorical spending. We attempted to approximate the major categories of spending in the U.S. federal budget. In this way, we tested an identified-victim bias--the idea that people oppose particular budget cuts, even though they are happy with spending reductions in the abstract. [FN70]

Specifically, we set tax and spending levels at 16, 20, and 24 percent of GDP. We asked the subjects to adjust the levels, as in the prior experiment. Screens were presented in two sets of pairs. In the first set, "Tax 1" and "Total Spend" were precisely parallel to the tax and spending questions in the prior experiment. In the second set, "Tax 2" and "Category Spend," we asked the same question about tax level but asked about spending by budget categories.

***1778** Figure 4

Levels of Taxation and Spending Implied by Judgments

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(Taxation questions are dashed lines spending questions are solid lines)

Figure 4 shows the mean judgments for the four conditions. In Tax 1 and Total Spend, subjects wanted less spending and less taxation on the whole, especially when the starting level of each was high, confirming the results of the prior experiment. As before, too, subjects made some attempt to adjust toward a constant level of desired tax and spending, but not enough to remove the influence of the starting point (perfect adjustment would have made the lines horizontal, with tax and spending invariant to starting point). Because of this under-adjustment, all deficits and surpluses remained incompletely corrected. On the whole, however, subjects favored neither surpluses nor deficits, although they favored reductions in both spending and taxation.

Tax 1 and Tax 2 did not differ significantly. In all trials, subjects wanted on average to cut taxes, except when these were already at the lowest level in ***1779** the range, here 16 percent. But subjects did not integrate their tax decisions with their attitudes on spending, as noted above, such that deficits persisted.

Total Spend and Category Spend, however, differed significantly. Although subjects adjusted Category Spend somewhat by reducing spending more when initial spending was higher, the amount of adjustment (change from the starting point in Figure 4) was a mere 7 percent of the amount of the downward adjustment found in Total Spend. Moreover, the Category Spend and Tax 2 judgments together implied much higher deficits than the starting point on the average. Subjects wanted to cut taxes but did not want to change spending significantly when, and only when, they were faced with questions by specific category of spending.

Figure 5

Category Spending Changes, in Percent of Spending

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(Calculated both as if all categories were equal parts of the budget, and the actual percents given to the subjects)

***1780** Figure 5 shows desired overall spending changes by category. It does so both for the actual changes, calculated on the assumptions given to the subjects about the relative spending on each category, and for changes under an "equal" condition in which each of the six categories was assumed to be equivalent: that is, on the (incorrect) assumption that each category took up one-sixth of the total spending listed (92 percent of all government spending). It is apparent that subjects were willing to cut some spending. Their favorite target for cuts was foreign aid. But, interestingly, foreign aid is already a small share of the U.S. budget--some suggestive evidence that popular opinion matters. If foreign aid were a major item of expenditure, subjects would have been making significant cuts. Yet analysis of the data even on the assumption that all categories were equal in spending (as shown in Figure 5) does not change the main result. Although spending cuts were greater when analyzed this way (because subjects were greatly cutting the small category of foreign aid), spending was still substantially greater than it was chosen to be by the very same subjects in Total Spend, the condition in which spending cuts were made globally. The overall deficit was also therefore much greater when calculated using the category spend responses. It appears that a primary reason why subjects were reluctant to cut particular categories was because these categories were identified, and made salient, versus lumped together and kept nonsalient and abstract.

In sum, we found no support for two hypotheses about why the "starve-the-beast" strategy might gain political support. People do not favor deficits, even in the short-term. Nor are people naively optimistic that deficits today will somehow disappear tomorrow. We found strong support, however, for a third hypothesis: People favor spending cuts in general but not in particular. The "starve-the-beast" strategy can work--in the sense of getting subjects to support policies of tax cuts today that they would not otherwise support--by separating out decisions about tax and spending, making the former concrete while keeping the latter abstract, thereby generating the conditions for an isolation effect to take hold.

III. Why It Matters

Why do these various heuristics and biases in understanding and accepting redistributive public finance programs, which we grouped under the common label of isolation effects, matter? We realize that there is still much work to be done in connecting our findings to actual tax systems, ***1781** which are the product of complex and multilayered political processes. [FN71] But we have a strong belief that these isolation effects are relevant. Citizen input matters. Actual public finance systems show a tendency towards hidden taxes, the income tax does not compensate for the relative lack of progressivity in other tax systems, privatization seems to affect redistribution, and deficits appear to arise, persist, and affect policy decisions.

We address in this section the prescriptive challenges in moving from the is of cognitive bias in the understanding of tax to any compelling ought. [FN72] It is important to attempt this movement. There is a tendency to conclude that if tax and other public finance systems appeal to popular perceptions, so much the better, because there will be psychological gains from putting the pain of tax in its most pleasing light. We believe that this happy tale is wrong-- dangerously wrong--for several reasons.

First, as we have stated throughout, even psychologically pleasing taxes have real effects. In particular, pleasing taxes can be inefficient, violating the first prong of the optimal welfare-economics analysis. The corporate tax is a leading example of a popular hidden tax. Although the tax seems to please people because it does not strike them as a "tax"--or at least not one that they personally pay--a corporate tax has real effects on prices and other allocative de-

cisions. If the distorting costs of the tax are higher than those of any alternative equal revenue-raising measure, then, ceteris paribus, society is paying a real welfare cost for its psychological preferences. In such a case, the first prong of the optimal welfare economics approach cannot be followed because people will not accept efficiency-enhancing or wealth-maximizing reforms on account of their cognitive errors.

Second, and perhaps worse, equity can suffer from cognitive errors as well. Equity can be pitted against efficiency in a tradeoff not mandated by the optimal welfare-economics approach. Psychologically pleasing hidden taxes, such as corporate income ones, generally will not be as progressive as subjects themselves desire taxes to be in the abstract. If the isolation or disaggregation effect were not so widespread, this equity effect may not matter all that much, although the efficiency losses noted in the prior paragraph would still occur. Society could have as many regressive taxes or surcharges ***1782** as it desired, as long as it had a single system, such as the personal income tax, in which to redistribute. We have seen, however, that ordinary subjects have a hard time understanding extreme progressivity in any single system, viewed in isolation. This fact counsels against the earned income tax credit's strategy, of using a negative income tax bracket to offset positive taxes elsewhere, [FN73] because the negative tax becomes salient and draws fire. The reformer concerned with redistribution needs to look at all tax systems individually because the polity will not adequately integrate them. The same tension is evident in the privatization effect. The two-part optimal welfare-economics analysis suggests that efficiency alone should dictate whether the government provides a good or service. But because ordinary subjects have a difficult time integrating the effect of spending cuts or government downsizing on the residual tax system, bottom-line redistribution can suffer on account of even an efficiency-enhancing reform. The paretian constraint will not hold with privatization; the rich will get richer, the poor, poorer.

These two findings--that equity and efficiency can both suffer on account of prevalent heuristics and biases--constitute major ethical challenge to the status quo, and to traditional welfare economics. They are thus our principal concerns. Consistent with many other researchers in diverse disciplines, we have found that most subjects want at least moderate redistribution, viewed as a baseline matter. Yet citizen support for redistribution can change with the institutional setting. This is puzzling and troubling. And thinking about public finance raises still other concerns.

Third, for example, the resolution of public finance matters can be fragile and volatile, as equivalent frames can shift public opinion. Instability in public finance systems is itself a bad because it alone reduces welfare. [FN74] Cognitive psychology suggests that people's preference shifts or reversals can obtain with no change in the underlying substance, so it is not a matter of people seeing the light and adopting “better” resolutions of public finance issues. People will simply choose more progressivity if they can be led to think in percentage terms, and less in dollar terms. They will choose policies that can be understood as bonuses, and then reject the same policies when they come to see them as penalties. This back and forth, on purely formal grounds, is problematic.

Fourth, given the importance of framing and related effects, politics will reward rhetoric over substance. “Great communicators” will be prized, not because they advocate “better” policies, but because they make their ***1783** policies sound better to voters. This diverts political resources from the potentially welfare-enhancing study of substantive policy effects to the purely formal rhetorical presentation of matters. This leads to the next concern, which is especially great.

Finally, and perhaps most disturbingly, a skilled politician or political party can manipulate public opinion and get a public finance system in place that conflicts with prevalent democratic preferences. Suppose for example that a politician or party wanted to reverse course, and to reduce the degree of redistribution prevailing throughout public finance systems. Our research provides an eerie roadmap for success. Our findings suggest that a policy position to lessen social redistribution would likely lose in a straight up or down vote because a majority of people favor at least moderate redistribution. [FN75] The rhetorically skilled politician, however, could effect a collective preference reversal. She might

first choose hidden taxes, with a regressive incidence, and raise money through a series of relatively flat surcharges not labeled as taxes. People would likely support these, and a surplus might even result. Larger surpluses might follow from selective "privatization" of government goods and services, reducing the need for taxes. Cuts could then be made to the most salient tax--the income tax--which would continue to reflect moderate progressivity, even as its importance in the overall budget declined. Indeed, the politician could take this a step further, and separate out the topics of tax and spending cuts, cutting taxes now and postponing spending cuts until later. The resulting deficit would curtail government growth, and it could lead to replacement taxes less progressive than the initial baseline; ultimately, the pressures of the deficit and tax aversion would lead to support for even category spending cuts. The net result would be a smaller government and less dependence on the single remaining progressive tax system, a tax system that would continue to have only moderate levels of progressivity. Overall, the series of steps would lead to dramatically less redistribution than the people themselves wanted at the outset, and along the way there would be many "losers," concentrated in the lower-income classes. The cumulative changes would fail to meet the basic paretian constraint. Of course, the astute observer might notice that this is what has been done in the United States, under Republican Party leadership, beginning with Ronald Reagan in 1981. [FN76]

***1784** IV. What Is To Be Done?

We hope to have motivated readers and related researchers that how ordinary citizens perceive public finance systems is important, and that the stakes for collective social welfare in improving thinking about taxing and spending can be large. In our ongoing work, we have only begun to think about systematic solutions to these problems.

To start the analysis, consider our final result on "starving the beast." Our research shows that the strategy might work to effect a preference reversal in the citizenry, getting the people to support deficits and spending cuts against their own initial judgments. The key to the technique's success is to match specific tax cuts today--which subjects will support--with the abstract, general idea of spending cuts today, which subjects will also support. If tax cuts today must be matched by specific spending cuts today, then the opposition to both specific cuts and deficits is likely to preserve the status quo. On the other hand, if the tax and spending decisions can be separated in time and (logical) space, then the specificity of the spending cuts can recede, and a disaggregation bias effect can take hold. Subjects will focus on the tax cuts alone, where a generic tax aversion will lead them to support cuts. A budget deficit results. Once this deficit is created, the preference for fiscal prudence causes people to want to raise taxes and cut spending. But these desires are not strong enough to reduce the deficit to zero, even when people are asked about the "long run."

There is inconsistency here, and it does not seem to follow from a simple optimism bias. It is not that subjects seem to have a naive belief that things somehow will be better tomorrow, miraculously closing the deficits without the pain of tax increases or spending cuts. Rather the inconsistency follows from a failure properly to anticipate the difficulty in making specific cuts tomorrow--the depth of the endowment effect. At a high level of generality, the "starve-the-beast" strategy works by pairing a specific (salient) tax cut with an abstract (nonsalient) set of spending cuts.

This conceptualization suggests two broad ways for governments to avoid deficits. One way is to keep everything abstract: to pass laws about balanced budgets, as in the form of constitutional restrictions. Our experiments showed that, in the abstract, subjects supported fiscal balance. Many state governments in the U.S. are indeed required to have balanced budgets each year, and the U.S. government has occasionally tried to bind itself in advance by various budgetary rules.

***1785** An alternative is to make everything concrete and specific. We could break taxes down into categories earmarked for particular services, as in the case of the various wage taxes in the United States. If citizens come to think of

each tax as linked with a particular service, they may be less willing to cut taxes. [FN77] This could help explain why the Social Security and Medicare payroll tax in the United States, now the largest tax for most American taxpayers, is also the one major federal tax that has never been cut. [FN78] This alternative would probably lead to a larger, more active government than the first method (binding in the abstract).

It may also be possible simply to confront people with the conflict in their opinions. Advocates of larger government are often tempted to answer their opponents who want to cut both taxes and spending by saying, "O.K., but where? Exactly what do you want to cut?" The usual answer, "government waste," may stop working after a while, given that practically every politician elected to public office has been against "waste." But then that would be rational, as politics seldom are.

These reflections lead to our final thoughts on three broad approaches to mitigating the problems we have noted.

A. Individual-Level Education

Possibly the most common grounds for hope is to help individuals become consistent in their judgment and decision-making through "debiasing"--public education being perhaps the best mechanism. Our experiments give some, but rather little, grounds for hope here. The experiment on hidden taxes showed that people react somewhat to an explanation that hidden taxes are less progressive than the income tax, or to the fact that deductions under a progressive income tax have a regressive effect. But they did not react much to these explanations. People seemed more driven by a visceral opposition to the income tax. We also have little reason to believe that such debiasing would endure. In other cases, as in the work on disaggregation bias with multiple tax systems, our experimental designs made matters quite transparent. Subjects simply had to be globally consistent, and yet they were not. These and other related findings give us reasons to doubt that individual-level debiasing or education will eradicate the root problem.

***1786** This is not surprising. Situating heuristics and biases in a basically rational framework, we see that most such biases are handy rules of thumb or guides to action in most cases. The isolation effect reflects a person's prudential principle of paying attention only, or mainly, to what is in front of him or her. Experts can transcend or at least mitigate these biases in specific contexts, [FN79] but how can we get the ordinary citizen to think better--more consistently--about public finance? The subject matter is complex, though all of our experiments concerned important issues and we took pains to present the information simply. Thinking about specific public finance issues is an unfamiliar activity to all but a small handful of experts. Precise questions such as those about marriage penalties, child-care credits, private Social Security accounts, and increased user fees are ever-changing. Perhaps worst of all, the stakes for the individual citizen in becoming better informed are extremely low. For one thing, the dollars-and-cents consequences of incremental decisions to ordinary citizens are often insignificant. For another thing, individual citizen input is limited to single votes in crude, multi-issue, winner-take-all elections. It is hard to expect that ordinary citizens, consumed enough with far more pressing matters, can or will become consistent decisionmakers on complex public finance subjects. [FN80] More hope might lie in better voting procedures. [FN81]

On the other hand, debiasing might not be so hard if people could learn to think more logically and consistently, like economists and other social scientists do. Economics is complicated in part because it attempts to take many factors into account simultaneously. The discipline overcomes isolation effects by looking at indirect and hidden effects. But economics also simplifies by integrating. Often the simplification is striking. Simple principles like "conservation of money" (analogous, perhaps to conservation of mass in Newtonian physics) or "no free lunch" can make public policy easier to understand. Such principles would lead to immediate questions about how tax cuts will be covered, who will pay after privatization, and so on. It is not hard to learn that truly free lunches are rare. Perhaps economics should be a

requirement for high school graduation. [FN82]

***1787** B. System-Level Changes

Another possibility for structural reform would be to leave individuals to be individuals, and to implement system-wide changes instead. We consider here two broad possibilities, the first anticipated by our prior discussion of "starving the beast."

1. Institutional and Constitutional Constraints

One promising path for further exploration is to put in place constitutional or other legal constraints. The "starve-the-beast" analysis supports the wisdom of such constraints: In times of cool, global reflection, consistent and sensible policy outcomes might prevail. Thus, for example, "balanced budget" amendments or rules would create constraints that, our research has found, most subjects would favor. "Paygo" mechanisms requiring legislators to tie tax cuts to specific spending cuts may also improve policy outcomes. [FN83] Other ideas include requiring the government to produce "fiscal impact statements," along the lines of environmental impact statements, to make the effects of various fiscal actions more transparent. A helpful analogy in tax policy is the "tax expenditure" budget championed by Stanley Surrey. [FN84] This budget requires the government to list, as a form of expenditures, the various amounts of foregone revenue occasioned by deductions, exclusions, and credits in the Internal Revenue Code. Although there are inevitably questions and controversies in arriving at definitions and figures, [FN85] the device has served a kind of consciousness-raising or debiasing function. Of course, such informational mechanisms, alone, may not always produce results; one wonders if the annual statement of accrued Social Security benefits that American taxpayers receive each year does any more than confuse them. [FN86] This leads us back to the idea of tying government's hands to some mast, as with constitutional constraints.

***1788** 2. Competition

A more fundamental idea is to look to the example of private markets, where competition selects the more efficient producers notwithstanding widespread cognitive error. After all, in private markets, ordinary actors (typically consumers) can easily be lead astray by their heuristics and biases. Yet market forces serve as a kind of arbitrage mechanism, lessening, if not altogether eliminating, the effects of individual biases. [FN87] Thus, for example, financial markets such as the stock market ought to feature efficient pricing, as long as there are enough rational actors without liquidity constraints to set things aright; consumer markets likewise tend towards marginal cost pricing. The irrational heuristics of some are a source of profit for others; this is a kind of "arbitrage" of irrationality, in which one person's mistake is another's gain.

Competition seems to play some role in public finance. Consider that the general hidden tax bias suggests that all taxes should be hidden, and thus that the corporate tax in particular should be quite large. Yet corporate taxes in the United States and other advanced democracies are limited and falling. [FN88] Why? A compelling answer is that capital is fluid, such that any overly high corporate tax rates would lead companies to locate elsewhere. Indeed, competition might lead to the elimination of the tax, which is not necessarily a bad thing. In general, creating competition across fiscal units might push public finance in a more optimal direction, away from wastefulness or inefficiency. [FN89]

But arbitrage in public settings has its limits. Arbitrage against heuristics and biases is a private good in private markets, but a public good in public markets. The private actor, noticing an anomaly in private markets, can profit from her insight: The invisible hand of competition works to effect marginal cost pricing, for example. In the public sphere, in

contrast, an ***1789** actor who notices an inefficient tax or spending program--a violation of the first prong of the optimal welfare-economics analysis--cannot thereby capture any gains for herself or even her party. Public goods are predictably undersupplied. [FN90] Thus, for example, one is hard pressed to find a major politician or political party campaigning against hidden taxes such as the corporate income tax. [FN91]

More generally, the arenas in which competition can occur are limited and inconsistent. Consider some possibilities.

a. Politics

Politicians compete, of course, for votes and increasingly for money. But they do not necessarily compete on the basis of wealth maximization, to which private markets relentlessly head. Rather, as we have noted, politicians might compete on the basis of their purely rhetorical success and thus can exacerbate, not lessen, the effects of citizen heuristics and biases.

b. Investment

To some extent, government can compete for investment, including the location of plants that employ workers. However, this kind of competition is often destructive in several ways. [FN92] Governments often pay too much in a "winner's curse" phenomenon. [FN93] And they end up providing subsidies to some industries at the expense of others that might be more productive. The biases of politics towards the immediate and the salient once more can lead public policy astray.

c. Immigration and Emigration

In principle, people can vote with their feet. [FN94] Greater competition among governments under a regime of free exit and entry could lead to more people living in places with better systems of public finance overall. To some ***1790** extent, the states of the United States compete in this way. [FN95] Such competition also occurs now among nations for immigrants, who often risk their lives to escape nations that are very badly governed. Yet, it is not clear that nations even benefit from expanding populations or want the immigrants who want to come. Thus, competition among governments is probably not a complete, long-term solution.

In sum, the idea of competition in public finance settings seems attractive, and it might work in some ways. However, many of the ways in which it might work have problems and do not offer easy answers to all of the challenges raised by behavioral public finance.

3. Role of Experts

Finally, another possible way out of the problem of widespread cognitive bias is to take matters out of the hands of the people and ordinary legislatures, as has been done in other areas such as environmental regulation and drug approval. Legislators tend to micromanage tax, which leads to a complicated tax code built by accretion, like a coral reef. [FN96] Could citizens come to trust a government agency that designed the tax code itself? The legislature would give the agency general guidance, as it does to the Food and Drug Administration, say. It also would be able to take away any powers given.

Arguably, large governments have been turning over more power to regulatory agencies. Justice Stephen Breyer has described such changes in France, and has advocated similar changes in the United States (for risk regulation in particular). [FN97] Cass Sunstein has shown in detail how this sort of idea might work. [FN98] Central banks have essentially de-politicized the setting of interest rates. What may be crucial, however, is that citizens have sufficient understanding of

the domains in question so that they can trust the regulators. Although we cannot expect everyone to be able to think like an economist, we can more reasonably expect that secondary education would lead people to understand, in the context of a few examples, what it is that economists try to do, and how. [FN99]

***1791** Conclusion

Our primary concern in this Article has been with how ordinary people think about redistribution through a public tax and transfer system, and how widespread cognitive errors might interfere with a welfare improving, optimal public finance system. We have presented evidence of several distortions in judgments about redistribution. Some are minor, such as the effect of presenting information in percentage versus dollars terms. Others are more serious:

• People dislike penalties and feel that they should fall more heavily on the rich, while the poor should get bonuses; the preferred distribution depends, however, on whether a difference is described as a penalty or bonus.

• Judgments are affected by whether or not something is described as a "tax," even when the consequences are held constant.

• People prefer hidden taxes in part because they do not think through to the next step of who actually will pay them. When they are prompted to think about this, their support for hidden taxes declines, but not dramatically.

• People prefer tax deductions to direct subsidies in part because they do not think about the regressiveness of deductions under a progressive marginal rate system. When prompted to think about distributional effects, their support for deductions declines, but again not dramatically.

• When people are asked to make judgments about a distribution, they isolate what they are asked to distribute, ignoring the possibility of using distribution in one system to correct maldistribution elsewhere.

• Similarly, people, even when they favor progressive taxation, fail to compensate in the tax system for the regressive effects of spending cuts.

• People favor lower taxes and lower government spending in general, but they are unwilling to cut specific programs anywhere near enough to constitute the general cuts they say they want.

We have focused on the isolation effect as an explanation for this panoply of phenomena. People make judgments about what is in front of their noses. They ignore logically connected information and data that is "offstage," however slightly. This natural tendency leads to instability, easy manipulation, and attempts to hide possible consequences of public fiscal policies as a part of winning support for them. All too often, the result is that redistributive policies are undermined because people do not think about the distributional consequences of some policy change, such as privatization or the use of tax deductions. Our work thus helps to understand ***1792** some of the difficulties of making democracy work. In public finance, everyone primarily wants good outcomes, but democracy still does not quite produce them.

We also have suggested various ways to remedy these effects, such as through education, and redesigning institutions, for example, by relying more heavily on expert regulatory agencies to design tax policy. These answers are far from final. Our hope is that, in the long run, better understanding of the imperfections of democratic government can bring it closer to perfection. We can see no better alternative to democracy itself for answering its own challenges.

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[FN1]. A given transaction is "pareto superior" if it benefits at least one party and harms no one. A "pareto optimal" allocation of resources occurs when no further pareto superior trades are possible.

[FN2]. See, e.g., Robin Boadway & Neil Bruce, Welfare Economics 3 (1984); Joseph E. Stiglitz, Economics of the Public Sector 60-61 (3d ed. 2000). For a more general discussion of the two welfare theorems and an application to income tax policy, see Kyle Logue & Ronen Avraham, Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance, 56 Tax L. Rev. 157, 159 n.8 (2003).

[FN3]. Louis Kaplow & Steven Shavell, Fairness Versus Welfare 52-58 (2002).

[FN4]. Kaplow and Shavell first proposed that the tax system be used as the exclusive means for redistribution in Louis Kaplow & Steven Shavell, Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income, 23 J. Legal Stud. 667 (1994). See also Louis Kaplow & Steven Shavell, Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income, 29 J. Legal Stud. 821 (2000) [hereinafter Kaplow & Shavell, Should Legal Rules Favor the Poor?]. Economists had long been making similar arguments. See, e.g., Arnold C. Harberger, On the Use of Distributional Weights in Social Cost-Benefit Analysis, 86 J. Pol. Econ. S87 (1978). For criticisms of the Kaplow-Shavell argument, see Ronen Avraham et al., Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell, 89 Iowa L. Rev. 1125 (2004); Logue & Avraham, supra note 2; Chris William Sanchirico, Deconstructing the New Efficiency Rationale, 86 Cornell L. Rev. 1003 (2001); Chris William Sanchirico, Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View, 29 J. Legal Stud. 797 (2000). For one among several replies by Kaplow and Shavell, see Kaplow & Shavell, Should Legal Rules Favor the Poor?, supra.

[FN5]. See, e.g., Richard A. Musgrave & Peggy B. Musgrave, Public Finance in Theory and Practice 4 (5th ed. 1989); Stiglitz, supra note 2, at 27.

[FN6]. It is compelling to consider that tax or other "redistributive" programs are better understood as setting the normatively appropriate initial distribution of material resources, as opposed to their redistribution. See, e.g., Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice 7-10 (2002); David Duff, Private Property and Tax Policy in a Libertarian World: A Critical Review, 18 Canadian J.L. & Jurisprudence 23, 30-31 (2005). For ease of exposition, however, we follow convention and write about the distributive prong of the optimal welfare economics approach as being "redistributive."

[FN7]. See R.H. Coase, The Firm, the Market, and the Law 179-85 (1988).

[FN8]. A public good is one whose benefits are nonexcludable and not rivalrous (one person's enjoyment does not affect another's). Harvey S. Rosen, Public Finance 53 (4th ed. 1995).

[FN9]. See Michael Rothschild & Joseph Stiglitz, Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information, 90 Q.J. Econ. 629 (1976).

[FN10]. For example, Kyle Loque and Ronen Avraham, in work addressing the Kaplow-Shavell approach, raise questions of whether all goods are truly commensurate with money. Logue & Avraham, supra note 2, at 169 n.38. Richard Bird and Eric Zolt raise questions about the practical administration and political feasibility of redistributive taxes in developing countries, suggesting that redistribution can best be effected by the "transfer" prong of a tax and transfer system (a result to which our research lends support, as discussed infra note 58). Richard M. Bird & Eric M. Zolt, Redistribution via Taxation: The Limited Role of the Personal Income Tax in Developing Countries, 52 UCLA L. Rev. 1627; see also Louis Kaplow, Optimal Income Transfers 1-3 (2004) (unpublished manuscript, on file with authors). Christine Jolls, taking a behavioral economics approach, suggests that optimism and other biases, such as the use of "mental accounts," related to our invocation of the isolation effect, discussed infra note 20 and accompanying text, mean that nontax systems are often better at redistribution than tax systems are. Christine Jolls, Behavioral Economics Analysis of Redistributive Legal Rules, 51 Vand. L. Rev. 1653, 1669-73 (1998).

[FN11]. See, e.g., Choices, Values, and Frames (Daniel Kahneman & Amos Tversky eds., 2000); Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahneman et al. eds., 1982).

[FN12]. A characteristic finding of the cognitive psychology literature is that subjects answer questions differently that present the same choices in different words--for example, half empty versus half full, child bonus versus child penalty. See generally sources cited supra note 11.

[FN13]. We hasten to add that we are not stating, by fiat, what this "right" level of redistribution is. We follow the standard economics approach of remaining agnostic on this question. See, e.g., Kaplow & Shavell, supra note 3, at 27; Logue & Avraham, supra note 2, at 157. Rather we mean that the overall system may not effect the level and type of redistribution that citizens themselves desire, because of framing and other effects.

[FN14]. Thomas Griffith makes a related but different point in a recent article. Thomas D. Griffith, Progressive Taxation and Happiness, 45 B.C. L. Rev. 1363, 1398 (2004). Griffith argues that people oppose progressive taxation even though these very taxes make them happy, because they misestimate the effects of declining marginal utility and positional status. Griffith's argument tracks the concept explored by Daniel Kahneman, of a distinction between people's decision versus experienced utility, whereby people systematically use the "wrong" weights, by their own lights, in reaching decisions. See Daniel Kahneman, Experienced Utility and Objective Happiness: A Moment-Based Approach, in Choices, Values and Frames, supra note 11, at 673. This is an example of dynamic inconsistency manifesting itself over time. The inconsistency we find and explore in this Article is, in contrast, static. Our concerns are with what Kahneman would call decision utility: We find that people are inconsistent in making decisions in the present tense.

[FN15]. Gini coefficients are measures of inequality in income distribution in populations. They vary from zero, indicating perfect equality where everyone has the same income, to one, indicating perfect inequality where one household has 100 percent of the country's income. Office for Nat'l Statistics, Measuring Inequality in Household Income: The Gini Coefficient, available at http://www.statistics.gov.uk/about/methodology_by_ theme/gini/default.asp.

[FN16]. See, e.g., Richard H. Thaler, The Winner's Curse: Paradoxes And Anomalies of Economic Life (1992). Behavioral economics also has important roots in the work of Herbert Simon on "bounded rationality." Herbert A. Simon, A Behavioral Model of Rational Choice, 69 Q.J. Econ. 99 (1955). Daniel Kahneman and Amos Tversky advanced the field considerably beginning in the 1970s; the field reached full flower with the award of the Nobel Prize in Economics to Kahneman in 2002. Researchers such as Richard Thaler have applied the insights to standard consumer or financial set-

tings.

[FN17]. See, e.g., Jonathan Baron, Thinking and Deciding 277-302 (3d ed. 2000).

[FN18]. Transitivity holds that if a person prefers good or choice set A to B, she should not also prefer good or choice set B to A.

[FN19]. Richard H. Thaler, Toward a Positive Theory of Consumer Choice, 1 J. Econ. Behav. & Org. 39, 45 (1980), reprinted in Richard H. Thaler, Quasi Rational Economics 3, 9 (1991).

[FN20]. Lorraine Chen Idson et al., Overcoming Focusing Failures in Competitive Environments, 17 J. Behav. Decision Making 159, 159-61 (2004); Steven K. Jones et al., Choices and Opportunities: Another Effect of Framing on Decisions, 11 J. Behav. Decision Making 211, 211-14 (1998); Paolo Legrenzi et al., Focusing in Reasoning and Decision Making, 49 Cognition 37, 38-39 (1993); Edward J. McCaffery & Jonathan Baron, The Humpty Dumpty Blues: Disaggregation Bias in the Evaluation of Tax Systems, 91 Organizational Behav. & Hum. Decision Processes 230, 232 (2003); Daniel Read et al., Choice Bracketing, 19 J. Risk & Uncertainty 171, 172-73 (1999).

[FN21]. Richard H. Thaler, Mental Accounting and Consumer Choice, 4 Marketing Sci. 199 (1985), reprinted in Quasi Rational Economics, supra note 19, at 25.

[FN22]. Incidence concerns the subject of who ultimately bears the burden of a tax. See, e.g., Arnold C. Harberger, The Incidence of the Corporation Income Tax, 70 J. Pol. Econ. 215 (1962). Efficiency analysis concerns the welfare loss or “deadweight costs” of various alternative taxes.

[FN23]. Baron, supra note 17, at 44-46.

[FN24]. In the interests of general readership, we omit almost all technical statistical terms and analyses in this Article. Formal analysis is readily available in the underlying, cited studies.

[FN25]. See, e.g., Linda Babcock et al., The Propensity To Initiate Negotiations: A New Look at Gender Variation in Negotiation Behavior (2002) (unpublished paper presented at the 15th Annual Conference for the International Association of Conflict Management, June 9-12, 2002).

[FN26]. See, e.g., Peggy A. Hite & Michael L. Roberts, An Experimental Investigation of Taxpayer Judgments on Rate Structure in the Individual Income Tax System, 13 J. Am. Tax'n Ass'n 47 (1991).

[FN27]. See id. at 49-50.

[FN28]. McCaffery & Baron, supra note 20, at 233.

[FN29]. See generally Daniel Kahneman & Amos Tversky, Variants of Uncertainty, 11 Cognition 143 (1982), reprinted in Judgment Under Uncertainty: Heuristics and Biases, supra note 11, at 509; Paul Slovic et al., Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats, 24 Law & Hum. Behav. 271 (2000).

[FN30]. Edward J. McCaffery & Jonathan Baron, Framing and Taxation: Evaluation of Tax Policies Involving Household Composition, 25 J. Econ. Psychol. 679, 692-95 (2004).

[FN31]. Id. at 698-700.

[FN32]. Paul Slovic and his colleagues found just such selective use of metrics by experts in seeking to influence public opinion. See Slovic et al., supra note 29, at 292-93.

[FN33]. Thomas C. Schelling, Economic Reasoning and the Ethics of Policy, 63 Pub. Interest 37, 53-56 (1981).

[FN34]. McCaffery & Baron, supra note 30, at 685.

[FN35]. Id. at 688.

[FN36]. Edward J. McCaffery & Jonathan Baron, Heuristics and Biases in Thinking About Tax, 96 Proc. Ann. Conf. on Tax'n 434, 438 (2003).

[FN37]. “No new taxes” was the infamous pledge of the elder George Bush, 41st President of the U.S.; his alleged violation of the pledge is said to have cost him reelection. We also have been informed by experts who advise on global tax reform that citizens often vehemently oppose user fees for services that they perceive as “free,” that is, paid through general taxes. Thanks to Richard Bird for discussions on point.

[FN38]. For more on the hidden tax bias discussion, see infra Part II.D.

[FN39]. This is a general finding of our “starve-the-beast” experiments, reported below. For general polling data reaching similar conclusions, see a compilation of different polls on the federal budget and taxes, available at http://www.pollingreport.com/budget.htm [hereinafter Federal Budget and Taxes].

[FN40]. Catherine C. Eckel et al., An Experimental Test of the Crowding Out Hypothesis, 89 J. Pub. Econ. 1543 (2005).

[FN41]. James Andreoni, An Experimental Test of the Public-Goods Crowding-Out Hypothesis, 83 Am. Econ. Rev. 1317, 1325-26 (1993).

[FN42]. Of course, the question of the ultimate incidence of the corporate tax is among the hardest practical questions facing public finance. See, e.g., Harberger, supra note 22.

[FN43]. Edward J. McCaffery, Cognitive Theory and Tax, 41 UCLA L. Rev. 1861, 1874-86 (1994), reprinted in Behavioral Law and Economics 398, 400-08 (Cass R. Sunstein ed., 2000).

[FN44]. Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263, 274-77 (1979).

[FN45]. Daniel Kahneman et al., Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias, J. Econ. Perspectives, Winter 1991, at 193, 194-97.

[FN46]. McCaffery & Baron, supra note 30.

[FN47]. The principal experiment we report also involved an attempt at educating subjects, a theme to which we return in conclusion. See infra Part IV.A.

[FN48]. The four types of insurance were health, disability, unemployment, and “terrorism” insurance for property.

[FN49]. This adds to the argument of Bird and Zolt, supra note 10, against using progressive income taxes to redistribute wealth in developing countries.

[FN50]. See generally Deborah A. Geier, Integrating the Tax Burdens of the Federal Income and Payroll Taxes on Labor Income, 22 Va. Tax Rev. 1 (2002); Deborah A. Geier, The Payroll Tax Liabilities of Low- and Middle-Income Taxpayers, 106 Tax Notes 711 (2005); Andrew Mitrusi & James Poterba, The Distribution of Payroll and Income Tax Burdens, 1979-1999, 53 Nat'l Tax J. 765 (2000).

[FN51]. McCaffery & Baron, supra note 20, at 234-35.

[FN52]. Ten subjects did not respond differently at all when they were asked for total tax or the other tax. The results were essentially the same when these subjects were removed from the analysis.

[FN53]. Additionally, compare the results in Table C. Even after adjustment, the level of taxation in these two conditions is about the same, yet subjects favored a far less graduated overall tax system when the given income tax was flat, in Row 8, then when graduated, in Row 6.

[FN54]. Amos Tversky & Daniel Kahneman, Judgment Under Uncertainity: Heuristics and Biases, 185 Science 1124, 1128-30 (1974), reprinted in Judgment Under Uncertainty: Heuristics and Biases, supra note 11, at 3, 14-18; Daniel Kahneman et al., Economic Preferences or Attitude Expressions?: An Analysis of Dollar Responses to Public Issues, 19 J. Risk & Uncertainty, 203, 225-28 (1999), reprinted in Choices, Values, and Frames, supra note 11 at 642, 665-68; Baron, supra note 17, at 375-76.

[FN55]. McCaffery & Baron, supra note 20, at 236.

[FN56]. I.R.C. §32 (2000); see also Lawrence Zelenak, Tax or Welfare? The Administration of the Earned Income Tax Credit, 52 UCLA L. Rev. 1867 (2005).

[FN57]. Jonathan Baron & Edward J. McCaffery, Masking Redistribution (or Its Absence), in Behavioral Public Finance (Edward J. McCaffery & Joel Slemrod eds., forthcoming), available at http://ssrn.com/abstract=528165.

[FN58]. Our results lend additional credence to the work of Bird & Zolt, supra note 10. Bird and Zolt find that expenditure programs are more important to redistribution, on net, than are tax systems. The fact that subjects seem to have a difficult time redistributing outside of expenditure programs supports this finding. Of course it also makes more problematic the choice of ethically appropriate redistribution in the first place, especially if this is to be determined by some aggregation of individual preferences.

[FN59]. For some related discussions, see William G. Gale & Peter R. Orszag, Bush Administration Tax Policy: Starving the Beast?, 105 Tax Notes 999 (2004), Daniel N. Shaviro, Can Tax Cuts Increase the Size of the Government?, 18 Can. J.L. & Jurisprudence 135 (2005), and Daniel N. Shaviro, Reckless Disregard: The Bush Administration's Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap, 45 B.C. L. Rev. 1285 (2004).

[FN60]. See, e.g., James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 31-39 (1962).

[FN61]. Robert J. Barro, Are Government Bonds Net Wealth?, 82 J. Pol. Econ. 1095, 1101-06 (1974).

[FN62]. See, e.g., Kahneman & Tversky, supra note 44 (prospect theory); Kahneman et al., supra note 45 (endowment effect).

[FN63]. McCaffery & Baron, supra note 36, at 442.

[FN64]. This term is usually attributed to David Stockman, the budget director in President Ronald Reagan's administration. John Maggs, Feeding the Beast, Nat'l J., Mar. 5, 2005, at 689.

[FN65]. The optimism bias is discussed by Jolls, supra note 10; see also Colin Camerer & Dan Lovallo, Overconfidence and Excess Entry: An Experimental Approach, 89 Am. Econ. Rev. 306, 310-13 (1999); Daniel Kahneman & Dan Lovallo, Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking, 39 Mgmt. Sci. 17, 24-29 (1993); Dan Lovallo & Daniel Kahneman, Delusions of Success: How Optimism Undermines Executives' Decisions, Harv. Bus. Rev., July 2003, at 56.

[FN66]. Such an effect would be analogous to the "identified victim" effect. See Karen Jenni & George Loewenstein, Explaining the "Identifiable Victim Effect," 14 J. Risk & Uncertainty 235, 235-36 (1997); Deborah A. Small & George Loewenstein, Helping a Victim or Helping the Victim: Altruism and Identifiability, 26 J. Risk & Uncertainty 5, 5-7 (2003); Tehila Kogut & Ilana Ritov, The "Identified Victim" Effect: An Identified Group, or Just a Single Individual? (unpublished paper presented at the 19th Biannual Conference on Subjective Probability, Utility, and Decision Making, Aug. 25-27, 2003).

[FN67]. See sources cited supra note 54.

[FN68]. See supra note 24.

[FN69]. See supra Part II.E.

[FN70]. See generally George Lowenstein et al., Statistical, Identifiable and Iconic Victims and Perpetrators, in Behavioral Public Finance, supra note 57, available at http://papers.ssrn.com/5013/papers.cfm?abstract_id=678281.

[FN71]. See generally Sven Steinmo, Taxation and Democracy: Swedish, British, and American Approaches to Financing the Modern State (1993) for a discussion of the role that popular democratic input may or may not have in formulating tax policies. We discuss some of these issues at greater length in Edward J. McCaffery & Jonathan Baron, Thinking About Tax, Psychol. Pub. Pol'y & L. (forthcoming), available at http://srrn.com/abstract=567767.

[FN72]. See generally David Hume, A Treatise on Human Understanding (Ernest Mossner ed., 1969) (1739) for the classic statement of the difficulty in moving from a descriptive fact, an "is," to a moral position, an "ought."

[FN73]. See Zelenak, supra note 56.

[FN74]. See generally Martin Feldstein, On the Theory of Tax Reform, 6 J. Pub. Econ. 77 (1976).

[FN75]. Our findings that people generally support moderate redistribution are confirmed by others. See Hite & Roberts, supra note 26; Michael L. Roberts et al., Understanding Attitudes Towards Progressive Taxation, 58 Pub. Opinion Q. 165, 184-86 (1994); Federal Budget and Taxes, supra note 39.

[FN76]. See generally C. Eugene Steuerle, Contemporary U.S. Tax Policy (2004).

[FN77]. Elizabeth Garrett, Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process, 65 U. Chi. L. Rev. 501, 546-47 (1998).

[FN78]. McCaffery & Baron, supra note 20, at 231.

[FN79]. Geoffrey T. Fong et al., The Effects of Statistical Training on Thinking About Everyday Problems, 18 Cognitive

Psychol. 253 (1986); Darrin R. Lehman & Richard E. Nisbett, A Longitudinal Study of the Effects of Undergraduate Training on Reasoning, 26 Developmental Psychol. 952 (1990); Richard E. Nisbett et al., Teaching Reason, 238 Science 625 (1987).

[FN80]. But cf. John G. Matsusaka, For the Many or the Few: The Initiative, Public Policy, and American Democracy 29-52 (2004) (finding that the results of popular referendums and initiative votes are generally efficient).

[FN81]. See, e.g., Jonathan Baron et al., Approval Voting and Parochialism 5-6 (July 21, 2004) (unpublished manuscript, on file with authors).

[FN82]. A quick way to make this happen is for the Educational Testing Service to put economics questions on the SAT.

[FN83]. See, e.g., Garrett, supra note 77, at 555-68.

[FN84]. See, e.g., Stanley S. Surrey, Pathways to Tax Reform: The Concept of Tax Expenditures 6-14 (1973); McCaffery, supra note 43, at 1941-42; Daniel N. Shaviro, Rethinking Tax Expenditures and Fiscal Language, 57 Tax L. Rev. 187, 187-88 (2004).

[FN85]. See, e.g., Boris I. Bittker, A “Comprehensive Tax Base” as a Goal of Income Tax Reform, 80 Harv. L. Rev. 925 (1967); Boris I. Bittker, Effective Tax Rates: Fact or Fancy?, 122 U. Pa. L. Rev. 780 (1974).

[FN86]. See Howell E. Jackson, Accounting for Social Security Benefits, in Behavioral Public Finance, supra note 57.

[FN87]. See, e.g., Nicholas C. Barberis & Richard H. Thaler, A Survey of Behavioral Finance, in 1B Handbook of the Economics of Finance 1054 (George M. Constantinides et al. eds., 2003) (questioning the view of others that arbitrage mechanisms eliminate the effect of heuristics and biases in private financial markets); McCaffery & Baron, supra note 36.

[FN88]. In 1965, taxes on corporate income as a percentage of total taxation were 16.4 percent, 22.2 percent, and 7.8 percent for the U.S., Japan, and Germany respectively. By 2002, they had fallen, respectively, to 6.7 percent, 7.8 percent, and 2.9 percent. Organisation for Economic Co-operation and Development, Revenue Statistics 1965-2003, at 73 (2004).

[FN89]. It is disturbing in this regard that large fiscal powers, such as the United States, use their power to restrict competition along these lines-- requiring, for example, effective corporate taxes among developed nations (as discussed by Ehud Kamar)--in a way that would be objectionable and indeed potentially illegal among private actors. See Ehud Kamar, Beyond Competition for Incorporations (2005) (unpublished manuscript, on file with authors), available at http://papers.ssrn.com/sol3/papers/cfm?abstract_id=720121.

[FN90]. Stiglitz, supra note 2, at 128-30.

[FN91]. See Jennifer Arlen & Deborah M. Weiss, A Political Theory of Corporate Taxation, 105 Yale L.J. 325, 335-62 (1994) for a discussion of why no one is seemingly opposed to corporate income taxes.

[FN92]. Max Bazerman et al., “You Can't Enlarge the Pie”: Six Barriers to Effective Government 67-98 (2001).

[FN93]. Thaler, supra note 16, at 50-62.

[FN94]. Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956); William A. Fischel, Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation, in Property Rights: Cooperation, Conflict

and Law 343 (Terry L. Anderson & Fred S. McChesney eds., 2002).

[FN95]. Marcel Kahan & Ehud Kamar, The Myth of State Competition in Corporate Law, 55 Stan. L. Rev. 679 (2002).

[FN96]. See generally Edward J. McCaffery, The Holy Grail of Tax Simplification, 1990 Wis. L. Rev. 1267 (discussing the complexity of tax).

[FN97]. Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation (1993).

[FN98]. Cass R. Sunstein, Risk and Reason: Safety, Law, and the Environment 116-19 (2002).

[FN99]. Jonathan Baron, Why Teach Thinking?--An Essay, 42 Applied Psychol.: Int'l Rev. 191 (1993), available at http://www.sas.upenn.edu/~baron/.

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decisions when considering risk data stated in probability as opposed to frequency metrics.[29] In tax, the metric effect can lead to confusion.

The first two tables come from an experiment in which we asked subjects about their attitudes about both the level of taxation (Table A) and the slope of its distribution (Table B).[30] The experiment was concerned primarily with how subjects accommodated for marriage and children, but it also gives a good look at the metric effect. There were four types of taxpayers: single persons, married equal-earner couples with incomes presented on a per person basis (Equal 1), married equal-earner couples with incomes presented per couple (Equal 2), and married one-earner couples, all with and without children.[31]

We asked subjects simply to fill in blanks for how much they thought each household/couple ought to pay in taxes at four income levels: $25,000, $50,000, $100,000 and $200,000. Sometimes we asked the subjects to use dollars, others times percents. Table A gives the mean responses across all income categories for the various household types. We converted subjects' answers originally given in dollars into percent, so that the metric effect is eliminated from our presentation of the results.

TABLE A
MEAN OVERALL LEVEL OF TAX (IN PERCENT)
AS A FUNCTION OF HOUSEHOLD TYPE AND METRIC FRAME

Answer in Dollars				
	Single	*Equal 1*	*Equal2*	*One-earner*
No child	14.7	14.0	13.8	13.4
Child	12.4	13.3	12.5	11.9
Answer in Percent				
	Single	*Equal 1*	*Equal2*	*One-earner*
No child	17.5	17.6	17.3	16.5
Child	15.1	17.4	15.2	14.7

29. *See generally* Daniel Kahneman & Amos Tversky, *Variants of Uncertainty*, 11 COGNITION 143 (1982), *reprinted in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 11, at 509; Paul Slovic et al., *Violence Risk Assessment and Risk Communication: The Effects of Using Actual Cases, Providing Instruction, and Employing Probability Versus Frequency Formats*, 24 LAW & HUM. BEHAV. 271 (2000).

30. Edward J. McCaffery & Jonathan Baron, *Framing and Taxation: Evaluation of Tax Policies Involving Household Composition*, 25 J. ECON. PSYCHOL. 679, 692–95 (2004).

31. *Id.* at 698–700.

Note that the levels are consistently and significantly higher when subjects gave their answers in a percentage metric.

Table B shows that the slope of desired progression is also higher when the question was asked in percent. There is a *progressivity illusion* when the values are given in dollars.

TABLE B
MEAN FAIR TAXES (IN PERCENT)
AS A FUNCTION OF INCOME AND METRIC FRAME

	$25,000	$50,000	$100,000	$200,000
Dollars	9.3	11.7	15.2	16.8
Percent	9.2	13.0	18.8	24.6

Tables A and B demonstrate that people support both higher and more steeply progressive taxes when they are thinking about taxes in percentage as opposed to in dollar terms. This finding suggests that the optics of progressive marginal rates might lead to instability in tax systems, or to an undue premium on rhetoric as opposed to reality in political portrayals of public finance. For example, candidates who favor progressive taxes ought to talk in percentage terms, and those who favor flatter taxes in dollar terms.[32]

B. Penalty Aversion and the Schelling Effect

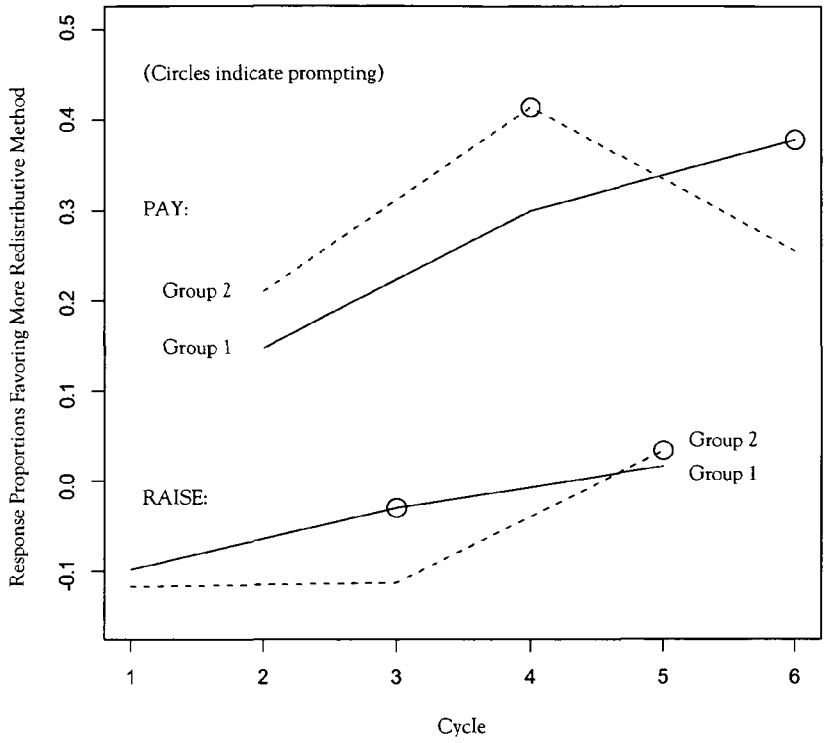
There are more troubling applications of cognitive psychology to redistribution. For example, people do not like "penalties" but they do like "bonuses." In standard economics, however, these are simply two sides of the same coin: A bonus is the absence of a penalty, a penalty the absence of a bonus. Yet whether one describes an issue as a bonus or as a penalty can have dramatic effects on its evaluation. This problem abounds in tax. A child bonus is a childless penalty, a marriage bonus is a singles penalty, and so on. We hypothesized that subjects would have a more positive impression of a policy stated in its bonus than in its penalty frame.

Following a classroom demonstration from Thomas Schelling,[33] and drawing on our own knowledge of the metric effect, we also suspected that

32. Paul Slovic and his colleagues found just such selective use of metrics by experts in seeking to influence public opinion. *See* Slovic et al., *supra* note 29, at 292–93.

33. Thomas C. Schelling, *Economic Reasoning and the Ethics of Policy*, 63 PUB. INTEREST 37, 53–56 (1981).

FIGURE 1
"FAVORABLE" ATTITUDES TOWARD REDISTRIBUTIVE POLICY
AS A FUNCTION OF WHERE DEBIASING OCCURRED



Note that subjects on the whole did not support raising the money through an income tax; the Raise responses are generally below 0 percent pro-redistribution. Notably, the income tax is the least hidden of all taxes. Contrary to our initial expectations, on Pay, subjects preferred direct payments or credits to using the income tax system to pay for services even before the educational prompting, although they were happy enough to further abandon the income tax as a spending system after that debiasing. What is most striking in Figure 1 is that subjects were inconsistent when it comes to redistribution, favoring it in the Pay condition but not overall in the Raise condition, but consistent in opposing the income tax. The subjects simply did not like the income tax as a vehicle to raise

We found that for all three of the cost-yielding cuts (health care, education, social security), subjects corrected far less than would be required even to get close to maintaining constant redistribution across conditions. While some subjects attempted to offset the cost-increasing effects of cuts, on average the attempt fell far short of what was needed to maintain progression.

Figure 2 shows the mean response of subjects, using the same type of graph they saw, in the absence of any cuts and in the presence of three cuts. The lowest panel represents the results of including out-of-pocket costs.

FIGURE 2
MEAN AND INFERRED RESPONSES FOR TAX RATES IN PRESENCE AND ABSENCE OF HEALTH CARE, EDUCATION, AND SOCIAL SECURITY

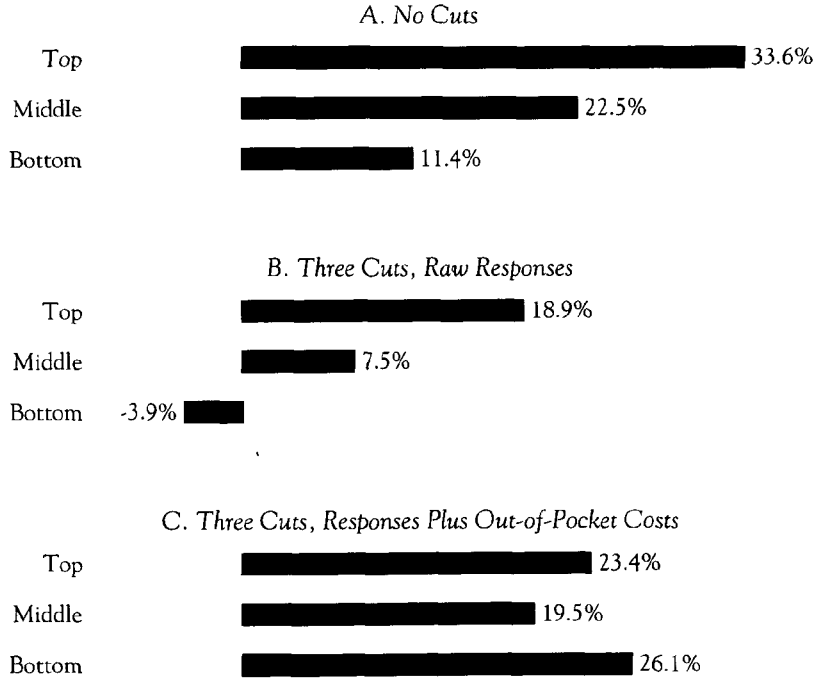
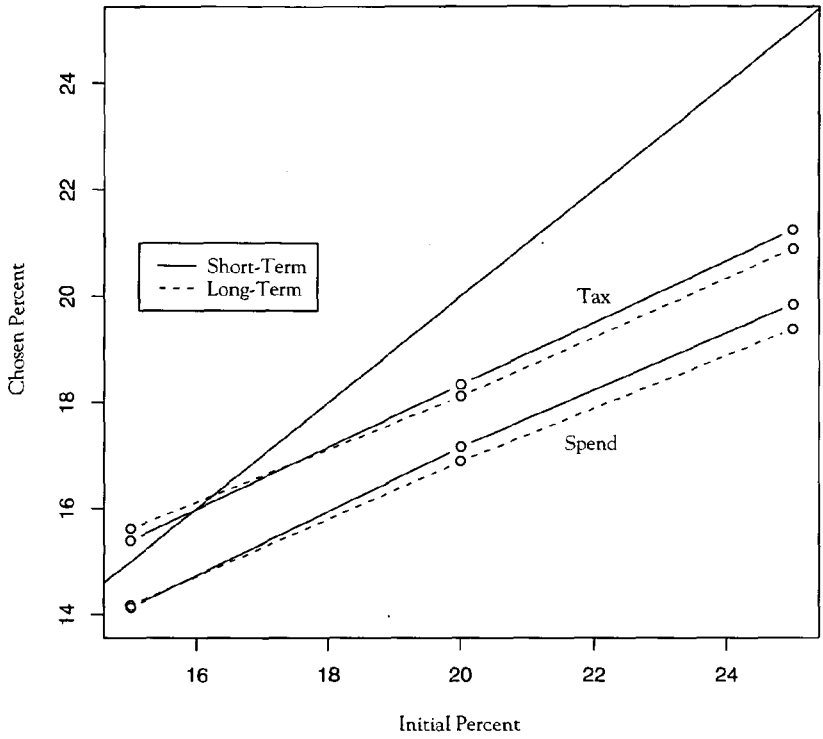


Figure 2 gives an excellent look at the isolation effect or disagreggation bias, as it played out in a unified tax and spending system. Subjects preferred at least moderate progressivity in the baseline, global condition (Panel A), with government provision of all five sets of goods and services. With three major private-cost items removed from the mix of public goods (Panel B),

FIGURE 3
PREFERRED LEVELS OF TAXATION AND SPENDING



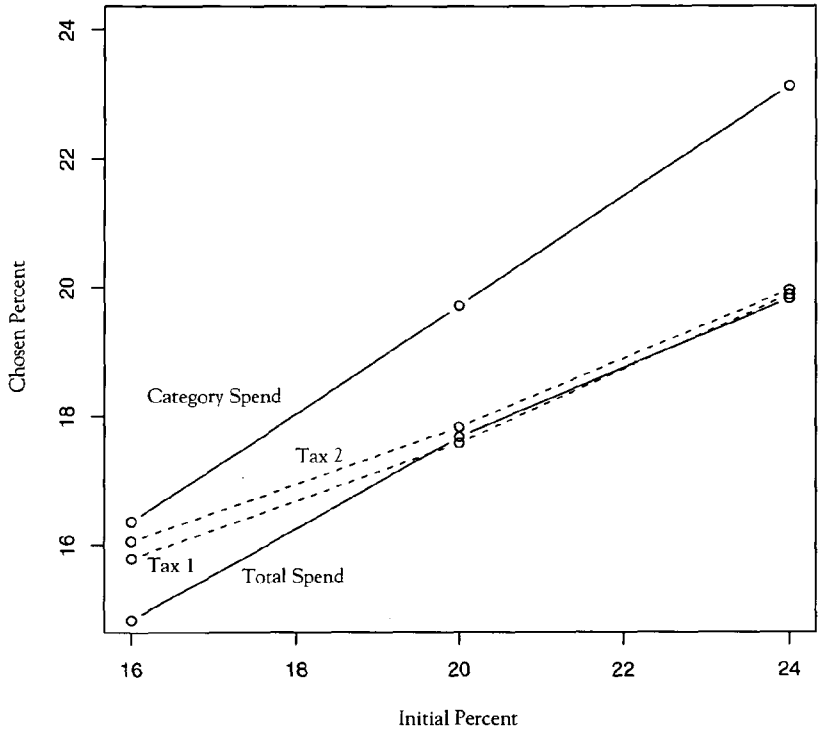
(The diagonal line—the one at the 45° angle—represents no change from starting point)

Figure 3 shows subjects' preferred levels of taxation and spending as a function of the starting levels of each. Three features of the results are especially interesting.

One, subjects preferred lower taxes, reflecting once again a general tax aversion. In the high (25 percent) and medium (20 percent) initial tax conditions, subjects lowered the tax rate. In the low (15 percent) initial tax condition, they supported a slight but insignificant tax increase, although it is worth noting that the introductory page had set a current condition default at 20 percent, so subjects might indeed have taken this particular starting point as a tax cut.

Two, subjects generally favored a surplus over a deficit. Preferred levels of taxation were higher than preferred levels of spending by an average of 1.3 percent of GDP. Surpluses were created because the subjects cut spending

FIGURE 4
LEVELS OF TAXATION AND SPENDING IMPLIED BY JUDGMENTS



(Taxation questions are dashed lines, spending questions are solid lines)

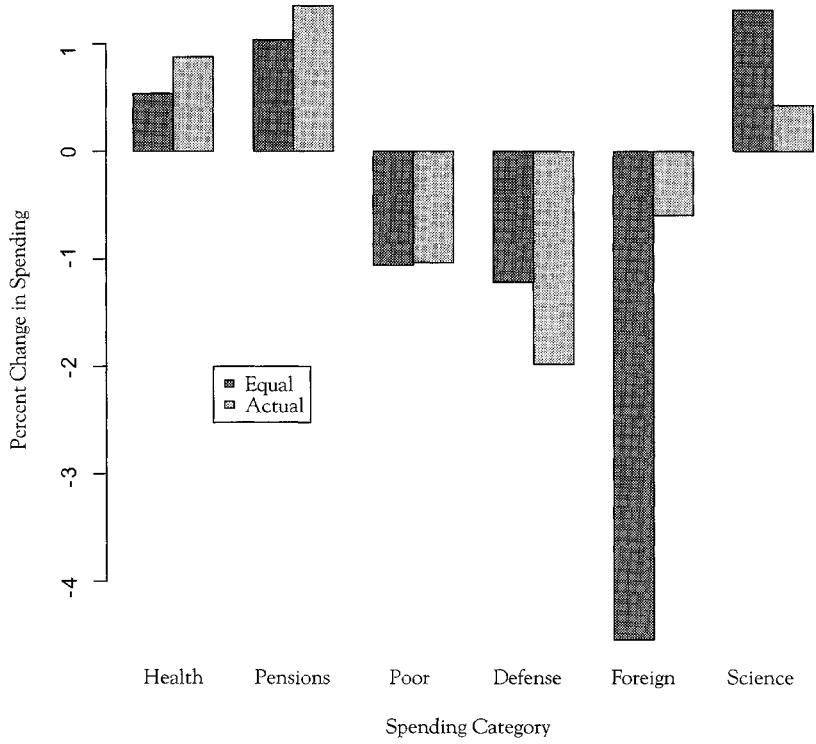
Figure 4 shows the mean judgments for the four conditions. In Tax 1 and Total Spend, subjects wanted less spending and less taxation on the whole, especially when the starting level of each was high, confirming the results of the prior experiment. As before, too, subjects made some attempt to adjust toward a constant level of desired tax and spending, but not enough to remove the influence of the starting point (perfect adjustment would have made the lines horizontal, with tax and spending invariant to starting point). Because of this under-adjustment, all deficits and surpluses remained incompletely corrected. On the whole, however, subjects favored neither surpluses nor deficits, although they favored reductions in both spending and taxation.

Tax 1 and Tax 2 did not differ significantly. In all trials, subjects wanted on average to cut taxes, except when these were already at the lowest level in

the range, here 16 percent. But subjects did not integrate their tax decisions with their attitudes on spending, as noted above, such that deficits persisted.

Total Spend and Category Spend, however, differed significantly. Although subjects adjusted Category Spend somewhat by reducing spending more when initial spending was higher, the amount of adjustment (change from the starting point in Figure 4) was a mere 7 percent of the amount of the downward adjustment found in Total Spend. Moreover, the Category Spend and Tax 2 judgments together implied much higher deficits than the starting point on the average. Subjects wanted to cut taxes but did not want to change spending significantly when, and only when, they were faced with questions by specific category of spending.

FIGURE 5
CATEGORY SPENDING CHANGES, IN PERCENT OF SPENDING



(Calculated both as if all categories were equal parts of the budget, and the actual percents given to the subjects)

Office of the President

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Most Reverend William S. Skylstad, D.D.
Bishop of Spokane

October 10, 2006

Honorable George W. Bush
President of the United States
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20502

Dear Mr. President:

On behalf of the U.S. Conference of Catholic Bishops, I write to ask that you veto H.R. 6061, the Secure Fence Act of 2006. As you know, H.R. 6061 would authorize the construction of up to 700 miles of fencing and barriers along our southern border with Mexico, among other provisions.

To be clear, the U.S. Catholic bishops are supportive of efforts to enforce immigration law and secure our borders, so long as the mechanisms and strategies applied toward this end protect human dignity and protect human life.

However, we are opposed to this legislation because we believe it could lead to the deaths of migrants attempting to enter the United States and increased smuggling-related violence along our border. We also believe it would send the wrong signal to our peaceful neighbor to the south, Mexico, as well as the international community. Finally, we do not believe it will solve the problem of illegal immigration faced by our nation.

The Government Accountability Office (GAO) recently found that migrant deaths have doubled since 1995, about the time that the government initiated a series of border enforcement initiatives designed to stem illegal entries at ports-of-entry and other traditional crossing routes. Since that time, close to 3,000 migrants have died in remote portions of the southwest region of the country.

In our estimation, the erection of a border fence would force migrants, desperate to find employment to support their families, to seek alternative and more dangerous ways to enter the country, contributing to an increase in deaths, including among women and children. It also would drive migrants to depend upon unscrupulous smugglers, who would exploit them and, in some cases, place them in dangerous situations which may cause them harm.

As you know, Mr. President, the U.S. Catholic bishops believe that the defense of human life at all stages is of utmost importance and priority.

Another likely result of a border fence is an increase, not decrease, in smuggling-related violence, as smuggling networks may attempt to devise more elaborate and, in some cases, more confrontational schemes to smuggle persons into the country. Increased competition among smuggling gangs could lead to more violence in border communities. As Department of Homeland Security Secretary Michael Chertoff recently stated, violence against Border Patrol agents increased over 100 percent in 2005.

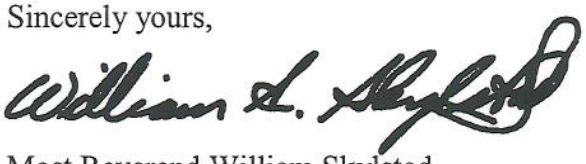
We also feel strongly that the erection of a 700-mile border fence would send a signal to Mexico and other countries in the hemisphere that the United States is not willing to work cooperatively to address the problem of illegal immigration. It could harm our relations with these countries and inhibit bilateral progress on mutual interests. As the world's greatest democracy and lone superpower, our nation should be able to address the issue of illegal immigration without resorting to the construction of fences and barriers.

Finally, Mr. President, we do not believe that a border fence will solve the immigration crisis in our nation. As you may know, close to one-half of all persons residing without documentation enter the country legally and overstay their visas. Moreover, as the Catholic Church is a universal organization which witnesses the economic conditions in sending countries such as Mexico, we do not believe that a fence will deter persons desperate to escape poverty from seeking employment in our country. From this universal perspective, we strongly feel that the development of just global economic and trade policies designed to help create living wage jobs in countries of origin would permit persons to remain home and support themselves and their families.

Mr. President, the U.S. Catholic bishops have appreciated your leadership on immigration and your support of comprehensive immigration reform. It is our view that the best way to secure our border is through the enactment of a comprehensive immigration reform measure, not by the construction of a border fence.

We hope that you will agree with this assessment and veto H.R. 6061, the Secure Fence Act of 2006.

Sincerely yours,



Most Reverend William Skylstad
Bishop of Spokane
President, U.S. Conference of Catholic Bishops

Strangers No Longer: Together on the Journey of Hope

Issued by USCCB, January 22, 2003

A Pastoral Letter Concerning Migration
from the Catholic Bishops of Mexico and the United States

Contents

Introduction

1. As we begin the third millennium, we give thanks to God the Father for the many blessings of creation, and to our Lord Jesus Christ for the gift of salvation. We raise our prayer to the Holy Spirit to strengthen and guide us in carrying out all that the Lord has commanded us. In discerning the signs of the times, we note the greatly increased migration among the peoples of the Americas, and we see in this but one manifestation of a worldwide phenomenon–often called globalization–which brings with it great promises along with multiple challenges.

2. We speak as two episcopal conferences but as one Church, united in the view that migration between our two nations is necessary and beneficial. At the same time, some aspects of the migrant experience are far from the vision of the Kingdom of God that Jesus proclaimed: many persons who seek to migrate are suffering, and, in some cases, tragically dying; human rights are abused; families are kept apart; and racist and xenophobic attitudes remain.

3. On January 23, 1999, at the Basilica of Our Lady of Guadalupe, Pope John Paul II presented his apostolic exhortation *Ecclesia in America*, which resulted from the Synod of Bishops of America.[1] In the spirit of ecclesial solidarity begun in that synod and promoted in *Ecclesia in America*, and aware of the migration reality our two nations live, we the bishops of Mexico and the United States seek to awaken our peoples to the mysterious presence of the crucified and risen Lord in the person of the migrant and to renew in them the values of the Kingdom of God that he proclaimed.

4. As pastors to more than ninety million Mexican Catholics and sixty-five million U.S. Catholics, we witness the human consequences of migration in the life of society every day. We witness the vulnerability of our people involved in all sides of the migration phenomenon, including families devastated by the loss of loved ones who have undertaken the migration journey and children left alone when parents are removed from them. We observe the struggles of landowners and enforcement personnel who seek to preserve the common good without violating the dignity of the migrant. And we share in the concern of religious and social service providers who, without violating civil law, attempt to respond to the migrant knocking at the door.

5. Migrants and immigrants are in our parishes and in our communities. In both our countries, we see much injustice and violence against them and much suffering and despair among them because civil and church structures are still inadequate to accommodate their basic needs.

6. We judge ourselves as a community of faith by the way we treat the most vulnerable among us. The treatment of migrants challenges the consciences of elected officials, policymakers, enforcement officers, residents of border communities, and providers of legal aid and social services, many of whom share our Catholic faith.

7. In preparing this statement we have spoken with migrants, public officials, enforcement officers, social justice activists, pastors, parishioners, and community leaders in both the United States and Mexico as part of a process that lasted two years. Our dialogue has revealed a common desire for a more orderly system that accommodates the reality of migration and promotes just application of civil law. We seek to measure the interests of all parties in the migration phenomenon against the guidelines of Catholic social teaching and to offer a moral framework for embracing, not rejecting, the reality of migration between our two nations. We invite Catholics and persons of good will in both nations to exercise their faith and to use their resources and gifts to truly welcome the stranger among us (cf. Mt 25:35).

8. In recent years, signs of hope have developed in the migration phenomenon in both Mexico and the United States: a growing consciousness of migrants as bearers of faith and culture; an outpouring of hospitality and social services, including migrant shelters; a growing network of advocates for migrants' and immigrants' rights; a more organized effort at welcome and intercultural communion; a greater development of a social conscience; and greater recognition by both governments of the importance of the issue of migration. Each of our episcopal conferences has spoken with great urgency to encourage these signs of hope.[2] We reiterate our appreciation for and our encouragement of manifestations of commitment to solidarity according to the vision inspired by *Ecclesia in America* (EA).

9. We speak to the migrants who are forced to leave their lands to provide for their families or to escape persecution. We stand in solidarity with you. We commit ourselves to your pastoral care and to work toward changes in church and societal structures that impede your exercising your dignity and living as children of God.

10. We speak to public officials in both nations, from those who hold the highest offices to those who encounter the migrant on a daily basis. We thank our nations' presidents for the dialogue they have begun in an effort to humanize the migration phenomenon.

11. We speak to government personnel of both countries who enforce, implement, and execute the immigration laws.

12. Finally, we speak to the peoples of the United States and Mexico. Our two nations are more interdependent than ever before in our history, sharing cultural and social values, common interests, and hopes for the future. Our nations have a singular opportunity to act as true neighbors and to work together to build a more just and generous immigration system.

Chapter I
America: A Common History of Migration and a Shared faith in Jesus Christ

13. America is a continent born of immigrant peoples who came to inhabit these lands and who from north to south gave birth to new civilizations. Throughout history the continent has suffered through the expansion of other peoples who came to conquer and colonize these lands, displacing and eliminating entire peoples and even forcing unknown millions of persons and families from Africa to come as slaves.

14. It was precisely within the historical processes of forced and voluntary movements that faith in Christ entered into these lands and extended all over the continent. Faith in Christ has thus "shaped [our] religious profile, marked by moral values which, though they are not always consistently practiced and at times are cast into doubt, are in a sense the heritage of all Americans, even of those who do not explicitly recognize this fact" (EA, no. 14).

15. Our continent has consistently received immigrants, refugees, exiles, and the persecuted from other lands. Fleeing injustice and oppression and seeking liberty and the opportunity to achieve a full life, many have found work, homes, security, liberty, and growth for themselves and their families. Our countries share this immigrant experience, though with different expressions and to different degrees.

16. Since its origins, the Mexican nation has had a history marked by encounters between peoples who,

coming from different lands, have transformed and enriched it. It was the encounter between Spaniards and indigenous people that gave rise to the Mexican nation in a birth that was full of the pain and joy that the struggle for life entails. Besides this, immigrants from all continents have participated in the birth of Mexico; they continue to do so now and will for years to come. Mexico is not only a country of emigrants, but also a country of *immigrants* who come to build their lives anew. It is important to remember the difficult experiences many of our brothers and sisters have of being strangers in a new land and to welcome those who come to be among us.

17. Since its founding, the United States has received immigrants from around the world who have found opportunity and safe haven in a new land. The labor, values, and beliefs of immigrants from throughout the world have transformed the United States from a loose group of colonies into one of the leading democracies in the world today. From its founding to the present, the United States remains a nation of immigrants grounded in the firm belief that newcomers offer new energy, hope, and cultural diversity.

18. At the present time, the interdependence and integration of our two peoples is clear. According to U.S. government statistics, about 800,000 Mexicans enter the United States each day.[3] Cross-border U.S. and Mexican investment has reached unprecedented levels in recent years. Moreover, each year the United States admits between 150,000 to 200,000 Mexicans into the country as legal permanent residents, amounting to nearly 20 percent of the total number of legal permanent residents *admitted* each year.[4] A significant number of U.S. citizens live, work, and retire in Mexico. In addition to this present interdependence, Mexico and the United States have been bound historically by spiritual connections.

19. Our common faith in Jesus Christ moves us to search for ways that favor a spirit of solidarity. It is a faith that transcends borders and bids us to overcome all forms of discrimination and violence so that we may build relationships that are just and loving.

20. Under the light of the apparition of Our Lady of Guadalupe to the littlest of her children, who were as powerless as most migrants are today, our continent's past and present receive new meaning. It was St. Juan Diego whom our Mother asked to build a temple so in it she could show her love, compassion, aid, and defense to all her children, especially the least among them.[5] Since then, in her Basilica and beyond its walls, she has brought all the peoples of America to celebrate at the table of the Lord, where all his children may partake of and enjoy the unity of the continent in the diversity of its peoples, languages, and cultures (EA, no. 11).

21. As Pope John Paul II wrote in *Ecclesia in America*:

In its history, America has experienced many immigrations, as waves of men and women came to its various regions in the hope of a better future. The phenomenon continues even today, especially with many people and families from Latin American countries who have moved to the northern parts of the continent, to the point where in some cases they constitute a substantial part of the population. They often bring with them a cultural and religious heritage which is rich in Christian elements. The Church is well aware of the problems created by this situation and is committed to spare no effort in developing her own pastoral strategy among these immigrant people, in order to help them settle in their new land and to foster a welcoming attitude among the local population, in the belief that a mutual openness will bring enrichment to all. (EA, no. 65)

Chapter II
Reflections in the Light of the Word of God and Catholic Social Teaching

Migration in the Light of the Word of God

22. The word of God and the Catholic social teaching it inspires illuminate an understanding–one that is ultimately full of hope–that recognizes the lights and shadows that are a part of the ethical, social, political, economic, and cultural dimensions of migrations between our two countries. The word of God and Catholic social teaching also bring to light the causes that give rise to migrations, as well as the

consequences that they have on the communities of origin and destination.

23. These lights and shadows are seen in faith as part of the dynamics of creation and grace on the one hand, and of sin and death on the other, that form the backdrop of all salvation history.

Old Testament
24. Even in the harsh stories of migration, God is present, revealing himself. Abraham stepped out in faith to respond to God's call (Gn 12:1). He and Sarah extended bounteous hospitality to three strangers who were actually a manifestation of the Lord, and this became a paradigm for the response to strangers of Abraham's descendants. The grace of God even broke through situations of sin in the forced migration of the children of Jacob: Joseph, sold into slavery, eventually became the savior of his family (Gn 37:45)–a type of Jesus, who, betrayed by a friend for thirty pieces of silver, saves the human family.

25. The key events in the history of the Chosen People of enslavement by the Egyptians and of liberation by God led to commandments regarding strangers (Ex 23:9; Lv 19:33). Israel's conduct with the stranger is both an imitation of God and the primary, specific Old Testament manifestation of the great commandment to love one's neighbor: "For the Lord, your God, is the . . . Lord of lords, the great God, mighty and awesome, who has no favorites, accepts no bribes, who executes justice for the orphan and widow, and befriends the alien, feeding and clothing him. So you, too, must befriend the alien, for you were once aliens yourselves in the land of Egypt" (Dt 10:17-19). For the Israelites, these injunctions were not only personal exhortations: the welcome and care of the alien were structured into their gleaning and tithing laws (Lv 19:9-10; Dt 14:28-29).

New Testament
26. Recalling the migration of the Chosen People from Egypt, Jesus, Mary, and Joseph themselves were refugees in Egypt: "Out of Egypt I called my son" (Mt 2:15). From this account the Holy Family has become a figure with whom Christian migrants and refugees throughout the ages can identify, giving them hope and courage in hard times.

St. Matthew also describes the mysterious presence of Jesus in the migrants who frequently lack food and drink and are detained in prison (Mt 25:35-36). The "Son of Man" who "comes in his glory" (Mt 25:31) will judge his followers by the way they respond to those in such need: "Amen, I say to you, whatever you did for one of these least brothers of mine, you did for me" (Mt 25:40).

27. The Risen Christ commanded his apostles to go to all nations to preach his message and to draw all people through faith and baptism into the life of God the Father, Son, and Holy Spirit (Mt 28:16-20). The Risen Christ sealed this command through the sending of the Holy Spirit (Acts 2:1-21). The triumph of grace in the Resurrection of Christ plants hope in the hearts of all believers, and the Spirit works in the Church to unite all peoples of all races and cultures into the one family of God (Eph 2:17-20).

The Holy Spirit has been present throughout the history of the Church to work against injustice, division, and oppression and to bring about respect for individual human rights, unity of races and cultures, and the incorporation of the marginalized into full life in the Church. In modern times, one of the ways this work of the Spirit has been manifested is through Catholic social teaching, in particular the teachings on human dignity and the principle of solidarity.

Migration in the Light of Catholic Social Teaching
28. Catholic teaching has a long and rich tradition in defending the right to migrate. Based on the life and teachings of Jesus, the Church's teaching has provided the basis for the development of basic principles regarding the right to migrate for those attempting to exercise their God-given human rights. Catholic teaching also states that the root causes of migration–poverty, injustice, religious intolerance, armed conflicts–must be addressed so that migrants can remain in their homeland and support their families.

29. In modern times, this teaching has developed extensively in response to the worldwide phenomenon of migration. Pope Pius XII reaffirms the Church's commitment to caring for pilgrims, aliens, exiles, and

migrants of every kind in his apostolic constitution *Exsul Familia*, affirming that all peoples have the right to conditions worthy of human life and, if these conditions are not present, the right to migrate. "Then–according to the teachings of [the encyclical] *Rerum Novarum*–the right of the family to a [life worthy of human dignity][6] is recognized. When this happens, migration attains its natural scope as experience often shows."[7]

30. While recognizing the right of the sovereign state to control its borders, *Exsul Familia* also establishes that this right is not absolute, stating that the needs of immigrants must be measured against the needs of the receiving countries:

Since land everywhere offers the possibility of supporting a large number of people, the sovereignty of the State, although it must be respected, cannot be exaggerated to the point that access to this land is, for inadequate or unjustified reasons, denied to needy and decent people from other nations, provided of course, that the public wealth, considered very carefully, does not forbid this.[8]

In his landmark encyclical *Pacem in Terris*, Blessed Pope John XXIII expands the right to migrate as well as the right to not have to migrate: "Every human being has the right to freedom of movement and of residence within the confines of his own country; and, when there are just reasons for it, the right to emigrate to other countries and take up residence there."[9] Pope John XXIII placed limits on immigration, however, when there are "just reasons for it." Nevertheless, he stressed the obligation of sovereign states to promote the universal good where possible, including an obligation to accommodate migration flows. For more powerful nations, a stronger obligation exists.

31. The Church also has recognized the plight of refugees and asylum seekers who flee persecution. In his encyclical letter *Sollicitudo Rei Socialis*, Pope John Paul II refers to the world's refugee crisis as "the festering of a wound."[10] In his 1990 Lenten message, Pope John Paul II lists the rights of refugees, including the right to be reunited with their families and the right to a dignified occupation and just wage. The right to asylum must never be denied when people's lives are truly threatened in their homeland.[11]

32. Pope John Paul II also addresses the more controversial topic of undocumented migration and the undocumented migrant. In his 1995 message for World Migration Day, he notes that such migrants are used by developed nations as a source of labor. Ultimately, the pope says, elimination of global underdevelopment is the antidote to illegal immigration.[12] *Ecclesia in America*, which focuses on the Church in North and South America, reiterates the rights of migrants and their families and the respect for human dignity "even in cases of non-legal immigration."[13]

33. Both of our episcopal conferences have echoed the rich tradition of church teachings with regard to migration.[14] Five principles emerge from such teachings, which guide the Church's view on migration issues.

I. Persons have the right to find opportunities in their homeland.
34. All persons have the right to find in their own countries the economic, political, and social opportunities to live in dignity and achieve a full life through the use of their God-given gifts. In this context, work that provides a just, living wage is a basic human need.

II. Persons have the right to migrate to support themselves and their families.
35. The Church recognizes that all the goods of the earth belong to all people.[15] When persons cannot find employment in their country of origin to support themselves and their families, they have a right to find work elsewhere in order to survive. Sovereign nations should provide ways to accommodate this right.

III. Sovereign nations have the right to control their borders.
36. The Church recognizes the right of sovereign nations to control their territories but rejects such control when it is exerted merely for the purpose of acquiring additional wealth. More powerful economic nations, which have the ability to protect and feed their residents, have a stronger obligation to accommodate

migration flows.

IV. Refugees and asylum seekers should be afforded protection.
37. Those who flee wars and persecution should be protected by the global community. This requires, at a minimum, that migrants have a right to claim refugee status without incarceration and to have their claims fully considered by a competent authority.

V. The human dignity and human rights of undocumented migrants should be respected.
38. Regardless of their legal status, migrants, like all persons, possess inherent human dignity that should be respected. Often they are subject to punitive laws and harsh treatment from enforcement officers from both receiving and transit countries. Government policies that respect the basic human rights of the undocumented are necessary.

39. The Church recognizes the right of a sovereign state to control its borders in furtherance of the common good. It also recognizes the right of human persons to migrate so that they can realize their God-given rights. These teachings complement each other. While the sovereign state may impose reasonable limits on immigration, the common good is not served when the basic human rights of the individual are violated. In the current condition of the world, in which global poverty and persecution are rampant, the presumption is that persons must migrate in order to support and protect themselves and that nations who are able to receive them should do so whenever possible. It is through this lens that we assess the current migration reality between the United States and Mexico.

Chapter III
Pastoral Challenges and Responses

Toward Conversion
40. Our concern as pastors for the dignity and rights of migrants extends to pastoral responses as well as public policy issues. The Church in our two countries is constantly challenged to see the face of Christ, crucified and risen, in the stranger. The whole Church is challenged to live the experience of the disciples on the road to Emmaus (Lk 24:13-25), as they are converted to be witnesses of the Risen Lord after they welcome him as a stranger. Faith in the presence of Christ in the migrant leads to a conversion of mind and heart, which leads to a renewed spirit of communion and to the building of structures of solidarity to accompany the migrant. Part of the process of conversion of mind and heart deals with confronting attitudes of cultural superiority, indifference, and racism; accepting migrants not as foreboding aliens, terrorists, or economic threats, but rather as persons with dignity and rights, revealing the presence of Christ; and recognizing migrants as bearers of deep cultural values and rich faith traditions. Church leaders at every level are called on to communicate this teaching as well as to provide instruction on the phenomenon of migration, its causes, and its impact throughout the world. This instruction should be grounded in the Scriptures and social teaching.

Toward Communion
41. Conversion of mind and heart leads to communion expressed through hospitality on the part of receiving communities and a sense of belonging and welcome on the part of those in the communities where migrants are arriving. The New Testament often counsels that hospitality is a virtue necessary for all followers of Jesus. Many migrants, sensing rejection or indifference from Catholic communities, have sought solace outside the Church. They experience the sad fate of Jesus, recorded in St. John's Gospel: "He came to what was his own, but his own people did not accept him" (Jn 1:11). The need to provide hospitality and create a sense of belonging pertains to the Church on every level, as Pope John Paul II said in his annual message on World Migration Day 1993: "The families of migrants . . . should be able to find a homeland everywhere in the Church."[16]

42. We bishops have the primary responsibility to build up the spirit of hospitality and communion extended to migrants who are passing through or to immigrants who are settling in the area.

- We call upon pastors and lay leaders to ensure support for migrant and immigrant families.

- We urge communities to offer migrant families hospitality, not hostility, along their journey.
- We commend church communities that have established migrant shelters that provide appropriate pastoral and social services to migrants.
- We encourage Catholics and all people of good will to work with the community to address the causes of undocumented migration and to protect the human rights of all migrants.
- We call on the local church to help newcomers integrate in ways that are respectful, that celebrate their cultures, and that are responsive to their social needs, leading to a mutual enrichment of the local church.
- We ask that special attention be given to migrant and immigrant children and youth as they straddle two cultures, especially to give them opportunities for leadership and service in the community and to encourage vocations among them.
- The Church on both sides of the border must dedicate resources to provide pastoral care for migrants who are detained or incarcerated. The presence of the Church within detention facilities and jails is an essential way of addressing the human rights violations that migrants may face when they are apprehended.
- We encourage local dioceses to sponsor pertinent social services for migrants and immigrants, particularly affordable legal services.
- In many rural dioceses, the primary site of pastoral outreach for farm workers is the migrant camp, usually at a significant distance from the parish church. In this context we encourage local parishioners to be prepared as home missionaries and the migrants themselves to be prepared as catechists and outreach workers.

Toward Solidarity

43. The building of community with migrants and new immigrants leads to a growing sense of solidarity. The bishop as pastor of the local church should lead the priests, deacons, religious, and faithful in promoting justice and in denouncing injustice towards migrants and immigrants, courageously defending their basic human rights. This should be true in both the sending and receiving churches. As leaven in the society, pastoral agents can be instruments for peace and justice to promote systemic change by making legislators and other government officials aware of what they see in the community. Working closely with other advocates for workers and with non-governmental organizations, the Church can be instrumental in developing initiatives for social change that benefit the most vulnerable members of the community.

44. The Church should encourage these broad-based efforts to provide both a comprehensive network of social services and advocacy for migrant families. Another important resource these communities can offer migrants, especially those seeking asylum or family reunification, is affordable or free legal assistance. A special call is issued to lawyers in both our countries to assist individuals and families in navigating the arduous immigration process and to defend the human rights of migrants, especially those in detention. Parishes should work together to provide adequate services throughout the community, making every effort to invite parishioners with special expertise (lawyers, doctors, social workers) to assist generously wherever they can.

Pastoral Care at Origin, in Transit, and at Destinations

45. The reality of migration, especially when the journey entails clandestine border crossings, is often fraught with uncertainties and even dangers. As migrants leave their homes, pastoral counseling should be offered to help them to better understand these realities and to consider alternative options, including the exploration of available legal means of immigration.

Native Peoples Deserve Special Consideration

The one ancestral homeland of the Tohono O'odham nation that stretches across the United States and Mexico has no border. Neither does the homeland of the Yaqui nation. Tribal members' rights to travel freely throughout the land they have inhabited for one thousand years should be respected. They should be able to visit family members and participate in religious and cultural celebrations, observances, and other community events

without harassment or multiple identity checks in both Mexico and the United States.

46. Prayer books and guides to social and religious services should be provided along the way and at the points of arrival. The migrants should be reminded of their role as evangelizers: that they have the capacity to evangelize others by the daily witness of their Christian lives. Special encouragement should be given to migrants to be faithful to their spouses and families and to thereby live out the sacrament of marriage. Support of the family that is left behind is also needed. Migration under certain conditions can have a devastating effect on families; at times, entire villages are depopulated of their young people.

47. Dioceses in Mexico and the United States need to work closely to provide a sacramental presence for migrants. Ideally, local parishes should ensure that sacramental preparation is available to people on the move, making special provisions for them given their transitory lives of following work wherever it leads. Eucharistic celebrations or communion services and the Sacrament of Reconciliation should be available to migrants where they can easily attend, and at times that best suit working people with families.

Collaborative Pastoral Responses

48. *Ecclesia in America* recommends collaboration between episcopal conferences for more effective pastoral responses. Collaboration is most needed in the development of a more systematic approach to ministerial accompaniment of migrants. The numbers of migrants who leave Central and South America and Mexico and who enter the United States are so large that a more concerted effort is needed in the preparation of priests, religious, and lay leaders who accompany them.

49. In previous centuries, when immigrants from eastern and western Europe came to all parts of the American continent, the Church in some countries established national seminaries to prepare priests to serve in the lands where others in their country were settling, particularly in North and South America. In other countries, the Church developed religious communities of men and women to accompany emigrants on their way, to minister to them on arrival, and to help them integrate into their new homes from a position of strength, often by forming national or personal parishes. In still other countries, the Church has developed exchange or temporary programs in which commitments are made to supply priests for a period of three to five years. Up to the present there have been individual exchanges of priests between Central and South American, Mexican, and U.S. dioceses. The bishops from Central and South America and Mexico have visited the U.S. dioceses to which these priests and their people have immigrated, and U.S. bishops have visited dioceses in Central and South America and Mexico, reflecting the teaching of the Second Vatican Council that every local church is missionary, both as sending and receiving church. This exchange has built up the spirit of collaboration encouraged in *Ecclesia in America*. These efforts have been very positive, but the results have not been uniform.

50. Careful and generous cooperation between dioceses is important to provide priests and religious who are suited for this important ministry. Guidelines for their training and reception by the host diocese must be developed jointly with the diocese that sends them. During their stay in the host diocese, international priests and religious deserve an extensive and careful orientation and gracious welcome. As immigrants themselves, they too experience the loss of a familiar and supportive environment and must have the support they need to adjust to the new environment and culture. Periodically, as resources allow, they should be encouraged to return to their home dioceses or motherhouses to rest and to reconnect with their communities.

51. A next step would be to study the possibility of a more comprehensive preparation and assignment of clergy, religious, and lay people who dedicate themselves to pastoral accompaniment of migrants. Such a study by representatives of both episcopal conferences should focus on the following:

- The needs of migrants on their journey and at the points of their arrival
- The dioceses most in need of priests, religious, and lay leaders
- The possibility of seminaries in Mexico to prepare priests for service in the United States

- The assignment of religious communities to accompany migrants

The study also should include recommendations on ways to build bridges of exchange between dioceses and on effective programs to orient ministers to the new culture they will enter. This formation should be an integral process of human development, educational enrichment, language acquisition, intercultural communication, and spiritual formation. In order to meet this critical need as soon as possible, cooperation with existing seminaries, schools of theology, and pastoral institutes is highly encouraged.

This study should also investigate ways to help the immigrants themselves to continue an active role as lay leaders in the new settings in which they find themselves and ways for the receiving church to animate and encourage them, especially those who served as catechists and community leaders in the country of origin. We recommend that a special academic subject on pastoral migration or human mobility be included as part of the regular curriculum in our seminaries, institutions, and houses of formation.

52. Another area of collaboration could be in the preparation of catechetical materials that would be culturally appropriate for migrant farm workers. Several examples already exist that reflect the collaboration of dioceses along both the United States-Mexico border and the Mexico-Guatemala border.

53. This cross-border collaboration has already reaped positive results, such as the development of legal services, social services, cooperation with houses of hospitality along the borders, and prayer books for the journey. Joint prayer services at the border, such as the *Posadas*, Good Friday vigils, and All Souls rites to cherish the memory of those who have died, also have been held.

54. To develop and continue the cooperation between the Church in the United States and Mexico, we bishops encourage ongoing dialogue between bishops and pastoral workers on the border, exchanges between dioceses, and continuing meetings between the USCCB's Committee on Migration and the CEM's Episcopal Commission for the Pastoral Care for People on the Move.

55. *Ecclesia in America* summed up these pastoral recommendations as follows:

Migrants should be met with a hospitable and welcoming attitude which can encourage them to become part of the Church's life, always with due regard for their freedom and their specific cultural identity. Cooperation between the dioceses from which they come and those in which they settle, also through specific pastoral structures provided for in the legislation and praxis of the Church, has proved extremely beneficial to this end. In this way the most adequate and complete pastoral care possible can be ensured. The Church in America must be constantly concerned to provide for the effective evangelization of those recent arrivals who do not yet know Christ. (no. 65)

Chapter IV
Public Policy Challenge and Responses

56. The United States and Mexico share a special relationship that requires focused attention upon joint concerns. The realities of migration between both nations require comprehensive policy responses implemented in unison by both countries. The current relationship is weakened by inconsistent and divergent policies that are not coordinated and, in many cases, address only the *symptoms* of the migration phenomenon and not its root causes.

57. Now is the time for both the United States and Mexico to confront the reality of globalization and to work toward a globalization of solidarity. We call upon both governments to cooperate and to jointly enact policies that will create a generous, legal flow of migrants between both nations. Both governments have recognized the integration of economic interests through the North American Free Trade Agreement (NAFTA). It is now time to harmonize policies on the movement of people, particularly in a way that respects the human dignity of the migrant and recognizes the social consequences of globalization.

58. With these goals in mind, we offer several policy recommendations for both nations to consider that address the root causes of migration, legal avenues for migration, and humane law enforcement. These recommendations focus upon both U.S. and Mexican government policies toward newcomers in their own nations, since both are receiving countries.

Addressing the Root Causes of Migration

59. As we have stated, persons should have the opportunity to remain in their homeland to support and to find full lives for themselves and their families. This is the ideal situation for which the world and both countries must strive: one in which migration flows are driven by choice, not necessity. Paramount to achieving this goal is the need to develop the economies of sending nations, including Mexico.

60. Only a long-term effort that adjusts economic inequalities between the United States and Mexico will provide Mexican workers with employment opportunities that will allow them to remain at home and to support themselves and their families. The Church has consistently singled out economic inequality between nations as a global disorder that must be addressed.Within the United States-Mexico relationship, we have witnessed the application of economic policies that do not adequately take into account the welfare of individual proprietors who struggle to survive. For example, the North American Free Trade Agreement (NAFTA) has harmed small businesses in Mexico, especially in the rural sector. Both nations should reconsider the impact of economic and trade agreements on persons who work hard at making a living through individual enterprises.

61. The creation of employment opportunities in Mexico would help to reduce poverty and would mitigate the incentive for many migrants to look for employment in the United States. The implementation of economic policies in Mexico that create living-wage jobs is vital, especially for Mexican citizens without advanced skills. Targeted development projects in Mexican municipalities and rural areas that traditionally have had the highest rates of emigration are necessary. Projects and resources particularly should be targeted to the Mexican agricultural sector and small businesses.

62. As border regions are the focal point of the migration phenomenon, resources also should be directed toward communities on the United States-Mexico border. Such additional resources would augment existing efforts by border residents to aid migrants in meeting their most basic needs. We urge the initiation of joint border development projects that would help build up the economies of these areas so that border residents may continue to work and live cooperatively. Church leaders should work with both communities on the U.S. and Mexican border and both communities on the Mexican and Guatemalan border to help them to overcome fears and prejudices.

Creating Legal Avenues for Migration

63. With both the United States and Mexico experiencing economic, social, and cultural integration on an unprecedented scale, it is important that both governments formally acknowledge this reality by enacting reforms in the immigration systems of both countries.

Family-Based Immigration

64. As pastors, we are troubled by how the current amalgamation of immigration laws, policies, and actions pursued by both governments often impedes family unity. While the majority of Mexican migrants enter the United States to find work, many cross the border to join family members.

65. The U.S. legal immigration system places per-country limits on visas for family members of U.S. legal permanent residents from Mexico. This cap, along with processing delays, has resulted in unacceptable waiting times for the legal reunification of a husband and wife, or of a parent and child. For example, the spouse or child of a Mexican-born legal permanent resident can wait approximately eight years to obtain a visa to join loved ones in the United States. Spouses and parents thus face a difficult decision: either honor their moral commitment to family and migrate to the United States without proper documentation, or wait in the system and face indefinite separation from loved ones.

66. This is an unacceptable choice, and a policy that *encourages* undocumented migration. In order to

ensure that families remain together, reform of the U.S. family-based legal immigration categories vis-à-vis Mexico is necessary. A new framework must be established that will give Mexican families more opportunities to legally reunite with their loved ones in the United States.[17] This would help alleviate the long waiting times and, in time, would *reduce* undocumented migration between the United States and Mexico.

67. Family unity also is weakened when the children of immigrants are left unprotected. In the United States, birthright citizenship should be maintained as an important principle in U.S. immigration law. In Mexico, some children are being denied birth certificates and consequent Mexican nationality due to their parents' undocumented status. As the Mexican Constitution ensures and Article 68 of the National Law of Population codifies, such children have the right and protection to be documented at birth. Otherwise, their access to health, education, and other basic services may be denied later in life. Moreover, the right to an identity and nationality are enshrined in international covenants.

Legalization of the Undocumented

68. Approximately 10.5 million Mexican-born persons currently live in the United States, about 5.5 million of whom reside legally, and the remainder of whom have undocumented status. Each year, an estimated 150,000 Mexican migrants enter the United States without authorization, working in such industries as agriculture, service, entertainment, and construction.[18] Despite the rhetoric from anti-immigrant groups and some government officials, they labor with the quiet acquiescence of both government and industry.

69. A broad legalization program of the undocumented would benefit not only the migrants but also both nations. Making legal the large number of undocumented workers from many nations who are in the United States would help to stabilize the labor market in the United States, to preserve family unity, and to improve the standard of living in immigrant communities. Moreover, migrant workers, many of whom have established roots in their communities, will continue to contribute to the U.S. economy.

70. Legalization also would maintain the flow of remittances to Mexico and would give Mexicans safe and legal passage back to Mexico, if necessary. In addition, such legalization would promote national security by reducing fear in immigrant communities and by encouraging undocumented persons to become participating members of society. Legalization represents sound public policy and should be featured in any migration agreement between the United States and Mexico. In order to ensure fairness for all nationalities, the U.S. Congress should enact a legalization program for immigrants regardless of their country of origin.

71. In the case of Mexico, the legalization programs that the Mexican National Migration Institute have executed provide a good beginning. The benefits of legalization have been evident to the migrants themselves, since they may now work with the protection of their basic labor rights; and to the government, which can now gain a more realistic picture of the population present in the country. We hope that future programs will provide more publicity and information to the public, will increase the number of and better train those who administer them, and will decrease the cost to the applicant, which in the past has disadvantaged those with lesser means.[19]

Employment-Based Immigration

72. In the context of the United States-Mexico bilateral relationship, the United States needs Mexican laborers to maintain a healthy economy and should make a special effort to provide legal avenues for Mexican workers to obtain in the United States jobs that provide a living wage and appropriate benefits and labor protections. The U.S. employment-based immigration system should be reformed to feature both *permanent* and, with appropriate protections, *temporary* visa programs for laborers. A system that is transparent and that protects the rights of workers should be formulated. Visa costs of the program should remain affordable for all who wish to participate. Reform in worker programs must be coupled with a broad-based legalization program.

Remittances: The Lifeblood of Many Mexican Families

Mexican workers who labor in the United States send large portions of their wages, which they

have earned by the sweat of their brows, back to their families in Mexico. Termed "remittances," these funds amount to as much as $8-10 billion a year, representing one of the largest sources of foreign currency in Mexico. These funds are an important source of support for many families in Mexico. Unfortunately, many Mexican workers in the United States must pay exorbitant fees (some as high as 20%) to send remittances to their families in Mexico. Perhaps a more efficient means can be devised for sending funds to Mexico that would result in more of the money reaching those in need. Furthermore, arrangements could be made with the organizations that process these remittances to channel some of their earnings from the fees to support community development efforts in Mexico, such as road construction, sewers, health clinics, and so on. Such an approach could be further expanded by making arrangements with the U.S. and Mexican governments to match developmental funds paid through fee revenues in order to augment the investment in sustainable community development programs.

73. A certain number of work visas should be created to allow laborers to enter the country as legal permanent residents. Family ties and work history in the United States are two of the possible factors that should be considered in allocating such visas. A visa category featuring permanent residency would recognize the contributions of long-term laborers and would ensure that their labor rights are respected.

74. More problematic is the reform of U.S. temporary worker programs. The first U.S. agricultural temporary-worker program, known as the *Bracero* program, ended abruptly in 1964 because of widespread evidence of corruption and abuse of workers. The current program, which allows more than thirty thousand workers to enter the United States each year, is marked by a lack of enforcement of worker protections and by insufficient wages and benefits to support a family.

75. Nevertheless, we recognize that, as an alternative to undocumented migration, an efficient legal pathway must be established that protects the basic labor rights of foreign-born workers. In order to prevent future abuse of workers, any new temporary worker program must afford Mexican and other foreign workers wage levels and employment benefits that are sufficient to support a family in dignity; must include worker protections and job portability that U.S. workers have; must allow for family unity; must employ labor-market tests to ensure that U.S. workers are protected; and must grant workers the ability to move easily and securely between the United States and their homelands. It must employ strong enforcement mechanisms to protect workers' rights and give workers the option to become lawful permanent residents after a specific amount of time. In addition, the United States and Mexico should conclude a Social Security agreement that allows workers to accrue benefits for work performed during participation in the program.

76. A properly constructed worker program would reduce the number of undocumented persons migrating from Mexico to the United States, lessening the calls for border enforcement and the demand for the services of unscrupulous smugglers.

77. Moreover, in order to honor the labor rights of foreign-born workers, the United States should sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which lays out principles for the protection of the labor and human rights of migrant workers.[20] Mexico, already a signatory, should implement its principles without current reservations.

Humane Enforcement Policies in Mexico and the United States
Enforcement Tactics

78. As explained above, the Catholic Church recognizes the right and responsibility of sovereign nations to control their borders and to ensure the security interests of their citizens. Therefore, we accept the legitimate role of the U.S. and Mexican governments in intercepting undocumented migrants who attempt to travel through or cross into one of the two countries. We do not accept, however, some of the policies and tactics that our governments have employed to meet this shared responsibility.

79. The men and women of the law enforcement agencies charged with maintaining the United States-

Mexico border have difficult jobs that require long hours in sometimes extreme conditions. Unfortunately, the enforcement policies that they implement have had the effect of undermining the human dignity of migrants and creating a confrontational and violent relationship between enforcement officers and migrants. Steps must be taken to create an environment in which force is used only in the most necessary circumstances, and only to the extent needed, to protect the physical well-being of both the enforcement officer and the migrant. This requires not only a review and reform of enforcement tactics, but also, more importantly, a reshaping of the enforcement policies of both nations.

U.S. Enforcement Strategy Fails to Deter Migrants

In 1994, the U.S. government adopted a new border enforcement strategy designed to deter migrants from entering the United States from Mexico. The Immigration and Naturalization Service (INS) has launched several blockade initiatives over the past several years, including "Operation Hold the Line," in El Paso, Texas, in 1993; "Operation Gatekeeper," in the San Diego, California, region in 1994; and "Operation Safeguard," in southern Arizona, in 1995. According to an August 2001 report by the U.S. General Accounting Office (GAO), the primary discernible effect of the enforcement strategy has been to divert migrants away from the largest concentration of enforcement resources, most typically to remote regions of the southwestern United States. During the same period, the number of undocumented persons in the United States has more than doubled, from four million in 1994 to more than eight million in 2000.

80. Alarmingly, migrants often are treated as criminals by civil enforcement authorities. Misperceptions and xenophobic and racist attitudes in both the United States and Mexico contribute to an atmosphere in which undocumented persons are discriminated against and abused. Reports of physical abuse of migrants by U.S. Border Patrol agents, the Mexican authorities, and in some cases, U.S. and Mexican residents are all too frequent, including the use of excessive force and the shackling of migrants' hands and feet.

81. In the United States, documented abuses of migrants occur frequently. To be sure, the large majority of Border Patrol agents conduct themselves in a professional and respectful manner. But there exist those who perpetrate abuses and who are not held accountable by the U.S. government.[21]

82. In addition, the U.S. record of handling undocumented unaccompanied minors from Mexico and other countries is shameful. Mexican children intercepted along the U.S. border often are placed in dilapidated detention facilities for days at a time until they can be repatriated. Children from Mexico and other countries in Central America often are not given the option to contact an attorney, guardian, or relative, or to file for asylum. These practices must stop. Because of their heightened vulnerability, unaccompanied minors require special consideration and care.

83. Mexican enforcement of immigration laws, targeted specifically through racial profiling of migrants attempting to reach the United States, has been marked by corruption, police brutality, and systemic abuses of basic human rights. Migrants often are forced to bribe Mexican police to continue transit and, if unable to produce payments, are beaten and returned to the border. Because of the lack of rights and policies that drive undocumented migrants away from small urban areas, the migrants often are assaulted by bandits in the border area between Ciudad Hidalgo, Mexico, and Tecun Uman, Guatemala. We know of migrants from Central America who pay thousands of dollars to smugglers to shepherd them through Mexico but who, in some cases, are kidnapped. Their families never hear from them again.

84. Although we acknowledge that the government of Mexico has improved the administration of the migration system and is attempting to bring the rule of law to it, Mexican immigration policies remain unclear and inconsistent. Corruption continues to weaken the Mexican migration system and to hurt the common good. We urge the Mexican National Migration Institute to strengthen the participation of civil society organizations in its Delegation Councils[22] as partners to bring healthy transparency to the country's migration system.

85. In order to address these excesses, both governments must create training mechanisms that instruct enforcement agents in the use of appropriate tactics for enforcing immigration law. We urge the U.S. and Mexican governments to include human rights curricula in their training regimens so that immigration enforcement personnel are more sensitive to the handling of undocumented migrants.[23] Community organizations, including dioceses and parishes, can assist enforcement officials in this effort. In addition, the enforcement function in both nations should be left to federal authorities (the Immigration and Naturalization Service and Border Patrol in the United States, and the National Migration Institute and Federal Preventive Police in Mexico), not transferred to local police who necessarily have other priorities and who are untrained in the proper methods for enforcing immigration law. Military personnel from any branch or service should not be used to enforce migration laws along either country's land borders.

Border Enforcement Policies

86. Of particular concern are the border enforcement policies pursued by both governments that have contributed to the abuse and even deaths of migrants in both Mexico and the United States. Along the United States-Mexico border, the U.S. government has launched several border-blockade initiatives in the past decade designed to discourage undocumented migrants from entering the country. These initiatives have been characterized by a tripling of Border Patrol agents, especially at ports of entry, and the use of sophisticated technology such as ground sensors, surveillance cameras, heat-detecting scopes, and reinforced fencing.

87. Rather than significantly reducing illegal crossings, the initiatives have instead driven migrants into remote and dangerous areas of the southwest region of the United States, leading to an alarming number of migrant deaths. Since the beginning of 1998, official statistics indicate that more than two thousand migrants have lost their lives trying to cross the United States-Mexico border, many from environmental causes such as heat stroke, dehydration, hypothermia, or drowning. The blockades also have contributed to an increase in migrant smuggling, in which desperate migrants pay high fees to smugglers to get them into the United States. In recent years, smuggling has become a more organized and profitable enterprise.[24]

"Come and Look at My Brother in His Coffin"

Jose Luis Hernandez Aguirre tried desperately to find work in the *maquiladora* plants near Mexicali but was unable to do so. With a wife and two children, ages one and seven, Jose needed to find a job that would put food on the table. A smuggler told him of the high-paying jobs across the border and offered, for $1,000, to take him there. Joined by his brother Jaime and several others, the group headed for the United States with hope. After one day, brother Jaime called and reported to the family and Jose's sister, Sonia, that Jose was lost. Jaime could not make the trek in the desert, but Jose wanted to continue on the journey. He had to find a job for his family. Four days later, Jose's body was found in the desert. His sister Sonia borrowed a truck to retrieve Jose's remains. Upon her return, she encountered another group of migrants heading to the United States. "Why do you want to risk your lives like this?" she implored. "Come and look at my brother in his coffin."

88. In southern Mexico, similar policies have resulted in countless migrant deaths along the Suchiate River, most by drowning. Another cause for concern is the presence of Mexican checkpoints–far from most urban areas and difficult to monitor for human rights abuses–which are manned by military and federal, state, and local police agencies along the country's borders and interior. Because these checkpoints are used as "choke" points for arms, drugs, and migrant smuggling, there is an unfair tendency to associate migrants with criminal activity.

89. We urge both the U.S. and Mexican enforcement authorities to abandon the type of strategies that give rise to migrant smuggling operations and migrant deaths. Care should be taken not to push migrants to routes in which their lives may be in danger. The U.S. Border Patrol has recently launched a border safety initiative to prevent migrant deaths. We ask the Border Patrol to redouble their efforts in this area and to work more closely with community groups to identify and rescue migrants in distress. We also urge

more concerted efforts to root out smuggling enterprises at their source using a wide range of intelligence and investigative tactics. In other church documents, the U.S. bishops have also expressed concern about the increasing drug-trafficking industry.[25]

90. Similarly, we call upon both nations to undertake joint efforts to halt the scourge of trafficking in human persons, both within our hemisphere and internationally. Trafficking in persons–in which men, women, and children from all over the globe are transported to other countries for the purposes of forced prostitution or labor–inherently rejects the dignity of the human person and exploits conditions of global poverty.

91. Both governments must vigilantly seek to end trafficking in human persons. The U.S. government should vigorously enforce recent laws that target traffickers both at home and abroad. Mexican authorities must strengthen efforts to identify and to destroy trafficking operations within Mexico. Together, both governments should more effectively share information on trafficking operations and should engage in joint action to apprehend and prosecute traffickers.

Due Process Rights

92. In 1996, the U.S. Congress eviscerated due process rights for migrants with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which authorizes the detention and deportation of migrants for relatively minor offenses, even after they have served their sentences. IIRIRA has caused the unjust separation of untold numbers of immigrant families.[26] We urge the U.S. Congress to revisit this law and to make appropriate changes consistent with due process rights.

93. We also urge the Mexican government to honor the right to due process for all those who are in the country, specifically documented and undocumented migrants who do not now enjoy due process and who may be removed from the country for arbitrary reasons. Recognizing such a right only strengthens the rule of law in a country and further legitimates its institutions.[27]

94. Once apprehended, migrants often are held in unsanitary and crowded prisons, jails, and detention centers, in Mexico and the United States, sometimes alongside serious criminal offenders. Migrants without documentation should not be treated as criminals, should be detained for the least amount of time possible, and should have access to the necessary medical, legal, and spiritual services. Asylum seekers who pass an initial "credible fear" interview should be released.

Protecting Human Rights in Regional Migration Policies

95. As defenders of those who flee persecution in foreign lands, we are increasingly troubled by the asylum policies employed by both the United States and Mexico. Most alarming is the prospect of creating a North American exterior boundary system in which asylum policies would be regionalized in such a way as to deny asylum seekers appropriate judicial remedies and protection.[28]

96. Increasingly, asylum seekers from across the globe are smuggled through Central America to Mexico and the United States. They come from as far away as China, India, Iran, and Iraq. In most cases, they have valid claims for protection, but many are swept up in anti-smuggling initiatives in Central America and Mexico and are sent back to their persecutors without proper screening.

97. The denial of asylum adjudication rights is an especially acute problem along the United States-Mexico border. Employing a U.S. policy known as *expedited removal*, U.S. immigration officers routinely detain and deport migrants without giving them a hearing before an immigration judge. In fact, expedited removal is most heavily used against Mexicans. Of the just over 180,000 total removals from the United States in FY1999 and FY2000, 81 percent of those deported were Mexican.[29] Moreover, Mexicans and others deported under expedited removal are subject to being barred from readmission to the United States for at least five years. Along the southern border of Mexico, migrants are returned on a regular basis to Central America without screening.

98. Denying access to asylum procedures, making them complicated, or not providing clear information

about them in languages that people can understand is a grave injustice and violates the spirit of international law and commitments made by both our countries.[30]

99. We restate our long-held position that asylum seekers and refugees should have access to qualified adjudicators who will objectively consider their pleas. We urge both countries to take a leadership role in the Regional Conference on Migration (*Puebla* Process) and to work with our Central American neighbors to ensure that asylum seekers and refugees throughout our hemisphere have access to appropriate due process protections consistent with international law.

Consequences of September 11 Terrorist Attacks for Migrants

100. The terrorist attacks of September 11, 2001, which ended so tragically in New York, the Washington, D.C., area, and Pennsylvania, have placed national security concerns at the forefront of the migration debate and have added another dimension to the migration relationship between the United States and Mexico. Certain security actions are a necessary response to credible terrorist threats, such as improved intelligence sharing and screening, enhanced visa and passport security, and thorough checks at the United States-Mexico border. Other actions, however, such as reducing legal immigration between the two nations, do not serve to make the United States or Mexico more secure. We urge both nations to cooperate in this area, but not to enact joint policies that undermine human rights, reduce legal immigration, or deny asylum seekers opportunities for protection.

Conclusion

101. As bishops we have decided, in the words of Pope John Paul II, to "put out into the deep"[31] in search of common initiatives that will promote solidarity between our countries, particularly among the Catholics of both countries. We are committed to the new evangelization of our continent and to the search for new ways of leading our peoples to encounter Christ, who is "the path to conversion, communion and solidarity" (EA, no. 7).[32]

102. We recognize the phenomenon of migration as an authentic sign of the times. We see it in both our countries through the suffering of those who have been forced to become migrants for many reasons. To such a sign we must respond in common and creative ways so that we may strengthen the faith, hope, and charity of migrants and all the People of God. Such a sign is a call to transform national and international social, economic, and political structures so that they may provide the conditions required for the development for all, without exclusion and discrimination against any person in any circumstance.

103. In effect, the Church is increasingly called to be "sign and instrument both of a very closely knit union with God and of the unity of the whole human race" (*Lumen Gentium*, no. 1). The Catholic bishops of the United States and Mexico, in communion with the Holy Father in his 1995 World Migration Day message, affirm that

In the Church no one is a stranger, and the Church is not foreign to anyone, anywhere. As a sacrament of unity and thus a sign and a binding force for the whole human race, the Church is the place where illegal immigrants are also recognized and accepted as brothers and sisters. It is the task of the various Dioceses actively to ensure that these people, who are obliged to live outside the safety net of civil society, may find a sense of brotherhood in the Christian community. Solidarity means taking responsibility for those in trouble.

The Church must, therefore, welcome all persons regardless of race, culture, language, and nation with joy, charity, and hope. It must do so with special care for those who find themselves–regardless of motive–in situations of poverty, marginalization, and exclusion.

104. We ask our presidents to continue negotiations on migration issues to achieve a system of migration between the two countries that is more generous, just, and humane. We call for legislatures of our two countries to effect a conscientious revision of the immigration laws and to establish a binational system that accepts migration flows, guaranteeing the dignity and human rights of the migrant. We ask public

officials who are in charge of formulating, implementing, and executing immigration laws to reexamine national and local policies toward the migrant and to use their leadership positions to erase misconceptions about migration. We ask adjudicators who process immigrants' legal claims to create a welcoming atmosphere that does not threaten their confidence or security. We encourage the media to support and promote a genuine attitude of welcoming toward migrants and immigrants.

105. We, the Catholic bishops of the United States and Mexico, pledge ourselves to defend the migrant. We also pledge to support the creation of the necessary conditions so that all may enjoy the fruit of their work and life in their homeland, if they so wish.

106. We stand in solidarity with you, our migrant brothers and sisters, and we will continue to advocate on your behalf for just and fair migration policies. We commit ourselves to animate communities of Christ's disciples on both sides of the border to accompany you on your journey so that yours will truly be a journey of hope, not of despair, and so that, at the point of arrival, you will experience that you are strangers no longer and instead members of God's household. We pray that, wherever you go, you will always be conscious of your dignity as human beings and of your call to bring the Good News of Jesus Christ, who came that we "might have life and have it more abundantly" (Jn 10:10). We invite you who are forced to emigrate to maintain contact with your homes and, especially, to maintain fidelity to your families so that you treasure your cultural values and the gift of faith and so that you bring these treasures to whatever place you go.

107. The appearance of Our Lady of Guadalupe to St. Juan Diego revealed the compassionate presence of God reaching out to Mary to be in solidarity with and to give hope to a suffering people. In the same spirit, we, the Catholic bishops of the United States of Mexico and the United States of America, have written this letter to give hope to suffering migrants. We pray that you will experience the same hope that inspired St. Paul in his Letter to the Romans:

What will separate us from the love of Christ? Will anguish, or distress, or persecution, or famine, or nakedness, or peril, or the sword? As it is written: "For your sake we are being slain all the day; we are looked upon as sheep to be slaughtered." No, in all these things we conquer overwhelmingly through Him who loved us. For I am convinced that neither death, nor life, nor angels, nor principalities, nor present things, nor future things, nor powers, nor height, nor depth, nor any other creature will be able to separate us from the love of God in Christ Jesus our Lord. (Rom 8:35-39)

108. And may the blessing of Almighty God come down upon you and be with you forever: the blessing of God the Father, who loves you with an everlasting love, the blessing of God the Son, who was called out of exile in Egypt to be our Savior, and the blessing of God the Holy Spirit, who guides you to extend Christ's reign wherever you go. And may Mary of Guadalupe, our mother, bring you safely home.

Delivered on the fourth anniversary of Ecclesia in America, *January 22, 2003, Washington, D.C., U.S.A., and Mexico City, Mexico.*

Definitions

Asylee: See *Refugee*, below. The definition conforms to that of a refugee except regarding the location of the person upon application for asylum: The asylee applies for protection in the country of asylum, whereas the refugee applies for status in either his or her home country (under certain circumstances) or in a country of temporary asylum.

Globalization: The process whereby the world's goods, communications, and peoples are more fully integrated, accessible, and interdependent.

Immigrant: A person who moves to another country to take up permanent residence.

Legal Immigrant: A person who has been admitted to reside and work on a permanent basis in the United States; admission is most commonly based on reunification with close family members or employment.

Migrant: A person on the move, either voluntarily or involuntarily, in the person's own country, internationally, or both. Unlike refugees, migrants are commonly considered free to return home whenever they wish because their lives are not in danger there.

Refugee: Any person, who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling, to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (source: United Nations International Law).

Undocumented immigrant: A person who is in a country without the permission of that country's government. Such persons are called "undocumented" because they lack the required paperwork.

Notes

[1] The synod was held in Vatican City from November 16 to December 12, 1997.

[2]Cf. Conferencia del Episcopado Mexicano (CEM), *Del Encuentro con Jesucristo a la Solidaridad con Todos* (México, DF: CEM, 2000). United States Conference of Catholic Bishops (USCCB), *Welcoming the Stranger Among Us: Unity in Diversity* (Washington, D.C.: USCCB, 2000).

[3] U.S. Department of Transportation, Bureau of Transportation Statistics, *North American Trade and Travel Trends*, BTS01-07 (Washington, DC 2001), 19.

[4] Immigration and Naturalization Service, press release "INS Announces Legal Immigration Figures for FY2001," Washington, D.C., August 30, 2002.

[5] V. Maccagnan, ed. Stefano de Fiores and Salvatore Meo, *"Guadalupe," Nuevo Diccionario de Mariologia* (Madrid: 1988).

[6] "No one would exchange his country for a foreign land if his own afforded him the means of living a decent and happy life" (Pope Leo XIII, *Rerum Novarum [On Capital and Labor]* [May 15, 1891], no. 47. Retrieved from Vatican website: *www.vatican.va*).

[7] Pope Pius XII, *Exsul Familia (On the Spiritual Care to Migrants)* (September 30, 1952), in *The Church's Magna Charta for Migrants*, ed. Rev. Giulivo Tessarolo, PSSC (Staten Island, N.Y.: St. Charles Seminary, 1962), 50, citing June 1, 1951, Vatican radio address.

[8] Ibid., 51, citing 1948 Vatican letter to U.S. bishops.

[9] Pope John XXIII, *Pacem in Terris (Peace on Earth)* (April 11, 1963) (Washington, D.C.: USCCB, 1963), no. 25.

[10] Pope John Paul II, *Sollicitudo Rei Socialis (On Social Concern)* (December 30, 1987) (Washington, D.C.: USCCB, 1988), no. 24.

[11] Pontifical Council *Cor Unum* and Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Refugees: A Challenge to Solidarity* (1992), nos. 13-14. Retrieved from Vatican website: *www.vatican.va*.

[12] Pope John Paul II, Message for World Migration Day 1995-1996, *Undocumented Migrants* (July 25, 1995), no. 2. Retrieved from Vatican website: *www.vatican.va*.

[13] Pope John Paul II, *Ecclesia in America (The Church in America)* (January 22, 1999) (Washington, D.C.: USCCB, 1999), no. 65, citing Propositio 20.

[14] "Immigrants from lands across the globe have helped build our great nation. . . . Their presence has enriched our local communities, rural areas, and cities, and their faith in God has enlightened our increasingly secularized culture" (USCCB Resolution on Immigration Reform, November 16, 2000, no. 2).

[15] Pope Paul VI, *New Norms for the Care of Migrants "Pastoralis Migratorum"* (August 15, 1969) (Washington, D.C.: USCCB, 1969), no. 7.

[16] Pope John Paul II, Message for World Migration Day 1993, *Problems of the Migrant Family* (August 6, 1993), no. 3, citing *Familiaris Consortio*, no. 77. Also see *Welcoming the Stranger Among Us: Unity in Diversity* for recommendations.

[17] The bishops in the United States have consistently supported reform of the family reunification visa system. Numerical limits on visas have adversely impacted many nationalities, especially Filipinos. In the context of this statement, we focus on Mexican family reunification because of the proximity of Mexico to the United States and because of the unprecedented number of families separated between these two countries. The per-country limit for Mexico and other affected countries, such as the Philippines, should be increased without harming allotments for other nations.

[18] U.S.-Mexico Migration Panel, *Mexico-U.S. Migration: A Shared Responsibility* (Washington, D.C.: Carnegie Endowment for International Peace, 2001). Jeffrey Passel, "New Estimates of the Undocumented Population in the United States" (Washington, D.C.: Migration Policy Institute/Migration Information Source, May 22, 2002).

[19] Foro Migraciones, *Migración: México Entre Sus Dos Fronteras*, 2000-2001 (México: Foro Migraciones, 2002). The CEM's Human Mobility Commission is a member.

[20] In the U.N. Convention, migrant workers are viewed as more than laborers or economic entities. They are social entities with families and, accordingly, have rights, including the right to family reunification. (See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations General Assembly, December 18, 1990. This document can be obtained from the U.N. Center for Human Rights, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland.)

[21] In 2000, the U.S. Office of Internal Audit (OIA) of the U.S. Immigration and Naturalization Service (INS) opened 4,527 cases of reported abuse by INS agents. Roughly 10 percent were referred to the U.S. Department of Justice's Civil Rights Division, and less than 10 percent of those referred led to prosecutions. See *Chaos on the U.S.-Mexico Border: A Report on Migration Crossing Deaths, Immigrant Families, and Subsistence-Level Laborers* (Washington, D.C.: Catholic Legal Immigration Network, 2001).

[22] The Mexican National Migration Institute has consulting councils for each of its thirty-two regional offices (one for each state and Mexico City) and national office. Such councils include representatives from broad sectors of Mexican society, including universities, shelters, and churches.

[23] The U.S. Border Patrol does include some treatment of human rights protection in their training. More intensive instruction in the proper use of force and in appropriate engagement and retention techniques should be considered.

[24] In Tecuman, Guatemala, along the Mexico-Guatemala border, smugglers have established offices to receive Central American migrants who wish to travel through Mexico to the United States. (Source: U.S.

bishops' delegation to Central America, October 2000.)

[25] See *New Slavery, New Freedom: A Pastoral Message on Substance Abuse* (Washington, D.C.: United States Conference of Catholic Bishops, 1990).

[26] The law also applies retroactively for an offense committed years ago for which a person has already served his or her sentence.

[27] "What article 33 of the Constitution does, is grant the faculty to the government of being able to arbitrarily expel a foreigner. It is arbitrary, firstly, because no due process is required, in other words, it is a faculty that may not be submitted to the scrutiny of constitutionality or legality, either *ex ante* or *ex post*. It is a direct elimination of the guarantees contained under articles 14 and 16 of the Constitution." (Foro Migraciones, *Migración: México Entre Sus Dos Fronteras*, 2000-2001 (México: Foro Migraciones, 2002], 57).

[28] The United States and Canada agreed to coordinate asylum policies on December 5, 2002.

[29] U.S.-Mexico Migration Panel, *Mexico-U.S. Migration: A Shared Responsibility* (Washington, D.C.: Carnegie Endowment for International Peace, 2001), 28. Also see *Statistical Yearbook of the Immigration and Naturalization Service, Fiscal Year 2000* (online at *www.ins.usdoj.gov*).

[30] The detention of asylum seekers without serious reasons is a violation of the letter and spirit of the "Conclusions on International Protection" of the UNHCR Executive Committee. Both Mexico and the United States are members of the UNHCR Executive Committee, and both have accepted the conclusions. References: No. 44 (XXXVII) 1986; No. 46 (XXVII) 1987; No. 50 (XXXIX) 1988; No. 55 (XL) 1989; No. 65 (XLII) 1991; No. 68 (XLIII) 1992; No. 71 (XLIV) 1993; No. 85 (XLIX) 1998; No. 89 (LI) 2000.

[31] Pope John Paul II, *Novo Millennio Ineunte* (January 6, 2001), no. 1. Retrieved from Vatican website: *www.vatican.va*.

[32] "Taking the Gospel as its starting-point, a culture of solidarity needs to be promoted, capable of inspiring timely initiatives in support of the poor and the outcast, especially refugees forced to leave their villages and lands in order to flee violence" (EA, no. 52).

The document *Strangers No Longer: Together on the Journey of Hope. A Pastoral Letter Concerning Migration from the Catholic Bishops of Mexico and the United States* was developed by the Committee on Migration of the United States Conference of Catholic Bishops (USCCB) in collaboration with the Conferencia del Episcopado Mexicano (CEM). It was approved simultaneously by the full bodies of U.S. Catholic bishops and the Mexican bishops at their November 2002 General Meetings and has been authorized for publication in the United States by the undersigned.

Msgr. William P. Fay
General Secretary, USCCB

Quotes from Pope Pius XII's *Exsul Familia (On the Spiritual Care to Migrants)* are taken from *The Church's Magna Charta for Migrants*, ed. Rev. Giulivo Tessarolo, PSSC (Staten Island, N.Y.: St. Charles Seminary, 1962). Used with permission. Copies of this book are available from the Center for Migration Studies at the St. Charles Mission Center; phone: 718-351-8800.

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FAIR
FEDERATION FOR AMERICAN IMMIGRATION REFORM

The Morality of Mass Immigration from a Roman Catholic Perspective

What are Catholics in the pews to make of their bishops' costly, all-out commitment to a version of immigration reform that would swell today's high legal immigration, undermine workers' bargaining power and do little to curb future illegal entries?

The bishops' lobbying goals for immigration are radical, expansive, and generous to a fault. They explicitly endorse the two guest worker programs, amnesty for illegals, and lavish increases in regular family and employment immigration in Senators John McCain and Ted Kennedy's proposed legislation — the *Safe America and Orderly Immigration Act* (SAOIA). (Many of the provisions of this bill had been incorporated into other Senate immigration bills by early 2006.) The bill's breathtakingly expansionist proposals, and its paucity of serious border control and enforcement measures, suggest that US Catholic Conference lobbyists did their work well in the drafting.

Using a guest worker program as political cover, the Kennedy-McCain bill and similar others would in effect amnesty ten to eleven million illegal immigrants that settled here before May 2005. Without waiting to see the labor market and fiscal effects of that mass amnesty, Kennedy-McCain adds on 400,000 or more guest workers a year from abroad. Both categories of guest workers and their dependents would be eligible to apply for legal permanent residence after four years here.

That waiting period is necessary to support the fiction of the bill's backers and the bishops that this arrangement is not a widely opposed "amnesty," but "earned legalization." The employment category of regular immigration visas for skilled and unskilled aliens would more than double to 290,000 a year. Immigration of relatives of citizens and resident aliens would nearly double from its present ceiling of 480, 000. Kennedy-McLain, according to some estimates, would raise overall immigration to 25 million over the next ten years.

But the bishops' wish list does not stop with Kennedy-McCain. They want much kinder, gentler — and less stringent — immigration enforcement. Their congressional testimony, speeches and statements in recent years claim that the existing US immigration system " . . .which can lead to family separation, suffering and even death, is morally unacceptable and must be reformed." The bishops also express increasing concern that ". . . the U.S. immigration regime violates basic human dignity and has placed the lives of migrants at risk."[1]

The implication of these categorical moral judgments is that responsibility for the migration chaos is America's alone: the poor choices of the migrants themselves and their governments, the recklessness of some migrants, and the greed of the smugglers and other predators are not major factors in the family separation, injury and death the bishops deplore.

Nor do the bishops display any recognition that U.S. policymakers and enforcement officials also have considerable concerns for human rights of migrants, as well as conscientious procedures

and safeguards to protect them, often with some sacrifice of the efficiency or personal security of enforcement agents.

As remedies to Washington's presumed violations of human dignity, the bishops now or earlier have called for

- intensive training of border patrol agents (as if they now receive none) in "cultural awareness, and appropriate enforcement tactics and use of force;"
- no shackling and lengthy detentions of those apprehended, particularly minors, and no denial of access to asylum petitioning.
- no anti-terrorism policies which unjustly impact all immigrants, and no ethnic or racial profiling;
- no involvement of state and local police in immigration enforcement.
- no sanctions on employers of illegal aliens[2]

Church leaders have also protested the tough enforcement provisions in the House of Representatives' Sensenbrenner bill, enacted in December, 2005 (HR 4437). A particular target has been the bill's provision expanding the definition of criminal acts of harboring and assisting illegal alien to cover private civic and charitable groups. Archbishop Roger Mahony of Los Angeles, the key voice in the Justice for Immigrants lobbying campaign, said "the whole concept of punishing people who serve immigrants is un-American" . . . "We are not about to become immigration agents." Mahony warned that he would instruct his priests to defy the legislation if it is enacted.[3]

Left unstated is that much of Catholic Charities' services to immigrants, legal and illegal, is financed by generous government grants, fees and contracts. Under this faustian bargain, about two-thirds of Catholic Charities' budget of $33.5 million for Mahony's Los Angeles Archdiocese in 2003 came from government grants, fees and contracts for services, including refugee resettlement and community outreach to immigrant groups.

Catholic Charities and their spin-offs and subsidiaries.

Other major dioceses receive comparable government infusions.[4] The Catholic Legal Immigration Network, a major litigator against the government's immigration enforcement and regulatory procedures, in 2004 received 21 percent of its revenues from government grants and fees.

Nationally, in 2003 about 60 percent of Catholic Charities income — some $1.78 billion — came from federal, state and local government. While the U.S. bishops are well rewarded by the government to be "immigration facilitators," that funding apparently carries for them no corresponding obligation to be "immigration agents." Not surprisingly, the bishops' lobbying goals include a call for the engagement of "non-profit legal agencies" in implementing a new program of immigration reform. One is reminded of theologian Reinhold Niebuhr's warning that "No one has the right to be unselfish with other people's interests."[5]

The hierarchy from the Pope down has from time to time acknowledged the right of sovereign states to control their borders. But the numerous conditions the churchmen have invoked would seriously vitiate this right. The enforcement prohibitions, such as those demanded above, suggest that bishops would like to condition this sovereign prerogative of states right out of existence. Their present position seems to be a strong presumption of a right to immigrate, with the burden on governments to prove that such entries would be unduly harmful. A recent expression of this view is the joint pastoral letter of U.S. and Mexican bishops:

> The Church recognizes the right of sovereign nations to control their territories, but

> rejects such control when it is exercised merely for the purpose of acquiring additional wealth.
>
> . . . All goods of the earth belong to all people. When persons cannot find employment in their country or origin to support themselves and their families, they have a right to find work elsewhere in order to survive. Sovereign nations should provide ways to accommodate this right.[6]

Under these formulations, policies by the U.S. to increase the earnings of its own low-wage residents by restricting immigration would be a "purpose of acquiring additional wealth" and therefore illicit. .

The bishops apparently feel no reticence about writing detailed prescriptions for a temporal social problem that is more in the realm of Caesar than of God. They also engage in a remarkable degree of micromanagement considering their general lack of first hand experience with law enforcement.

The bishops make two other appeals that are well-worn gambits in two generations of immigration debate. The first is a truism: that the country should provide more legal opportunities to work in the U.S. to ease the "perceived" need for a blockade enforcement policy. More opportunities for legal immigration is a tautological solution that is hard to quarrel with. With the stroke of a legislative pen, illegal immigration could indeed be defined out of existence — along with any pretense of immigration limits.

The second lofty appeal is also unexceptionable but in fact a prescription for non-action: the country should address the "root causes" of migration with more enlightened trade and assistance policies toward sending countries.

Getting at the "root causes" has long been a rhetorical way of turning the debate away from practical enforceable limits in the present toward the notion of long-term gradual solution through inevitable growth toward prosperity and justice. The Clinton administration successfully used this logic in the 1990s as a major selling point for the North American Free Trade Association, the enactment of which has been followed by vast new waves of migrants from Mexico.

The Immigration Reform and Control Act of 1986 spawned a high level Commission on Migration and Cooperative Economic Development which labored over root causes for months. The Commission endorsed the idea of NAFTA, but otherwise it had no visible effect on U.S. development policy toward Latin America.

Similarly, Kennedy-McCain includes proposals for economic cooperation and support for Mexico and other sending countries. Sadly, because of extremely rapid labor force growth, relentless corruption, and serious macroeconomic setbacks in the 80s and 90s, the push factors in Mexico are stronger now than two decades ago. Everyone wants to see Mexico more prosperous and democratic. But effective enforcement cannot be delayed while we wait indefinitely for this to happen.

All the bishops' proposals are rooted in genuine concern for the welfare and safety of a migrant population they have increasingly embraced as special clients in recent decades — the objects of the Church's "preferential option for the poor." The bishops' ideal immigration policy is made in heaven. And that is its biggest problem. Legislators and citizens live and work in the secular City of Man, with its ecology of greed, compromise, ideals, conflicts, fears, limits, and the unending search for individual and community security.

The bishops' project offers us an illusory regime where traffic signals are always green, where violence and fraud are overcome by trust and good will, and where a cornucopian vision of the United States has no place for fears about job and housing shortages, overburdened schools, conservation of resources and overpopulation. But Catholic thought is not entirely cornucopian. Pope Leo XIII and other pontiffs have acknowledged that overpopulation can indeed occur, causing unemployment and other hardships justifying emigration. Yet there is no recognition that the United States, with the most rapidly growing population in the industrial west, acts legitimately when limiting immigration to deal with its own unemployment and wage stagnation.

More troubling is the sight of a Church hierarchy so long associated with distributive justice and workers' welfare allied in its lobbying effort with the U.S. Chamber of Commerce, the "Essential Workers Immigration Coalition" and its array of major rent-seeking industry interest groups, which fan fears of unproven labor shortages and regard guest workers as another commodity to lower the cost of labor. Is the driving concern of those allies the dignity of workers?

The lobbying goals are a puzzling departure from the Church's past positions on guest worker programs. In the 1950s and early 1960s, the bishops were in the forefront of the successful fight to end the "Bracero" migrant labor agreement with Mexico. The labor priest, Monsignor George Higgins of the National Catholic Welfare Conference, and Archbishop Patrick Lucey of San Antonio[7] , touched the conscience of millions of Christians with their exposures of the corruption, exploitation of both Mexican and American workers, and the agreement's corrosive effects on the labor standards of poor workers in the Southwest. In the late 1970's Notre Dame President Father Theodore Hesburgh, as Chair of the Select Commission on Immigration and Refugee Policy, reaffirmed this opposition to guest worker programs.

Have the bishops become just one more contentious, rent-seeking interest group in pressing for radical immigration reforms? High immigration has been good business for the American bishops. Tax-free government grants and contracts to Church charities serving refugees and immigrants are worth several hundred million yearly, further strengthening Church patronage and influence.

It's unsurprising that bishops want to align themselves with their large and growing Hispanic constituency, which a number of Church leaders have hailed as the future of the Church. (Some 42 percent of all new immigrants are Catholic.) If growth is their goal, the bishops should take into account that their Hispanic contingent has youth and high fertility, insuring continued growth even if mass immigration is slowed. And many of the same young U.S.-born Hispanics are children of earlier immigrants and now have a claim on America's protection of their labor, educational and housing standards.

The Church will need all this clout and more if its "Justice for Immigrants" campaign is to make rank and file Catholics abandon their preference for limited immigration and accept mass immigration as a moral imperative. Polls show considerable resistance to mass immigration among American Catholics — increasingly even among Hispanics. In 2005, 54 percent of Arizona's Catholics supported proposition 200, a referendum to deny non-federally funded services to illegal aliens. Some 52 percent of California's Catholics backed a similar referendum in 1994 in California. A 2003 poll by Pew Research Center showed that 79 percent of Catholics agreed completely or mostly with the proposition that: "We should restrict and control people coming into our country to live more than we do now." Sixty-two percent of Hispanic Catholics agreed with this proposition.[8]

Is the "common good" to be served by immigration policy something that is more clearly grasped by religious leaders than other citizens? Some of the prelates' rhetoric implies that they view Catholic social doctrine as readily applicable revelatory truth. Concerned Catholics may be confused by the frequent and selective use of biblical proof texts by advocates of mass immigration. Such words as "be kind to the alien among you, for you were once aliens

(Deuteronomy)," and "I was a stranger and you welcomed me, (Matthew) " appeal to the best in all of us and deserve our making them real in our personal behavior. But they don't make very good guides to concrete policy choices. Somehow the society-transforming mass transfers of population that the U.S. and Mexican bishops favor just don't seem to be what the ancient authors of scripture had in mind.

Compared to the moral certainties of the bishops, our secular nation is more humble about the democratic process, more mindful of government's custodial role of present and future national interests and as mediator of the wide range of stubborn, competing visions of the "common good." Christian realist theologian Reinhold Niebuhr best described the dilemma.

> The farther one moves from a principle of the commandment of love to detailed applications in particular situations, the more hazardous the decision becomes, and the more impossible it is to compel others to a similar conviction by appeal to a common faith . . . Christians must make these hazardous political decision with the full recognition that others equally devoted to the common good my arrive at contrary conclusions.[9]

Authored by David Simcox, former Executive Director of the Center for Immigration Studies, March 2006

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[1] Testimony of Most. Rev. Gerald Barnes, Chairman, U.S. Conference of Catholic Bishops ' Committee on Migration before the Senate Judiciary Committee, July 26, 2005. USCCB Committee on Migration, Washington, DC.

[2] Testimony before the U.S. Senate Judiciary Committee of Rev. Richard Ryscavage, S.J. on Behalf of the the U.S. Catholic Conference on "Legislation to Repeal Employer Sanctions" (S.1734). April 3, 1992

[3] Immigrants Gain the Pulpit, *Los Angeles Times*, March 1, 2006

[4] www.guidestar.org. Search on "Catholic Charities of Los Angeles" for INS form 990. Site accessed March 21, 2006.

[5] Reinhold Niebuhr, *Moral Man and Immoral Society*. New York: Scribners, 1960

[6] *Strangers No Longer: Together on the Journey of Hope*; A Pastoral Letter Concerning Migration from the Catholic Bishops of Mexico and the United States. USCCB, January 22, 2003

[7] Handbook of Texas Online, s.v. "BISHOPS' COMMITTEE FOR HISPANIC AFFAIRS." www.tsha.utexas.edu/handbook/online/articles/BB/icb5.html, accessed March 16, 2006

[8] The Pew Center, The 2004 Political Landscape, Question Q28N, page 2, Released November 5, 2003. For cross - tab for hispanic catholics, see: James C. Russell, *Breach of Faith: American Churches and the Immigration Crisis*. Raleigh, NC: Representative Government Press, 2004.

[9] R. Niebuhr, *Love and Justice* . : Gloucester, MA: Peter Smith1976, p. 60

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IMMIGRATION AND INCOME INEQUALITY

How Rising Immigration Leads to the Declining Share of Middle-Income Households and Greater Income Inequality

FAIR™

A Report by the Federation for American Immigration Reform

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The Federation for American Immigration Reform (FAIR) is a national, non-profit, public interest organization of concerned citizens working to reform our nation's immigration policy. FAIR seeks to improve border security, to stop illegal immigration, and to promote immigration levels consistent with the national interest. FAIR is the largest and most effective organization in the United States dedicated exclusively to immigration issues. It is financially supported by 70,000 members and over 40 foundations nationwide. FAIR is a tax-exempt organization under §501(c)3 of the Internal Revenue Code.

Immigration and Income Inequality

How Rising Immigration Leads to the Declining Share of Middle-Income Households and to Greater Income Inequality

> *"There are three classes of citizens. The first are the rich, who are indolent and yet always crave more. The second are the poor, who have nothing, are full of envy, hate the rich, and are easily led by demagogues. Between the two extremes lie those who make the state secure and uphold the laws."*
>
> **— Euripides, *The Suppliants* c. 420 B.C.**

Executive Summary

The 2000 Census data show that during the previous decade the share of middle-income U.S. households fell to below one-third of all households. The less than 30 percent of households that were in the $35,000 - $67,000 income range was a decline from about 34 percent of households in the comparable $25,000 - $50,000 range in 1990.

An important factor influencing the decline of the share of middle-income families is legal immigration. The flow of new immigrants adds both to upper-income families and to low-income families, while new illegal immigration adds generally to low-income families. At the same time, middle-income families are dwindling.

Studying the distribution of income and immigrant settlement can demonstrate this impact of immigration. The results show a pattern of smaller shares of middle-income families in locations with larger immigrant populations and larger middle-income shares in areas with lower immigrant populations. This may be seen in analyzing immigration and income data for the states, and to an even greater extent in analyzing data for metropolitan areas.

Equally important in showing the effects of immigration on the nation's income distribution, is studying the pattern of change between 1990 and 2000. This focus shows that the states that added the most immigrants to their population over that period also had the greatest losses in the middle-income share of their population while share of middle-income households was less affected in states that added fewer immigrants.

If legal immigration is not substantially reduced and illegal immigration curtailed, this nation is will continue to see a precipitous and continual decline in its middle class — arguably the cornerstone of American democracy.

Key Findings

- The increase in the number of well-off families in 2000 comes both from some middle income households in 1990 improving their earnings as well as the arrival of well-paid foreign professionals. The increase in low-income households in 2000 is fueled largely by the influx of relatively unskilled and unschooled foreigners, both legally and illegally in the country.

- The trend of a decreasing share of middle-income households is likely to continue as long as mass immigration and lax immigration law enforcement continue. This trend will be accelerated if guest-worker/amnesty proposals, currently being considered by both parties, were adopted. What this means is that the workforce will increasingly be divided into high-education, high-skills, high-wage workers on one hand, and limited-education and limited-skills workers earning low wages on the other hand.

- The 2000 Census data shows that more than seventy percent of the society was composed of the wealthy and the poor. Poor households (41.5%) outnumbered the well off (29%).

- This trend of growing economic polarization, in which the population is increasingly either wealthy or poor, is moving in the direction of the economic pattern that tends to characterize societies in the Third World.

- The states with larger foreign-born shares tend to be the same states with the smaller middle-income shares. California, the state with the largest settlement of both legal and illegal immigrants, displays the greatest income inequality.

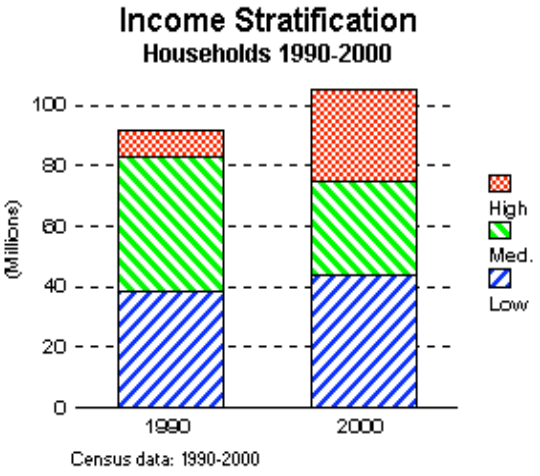
- A comparison of 1990 and 2000 Census data show the inverse relationship between rising immigrant shares and falling shares of mid-income households. In 2000, immigrant shares consistently are higher and mid-income shares are lower than they were in 1990.

- Nationally, between 1990 and 2000, low-income households increased by 5.3 million, and more than half of that increase occurred in California, Florida, Texas, New York, North Carolina, Georgia and Arizona. The bulk of the increase in the foreign-born population over the 1990s occurred in the same states.

- Similar to the inverse trend among the states, among high-immigration metropolitan areas, the share of low-income households was rising, while low-immigration metro areas were experiencing a falling share of low-income households over the decade. This trend may be seen in both large and small metropolitan areas.

Findings from the 2000 Census

Over the decade of the 1990s, the number of middle-income households[1] in the United States decreased by more than 13.6 million — an enormous 30.3 percent decline. This major societal change is inextricably linked with the rapid rise in the immigrant population — both legal and illegal — as was shown in an earlier study of 1990 Census data.[2] The more recent income and immigration data, like that in the previous study, demonstrate convincingly that the current wave of immigrant settlement is inextricably linked to this erosion of the American middle class.



A change in income distribution is neither bad nor good, per se. If the number of low-income households were falling, while the numbers of middle-income and high-income households were increasing, this would be a welcome change. And, while an increase in the number of high-income households may be a sign of prosperity, it may also portend societal prob-

lems if, at the same time, the number of low-income households is not declining. That is precisely what the 2000 Census data show. While the number of middle-income households was dropping precipitously, and the number of high-income households was increasing, the number of low-income households was also increasing — by 5.3 million households — a 14 percent increase.[3]

The increase in the number of well-off families in 2000 comes both from some middle income households in 1990 improving their earnings as well as the arrival of well-paid foreign professionals. In fiscal year 2000, about 14 percent of immigrants admitted for permanent residence aged 20-64 was composed of professionals, executives and management. The increase in low-income households in 2000 is fueled largely by the influx of relatively unskilled and unschooled foreigners, both legally and illegally in the country. The 2000 Census data show that more than seventy percent of the society was composed of the wealthy and the poor, and poor households (41.5%) outnumbered the wealthy (29%). This greater economic polarization coincides with changes in the pattern of immigrant settlement.

"Throughout history all intelligent observers of society have welcomed the emergence of a flourishing middle class, which they have rightly associated with economic prosperity, political stability, the growth of individual freedom and the raising of moral and cultural standards. … The health of the middle class is probably the best index of the health of society as a whole; and any political system which persecutes its middle class systematically is unlikely to remain either free or prosperous for long."

—Paul Johnson,
***Enemies of Society,* 1977**

With immigrants disproportionately swelling the numbers of households at the bottom of the socio-economic structure, this may have significant societal implications beyond the fiscal burden that it represents. This growing stratification in our society is making it resemble more the economic disparity in Third World countries, except, of course, that the well-off population here is much broader than in the Third World. It should be kept in mind that, in many of these stratified societies, this inequality has engendered resentment towards the wealthy by those who make only a fraction of the wages. In the United States, there also is also evidence of increasing political mobilization, and in some cases criminality, among those who see only a limited prospect for upward mobility and by children who see their parents failing to achieve the American dream.

One approach to analyzing income inequality focuses on the difference between the extremes of the wealthy and the impoverished. The Gini index is a mathematical tool developed to measure the difference between these extremes. Our focus is not, however, on the extremes of high and low income households, but rather on what is happening to the middle class and how that relates to changes in the concentration of immigrants. Nevertheless, it should be noted that the Gini index has documented a steadily rising trend in inequality from a low point in 1968 up to the present. That trend in greater inequality coincides with the upward trend in immigrant settlement — both legal and illegal — unleashed by the Immigration Act of 1965.[4] Recent research has shown the connection between increased immigrant settlement and increased income inequality as measured by the Gini index.[5]

The Role of Immigration in Changing the National Income Structure

Immigration is one of the factors fueling the change in the income structure in our country.[6] As noted in the seminal study of the effects of immigration by the National Research Council (NRC),[7] immigration is composed largely of some high-wage earners and many more low-wage earners. For that rea-

son, it tends to add to the high-wage earning population as well as the ranks of low-wage earners. In addition, the NRC study concluded that immigration tends to boost the wealth accumulation by the wealthiest, while undermining the wages of the nation's poorest workers. As the supply of labor available for a specific job increases, there is less incentive for employers to offer higher wages to attract new workers, and wages tend to stagnate or fall.

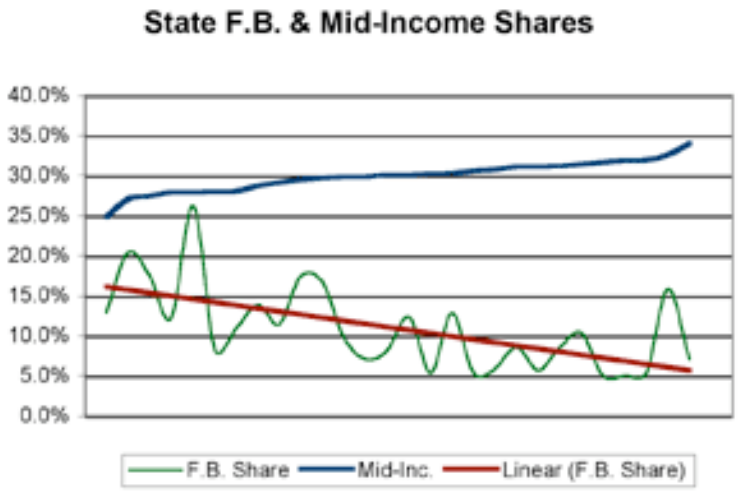
As the NRC's press release on the study noted: "Wages of native-born Americans with less than a high school education who compete with immigrants may have fallen some five percent over the past 15 years because of this competition." This trend of wage depression or suppression is well documented in sectors of the economy such as seasonal crop agriculture, food processing and janitorial services, and it is marked by employers increasingly claiming that they cannot find Americans to do these jobs as the wages fall.

In a study of the relationship between immigration and income inequality in California, Public Policy Institute of California researcher Deborah Reed concluded that, "Of the factors examined…rising returns to skill and immigration account for 44 percent of the rising income inequality in California." Furthermore, the study noted that there is greater income inequality in California in comparison to the rest of the country and it concluded that, "The study found that virtually all of the difference in income inequality between the state and the rest of the nation in 1989 was due to immigration."[8]

To examine the interrelationship between changes in middle-income households and immigration, we looked at Census data for the country as a whole, at the trend among the 50 states and the District of Columbia, and in both large and small metropolitan statistical areas. We found evidence of the coinciding trends of increasing immigrant shares and declining middle-income household shares in each of these analyses.

National Income and Immigrant Shares in the States

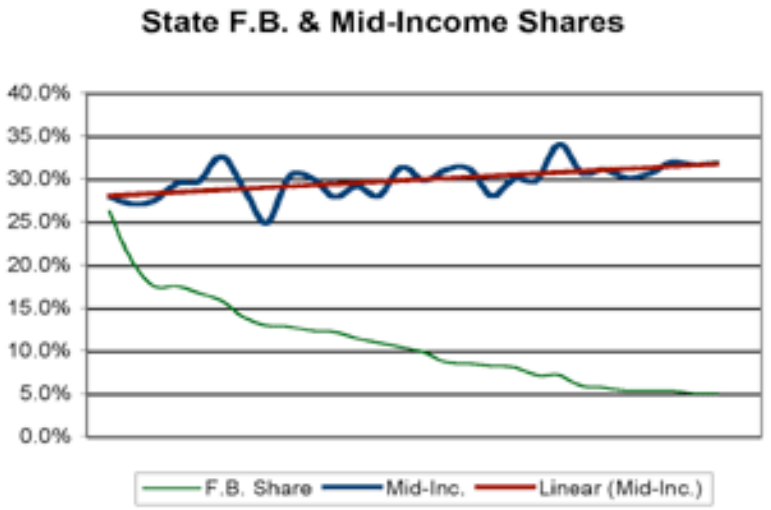
When 2000 Census data for Washington, D.C. and the 27 states with foreign-born population shares higher than five percent[9] are arranged in order of ascending middle-income shares, a trend becomes evident. The states with the larger foreign-born shares tend to be the same states with the smaller middle-income shares of their population (i.e., higher immigration coincides with lower middle-income households).



As the array of middle-income shares among the 28 localities rises from 24.8 percent (District of Columbia) to 34.1 percent (Utah), the trend is downward in the corresponding foreign-born shares of the population. The range drops from about 16 percent, coinciding with the lowest middle-income shares, to about five percent, coinciding with the highest middle-income shares.

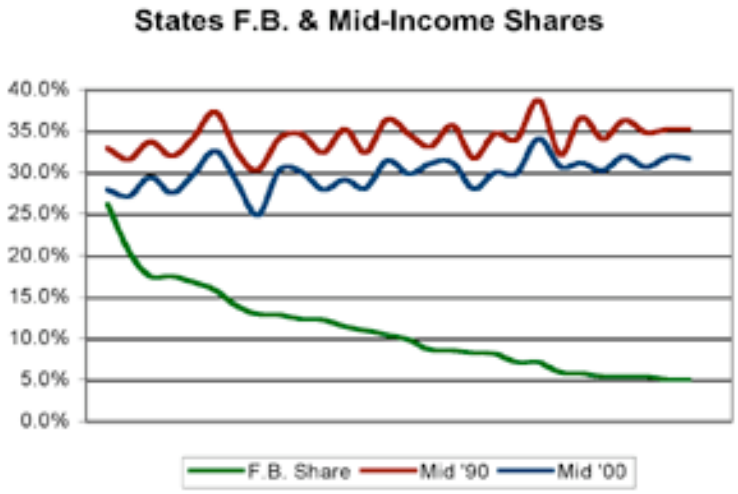
In other words, where the lowest middle-income shares of the population are found, the highest immigrant shares of the population are also likely to be found. The question then is, does this trend also hold true in reverse? Where the highest immigrant shares are found, does that result in the lowest shares of the middle-income population?

It does. This same trend may be seen in reverse when the data are arranged by descending order for the foreign-born share for the same 28 localities. As the foreign-born share decreases from 26.2 percent (California) to five percent (Idaho), the trend in the middle-income household level rises, from about 28 percent to about 32 percent of all households (i.e., lower immigration coincides with higher middle-income shares).



The fact that lower middle-income shares tend to coincide with higher immigrant concentrations, and vice versa, does not necessarily mean that one caused the other. It is possible that immigrants may be attracted to areas of relatively high concentrations of low-income households, although this seems unlikely if the object of the illegal immigration is to seek job opportunities. Nevertheless, it could result when newly arriving immigrants are drawn to areas where there are already concentrations of earlier immigrants, or where localities encourage illegal residents to settle by the adoption of policies that accommodate them, e.g. providing hiring halls or driver's licenses. However, because most illegal residents and many newly arriving immigrants work in low-wage jobs,[10] it is clear that the settlement of these immigrants contributes to the increase in the share of low-income households.

The 2000 Census data for the states show the inverse relationship between immigrant shares and mid-level income shares. Large immigrant population concentrations tend to coincide with smaller middle-income population shares, and vice versus. This suggests that during a period of rapidly increasing immigrant settlement, like the present, it could be expected that there would be a decrease in the share of middle-income households.



1990-2000 Change in the Middle-income Share in the States

When Census data for middle-income household shares in 1990 are compared with the similar, inflation-adjusted shares for 2000,[11] it may be seen that the middle-income shares tend to rise in both years as the foreign-born share becomes smaller (Table 1). This comparison is for data in the previously identified 28 jurisdictions.

Table 1

State	Foreign-Born Percentage			Middle-Income Percentage		
	1990	2000	Difference	1990	2000	Difference
California	21.7%	26.2%	4.5%	32.9%	27.9%	-5.0%
New York	15.9%	20.4%	4.5%	31.6%	27.1%	-4.5%
Hawaii	14.7%	17.5%	2.8%	33.7%	29.4%	-4.3%
New Jersey	12.5%	17.5%	5.0%	32.0%	27.5%	-4.5%
Florida	12.9%	16.7%	3.8%	34.1%	29.7%	-4.4%
Nevada	8.7%	15.8%	7.1%	37.3%	32.6%	-4.7%
Texas	9.0%	13.9%	4.9%	32.4%	28.7%	-3.7%
District of Columbia	9.7%	12.9%	3.2%	30.3%	24.8%	-5.5%
Arizona	7.6%	12.8%	5.2%	34.1%	30.3%	-3.8%
Illinois	8.3%	12.3%	4.0%	34.6%	30.1%	-4.5%
Massachusetts	9.5%	12.2%	2.7%	32.4%	27.9%	-4.5%
Rhode Island	9.5%	11.4%	1.9%	35.2%	29.1%	-6.1%
Connecticut	8.5%	10.9%	2.4%	32.4%	28.0%	-4.4%
Washington	6.6%	10.4%	3.8%	36.4%	31.4%	-5.0%
Maryland	6.6%	9.8%	3.2%	34.6%	29.8%	-4.8%
Colorado	4.3%	8.6%	4.3%	33.1%	31.1%	-2.0%
Oregon	4.9%	8.5%	3.6%	35.7%	31.2%	-4.5%
New Mexico	5.3%	8.2%	2.9%	31.7%	28.0%	-3.7%
Virginia	5.0%	8.1%	3.1%	34.7%	30.0%	-4.7%
Georgia	2.7%	7.1%	4.4%	34.0%	29.9%	-4.1%
Utah	3.4%	7.1%	3.7%	38.7%	34.1%	-4.6%
Alaska	4.5%	5.9%	1.4%	32.1%	30.7%	-1.4%
Delaware	3.3%	5.7%	2.4%	36.6%	31.1%	-5.5%
Michigan	3.8%	5.3%	1.5%	34.0%	30.2%	-3.8%
Minnesota	2.6%	5.3%	2.7%	36.3%	32.0%	-4.3%
North Carolina	1.7%	5.3%	3.6%	34.8%	30.6%	-4.2%
Idaho	2.9%	5.0%	2.1%	35.2%	31.9%	-3.3%
Kansas	2.5%	5.0%	2.5%	35.2%	31.6%	-3.6%

In 2000, as the foreign-born share decreases (from California to Kansas), the trend for the middle-income share rises from less than 28 percent to about 32 percent. In 1990, the corresponding tend in the middle-income share was an increase from about 33 percent to about 35 percent of the households.

It is noteworthy that the middle-income household shares are consistently lower in 2000 than in 1990? after each of these 28 jurisdictions had experienced an increase in foreign-born settlement. It also may be seen that the decrease in middle-income household shares between 1990 and 2000 tended to be somewhat greater in states where the increase in both the foreign-born share and the number largest.

The data reveal that while all states experienced a drop in the share of middle-income earners, states with higher levels of immigration had more dramatic decreases. The amount of decrease in the middle-income shares tended to be greater among the states already with large foreign-born populations (averaging a 4.5% drop in middle income household shares among the top ten high foreign-born share states) than it was among states with lower shares (averaging a 3.9% drop in middle income shares for the ten lowest with the lowest foreign-born shares).

Low-Income Households among the States

A look at the change in the shares of low-income households between 1990 and 2000 shows that the segment of the population did not fare as well in high-immigration states as in low-immigration states (Table 2). When the share of households in the low-income range (less than about two times the poverty level)[12] is compared using 1990 and 2000 Census data, the high-immigration states show an increase not only in the number of low-income households but also in the share of such households (i.e., more immigration coincides with more low-income families).

Table 2

State	1990			2000		
	Foreign-Born %	Low-Income Households	Low-Income Share	Foreign-Born %	Low-Income Households	Low-Income Share
California	21.7%	3,539,991	34.1%	26.2%	4,249,200	36.9%
New York	15.9%	2,529,582	38.1%	20.4%	2,892,481	41.0%
Hawaii	14.7%	106,168	29.8%	17.5%	138,967	34.4%
New Jersey	12.5%	804,877	28.8%	17.5%	951,777	31.0%
Florida	12.9%	2,315,826	45.1%	16.7%	2,853,954	45.0%
Nevada	8.7%	122,072	39.2%	15.8%	284,298	37.8%
Texas	9.0%	2,816,915	46.4%	13.9%	3,258,923	44.1%
District of Columbia	9.7%	102,350	41.0%	12.9%	110,568	44.5%
Arizona	7.6%	617,348	45.1%	12.8%	814,028	42.8%
Illinois	8.3%	1,609,458	38.3%	12.3%	1,699,558	37.0%
High 10	**12.1%**	**14,564,587**	**38.6%**	**16.6%**	**17,253,754**	**39.5%**

Table 2—*continued*

State	1990			2000		
	Foreign-Born %	Low-Income Households	Low-Income Share	Foreign-Born %	Low-Income Households	Low-Income Share
Virginia	5.0%	834,226	36.4%	8.1%	991,377	36.7%
Georgia	2.7%	1,020,011	43.1%	7.1%	1,228,843	40.9%
Utah	3.4%	222,431	41.4%	7.1%	101,982	42.4%
Alaska	4.5%	52,896	28.0%	5.9%	71,395	32.2%
Delaware	3.3%	83,901	33.9%	5.7%	106,668	35.7%
Michigan	3.8%	1,388,248	40.6%	5.3%	1,472,557	38.9%
North Carolina	1.7%	1,177,968	46.8%	5.3%	1,397,569	44.6%
Minnesota	2.6%	657,493	39.9%	5.3%	680,549	35.9%
Kansas	2.5%	429,850	45.5%	5.0%	443,759	42.7%
Idaho	2.9%	178,197	49.4%	5.0%	216,419	46.0%
Low 10	**3.2%**	**6,045,223**	**40.5%**	**6.0%**	**6,711,118**	**39.6%**

On average, the high-immigration states increased the average share of low-income households ? by about one percentage point ? and the number of such households ? by more than 2.5 million (15.6%). Conversely, the low-immigration states saw the average share of low-income households decrease even though the number of low-income households was increasing.

In 1990, the ten states with the highest immigrant shares had smaller shares of low-income households than the states with the lowest immigrant shares (38.6% compared to 40.5%).

By 2000 the number of low-income households in the high-immigration states had increased by 18.5 percent, and the share of those households had increased to an average of 39.5 percent of all households. Over the same period, the share of low-income households in the ten states with the lowest immigration shares had fallen to 39.6 percent even though the number of those low-income households had increased by 11 percent (i.e., lower immigration coincided with less increase in low-income households).

The data show that the share of the foreign-born population increased across the board between 1990 and 2000. The low-income share of the population decreased in six of the ten low-immigration states. Over the same period, the share of low-income households rose in states with the largest immigrant populations, but fell in others with lower immigrant shares. The low-income share rose overall because the increase was greater in states that had large low-income shares than in states that had smaller low-income shares.

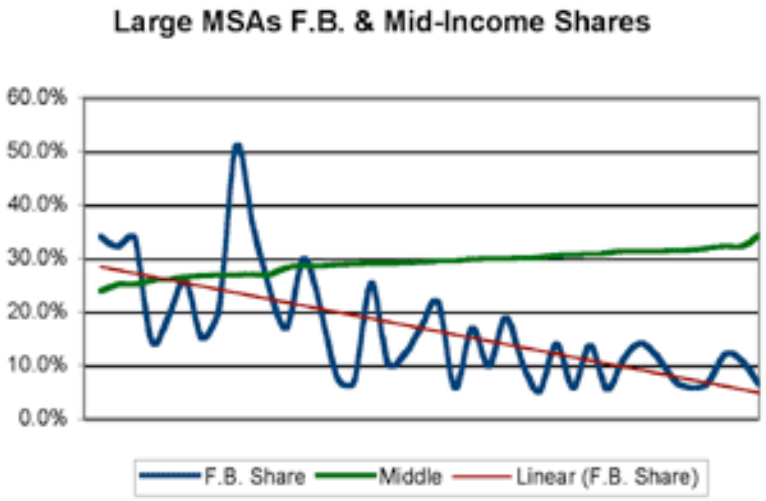
Nationally, between 1990-2000, the number of lower-income households increased by 5.3 million. More than half (50.3%) of that increase occurred in seven states: California (709,209), Florida

(538,128), Texas (442,008), New York (362,899), North Carolina (219,601), Georgia (208,832), and Arizona (196,680). An additional ten states had increases of more than 100,000 lower-income households, and, when they were added to the first seven, the 17 accounted for nearly three-quarters (74.1%) of the national total increase in lower-income households. The additional ten were: Pennsylvania (157,195), Virginia (157,151), New Jersey (146,900), Tennessee (142,809), South Carolina (123,210), Maryland (113,559), Ohio (111,126), Washington (110,607), Massachusetts (104,932), and Nevada (101,510).

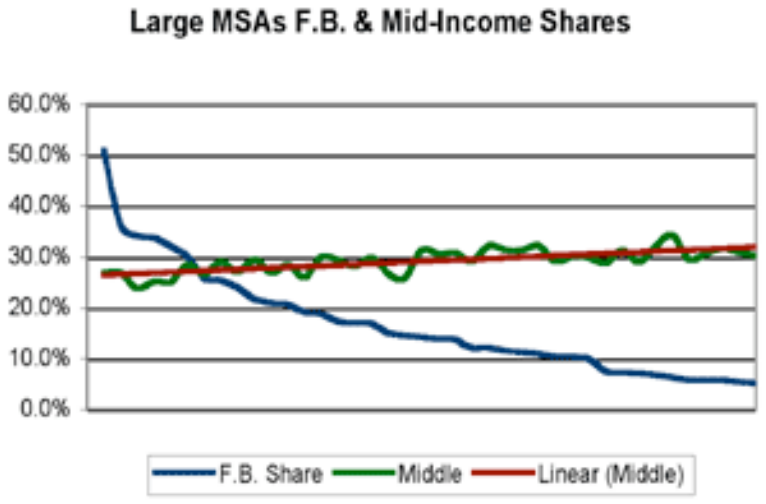
The bulk of the increase in the foreign-born population over the 1990s occurred in the same states. The seven states that accounted for the largest increases in low-income households also accounted for more than three-fifths (60.9%) of the 11.3 million increase in immigrant residents over the decade. The additional ten states, when added to the first seven, together accounted for nearly four-fifths (79.1%) of the total increase in immigrants. There were, however, exceptions to this parallel trend. Colorado, Illinois, Michigan, Minnesota, and Oregon all had increases of more than 100,000 in their foreign-born populations during the 1990's. And, while each of them also had increases in the number of low-income households, unlike the above 17 states they experienced decreases in the share of low-income households over the decade.

Large Metropolitan Area Income and Immigrant Shares

A further test of the relationship between immigrant settlement and household income shares was done for 41 large metropolitan statistical areas (MSAs) ? all those that had more than one million residents in 1990 and had a foreign-born population of five percent or more in 2000. When these metro areas are arranged in order of ascending middle-income shares, it can be seen once again that the trend is for the higher middle-income levels to occur where the foreign-born share is lower.



As middle-income shares rise from 23 percent (in San Jose) to 34 percent (Salt Lake City), the trend in immigrant-settlement shares decreases from near 29 percent to about five percent. The data for low-income shares (not shown) changes only marginally.



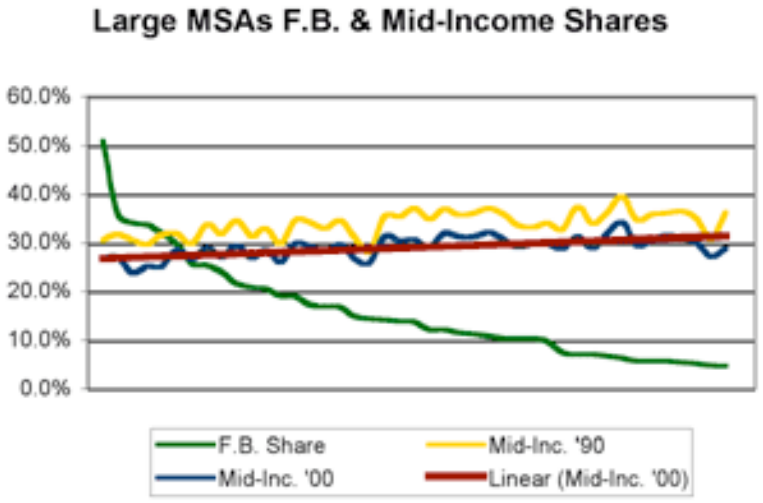
Rearranging the array to show the descending order of the foreign-born shares — from Miami (50.9%) to Cleveland (5.1%) — again shows a corresponding upward trend in middle-income shares.

Comparing these metropolitan area data with those for the states shows much higher levels of immigrant concentrations in the metropolitan areas and a greater spread between the

high immigrant shares and the low immigrant shares. There also is a greater spread between the low and high ends of the middle-income household data array. In addition, the fact that the trend for low-income households does not show much change as the share in the middle-income households increases, explains why the shares for high-income households will tend to be larger where the foreign-born shares are largest and that they will drop where the immigrant concentrations are lower.

Change in the Middle-income Share in Large Metro Areas over the 1990s

When the data for the 1990 and 2000 middle-income shares are compared for the 41 metro areas with 2000 foreign-born shares of five percent or higher, it may be seen that the middle-income shares tend to rise in parallel fashion as the foreign-born share becomes smaller.



In 2000, the trend in the middle-income share rises from about 27 percent to about 31 percent, while, in 1990, the corresponding trend was from about 31 percent to about 37 percent. It should be noted that the middle-income household shares are fairly uniformly lower in 2000 ? after all of the jurisdictions had experienced an increase in foreign-born settlement.

Low-Income Households in Large Metropolitan Areas

A focus on the change in the shares of low-income households in the same 41 large metro areas over the decade of the 1990s shows that, as in the states, this lowest earning share of the population fared worse in high-immigration metro areas than in low-immigrant metro areas (Table 3).

The metropolitan areas with the highest immigrant shares increased both the number of low-income households (on average by 18.4%) as well as increasing the share of such households. Over the same period, the large metro areas with the lowest immigrant shares had a decreasing share of low-income households, although the number of such households was increasing (by an average of 17.9%).

These data show that the share of the low-income households increased between 1990-2000 in seven of the ten metro areas with the highest shares of immigration.

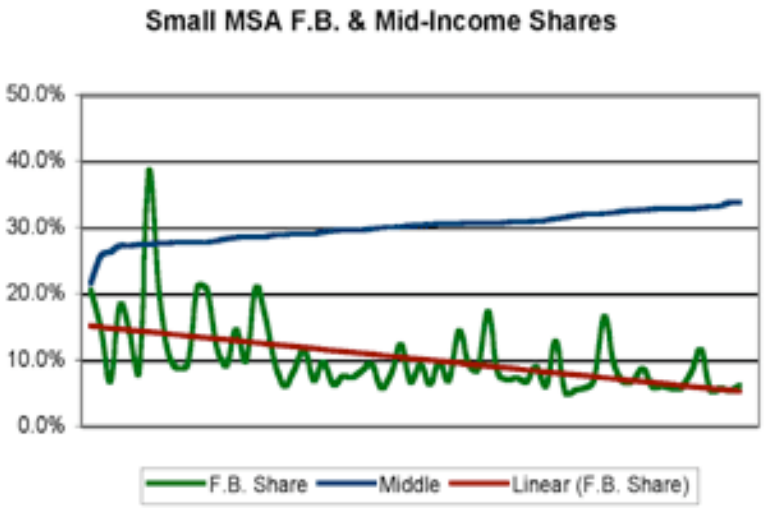
Among the lowest immigration metro areas, the share of low-income households decreased in six of the ten localities.

Table 3

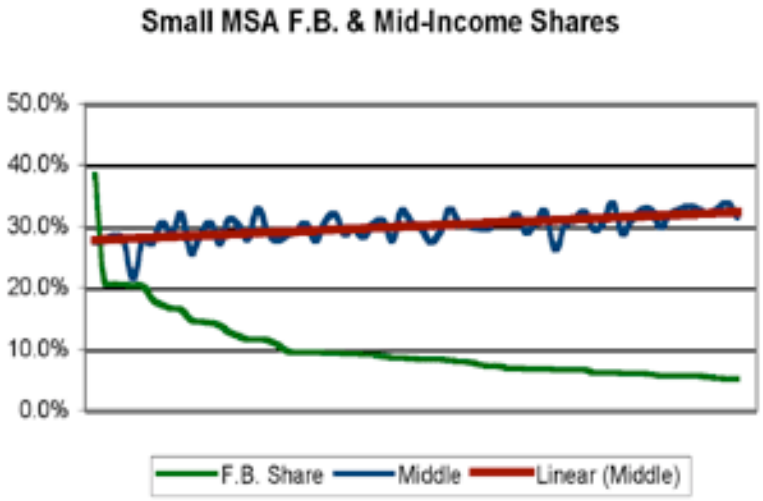
Metro Area	1990			2000		
	FB%	Low%	Low#	FB%	Low%	Low#
Miami	45.1%	46.5%	321,945	50.9%	48.7%	378,792
Los Angeles	32.7%	35.5%	1,061,291	36.2%	41.9%	1,313,177
San Jose	23.2%	21.3%	110,798	34.1%	20.3%	115,273
New York	26.7%	40.4%	1,313,969	33.7%	43.7%	1,523,920
San Francisco	27.5%	28.7%	184,399	32.0%	26.6%	182,116
Orange	23.9%	22.7%	187,744	29.9%	27.3%	255,135
Bergen-Passaic	18.5%	25.8%	119,750	25.7%	28.2%	139,739
Ft. Lauderdale	15.8%	40.8%	215,604	25.3%	41.8%	273,712
Oakland	16.2%	29.3%	228,483	24.0%	28.3%	245,858
San Diego	17.2%	34.3%	304,379	21.6%	36.6%	364,375
High-10	—	**32.5%**	**4,048,363**	—	**34.3%**	**4,792,097**
Detroit	5.5%	36.9%	583,043	7.5%	35.5%	602,978
Minneapolis	3.6%	31.5%	302,454	7.1%	29.4%	334,910
Philadelphia	5.1%	34.3%	617,798	7.0%	36.7%	853,118
Charlotte	2.1%	39.4%	173,624	6.7%	36.5%	210,267
Salt Lake-Ogden	3.1%	38.5%	133,799	6.3%	32.8%	141,921
Rochester	5.0%	35.7%	141,404	5.7%	39.4%	165,837
Greensboro	1.6%	42.7%	177,117	5.7%	42.5%	211,895
Baltimore	3.7%	32.4%	285,167	5.7%	34.7%	337,876
Milwaukee	3.7%	37.4%	164,316	5.4%	37.6%	220,290
Cleveland	4.5%	41.0%	346,526	5.1%	41.3%	368,434
Low-10	—	**37.0%**	**2,925,248**	—	**36.7%**	**3,448,156**

Smaller Metropolitan Area Income and Immigrant Shares

A final examination of the relationship between high immigrant settlement and lower shares of household income was done to determine whether the relationship between rising foreign-born concentrations and declining middle-income household shares, that was found in looking at large metro areas, would hold as well when smaller metropolitan areas were analyzed. The data analyzed are for the 68 metropolitan areas with fewer than one million residents in 1990 and with foreign-born populations of five percent or more in 2000.



The data reveal that for these metro areas the middle-income share in 2000 rises from about 21.5 percent (Stamford-Norwalk, Conn.) to 33.7 (Olympia, Wash.), the trend in the foreign-born share in the corresponding metropolitan areas declines from about 15 percent to five percent.



When the data array is reversed, the middle-income share trend rises from about 28 percent to about 32 percent as the immigrant share decreases from 38.5 percent (Jersey City, N.J.) to 5.1 percent (Allentown-Bethlehem-Easton, Penn.).

The foreign-born population share rose between 1990-2000 in all of these 68 smaller metro areas. The increase was more than one percentage point in all but two of the metro areas, and the increase was greater than five percentage points in 17 of the metro areas.

Low-Income Households in Smaller Metro Areas

The comparison of lower-income household shares in 1990 with lower-income household shares in 2000 shows that the average lower-income share increased in the smaller metro areas with high concentrations of foreign-born settlement. Over the same period, the average share of lower-income households decreased in 2000 in metro areas with smaller shares of immigrant settlement (Table 4).

Table 4

Metro Area	FB% 1990	FB% 2000	Low% 1990	Low% 2000
Jersey City	30.6%	38.5%	40.8%	44.0%
Fresno	17.5%	21.0%	47.2%	50.0%
Ventura	17.0%	20.7%	23.4%	26.6%
Bridgeport	10.9%	20.5%	25.1%	31.9%
Stamford-Norwalk	12.2%	20.4%	23.2%	22.3%
Yolo	14.4%	20.3%	43.6%	43.3%
Santa Cruz	14.0%	18.2%	32.2%	31.8%
Vallejo	12.7%	17.2%	29.4%	30.2%
Yuba City	11.8%	16.6%	51.2%	50.4%
Las Vegas	8.7%	16.5%	41.0%	39.8%
Top 10	**15.0%**	**21.0%**	**35.7%**	**37.0%**
Wichita	3.1%	5.9%	40.9%	32.7%
OK city	3.2%	5.7%	46.3%	29.8%
New London-N.	4.2%	5.7%	29.1%	31.9%
Burlington	3.8%	5.7%	34.8%	32.8%
Bremerton	4.1%	5.7%	36.5%	33.2%
Boise City	2.8%	5.6%	44.2%	32.8%
Jacksonville	3.4%	5.4%	41.8%	31.8%
Des Moines	2.1%	5.3%	38.7%	33.0%
Grand Rapids	2.8%	5.2%	37.6%	33.7%
Allentown	3.6%	5.1%	37.7%	31.5%
Low 10	**3.3%**	**5.5%**	**38.8%**	**32.3%**

Conclusions

The above analysis and the earlier study of 1990 Census data indicate that the trend of a decreasing share of middle-income households is likely to continue as long as mass immigration and lax immigration law enforcement continue.

While the increase in the immigrant population could be curbed by stemming the flow of illegal immigration, now estimated to add about a half-million new illegal residents each year, there is little indication that the Bush Administration or Congress are prepared to deal with this problem any more seriously than the Clinton Administration did earlier. In fact, the prospect of the Administration's support for a new guest-worker program that would legitimate the status of illegal alien workers seems likely to attract still others to follow the example of their relatives, friends, and neighbors who earlier came illegally, thus exacerbating the problem. The platforms of all of the contenders for the Democrat nomination suggest an even greater readiness to bend the immigration laws to accommodate aliens illegally in the country.

Similarly, there is little evidence that either the Administration or the Congress is prepared to deal with the nation's currently out-of-control legal immigration structure. After choosing to lay aside the 1995 recommendations of the U.S. Commission on Immigration Reform ? the Jordan Commission ? for a restructuring and reduction in legal immigration, the Congress has shown little indication of being prepared to address the issue.

Immigration has grown to immoderate proportions since being unleashed in 1965. From averaging less than 300,000 per year in the early 1960s, immigration — legal and illegal — has zoomed to about 1.4 million per year (more than one million legal admissions in both fiscal years 2001 and 2002). Some of this increase is due to amnesty-type provisions for groups of illegal immigrants and programs added in recent years, such as the visa lottery system. Another contributing factor is the numerically uncapped family reunification immigration

If neither the expanding immigrant settlement nor the composition of it is changed ? characterized by large numbers of poorly educated and largely unskilled persons, it is reasonable to expect that this immigrant flow will also continue to add to the ranks of low-income households

What this trend means in terms of the workforce is a greater separation between high-education, high-skills, high-wage workers on the high end of the scale and the limited-education, limited-skills, low-wage workers on the low end of the scale. The erosion of the middle ground between these extremes means fewer opportunities at a seamless upward mobility.

In a society that continues to espouse egalitarian principles and hold upward mobility as an opportunity for all, a growing abyss between the shibboleth and the practice of upward mobility may lead to increasing resentment and frustration. The growing settlement of foreign newcomers who compete for job opportunities with earlier immigrants and others in the nation's most disadvantaged segment of the population, increased social tensions and conflict may be expected.

As UCLA Professor William A. V. Clark has commented, "Conflict takes many forms, from disagreement generated by prejudice to tensions arising from conflict over jobs and political power. At the extreme, the 1992 [Los Angeles] riots were a volatile manifestation of minority/majority conflict and of interethnic conflict. Race and ethnic relations are much more complicated today than they were in the 1960s and 1970s, when the debates revolved around outlawing segregation and creating equal opportunities

for blacks. Today's conflict has four subdimensions: cultural differences, racial and interethnic tension, economic conflict, and political power struggles. Each of these is intertwined with recent immigration."[13]

Finally, it must be noted that the trend of increasing legal and illegal immigration and a declining middle class need not be accepted as inevitable. To the extent that today's mass immigration is contributing to the greater income stratification, that process can be arrested and reversed by changing the nation's immigration policy. Such a change is long overdue. The American public has long believed that illegal immigration must be stopped and that legal immigration should be lowered. The blue-ribbon Jordan Commission offered a detailed blueprint for bringing immigration policy more into line with the public's expectations. But Congress has yet to adopt the document verification system the Commission recommended as the key reform to deny jobs to illegal workers and, thereby, deter illegal immigration, and it has yet to seriously address the issue of legal immigration reform and reduction.

Advocacy of lower immigration is not a partisan position, nor is it either conservative or liberal. It does tend, however, to segment along socio-economic lines, with better-educated, and wealthier Americans favoring the status quo. As shown above, they are the ones who are benefiting from the current trend, to the disadvantage of middle and lower income segments of the population.

Author, and social commentator Michael Lind noted in 1998 that, "The unpleasant truth is that the present rate of legal immigration has been a boon to employers ? and a disaster for low-income workers. It is time for progressives to take the issue back...and advocate an immigration policy that keeps the interests of the working class, not the business class, in mind."[14]

Lind's focus was on immigration's impact on working class families, but the trend he identified affects middle-income families too, and immigration reformers must keep that in mind.

ENDNOTES

1 Middle-income households in this study for 2000 data were those with income between $35,000 and $67,700. This range is comparable to the $25,000-50,000 range in 1990 after adjustment for inflation. To achieve the 2000 range, we added two-thirds of the households in the $50,000-75,000 range to the households in the $35,000-50,000 range. The remaining one-third of the households was added to the high-income household share. This middle-income range includes the national median household income of $41,994.

2 "*What is the Relationship Between Income Inequality and Immigration?*", John L. Martin, Federation for American Immigration Reform Research Paper, October 1996. This study documented a trend of "…a steadily rising share of immigrants as the share of mid-level income earners declined."

3 In 1989, the year for which data were collected in the 1990 Census, $25,000 was about double (1.99) the poverty level for a family of four, two of whom were children. This level included 41.8 percent of all households. Ten years later, $35,000 in income was only slightly more than double (2.07) the poverty level for the same sized family. That income level included 41.4 percent of all households.

4 Daniel H. Weinberg "A Brief Look at Postwar U.S. Income Inequality," U.S. Census Bureau, (http://www.census.gov/hhes/income/incineq/p60asc.html - accessed April 15, 2003).

5 "Recent immigration accounts for about half of the regional variance in the Gini in 1997 and about 25% to 40% of the regional variance in the growth of the Gini between 1969 and 1997." Reed Deborah, "Immigration and Males' Earnings Inequality in the Regions of the United States," *Demography*, August 2001, p. 372.

6 South-Western College, "Policy Debate: What Accounts for Recent Increases in Income Inequality?," (http://www.swcollege.com/bef/policy_debates/income_inequality.html -accessed April 15, 2003).

7 National Research Council, *The New Americans: Economic, Demographic and Fiscal Effects*, National Academy Press, 1997.

8 Reed, Deborah S., "California's Rising Income Inequality: Causes and Concerns," Feb. 1999, Public Policy Institute of California.

9 The five-percent foreign-born cut-off was used to concentrate the analysis on those localities where the spread between high-immigration and low-immigration settlement was greatest. The inclusion of the other 23 states with foreign-born populations between 1.1 percent (West Virginia) and 4.4 percent (Nebraska) tended to dilute, but not reverse, the trend. The narrowing of the scope of the analysis eliminated several states that had comparatively large low-income household shares because of an overall low-income structure of the state's economy independent of the foreign-born population.

10 Among full-time, year-round workers, 31.1 percent of foreign-born residents earned less than $20,000 a year, compared to 17.4 percent of native-born residents who earned that little. Low salaries are particularly common among the foreign-born from Central America, 47.4 percent of whom earned less than $20,000 a year. The share of the foreign-born living in poverty (16.1 percent) is almost 50 percent higher than the share of the native-born living in poverty (11. percent). Naturalized citizens have a poverty rate similar to natives, but the non-citizen foreign-born were twice as likely to be poor, with a poverty rate of 19.7 percent. In other words, one out of every five non-citizens is poor. (Foreign-Born Population of the United States, Current Population Survey - March 2002 Detailed Tables (PPL-162), U.S. Bureau of the Census, Washington, DC.)

11 While this approximation arrived at by adding 2/3 of the households in the $50-75,000 range to the households in the $35-50,000 range would be precise only if the households were evenly spread throughout the range in each state, the resultant data do not show significant variations appearing among the states between the two data sets.

12 The poverty level for a family of four with two children in 1989 was $12,575, so $25,000 household income was 1.99 times the poverty level. For the same family in 1999 the poverty level was $16,895, so the $35,000 household income was 2.07 times the poverty level.

13 Clark, William A. V., 1998, California Cauldron: Immigration and the Fortunes of Local Communities , p. 197, The Guilford Press, New York.

14 Lind, Michael, "Mother Jones," August, 1998.

THIS REPORT WAS PREPARED BY JACK MARTIN.

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Symposium: Intellectual Property and Social Justice

***563** FOREWORD: IS NOZICK KICKING RAWLS'S ASS? INTELLECTUAL PROPERTY AND SOCIAL JUSTICE

Anupam Chander [FNa1]

Madhavi Sunder [FNaa1]

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Introduction

"Nozick is kicking Rawls's ass." So proclaimed Talha Syed to a group of intellectual property scholars assembled in the small college town of Davis, California, for a conference on Intellectual Property and Social Justice in March 2006. [FN1] No one in the august group rebutted the claim.

***564** Robert Nozick stands as one of the foremost intellectual antagonists to claims for distributive justice. [FN2] John Rawls, meanwhile, penned the most important modern political theory justifying an egalitarian society. [FN3] Thus, the suggestion that Nozick is prevailing over Rawls would appear to cast a pall on calls for embedding demands for social justice within the law of intellectual property. Social justice, after all, is generally taken to require significant obligations towards the poor.

Is the libertarian vision of Nozick indeed in ascendance in intellectual property, overshadowing Rawls's egalitarianism? There is strong reason to answer "no." From Doha to Geneva, from Rio de Janeiro to Ahmedabad, from Palo Alto to New Haven, from Davis to Copenhagen, individuals and groups insist that intellectual property must serve a broad array of human ends. These cities mark the launching pads for some of the growing networks dedicated to improving the distribution of intellectual property. In Doha, Qatar, in 2001, member states of the World Trade Organization declared that intellectual property law "does not and should not prevent Members from taking measures to protect public health." [FN4] In Geneva, the World Intellectual Property Organization ("WIPO") General Assembly sought in 2004 to commit WIPO to a "development agenda." [FN5] A decade earlier, in Rio de Janeiro in 1992, nations agreed to a Convention on Biological Diversity, recognizing that sovereign control over biological resources would aid the preservation of biological diversity. [FN6] In Ahmedabad, India, a Honey Bee Network seeks to share local agricultural innovations with a wider population on equitable terms. [FN7] Palo Alto gave birth to the Creative Commons, which helps creators share their work widely through streamlined licenses. In Davis, the organization Public Intellectual Property Resource for Agriculture seeks to leverage the patents held by public institutions to form useful patent pools for facilitating humanitarian use of crop knowledge. In Copenhagen, the artist and activist group Superflex helps developing country farmers brand their products in the same fashion as large ***565** multinationals, so that these farmers can exploit trademarks in products they cultivated.

These are not merely fringe efforts, tilting at windmills, but rather practical engagements with real world problems, from increasing access to medicines and culture to fostering socially useful innovations and economic development. Nor are these activities necessarily hostile to intellectual property; rather, many seek to harness intellectual property for social ends.

Thus far, intellectual property theory has been behind the practice. But the papers in this Symposium, considered collectively, form a rebuttal to the declaration that a libertarian vision dominates both intellectual property law and scholarship.

Social justice in intellectual property has recently gained special urgency because of three developments, the first two technological, and the third legal: (1) the rise of the Internet; (2) the rise of biotechnology; and (3) the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").

The Internet--through its various applications, from the World Wide Web and e-mail to peer-to-peer file sharing--enables anyone to share the stuff of intellectual property, the intellectual products themselves, relatively cheaply and widely. This radical change in the technology for disseminating intellectual products fosters hope for the most wide-

spread use of human knowledge. Borges's infinite library becomes almost conceivable, though it is not clear whether its midwife will be Google or a coalition of libraries. [FN8] At the same time, the ready dissemination of information (facilitating copyright infringement) led to the adoption of laws that criminalize the circumvention of technologies that protect intellectual property, laws that might be exploited to limit the dissemination of information or to lock out competition. [FN9] The broad vision of human advancement through information sharing has roused many to focus on how intellectual property might hamper or facilitate that vision's realization.

***566** The growing importance of biotechnology to advances in agriculture and medicine increasingly implicates intellectual property in these areas. The Green Revolution was made possible by scientific advances in agriculture largely independent of intellectual property claims, but today's breakthroughs will depend on patentable (and likely patented) innovation. This may help incentivize private research, but may also obstruct innovation which would have to clear a thicket of prior patents. The efforts to develop a genetically modified strain of “golden rice” infused with beta carotene stumbled when it was discovered that some seventy patents had been filed on the genes and constructs owned by some thirty-two companies and institutions. [FN10] There may be little freedom to operate in many areas of biotechnology, at least in the absence of permission from dozens of entities worldwide.

The third development, TRIPS, now in effect in all but the world's very least developed countries, requires patents in everything from seeds to drugs, making intellectual property law literally an issue of life or death. Yet, paradoxically, intellectual property's “march into all corners of our lives and to the most destitute corners of the world in the last century has . . . exposed the fragility of its economic foundations while amplifying its social and cultural effects.” [FN11] We now know, for example, that intellectual property rights do not incentivize the creation of drugs to treat poor people's ills, and that intellectual property may offer no incentive for creation when a country lacks infrastructure necessary for technical innovation. As Professor Laurence Helfer points out in his paper, a United Nations committee recently recognized the broad impact of TRIPS on “(1) the transfer of technology to developing countries; (2) the consequences for the right to food of plant breeders' rights and patents for genetically modified organisms; (3) biopiracy; (4) the protection of the culture of indigenous communities; and (5) the impact on the right to health of legal restrictions on access to patented pharmaceuticals.” [FN12]

***567** In this Foreword, we seek to contextualize the papers in this Symposium issue, showing how they outline the major arguments with respect to approaching intellectual property through the lens of social justice. We also seek to defend the fundamental project, explaining why we must heed considerations of social justice as we deliberate on the contours of intellectual property. In Part I, we situate the papers within the larger philosophical debate between Nozick and Rawls, showing that egalitarian norms pulsate through a significant strain of intellectual property scholarship. Some will demur. They will argue that intellectual property should serve a single goal: incentivizing the creation of cultural and scientific products, as the market dictates. Concerns about social justice should be dealt with through other means--perhaps through taxation and welfare payments. [FN13] In Part II, we will argue against such an impoverished vision of the values of intellectual property law.

I. Arguments About Intellectual Property and Social Justice

For Nozick, social justice requires that governments interfere as little as possible with private arrangements, and devote themselves instead to protecting such arrangements. [FN14] Nozick separates the question of social justice in property into three issues: (1) justice in the initial acquisition, (2) justice in subsequent transfers, and (3) justice with respect to reparations for violating (1) and (2). [FN15] With respect to initial acquisition, Nozick largely follows John Locke, granting a laborer rights to own what she makes and to appropriate anything not already owned, provided her appropri-

ation leaves “enough and as good” for others. [FN16] Justice in subsequent transfers is left largely to the free market; governments should avoid interfering with or coercing transfers (including taxation, which Nozick likens to forced labor). Justice in reparations is quite simply that: reimbursing victims of harm done by others.

Where Nozick's foremost value is liberty, which he sees as freedom from the state, Rawls's theory seeks to structure a more egalitarian society, requiring more direct state involvement. Political institutions must always seek to improve the lot of the worst off in society; their success or failure hangs on how well they achieve this goal. This is ***568** Rawls's central disagreement with Nozick, who would have political institutions protect private property and free contract, with minimal redistribution.

A. Intellectual Property and Distributive Justice

Distributive justice through intellectual property, however, occupies many of the papers in this Symposium. Professor William Fisher and Talha Syed lead their powerful paper with a staggering fact, one designed to motivate distributive justice in intellectual property on a global level:

> Each year, roughly nine million people in the developing world die from infectious diseases. The large proportion of those deaths could be prevented, either by making existing drugs available at low prices in developing countries, or by augmenting the resources devoted to the creation of new vaccines and treatments for the diseases in question. [FN17] Fisher and Syed address the central question for global distributive justice: why should the richer nations pay for the health care needs of the poorer nations? Like Rawls, they focus not on “the morality of individual choice” (e.g., to give or not give), but on “the responsibilities of institutions.” [FN18] They consider arguments “from historical equity, social utility, and deontological and teleological theories of distributive justice.” [FN19] They conclude that each of these philosophies--from utilitarianism to cosmopolitanism-- supports health-related obligations from the North to the South.

Fisher and Syed provide a strong philosophical foundation for James Love's practical suggestion: a Medical Research and Development Treaty where developed nations would fund the creation and delivery of essential medicines to treat AIDS and other diseases in the developing world. [FN20] Innovators in both developing and developed nations would be rewarded not by royalties from patents on their inventions, but rather through prizes for the incremental health benefits of their invention, when compared to existing medicines. Love explores the possibility of using privately managed research and development funds to channel money into research that could not otherwise access private capital.

Professor Margaret Chon identifies distributive justice as a central issue in determining how to allocate rights to technical knowledge between ***569** producers and users. [FN21] Taking a Rawlsian “bottom up” perspective which considers the impact of the global intellectual property regime on those at global society's margins, she describes how the world's poor lack access to basic textbooks. She argues that intellectual property law should not stand in the way of the widespread dissemination of textbooks, even where those seeking education lack the means to compensate the copyright owner.

Professor Keith Aoki questions the justice in the initial acquisition of some important intellectual properties. “The exclusion of slaves from owning patents,” [FN22] for example, meant that black inventors could be exploited--even while some justified the denial of patents to blacks on the theory that they “lacked the requisite inventive agency to generate or possess patentable ideas.” [FN23] Some historians, for example, suggest that Eli Whitney may have borrowed the central idea of the cotton gin from a slave. Aoki's goal is not to simply argue for restitution for the past injustice of failing to recognize black authorship, but to put intellectual property law into a social context. For example, Aoki points out the cruel irony that the cotton gin may have prolonged the economic viability of slavery, which had come under in-

creasing pressure in the marketplace until this innovation. [FN24] Similarly, after demonstrating the failure of copyright law to recognize the inventiveness of black blues artists, Aoki seeks not to grant individual intellectual property rights to such artists, but rather to create limited commons property regimes that would give these artists freedom to borrow from each other while increasing their bargaining power with respect to outside parties.

Where Aoki describes communities that did not receive the economic benefit of their creations (a Lockean-Nozickian concern, to be sure), the paper by Professor Rosemary Coombe, Steven Schnoor, and Mohsen Ahmed examines efforts by traditional communities to commodify their cultural knowledge. [FN25] These communities are using the tools of intellectual property--trademarks, certification marks, copyrights, patents, and geographical indications--for their own economic advantage. They are learning to market their place, tradition, history, and ***570** narrative. But Coombe and her coauthors have two worries: first, that this strategy puts greater burdens on intellectual property to serve as a governance mechanism within the community; and second, that this strategy may reify certain customs or hierarchies.

Professor Shubha Ghosh spins a tale to distinguish the real property commons from the intellectual property commons. [FN26] Unlike real property which at least today has already been clearly demarcated, intellectual property remains yet unexplored. This characteristic, Ghosh suggests, should lead us to consider distributive justice directly when we evaluate justice among intellectual property creators, justice among creators and users, and justice between generations.

Professor Ann Bartow expands the discussion from the structure of intellectual property to the implications for social justice of the commonplace practice of naming public sites. [FN27] Such naming practices, she argues, have enormous, though often neglected, cultural significance. She observes, for example, that we are likely to view “a community in which a public school is named for Robert E. Lee very differently from a community in which a public school is named for Martin Luther King, Jr.” [FN28] (the example strikes home: the UC Davis School of Law, housed in an edifice named for Martin Luther King, Jr., seeks to carry on meaningfully King's legacy for social justice through law). Given the cultural implications of public names, she worries that the usual processes for selection are undemocratic. She calls for transparency and accountability in the selection process.

Like Nozick and Rawls, the contributors to this Symposium have fundamental disagreements about the means for making this area of law more socially just. A number of the papers raise objections, or at least cautions, to a social justice approach to intellectual property.

In his paper, winkingly titled Locke Remixed ;-), Professor Robert Merges offers two important arguments against redistribution through unlicensed cultural remixes, a position he associates with one of us (Sunder) and with Coombe. [FN29] His principal argument follows Nozick (whose theory of initial acquisition remixes Locke's): creators deserve the fruits of their labors, and forcing them to yield a significant amount of these fruits would be unfair. [FN30] His second argument is more pragmatic: ***571** even when copyright owners might have the legal right to stop a remix, they very often do not exercise the right, perhaps because they do not object to the particular use or because of the transactions costs of enforcing their right. “[R]emix culture has sprouted and grown quite rapidly,” Merges argues, “without any major changes in the law.” [FN31]

Merges's first argument relies on a particular moral philosophy and can thus be disputed by those who do not share that philosophy. Even if one does accept Nozick's account of property, we must still pay attention to the justice of the initial acquisition; today's copyright holders often drew upon the labors of others without meaningful consent or compensation. Yet another difficulty is one presented by Nozick himself: where do we draw the limits on the property rights that flow from one's labor? Should a can of tomato juice poured into the ocean, Nozick memorably asks, make the ocean

mine? This critique becomes particularly sharp in the context of remixing, where one must define the scope of the derivative work correctly; after all, remixers, too, are laborers hard at work creating value. Where should the original author's control end? A Lockean theory of control might grant much greater rights than a purely incentive-driven account; it might provide the creator with windfalls far beyond those necessary to motivate the creation. Relying upon the Lockean proviso to set the limits seems much too abstract and indefinite.

Merges's second argument--that remixers are doing fine even without legal rights because the copyright owners have waived their claims out of generosity or for practical reasons--can be turned around: if the default rule were set otherwise--to give broader remix rights to third parties--perhaps the "kindness of strangers" [FN32] would still flow, now in the reverse direction.

B. Intellectual Property and Human Rights

Helfer argues that both the human rights and intellectual property domains have moved towards each other, such that their language and claims increasingly overlap. [FN33] He imagines three possible futures for the intertwining of human rights and intellectual property. First, intellectual property owners might use human rights to expand their intellectual ***572** property claims, now founded on a fundamental human right. Second, countries could use human rights to impose external limits on intellectual property, establishing "external limits, or maximum standards of protection, upon rights holders." [FN34] Third, policymakers might seek to achieve human rights ends through intellectual property means (that is, recognizing that intellectual property might either help or harm a particular effort to promote a minimum human need).

Professor Kal Raustiala offers a sobering intervention, questioning "whether the infusion of human rights concepts and rhetoric will serve, on balance, to make international IP rights more socially just, or just more powerful." [FN35] We respond to Raustiala's concerns in Part II below.

Professor Peter Yu reviews the drafting history leading up to the intellectual property-related provisions in the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights. [FN36] He argues that "it is important to clearly delineate which attributes of intellectual property rights would qualify as human rights and which attributes or forms of those rights should be subordinated to human rights obligations due to their lack of any human right basis." [FN37] Such a clear delineation would show that intellectual property rights, even if conceived as human rights, are not absolute, but rather must be balanced with other, perhaps paramount, human rights.

C. Copyrights, Creativity, and Catalogs

Noting the absence of theories of cultural creation--a seemingly central question for copyright law--Professor Julie Cohen ambitiously begins to weave a story of how we create. [FN38] She sees creativity as characterized (in Professor Leslie Kurtz's words) by "intrinsic rewards, creative play, serendipity, cross-fertilization, and the unstructured freedom to see what happens without knowing in advance." [FN39] Copyright law, Cohen argues, should seek not simply to incentivize more creative goods, but to facilitate the conditions for creativity--including centrally the ability to "play." [FN40]

***573** For many, Google Book Search promises to enhance such play in the field of the word. Google has begun to digitize the collections of some of the world's biggest libraries and make them available worldwide, in snippet form for books in copyright, and in full text form for books in the public domain. But Professor Siva Vaidhyanathan fears that

Google's fair use defense for this copying will fail, and the similar not-for-profit projects of libraries will be jeopardized by an adverse legal precedent. [FN41] Libraries, he believes, should be public, not private, projects. Vaidhyanathan, who teaches at NYU's education school, distrusts Google as the librarian for all human knowledge.

Kurtz and Professor Molly Van Houweling elegantly summarize the contributions by Cohen and Vaidhyanathan. Van Houweling worries about what may be lost in the move from physical to virtual libraries, including physical encounters with books, and people, in the same aisle. [FN42]

In discussing Cohen's description of the playful, unpredictable, and culturally embedded nature of creativity, Kurtz concludes, “If copyright is to promote creativity, it will not be well served by rigid control over the ability to access and use cultural goods.” [FN43] Kurtz is more optimistic than Vaidhyanathan about Google's library project, both from the standpoint of law and from the standpoint of social justice. She argues that Google “may have a strong fair use defense,” primarily because “the project does not appear to harm any of the publishers' markets.” [FN44] She also believes Google offers a “valuable research tool,” especially for those far from the world's metropoles, allowing anyone with Internet access “to engage with all sorts of materials.” [FN45]

II. Why Consider Social Justice Within Intellectual Property?

Intellectual property law is a human construction designed to solve a fundamental problem of information economics: without intellectual property protections, the ready duplicability of information undermines incentives to create information. Armed with this economic insight and fortified by a constitutional mandate to “promote the Progress of Science and useful Arts,” [FN46] some intellectual property scholars--let's call them ***574** “Intellectual Property Originalists” [FN47]--would keep intellectual property's focus single-minded: to incentivize the production of information. [FN48] They would thus resist any call to expand the values of intellectual property to the broad array of values constituting social justice.

A. The Case for a Broader View of Intellectual Property Values

We will argue here that the view of intellectual property as serving only to incentivize more information production is too narrow. We offer a set of arguments for an expansive understanding of the values motivating and structuring intellectual property law.

Spurring different kinds of innovation. Even if we are interested solely in spurring innovation, are we disinterested entirely in what kind of innovation we are spurring? Does it matter if the intellectual property regime fails to incentivize the creation of treatments for poor people's diseases? [FN49] While some might prefer official technological neutrality, governments often are keen to spur more socially useful inventions. In Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., the Supreme Court observed that a rule that encouraged one kind of innovation might simultaneously curtail another kind of innovation: “The more artistic protection is favored, the more technological innovation may be discouraged. . . .” [FN50]

Providing grounds for limiting intellectual property claims. A single-minded focus on incentivizing creation could lead to maximalist intellectual property claims. The only limit on intellectual property would be found in (1) the claim that additional intellectual property rights are unnecessary to spur creation, and (2) situations where expanding intellectual property rights for some will interfere with others' ability to create. A broad range of human values should help restrain maximalist intellectual property demands.

Precipitating purpose need not require inattention to other values. The fact that a legal regime might be created for one purpose should not mean that the implications of that regime for all other purposes should be ignored. ***575** The state raises an army because of the need to assure its security against foreign invasions. Yet, the state might deploy the army domestically in case of natural disasters. And it might need to create limits on how the army might operate (such as prohibitions on torture and sexual harassment)-- limits stemming not necessarily from self-defense but from other human values. Similarly, the fact that intellectual property law might be established for instrumental reasons does not mean that other purposes should not be considered when we set its metes and bounds. Furthermore, we could even treat the incentive rationale as primary, but other goals as important factors nonetheless.

Redistribution through tax inadequate. Those who disfavor a social justice agenda for intellectual property are not necessarily antagonistic to social justice itself. They would often simply prefer what they find to be a superior forum for considering such issues: tax. But it seems unrealistic to expect the effects to be sorted out through a redistributive tax regime. [FN51] Furthermore, why compound disadvantage through an intellectual property system indifferent to equality [FN52] in the hopes that it might be sorted out later through a tax system?

Intellectual property laws not necessarily globally scalable. The insistence on a single maximand for intellectual property law becomes even more problematic as Western-style intellectual property law is imposed on developing countries. A narrow focus on spurring innovation through intellectual property rights fails to differentiate between capacities to innovate or, more importantly, capacities to commercialize innovation. Such capacities may be limited perhaps because of small home markets or the absence of governmental research and development funding. [FN53] Furthermore, the expansion of intellectual property rights globally has not been coupled with a reinvigorated commitment to global development. Foreign aid budgets have largely stagnated or declined--hardly likely to compensate for the larger net royalty payments now likely to flow from the South to the North as a result of TRIPS. [FN54]

***576** Single-minded focus not true of most other areas of the law. Property law, like most or perhaps all other areas of law, does not have such a single-minded focus. Property rights in land serve a myriad of values, and are justified and cabined accordingly.

Hard to justify copyright fair use if intellectual property limited to incentives. Intellectual property has long harbored multiple values, such as the First Amendment values implicit in fair use. Recent efforts to reconstruct fair use doctrine as principally a response to transaction costs-induced market failure [FN55] might jeopardize the doctrine itself. As transaction costs of finding the copyright owner and negotiating a license diminish as a result of electronic information networks, markets may well transform fair use into fared use, undermining fair use. A broad understanding of intellectual property values might justify fair use in the face of technological erosion.

Theory is behind the practice. Where theoreticians seem to prefer the incentive story, in practice, intellectual property law is already replete with concerns for many values. In a recent Supreme Court intervention, for example, Justice David Souter, writing for the Court, was "mindful of the need to keep from trenching on regular commerce" [FN56]--a value quite beyond simply incentivizing production of more music. Explicitly acknowledging the plural values implicated by intellectual property in our theoretical framework will help rationalize this law.

B. Critiques of the Social Justice Approach

We consider here three critiques of our approach.

Whose values? Many will worry that our approach would constitute the legal academy as Platonic rulers. How do

we identify the myriad values to be considered? And whose values? Rawls's? Nozick's? Or someone else's entirely? [FN57]

***577** But we do not presume to offer any particular teleology for intellectual property. Rather, that is the domain of the democratic process. The values of intellectual property will be determined dynamically through the politics of the age, just as the social movements of the past marked real property law.

Judges, of course, will make many of these decisions, and thus, as the legal realists recognized, the values of the judges themselves will play an important part in determining intellectual property law. Yet, even Bickel did not find common law adjudication to be undemocratic. His complaint was with constitutional adjudication. [FN58]

Too complex. Introducing additional values to intellectual property analysis will necessarily complicate that analysis. But if our move adds complexity, it is just the complexity necessary to get things right. Narrowing the calculus to ease the calculation will likely lead to the wrong answer. Simplifying assumptions are useful only when their omissions are not so critical as to render the results invalid. Economy should not come at the expense of achieving a just outcome.

Threat to public domain. Intellectual property scholars have mounted a heroic effort to staunch the enclosure of the public domain of information. Many worry that broadening our understanding of intellectual property will buttress maximalist intellectual property claims. As Raustiala writes, "the introduction of human rights language to the policy debate over IP may have a . . . strengthening influence" for intellectual property claims. [FN59] Raustiala understands that many find "unfairness in a system whereby refined products based on traditional knowledge and genetic resources are protected via international IP law, while the underlying traditional knowledge and resources are not." [FN60] But he worries that human rights-based claims for intellectual property "will serve to wall off still more from the public domain," stifling innovation. [FN61] He cautions that "the risk is that the language and politics of human rights, as it filters into the language and politics of IP rights, will make it harder for governments to resist the siren songs of those seeking ever more powerful legal entitlements." [FN62]

While we appreciate this warning, we believe that human rights are a principal source for delimiting intellectual property, not simply expanding it. For example, the arguments for access to medicines (and the compulsory license schemes they often entail) typically rely not on claims of authorship or incentive, but rather on the desire to expand human ***578** capabilities. Yu discusses the case of Ashdown v. Telegraph Group Ltd., [FN63] in which the English Court of Appeals relied on human rights law to establish a compulsory license allowing a paper to publish a memo of a secret meeting with Prime Minister Tony Blair, despite claims that it would infringe copyright. [FN64] Thus, human rights arguments may help repel the advance of intellectual property by providing justifications for limiting it.

Indeed, rather than shrinking the public domain, our argument may likely expand it. Recognizing the diversity of values underlying intellectual property should lead us to share certain rights in intellectual products, rather than reserve them more closely. Recall that new theories of property, from personhood to social relations, enhanced our ability to explain and justify legal limits on property, even while they served to bolster some property claimants, such as tenants.

Still others pragmatically warn that rights intended to aid the poor are more likely to be wielded ultimately by those already in power. But this suggests that it is analytically difficult to distinguish Disney from the dissident, or Monsanto from a mountain tribe. [FN65] In fact, courts can make such distinctions when they are justified by other normative reasons.

Furthermore, this is the risk of any legal reform effort--even the public domain movement itself. Elsewhere we have argued that the campaign to preserve the public domain, which is taken up in everyone's name, in fact may be to the be-

nefit of the powerful who are in a better position to quickly appropriate ideas and goods in the public domain for themselves. [FN66] We suggest that an intellectual property regime that expressly acknowledges and confronts its social and cultural effects will be best suited to resolve these issues.

Conclusion

No human domain should be immune from the claims of social justice. Intellectual property, like property law, structures social relations and has profound social effects. The papers in this Symposium describe, critique, and propose ways of governing this interplay between law and society. It is often said that the twenty-first century will be the Age of Knowledge ***579** and Participation. Intellectual property law will help define the possibilities and human capabilities of this Age.

Both Rawls and Nozick sought to craft principles for the most just society within human grasp. Their debate should not be verboten within intellectual property scholarship. Indeed, intellectual property appears in their scholarship. [FN67] The writers in this Symposium employ philosophy, sociology, welfare economics, cultural studies, feminist theory, communications theory, and critical race theory to understand intellectual property. In going beyond a narrow, economic incentive-based account, they demonstrate the broad range of values and approaches necessary to the study of intellectual property today. Intellectual property regulates the production and distribution of information. Considerations of social justice cannot be peripheral to such a central human construction.

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[FNaa1]. Carnegie Scholar, 2006-2008; Professor, UC Davis School of Law. A.B. Harvard; J.D. Stanford. We wish to thank Dean Rex Perschbacher and Associate Dean Kevin Johnson for the enormous support that made this symposium possible. We are also grateful to the participants in the Symposium for their hard work and dedication to a productive exchange. We thank Rochelle Cooper Dreyfuss and Pamela Samuelson for their important contributions to our discussions.

[FN1]. Talha Syed, himself, does not believe that this is a happy state of affairs, as is evident from his symposium paper with Professor William Fisher, which embraces a vision of a just and attractive society with a strong egalitarian ethic. See generally William W. Fisher & Talha Syed, Global Justice in Health Care: Developing Drugs for the Developing World, 40 UC Davis L. Rev. 581 (2007).

[FN2]. See generally Robert Nozick, Anarchy, State and Utopia (1974).

[FN3]. See generally John Rawls, A Theory of Justice (rev. ed. 1999).

[FN4]. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 4, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

[FN5]. World Intellectual Prop. Org. [WIPO], General Assembly, Report: Thirty-First (15th Extraordinary) Session, ¶ 218, WO/GA/31/15 (Oct. 5, 2004).

[FN6]. See Convention on Biological Diversity art. 15, June 5, 1992, S. Treaty Doc. No. 103-20, 1760 U.N.T.S. 79.

[FN7]. See Honey Bee Network, What Is Honeybee?, http:// knownetgrin.honeybee.org/honeybee.htm (last visited Nov. 28, 2006).

[FN8]. See Siva Vaidhyanathan, The Googlization of Everything and the Future of Copyright, 40 UC Davis L. Rev. 1207, 1220 (2007) (asking whether public libraries may be better suited to task of administering such library because "[l]ibraries and universities last. Companies wither and crash. Should we entrust our heritage and collective knowledge to a company that has been around for less than a decade?").

[FN9]. See, e.g., Lawrence Lessig, Free Culture 160 (2004) ("Technology becomes a means by which fair use can be erased; the law of the [Digital Millenium Copyright Act] backs up that erasing."); Anupam Chander, Exporting DMCA Lockouts, 54 Clev. St. L. Rev. 205, 208 (2006) (noting how DMCA might be deployed to limit competition in goods in which software is embedded); Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised, 14 Berkeley Tech. L.J. 519, 546 (1999) (arguing that DMCA "may have a chilling effect on legitimate activities, including those affecting free speech").

[FN10]. See R. David Kryder et al., The Intellectual and Technical Property Components of Pro-Vitamin A Rice (GoldenRice™): A Preliminary Freedom-to-Operate Review 7 (2000), available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1007&context=piercelaw/facseries. Some criticize GoldenRice on the merits of its nutritional value or its reliance on genetic modification. Greenpeace, All That Glitters Is Not Gold: The False Hope of Golden Rice, May 2005, http://www.greenpeace.org/raw/content/international/press/reports/all-that-glitters-is-not-gold.pdf; Vandana Shiva, The "Golden Rice" Hoax: When Public Relations Replaces Science, available at http://online.sfsu.edu/~ rone/GEes-says/goldenricehoax.html (last visited Jan. 17, 2007).

[FN11]. Madhavi Sunder, IP^3, 59 Stan. L. Rev. 257, 260 (2006).

[FN12]. Laurence R. Helfer, Toward a Human Rights Framework for Intellectual Property, 40 UC Davis L. Rev. 971, 985 (2007).

[FN13]. See Louis Kaplow & Steven Shavell, Fairness Versus Welfare 33 (2002) ("[D]istributional objectives can often be best accomplished directly, using the income tax and transfer (welfare) programs.").

[FN14]. Nozick, supra note 2, at 12 (describing need for protective associations such as states to resolve disputes about private arrangements); id. at 149 ("The minimal state is the most extensive state that can be justified.").

[FN15]. Id. at 151-52.

[FN16]. Id. at 174-78.

[FN17]. Fisher & Syed, supra note 1, at 583.

[FN18]. Id. at 588.

[FN19]. Id. at 584.

[FN20]. James Love, Measures to Enhance Access to Medical Technologies, and New Methods of Stimulating Medical R & D, 40 UC Davis L. Rev. 679, 696-705 (2007).

[FN21]. Margaret Chon, Intellectual Property "from Below": Copyright and Capability for Education, 40 UC Davis L. Rev. 803, 807 (2007) ("The calibration of this foundational balance [in TRIPS Article 7] is fundamentally a question of distributive justice ....").

[FN22]. Keith Aoki, Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development), 40 UC Davis L. Rev. 717, 741 (2007).

[FN23]. Id. at 742.

[FN24]. Id. at 745-46.

[FN25]. Rosemary J. Coombe, Steven Schnoor & Mohsen Ahmed, Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property, 40 UC Davis L. Rev. 891 (2007).

[FN26]. Shubha Ghosh, The Fable of the Commons: Exclusivity and the Construction of Intellectual Property Markets, 40 UC Davis L. Rev. 855 (2007).

[FN27]. Ann Bartow, Trademarks of Privilege: Naming Rights and Physical Public Domain, 40 UC Davis L. Rev. 919 (2007)

[FN28]. Id. at 932-33.

[FN29]. Robert Merges, Locke Remixed ;-), 40 UC Davis L. Rev. 1259 (2007).

[FN30]. Id. at 1262 ("[I]t would not be fair to the people who create original mass market content for remixers to 'redistribute' too much of the money creators earn from their work.").

[FN31]. Id. at 1263. Of course, the law itself gives remixers legal rights through the fair use exceptions to copyright. See, e.g., Anupam Chander & Madhavi Sunder, Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use, 95 Cal. L. Rev. (forthcoming 2007) (arguing that unlicensed fan fiction that valorizes types of people neglected in original work will often qualify as fair use).

[FN32]. Merges, supra note 29, at 1264.

[FN33]. Helfer, supra note 12, at 975 (writing that "[i]n this maelstrom of reaction, resistance, and regime shifting, international human rights law is poised to become an increasingly central subject of contestation" in international intellectual property debates).

[FN34]. Id. at 1017.

[FN35]. Kal Raustiala, Density and Conflict in International Intellectual Property Law, 40 UC Davis L. Rev. 1021, 1023-24 (2007).

[FN36]. Peter K. Yu, Reconceptualizing Intellectual Property Interests in a Human Rights Framework, 40 UC Davis L. Rev. 1039, 1047-70 (2007).

[FN37]. Id. at 1128.

[FN38]. Julie E. Cohen, Creativity and Culture in Copyright Theory, 40 UC Davis L. Rev. 1151, 1190-92 (2007).

[FN39]. Leslie A. Kurtz, Copyright and the Human Condition, 40 UC Davis L. Rev. 1233, 1244 (2007).

[FN40]. Cohen, supra note 38, at 1190.

[FN41]. Vaidhyanathan, supra note 8, at 1230 (arguing that Google's claim “is destined to backfire”).

[FN42]. Molly Shaffer Van Houweling, Bumping Around in Culture: Creativity, Spontaneity, and Physicality in Copyright Policy, 40 UC Davis L. Rev. 1253, 1257 (2007) (considering implications of Google Library Project's loss of physical encounters with books).

[FN43]. Kurtz, supra note 39, at 1244.

[FN44]. Id. at 1249.

[FN45]. Id. at 1250-51.

[FN46]. U.S. Const. art. I, § 8, cl. 8.

[FN47]. Sunder, supra note 11, at 330.

[FN48]. See, e.g., Mark A. Lemley, Property, Intellectual Property, and Free Riding, 83 TEX. L. REV. 1031, 1031 (2005) (“Intellectual property protection in the United States has always been about generating incentives to create.”).

[FN49]. This is, of course, a central concern for both the Fisher and Syed and Love papers in this Symposium. See Fisher & Syed, supra note 1, at 583 (expressing concern that “pharmaceutical firms concentrate their research and development ... resources on diseases prevalent in Europe, the United States, and Japan--areas from which they receive 90-95% of their revenues--and most of the diseases that afflict developing countries are uncommon in those regions”); Love, supra note 20, at 696-705.

[FN50]. 125 S. Ct. 2764, 2775 (2005).

[FN51]. For the general argument that most subject areas of law should ignore distributional consequences in favor of direct redistribution through the tax system, see generally Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2002).

[FN52]. See generally Anupam Chander, The New, New Property, 81 Tex. L. Rev. 715 (2003) (describing how assignment of initial entitlements in domain name system compounds inequality); Anupam Chander & Madhavi Sunder, The Romance of the Public Domain, 92 Cal. L. Rev. 1331, 1353 (2004) [hereinafter Chander & Sunder, Romance] (arguing that TRIPS creates “an international intellectual property regime that is sharply tilted in favor of the developed world”).

[FN53]. Chander & Sunder, Romance, supra note 52, at 1351-54 (describing reasons why developing world companies might find it difficult to exploit resources from their home states globally).

[FN54]. In 1999, developing countries paid some $7.5 billion more in royalties and license fees than the royalties and license fees they received, even though this was well before the deadlines for full implementation of TRIPS obligations in the developing states. Commission on Intellectual Property Rights, U.K. Sec'y of State for Int'l Dev., Integrating Intellectual Property Rights and Development Policy 21 (2002), available at http://www.iprcommission.org/graphic/documents/final_report/CIPRfullfinal.pdf. The United States, by contrast, saw an $8 billion increase in its surplus of royalties and fees related mainly to intellectual property transactions between 1991 and 2001. Id.

[FN55]. See, e.g., Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax

Case and Its Predecessors, 82 Colum. L. Rev. 1600, 1627-30 (1982) (describing fair use as justified by market breakdowns resulting from transaction costs, externalities, and anti-dissemniation motives).

[FN56]. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2780 (2005).

[FN57]. See generally Bruce A. Ackerman, Social Justice in the Liberal State (1980); Brian Barry, Why Social Justice Matters (2005).

[FN58]. See Anupam Chander, Globalization and Distrust, 114 Yale L.J. 1193, 1194-95 (2005).

[FN59]. Raustiala, supra note 35, at 1032.

[FN60]. Id. at 1033.

[FN61]. Id.

[FN62]. Id. at 1037.

[FN63]. [2002] EWCA (Civ) 1142, [2001] W.L.R. 967 (Eng.).

[FN64]. Yu, supra note 36, at 1096-99.

[FN65]. Merges asserts a version of this claim explicitly, suggesting that limits on Disney will also be limits on the little creator: “There is no principle way to distinguish a big Disney production from an animated film made by a group of film school friends, or a Beatles recording from a homemade garage band master tape. Therefore, any legal regime that strikes against the authority and hegemony of Disney and the Beatles will inevitably impact small producers of original content.” Merges, supra note 29, at 1270 n.19.

[FN66]. See Chander & Sunder, Romance, supra note 52, at 1340-41.

[FN67]. See, e.g., Nozick, supra note 2, at 141 (discussing copyrights and patents).

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International Rights Approaches to Intellectual Property

***971** TOWARD A HUMAN RIGHTS FRAMEWORK FOR INTELLECTUAL PROPERTY

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***973** Introduction

The international intellectual property system is on the brink of a deepening crisis. Government officials, civil soci-

ety groups, and private parties are staking out opposing positions on a variety of issues in an increasingly wide array of international venues. The issues range from patented medicine to biodiversity and traditional knowledge, and from digital content and webcasting to the harmonization of procedural rules. The results are increasingly dysfunctional: acrimonious and unresolved clashes over substantive rules and values, competition among international institutions for policy dominance, and a proliferation of fragmented and incoherent treaty obligations and nonbinding norms.

This ominous state of affairs has evolved fairly rapidly. The last decade has seen a dramatic expansion of intellectual property protection standards, both in their subject matter and in the scope of the economic interests they protect. Advances in technology have engendered demands for new forms of legal protection by businesses and content owners. And with the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), [FN1] nation states linked intellectual property rights to the world trading system, creating new and robust enforcement opportunities at the international and national levels. These interrelated developments have made intellectual property rights relevant to a broad range of value-laden economic, social, and political issues with important human rights implications, including public health, education, food and agriculture, privacy, and free expression. [FN2]

A recent wave of resistance to this rapid expansion of intellectual property rights has brought the work of the World Trade Organization ***974** ("WTO") and the World Intellectual Property Organization ("WIPO")--the two most prominent international intellectual property lawmaking venues--to a virtual standstill. In the WTO, issues relating to compulsory licenses for patented pharmaceuticals; the relationship among biodiversity, patents, and plant breeders' rights; and the protection of geographical indications have remained unresolved for nearly four years. [FN3] Negotiations in WIPO are faring little better. Industrialized nations are pressing for new treaties relating to substantive patent rules, audiovisual works, and broadcasters' rights. Developing countries and consumer groups have countered with a "development agenda" that calls for a moratorium on new treaty-making and instead demands that WIPO give greater attention to public access to knowledge and to non-proprietary systems of creativity and innovation. These conflicting forces have essentially neutralized each other. Each side has blocked or delayed its opponents' proposals as debates over new rules and policies have become increasingly contentious and mired in procedural formalism. [FN4]

With forward motion in the WTO and WIPO effectively stalled, both proponents and opponents of intellectual property rights have sought out greener pastures. Developing countries and their like-minded nongovernmental organization ("NGO") allies have decamped to more sympathetic multilateral venues--most notably the World Health Organization ("WHO"), the Food and Agriculture Organization, and the conferences of the Convention on Biological Diversity--where they have found more fertile soil in which to grow proposals that seek to roll back intellectual property rights or at least ***975** eschew further expansions of the monopoly privileges they confer. Developed countries and intellectual property owners, too, are leaving the field, not for other multilateral organizations but for bilateral and regional trade and investment treaties. The price these countries demand for expanded market access and foreign investment is adherence to intellectual property rules that equal or exceed those found even in the most protective multilateral agreements. [FN5]

In this maelstrom of reaction, resistance, and regime shifting, international human rights law is poised to become an increasingly central subject of contestation. For more than a century, international agreements have protected certain moral and material interests of authors, inventors, and other intellectual property creators. Until very recently, however, the conceptualization of these intellectual property interests as internationally protected human rights was all but unexplored. Intellectual property has remained a normative backwater in the burgeoning post-World War II human rights movement, neglected by international tribunals, governments, and legal scholars while other rights emerged from the jurisprudential shadows. [FN6]

What little can be discerned about the intellectual property provisions of human rights law reveals a concern for bal-

ance. Both the 1948 Universal Declaration of Human Rights ("UDHR") and the 1966 International Covenant on Economic, Social, and Cultural Rights ("ICESCR" or "the Covenant") recognize the moral and material interests of authors and inventors [FN7] and the right "to enjoy the arts and ***976** to share in scientific advancement and its benefits." [FN8] These clauses offer protection to creators and innovators and the fruits of their intellectual endeavors. But they also recognize the public's right to benefit from the scientific and cultural progress that intellectual property products can engender.

Without elaboration, however, these textual provisions provide only a faint outline of how to develop human rights-compliant mechanisms to promote creativity and innovation. They also invite governments and activists on both sides of the intellectual property divide to use the rhetoric of human rights to bolster arguments for or against revising intellectual property protection standards in treaties and in national laws. [FN9] Without greater normative clarity, however, such "rights talk" [FN10] risks creating a legal environment in which every claim (and therefore no claim) enjoys the distinctive protections that attach to human rights. [FN11]

The skeletal and under-theorized intellectual property provisions of human rights law also leave critical questions unanswered. What, for ***977** example, is the relationship between the intellectual property clauses of the UDHR and ICESCR and the remaining civil, political, social, and economic rights enshrined in human rights pantheon? And how do human rights law's intellectual property rules interface with the rules set out in multilateral agreements emanating from WIPO, the WTO, and regional and bilateral trade and investment treaties?

These uncertainties--together with the deepening crisis facing the international intellectual property system--highlight the need to develop a comprehensive and coherent "human rights framework" for intellectual property law and policy. The questions to be answered in constructing such a framework are foundational. They include issues as basic as defining the different attributes of the "rights" protected by each system; whether relevant standards of conduct are legally binding or only aspirational; whether such standards apply to governments alone or also to private parties; and adopting rules to resolve inconsistencies among overlapping international and national laws and policies. A human rights framework for intellectual property must also distinguish situations in which the two legal systems have the same or similar objectives (but may employ different rules or mechanisms to achieve those objectives), from "true conflicts" of goals or values that are far more difficult to reconcile. [FN12] Finally, the framework must include an institutional dimension, one that considers the diverse international and domestic lawmaking and adjudicatory bodies in which states and non-state actors generate new rules, norms, and enforcement strategies.

This Article offers a preliminary foray into these novel and complex issues. Part I begins with a brief overview of the textual and historical foundations of the intersections between human rights and intellectual property, focusing on the underlying legal and institutional factors that have fomented recent conflicts between the two legal regimes. Part II describes the genesis of those conflicts in greater detail, focusing on the rights of indigenous peoples and traditional knowledge and on the U.N. human rights system's response to TRIPS and bilateral and regional intellectual property treaties. Part III turns to an analysis of two documents, recently drafted by the U.N. Committee on Economic, Social, and Cultural Rights, which suggest a partial and tentative outline of a human rights framework for intellectual property. I use these documents to flesh out the ***978** framework in greater detail and offer a preliminary approach for mediating the two fields of law and policy. Part IV analyzes the rapidly changing institutional environment in which new actors are generating new legal rules relevant to the human rights-intellectual property interface. I focus in particular on recent treaty-making initiatives in the U.N. Educational, Scientific and Cultural Organization ("UNESCO"), WHO, and WIPO, each of which uses international human rights law in different ways to challenge existing approaches to intellectual property protection and to revise the mandates of intergovernmental organizations.

I. The Textual and Historical Foundations of a Human Rights Framework for Intellectual Property

If asked to identify the freedoms and liberties protected as human rights, even the most knowledgeable observers would be unlikely to list the right of authors and inventors to protect the fruits of their intellectual efforts. Yet such rights were recognized at the birth of the international human rights movement. No less an august statement of principles than the UDHR provides that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author." [FN13] The UDHR's drafting history makes clear that the protection of authors' rights was no accident, even if the drafters' precise intentions remain elusive. [FN14] Support for these rights also finds ***979** expression in nearly identical language in the ICESCR, an international convention adopted nearly twenty years later that makes the UDHR's economic and social guarantees binding as a matter of treaty law. [FN15]

Strikingly, human rights law's inclusion of the rights of creators and inventors has not been reciprocated in the international intellectual property system. No references to "human rights" appear in multilateral treaties such as the Paris, [FN16] Berne, [FN17] and Rome [FN18] Conventions, nor do they appear in the more recently adopted TRIPS Agreement. These treaties repeatedly describe the legal protections for authors, inventors and other intellectual property owners as "rights," "private rights," and "exclusive rights," [FN19] phrases that may appear to suggest a commonality of objectives between the two legal regimes.

These linguistic and textual parallels are only superficial, however. References to rights in intellectual property treaties serve distinctive structural and institutional purposes. They help to demarcate the treaties as charters of private rather than public international law, [FN20] that is, as agreements that authorize individuals and businesses to ***980** claim legal entitlements against other private parties in national courts under national laws. [FN21] In addition, use of "rights" language helps to bolster claims of intellectual property owners in foreign legal systems unfamiliar with or skeptical of the entitlements the treaties create for non-nationals. The principal justifications for references to rights in intellectual property agreements are thus grounded not in deontological claims about the inherent attributes or needs of human beings, but rather arise from efforts to realize the economic and instrumental benefits of protecting intellectual property products across national borders.

Although the references to rights in intellectual property law and human rights law have distinct theoretical and philosophical roots, the recent expansion of the two fields has blurred these distinctions in new and unexamined ways. International relations scholars have noted the tendency of international legal regimes to expand their scope over time, creating dense "policy spaces" in which formerly unrelated sets of principles, norms, and rules increasingly overlap in incoherent and inconsistent ways. [FN22] Such regime expansions are especially pronounced in international intellectual property law and international human rights law.

Since its inception in the late nineteenth century, the development of intellectual property protection rules occurred in a uni-modal international regime confined to intellectual property-specific diplomatic conferences and conventions. The focus of treaty-making during this formative period was the gradual expansion of protected subject matters and exclusive rights through periodic revisions to the Berne, Paris, Rome, and other conventions. [FN23] With the advent of TRIPS in 1994, the regime entered into a bimodal phrase in which rule-making competencies were shared between two ***981** intergovernmental organizations: WIPO and the WTO. [FN24] By 2005, however, the international intellectual property system had morphed again, this time into a "conglomerate regime" or a "regime complex"--a multi-issue, multi-venue, mega-regime in which governments and NGOs shift norm creating initiatives from one venue to another within the conglomerate, selecting the forum in which they are most likely to achieve their objectives. [FN25]

The international human rights regime has exhibited similar expansionist tendencies. Although the roots of human rights law date back to the inter-war years, its full flowering first occurred in the years following World War II. During this gestational period, government officials, international bureaucrats, NGOs, and scholars were occupied with foundational issues. Their most pressing goal was to elaborate and codify legal norms and enhance international mechanisms for monitoring compliance by nation states. As treaties, institutions, and jurisprudence evolved, the regime developed a de facto separation of human rights into categories. These categories ranged from a core set of peremptory norms for the most egregious forms of misconduct, to civil and political rights, to economic, social, and cultural rights. [FN26]

Economic, social, and cultural rights are the most expansive and, for many countries, the most controversial. Whereas civil and political rights are negative liberties that require government officials to refrain from particular actions, economic, social, and cultural rights obligate governments to provide minimum levels of subsistence and well-being to individuals and groups. Achieving these goals requires affirmative measures that often have significant financial consequences and require difficult tradeoffs among competing categories of rights holders and other claimants. [FN27] These affirmative obligations also ***982** create broad areas of overlap--and of potential conflict--with international intellectual property protection rules, as the next section explains.

II. Initial Contestations over Human Rights and Intellectual Property

Two events catapulted intellectual property issues onto the agenda of international human rights norm-creating bodies. The first was an emphasis on the neglected cultural rights of indigenous peoples, and the second was the linking of intellectual property and trade through TRIPS and, more recently, bilateral and regional "TRIPS-plus" treaties. [FN28] These events exposed serious normative deficiencies of intellectual property from a human rights perspective, and they prompted new standard-setting initiatives which increased the contestations between the two regimes.

A. The Rights of Indigenous Peoples and Traditional Knowledge

Beginning in the early 1990s, the U.N. human rights system began to devote significant attention to the rights of indigenous communities. [FN29] Among the many claims that these communities sought from nation states was the right to recognition of and control over their culture, including traditional knowledge relating to biodiversity, medicines, and agriculture. From an intellectual property perspective, traditional knowledge was treated as part of the public domain, either because it did not meet established subject matter criteria for protection, or because the indigenous communities ***983** who created it did not endorse private ownership rules. [FN30] By treating this knowledge as effectively un-owned, however, intellectual property law made that knowledge available for exploitation by third parties, to be used as an upstream input for later downstream innovations that were themselves privatized through patents, copyrights, and plant breeders' rights. [FN31] Adding insult to injury, the financial and technological benefits of those innovations were rarely shared with indigenous communities. [FN32]

U.N. human rights bodies sought to close this hole in the fabric of intellectual property law by commissioning a working group and a special rapporteur to create a Draft Declaration on the Rights of Indigenous Peoples [FN33] and Principles and Guidelines for the Protection of the Heritage of Indigenous People. [FN34] These documents adopt a ***984** decidedly skeptical approach to intellectual property protection. On the one hand, the documents urge states to protect traditional knowledge using legal mechanisms that fit comfortably within existing intellectual property paradigms--such as allowing indigenous communities to seek injunctions and damages for unauthorized uses. [FN35] But the documents also define protectable subject matter more broadly than existing intellectual property laws, and they urge states to deny patents, copyrights, and other exclusive rights over "any element of indigenous peoples' heritage" that does not provide

for “sharing of ownership, control, use and benefits” with those peoples. [FN36] In short, a human rights-inspired analysis of traditional knowledge views intellectual property as one of the problems facing indigenous communities, and, only perhaps, as part of a solution to those problems.

B. The TRIPS Agreement, “TRIPS-Plus” Treaties, and Human Rights

The second area of intersection between human rights and intellectual property relates to the 1994 TRIPS Agreement and “TRIPS-plus” treaties. [FN37] TRIPS adopted relatively high minimum standards of protection for all WTO members, including many developing and least developed countries with little previous interest in protecting patents, copyrights, and trademarks. [FN38] In addition, unlike previous intellectual property agreements, TRIPS has teeth. It is linked to the WTO's dispute settlement system in which states enforce treaty bargains ***985** through mandatory adjudication backed up by the threat of retaliatory trade sanctions. [FN39]

The U.N. human rights system first turned its attention to TRIPs in 2000. In August of that year, the U.N. Sub-Commission on the Protection and Promotion of Human Rights (“Sub-Commission”) adopted Resolution 2000/7 on “Intellectual Property Rights and Human Rights.” [FN40] The resolution, which was highly critical of intellectual property protection, stated that “actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights.” [FN41] These conflicts cut across a wide swath of legal terrain, including: (1) the transfer of technology to developing countries; (2) the consequences for the right to food of plant breeders' rights and patents for genetically modified organisms; (3) biopiracy; [FN42] (4) the protection of the culture of indigenous communities; and (5) the impact on the right to health of legal restrictions on access to patented pharmaceuticals. [FN43] To resolve these conflicts, the Sub-Commission urged national governments, intergovernmental organizations, and civil society groups to give human rights “primacy . . . over economic policies and agreements.” [FN44]

This assertion of normative predominance had no legal force, however, because the Sub-Commission's resolutions are, by their own terms, nonbinding. Nor did the Sub-Commission parse the texts of ***986** the relevant (and binding) international agreements or the rules of customary international law to identify which specific human rights protections TRIPS violates. Rather, the Resolution's principal objective was to propose an ambitious new agenda for reviewing intellectual property issues within the U.N. human rights system, an agenda animated by the basic principle of human rights primacy. [FN45]

In the more than five years since the Resolution's adoption, the response to the Sub-Commission's invitation has been overwhelming. The actions taken and documents produced by U.N. human rights bodies are numerous and diverse. They include: (1) annual resolutions by the U.N. Commission on Human Rights on “Access to Medication in the Context of Pandemics such as HIV/AIDS, Tuberculosis and Malaria,” which urge states to ensure such access; [FN46] (2) an analysis of TRIPS by the U.N. High Commissioner for Human Rights, which argues that intellectual property laws must promote access to knowledge and innovations, opposes the adoption of TRIPS-plus treaties, and emphasizes states' obligations to provide access to affordable medicines to treat HIV/AIDS; [FN47] (3) a report by two Special Rapporteurs on Globalization, which asserts that intellectual property protection has undermined human rights objectives; [FN48] (4) a second resolution by the Sub-Commission that identifies a widening set of conflicts between TRIPS and human rights, including “the rights to self-determination, food, housing, work, health and education, and . . . transfers of technology to developing countries” [FN49]; (5) an attempt by ***987** the High Commissioner for Human Rights to seek observer status with the WTO and participate in the reviews of TRIPS; [FN50] and (6) a report by the U.N. Secretary General on intellectual property and human rights based on information submitted by states, intergovernmental organizations, and NGOs. [FN51]

Several of these documents contain trenchant critiques of TRIPS, of TRIPS-plus treaties, and of expansive intellectual property rights more generally. They also discuss the empirical effects of intellectual property agreements on specific human rights, in particular the right to health in the context of global pandemics such as HIV/AIDS. [FN52] With few exceptions, however, these studies fail to provide a detailed textual analysis of a human rights framework for intellectual property and how that framework interfaces with existing intellectual property protection standards in national and international law.

III. Mediating Intellectual Property and Economic, Social, and Cultural Rights: The Interpretive Approach of the CESCR Committee

This absence of close textual scrutiny in the resolutions and reports discussed in the previous sections of this Article is not surprising, given that the principal areas of overlap between the two legal regimes relate to economic, social, and cultural rights. Among human rights law's diverse categories, these rights are the least well-developed and the least doctrinally prescriptive. The ICESCR--the principal international agreement that protects these rights--is a programmatic treaty. [FN53] Its provisions are drafted in gradualist and ambiguous language that requires each ratifying state to "take steps . . . to the maximum of its available resources, with a view to achieving ***988** progressively the full realization of the rights recognized in the present Covenant by all appropriate means." [FN54]

Only in the last decade have economic, social, and cultural rights received sustained jurisprudential attention. The U.N. Committee on Economic, Social, and Cultural Rights ("the CESCR Committee" or "the Committee") has been the progenitor of a movement to imbue these rights with greater prescriptive force. The Committee is a supervisory body of eighteen human rights experts who interpret the ICESCR and monitor its implementation by its more than 150 member nations. [FN55]

One of the Committee's principal functions is to provide these nations with guidance as to the treaty's meaning. This guidance takes the form of nonbinding "general comments" on specific treaty articles or specific human rights issues. [FN56] General comments serve as focal points for change in national legal systems and provide a standard against which the Committee can review states' compliance with the Covenant. Formally, these recommended interpretations are directed only to governments. [FN57] But their scope is not limited to public laws or the actions of public officials. They extend as well to individuals, business associations, and other private parties whose conduct implicates social, economic, and cultural rights. Although these non-state actors have no direct human rights responsibilities under the Covenant, governments are required to regulate their activities to satisfy their own treaty obligations. [FN58]

The CESCR Committee's first interpretive foray into intellectual property occurred in the fall of 2001, when it published a "Statement on Human Rights and Intellectual Property." [FN59] The statement offered ***989** a preliminary analysis of the ICESCR's intellectual property provisions and their relationship to other economic and social rights in the Covenant. It also set out a new agenda for the Committee to draft general comments on each of the ICESCR's intellectual property clauses. [FN60] In November 2005, the Committee published the first of these general comments, an exegesis on article 15(1)(c) of the Covenant ("General Comment"), "the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." [FN61]

Taken together, the Committee's 2001 statement and the 2005 general comment on "authors' rights" [FN62] provide a partial blueprint of a human rights framework for intellectual property. In the sections that follow, I review these two documents in detail, expanding upon that outline and analyzing its substantive implications.

A. Introducing a “Violations Approach” to Authors' Rights

The Committee's General Comment reveals the challenges of developing a coherent and detailed interpretation of article 15(1)(c) from the Covenant's sparse text. The draft is a lengthy, densely worded, and somewhat repetitive document of fifty-seven paragraphs divided into six parts: (1) an introductory section that explains the basic's premises of the Committee's analysis; (2) a close textual reading of article 15(1)(c)'s “normative content”; (3) a section ***990** outlining states' legal obligations, including general, specific, core, and related obligations; (4) an analysis of actions or omissions that would violate the article; (5) a section on how authors' rights are to be implemented at the national level; and (6) a short discussion of the obligations of non-state actors and intergovernmental organizations. [FN63]

This organizational structure, and in particular the distinction it creates between “legal obligations” and “violations,” is likely to mystify domestic intellectual property lawyers. The Committee's methodology will, however, be familiar to foreign ministries, human rights scholars, and NGOs who have followed the Committee's past efforts to provide concrete interpretations of the ICESCR's many ambiguous clauses. In particular, the Committee has developed a “violations approach” to interpreting the Covenant that distinguishes “core obligations”--minimum essential levels of each right which all states must immediately implement--from other obligations that may be achieved progressively as additional resources become available. [FN64] These core obligations include three distinct undertakings--to respect, to protect, and to fulfill. As the Committee explains in the General Comment on authors' rights:

> The obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c). [FN65] These three core obligations, although framed in the distinctive language of human rights law, should, upon reflection, seem reasonably familiar to intellectual property lawyers and scholars. Taken seriatim, they bar states from violating authors' material and moral interests themselves, most notably in the form of infringements by government agencies or officials; [FN66] they mandate “effective ***991** protection” of those interests in legislation, including protection of “works which are easily accessible or reproducible through modern communication and reproduction technologies”; [FN67] and they require states to provide judicial and administrative remedies for authors to prevent unauthorized uses of their works (i.e., injunctions) and to recover compensation for such uses (i.e., damages), and, more broadly, to facilitate authors' participation in and control over decisions that affect their moral and material interests. [FN68]

These obligations also overlap with several provisions in intellectual property treaties, most notably the Berne Convention's reproduction rights and moral rights clauses, the “making available” right in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the enforcement provisions in TRIPS. [FN69] These commonalities suggest that states can satisfy their obligations under article 15(1)(c), at least in part, by ratifying international intellectual property agreements and by enacting national copyright and neighboring rights laws. The ICESCR's state reporting procedures strongly support this claim. [FN70] Since the early 1990s, member nations have regularly cited to such treaties and laws to demonstrate compliance with the authors' rights provisions in the Covenant. [FN71]

***992** Notwithstanding the commonalities between the human rights and intellectual property regimes, the Committee's “core obligations” approach to authors' rights leaves many issues unresolved. Most notably, it does not define the content of the “moral and materials interests” which states are required to “respect, protect, and fulfill.” [FN72] Nor does it specify whether--and, if so, how--a human rights framework for authors' rights differs from the legal rules contained in intellectual property treaties and domestic legislation. The next section considers the Committee's treatment of these key

definitional issues.

B. Developing a Distinctive Human Rights Framework for Authors' Rights

The General Comment gives detailed attention to the differences between authors' moral and material interests and the provisions of intellectual property treaties and statutes. The Committee begins with the basic and uncontroversial assertion that the "scope of protection" of authors' rights in article 15(1)(c) "does not necessarily coincide with what is termed intellectual property rights under national legislation or international agreements." [FN73] But what, precisely, are these differences in scope?

The Committee first compares foundational principles. It notes that "[h]uman rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity . . . for the benefit of society as a whole." [FN74] Because intellectual property rights are granted by the state, they may also be taken away by the state. They are temporary, not permanent; they may be "revoked, licensed or assigned"; [FN75] and they may be ***993** "traded, amended and even forfeited," [FN76] commensurate with the regulation of a "social product [that] has a social function." [FN77] By contrast, human rights are enduring, "fundamental, inalienable and universal entitlements." [FN78] These statements reflect a vision of authors' rights as human rights that exist independently of the vagaries of state approval, recognition, or regulation.

The Committee identifies several distinctive features of authors' rights in the Covenant. For example, article 15(1)(c) applies only to "individuals, and under certain circumstances groups of individuals and communities." [FN79] Corporations and other legal entities are expressly excluded. [FN80] This represents a profound departure from Anglo American copyright laws, which have long recognized that legal entities can enjoy the status of authors of intellectual property products, for example, of works made for hire. [FN81]

Moreover, the protections provided to these natural persons have a distinctive human rights flavor. Consider the issue of equality. A cornerstone of intellectual property treaties is the "national treatment" of foreign authors and rights owners. [FN82] A human rights framework for authors' rights encompasses a rule of equality between domestic and foreign owners of intellectual property products. But it goes much further, including many additional prohibited grounds of discrimination and mandating equal access to legal remedies for infringement, including access for "disadvantaged and marginalized groups." [FN83] Equality also has a process dimension, which requires ***994** states to provide authors with information "on the structure and functioning of . . . legal or policy regime[s]," and to facilitate their participation in "any significant decision-making processes with an impact on their rights and legitimate interests," either directly or through "professional associations." [FN84]

These distinctive features of a human rights conception of authors' rights have some surprising consequences. If the moral and material interests of authors and creators are fundamental rights, then the ability of governments to regulate them--either to protect other human rights or to achieve other social objectives--ought to be exceedingly narrow. And in fact, the Committee has developed a stringent test for assessing the legality of state restrictions on social and economic rights, [FN85] a standard that it reaffirms in the General Comment on article 15(1)(c).

According to this test, government restrictions on authors' rights must be "[1] determined by law, [2] in a manner compatible with the nature of these rights, [3] must pursue a legitimate aim, and [4] must be strictly necessary for the promotion of the general welfare in a democratic society." [FN86] In addition, such limitations must "be [5] proportionate, meaning that [6] the least restrictive measures must be adopted when several types of limitations may be imposed."

[FN87] This multipart test is an intellectual property owner's dream. And it is far more constraining than the now ubiquitous “three-step test” [FN88] used to ***995** assess the treaty-compatibility of exceptions and limitations in national copyright and patent laws. [FN89]

Yet if restrictions on authors' rights are to be so rigidly scrutinized (and, presumably, so rarely upheld) how, then, are governments to strike a balance between authors' rights on the one hand and the public's interest in access to knowledge on the other? [FN90] A close parsing of the text offers hints of how the Committee may ultimately construct a distinctive human rights framework for intellectual property when it drafts general comments interpreting the remaining rights protected by article 15, which include the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the freedom indispensable for scientific research and creative activity. [FN91]

The key to understanding this framework is to identify the purposes of recognizing authors' moral and material interests as human rights. According to the Committee, such rights serve two essential functions. First, they “safeguard[] the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage.” [FN92] And second, they protect “basic ***996** material interests which are necessary to enable authors to enjoy an adequate standard of living.” [FN93]

These two statements, which recur throughout the General Comment, [FN94] suggest the existence of an irreducible core of rights--a zone of personal autonomy in which authors can achieve their creative potential, control their productive output, and lead independent, intellectual lives, all of which are essential requisites for any free society. [FN95] Legal protections in excess of those needed to establish this core zone of autonomy may serve other salutary social purposes. But those additional protections are not required under article 15 of the Covenant and, as a result, they are not subject to the restrictive test quoted above.

Stated differently, once a country guarantees authors and creators these two core rights--one moral, the other material--any additional intellectual property protections the country provides “must be balanced with the other rights recognized in the Covenant,” and must give “due consideration” to “the public interest in enjoying broad access to” authors' productions. [FN96] The ICESCR thus gives each of its member states the discretion to eschew these additional protections altogether or, alternatively, to shape them to the particular economic, social, and cultural conditions within their borders. [FN97]

***997** A human rights framework for authors' rights is thus both more protective and less protective than the approach endorsed by copyright and neighboring rights regimes. It is more protective in that rights within the core zone of autonomy are subject to a far more stringent limitations test than the one applicable contained in intellectual property treaties and national laws. It is also less protective, however, in that a state need not recognize any authors' rights lying outside of this zone or, if it does recognize such additional rights, it must give appropriate weight to other social, economic, and cultural rights and to the public's interest in access to knowledge.

C. First Steps Toward a Balanced Regime of Intellectual Property Protection

The Committee's General Comment on article 15(1)(c)--which focuses only the sub-paragraph of article 15 that protects the rights of creators and inventors--offers few details of how states are to achieve balanced, human rights-compliant rules of intellectual property protection. Its most informative statement appears in a single paragraph of the General Comment-- paragraph 35--which, as described below, sets forth an interpretive principle and three specific recommendations. [FN98]

The interpretive principle requires states to ensure that "legal and other regimes" for the protection of intellectual property "constitute no impediment to their ability to comply with their core obligations in relation to the right to food, health, education culture, as well as the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications or any other right set out in the Covenant." [FN99] On the one hand, this statement is simply an innocuous reminder that states must reconcile all of their treaty commitments and avoid derogating from one set of treaty rules when satisfying another. But the reference to compliance with the ICESCR's "core obligations" masks a deeper structural understanding of how the Committee believes governments should reconcile human rights and intellectual property.

First, such a reference acknowledges, albeit indirectly, that states may have difficulty reconciling treaty-based intellectual property protection rules with the Covenant's non-core obligations. These non-core obligations include the more expansive aspects of economic, social, and cultural rights that go beyond the Covenant's "minimum ***998** essential levels" of protection [FN100] and that states may permissibly recognize over time as constrained by their limited resources. This suggests that governments retain--at least in the near term--a fairly broad "margin of appreciation" [FN101] within which to reconcile human rights guarantees, intellectual property protection rules, and other policy objectives, and that the calibrations needed to achieve such reconciliation may permissibly vary from one country to another. [FN102]

Second, by referencing "core obligations"--a phrase that appears nowhere in the text of the ICESCR and is instead a product of the Committee's own general comment jurisprudence--the Committee has arrogated to itself the power to determine which rights are "core" and thus could be violated by a government's adoption of expansive intellectual property rules. [FN103] The Committee has thus linked violations of the ICESCR to an evolving legal standard that its members will develop in future general comments identifying the core aspects of specific Covenant rights, including the public's right "to enjoy the benefits of scientific progress and its applications." [FN104]

In the interim, however, the Committee offers three specific prescriptions for member states. First, it opines that states "have a duty to prevent . . . unreasonably high costs for access to essential medicines, plant seeds or other means or food production, or to schoolbooks and learning materials, [from] undermin[ing] the rights ***999** of large segments of the population to health, food and education." [FN105] Second, it recommends that states "prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health, and privacy," for example "by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights," and by "consider[ing] to what extent the patenting of the human body and its parts would affect their obligations under the Covenant." [FN106] Finally, it urges states to "consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of" authors' rights. [FN107]

These detailed recommendations have uncertain consequences for states that have ratified TRIPS and other intellectual property treaties. Inasmuch as general comments are only nonbinding interpretations of the ICESCR, governments could reasonably interpret the Committee's prescriptions as nothing more than aspirational goals. And, indeed, the recommendations in paragraph 35 are formulated merely as suggestions for governments to consider.

Even in this hortatory form, however, these recommendations may produce meaningful legal and political change. [FN108] For example, they create opportunities for the Committee, aided by information provided by sympathetic NGOs, to question officials about license fees and ***1000** patent eligibility rules when governments submit reports on the steps they have taken, and the difficulties they have encountered, to implement article 15. [FN109] The recommendations also provide a template for countries whose governments already oppose expansive intellectual property protection standards to implement more human rights-friendly standards in their national laws. [FN110] And they may influence the

jurisprudence of WTO dispute settlement panels, which are likely to confront arguments that TRIPS should be interpreted in a manner that avoids conflicts with nonbinding norms and harmonizes the objectives of the international intellectual property and international human rights regimes. [FN111] These changes are likely to evolve incrementally over the course of years.

A more immediate response to the Committee's analysis and recommendations, however, may occur in other intergovernmental negotiating fora. In the General Comment's concluding section, the Committee attempts to expand its influence and create a broader audience for its ideas. In discussing the obligations of actors other than states parties, the Committee declares that "as members of international organizations such as WIPO, UNESCO, FAO, WHO, and WTO, states parties have an obligation to take whatever measures they can to ensure that the policies and decisions of those organizations are in conformity with their obligations under the Covenant." [FN112] It also calls on these organizations, as independent actors, "to intensify their efforts to take into account human rights principles and obligations in their work concerning" authors' rights. [FN113]

These entreaties are overt attempts to expand the Committee's distinctive human rights framework for intellectual property to other international venues where intellectual property treaty-making and standard-setting is underway. The next part of this Article explores ***1001** these developments, taking up specific lawmaking initiatives under way or recently completed in UNESCO, the WHO, and WIPO.

IV. Recent Treaty-Making in Other Intergovernmental Organizations Relevant to a Human Rights Framework for Intellectual Property

In the last two years, intellectual property issues have risen to the top of the agendas of several international organizations. Work in these venues involves not only the creation of new nonbinding norms but, more compellingly, new international agreements. The approaches to intellectual property contained in these treaties, both those that have recently been adopted and those still in draft form, are closely aligned with the human rights framework for intellectual property reflected in the CESCR Committee's recent interpretive statements. Several of these agreements expressly draw support from human rights law. In addition, they all include provisions that are skeptical of expansive intellectual property protection standards and appear to conflict with the obligations in TRIPS, TRIPS-plus treaties, and other intellectual property agreements.

A. UNESCO: The Convention on the Protection and Promotion of the Diversity of Cultural Expressions

On October 20, 2005, UNESCO adopted a new international agreement, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions ("Cultural Diversity Convention"). [FN114] The Convention, which is a product of two years of intensive negotiations by government officials and meetings of independent experts, builds upon the Universal Declaration on Cultural Diversity which UNESCO's members unanimously adopted in 2001. [FN115] The Convention's birth was significantly more contentious than that of its nonbinding parent, however. The United States in ***1002** particular expressed vociferous opposition. [FN116] Fighting a losing battle to amend the draft treaty during the final rounds of negotiations, the head of the U.S. delegation branded the final document as "deeply flawed and fundamentally incompatible with [UNESCO's] obligation to promote the free flow of ideas," and voted (with Israel) to oppose its adoption by 148 other nations. [FN117]

The Cultural Diversity Convention responds to the belief shared by many governments that the increasingly fluid movement of cultural goods and services across national borders is endangering cultural diversity and domestic cultural

industries. A coalition of mainly Francophone industrialized and developing countries promoted the new treaty as a way to combat this threat and preserve their distinctive national cultures. [FN118] Asserting that cultural diversity is a "common heritage of humanity," [FN119] the Convention reaffirms states' "sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions" within its territory. [FN120] A series of "guiding principles" informs how states are to achieve this objective. These principles include refraining ***1003** from actions that "hinder respect for human rights," such as "freedom of expression, information and communication," and a "principle of openness and balance," which seeks an accommodation between protecting local culture and "promot[ing], in an appropriate manner, openness to other cultures of the world." [FN121]

A major point of contention among the treaty's drafters was how to define "cultural expressions," "cultural industries," and "cultural activities, goods and services," [FN122] given the overlap among these terms and free trade and intellectual property agreements. Ultimately, the drafters adopted capacious definitions of these phrases, [FN123] creating significant conflicts with several WTO agreements. In particular, the Cultural Diversity Convention authorizes its member states to give preferential treatment to the production, distribution, dissemination, and consumption of domestic cultural industries, [FN124] a preference that is inconsistent with the national treatment rules in GATT, GATS, and TRIPS. [FN125] According to some commentators these provisions are also ***1004** intended to slow the United States' effort to negotiate bilateral trade treaties that require developing countries to "give up their rights to preserve and support their own unique audiovisual and information services, including film, television and music." [FN126]

Although early commentary on the new treaty has stressed its clash with international trade rules, the Cultural Diversity Convention's relationship to intellectual property protection standards has an even more troubled history. One might reasonably expect a treaty on cultural diversity to contain an extensive treatment of these standards. Remarkably, the Convention's final text contains only a single express reference on intellectual property--a statement of "the importance of intellectual property rights in sustaining those involved in cultural creativity"--which is buried near the end of a twenty-one paragraph preamble. [FN127] In addition, the treaty contains three citations to the Universal Declaration on Human Rights or to "universally recognized human rights instruments." [FN128] These references highlight the importance of certain rights protected by those documents, such as "freedom of expression, information and communication," and "freedom of thought." [FN129] Yet they make no mention of the documents' authors' rights provisions.

The Cultural Diversity Convention's sparse references to intellectual property are a profound departure from earlier versions of the treaty, most notably a March 2005 "composite text" produced by a group of intergovernmental experts charged with writing a preliminary draft of the Convention. [FN130] The preamble set the tone of the composite text, ***1005** emphasizing "the vital role of the creative act . . . and hence the vital role of artists and other creators, whose work needs to be endowed with appropriate intellectual property rights." [FN131] This was followed, in the draft treaty's definitions section, with a list of the characteristics of "cultural goods and services," which recognized that such goods and services "generate, or may generate, intellectual property, whether or not they are protected under existing intellectual property legislation." [FN132] The composite text also included, in unequivocal and forceful language, an affirmative obligation to protect intellectual property. This obligation extended to intellectual property rights recognized in "existing international instruments to which States are parties" [FN133] as well as "traditional . . . cultural contents and expressions," [FN134] with a particular focus on preventing piracy, misappropriation, and "the granting of invalid intellectual property rights." [FN135]

Finally, in recognition of the need to harmonize the draft treaty with preexisting treaties, the composite text included two "savings clauses" that specified which treaty obligations were to take precedence in the event of a conflict between agreements. [FN136] The first clause specified that the provisions of the draft Cultural Diversity Convention were ***1006** subordinate to "any existing international instrument relating to intellectual property rights" to which the Convention's

member states were also parties. [FN137] The second paragraph carved out a narrow exception to this hierarchy, however, recognizing that "[t]he provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions." [FN138] Inspired by a similar provision in the Convention on Biological Diversity which has yet to be authoritatively interpreted, this savings clause would have subordinated trade and intellectual property obligations to those of the Cultural Diversity Convention in the event that a member state could demonstrate such damage. [FN139]

In comparison to the March 2005 composite text, the final Convention manifests near antipathy to intellectual property protection standards. The drafters removed all of the clauses described above and replaced them with far weaker commitments. [FN140] When protecting and promoting the diversity of cultural expressions, member states now "may" adopt "measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions." [FN141] And they need only "endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions." [FN142] By contrast, states may also achieve the Cultural Diversity Convention's goals by "promot[ing] the free exchange and circulation of . . . cultural expressions and cultural activities, goods ***1007** and services" [FN143]--a provision that could be read as sanctioning promotional efforts that disregard intellectual property protection rules required by TRIPS and other international agreements.

Finally, the savings clause contained in the Convention differs substantially from the earlier draft described above. In place of hierarchical rules, the clause adopts a posture of studied ambiguity. On the one hand, it stresses the need to "foster mutual supportiveness between th[e] Convention and other treaties" and specifies that none of its provisions "shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties." [FN144] But the savings clause also emphasizes that the Cultural Diversity Convention is not "subordinat[e] . . . to any other treaty." [FN145] And it directs member states to take into account the Convention's provisions when "interpreting and applying the other treaties to which they are parties or when entering into other international obligations." [FN146] How states will reconcile these clauses, and whether they will enable states to protect cultural diversity in ways that violate trade and intellectual property agreements, cannot be determined until after the Convention enters into force following its thirtieth ratification. [FN147]

B. WHO: The Medical Research and Development Treaty

In February 2005, a coalition of more than 150 NGOs, public heath experts, economists, and legal scholars called on the WHO to consider a proposal for a Medical Research and Development Treaty ("MRDT"). [FN148] The treaty aims to establish a new legal framework to promote research and development for pharmaceuticals and other medical treatments that functions as an alternative to patents and the monopoly drug pricing they engender. The treaty's proponents argue that expansive intellectual property protection rules have created numerous problems, including restricting access to essential medicines, costly and wasteful marketing of drugs and medical products, and skewing investment away from innovations needed to ***1008** treat diseases that afflict individuals throughout the developing world. [FN149]

The core objectives of the MRDT include encouraging investments in medical innovation responsive to the greatest global need, fairly allocating the costs of such innovation among governments, and sharing the benefits of medical innovation, including new drugs and medical technologies, with developing countries. [FN150] The treaty achieves these goals by setting minimum financial obligations for qualifying research and development based upon each nation's gross domestic product. Member states can meet those obligations by funding qualifying research projects within their own bor-

ders. But they can also fund eligible research in other countries through a system of tradable credits that resembles the emissions trading mechanism created for environmental agreements such as the Kyoto Protocol. [FN151] According to the treaty's proponents, the result of these provisions will be a new legal paradigm that "provide[s] the flexibility to reconcile different policy objectives, including the promotion of both innovation and access, consistent with human rights and the promotion of science in the public interest." [FN152]

The MRDT's intellectual property provisions are both novel and controversial. The treaty requires all member states to adopt "minimum exceptions to patents rights for research purposes" within five years of ratification. [FN153] (The current draft does not specify the content of these exceptions, however.) It also includes a commitment to forego patent applications for a yet-to-be-specified period of time for inventions based upon data from certain open or "public goods databases." [FN154] In the area of copyright, related rights, and databases, the treaty envisions the adoption of "a best practices model for ***1009** exceptions" in national laws. [FN155] It does not explain, however, how these exceptions further the treaty's medical research goals.

To protect the MRDT's distinctive alternative framework for medical research and innovation, including its intellectual property provisions, the MRDT's proponents needed to specify the treaty's relationship to other international agreements. The drafters adopted a distinctive approach to this important legal issue. Unlike other recently adopted treaties whose provisions plausibly conflict with preexisting trade or intellectual property agreements, the MRDT does not contain a clause specifying its relationship to those agreements. Rather, with respect to a defined class of medical research and development products, [FN156] the MRDT's signatories agree "to forgo dispute resolution cases" that concern (1) the TRIPS provisions protecting patents and undisclosed test data, or (2) the "pricing of medicines." [FN157] They also agree to forgo such dispute settlement, as well as sanctions, "in regional or bilateral trade agreements or unilateral trade policies." [FN158] This forbearance is not absolute, however. Rather, it applies only "in areas where compliance with the terms of the Treaty provides an alternative and superior framework for supporting innovation." [FN159]

The MRDT's future remains uncertain. A meeting of experts attending the World Health Assembly in May 2005 debated the treaty's provisions and underlying philosophy, and advocates at that meeting have proposed that the Assembly establish a committee of member states to consider the draft treaty sometime in 2006. [FN160]

C. WIPO: The Development Agenda and Access to Knowledge Treaty

Since its creation in the late 1960s, the WIPO has engaged in a broad array of activities consistent with its mandate of "promot[ing] ***1010** the protection of intellectual property throughout the world." [FN161] To assist member states in negotiating international agreements, the WIPO Secretariat hosts periodic diplomatic conferences, shares information, and provides expert advice. WIPO also provides technical assistance and training to national governments and to their intellectual property offices, especially in developing countries. More recently, the organization has created standing, expert, and intergovernmental committees which examine specific intellectual property topics and create nonbinding guidelines and recommendations (so-called "soft law"). [FN162]

Over the last decade, WIPO and its member states have been exceptionally active in negotiating new intellectual property treaties relating to copyrights, patents, and trademarks and in undertaking an ambitious program of soft lawmaking. Although these activities have generated new intellectual property protection standards, those standards have not exclusively favored the interests of industrialized countries. Although some initiatives have benefited states with well-resourced and influential intellectual property industries, developing countries have retained considerable influence in the organization to shape treaty obligations and soft law norms. [FN163]

Two years ago, however, the political winds shifted in favor of governments and civil society groups seeking to refocus WIPO's mandate away from generating new intellectual property protection standards and toward economic development and non-proprietary approaches to promoting human innovation and creativity. In October 2004, the WIPO General Assembly adopted a proposal from Argentina and Brazil to establish a new Development Agenda for the organization. [FN164] This proposal reflected collaboration among like-minded developing countries (known as the "Friends of Development") [FN165] and civil society groups, the latter of which issued ***1011** the "Geneva Declaration on the Future of WIPO" prior to the General Assembly meeting. [FN166]

The Geneva Declaration was a brilliant example of using core institutional principles to foment institutional reform. Although the convention establishing WIPO speaks of promoting intellectual property protection on a global basis, there is authority for interpreting the organization's mandate much more capaciously. In 1974 WIPO entered into an agreement designating it as a specialized agency of the United Nations. [FN167] Adopted during a period when pressure by newly independent developing countries for a New International Economic Order was at its zenith, [FN168] the agreement states that WIPO is responsible for "promoting creative intellectual activity and facilitating the transfer of technology . . . to developing countries in order to accelerate economic, social and cultural development." [FN169]

The Geneva Declaration's drafters seized upon this long-forgotten treaty language to articulate a revised mission for WIPO. Proceeding from the premise that "[h]umanity faces a global crisis in the governance of knowledge, technology and culture," [FN170] the Geneva Declaration demands that WIPO eschew additional expansions of monopoly privileges. [FN171] Instead, it urges the organization to devote greater attention to issues such as (1) the social and economic costs of ***1012** intellectual property protection, (2) reforms of existing intellectual property rules, and (3) non-proprietary systems of creativity and innovation, such as "Wikipedia, the Creative Commons, GNU Linux and other free and open software projects, as well as distance education tools and medical research tools." [FN172]

Among the many items on the Development Agenda is a proposal for a Treaty on Access to Knowledge (colloquially referred to as the "A2K Treaty"). [FN173] Although the A2K Treaty has recently received the backing of influential developing countries such as Brazil and India, its origins are firmly rooted in civil society. In fact, the treaty's genesis resembles the decentralized, open source collaboration models that its text endorses. A diverse group of NGOs, whose members include medical researchers, educators, archivists, disabled people, and librarians from industrialized and developing nations, drafted and circulated numerous suggestions for provisions to be included in the treaty. [FN174] In February 2005, representatives of these groups met in Geneva to discuss the proposals and to hammer out a comprehensive text. [FN175]

The current draft of the A2K Treaty bears the telltale fingerprints of multiple authors with diverse (if not divergent) interests. It includes a dozen articles on limitations and exceptions to copyright and related rights, provisions on patent protection aimed at "expanding and enhancing the knowledge commons," measures to promote open standards and control anticompetitive practices, and a hodge podge of ***1013** miscellaneous and unfinished clauses on technology transfer, copyright collecting societies, and financial obligations. [FN176]

Several common threads connect these varied provisions. First, according to observers at the Geneva meeting, the treaty's proponents strongly support the view that "access to knowledge is a basic human right, and that restrictions on access ought to be the exception, not the other way around." [FN177] Although the draft text does not expressly mention human rights nor cite to the ICESCR or the UDHR, many of its provisions echo the human rights framework for intellectual property described in this Article. For example, the treaty's preamble highlights the need for a balanced regime of protection, emphasizing both the importance of "protecting and supporting the interests of creative individuals and communities" and "enhanc[ing] participation in cultural, civic and educational affairs, and sharing of the benefits of scientific

advancement." [FN178]

A second thematic link among the A2K Treaty's diverse clauses is that both subject matter exclusions from, and exceptions and limitations to, intellectual property protection standards are mandatory rather than permissive. In the area of inventions, for example, the treaty contains a lengthy list of exclusions from patentable subject matter, including, most controversially, computer programs and business methods. [FN179] With respect to copyright, the treaty states that "[f]acts and works lacking in creativity, should not be subject to copyright or copyrightlike protections," [FN180] a rule that appears to preclude sui generis protection for unoriginal databases. It also contains a lengthy list of exceptions and limitations, which (in the case of copyrighted works) are presumed to satisfy the "three-step test" for such restrictions set out in TRIPS. [FN181]

The A2K Treaty's subject matter exclusions and its exceptions and limitations parallel similar provisions found in some--but by no means all-- national laws. For states that ratify the A2K Treaty, however, these exceptions will become compulsory. The treaty thus ***1014** endorses maximum standards of intellectual property protection to counterbalance the "minimum standards" approach that intellectual property agreements have followed for more than a century. [FN182]

Under this "minimum standards" approach, multilateral intellectual property treaties establish a floor of protection. But nothing in the treaties prevents governments from enacting more expansive intellectual property rules in their domestic laws or from entering into subsequent agreements that achieve the same result. Indeed, the treaties expressly contemplate that governments may gravitate toward such higher standards. [FN183] By placing a mandatory ceiling on how high these standards can rise, the proponents of the A2K Treaty are attempting to counteract the upward drift of intellectual property rules that has accelerated over the past few decades and to establish a balance regime of protection that is fully consistent with a human rights framework for intellectual property.

Conclusion

The creation of a human rights framework for intellectual property is still in an early stage of development. During this gestational period, government officials, international jurists, NGOs, and commentators--many of whom have divergent views concerning the appropriate relationship between human rights and intellectual property--have a window of opportunity to influence the framework's substantive content and the procedural rules that mediate relationships among its component parts. In this conclusion, I briefly sketch three hypothetical futures for the framework and explain why each of these predictions is both plausible and likely to be contested by states and non-state actors.

***1015** A. Using Human Rights to Expand Intellectual Property

One possible future relationship between human rights and intellectual property is an expansion of intellectual property protection standards at the expense of other human rights and the interests of licensees, users, and consumers. In this vision of the future (a dystopian one, to be sure), industries and interest groups that rely upon intellectual property for their economic well-being would invoke the authors' rights and property rights provisions in human rights treaties to further augment existing standards of protection. The fear of such expansions helps to explain why some commentators are skeptical of attempts to analyze intellectual property issues in human rights terms. [FN184]

Early intimations of this version of the framework's future are already apparent. The authors' rights clauses of the UDHR and ICESCR share a close affinity with the natural rights tradition of droit d'auteur prominent in civil law jurisdictions. [FN185] Constitutional courts in several European countries have recently relied on fundamental rights guaran-

tees in their respective domestic constitutions to justify intellectual property protection. [FN186] It would be but a short step for these courts to turn to international human rights law to enhance this protection still further. [FN187]

Whether these expansionist tendencies take root or not may depend upon the outcome of a dispute pending before the European Court of Human Rights ("ECHR"), the international tribunal charged with adjudicating complaints under the European Convention on Human ***1016** Rights ("European Convention") and its Protocols. [FN188] In Anheuser-Busch, Inc. v. Portugal, a decision issued in late 2005, [FN189] the ECHR concluded that registered trademarks are protected by the property rights clause of the European Convention's first Protocol. [FN190] Using forceful and unequivocal language, the ECHR stated that "intellectual property as such incontestably enjoys the protection of Article 1 of Protocol No. 1." [FN191] On the facts presented, however, a majority of the ECHR found no violation of the right to property because the American brewer's trademark application was contested by a rival Czech beer distributor whose products were protected by a registered geographical indication. [FN192] Given the importance of these issues, the ECHR referred the case to a Grand Chamber for re-argument in 2006. [FN193] The Grand Chamber held that the right to property includes intellectual property as well as applications to register trademarks. On the unique facts presented, however, it concluded that the government had not violated article 1. [FN194] The Grand Chamber thus left unresolved ***1017** the more difficult issue of when governments may regulate or restrict intellectual property in the public interest.

B. Using Human Rights to Impose External Limits on Intellectual Property

Patent, trademark, and copyright owners who invoke the property rights and authors' rights provisions of human rights law to demand additional legal protections will likely face stiff resistance from user groups. These groups can draw upon other fundamental rights and freedoms to press for a competing version of the framework, one that relies on human rights law to restrict intellectual property.

National courts in Europe are using the right to freedom of expression protected by the European Convention for precisely this purpose. [FN195] "In particular, there have been a number of decisions in the field of copyright in which the freedom of expression has been invoked to justify a use that is not covered by an exception provided for in the law." [FN196] These decisions rely on human rights law to overcome the "malfunctions" of the intellectual property system, using them as a "corrective when [intellectual property] rights are used excessively and contrary to their functions." [FN197] In effect, these cases reach beyond intellectual property's own safety valves--such as fair use, fair dealing, and other exceptions and limitations--to impose external limits, or maximum standards of protection, upon rights holders. [FN198]

How might user groups increase the likelihood that national courts will invoke human rights law to constrain intellectual property in this way? One plausible method would be to extend the strategy described in Part IV of this Article to other international lawmaking venues. [FN199] ***1018** Increasing the number of new treaties and soft law standards that contain precise, subject-specific limits on intellectual property improves the odds that domestic judges will refer to those limits when resolving the disputes that come before them. Such an approach also creates "strategic inconsistency" that increases pressure on government representatives in other international organizations to acknowledge these new rules and standards. [FN200]

This tactic has considerable risks, however. The international legal system is disaggregated and decentralized and lacks the comprehensive normative hierarchies and enforcements mechanisms found in national laws. [FN201] A surfeit of conflicting rules will further diminish the system's coherence. This could make international rules less amenable to incorporation into national law, especially for judges unsure of their authority to construe domestic statutes in harmony with those rules.

C. Achieving Human Rights Ends Through Intellectual Property Means

The two future frameworks described above share a common strategy. They each take the existing baseline of intellectual property protection as a given and then invoke human rights law to bolster arguments for moving that baseline in one direction or the other.

A third human rights framework for intellectual property proceeds from a very different premise. It first specifies the minimum outcomes--in terms of health, poverty, education, and so forth--that human rights law requires of states. The framework next works backwards to identify different mechanisms available to states to achieve those outcomes. Intellectual property plays only a secondary role in this version of the framework. Where intellectual property laws help to achieve human rights outcomes, governments should embrace it. Where it hinders those outcomes, its rules should be modified (but not necessarily restricted, as I indicate below). But the focus remains on the minimum levels of human well-being that states must provide, using either appropriate intellectual property rules or other means.

A 2001 report by the U.N. High Commissioner for Human Rights analyzing the impact of TRIPS on the right to health exemplifies this ***1019** outcome-focused, inductive approach. [FN202] The report reviews the components of the right to health protected by article 12 of the ICESCR. [FN203] According to a general comment issued by the CESCR Committee, the right to health includes an obligation for states to promote medical research and to provide access to affordable treatments, including essential drugs. [FN204]

The High Commissioner's report analyzes how intellectual property affects these two obligations. It acknowledges that patents help governments promote medical research by providing an incentive to invent new medical technologies, including new drugs. But the report also asserts that pharmaceutical companies' “commercial motivation . . . means that research is directed, first and foremost, towards ‘profitable’ disease. Diseases that predominantly affect people in poorer countries . . . remain relatively under-researched.” [FN205] One way to remedy this market imperfection is to create incentives for innovation outside of the patent system. [FN206]

A similar perspective informs the High Commissioner's discussion of access to essential medicines. The report states that patent protection decreases the affordability of drugs. But affordability also depends on factors unrelated to intellectual property, “such as the level of import duties, taxes, and local market approval costs.” [FN207] In light of these dual impediments, governments can improve access to patented pharmaceuticals in two ways. First, they can exploit the flexibilities already embedded in TRIPS, such as issuing compulsory licenses to manufacturer generic drugs and importing cheaper drugs from other countries. [FN208] Second, they can adopt affordability-enhancing mechanisms outside of the intellectual property system, for example through differential pricing, “the exchange of price information, price competition and price negotiation with public procurement and insurance schemes.” [FN209] Strikingly, the efficacy of ***1020** these mechanisms may require augmenting existing intellectual property protection rules, such as negotiating “drug licensing agreements with geographical restrictions [,] . . . so that cheaper drugs do not leak back to wealthier markets.” [FN210]

It is too early to predict which of these three versions of the human rights framework for intellectual property, or others yet to be identified, will emerge as dominant. What is certain is that the rules, institutions, and discourse of international human rights are now increasingly relevant to intellectual property law and policy and that the two fields, once isolated from each other, are becoming ever more intertwined.

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[FN1]. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

[FN2]. For earlier analyses of these trends, see Peter Drahos, The Universality of Intellectual Property Rights: Origins and Development 19-23 (1998), available at http:// www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf (documenting proceedings of panel discussion held by World Intellectual Property Organization in collaboration with Office of U.N. High Commissioner for Human Rights); Laurence R. Helfer, Human Rights and Intellectual Property: Conflict or Coexistence?, 22 Neth. Q. Hum. Rts. 167, 171-75 (2004) [hereinafter Helfer, Conflict or Coexistence]; Laurence R. Helfer, Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking, 29 Yale J. Int'l L. 1, 26-45 (2004) [hereinafter Helfer, Regime Shifting].

[FN3]. See, e.g., Frederick M. Abbott, The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health, 99 Am. J. Int'l L. 317, 324-26 (2005); Scant Progress in GI Discussions, Bridges Wkly. Trade News Dig. (Geneva, Switz.), Sept. 27, 2005, available at http:// www.ictsd.org/weekly/05-09-28/WTOinbrief.htm#2; TRIPS Council Meeting Suspended in Effort to Meet Public Health Deadline, Bridges Wkly. Trade News Dig. (Geneva, Switz.), Mar. 16, 2005, available at http://www.ictsd.org/weekly/05-03-16/story1.htm.

[FN4]. See, e.g., Daniel Pruzin, WIPO Members Reach Compromise on Advancing Patent Law Negotiations, 22 Int'l Trade Rep. (BNA) 1622 (Oct. 13, 2005) ("The United States and a group of mainly developed countries have been at loggerheads since May 2003 ... over the future direction and scope of negotiations on WIPO's proposed Substantive Patent Law Treaty."); Michael Warnecke, WIPO Fails to Reach Consensus on Including Webcasts in Broadcasting Treaty, 70 Pat. Trademark & Copyright J. (BNA) 599 (Sept. 30, 2005) (describing disputes over proposed broadcasting treaty).

For some commentators, this deadlock is a salutary result. See Keith E. Maskus & Jerome H. Reichman, The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods, 7 J. Int'l Econ. L. 279, 312-13 (2004) (calling for moratorium on additional international intellectual property lawmaking).

[FN5]. See Brian Knowlton, U.S. Plays It Tough on Copyright Rules, Int'l Herald Trib., Oct. 4, 2005, at 1, available at http:// www.iht.com/articles/2005/10/03/business/iprtrade.php ("So determined is the United States to strengthen copyright and patent protection that it is, in effect, exporting its own standards through free trade agreements reached with countries or regions as diverse as Australia, Singapore and Central America."); see also Concerns Raised Over Access to Medicines Under Trade Treaties, Bridges Wkly. Trade News Dig. (Geneva, Switz.), Jul. 14, 2004, available at http:// www.ictsd.org/weekly/04-07-14/story3.htm; GRAIN, Bilateral Agreements Imposing TRIPS-Plus Intellectual Property Rights on Biodiversity in Developing Countries (2005), http://www.grain.org/rights_files/TRIPS-plus%20table_ September_2005.pdf.

[FN6]. Recently, a few commentators have started to explore in detail specific facets of the intersection between intellectual property law and human rights law, such as the relationship between copyright and freedom of expression. See generally, Copyright and Free Speech: Comparative and International Analyses (Jonathan Griffiths & Uma Suthersanen eds., 2005); Copyright and Human Rights: Freedom of Expression--Intellectual Property-- Privacy (Paul L.C. Torremans ed., 2004) [hereinafter Copyright and Human Rights].

[FN7]. Universal Declaration of Human Rights art. 27, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N.

Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Economic, Social, and Cultural Rights arts. 15(1)(b), (c), Dec. 16, 1966, 993 U.N.T.S. 3, 5 [hereinafter ICESCR] (recognizing right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" and to "to enjoy the benefits of scientific progress and its applications").

[FN8]. UDHR, supra note 7, art. 27(1).

[FN9]. See, e.g., Tom Giovanetti & Merrill Matthews, Institute for Policy Innovation, Intellectual Property Rights and Human Rights, Ideas, Sept. 2005, at 2, 2), available at http://www.ipi.org (asserting that "IP protection has long been recognized as a basic human right" and that those who "want to weaken IP protections" are advocating "expropriation of others' property" and engaging in "ironically, one of the most 'anti-human rights' actions governments could take"); Third World Network, Statement at the Third Intersessional Intergovernmental Meeting (July 22, 2005), http://lists.essential.org/pipermail/a2k/2005-July/000539.html (challenging assertion that "IP rights have been recognized at human rights" as "a misreading of the existing international conventions," and that [t]he [ICESCR recognizes] rewarding intellectual contribution but does not specifically mention 'IP rights"'); see also Letter from Shari Steele, Staff Attorney, Electronic Freedom Foundation, to WIPO Internet Domain Name Process (Nov. 6, 1998), available at http://www.eff.org/Infrastructure/DNS_control/19981106_eff_wipo_ dns.comments ("We believe that the provision of Internet domain names is fundamentally a human rights issue, not an intellectual property issue.").

[FN10]. See Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 14 (1991).

[FN11]. See, e.g., Philip Alston, Conjuring up New Human Rights: A Proposal for Quality Control, 78 Am. J. Int'l L. 607 (1984); John H. Knox, Beyond Human Rights: Developing Private Duties Under Public International Law 17 (Sept. 1, 2005) (unpublished manuscript, on file with author).

[FN12]. Cf. Brainerd Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, in Selected Essays on the Conflict of Laws 77, 107 (1963) (distinguishing between false conflicts, which "present no real conflicts problem" and "true conflicts," which "cannot be solved by any science or method of conflict of laws").

[FN13]. UDHR, supra note 7, art. 27(2).

[FN14]. Johannes Morsink, The Universal Declaration of Human Rights: Origins, Drafting and Intent 220-21 (1999). As one scholar recently observed, although the motivations of governments who favored inclusion of article 27 in the UDHR are somewhat obscure, the proponents appear to have been divided into two camps:

> What we know is that the initial strong criticism that intellectual property was not properly speaking a Human Right or that it already attracted sufficient protection under the regime of protection afforded to property rights in general was eventually defeated by a coalition of those who primarily voted in favour because they felt that the moral rights deserved and needed protection and met the Human Rights standard and those who felt the ongoing internationalization of copyright needed a boost and that this could be a tool in this respect.

Paul Torremans, Copyright as a Human Right, in Copyright and Human Rights, supra note 6, at 6. The intentions of the drafters of the analogous provisions of the ICESCR seem equally obscure. See Maria Green, Int'l Anti-Poverty L. Ctr., Drafting History of the Article 15(1)(c) of the International Covenant, PP 41-43, U.N. Doc. E/C.12/2000/15 (Oct. 9, 2000), available at http:// www.unhchr.ch/tbs/doc.nsf/0/872a8f7775c9823cc1256999005c3088?Opendocument (demonstrating that debates over intellectual property provisions of ICESCR focused on Cold War issues, and concluding that Covenant's drafters "did not seem to deeply consider the difficult balance between public needs and private rights when it comes to intellectual property," and that "[w]hen the question was raised, they tended to dismiss it almost out of hand").

[FN15]. ICESCR, supra note 7, art. 15(1); see also Green, supra note 14, PP 7-46 (discussing drafting history of article 15(1)(c)).

[FN16]. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 (revised July 14, 1967) [hereinafter Paris Convention].

[FN17]. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221 (last revised July 24, 1971) [hereinafter Berne Convention].

[FN18]. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention].

[FN19]. See, e.g., TRIPS, supra note 1, pmbl. ("recognizing that intellectual property rights are private rights"); Berne Convention, supra note 17, art. 9(1) ("Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."); Paris Convention, supra note 16, art. 2 (referring to "the rights specially provided for by this Convention").

[FN20]. See Janet Koven Levit, A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments, 30 Yale J. Int'l L. 125, 192 (2005) (stating that "private international law has traditionally governed relationships and litigation between private parties"). But see Paul Schiff Berman, From International Law to Law and Globalization, 43 Colum. J. Transnat'l L. 485, 520-21 (2005) (explaining ways in which distinctions between public and private international law are artificial and increasingly eroding).

[FN21]. This structural framework also helps to explain the assertion made by international intellectual property scholars that there is "no international intellectual property law per se; instead intellectual property rights are subject to the principle of territoriality" and "vary according to what each state recognizes and enforces." Andrea Morgan, Comment, TRIPS to Thailand: The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, 23 Fordham Int'l L.J. 795, 796 (2000) (collecting authorities).

[FN22]. See Robert O. Keohane & Joseph S. Nye, Jr., The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy, in Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium 264, 266 (Roger B. Porter et al. eds., 2001).

[FN23]. See 1 Sam Ricketson & Jane C. Ginsburg, International Copyright and Neighboring Rights: The Berne Convention and Beyond 84-133 (2d ed. 2006).

[FN24]. See Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754 (1996) (providing for joint legal and technical assistance to developing countries and information between both organizations).

[FN25]. See Helfer, Regime Shifting, supra note 2, at 16-17.

[FN26]. See Helfer, Conflict or Coexistence, supra note 2, at 50-51.

[FN27]. For thoughtful recent discussions on achieving economic, social, and cultural rights, see generally Cass R. Sunstein, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever (2004); Mark Tushnet, Enforcing Socio-Economic Rights: Lessons from South Africa, ESR Review, Sept. 2005, at 2, 2, available at http://

www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-review/esr-previous-editions/esrreviewsept2005.pdf; Mark Tushnet, Social Welfare Rights and the Forms of Judicial Review (unpublished paper), available at http://www.nyu.edu/gsas/dept/politics/seminars/tushnet.pdf. For an earlier critical analysis of economic and social rights, see Cass R. Sunstein, Against Positive Rights, in Western Rights?: Post-Communist Application 225 (Andras Sajo ed., 1996).

[FN28]. These treaties are referred to as "TRIPS-plus" because they contain intellectual property protection rules more stringent than those found in TRIPS, obligate developing countries to implement TRIPS before the end of its specified transition periods, or require such countries to accede to or conform to the requirements of other multilateral intellectual property agreements. See Peter Drahos, BITs and BIPs: Bilateralism in Intellectual Property, 4 J. World Intell. Prop. L. 791, 794-807 (2002), available at www.oxfam.org.uk/what_ we_do/issues/trade/papers.htm (describing TRIPS-plus bilateral agreements negotiated by United States and E.C. with individual developing country governments); GRAIN, "TRIPS-Plus" Through the Back Door: How Bilateral Treaties Impose Much Stronger Rules for IPRs on Life Than the WTO (2001) [hereinafter GRAIN, TRIPS-Plus], available at http://www.grain.org/docs/trips-plus-en.pdf (same); OECD, Regionalism and the Multilateral Trading System 111, 111-22 (2003), available at http://www1.oecd.org/publications/e-book/2203031E.PDF (same).

[FN29]. See Erica-Irene Daes, Intellectual Property and Indigenous Peoples, 95 Am. Soc'y Int'l L. Proc. 143, 147 (2001).

[FN30]. See Graham Dutfield, TRIPS-Related Aspects of Traditional Knowledge, 33 Case W. Res. J. Int'l L. 233, 238 (2001) ("TK [traditional knowledge] is often (and conveniently) assumed to be in the public domain. This is likely to encourage the presumption that nobody is harmed and no rules are broken when research institutions and corporations use it freely.").

[FN31]. See Laurence R. Helfer, Food and Agric. Org. of the U.N., Intellectual Property Rights in Plant Varieties: International Legal Regimes and Policy Options for National Governments 2-3 (2004).

[FN32]. See United Nations, Economic and Social Council, Sub-Commission on Human Rights, Written Statements Submitted by International Indian Treaty Council 3, U.N. Doc. E/CN/4/2003/NGO/127 (2003):

> The theft and patenting of Indigenous Peoples' bio-genetic resources is facilitated by [TRIPS]. Some of the plants which Indigenous Peoples have discovered, cultivated, and used for food, medicine, and for sacred ceremonies since time immemorial have already been patented in the United States, Japan and Europe. A few examples of these are ayahuasca, quinoa, and sangre de drago in South America; Kava in the Pacific; turmeric and bitter melon in Asia.
>
> There are some exceptions, however, particularly in the form of so-called bioprospecting agreements between indigenous groups and entities in the developed world. For a discussion of these agreements, see Charles R. McManis, Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally (Univ. of Washington Occasional Papers No. 1, 2003).

[FN33]. U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

[FN34]. See U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1995/26, Annex 1 (June 21, 1995) (initial text draft of Principles and Guidelines); U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Report of the Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, U.N. Doc. E/CN.4/Sub.2/2000/26 (2000) (revised text of draft Principles and Guidelines). The Sub-Commission later adopted the Re-

vised Draft Principles and Guidelines and transmitted them to the Commission for its approval. U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, Decision 2000/107, U.N. Doc. E/CN.4/Sub.2/DEC/107/2000/107 (2000).

[FN35]. U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm'n on Promotion & Prot. Human Rights, Revised Draft Principles and Guidelines, Guidelines § 23(b) [hereinafter ESOSOC, Revised Draft] (providing that national laws to protect indigenous peoples' heritage should provide means for indigenous peoples to prevent and obtain damages for "the acquisition, documentation or use of their heritage without proper authorization of the traditional owners").

[FN36]. ESOSOC, Revised Draft, Guidelines § 23(c).

[FN37]. See TRIPS, supra note 1; GRAIN, TRIPs-Plus, supra note 28.

[FN38]. For a review of the changes TRIPS wrought, see J.H. Reichman, The TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries?, 32 Case W. Res. J. Int'l L. 441, 445-56 (2000).

[FN39]. See Helfer, Regime Shifting, supra note 2, at 2.

[FN40]. U.N. Econ. & Soc. Council [ESOSOC], Sub-Comm'n on Promotion & Prot. of Human Rights, Intellectual Property Rights and Human Rights, Res. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) [hereinafter Resolution 2000/7], available at http:// www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument. For a discussion of the Resolution's history, see generally David Weissbrodt & Kell Schoff, A Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7, 5 Minn. Intell. Prop. Rev. 1 (2003).

[FN41]. Resolution 2000/7, supra note 40, pmbl. P 11.

[FN42]. "Biopiracy" has been loosely used to describe any act by which a commercial entity obtains intellectual property rights over biological resources that are seen as "belonging" to developing states or indigenous communities located within their borders. See CEAS Consultants (Wye) Ltd., Ctr. for European Agric. Studies, Final Report for DG TRADE Eur. Comm.: Study on the Relationship Between the Agreement on TRIPS and Biodiversity Related Issues 78 (2000).

[FN43]. Resolution 2000/7, supra note 40, pmbl. P 11; see also id. P 2 (identifying conflicts between TRIPS and "the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination").

[FN44]. Id. P 3.

[FN45]. Id.

[FN46]. See Comm'n on Human Rights Res. 2003/29, U.N. Doc. E/CN.4/RES/2003/29 (Apr. 22, 2003); Comm'n on Human Rights Res. 2001/33, U.N. Doc. E/CN.4/RES/2001/33 (Apr. 23, 2001); Comm'n on Human Rights Res. 2002/32, U.N. Doc. E/CN.4/RES/2002/32 (Apr. 22, 2002); see also Human Rights Commission Calls on States to Use TRIPS Flexibilities, Bridges Wkly. Trade News Dig. (Geneva, Switz.), Apr. 20, 2005, at 5. The first resolution, sponsored by Brazil in 2001, mandates that states, in implementing the right to the highest attainable standard of health, "adopt legislation or other measures, in accordance with applicable international law" to "safeguard access" to such medications "from any limitations by third parties." Comm'n on Human Rights Res. 2001/33, supra, P 3(b).

[FN47]. The High Commissioner, Report of the High Commisioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights, PP 10-15, 27-58, U.N. Doc. E/CN.4/Sub.2/2001/13 (June 27, 2001) [hereinafter High Commissioner Report].

[FN48]. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion and Prot. of Human Rights, Globalization and Its Impact on the Full Enjoyment of Human Rights, PP 19-34, U.N. Doc. E/CN.4/Sub.2/2001/10 (Aug. 2, 2001) (prepared by J. Oloka-Onyango & Deepika Udagama) [hereinafter Globalization Report].

[FN49]. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Prot. and Promotion of Human Rights, Intellectual Property and Human Rights, Res. 2001/21, U.N. Doc. E/CN.4/Sub.2/RES/2001/21 (Aug. 16, 2001) (identifying "actual or potential conflicts" between human rights obligations and TRIPS, and asserting "need to clarify the scope and meaning of several provisions of the TRIPS Agreement").

[FN50]. See High Commissioner Report, supra note 47, P 68.

[FN51]. The Secretary-General, Report of the Secretary-General on Economic, Social and Cultural Rights, Intellectual Property Rights and Human Rights, U.N. Doc. E/CN.4/Sub.2/2001/12 (June 14, 2001).

[FN52]. See High Commissioner Report, supra note 47, P 15 (stressing need for TRIPS to "be assessed empirically to determine the effects of the Agreement on human rights in practice"); Globalization Report, supra note 48, PP 19-34 (critiquing TRIPS and international trade regime more generally).

[FN53]. See David Weissbrodt et al., International Human Rights: Law Policy and Process 88-93 (3d ed. 2001) (explaining that ICESCR establishes programmatic and flexible commitments that are to be achieved over time).

[FN54]. ICESCR, supra note 7, art. 2(1).

[FN55]. Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, available at http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf (last visited Feb. 20, 2007).

[FN56]. See Matthew C.R. Craven, The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development 89-92 (1995).

[FN57]. See Comm. on Econ., Soc. & Cultural Rts., General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1), U.N. Doc. E/1991/23 (Dec. 14, 1990), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument.; see also Weissbrodt et al., supra note 53, at 104-07 (discussing evolution of Committee's general comments).

[FN58]. For a thoughtful and influential analysis of these issues, see generally Andrew Clapham, Human Rights in the Private Sphere (1993).

[FN59]. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C12/2001/15 (Dec. 14, 2001) [hereinafter Statement on Human Rights and Intellectual Property], available at http://www.unhchr.ch/tbs/doc.nsf/0/1e1f4514f8512432c1256ba6003b2cc6/ $FILE/G0146641.pdf (follow-up to day of general discussion on article 15.1(c), Monday, 26 November 2001).

[FN60]. Id. P 2.

[FN61]. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c)), U.N. Doc. E/C.12/2005 (Nov. 21, 2005) [hereinafter General Comment No. 17], available at http:// www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf.

[FN62]. The Anglophone phrases “the rights of authors” and “authors' rights” are confusingly similar to, but legally distinct from, the Francophone “droit d'auteur,” which refers to legal rights granted to authors and creators in countries that follow the civil law tradition of protection for literary and artistic works. See generally Alan Strowel, Droit D'auteur et Copyright: Divergences et Convergences (1993) (comparing droit d'auteur and copyright). By contrast, the references to “authors' rights” and similar phrases in this Article describe the legal entitlements for creators and inventors that are recognized in international human rights law. These legal protections are not coterminous with those of droit d'auteur.

[FN63]. General Comment No. 17, supra note 61.

[FN64]. Id. P 10; see also Audrey Chapman, Conceptualizing the Right to Health: A Violations Approach, 65 Tenn. L. Rev. 389, 395 (1998).

[FN65]. General Comment No. 17, supra note 61, P 28; see also id. PP 44-46 (discussing actions and omissions that violate these three obligations).

[FN66]. Id. PP 30, 44.

[FN67]. Id. PP 31, 45.

[FN68]. See id. PP 34, 46.

[FN69]. Berne Convention, supra note 17, arts. 6bis, 9; WIPO Copyright Treaty art. 8, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 65 (entered into force Mar. 6, 2002) [hereinafter WTC], available at http:// www.wipo.int/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf; WIPO Performance and Phonograms Treaty art. 10, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (entered into force May 20, 2002), available at http:// www.wipo.int/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf; TRIPS, supra note 1, arts. 41-51, 61.

[FN70]. ICESCR, supra note 7, art. 16 (requiring states to submit periodic “reports on the measures they have adopted and the progress made in achieving the observance of the rights recognized” in Covenant).

[FN71]. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Report: Jordan, P 151, U.N. Doc. E/1990/6/Add.17, (July 23, 1998), available at http:// www.unhchr.ch/tbs/doc.nsf/(Symbol)/7eb0986e8af3f29c802567240056ca4c? Opendocument (citing amendments to Copyright Protection Act that conform to international copyright treaties and government's intent to ratify such treaties to demonstrate compliance with article 15(1)(c)); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, Initial Report: Israel, PP 782-88, U.N. Doc. E/1990/5/Add.39(3), (Jan. 20, 1998), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/41e674c4a2affbd480256617004768f5? Opendocument (discussing evolution and expansion of copyright legislation and ratification of numerous international agreements to demonstrate compliance

with article 15(1)(c)); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, Third Periodic Report: Cyprus, P 420, U.N. Doc. E/1994/104/Add.12 (June 6, 1996), available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1994.104.Add.12.En?Opendocument (citing ratification of Berne Convention and domestic copyright legislation to demonstrate compliance with article 15(1)(c)).

[FN72]. General Comment No. 17, supra note 61, P 28.

[FN73]. Id. P 2; see also id. P 3 (“It is ... important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1(c).”).

[FN74]. Id. P 1.

[FN75]. Id. P 2.

[FN76]. Id.

[FN77]. Statement on Human Rights and Intellectual Property, supra note 59, P 4.

[FN78]. Id. P 6.

[FN79]. General Comment No. 17, supra note 61, P 1.

[FN80]. See id. P 7 (stating that drafters of ICESCR article 15 “considered authors of scientific, literary or artistic productions to be natural persons”); Statement on Human Rights and Intellectual Property, supra note 59, P 6 (contrasting human rights approach to authors' rights with that of intellectual property regimes which “are increasingly focused on protecting business and corporate interests and investments”).

[FN81]. See 17 U.S.C. § 201(b) (2006) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author ... and ... owns all of the rights comprised in the copyright.”).

[FN82]. See, e.g., Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, at 17-38 (1987); David Vaver, The National Treatment Requirements of the Berne and Universal Copyright Conventions, 17 Int'l Rev. Indus. Prop. & Copyright L. 577 (1986).

[FN83]. General Comment No. 17, supra note 61, P 39(d); see also Statement on Human Rights and Intellectual Property, supra note 59, P 7 (stating that “human rights instruments place great emphasis on protection against discrimination,” and that rights guaranteed in Covenant “must be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”).

[FN84]. General Comment No. 17, supra note 61, PP 18(b), 34. For an analysis of the General Comment's implications for government regulation of collective rights organizations, see Laurence R. Helfer, Collective Management of Copyright and Human Rights: An Uneasy Alliance, in Collective Management of Copyright and Related Rights 85 (Daniel J. Gervais ed., 2006).

[FN85]. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), P 28, U.N. Doc. E/C.12/2000/4, (Nov. 8, 2000), available at http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En? OpenDocument (discussing government's

burden to demonstrate legality of limitations on right to health).

[FN86]. General Comment No. 17, supra note 61, P 22 (bracketed numbers added).

[FN87]. Id. P 23 (bracketed numbers added).

[FN88]. See, e.g., WCT, supra note 69, art. 10(1) (“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”); TRIPS, supra note 1, art. 13 (“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”); id. art. 30 (“Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”).

[FN89]. See generally Mihaly Ficsor, How Much of What?: The “Three-Step Test” and Its Application in Two Recent WTO Dispute Settlement Cases, 192 Revue Internationale du Droit d'Auteur 110 (2002); Jane Ginsburg, Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions, 187 Revue Internationale du Droit d'Auteur 3 (2001).

[FN90]. The CESCR Committee emphasizes the need for balancing throughout the General Comment and in its 2001 Statement. See, e.g., General Comment No. 17, supra note 61, P 22 (“The right to the protection of the moral and materials interests resulting from one's scientific, literary and artistic productions is subject to limitations and must be balanced with the other rights recognized in the Covenant ....”); id. P 35 (“States parties are ... obliged to strike an adequate balance between their obligations under article 15, paragraph 1(c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant.”); Statement on Human Rights and Intellectual Property, supra note 59, P 4 (“Intellectual property rights must be balanced with the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications”) (footnote omitted); id. P 17 (“Article 15 of the Covenant sets out the need to balance the protection of public and private interests in knowledge.”).

[FN91]. General Comment No. 17, supra note 61, P 4.

[FN92]. Id. P 2. This “personal link” is protected by legislation that enables authors to “be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to their productions which would be prejudicial to their honour or reputation.” Id. P 40(b). The Committee's language closely tracks the moral rights provisions in article 6bis of the Berne Convention and in many national laws.

[FN93]. Id. P 2.

[FN94]. The Committee repeats variants of the “personal link” language a total of six times, and it reasserts the “adequate standard of living” formulation no less than nine times--repetitions that suggest the importance of these concepts to its analysis. See id. PP 2, 12, 15, 23, 30, 39 (personal link or similar language); id. PP 2, 4, 15, 16, 23, 30, 39, 44, 45 (adequate standard of living).

[FN95]. Cf. Copyright and human Rights, supra note 6, at 5 (stating that drafters of UDHR believed that best way to avoid recurrence of abuses of science, technology, and copyrighted propaganda that occurred during World War II would be "to recognize that everyone had a share in the benefits and that ... those who made valuable [intellectual] contributions were entitled to protection").

[FN96]. General Comment No. 17, supra note 61, PP 22, 35; see also id. P 11 (stating that nothing in article 15.1(c) prevents states parties from "adopting higher protection standards" in intellectual property treaties or national laws, "provided that these standards do not unjustifiably limit the enjoyment by others of their Covenant rights").

[FN97]. See id. P 18 (stating that "the precise application" of authors' and inventors' moral and material interests "will depend on the economic, social and cultural conditions prevailing in a particular State party").

[FN98]. Id. P 35.

[FN99]. Id.

[FN100]. Statement on Human Rights and Intellectual Property, supra note 59, P 12.

[FN101]. The term "margin of appreciation" refers to a doctrine of judicial deference developed by the European Court of Human Rights. It describes "the degree of discretion that [a human rights tribunal] is willing to grant national decision makers who seek to fulfill their ... obligations under [a human rights] treaty." Laurence R. Helfer, Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy, 39 Harv. Int'l L.J. 357, 404 (1998). The doctrine provides states with "a modicum of breathing room in balancing the protection of [specific human rights] against other pressing societal concerns." Id. See generally Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence (1996) (analyzing doctrine's origins and operations).

[FN102]. See General Comment No. 17, supra note 61, P 47 (noting "considerable margin of discretion" that each state possesses to determine "which measures are most suitable to meet its specific needs," and stating that these measures "will vary significantly from one State to another").

[FN103]. Statement on Human Rights and Intellectual Property, supra note 59, P 12 (explaining that "the Committee has begun to identify the core obligations arising from the 'minimum essential levels in relation to the rights to health, food and education"') (emphasis added).

[FN104]. ICESCR, supra note 7, art. 15(1)(b).

[FN105]. General Comment No. 17, supra note 61, P 35.

[FN106]. Id. P 35. It bears noting that TRIPS already permits member states to exclude from patentability "animals other than micro-organisms." TRIPS, supra note 1, art. 27(3)(b).

[FN107]. General Comment No. 17, supra note 61, P 35. An earlier draft of the general comment included a provision recommending states "to include human rights criteria among the requirements for the grant of patents or other intellectual property rights." Comm. on Econ., Soc. & Cultural Rights, Draft General Comment No. 18: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Art. 15(1)(c)) (Nov. 15, 2004). The Committee removed this provision from the final draft, perhaps because of the uncertain legality of such eligibility requirements under TRIPS. See Nuño Pires de Carvalho, Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications

Without Infringing the TRIPS Agreement: The Problem and the Solution, 2 Wash. U. J.L. & Pol'y 371, 386-89 (2000).

[FN108]. Scholars have recently emphasized the importance of nonbinding norms, or soft law, as a method to promote international cooperation. See C.M. Chinkin, The Challenge of Soft Law: Development and Change in International Law, 38 Int'l & Comp. L.Q. 850, 856-59 (1989) (discussing different ways in which soft law evolves into customary international law). See generally Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System (Dinah Shelton ed., 2000); Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 Int'l Org. 421 (2000).

[FN109]. ICESCR, supra note 7, arts. 16-17 (setting forth reporting obligations of states parties to ICESCR).

[FN110]. These countries may include developing countries who have proposed a new "Development Agenda" at WIPO. See WIPO General Assembly, Document Prepared by the Secretariat, Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO, WO/GA/31/11 (Aug. 27, 2004) [hereinafter Proposal by Argentina and Brazil], available at http:// www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/wo_ga_31_11.pdf. For a more detailed discussion of the WIPO Development Agenda, see infra Part IV.C.

[FN111]. For a prediction of how WTO dispute settlement jurists are likely to address these arguments, see Helfer, Regime Shifting, supra note 2, at 77-79.

[FN112]. General Comment No. 17, supra note 61, P 56.

[FN113]. Id. P 57.

[FN114]. See U.N. Educ., Scientific & Cultural Org. [UNESCO], Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005 [hereinafter Cultural Diversity Convention], available at http:// unesdoc.unesco.org/images/0014/001429/142919e.pdf. For a brief overview of the Convention's drafting history and its associated documents, see UNESCO, Convention on the Prot. and Promotion of the Diversity of Cultural Expression, http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_ SECTION=201.html (last visited Feb. 20, 2007).

[FN115]. Universal Declaration on Cultural Diversity, UNESCO Res. 25, UNESCO, 31st Gen. Conference, UNESCO Doc. 31C/Res.25 (Nov. 2, 2001), available at http://unesdoc.unesco.org/images/0012/001271/127160m.pdf.

[FN116]. See UNESCO Overwhelmingly Approves Cultural Diversity Treaty, Bridges Wkly. Trade News Dig. (Geneva, Switz.), Oct. 26, 2005, at 6, 7 (describing "all-out diplomatic offensive by Washington to modify the accord or delay its approval, including a letter from US Secretary of State Condoleezza Rice warning governments that the accord would 'sow conflict rather than cooperation"').

[FN117]. See Julio Godoy, UNESCO Adopts Convention to Protect Diversity, Inter Press Service News Agency, Oct. 20, 2005, http:// www.ipsnews.net/news.asp?idnews=30714. The final vote on the treaty's adoption was 148 votes in favor, 2 against, and 4 abstentions (Australia, Honduras, Liberia, and Nicaragua). See Press Release, Bureau of Public Information, General Conference Adopts Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), available at http:// portal.unesco.org/culture/en/ev.php-URL_ID=29078&URL_DO=DO_TOPIC&URL_ SECTION=201.html; Lawrence J. Speer, UNESCO Culture Convention Approved, Despite Objections from United States, 22 WTO Rep. (BNA) (Oct. 21, 2005).

[FN118]. The countries in the coalition were Canada, France, Germany, Greece, Mexico, Monaco, Morocco, and Seneg-

al. They were supported by the Francophone member states of UNESCO. See Jan Wouters & Bart De Meester, UNESCO's Convention on Cultural Diversity and WTO Law: Complementary or Contradictory? 3 n.6 (Institute for Int'l Law, Working Paper No. 73, 2005), available at http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WP73e.pdf.

[FN119]. Cultural Diversity Convention, supra note 114, pmbl., P 2.

[FN120]. Id. art. 5(1). This sovereign right must be exercised "in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments." Id.; see also Wouters & Meester, supra note 118, at 8 ("[T]he Convention puts forward only one main right: the State's right to adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory.").

[FN121]. Cultural Diversity Convention, supra note 114, arts. 2(1), (8).

[FN122]. Id. art. 4 (defining each of these terms).

[FN123]. See id. art. 4(3) (defining "cultural expressions" as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content"); id. art. 4(4) (defining "cultural activities, goods and services" as including "those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have"); id. art. 4(5) (defining "cultural industries" as "industries producing and distributing cultural goods or services as defined in paragraph 4 above").

[FN124]. The "measures" that states "may" adopt to protect and promote the diversity of cultural expressions within their respective territories include, most notably, the following:

> [M]easures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for their creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services; [and] measures aimed at providing domestic independent cultural industries and activities in the informal sector effective access to the means of production, dissemination and distribution of cultural activities, goods and services.

Id. arts. 6(2)(b), 6(2)(c).

[FN125]. See Wouters & Meester, supra note 118, at 18 (identifying numerous inconsistencies between WTO agreements and earlier version of Cultural Diversity Convention, including provisions that appear in final text, and stating that "measures that reserve certain space for domestic cultural goods ... are a clear violation of the principle of national treatment"); see also Lawrence J. Speer, U.S. Totally Isolated at UNESCO Meeting as Cultural Diversity Treaty Gets Approved, 22 WTO Rep. (BNA) (Oct. 20, 2005) (quoting statement by U.S. Ambassador to UNESCO that "[u]nder the provisions of the convention as drafted, any state, in the name of cultural diversity, might invoke the ambiguous provisions of this convention to try to assert a right to erect trade barriers to goods or services that are deemed to be cultural expressions").

[FN126]. Godoy, supra note 117.

[FN127]. Cultural Diversity Convention, supra note 114, pmbl., P 17. This single reference is especially surprising given that the Universal Declaration on Cultural Diversity advocates the "the full implementation of cultural rights as defined in Article 27 of the [UDHR] and in Articles 13 and 15 of the [ICESCR]." Universal Declaration on Cultural Diversity, supra note 115, art. 5.

[FN128]. Cultural Diversity Convention, supra note 114, pmbl., P 5, arts. 2(1), 5(1).

[FN129]. Id. at pmbl., P 12, art. 2(1).

[FN130]. U.N. Educational, Scientific and Cultural Organization [UNESCO], Preliminary Report of the Director-General Containing Two Preliminary Drafts of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, U.N. Doc. CLT/CPD/2005/CONF.203/6, App. 1 (Mar. 3, 2005) [hereinafter March 2005 Composite Text]. Intellectual property rights are also emphasized in a July 2004 draft of the Convention:

States Parties shall also ensure:

(a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;

(b) that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.

U.N. Educational, Scientific and Cultural Organization [UNESCO], Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, art. 7(2), U.N. Doc. CLT/CPD/2004/CONF-201/2 (July 2004).

[FN131]. March 2005 Composite Text, supra note 130, pmbl., P 10.

[FN132]. Id. art. 4(3).

[FN133]. Id. art. 7(3) ("[States Parties] shall ensure [intellectual property rights] are [fully respected and enforced] according to existing international instruments to which States are parties, particularly through the development [or strengthening] of measures against piracy.") (internal citations omitted) (brackets in original).

[FN134]. Id. art. 7(4) ("[States Parties] undertake to ensure in their territory [protection against unwarranted appropriation] of traditional and popular [cultural contents and expressions], [with particular regard to preventing the granting of invalid intellectual property rights].") (internal citations omitted) (brackets in original).

[FN135]. Id.

[FN136]. For a discussion of savings clauses between trade and environmental protection agreements, see Sabrina Saffrin, Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements, 96 Am. J. Int'l L. 606, 614-18 (2002).

[FN137]. March 2005 Composite Text, supra note 130, art. 19, Option A, P 1.

[FN138]. Id. art. 19, Option A, P 2.

[FN139]. U.N. Environment Programme [UNEP], Convention on Biological Diversity art. 22.1, June 5, 1992, U.N. Doc. UNEP/Bio.Div./N7-INC5/4, 31 I.L.M. 818 ("The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity."); see also Wouters & Meester, supra note 118, at 29 (analyzing savings clauses in March 2005 composite text).

[FN140]. The removal of these clauses appears to have occurred in early April 2005 at a meeting of UNESCO officials and government negotiators held in Cape Town, South Africa. See The Director General, UNESCO, Report of the Director-General on the Progress Achieved During the Third Session of the Intergovernmental Meeting of Experts on the

Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, P 11, U.N. Doc. 172 EX/20 (Aug. 11, 2005).

[FN141]. Cultural Diversity Convention, supra note 114, art. 6(2)(g).

[FN142]. Id. art. 7(2).

[FN143]. Id. art. 6(2)(e). This clause also appeared in earlier drafts of the Convention. See March 2005 Composite Text, supra note 130, art. 6(2)(d).

[FN144]. Cultural Diversity Convention, supra note 114, arts. 20(1)(a), 20(2).

[FN145]. Id. art. 20(1).

[FN146]. Id. arts. 20(1), 20(1)(b).

[FN147]. Id. art. 29 (specifying procedures for Convention's entry into force).

[FN148]. Medical Research and Development Treaty (draft Feb. 7, 2005) [hereinafter MRDT], available a http://www.cptech.org/workingdrafts/rndtreaty4.pdf.

[FN149]. See Letter to Ask World Health Organization to Evaluate New Treaty Framework for Medical Research and Development (Feb. 24, 2005) [hereinafter NGO Letter to WHO], available at http://www.cptech.org/workingdrafts/rndsignonletter.html; see also Nicoletta Dentico & Nathan Ford, The Courage to Change the Rules: A Proposal for an Essential Health R & D Treaty, 2 Pub. Lib. Sci. Med. 96, 97-98 (2005).

[FN150]. See Andrew Jack, WHO Members Urged to Sign Kyoto-Style Treaty, Fin. Times (London), Feb. 24, 2005, available at 2005 WLNR 2823253; Posting by William New, Medical R & D Treaty Debated at World Health Assembly, to Intellectual Property Watch, http://www.ip-watch.org/weblog/index.php?p=60 (May 30, 2005, 2:01 P.M.).

[FN151]. Jack, supra note 150; New, supra note 150.

[FN152]. NGO Letter to WHO, supra note 149, at 1.

[FN153]. MRDT, supra note 148, art. 14.2.

[FN154]. Id. art. 14.1

[FN155]. Id. art. 15.

[FN156]. The products defined as “qualified medical research and development” include: “i. Basic biomedical research; ii. Development of biomedical databases and research tools; iii. Development of pharmaceutical drugs, vaccines, medical diagnostic tools; iv. Medical evaluations of these products; and v. the preservation and dissemination of traditional medical knowledge.” Id. art. 4.1.

[FN157]. Id. art. 16(d).

[FN158]. Id. arts. 16(d), 2.3.

[FN159]. Id. art. 2.3.

[FN160]. See New, supra note 150; Tim Hubbard, Reply to the Comments Requested by CIPIH and WHO to the CPTech Proposal for a Medical Research and Development Treaty (MRDT) (Aug. 15, 2005), available at http://www.who.int/intellectualproperty/submissions/SubmissionsHubbard.pdf.

[FN161]. Convention Establishing the World Intellectual Property Organization [WIPO] art. 3(i), July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 (as amended Sept. 28, 1979).

[FN162]. See Edward Kwakwa, Some Comments on Rulemaking at the World Intellectual Property Organization, 12 Duke J. Comp. & Int'l L. 179, 192 (2002) (discussing resolutions and recommendations that comprise "the new 'soft law initiative' at WIPO").

[FN163]. For a more detailed discussion of these trends, see Helfer, Regime Shifting, supra note 2, at 25-26.

[FN164]. See World Intellectual Prop. Org. [WIPO], General Assembly, Report of the Twenty-First (15th Extraordinary) Session, P 218, WO/GA/31/15 (Oct. 5, 2004), available at http://www.cptech.org/ip/wipo/wipo10042004.html; WIPO, Proposal by Argentina and Brazil, supra note 110.

[FN165]. The Friends of Development are comprised of the following countries: Argentina, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, and Venezuela. See WIPO, Inter-Sessional Intergovernmental Meeting on a Development Agenda for WIPO, 1st Sess., Proposal to Establish a Development Agenda for WIPO: An Elaboration of Issues Raised in Document WO/GA/31/11, Annex at 2, IIM/1/4 (Apr. 6, 2005).

[FN166]. Geneva Declaration on the Future of the World Intellectual Property Organization (Oct. 12, 2004) [hereinafter Geneva Declaration], available at http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf.

[FN167]. Agreement Between the United Nations and the World Intellectual Property Organization art. 1, Dec. 17, 1974, [hereinafter UN-WIPO Agreement], available at http://www.wipo.int/treaties/en/agreement/pdf/un_wipo_ agreement.pdf.

[FN168]. As Peter Yu has stated, "The New International Economic Order sought to bring about fundamental changes in the international economic system by redistributing power, wealth, and resources from the developed North to the less developed South." Peter K. Yu, Currents and Crosscurrents in the International Intellectual Property Regime, 38 Loy. L.A. L. Rev. 323, 409 n.392 (2004) (citing Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, at 527, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (1974)).

[FN169]. UN-WIPO Agreement, supra note 167, art. 1.

[FN170]. Geneva Declaration, supra note 166, at 1.

[FN171]. Id. at 2 ("'A one size fits all' approach that embraces the highest levels of intellectual property protection for everyone leads to unjust and burdensome outcomes for countries that are struggling to meet the most basic needs of their citizens.").

[FN172]. Id. at 1. For more detailed discussions of the objectives of the Development Agenda's proponents, see generally Humanizing Intellectual Property: Developing Countries Launch New Initiative, Third World Resurgence, Nov.-Dec. 2004), available at http://www.twnside.org.sg/focus.htm (describing different components of Development Agenda); James Boyle, A Manifesto on WIPO and the Future of Intellectual Property, 2004 Duke L. & Tech. Rev. 9, available at www.law.duke.edu/journals/dltr/articles/2004dltr0009.html (arguing that WIPO must reverse "maximalist rights culture"

that international intellectual property regime currently embodies and that is detrimental to global development).

[FN173]. Treaty on Access to Knowledge (May 9, 2005) (draft) [hereinafter A2K Treaty], available at http://www.cptech.org/a2k/consolidatedtext-may9.pdf.

[FN174]. For a list of supporting civil society organizations, see IP Justice, NGO Group Statement Supporting the Friends of Development Proposal, http://www.ipjustice.org/WIPO/NGO_Statement.shtml (last visited Feb. 20, 2007). Proposals for inclusion in the A2K Treaty circulated through an "A2K" listerv. CPTech.org, A2K Listserv, http://lists.essential.org/mailman/listinfo/a2k.

[FN175]. See Posting of William New, Experts Debate Access to Knowledge, to Intellectual Property Watch, http://www.ip-watch.org/weblog/index.php? p=19&res=1024&print=0 (Feb. 15, 2005, 10:24 P.M.).

[FN176]. A2K Treaty, supra note 173, at 1-2 (listing various treaty provisions).

[FN177]. New, supra note 175.

[FN178]. A2K Treaty, supra note 173, pmbl., paras. 1, 4.

[FN179]. Id. art. 4.1(c) (stating that "patent rights shall not be granted for, inter alia, "programs for computers," "presentations of information," and "methods of teaching and education").

[FN180]. Id. art. 3.7.

[FN181]. Id. art. 3.1(a); see Ginsburg, supra note 89, at 17-19 (discussing three-step test for TRIPS-compatibility of exceptions and limitations to copyright and patent protection).

[FN182]. See, e.g., TRIPS, supra note 1, art. 1 ("Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement."); see also J.H. Reichman, Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement, 29 Int'l Law. 345, 351 (1995).

[FN183]. See, e.g., Berne Convention supra note 17, art. 19 ("The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."); Paris Convention, supra note 16, art. 19 ("It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention.").

[FN184]. See, e.g., Margaret Chon, Intellectual Property and the Development Divide, 27 Cardozo L. Rev. 2821, 2853 (2006); Kal Raustiala, Density and Conflict in International Intellectual Property Law, 40 UC Davis L. Rev. 1021, 1031-32 (2007).

[FN185]. See STROWEL, supra note 62, at 290-321.

[FN186]. See, e.g., Joseph Straus, Design Protection for Spare Parts Gone in Europe? Proposed Changes to the EC Directive: The Commission's Mandate and Its Doubtful Extension, 27 Eur. Intell. Prop. Rev. 391, 298 (2005) (discussing 2000 decision of German Constitutional Court which held that patents constitute property under article 14 of German Basic Law); Thomas Crampton, Apple Gets French Support in Music Compatibility Case, N.Y. Times, July 29, 2006, at C7 (discussing ruling of French Constitutional Council, country's highest judicial body, which "declared major aspects of the

so-called iPod law unconstitutional"; court's decision "made frequent reference to the 1789 Declaration on Human Rights and concluded that the law violated the constitutional protections of property").

[FN187]. For an insightful discussion of these issues, see Christophe Geiger, "Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union, 37 Int'l Rev. Intell. Prop. & Comp. L. 371, 382-85 (2006).

[FN188]. See generally European Court of Human Rights, http:// www.echr.coe.int/echr (last visited Feb. 20, 2007).

[FN189]. Anheuser-Busch, Inc. v. Portugal, App. No. 73049/01 (Eur. Ct. H.R. Oct. 10, 2005), available at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=787908&portal=hbkm&source=externalbydocnumber&table=1132746FF1FE2A468ACCBCD1763D4D8149.

[FN190]. See id. paras. 43-49; see also Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, opened for signature Mar. 20, 1952, 213 U.N.T.S. 262, 262 [hereinafter Article 1] ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions.").

[FN191]. Anheuser-Busch, App. No. 73049/01, para. 43.

[FN192]. Id. paras. 50-52.

[FN193]. Press Release, European Court of Human Rights, Grand Chamber HearingAnheuser-Busch Inc. v. Portugal (June 28, 2006), available at http:// www.coe.int/T/D/Kommunikation_und_politische_Forschung/Presse_und_Online_Info/Presseinfos/2006/20060628-381-GH-Portugal.asp. Review by this panel of 17 judges is reserved for disputes which involve "a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance." Id.

[FN194]. Anheuser-Busch, Inc. v. Portugal, App. No. 73049/01, PP 72, 79-87 (Eur. Ct. H.R. Grand Chamber Jan. 11, 2007), available at http:// cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=60433&sessionId=11419720&skin=hudoc-en&attachment=true. Article 1 expressly authorizes governments to regulate private property in the public interest. Article 1, supra note 190, at 262 ("The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...."). It does not, however, specify how the ECHR is to assess the legality of such regulations.

[FN195]. See Michael D. Birnhack, Copyrighting Speech: A Trans-Atlantic View, in Torremans, supra note 6, at 37, 52-61; Alain Strowel & François Tulkens, Equilibrer la liberté d'expression et le droit d'auteur: A propos des libertés de créer et d'user des oeuvres, in Droit D'auteur et Liberté D'expression 1 (Alain Strowel & François Tulkens eds., 2006).

[FN196]. Christophe Geiger, Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?, 35 Int'l Rev. Intell. Prop. & Competition L. 268, 277 (2004).

[FN197]. Id. at 278.

[FN198]. See Birnhack, supra note 195, at 61-62; Geiger, supra note 196, at 270-80.

[FN199]. See Helfer, Regime Shifting, supra note 2, at 58 (describing strategy whereby states and non-state actors shif-

ted lawmaking initiatives into biodiversity, plant genetic resources, public health, and human rights regimes as way to create “counterregime intellectual property norms” in tension with TRIPS).

[FN200]. Kal Raustalia & David G. Victor, The Regime Complex for Plant Genetic Resources, 58 Int'l Org. 277, 301-02 (2004); see also Helfer, Regime Shifting, supra note 2, at 60 (describing efforts by developing countries to integrate “principles, norms, and rules generated in other regimes into the WTO and WIPO”).

[FN201]. See Laurence R. Helfer, Constitutional Analogies in the International Legal System, 37 Loy. L.A. L. Rev. 193, 205-06 (2003).

[FN202]. High Commissioner Report, supra note 47.

[FN203]. ICESCR, supra note 7, art. 12.

[FN204]. High Commissioner Report, supra note 47, P 30.

[FN205]. Id. P 37.

[FN206]. See id. PP 37-38. One such alternative would be to establish “fixed monetary prizes for the first inventor to come up with an effective treatment for a medical indication” that was under-researched in the patent system. Keith E. Maskus, Ensuring Access to Essential Medicines: Some Economic Considerations, 20 Wis. Int'l L.J. 563, 578 (2002) (reviewing and critiquing such proposals).

[FN207]. High Commissioner Report, supra note 47, P 43.

[FN208]. Id. PP 47-49.

[FN209]. Id. P 46.

[FN210]. Id. P 47; see also id. P 50 (emphasizing need for rules to ensure that “trademarks are not counterfeited” so that consumers and medical professionals can “identify the source and quality of pharmaceuticals”).
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