ROGER PILON

On the Foundations of Justice

OVER the past decade and more we have witnessed a genuine revival of interest in the philosophy of law—on the part of both philosophers and lawyers, and in their own way on the part of some economists as well. I regret to say, however, especially before this audience, that the better part of that work has been carried on by those who stand substantially opposed to the ideas that define the classical liberal or conservative traditions. We who stand in those traditions have directed a large part of our attention over the years, of course, to economic matters and to policy studies generally—and accordingly have done much to secure our position through these efforts. But by contrast we have come rather more haltingly to the jurisprudential arena, and in particular to the workings of the courts. This is all the more unfortunate when we realize that our policy studies, if they are to be more than mere scholarship, must win acceptance in the end not only in the political and legislative arenas but in the judicial arena as well, which is where our legal order is ultimately shaped.

I. Judicial Review

THIS brings me, then, to my first topic, to the problem of judicial review. Without question, no subject has more centrally occupied the American jurisprudential mind over the years than this. And no one, perhaps, has put the matter more straightforwardly than a visitor to this country, Profesor H.L.A. Hart, speaking at the Law School at the University of Georgia in 1977, shortly after his retirement from the chair in jurisprudence at University College, Oxford. In that seminal address, which he entitled "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream," Professor Hart observed that "American jurisprudence, that is, American speculative thought about the general nature of law,...is marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason in deciding particular cases....The simple explanation of that concentration," he went on to say, "is the quite extraordinary role that the courts, above all the United States Supreme Court, play in American government." Citing Tocqueville: "scarcely any political question arises

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in the United States that is not resolved, sooner or later, into a judicial question."[1] But a more complete explanation, Hart continued, would point to two important factors that have served to secure this role and status for the Supreme Court. The first was of course the Supreme Court's own decision, in *Marbury v. Madison* and later in *McCulloch v. Maryland*, that

> *it had power to review and declare unconstitutional and so invalid enactments of Congress as well as of the state legislatures. The second was its doctrine that the clause of the fifth amendment, and the later fourteenth amendment, providing that no person should be deprived of life, liberty, or property without due process of law, referred not merely to matters of form or procedure but also to the content of legislation, so that, to an English lawyer's astonishment, even a statute of Congress of impeccable clarity, passed by an overwhelming majority and conforming to all procedural requirements specified in the Constitution, might still be held invalid because its interference with individual liberty or with property did not satisfy the requirement of a vague undefined standard of reasonableness or desirability, a doctrine which came to be called "substantive due process."*[2]

Now as a matter of legal and ideological history, this doctrine of substantive due process has cut both ways, of course.[3] Between the Civil War and the New Deal, for example, the Court repeatedly struck down a wide range of legislation aimed at regulating economic activity. And it did so because it found this legislation to interfere with various constitutional rights, especially with the right to freedom of contract, all of which led to Justice Holmes' famous dissent in the 1905 *Lochner* case—to wit, that the fourteenth amendment had not enacted Herbert Spencer's *Social Statics* or an economic philosophy of laissez-faire.[4] Although this period is often characterized as one of "judicial activism," a more precise description, I believe, would be one of "judicial negativism." For the Court was not so much active in creating *new* law and *new* rights as it was active in securing existing law and rights by prohibiting the enforcement of such new law as would abolish those rights. More recently, however, the Court has in fact been active in the direct sense of finding new rights and hence new law that heretofore had not been either recognized or written as a matter of statute. The abortion decisions of 1973 come most strikingly to mind in this connection.[5] But many other decisions as well have all amounted to a period of judicial activism that has cut in an ideological direction quite opposite that of the earlier period.[6]

The basic issues in the matter of judicial review, then, are plainly more than ideological, as is illustrated at the moment by the twenty or more bills before the Congress that would bar the Supreme Court and lower federal courts from hearing cases involving abortion, school desegregation,

1. H.L.A. Hart, "American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream," *George Law Review*, vol. 11, no. 5, pp. 969-70.
2. *Ibid.*, pp. 970-1.
3. See Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980), Parts II and III.
4. Lochner v. New York, 198 U.S. 45,75 (1905) (Holmes, J., dissenting).
5. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).
6. My use of "ideological" here is not meant to be precise. I mean simply to say that the earlier period of "judicial negativism" tended to support positions frequently associated today with the ideological "right," whereas the more recent period of "judicial activism" (proper) has tended to support positions frequently associated today with the ideological "left."

and school prayer.[7] While introduced by conservative legislators, frustrated over recent Court decisions that impede them from translating the mandate of November last into political change, still other conservatives are concerned about the balance-of-powers implications of these bills—whether or not they turn out to be permitted under Article III, section 2 of the Constitution, about which there is considerable uncertainty. Moreover, this second group of conservatives is concerned as well that such a move can also cut both ways: in the future, that is, a liberal congress might as easily remove its favored programs from review before, say, a conservative Reagan Court, leaving the nation to the tyranny of a liberal legislative majority, much as liberals today fear the possible tyranny of a conservative legislative majority.

At bottom, then, the problem of judicial review arises simply because we do not live in a pure democracy but rather in a republic wherein the "will" of the legislature or of the executive is subject to scrutiny by the "reason" of the Court—however much those attributes may seem today to be reversed. In this fundamental arrangement, in fact, and in particular in our distrust of unbridled democracy, friends of liberty can agree even with Professor Ronald Dworkin, who assumed the Oxford chair from which Professor Hart retired. Writing in the *New York Review of Books* on "The Jurisprudence of Richard Nixon," Professor Dworkin put the point quite plainly:

> *The constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.*[8]

Our rights are there, in short, to stand athwart the utilitarian calculus, to brake the democratic, majoritarian engine.

Now just what those rights are, and how we know that we have them, if indeed we do, are critical questions, of course, to which we will presently turn. Moreover, they are questions whose answers will go far toward separating many of us from Professor Dworkin. But whatever the content and ground of our rights turns out to be, if we have them, then it will not do to complain about talk of rights and to say that the judicial review that has cited them has frustrated some majority will. For even in a regime of "judicial passivism"—as is the case, for example, with much of our modern land-use and zoning legislation, wherein the courts simply defer to legislative judgment[9]—those courts will nonetheless be finding rights, if only by default. The legislation such courts let stand, that is, is legislation that entails obligations, correlative to which are rights, whether or not the courts have noticed those rights with any explicit language to that effect. Talk of rights is inescapable, then, even in a regime of judicial passivism. When it *will* do to complain about judicial review, however, is when judges err, when they let stand legislation that should be overturned, or they discover rights that are not there to be discovered, which I submit is precisely what recent courts have so often done. But in that case it is not the process of

7. See Ruth Marcus, "Fight Looms on Court Jurisdiction," *National Law Journal*, vol. 3, no. 30, April 6, 1981, p. 1.

8. Ronald Dworkin, "The Jurisprudence of Richard Nixon," *New York Review of Books*, vol. 18, no. 8, May 4, 1972, p. 27.

9. See Siegan, *Economic Liberties*, pp. 199-200; M. Bruce Johnson, "Planning Without Prices: A Discussion of Land Use Regulation without Compensation," in *Planning Without Prices*, ed. Bernard H. Siegan (Lexington, Mass.: D.C. Heath and Co., 1977), p. 69.

judicial review as such that is at fault. Rather, the error is in the execution of that process, and in the substantive decisions the judges have reached.

II. The Methods and Ends of Judicial Review

THIS brings me, then, to my second concern, to the methods of judicial review, which will lead in turn to a consideration of what those methods accomplish, and where they must eventually end. If a basic function of judicial review is to determine whether given statutes or practices violate the rights of individuals, it is a prerequisite of that determination, of course, to determine just what those individual rights are. But in this the Constitution itself will be of limited assistance. For the rights that are set forth there and in the Bill of Rights in particular are described in only the broadest of terms, which it is the business of judges to define more precisely. The right to liberty, for example, might be invoked as easily by a poor woman seeking an abortion at state expense as by a taxpayer seeking to avoid that exaction or a homeowner seeking a zoning exception or a manufacturer seeking relief from foreign competition. Clearly, the Founders could not have specified our every right, if for no other reason than that we have in principle an infinite number of rights, owing to the inventiveness that language permits. What they did instead, then, was to fasten upon a few of the broadest descriptions—life, liberty, and property, for example—leaving it to subsequent jurists to interpret those broad descriptions, to flesh out the detail as cases arose. Just how those jurists were supposed to go about that work, however, has been the subject of a very large literature. It has often been noted, in fact, that it is precisely at this point that the practice of law begins to merge with the practice of philosophy.

Nevertheless, there are certain recognized avenues along which judicial interpretation has proceeded when it has had to go beyond the literal language of the Constitution, as most often it has had to do. Jurists have referred, for example, to the intentions of the Framers, as set forth in such documents as the Declaration or the *Federalist Papers*. Or again, they have referred to precedent, especially in the form of the English common-law tradition. Similarly, statute as well as custom and usage have served as the source of rights. And finally, jurists have cited such diverse sources as learned opinion, conceptions of "social value," and often principles of reason, however broad their understanding of this final idea. And in all of this they have employed canons of logic, more or less.

Yet with each of these methods there are well-known shortcomings. The intentions of the Framers, for example, are sometimes obscure, or not in agreement with each other, or not dispositive of the case at hand. Similarly, statutes, or custom, or the precedents of common law have all been unclear at times, or inconsistent or inapposite. Learned opinion, of course, is frequently divided. And finally, the use of reason, notwithstanding the honorific universality that has ever attended our conception of that faculty, has too often turned out to be a notorious subterfuge for the use of the particular values or prejudices of the jurist, not excluding his own conception of contemporary "social values."

But in all of this there is a deeper problem still, which afflicts each of these methods, excepting only certain uses of reason. That problem is the same problem that afflicts legal positivism generally, namely, that even when we *can* unambiguously identify our legal rights, and even when we do this by tracing them to the Constitution itself, it is still an open question whether those rights are justified as a matter of ethics. Insofar as judicial review limits itself to legal materials and legal criteria, that is, it will yield legal rights only. For constitutional positivism, like legal positivism generally, is a descriptive or declaratory undertaking. It is not a

justificatory undertaking in any deeper moral sense, and should not be confused with such. In particular, it should not be supposed that to have traced a right to the Constitution is to have given a moral justification of that right. Rather, it is simply to have shown that the right claimed is recognized in our legal system.

Now it may turn out, of course, that our constitutional rights can also be justified as moral rights. That is a desideratum in the American context especially, wherein governments are instituted among men, we declared to the world, to secure their moral rights. But if this happy congruity between the legal and the moral does indeed turn out to be the case, that will be a function not only of legal but of moral theory as well—and a fortunate accident of legal history besides. It will mean, in our case, that the Founders got it right, right as a matter of ethics. Now in my view, they did get it right, at least for the most part, as I will try to indicate in a moment. But other peoples, and other founders, were not so fortunate, as a look around the world, and at the Soviet Constitution in particular, quite plainly suggests. Yet none of this can be determined at all unless we go behind the particular constitution under review, unless we look to the "higher law" background that may or may not inform it.

But why, it may be asked, does it matter that the legal order reflect the moral order as much as possible, and why do we need to draw this connection and remind ourselves of it from time to time? Is it not enough, that is, that we trace out the world of *legal* rights? Why do we have to go on to justify those rights against deeper moral criteria? Clearly, there are many answers to these questions. Let me focus, however, upon just two lines of response.

In the first place, it plainly gives comfort to many to know that our legal regime—and hence that our use of force—is in conformity with the canons of ethics. This lends moral legitimacy to our law, which encourages obedience without recourse to the police state. Nowhere is that state more required, of course, than in regimes where a great disparity obtains between the legal and moral orders. It is important to notice, moreover, that the obedience I speak of here is not simply unwilling compliance: morally legitimate law, that is, tends to encourage not merely legal obedience but moral behavior as well; legal commands not in conformity with the moral law, however, lead at least to moral schizophrenia, and often to civil disobedience, where that is possible.

A second line of argument for drawing the connection between the legal and the moral, however, is perhaps more basic, and certainly more germane to the issues at hand. For if ours is indeed a regime grounded in fundamental moral considerations, it is frequently necessary to go to those wellsprings simply to get clear about what the legal order is. As indicated earlier, our law is often *not* clear. When in the course of review a jurist has exhausted all the legal sources available to him, and these have not availed, he will then have to turn to the basic grounds that give rise to the law in the first place, just as the Founders did when they set about the creation of this regime. But here he will be inquiring not so much about law or legal theory as about ethics. He will be asking not what *is* the law but what *ought* the law to be. And in this he will be coming—if not straightforwardly, as did the Founders, then by necessity—upon the nexus between the legal and the moral that has ever fascinated and vexed the philosophy of law.

III. Normative Ethics

WE come, then, to my third and principal concern, to the higher law grounds a jurist might legitimately city by way of more precisely determining what our rights are—in sum, to the foundations of justice. This is a vast and complex subject, of course, which I am not going to dispose of here. Nevertheless, I do want to raise several issues, all directed, more or less, to my earlier claim that for the most part the

Founders did get it right as a matter of ethics. In order to give focus to these issues, however, it will be useful to mention here some of the conclusions toward which I will be driving. And in this connection, let me note too the ambiguity that surrounds the very idea "foundations of justice." That idiom can refer to the basic principles of justice—such as those I am about to discuss—from which more particular principles and rules may be derived. Or "foundations of justice" can refer to the arguments that support those basic principles. All too often, I am afraid, moral discussion is satisfied with the former; it is content, that is, simply to announce the basic principles of justice, when in truth the ultimate argument must be made at the still deeper level of analysis that may or may not support those principles.

I will say more about this second level of analysis in a moment. For the present, however, let me try to enunciate the principles of which I speak. In the American legal order they all relate, in one way or another, to our basic unit, the individual, and to the material foundation that defines the individual, property—broadly understood to mean title in life, liberty, and estate. In so stating the matter I allude, of course, to the seminal importance of John Locke to our moral, political, and legal order, though his was only the most influential of the many voices that were developing a similar theme in the seventeenth and eighteenth centuries.[10] And I allude as well to the recent work of Professor Robert Nozick of the Philosophy Department at Harvard, whose entitlement theory of justice has freshly stated our defining principles, giving them greater precision in the process.[11] Among other things, Professor Nozick has shown that justice is historical, that whether a given distribution of holdings is just depends not upon whether that distribution reflects some preconceived pattern—a pattern of equality, say, or merit, or effort, or whatever—but rather upon whether the distribution arose by a just process, whether the history of the matter was just—in particular, whether any rights were violated in the course of that history. That there are rich and poor, for example, is in itself quite irrelevant to the question whether there is justice or injustice. In particular, as a matter of rights, this fact gives us no warrant whatever for redistributing holdings, an undertaking that would be performed by right only if rights had been violated in a prior historical sequence, and then only with reference to more precisely drawn principles of rectification.

That justice is a matter of history, however, that it is not a matter of what Nozick calls "end-states," as is argued by various egalitarian theories, tells us nothing about the content of justice. In order to flesh the picture of justice out, then, in order to know more precisely, that is, just what it is we have rights to and how those rights get violated, we have to enunciate the three principles that constitute the entitlement theory. The first of these is the principle of justice in original acquisition, whereby holdings are justly held if they are held by a certain "natural necessity," as it were, as with our lives and liberties, or if they are acquired from the state of nature where they are unheld. (Let me note that this is not precisely Nozick's formulation. Under this principle he did not develop detailed arguments aimed at showing how it is that we have exclusive title over our lives and actions—title not enjoyed in many socialist states, for example. Nor did he

10. See, *e.g.*, Gottfried Dietze, *In Defense of Property* (Baltimore & London: Johns Hopkins Press, 1971), pp. 19-34; David Fellman, "Property in Colonial Political Theory," *Temple University Law Review*, vol. 16 (1942), pp. 388-406. For Locke's reference to "property" as "lives, liberties, and estates," see John Locke, *The Second Treatise of Government*, in *John Locke: Two Treatises of Government*, ed. Peter Laslett (Cambridge, Eng.: Cambridge Univ. Press, 1960), §§87, 123.

11. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), especially pp. 149-82.

treat things in the state of nature as entirely unheld, choosing instead to follow Locke's "proviso" argument which presumed otherwise and then went on to set limits on original acquisition.[12]) The second principle is that of justice in transfer, whereby holdings are rightly held if they have been acquired by voluntary transfer from those who rightly hold them. Finally, in the principle of justice in restitution we have the complex account of what justice requires when the principle of justice in transfer has been violated, when holdings have been transferred or extinguished without the consent of those who rightly hold them, as when torts or crimes are committed.

Taken together, these three principles state the basic idea behind the whole of our private law, our law of property, contract, and torts respectively, as this law has unfolded, more or less, through the course of the common law. That basic idea is one of private persons and voluntary association, which is to say, one of individual liberty, defined with reference to the real content of that liberty, its material foundation—namely, property.[13] So stated, violations of our rights amount to takings of our property, takings of our lives, liberties, and estates. Thus we get clear about what our *rights* are by getting clear about what our *property* is. Rights, then, are not the same as values; nor are they the same as interests, even important interests—interests that "rise to the level of rights," as the modern legal view would have it. There are many things that we value, and many things in which we have an interest, but these are not ours by right unless we hold title in them free and clear. OMB Director David Stockman was perfectly correct, then, when he recently remarked, on ABC's "Issues and Answers," that "the idea that's been established over the last 10 years that almost every service that someone might need in life ought to be provided, financed by the government as a matter of basic right, is wrong."[14] It is wrong indeed. We have *by right* only that which is ours to begin with or that which has become ours (and has not been subsequently alienated) through the processes just sketched. Whatever else there may be, however much we may value it, is not ours by right unless we acquire title to it. Thus do we define our separate beings, by the material foundations that describe the limits of our individual liberty—the same material foundations, not incidentally, that permit our liberty.[15]

IV. Moral Epistemology

THIS much outlines, very broadly of course, the basic principles or content of justice. It does not tell us, however, just why those principles are justified, as opposed to such competing principles as have been advanced by Karl Marx, say, or by John Rawls or Ronald Dworkin. Why, for example, does first possession entail title, with its attendant rights and correlative obligations?[16] Why cannot need or even want do the same? Or again, why is the voluntary element so crucial to justice? And even if the idea of property is an incalculable aid to the casuistry with which the jurist is primarily concerned—more

12. I have discussed these issues more fully in my doctoral dissertation, *A Theory of Rights: Toward Limited Government*, Univ. of Chicago, 1979, pp. 159-67.

13. For a further development of these points, see my "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," *Georgia Law Review*, vol. 13, no. 4 (1979), pp. 1171-96.

14. Cited editorially in the *Wall Street Journal*, March 27, 1981, p. 28.

15. For a more detailed explication of these principles, showing in particular how they serve to underpin the common law, see my "Corporations and Rights: On Treating Corporate People Justly," *Georgia Law Review*, vol. 13, no. 4 (1979), pp. 1245-1370, and "Property Rights and a Free Society," in *Resolving the Housing Crisis: Government Policy, Decontrol, and the Public Interest*, ed. M. Bruce Johnson (Ballinger, 1981), forthcoming.

16. See Richard A. Epstein, "Possession as the Root of Title," *Georgia Law Review*, vol. 13, no. 4 (1979), pp. 1221-43.

useful because more "real" than the idea of value—how do we get from property to rights? And how do we *know* these things?

It is here, of course, that we move to the second level of analysis mentioned earlier, and that we come up against the two great traditions in meta-ethics or moral epistemology: moral skepticism, the view that there are no moral "truths," or that if there are we cannot know them; and moral cognitivism, the view that the truths of ethics are both true and demonstrable.[17] Let me say here that I am afraid, in this age-old dispute, that skepticism has had the better of the day, and certainly it has since David Hume announced his simple but telling observation that from matters of fact one could not deduce matters of value, that statements about what *is* the case cannot serve as deductive ground for statements about what *ought* to be the case.[18] This profound point of logic, made almost in passing by Hume, constituted a devastating blow to ethics, undermining both natural law and natural rights theories as well, whether stemming from the ancients or from the moderns, from Aristotle or from Locke.[19] For each of these theories sought to derive its moral conclusions from certain factual premises, premises about the ends of man, for example, or about our natural equality in some state of nature. Yet Hume's point applies as well to the many consequentialist theories that have always stood opposed to the theories of natural law and natural rights—from utilitarianism to the wealth-maximization approach taken by the modern economic analysis of law, especially as this last has been put forward in the recent normative work of Professor Richard Posner, speaking from the Law School at the University of Chicago.[20] For even if it were shown that a given legal arrangement yields the greatest good for the greatest number, or that it maximizes society's wealth, and even if we set aside the disturbing distributive questions to which these formulations give rise, from observations such as these nothing at all follows about what we *ought* to do—much less about what we have a *right* to do. Nor are these consequentialist theories helped by their being tied to democratic political theories, as recent work in decision theory and in the theory of anarchism has shown.[21] For almost never do majoritarian processes yield majoritarian preferences. And even if they did, as such, majoritarian preferences impart no more legitimacy to a collective decision than the preferences of any other fraction of the whole. In sum, it is terribly difficult to locate the ground that will justify *any* moral conclusion, however much we may wish it were otherwise.[22]

Let me suggest, however, that the hurdles posed by moral skepticism are not entirely without benefit. For just as the arguments from skepticism frustrate the moral assertions one might wish to make, so too they frustrate the moral assertions of one's opponents. And ours is a time, let us note, of not a little moral and political excess, accompanied by great moral passion. Those who would expand the state, for example, binding our economy and thwarting our liberties in the process, are fired in their efforts by high moral beliefs and by a zeal and a self-righteousness that often border on the insufferable. How wonderful it is to

17. For an excellent general discussion of these issues see Alan Gewirth, "Ethics," *Encyclopaedia Britannica* (15th edition, 1974), vol. 6 pp. 976-998.

18. David Hume, *Treatise of Human Nature*, ed. Selby-Bigge (Oxford, Oxford Univ. Press, 1888), pp.469-70.

19. For the move in Locke from "is" to "ought," see *Second Treatise*, §6.

20. Richard Posner, "Utilitarianism, Economics, and Legal Theory," *Journal of Legal Studies*, vol. 8, no. 1 (1979), pp. 103-140.

21. See William H. Riker, "Implications From the Disequilibrium of Majority Rule for the Study of Institutions," *American Political Science Review*, vol. 74, no. 2 (1980), pp. 432-446; Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1976).

22. I have discussed these issues more fully in "On Moral and Legal Justification," *Southwestern University Law Review*, vol. 11, no. 4, 1979, pp. 1327-44.

use the arguments from moral skepticism to prick their moral pretensions. How delightful to show that they really don't know what they're talking about, that their values, however selfless or, as is often the case, confused, in no way entail rights to, say, reach into the pockets of others. And even the tyrant, let us further note, is usually found dressed in the trappings of moral pretension, whether in support of his favorite prohibitions, or in service of the democratic peoples republic, or in furtherance of the Aryan race. Even the tyrant, therefore, is ripe for moral undressing.

In the end, however, it is good to have in one's arsenal not only the explosive arguments from skepticism but a few affirmative arguments as well—or at least such arguments as can plausibly be generated. For there are those who will not dress their behavior with justificatory arguments but instead will simply behave *tout court*, often to the detriment of others. Against these, the debunking arguments from skepticism will not avail. What is called for instead is an affirmative defense—an assertion both of no-right on their part and of right on one's own side.

Yet even here, the insights from skepticism are useful; and not surprisingly they stem, in their modern form, from Immanuel Kant, who was awakened from his dogmatic slumbers, as he put it, by the arguments of Hume. Rooting ethics in pure reason rather than in the sentiment of the English empiricists or the virtues and vices of the ancients, Kant attempted to formulate a principle of universalization such that morality would be at bottom a matter of rational consistency. In this, of course, he was building upon and refining the traditional arguments from the Golden Rule, which had always appealed to canons of logical consistency.[23] But like those arguments, Kant never got it quite right; in particular, he never located precisely the content over which to universalize. Nevertheless, he has inspired many to the task. And in fact the current rebirth of interest in rational ethics, especially as this theory will serve as a kind of "natural" foundation for law, is largely in the Kantian tradition.

The individuals who are working in this tradition are too numerous to mention here.[24] Let me say simply that in general they have sought, with considerable variation, and often only implicitly, to locate a moral content over which to universalize such that all would be bound to accept the conclusions of obligation and correlative right entailed by that content. For the most part, however, these neo-Kantians have cast their substantive nets too broadly in order to get out the conclusions they have wanted, and in the process have been unable to show why all must of necessity accept this content for themselves. The person who elects to live in a welfare state, for example, is thereby bound to meet his welfare obligations when they come due. But from this, by no means does it follow that individuals are bound to make that election in the first place.

Are there features of the human condition, however, that in any way bind "up front," as it were, such that if so, we *would* have a moral content over which to universalize that is necessary or ineluctable? Are murderers, for example, or rapists and robbers at perfect "rational liberty," if you will, to elect not to abide by the usual pro-

23. See, *e.g.*, Marcus Singer, *Generalization in Ethics: An Essay in the Logic of Ethics, with the Rudiments of a System of Moral Philosophy* (New York: Alfred A. Knopf, 1961).

24. See, *e.g.*, Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978); Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977); Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Robert Nozick, *Anarchy, State, and Utopia;* John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). These are but a few of the books that give evidence of the recent rebirth of interest in moral and legal rationalism. In addition, there are countless articles in the philosophical and legal periodicals.

scriptions on those activities, provided only that they not complain when their own turns as victim arise? Or are there instead certain rights and obligations that we all must admit are justified, the denial of which will lead to self-contradiction, quite apart from our particular feelings or preferences in the matter?

Let me mention one recent line of argument that is moving toward answering these questions, albeit not in its present form, which is also guilty of the overreaching to which I have just pointed. I refer to the work of one of my teachers at the University of Chicago, Professor Alan Gewirth, whose book entitled *Reason and Morality* has recently come out from the University of Chicago Press. In this work, and in an earlier series of articles, Professor Gewirth has reached the Kantian universalization principle from a normative theory of action, arguing, even as against those who would not dress their behavior in justificatory garb, that in the very performance of conative acts, agents are necessarily albeit implicitly making right-claims relating to the voluntariness or freedom that necessarily or inescapably characterizes those acts. Even in choosing *not* to act, for example, the agent is behaving conatively, for purposes that seem good to him and hence that justify his acts to him, involving him in implicit right-claiming. Because these claims are grounded in generic reasons that apply equally to all others, agents deny the similar right-claims of others only on pain of contradicting themselves. In its fully developed form, then, and here I have barely mentioned it, this argument addresses the difficulties that have traditionally surrounded the Golden Rule, and the Kantian variations upon that Rule, by fastening upon the normative content that is inherent in the basic subject matter of ethics, human action.

As just mentioned, however, in its present formulations the argument is overextended, like many other neo-Kantian theories. More precisely, in order to derive the welfare state rather further down the line of argument, Gewirth contends earlier on that at the interpersonal level there are Good Samaritan obligations and correlative rights of recipience. But these conclusions are generated, as I have tried to show in some of my own work, only because Gewirth has construed the normative structure of action—the front part of his argument—beyond its natural bounds: he has gone beyond the property foundations of action that alone can serve as *necessary* content for the right-claims that are inherent in human action, claims that in turn get the whole moral game off the ground.[25] These property foundations of action will serve to get the ball rolling, as against the skeptic; but they will also serve to limit the course and direction of the roll, as against the moral overreacher, and as against such arguments as have come, for example, from Marx or Rawls or Dworkin.

Notwithstanding this overextension, however, when pared back by recourse to the natural ground from which it springs, this work affords us a significant advance, I believe, toward realizing the age-old hope to be able to ground the fundamental principles of ethics in universal principles of reason, such that men of good will might resolve their differences by appealing to

25. It should be noticed that the point at issue in the Good Samaritan context is not what one *ought* to do—as a decent or civilized human being—but what one is *obligated* to do (and presumably what correlative rights there are). Notice too that this is not merely a semantic quibble; there are subtle but far-reaching differences between these two ways of putting the matter, which were usually recognized by the classical theorists, but which modern political theory has often obfuscated. See generally my "Ordering Rights Consistently." See also H.L.A. Hart, "Are There Any Natural Rights?" in *Philosophical Review*, vol. 64, no.2 (1955), p. 186. For a discussion of the "leanness" of the classical theory of rights, see my "Capitalism and Rights: An Essay Toward Fine Tuning the Moral Foundations of the Free Society," *Journal of Business Ethics*, vol. 1, no. 1 (January 1982), forthcoming.

those rational foundations.[26] Thus grounded, these basic moral principles serve in turn to underpin the broad areas of the common law—which just are the areas of interpersonal dispute relating to liberty and property—and in time the political order envisioned by classical liberalism as well, all of which amounts to explicating the basic connection between law and ethics.[27] And it should be noticed that in all of this, consideration of value is needed only at the margin, which should comfort those economists who have rightly eschewed ethics for its subjectivity but wrongly assumed that the whole of ethics is subjective. In this connection, the theory of rights is to be distinguished from the theory of value. If our rights can be grounded in principles of reason, then at least a part of ethics can be secured from the skeptic. We then have both surety—in rights—and relativity—in values: the right to pursue whatever values we wish, provided only that we respect the equal rights of others in the process.

V. Conclusion

IN summary, then, I have moved, over the course of these remarks, from the very real problem of judicial review, through the increasingly abstract issues of judicial method and normative ethics, to the very ethereal matters of moral epistemology, in order to try to convey something of the flavor of the current jurisprudential and moral debate, and to try to indicate as well what it is the judge must do, the range of issues he must confront if he is to go about his business conscientiously. Not surprisingly, Professor Dworkin, who endorses this approach to judgeship, calls his mythical judge "Hercules." Professor Hart, on the other hand, calls this approach the Noble Dream, as opposed to the Nightmare, wherein the judge, unlike Hercules, simply calls the shots as he sees them, finding law and making law indifferently, often on his own intuitions, and often along lines described and even prescribed in the worst accounts of the school of legal realism, whose legacy we too often live with today.[28]

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...if ours is indeed a regime grounded in fundamental moral considerations, it is frequently necessary to go to those wellsprings simply to get clear about what the legal order is.

The truth of the matter about our judiciary, of course, at least insofar as it is possible to generalize about these matters, is that we live in a judicial regime that stands somewhere between the Nightmare and the Noble Dream. Let me suggest in closing, however, that we will not have better law until we move further in the direc-

26. There is really nothing to say—that is, no *argument* to be made—to those who are not of good will, or will not use principles of reason. (On the latter, see Aristotle, *Metaphysics* IV, 4.) My concern in this essay, however, is with rational justification, and in particular with the jurist, who by profession is not only committed to the rational justificatory process but is committed further, in the form of his written opinion, to submitting his use of that process to the scrutiny of the world.

27. For a fuller discussion see my dissertation, *A Theory of Rights*.

28. Hart, "American Jurisprudence Through English Eyes."

tion of the Noble Dream. We all wish to live under the rule of law, not under the rule of men. But there are points in every political order at which the rule of law depends critically upon the rule of men. In our own order we reach that point on the occasion of judicial review, when we are dependent upon both the intellectual and the moral integrity of the judge. These are qualities that are developed only in part by legal education. But insofar as they are, we would do well to turn our attention increasingly to this oft-neglected subject. And we would do well too to recognize that these issues are not simply a matter of economics, materialism, and behaviorism on one side as against theology, spiritualism, and morality on the other. There is rather a middle ground of legal and moral rationalism, which we inherited from the eighteenth century, which has ever been at the heart of our political order, and which calls for our continuing attention today.