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# CORPORATIONS AND RIGHTS: ON TREATING CORPORATE PEOPLE JUSTLY\*

Roger Pilon\*\*

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The (often heretical) conclusions I reach in this essay are my own, of course, not necessarily those of the Foundation or the individuals to whom I am indebted.

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### I. INTRODUCTION

The modern business corporation, which over the past century has grown to be our principal vehicle for economic interaction, has come in for increasing criticism in recent years. In addition to countless articles and commentaries in all manner of forums, witness the 1975 book of Christopher D. Stone, *Where the Law Ends: the Social Control of Corporate Behavior*, and, rather closer to the barricades, the *Taming the Giant Corporation* book of Ralph Nader, Mark Green, and Joel Seligman, which appeared with much fanfare in 1976.<sup>1</sup> Criticism of the corporation has been with us, of course, for almost as long as the corporation itself; but the incidence and intensity of the criticism seem to be related not so much to the incremental growth in corporate presence as to changes in the *Zeitgeist* which have served more or less to support it. This latest wave of criticism, for example, is likely an outgrowth of the "anti-establishment" activism of the sixties, especially as this activism has evolved into the consumer and environmental movements of the seventies. And as with earlier waves of criticism, new and anticipated regulations are already upon the corporation,<sup>2</sup> pointing once

<sup>1</sup> We learn from its dust jacket, for example, that the Nader book "not only explains in readable detail how our megacorporations abuse their power, but also what we—our government, our citizens—can do about it. It is not a hand-wringing book, but a solutions book." The text does not disappoint. For a review in these pages, altogether uncritical, see Blount, Book Review, 11 GA. L. REV. 445 (1977). Compare the reviews of *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations* (the larger study from which the book was taken): Birdzell, 32 BUS. LAW. 317 (1976), and Hessen, *Creatures of the State? The Case Against Federal Chartering of Corporations*, BARRON'S, May 24, 1976, at 7. The latter is an especially devastating critique of the scholarship behind the Nader study.

<sup>2</sup> See, e.g., Lieberman, *New Fire in the Drive to Reform Corporation Law*, BUS. WEEK, Nov. 21, 1977, at 98. Birdzell indicates some of those regulations:

Both the bargaining process and the business terms of the relationships among participants in the business organization are extensively regulated by Federal and state laws.

again to the intimacy of the connection between ideas and events.<sup>3</sup>

It is unfortunate that those who would defend the corporation have so frequently misunderstood this connection—where they have not missed it altogether.<sup>4</sup> For while rejoinders to the corporation's critics have not been absent, they have come too often from the utilitarian or economic cost-benefit side, not from the more strictly normative point of view that informs so much of the criticism. Thus these defenders seem often not to address the critics squarely, giving rise to the suspicion that the normative case may indeed rest with the critics after all. Many have argued, for example, often with great empirical sophistication, that the corporation does in fact serve the greater good of society, that it does operate in the public interest,<sup>5</sup>

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. . . Legislation directed at the bargaining process is illustrated by the disclosure requirements of the Securities Act of 1933, 48 Stat. 74, the Securities Exchange Act of 1934, 48 Stat. 881, and the Truth in Lending Act of 1968, 82 Stat. 146; and by the collective bargaining requirements of the National Labor Relations Act of 1935, 49 Stat. 449, and its successors, the Labor Management Relations Act 1947, 61 Stat. 136, and the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519. Illustrative of legislation limiting or specifying the terms of the bargain are the Fair Labor Standards Act of 1938, 52 Stat. 1060 (minimum wages) the Trust Indenture Act of 1939, 53 Stat. 149; the Social Security Act of 1935, 49 Stat. 620 (establishing participation in a government pension system as a required term of private employment) and the Employee Retirement Income Security Act of 1974, 88 Stat. 829 (regulating many of the terms of private pension plans). There are some 40 to 50 significant Federal statutes which may reasonably be viewed as imposing requirements on corporate management in favor of employee, consumer, investor, or environmental interests, ranging all the way to comprehensive regulation of entry, prices and services in much of the transportation, communication, energy, and banking industries.

Birdzell, *supra* note 1, at 317.

<sup>3</sup> See R. WEAVER, *IDEAS HAVE CONSEQUENCES* (1948). Philosophers, both contemporary and classical, have had very little to say directly about the corporation; for a survey see Goedecke, *Corporations and the Philosophy of Law*, 10 J. OF VALUE INQUIRY 81 (1976). Of course, the more general moral, political, and legal issues that do constitute the philosophical literature find their way quite easily into discussions of the corporation by those outside the philosophical profession.

<sup>4</sup> For an indication that this may be changing see Alsop, *Capitalism 101: Programs to Teach Free Enterprise Sprout On College Campuses*, WALL ST. J., May 10, 1978, at 1, col. 1: "What we see in Washington today is what was the vogue at the universities during the Vietnam-war period," says economist Alan Greenspan. "And what is being taught in the universities today will be the generally accepted concept 10 years from now."

<sup>5</sup> See, e.g., N. JACOBY, *CORPORATE POWER AND SOCIAL RESPONSIBILITY* 15-16 (1973):

The value-sets of environmental reformers, classical Marxists and violent anarchists, for example, are utterly irreconcilable. The best that can be done in a democratic society is to seek a mean between the extremes, a mean which approximates the standards of the majority. Thus, we propose that the performance of corporate business be judged by the degree to which it has fostered progress toward the consensual goals of the American people. The proper measure of its success as a social institution is its actual contribution to the Good Society, as most Americans envision it . . . .

contrary to at least a part of the critical brief. To so argue, however, is to leave the clear impression that if the corporation did not thus operate it would not be legitimate.<sup>6</sup> Moreover, it is to fail to recognize that even if "the public interest" can in fact be made sense of,<sup>7</sup> a simple shift in the preference schedule that goes to constitute it—toward which many of these critics are working—can serve to undermine that legitimacy.<sup>8</sup>

What I want to do here, then, is set forth a straightforward defense of the corporation's *rights*: its rights to exist and to operate free from outside interference, independent of whether it does or does not serve some larger public interest.<sup>9</sup> To many, no doubt, this will seem a very hard line; but only so will the legitimacy of the corporation be secured, at least in the deeper sense of that idea. (The more ephemeral sense of legitimacy, rooted as it is in the vicissitudes of public opinion, will be given and taken as that opin-

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See also N. CHAMBERLAIN, *THE LIMITS OF CORPORATE RESPONSIBILITY* (1973), where it is argued that the economic system that business itself has helped to create will prevent corporations from assuming the social responsibilities that critics would place upon them. But see Nisbet, *The Dilemma of Conservatives in a Populist Society*, 4 *POLICY REV.* 91, 102-03 (1978), who argues that corporations ought, all the same, to be taking on such responsibilities as support of education, research, and the arts.

<sup>6</sup> Many legal opinions support this view, of course. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 74 (1906): "[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public."

<sup>7</sup> See, e.g., *THE PUBLIC INTEREST* (C. Friedrich ed. 1962).

<sup>8</sup> For arguments in defense of the corporation that do take seriously the normative point of view see R. HESSEN, *IN DEFENSE OF THE CORPORATION*, (forthcoming); Hessen, *supra* note 1; D. Martin, *Corporate Privilege and Corporate Paternity* (1977) (Law and Economics Center Working Paper, University of Miami School of Law).

<sup>9</sup> Three points should be noted here, each of which will be developed more fully below. (1) To speak of corporate rights, or corporate responsibility, or corporate acts is not necessarily to construe the corporation as an individual or to vivify it. This is a useful way of speaking, though it can and often does lead to confusion. See Dunne, *Justice Story and the Modern Corporation—A Closing Circle?* 17 *AM. J. OF LEGAL HIST.* 262 (1973); Manne, *The Limits and Rationale of Corporate Altruism: An Individualistic Model*, 59 *VA. L. REV.* 708 (1973). (2) I mean indeed to defend the broad rights I have indicated above, unthinkable as that may be at this point in legal history. I will argue, that is, that the corporation, no less than the individual, has a moral right to be free from outside interference (as defined below), extant law notwithstanding. (3) In developing the point, as I do immediately following above, that rights obtain even (and especially) in the face of claims from the public interest, I do not mean to suggest that there is any necessary conflict between the two—though depending upon the definition of "the public interest" there will often be contingent conflicts. On the contrary, I would argue that Adam Smith was right in holding that for the most part the public interest is best served not when individuals aim at it (or are legally coerced to do so) but when they are left free to pursue their own *private* interests, subject to the constraints of the moral law. See F. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 300-01 (1967). It is for heuristic reasons, then, that I draw this contrast as sharply as I do above.

ion variously informs the public interest.)<sup>10</sup> For rights are intended to stand athwart the utilitarian calculus, to brake the democratic engine.<sup>11</sup> We have them and we have the capacity to create others (*e.g.*, contractual rights) not because any authority, democratic or otherwise, has bestowed them and this capacity upon us, but simply in virtue of what we are and what we do. It is against this background that the corporation must in the end be judged, against an overarching theory of rights and correlative obligations, which serves more or less to justify the whole of our behavior. For it is against this background that we create corporations in the first place and then go about acting in our various corporate capacities.

The purpose of this Article, then, is to inquire broadly into how that normative background determines what the various corporate people may and may not do. Just what rights and obligations do shareholders, directors, managers, employees, customers, and members of the public have as they act within the corporate mil-

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<sup>10</sup> See Kristol, 'Reforming' Corporate Governance, WALL ST. J., May 12, 1978, at 20, col. 3: "Corporations are highly vulnerable to criticism of their governing structure because there is no political theory to legitimate it . . . . The only thing to be said in its favor is that, on the whole, it works surprisingly well." Notice that the justificatory reason Kristol cites is of the utilitarian or, better, consequentialist sort mentioned above. But he too finds this kind of justification less than satisfactory; somewhat later in his commentary, in fact, he adds: "to gain the kind of legitimacy sanctioned by tradition rather than theory, an institution must learn how to adapt to changing circumstances and must engage in frequent self-scrutiny." *Id.* Kristol has indeed contrasted two senses of legitimacy here: "theoretical" legitimacy, rooted in economic or consequentialist theory; and the legitimacy that is rooted in tradition, which he goes on to argue is the sense that is imbued with ethical considerations. But unfortunately Kristol has shifted the argument only slightly. He has given the businessman good advice, to be sure, especially for those corporations that depend for their success upon public favor (and many, of course, do not). But his is a practical counsel only, not a moral prescription. For tradition cannot be the final arbiter in questions of moral legitimacy, since tradition itself must be judged against deeper moral and, ultimately, rational criteria, which I will set out in Part III *infra*. Thus the deeper sense of legitimacy I speak of above is rooted neither in tradition nor in economic theory but in rational ethics. (Indeed, both tradition and utilitarian economic theory are strongly imbued with the democratic—*i.e.*, preference or will based—calculus.) When this rational ethics is appropriately explicated, it will turn out that there is a political theory to legitimate the governing structure of the corporation—provided that structure conforms to the theory—*viz.*, the political theory that emerges from the theory of moral rights. Cf. Kristol, *On Corporate Capitalism in America*, 41 PUB. INTEREST 124, 139 (1975) (hereinafter cited as *Corporate Capitalism*).

<sup>11</sup> Robert Nozick characterizes rights as "side constraints" (on behavior), R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); Ronald Dworkin as "trumps," R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Less metaphorically, Wesley Newcomb Hohfeld speaks of rights as "claims" and "relations," W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (1946). However described, by virtue of their correlative obligations, rights serve to determine how others (*e.g.*, some democratic majority) shall or shall not act, regardless of how they may want (*e.g.*, vote) to act.

ieu, and, more important, why?<sup>12</sup> Thus the emphasis will be rather more upon ethics and the connection between ethics and law than upon economics and business as such. More specifically, however, I want to call into question some of the conceptual and normative assumptions of the corporate critics. It is not that the whole of what they say is without merit: for corporate behavior, no less than that of individuals, comes in various kinds and shades, as I will try to indicate below. Rather it is that many of their criticisms—as with so many attacks, often rooted in populist sentiment, upon the larger forces in a democratic society—are not only overdrawn but fundamentally wrong, from both a conceptual and a normative point of view. Arguments that presume that corporations “act,” for example, or that those whose actions are characterized as “corporate acts” have fewer rights and more extensive obligations than the rest of us, this by virtue of the greater power that attends that action, can only contribute to the confusion that surrounds the corporate debate.

In order to draw these confusions out, then, it will be necessary first to set forth very briefly some of what the critics are saying—their complaints, their proposals, and especially their justifications for enacting those proposals. This I will do in Part II. While the critics do not always speak in the language of rights and obligations, insofar as their proposals are to be realized through law they are implicitly speaking that way. In Part III, then, I will sketch at some length the background of rights and obligations against which these arguments may be judged. Here I will be speaking of *moral* rights and obligations, which serve to guide us—at least ideally—in the creation of their legal counterparts.<sup>13</sup> Thus the argument will proceed from within the natural law tradition, at least in one mod-

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<sup>12</sup> This is a continuation, then, of the debate that Dunne understands Adolf Berle to have opened late in his career, in his *Carpentier Lecture, The Three Faces of Power* (1967):

In concluding that a corporation was not a “person,” Berle also concluded that this was not the end but rather the beginning of debate. In piercing the corporation veil, he found not one but many persons all of whom had constitutional rights—to the enjoyment of property, to the fruits of contract, to the equal protection of the laws—which could be enmeshed in the corporate structure and for which the corporation therefore might most appropriately serve as surrogate.

Dunne, *supra* note 9, at 268-69. I hasten to add, however, that the theory of rights I sketch below would probably be less than well-received by Berle.

<sup>13</sup> This is the ideal recently set forth by R. DWORKIN, *supra* note 11. Here too I must note that the rights I will sketch below are rather different from Dworkin's, whose own theory is itself but a sketch. The reader—and Dworkin's “Herculean judge”—will have to compare the originals (notes 53 & 59 *infra*) to determine where the truth lies.

ern version: it will be assumed, that is, that whatever positive law there is is to be judged against a "higher law" background,<sup>14</sup> and in particular, against a background of the theory of rights, in keeping with the roots of the American tradition.<sup>15</sup> The discussion in Part III will be abstract, and may often appear to be far removed from the controversy that surrounds the corporation; I can only ask the reader's patience, for the connection is very real indeed, as I hope will be made clear in Part IV. There I will apply this theory to the various corporate relationships in order to determine the rights and obligations of the various corporate people. Within this framework, then, the criticisms and proposals set forth in Part II can be assessed. Finally, in Part V I will say a little about "responsibility," which I will interpret as connoting ethical considerations beyond the strict requirements of rights and obligations. Here the wheel may seem to turn, but let me save that till then.

Before beginning let me repeat and make clear that I will be concerned not so much with the "crazy-quilt" that is corporation law—that is any law for that matter—as with the larger normative or jurisprudential theory that stands behind or might stand behind the law. Thus I will treat more the broad overview than the narrow detailed view.<sup>16</sup> Moreover, the theory of rights that has been adumbrated thus far<sup>17</sup> and that will be sketched more fully in Part III will in many respects be a return to an older regime, to a time, for example, when freedom of contract was rather more highly re-

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<sup>14</sup> See E. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955). Notice that in saying that "whatever positive law there is is to be judged against a 'higher law' background" I avoid a problem traditionally faced by natural law theorists concerning the ontological status of bad law. When he says that bad law is no law at all, as he often does, the natural law theorist is left with the question, Then what is it? A perversion of law? But even a perversion of law is still law, is it not? In brief, I would argue (on another occasion) that with perfect consistency one can be a legal positivist in one's capacity as an empirical social scientist, while a natural law theorist in one's capacity as a moral critic (however frequently legal positivists may be utilitarians in this latter capacity). Thus I would clearly separate questions about the existence of law from questions about the obligatoriness of law. Cf. M. GOLDING, *PHILOSOPHY OF LAW* 33, 49 (1975).

<sup>15</sup> See B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); C. BECKER, *THE DECLARATION OF INDEPENDENCE* (1922).

<sup>16</sup> For an example of such an undertaking in the area of labor law, though one that treats the extant law more directly than I will be doing here, see Haggard, *The Right to Work—A Constitutional and Natural Law Perspective*, 1 J. OF SOC. AND POLITICAL AFF. 215 (1976). See also Vieira, *Of Syndicalism, Slavery and The Thirteenth Amendment: The Unconstitutionality of "Exclusive Representation" in Public-Sector Employment*, 12 WAKE FOREST L. REV. 515 (1976).

<sup>17</sup> See note 9 *supra*.



garded.<sup>18</sup> I realize, of course, that interpretations of the commerce clause, doctrines of police power and the general welfare, and many other considerations have very much superseded that earlier regime, all in the name of "public policy." But I would argue that if these trends continue, that "unruly horse"<sup>19</sup> may yet take us over.<sup>20</sup>

This is not to say, however, that a return to respect for basic rights would necessarily be popular—as noted earlier<sup>21</sup>—though in the long run I believe it would. For the theory of rights, making a clear distinction as it does between rights and values, will allow for unpopular speech, unpopular marches, unpopular private behavior, and to be consistent, unpopular economic behavior. It will not always move men, and indeed may on occasion repel them. But the hortatory must be clearly distinguished from the justificatory. It is the latter that concerns me here. It would be fair to say, then, that the argument that follows is aimed more at the courts than at the legislatures, more at the realm of reason than at the realm of will.

## II. THE CASE AGAINST THE CORPORATION

What then are the corporate critics saying? The complaints are so varied and endless that a complete account would be quite impossible here.<sup>22</sup> Moreover, at least a part of the attack is disingenuous in the sense that the real target is capitalism or the free-market system; as the most conspicuous components of that system<sup>23</sup>—serving nicely the populist *Weltanschauung*—corporations take the brunt of the criticism that is more properly directed else-

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<sup>18</sup> See Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. OF L. & ECON. 293, 293-94 (1975):

One of the first functions of the law is to guarantee to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties: if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world.

<sup>19</sup> *Richardson v. Mellish*, 130 Eng. Rep. 294, 303 (1824).

<sup>20</sup> See the essays in *THE FUTURE THAT DOESN'T WORK: SOCIAL DEMOCRACY'S FAILURES IN BRITAIN* (R. Tyrrell ed. 1977) (hereinafter cited as R. Tyrrell).

<sup>21</sup> See note 9 *supra*.

<sup>22</sup> For a good taxonomy of these criticisms see N. JACOBY, *supra* note 5, at 3-19. See also J. Mofsky, *Market Constraints on Corporate Behavior* 3-4 (March 1977, Law & Economics Center Monograph, University of Miami School of Law).

<sup>23</sup> Jacoby notes that profit-seeking corporations conduct over four-fifths of the private business of the United States economy. N. JACOBY, *supra* note 5, at 3. Most of these corporations, of course, are not the so-called "giants."

where.<sup>24</sup> These critics will not directly concern me here, though what I say in Part III will apply to them as much as to those whose aims are less ambitious. It will serve my purposes simply to give a sampling of the tone and substance of the charges and proposals; after that I will sketch two lines of argument aimed at justifying the proposals: the first simply assumes that we can control the corporation, the second goes to the heart of the justificatory question by challenging the very privacy of the corporation.

#### A. *Criticism and Proposals*

Beyond question, a fear of size and power dominates the criticism. With corporations, "a vast increase in size transforms the nature of the enterprise."<sup>25</sup> Indeed, "the largest corporations [are] more like private governments."<sup>26</sup> "It is an exercise in power when an electronics firm in a depressed eastern city shifts production to a newly built Mexican plant; when U.S. Steel decides to raise its price substantially in the face of slackening demand, thereby accelerating inflation."<sup>27</sup> Stated generally, "these massive institutions create serious adverse consequences for consumers, workers, shareholders, taxpayers, small businesses, and community residents; they operate without effective internal and external accountabilities [*sic*] to those persons so harmed."<sup>28</sup>

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<sup>24</sup> Here I would include J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967), and R. BARNET & R. MÜLLER, *GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS* (1974). Not to be outdone by the Economics Department, the Business School at Harvard has Professor George Cabot Lodge arguing that

[t]he development of a new consensus in the modern large corporation will require, in my view, giving to each member of the organization a greater "sense of belonging"; each should, to the limit of his ability, contribute to the formulation of decisions that affect the direction and conduct of the collective.

By way of example, Lodge goes on to cite that paragon of egalitarian efficiency, communist China, where "the factory manager must from time to time sweep the floor in order to maintain the comprehensive identity necessary for a sense of individual fulfillment for all." Lodge, *The Collectivist Corporation*, *HARV. TODAY* (March 1972).

<sup>25</sup> R. NADER, M. GREEN, & J. SELIGMAN, *TAMING THE GIANT CORPORATION* 17 (1976) (hereinafter cited as R. NADER). See also C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 5-7 (1975).

<sup>26</sup> R. NADER, *supra* note 25.

<sup>27</sup> *Id.* at 16. Indeed, it is an exercise in power when Ralph Nader decides to write a book! (Notice the theory of inflation implicit in this passage.)

<sup>28</sup> *Id.* at 7. It is noteworthy that rarely do these critics take on large proprietorships, partnerships, trusts, or foundations, not to mention labor unions or the many institutions of government itself, the powers of which are categorically different from those of private institutions. Those who would grant the distinction between private and public power (private parties may not use force, much less claim a monopoly over its use) might still argue that at

These fears translate into more specific charges, of course, which are usually directed against the corporation in the names of broadly defined groups or constituencies, as immediately above. Thus it is the rights or interests of shareholders, employees, consumers, and the public in general that the corporation is ignoring. By implication, management becomes "the corporation." This attribution of corporate identity to management raises complex issues, including how to characterize directors.<sup>29</sup> I will try to develop these issues somewhat more fully as we proceed. For the moment, however, I want to set the more specific criticisms out with reference to these broadly defined groups. This will help us to see the corporate milieu in terms of the relationships that constitute it. We are interested ultimately, again, in knowing what rights and obligations the various corporate people have. But they have these rights and obligations by virtue of standing in certain relationships; for rights are relationships—between right-holders and obligation-holders.<sup>30</sup> In the corporate milieu the various relationships that have come into being have in the process brought about the rights and obligations that go with them and indeed, when viewed normatively, go to constitute them. (These points will be developed more fully at the end of Part III.) Hence it would be useful to sort the critics' charges out with reference to these already-existing corporate relationships.

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least we all have a say, through the democratic process, in the use of public power. It is difficult to take that rejoinder seriously, however; for it seeks to equate the single instance of control we exercise infrequently when we vote, along with millions of others, with the countless instances of control we exercise daily when we make choices in the marketplace.

<sup>29</sup> To get an indication of these complexities see Dunne, *supra* note 9, who argues that in *SEC v. Texas-Gulf Sulfur Co.*, 401 F.2d 833 (2d Cir. 1968), and *Escott v. Barchris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968), we may be seeing a return to Justice Story's fiduciary or trustee theory of corporate directorship—with directors being held appropriately accountable—as set forth in *Wood v. Dummer*, 30 F. Cas. 435 (C.C.D.Me. 1824) (No. 17,944); the opposing theory, which separates ownership from control and stockholders from management, was set forth critically in 1932 by Adolf Berle and Gardiner Means in *The Modern Corporation and Private Property* but was developed in numerous post-Civil War decisions, the roots of which can be traced, according to Dunne, to *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 345 (1837). In light of *Lanza v. Drexel*, 479 F.2d 1277 (2d Cir. 1973), however, it may be that Dunne's thesis was premature. The most that can be said at the moment is that the legal duties of directors are unclear. See generally Berle, *Economic Functions of the Corporate System*, 62 COLUM. L. REV. 433 (1962); Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962); Note, *Scienter and Injunctive Relief Under Rule 10b-5*, 11 GA. L. REV. 879 (1977); Claxton, Book Review, 10 GA. L. REV. 311 (1975) (A. JACOBS, *THE IMPACT OF RULE 10b-5*).

<sup>30</sup> See W. HOHFELD, *supra* note 11; Hart, *Are There Any Natural Rights?*, 64 PHILOSOPHICAL REV. 175, 183-88 (1955).

1. *Shareholders.*—In the case of shareholders, then, most of the criticism stems from the observation that in the modern corporation share ownership is widely dispersed and hence “control” has effectively passed from these nominal “owners” of the corporation to an élite corps of professional managers, a thesis influentially set forth by Berle and Means in 1932.<sup>31</sup> This amounts to “power without property,” as Berle entitled a 1959 book; and power thus detached is irresponsible. Whereas in theory the shareholders elect the directors of the corporation, whose responsibility it is to direct and approve fundamental corporate actions, including the selection of management (who are thus employees), in reality it is management that has come to select—and serve on—the board. Boards no longer direct; they simply assent. Thus management is free to engage in the kinds of behavior—imprudently speculative, self-dealing, unethical, illegal—that can and sometimes does redound to the detriment of the shareholders. The only effective control these “owners” have over their assets—evidenced by the fact that shareholder meetings are so poorly attended—lies in their right to sell their shares.

The remedies proposed range from more tightly regulating the shareholder-director-management relationships—through new Securities and Exchange Commission directives—to wholly restructuring the corporation. Proposals for new regulations to encourage shareholder participation in the governance of the corporation are common. These “shareholder plebiscites” would require management to obtain shareholder approval on a broad range of issues—acquisitions, sales, mergers, financing, to name but a few. Moreover, greater political competition in the election of directors is called for through relaxed nominating requirements and the elimination of inside directors, with elections to be financed by the corporation. New regulations to make “going private” more difficult, to require greater communication and fuller disclosure between management and shareholders, to assign specific responsibilities to each director—these and many more are among the proposals of the critics.<sup>32</sup>

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<sup>31</sup> See note 29 *supra*.

<sup>32</sup> See, e.g., R. NADER, *supra* note 25, at 75-131; Stone, *supra* note 25, at 119-248; Kristol, *supra* note 10; Kristol, *Ethics and the Corporation*, WALL ST. J., April 16, 1975, at 18, col. 4. On “going private” see Securities Exchange Act of 1934 Release No. 14185 (Nov. 17, 1977) containing proposed going private regulations; Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974); Brudney & Chirelstein, *A Restatement of Corporate Freeze-Outs*, 87 YALE L. J. 1354 (1978).

2. *Employees.*—The struggle between corporations and labor is of course an old one. In addition to the traditional complaints concerning wages, hours, working conditions, and collective bargaining, there are the more recent criticisms relating to sexual, racial, and other forms of discrimination, to the lack of employee participation in corporate decisionmaking, to the dehumanizing authority structure between management and workers, and to the lack of protection for employees' civil rights. Here too corrective proposals have the flavor of greater "democratization" of the corporation; for decisionmaking would be taken out of the hands of management and put into the hands of either government regulators or workers themselves. Thus proposals include new regulations to prohibit discrimination, to broaden "affirmative action," to restrict a corporation's right to fire employees, to mandate due process procedures for the adjudication of "rights conflicts," and even to encourage "workplace democracy" by permitting employees to determine a broad range of corporate issues.<sup>33</sup>

3. *Consumers and the Public.*—The corporation-consumer relationship has received so much attention in recent years that complaints in this regard need only be mentioned: charges concerning defective or dangerous products, deceptive advertising, and collusion and price-fixing are commonplace. Likewise, we need only mention the criticisms of the corporation's behavior vis-à-vis the public in general: corporations pollute the environment, reduce the quality of life by stressing "economic values" over "human values," bribe public officials, "exploit" poor nations, and on and on. In each of these cases reformers call for more public regulation, ranging from a federal consumer protection agency with broad powers of inquiry and enforcement, to stiffer anti-trust regulations and enforcement, to various divestiture proposals, to community sanction for corpo-

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<sup>33</sup> Thus Yale political scientist Robert Dahl, in a passage as noteworthy for its precision of thought as for its sentiment:

[W]hy should people who own shares be given the privileges of citizenship in the government of the firm when citizenship is denied to other people who also make vital contributions to the firm? . . . The people I have in mind are, of course, employees and customers, without whom the firm could not exist, and the general public, without whose support for (or acquiescence in) the myriad protections and services of the state the firm would instantly disappear.

R. NADER, *supra* note 25, at 123-24. See also A. CONARD, *CORPORATIONS IN PERSPECTIVE* 348 (1976); D. EWING, *FREEDOM INSIDE THE ORGANIZATION: BRINGING CIVIL LIBERTIES TO THE WORKPLACE* (1977); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).

rate decisions, to a whole host of disclosure requirements. Again, not all of these criticisms are without merit, as we will see in Part IV. But I want now to look at what the critics offer by way of justification for further corporate regulation.

B. *The Justification for Outside Control*

1. *Reasons and Justifications.*—In this brief survey of criticisms and proposals I have set forth various reasons commonly advanced in support of further controlling the corporation. But to have a *reason* for wanting to control someone or something is not the same as having a *warrant* or *justification* for doing so. We may have many reasons for wanting to bring about some change in the world and yet not be justified in doing it. A gunman surely has reasons for taking his victim's wallet, but no justification for doing so. Conversely, there might be a justification for controlling someone or something and yet no reason for doing it. An employer might be entitled to dismiss an employee, for example, and yet have no reason to do so because the employee is performing well.

It is important, then, to distinguish reasons from justifications, although in many respects they are closely related.<sup>34</sup> Very briefly, as I am using the idea here, reasons are intimately bound up with our wants, with our conative side: we mention our wants when we give our reasons for acting. Now to be sure, our wants serve as our reasons for acting, and these reasons serve in turn to justify those actions, at least to us: this is one respect in which reasons and justifications are closely related.<sup>35</sup> (And of course "reason" may be used more broadly and in different senses than indicated by my limited usage here.) But to have a justification for doing something, especially when others are affected by that action, is ordinarily to have more than a mere reason for doing it. It is to have a warrant or a right to undertake the action. And this warrant or right is not simply an evaluative but a normative notion, rooted not in conation alone but in the *faculty* of reason and hence in the theory of justification. I have indicated, then, various of the reasons the critics advance for controlling the corporation; I want now to try to distinguish their reasons from their justifications, a distinction they often do not draw.

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<sup>34</sup> The issue I am raising here is quite complex; for a fuller discussion see the considerable and growing literature in the philosophy of action.

<sup>35</sup> See, e.g., Gewirth, *The Normative Structure of Action*, 25 REV. OF METAPHYSICS 238 (1971).

2. *Behaviorism and the Function of Law.*—One common line of argument, closely related to the school of sociological jurisprudence, is in truth no argument at all. Rather, the justification for controlling the corporation—and indeed for controlling the individual as well—is simply assumed. It is assumed in the form of a further assumption about the function and purpose of law, *viz.*, to control behavior (usually through a system of rewards and punishments or positive and negative sanctions, the modern impetus for which stems from Bentham<sup>36</sup>). Thus Christopher Stone argues that corporations—increasingly the “actors” in our society—are more and more responsible for “society’s problems.”<sup>37</sup> He takes “the corporate problem” to be the growth of “corporate influence and the dissatisfaction it provokes”; in short, “we cannot control them more to our satisfaction.”<sup>38</sup> In its formative years, he argues, the law developed to control individuals. The law eventually came to view corporations as individuals, but the “human-oriented premises” of the law have not been adjusted to treat these “*persona ficta*.”<sup>39</sup> If the law is to accomplish its end, Stone continues, the corporation must be viewed “sociologically”; for “[p]eople in concert do things they would not do alone.”<sup>40</sup> All of which suggests that “the law ought constantly to be searching out and taking into account the special institutional features of business corporations that make the problems of controlling them (and of controlling men-in-them) a problem distinct from that of controlling human beings in ordinary situations.”<sup>41</sup> While Stone goes on to say that one goal of the law is “fundamentally distributive,” by which he seems to mean that its aim is to right wrongs,<sup>42</sup> he only mentions this and adds immediately that the “primary goal” is to “reduce . . . the incidence of harmful behavior in the first place.”<sup>43</sup>

Now there are many useful insights in Stone’s book. At the same time, the approach throughout is that of the behavioral sciences: he

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<sup>36</sup> J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

<sup>37</sup> C. STONE, *supra* note 25, at xii.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1-2.

<sup>40</sup> *Id.* at 3-5.

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.* at 30. I say “seems” because Stone’s discussion of this complex issue is anything but clear, complicated as it is by considerations of “social costs” which are then fit into cost-benefit analyses. It appears, in fact, that Stone is working not with a property-taking theory of wrongful conduct, such as will be developed below, but with a much less precise (*i.e.*, less descriptive) harm-cost theory. Compare *id.* at 31-34 with R. NOZICK, *supra* note 11, at 57-87.

<sup>43</sup> C. STONE, *supra* note 25, at 30.

wants to *explain* corporate behavior in order that the law might *control* it, much as the Skinnerian scientist seeks to explain and then control the behavior of the experimental rat. The normative point of view—the *justification* for control—receives virtually no consideration. To be sure, Stone gives us *reasons* to control the corporation; but as brought out above, these do not go to the question, By what *right* do we control it? Stone simply assumes the “we” against “them” posture, the nonegalitarian or authoritarian point of view so common in these discussions about the corporation. If indeed control is the end, there are many measures—not least the Draconian—that might accomplish this: locking up all males between the ages of eighteen and thirty will drastically reduce criminal behavior! We could simply design our laws toward the end of control and ignore considerations of justice; thus we might design our tort remedies toward controlling would-be tortfeasors rather than toward having these tortfeasors compensate their victims.

But clearly we do not ordinarily go about designing our law with the control of behavior foremost in view. At its best, law is designed with an eye toward some theory of justice—and in particular, in the American tradition, toward the theory of rights. Individuals have rights, we all learned in grade school, and governments are instituted among men “to secure these rights.” The Declaration of Independence does not say that governments are instituted “to control individuals” (or groups of individuals such as corporations). I suggest, in short, that the behavioral approach of Stone and others simply confuses a *result* of (most) law—that behavior is controlled—with the *purpose* of law—to secure justice. Now it is true that we satisfy that purpose, in part, by bringing about that result, *i.e.*, we secure justice in part by controlling behavior, which is probably what Stone has in mind when he says that the “primary goal” of the law is to “reduce . . . the incidence of harmful behavior in the first place.” But it is imperative that we get the order right: unless we have the end of justice in view we have no normative guide by which to restrain our control measures. (Indeed, we may very well end up controlling according simply to our “satisfactions,”<sup>44</sup> as Stone puts it.) I shall argue below, in fact, that we are justified in controlling others, including corporations, only in accordance with the theory of rights. Absent that normative grounding, claims to

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<sup>44</sup> In fact, this appears (for again the text is less than clear) to be precisely what Stone would have: in straightforward legal positivist fashion he characterizes the law as “the expression of popular sentiment.” *Id.* at 93.



control amount to nothing more than claims to exercise power over others.

3. *Private or Public?*—I want to turn now to a second line of argument, which might be seen as designed to get around the justificatory difficulties that arise when corporations and those who own and manage them are thought to be individuals with rights. (Quite likely the argument was not actually designed with this purpose in mind, but it will help us to look at it that way.) If the road to control is blocked by the rights of corporations and various of the people in them, then we simply call into question the existence of those rights. If the corporation has rights in virtue of its being a person, then treat the corporation not as a person, nor even, perhaps, as a *persona ficta*, but as a “creature of the state.” It thus becomes *our* corporation to do with as *we* wish. We (the people) conceived it by way of our corporate charter. It exists at our pleasure. Thus by any reasonable theory of property—for who would want to undermine that notion on the way to taking over the corporation—we may control it. (Calling into question the rights of real people—shareholders and managers—is somewhat more difficult, involving as it does limitations upon freedom of contract, not to mention outright takings. I will treat this subject in Part IV.)

This “concession theory” or “public instrumentality” approach is indeed the route to control taken by the Nader group, though it has a long history in its own right.<sup>45</sup> To bring out something of the flavor of that argument, let me quote the following passage:

The basis of all political power in the United States, our civics books tell us, is the consent of the governed . . . . Our largest corporations also exercise vast power—over workers, shareholders, customers, and other citizens. But with whose consent? And with what legitimacy? In a view as conventional the century before it was uttered as it was in the subsequent century, Henry Carter Adams explained the rationale of corporate fran-

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<sup>45</sup> See note 47 *infra*. In the seminal *Dartmouth College* case Chief Justice Marshall wrote: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creation of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.” *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Cf. note 6 *supra*. Even Irving Kristol, a friendly critic of the corporation, has written that “[t]he large corporation has ceased being a species of private property, and is now a ‘quasi-public’ institution.” *Corporate Capitalism*, *supra* note 10, at 138. (Notice that words like “ceased” and “quasi” indicate a certain reluctance on Kristol’s part to look for theoretically clear and clean lines—a not uncommon characteristic among the so-called neo-conservatives.)

chise in his 1896 presidential address to the American Economic Association:

"Corporations originally were regarded as agencies of the state. They were created for the purpose of enabling the public to realize some social or national end without involving the necessity of direct governmental administration. They were in reality arms of the state, and in order to secure efficient management, a local or private interest was created as a privilege or property of the corporation. A corporation, therefore, may be defined in the light of history as a body created by law for the purpose of attaining public ends through an appeal to private interests." Corporations were therefore granted certain privileges—like limited liability, perpetual life, and the equal protection of the laws in return for their social utility.<sup>46</sup>

There is much in this passage that deserves comment.<sup>47</sup> I want to focus, however, on the question whether the corporation is indeed a public instrumentality. For clearly, if Nader's approach is sound, if what many consider to be a private contractual entity is in fact a public institution, then further justificatory inquiries are fatuous.<sup>48</sup> One hardly needs to justify public regulation of public institutions. To clarify this issue, however, it will be necessary to look not at the *actual* history of the corporation but at its *theoretical* genesis. For how the corporation actually evolved to become the institution it is today is irrelevant to the question whether it is legitimate *as* an institution. We will need to know, among other things, whether the state's involvement in the genesis of the corporation is necessary or whether it is gratuitous—and indeed itself in need of justification.

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<sup>46</sup> R. NADER, *supra* note 25, at 62-63.

<sup>47</sup> Notice, *e.g.*, the initial move from *political* power—which in the classical liberal tradition does require consent to be legitimate—to power *tout court*. Is Ralph Nader's power illegitimate when he exercises it without our consent? Notice too that no distinction is made here between early English and American corporations that arose under *special* charters, as described by Adams above, and the modern corporation chartered under *general* incorporation laws, which evolved from the joint stock associations that existed at common law. As Hessen rightly observes:

[Nader's] concept of the charter—as a promise to serve the state—derives from the 16th and 17th Centuries, when the Tudor and Stuart monarchs reigned in England. Englishmen who wanted to trade overseas had to obtain royal permission; freedom of commerce—to join with others to engage in overseas trade—was regarded as a privilege which only a royal charter could bestow.

Hessen, *supra* note 1, at 2. See also H. SOWARDS, *CORPORATION LAW: CASES & MATERIALS* §§ 1.01-.02 (1974).

<sup>48</sup> See Keeler, *Corporations: "Privateness" and Legitimacy*, REASON, Feb. 1977, at 43.

Surely it is through the actions of various individuals that the corporation arises at all. Are these actions legitimate? Do they need to be "authorized"? Or can individuals perform these actions by right?

In order to get to the bottom of these questions, then, we will have to know what it is that individuals may and may not do, *i.e.*, what rights and obligations they have *before* any corporation comes into being. Knowing that—no small undertaking itself—we can then take up the more complex questions before us here. In Part IV, then, we will return to this fundamental problem concerning the privacy of the corporation, which turns, as I have suggested, upon the legitimacy of the corporate birth. With that settled we will then take up the more specific criticisms and proposals set out earlier. But again, all of this requires that we know what rights and obligations belong to individuals as such (and why), before they enter into any corporate relationships—indeed, before they even create such an institution.

### III. RIGHTS AND OBLIGATIONS

#### A. *State-of-Nature Theory*

As these last remarks suggest, the argument will proceed in the tradition of state-of-nature theory, as developed by Hobbes, Locke, Rousseau, and, more recently, Robert Nozick,<sup>49</sup> to name but a few. Quite apart from the crucial role it played in the creation of the American state—especially through the influence of Locke's *Second Treatise of Government* on the Founding Fathers<sup>50</sup>—this tradition has contributed importantly to our understanding of both the complex moral theory that underpins our political and legal theory and the relationship between these theories. In state-of-nature theory we try to derive a government that is morally legitimate from a state of affairs devoid of any institutions of government; failing that, we try to show how a government *might* arise by a process that violates no one's rights, which is in part what Nozick recently undertook to do. Thus it is political legitimacy—how one man comes to have legitimate power, or authority, over an-

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<sup>49</sup> Note 11 *supra*. In order to appreciate the reasons for doing state-of-nature theory—some of which I will mention above—it is not necessary to believe, as some critics suggest, that anything like the state of nature ever existed (though what was early America?). The state of nature is a theoretical posit, used for *explanatory* purposes. These remarks apply *a fortiori* to the refinement of the state of nature that I will introduce shortly, the "status quo of noninterference among adult individuals," which is a purely theoretical construct.

<sup>50</sup> See notes 14 & 15 *supra*.

other—that is the fundamental concern of state-of-nature theory.

That concern is not the central issue here, of course;<sup>51</sup> but the fundamental insight of state-of-nature theory does warrant attention. It is that political and legal theory rest upon moral theory and, by implication, that institutions have rights, if they have them at all, only insofar as individuals have given them those rights.<sup>52</sup> Thus we begin with individuals, with *their* rights and obligations, not with groups or institutions, private or public, such as families, corporations, society, or the state. It is not simply that individuals were historically or anthropologically first; in some cases they were, but in other cases we should imagine they were not. Rather, it is for explanatory reasons that we begin with the simplest state of affairs; when we get clear about what rights and obligations obtain there we can then build up to more complex situations, including those involving corporations.

Against this background, then, let me begin. But let me stress at the outset that what follows is the barest sketch only. I have elsewhere developed this theory in much greater detail,<sup>53</sup> to which the reader should turn for a fuller account. What I want to do here is simply outline answers to two basic questions: Are there rights? What are there rights to? With this theory in view I will then return, in Part IV, to the corporate issue. In particular, I will show (1) that the corporation, far from being a “creature of the state,” is a voluntary association that can arise quite independently of the state and,

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<sup>51</sup> Nevertheless, the legitimacy of the state is intimately connected with the questions before us: the regulation of the corporation that flows from a state itself morally illegitimate will hardly be thought to be legitimate. Since I will not be taking the issue up directly, this may be a good place to note that in my own judgment the argument against the legitimacy of the state—any state—is persuasive, at least from a theoretical point of view. If we take seriously, that is, the right to freedom of association (by which we mean, of course, the right *not* to associate), as I shall argue below we must, then the state, the grandest example of forced association there is, violates this basic right and hence is illegitimate. Nevertheless, with David Hume, I do distinguish my practical from my theoretical life. For the present, that is, and probably for a very long time to come, I can envision no practical alternative to the state. Putting the matter this way serves a useful purpose, however; for if the state is a practical necessity only, if indeed “it is the right of the people to alter or to abolish it,” then the air of illegitimacy that surrounds the state will serve to create a strong presumption against any of its activities. For *all* state activity, by definition, involves forced association and is hence presumed to be illegitimate. On these issues generally see R. WOLFF, *IN DEFENSE OF ANARCHISM* (rev. ed. 1976); R. NOZICK, *supra* note 11.

<sup>52</sup> Cf. R. NOZICK, *supra* note 11, at 6: “Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.”

<sup>53</sup> See my doctoral dissertation, R. Pilon, *A Theory of Rights: Toward Limited Government* (1979) (unpublished thesis, The University of Chicago).

of special importance, can do so without violating the rights of anyone; and (2) that interference with the activities of the corporation is unwarranted when those activities violate no rights of others—indeed, that the corporation has a right *against* such interference, and others, including the state, have a correlative obligation *not* to interfere. I trust that a few of the conclusions I will be drawing—in the area of antitrust interference, for example—will be disquieting even to some of the friends of the corporation. Let me simply invite those friends to reflect upon the rights they would invoke at such uncomfortable junctures. If the requisite justificatory arguments for those would-be rights are not forthcoming, or if indeed they themselves lead to uncomfortable conclusions, then perhaps we should let the difficult cases fall where they will.

### B. *Are There Rights?*

1. *The Problem of Justification.*—The question whether individuals have moral rights is probably the most pressing issue before moral and legal philosophy today. For upon its resolution depends the moral legitimacy of the legal rights we find and enforce daily through the state. Jefferson thought that the existence of our rights was “self-evident,” that we were “endowed by [our] Creator” with certain rights. No doubt that “argument” satisfied the better part of the population in the eighteenth century—and in all likelihood it still satisfies, if not the better, at least the larger part of the population. (Those for whom Jefferson’s claim still suffices should probably be advised to turn directly to Part IV, thus to avoid the deep reaches into which we are about to plunge.) Yet to Jeremy Bentham, talk of moral or natural rights was “simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.”<sup>54</sup> And indeed it was David Hume, who died in the year America was born, who argued that from factual premises one could not derive normative conclusions:<sup>55</sup> thus from descriptions about the nature of man one could not derive prescriptions about the rights of man, which of course was the strategy at the heart of the natural law and natural rights traditions.

With Hume’s pronouncement, moral philosophers were awakened from their dogmatic slumbers, as Kant put it, and set to the task that has centrally occupied them ever since—how to give cognitive

<sup>54</sup> Bentham, *Anarchical Fallacies*, in 2 COLLECTED WORKS 501 (Bowring ed. 1843).

<sup>55</sup> D. HUME, TREATISE OF HUMAN NATURE, 469-70 (Selby-Bigge ed. 1888).

force to our moral judgments. By the first third of our own century, however, those philosophers had all but despaired. Thus in 1936 A.J. Ayer, reflecting the view of the dominant school of logical positivism, argued that we could divide the world of propositions into three types—logical, empirical, and evaluative (*e.g.*, normative, aesthetic, theological)—and that it was idle to look for truth among propositions of the third kind, for there was no truth or falsity about them: they were simply expressions of our emotions or sentiments.<sup>56</sup> As is often the case, however, the wheel seems more recently to have turned; for since Ayer drew his conclusions much has been done to call this moral skepticism into question.<sup>57</sup> Following often in the Kantian tradition of rational ethics, these recent studies have tried to show that rather more of ethics than many had heretofore thought is rooted not in Ayer's third category, nor even in his second, but in reason itself. Without wanting to overstate the matter, I think it fair to say that we are seeing here something of a return to the natural law tradition—which of course grounded ethics straightforwardly in reason<sup>58</sup>—though as with earlier versions of that tradition, the variations are considerable.

What I want to do, then, is sketch one contemporary version of

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<sup>56</sup> A. AYER, *LANGUAGE, TRUTH AND LOGIC* 102-20 (2d ed. 1946). Indeed, this view has dominated the thought of this century, not least in the social sciences, including economics. Thus we find no less a friend of the free market than Gordon Tullock arguing that

[i]n recent years, "ethical science" has fallen into disrepute, not because we are necessarily less moral now or because we worry about ethical problems less, but because of the obvious flaws in the "scientific" treatises on the subject. From Plato and Aristotle to St. Thomas Aquinas and William James, numerous books of all degrees of profundity have been produced that purport to deduce an ethical system from a few basic postulates. The dearth of current books on the subject reflects neither disrespect for the great minds who have labored in the field nor a belief that they have solved the problem, but is merely an indication of simple skepticism.

G. TULLOCK, *THE LOGIC OF THE LAW* 3 (1971). Moral skepticism is undoubtedly a healthy reaction to moral overreaching. But if correct, we are left in a most uncomfortable position, which perhaps helps to explain why the "dearth" of which Tullock speaks has become a plentitude in this decade, with Rawls and Nozick being only the most conspicuous examples.

<sup>57</sup> The literature here is extensive; in addition to countless journal articles see, *e.g.*, K. BAIER, *THE MORAL POINT OF VIEW* (1958); A. DONAGAN, *THE THEORY OF MORALITY* (1977); R. HARE, *FREEDOM AND REASON* (1963); R. NOZICK, *supra* note 11; J. RAWLS, *A THEORY OF JUSTICE* (1971); M. SINGER, *GENERALIZATION IN ETHICS: AN ESSAY IN THE LOGIC OF ETHICS, WITH THE RUDIMENTS OF A SYSTEM OF MORAL PHILOSOPHY* (1961); S. TOULMIN, *REASON IN ETHICS* (1950); H. VEATCH, *FOR AN ONTOLOGY OF MORALS* (1971).

<sup>58</sup> Thus Locke writes: "The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, of Possessions." J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 6 (P. Laslett ed. 1966). Notice the straightforward move from "is" to "ought" in this passage.

these recent developments in rational ethics, a version that in my judgment goes to the heart of the matter, resolving some of the most basic issues in ethics. I refer to the work of Alan Gewirth at the University of Chicago, who over the past several years has developed arguments in support of his Principle of Generic Consistency (PGC), which he has called "the supreme principle of morality."<sup>59</sup> From this principle flow certain basic rights, which entail other rights, including the rights with which we will eventually be concerned. In the next section I will take up this work of interpretation. What I want to do here is indicate briefly just what Gewirth is about, just how he justifies this principle and these basic rights, thereby showing them to exist.

2. *Acceptance or Consent Theory.*—Rights do not exist in the way tables and chairs do. Hence we have to first get clear what we mean when we say that a right "exists," or that someone "has" a right. It is useful, in this connection, to begin by looking at contractual rights, for these are *made* to exist—they are "brought into being," as it were, by human agency, and in particular by the phenomenon of *acceptance* or *consent*. (These acts and this process must themselves be justified, as we will see below; nevertheless, in virtue of their simplicity they have heuristic value for the issue at hand.) What happens when contractual rights are created, then, is just this: in agreeing to enter into the relationship, the parties simply "accept" certain obligations; correlative to these obligations are rights that are created in the other party.<sup>60</sup> These obligations and correlative rights did not exist before this consent was given; now they do. Thus it is in virtue of this phenomenon of *acceptance*—the complexities of which are considerable—that the relevant rights and obligations are brought into being and hence can be said to exist. For this acceptance or consent is both necessary and sufficient for

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<sup>59</sup> See A. GEWIRTH, *REASON AND MORALITY* (1978). See also the following articles by Gewirth, listed here chronologically: *The Generalization Principle*, 73 *PHILOSOPHICAL REV.* 229-42 (1964); *Categorical Consistency in Ethics*, 17 *PHILOSOPHICAL Q.* 289-99 (1967); *Metaethics and Moral Neutrality*, 78 *ETHICS* 214-25 (1967-68); *The Non-Trivializability of Universalizability*, 47 *AUSTRALASIAN J. OF PHILOSOPHY* 123-31 (1969); *Must One Play the Moral Language Game?* 7 *AM. PHILOSOPHICAL Q.* 107-18 (1970); *Obligation: Political, Legal, Moral*, in *POLITICAL AND LEGAL OBLIGATION*, 55-88 (J. Pennock & J. Chapman eds. 1970); *Some Comments of Categorical Consistency*, 20 *PHILOSOPHICAL Q.* 380-84 (1970); Gewirth, *supra* note 35; *Some Notes on Moral and Legal Obligation*, in *HUMAN RIGHTS* 291-96 (E. Pollock ed. 1971); *The Justification of Egalitarian Justice*, 8 *AM. PHILOSOPHICAL Q.* 331-41 (1971); *Moral Rationality* 3-40 (1972) (The Lindley Lecture, The University of Kansas); *The "Is-Ought" Problem Resolved*, 47 *AM. PHILOSOPHICAL A.PROC. AND ADDRESSES* 34-61 (1974).

<sup>60</sup> On correlativity see W. HOHFELD, *supra* note 11.

the existence of these rights and obligations.<sup>61</sup>

But while the kind of acceptance (assumption of obligation) indicated here will serve, when adequately explicated, to show that certain kinds of contractual rights exist, it will not suffice to justify the traditional natural rights, those moral rights that are said to exist independently of any explicit acceptance by obligation-holders of the correlative obligations. Nevertheless, here too the idea of acceptance is at the root of the justificatory argument that demonstrates the existence of these rights; for with all rights it is only in virtue of the obligation-holder's acceptance, on some criterion or other, of his obligation that the correlative right can be said to exist. These rights will reflect the deepest sense of "moral," however, only if their acceptance is generated by the appropriate criteria: only if the reasons for acceptance are rational—necessary to the subject of morality and sufficient to compel assent on pain of self-contradiction—will that acceptance not be arbitrary or contingent upon particular wants or preferences (for individuals are said to have these natural rights quite independently of our wants or preferences in the matter). These basic moral rights must be shown to exist, then, for reasons both necessary and sufficient to compel rational acceptance of their existence. It is in this fundamental way that morality is grounded in reason.

To show, then, that these most basic of rights exist we have to distinguish not simply between explicit and implicit acceptance but between contingent and necessary acceptance as well. When acceptance is *contingent*, i.e., when it arises from or is based upon particular wants or preferences, as in the contract example above, it is in this sense arbitrary and therefore will not serve to generate rights that reflect this deepest aspect of morality. Acceptance that is *necessary*, however, is not so generated or based and thus does not have this arbitrary quality about it. We *must* accept the law of contradiction, for example; it is not open to us to reject it, for as Aristotle demonstrated,<sup>62</sup> to attempt to deny that law it is necessary

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<sup>61</sup> In mentioning the complexities associated with the phenomenon of acceptance I mean to include various of the procedural formalities that serve to evidence that acceptance.

The idea of acceptance or recognition is central to H.L.A. Hart's arguments which develop the complex criteria needed to understand what it means to say that a legal system exists in some society. H. HART, *THE CONCEPT OF LAW* 59-60, 109-14 (1961). Similarly, of course, the idea of acceptance or consent is at the heart of our social contract theory of political obligation.

<sup>62</sup> IV ARISTOTLE, *METAPHYSICS* ch. 4.



to affirm it: in that affirmation we implicitly and necessarily accept the law.

3. *The Principle of Generic Consistency.*—The idea, then, is to develop a similar argument for ethics, which is precisely what Gewirth has done. He has shown that certain rights that individuals implicitly though necessarily claim for themselves apply necessarily to all others as well; to deny this implication about the rights of others amounts to contradicting the claims one necessarily makes, to contradicting oneself. Thus does one arrive at rational justification; for if the denial of the implication that others have the same rights that one necessarily claims for oneself leads to a contradiction, then by a *reductio ad absurdum* the negation of that denial is true, i.e., it is true that it is not the case that others do not have the same rights that one necessarily claims for oneself.<sup>63</sup>

But let me set forth Gewirth's own summary of the argument. He begins by treating human action as the basic subject of morality, for it is action that moral principles and rules are intended to direct:

The main point is that the voluntariness and purposiveness which every agent necessarily has in acting, and which he necessarily claims as rights for himself on the ground that he is a prospective agent who wants to fulfill his purposes, he must also, on pain of self-contradiction, admit to be rights of his recipients. For they are similar to him in being prospective agents who want to fulfill their purposes. Therefore every agent logically must admit that his recipients have certain basic rights equal to his own rights of voluntary and purposive participation in transactions, which are equivalent, respectively, to rights of freedom and of well-being. The statement of these rights constitutes an egalitarian-universalist moral principle. My argument hence largely takes the form of what I shall call dialectical necessities: dialectical, in that it proceeds through certain claims made by agents; necessities, in that these claims logically must be made by the agents and they also logically must accept the corresponding obligations.<sup>64</sup>

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<sup>63</sup> What we have here, then, at least in its fully explicated form, is a very sophisticated and much improved version of the argument that Locke cites from "the Judicious Hooker." J. LOCKE, *supra* note 58, § 5. (Hooker's argument is itself a variation of the Golden Rule, and accordingly it suffers from many of the problems that have traditionally attended that formulation; but it is the closest that Locke comes to spelling out the justificatory foundation for the Reason that is the Law of Nature.)

<sup>64</sup> Gewirth, *Moral Rationality*, *supra* note 59, at 20. Notice that Gewirth's use of "agent"

This egalitarian-universalist moral principle, the PGC, which is the general principle of these rights and obligations, is addressed to every agent as follows: "Apply to your recipient the same generic features of action that you apply to yourself."<sup>85</sup> Combining the formal consideration of consistency with the material consideration of the generic features of action, the PGC

requires an equal distribution of the most basic rights of action. It says to every agent that just as, in acting, he necessarily applies to himself and claims as rights for himself the generic features of action, voluntariness or freedom and purposiveness at least in the sense of basic well-being, so he ought to apply these same generic features to all the recipients of his actions by allowing them also to have freedom and basic well-being and hence by refraining from coercing them or inflicting basic harm on them.<sup>86</sup>

In sum, and very succinctly, every agent must accept on pain of self-contradiction that the rights he necessarily claims for himself apply to every other prospective agent as well; by virtue of his implicit though necessary acceptance of these claims, and the universality implicit in them, the corresponding rights must be said to exist. Hence it is logically necessary that we accept the existence of these most basic of rights.

### C. What Are There Rights To?

In the foregoing I have sketched Gewirth's argument and briefly set forth my own interpretation of its place in the tradition of acceptance or consent theory. I want now to trace some of the implications of that argument, to draw very generally the picture of the world of rights and obligations that the PGC implies. It is at this juncture that much of my own work begins,<sup>87</sup> with arguments that depart in some measure from the very limited interpretations that Gewirth has thus far adumbrated.<sup>88</sup> I will try to indicate, within

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here is the ordinary philosophical usage, to mean someone who acts. The legal usage—one who acts for another—will arise in Part IV.

<sup>85</sup> Gewirth, *The "Is-Ought" Problem Resolved*, *supra* note 59, at 57.

<sup>86</sup> *Id.*

<sup>87</sup> See note 53 *supra*; Pilon, *Criminal Remedies: Restitution, Punishment, or Both?* 88 *ETHICS* 348-57 (1978); Pilon, *Justice and No-Fault Insurance*, 57 *THE PERSONALIST* 82-92 (1976).

<sup>88</sup> See especially Gewirth, *The "Is-Ought" Problem Resolved*, *supra* note 59, at 57-58. At this writing, Gewirth's *Reason and Morality*, in which he sets forth lengthy interpretations

constraints appropriate to this Article, just why it is that I reach these conclusions, why the world of rights and obligations that emerges from Gewirth's theory is the world of classical liberalism, not the world of the supportive state which he believes his theory implies. I want to make clear, then, that the conclusions I will be drawing below, and especially in Part IV, are not to be attributed to Gewirth. I should add, however, that insofar as he has given us a correct picture of what the foundations of the moral world in fact are, and insofar as my interpretations of that basic work are correct, there is a deeper sense in which the conclusions that I draw are indeed to be attributed to him!

1. *Problems of Interpretation.*—The two basic rights that Gewirth believes are implied by his theory—to freedom and basic well-being—have been described differently in various of his articles. He treats them in the passage above as rights against coercion and harm. In general, they reflect, respectively, the voluntariness and purposiveness that are the generic features of human action. But a less than careful interpretation of these rights can lead quickly to unequal rights and obligations and indeed to inconsistency. If the right to well-being, for example, entails not simply that we not harm others but that we be positively obligated to assist them, then our basic right to freedom is immediately called into question. Indeed, this is precisely the difficulty Gewirth gets into,<sup>69</sup> as I will indicate shortly.

In order to avoid these difficulties, then, we need to be clear from the start about the context within which interpretation takes place. If that context already contains moral relationships, for example, these may color our attempt to determine what rights and obligations individuals have. What I want to do, then, is posit a theoretic-

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of his theory, has not yet been released. But I have seen a part of those interpretations in manuscript; they follow, in much greater detail, the line of argument adumbrated at 57-58 of *The "Is-Ought" Problem Resolved*. Accordingly, despite the greater detail, they do not meet the objections I sketch below, which are developed more fully in my dissertation, note 53 *supra*.

<sup>69</sup> It should be noted too that this is precisely the issue at the heart of the debate between *laissez-faire* capitalism and socialism. For the more the welfare state, which presumes to stand between these two systems, tries to insure basic well-being, the more it conscripts personal liberty and private property in service of that end. Hence the closer it moves toward all our socialism, a system that promises well-being for all but ends, as it must, by giving liberty to none. See Holm, *Taxation in Paradise*, 28 NAT'L REV. 1065 (the deteriorating situation in Sweden); R. Tyrrell, *supra* note 20. For some of the theoretical issues see Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43-53 (D. Raphael ed. 1967). For the logical structure underpinning these issues see R. Pilon, *supra* note 53.

cal state of affairs, a spatiotemporal starting point which I will call a status quo of noninterference. (In truth, this is a refined state of nature.) We can imagine this as a simplified world in which the moral slate has been wiped clean, a world of adult individuals, unrelated to each other by any historical events. Thus these individuals stand in no special relationships such as arise when people make contracts, commit torts, or beget children. H.L.A. Hart distinguishes these special relationships, and the rights and obligations that constitute them, from general relationships, or the relationships that hold between strangers.<sup>70</sup> We should imagine the individuals in this status quo to be generally related, then; whatever general rights and obligations there are in this theoretical world are held equally by all. Finally, in keeping with its being a status quo, let us imagine that these individuals do not in the beginning act; as we will see, this provision will help us to understand how it is that property arises. What we want to do, then, is try to determine just what actions the PGC prohibits, permits, or requires (the three deontic modalities); we want to determine what general rights and obligations there are, from which we can then build this world up, in small but clear steps, until we have something rather more recognizable.<sup>71</sup> We will be doing that for the rest of this article.

2. *Action, Inaction, and Freedom.*—Let us begin, then, by look-

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<sup>70</sup> Hart, *supra* note 30. The distinction between general and special relationships is drawn with reference to the justifications that underpin them. Special relationships and the rights and obligations that constitute them arise from special historical events (e.g., contracts), which justify them; they are thus "created." Special rights and obligations may be distributed unequally, of course, according as the events that bring them into being take place. General relationships, on the other hand, and the rights and obligations that constitute them are not thus created but stand *tout court*; these rights and obligations are held equally by all, for reasons indicated in the previous section: they are the traditional natural rights. Thus the distinction drawn here does not correspond to the traditional distinction between rights *in personam* and rights *in rem*, which seems to be drawn with reference to right-objects (this distinction is often less than clear); nor does it correspond exactly with Hohfeld's distinction between "paucital" and "multital" rights, which is drawn with reference to obligation-holders. Cf. W. HOHFELD, *supra* note 11, at 67, 72. By going directly to the justificatory foundations of these rights, Hart avoids much of the confusion that surrounds these other distinctions.

<sup>71</sup> Thus I am working with Nozick's observation that justice is historical: whether a given state of affairs is just depends upon how it came about. Applying that dictum, however, requires that we know what it *means* for a situation to come about justly. It is *that* question that I am pursuing here by building up a just world from little steps, each of which reflects and indicates the content of justice, each of which is an instance of a just process. As a morally clean slate, then, the status quo will serve as a benchmark for subsequent problems of rectification. Making a man whole again just means returning him to some such prior status quo. Cf. R. NOZICK, *supra* note 11, at 153-55.

ing at what the PGC in fact says. It is addressed to all agents as follows: Apply to your recipient the same generic features of action that you apply to yourself. Notice first that the PGC does not require anyone to *do* anything. It is addressed to agents but it does not require anyone to *be* an agent. Moreover, even if someone does act, the PGC is addressed to him only insofar as there is a *recipient* of his action. Acting in a way that involves no recipient would not violate the PGC. Thus of the three basic modes of acting that are relevant to the PGC—not acting, acting with no recipient, and acting with a recipient<sup>72</sup>—it is in the last case only that the PGC comes into play. Starting from the status quo, then, this means that (a) there is no obligation toward others *to* act, (b) there is no obligation *not* to act when acting involves no recipient, and (c) when there *is* a recipient there is an obligation not to coerce or harm him, *i.e.*, an obligation to obtain his consent before acting upon him (about which more below).

Thus the PGC, at bottom, is a principle of equal freedom: by placing the burden of obligation upon those whose actions have recipients, or who are about to act toward recipients, it implicitly sanctions the state of equal noninterference that precedes those actions. Owing to the voluntariness criterion, which requires that agents secure the consent of their recipients before involving them in transactions, the PGC says that in the absence of that consent the status quo of noninterference must be preserved. Hence the most basic right implied by the PGC—for it is logically prior to all other rights—is the right to noninterference, which may be variously described as the right to be free, the right to be left alone, the right against trespass, and so forth.

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<sup>72</sup> Those who might wish to substitute some other principle for the PGC should nevertheless note that whatever one's basic moral principle, the three modes of acting set forth here are fundamental. Whatever basic principle is settled upon, that is, the fundamental issue will not be what more specific *kinds* of associations are right or what more specific *kinds* of actions toward others are right but whether there ought to be association with or actions toward others *at all*. In short, whether to associate or not to associate (and why) is the fundamental question of ethics. For the very subject of ethics arises only because there is more than one person in the world and hence the *possibility* of association. (Were there but one person only, "ethics" would be mere prudential counsel. Egoistic or "self-development" theorists, rooted often in the ethics of antiquity, usually reflect this prudential posture, thinking they are nevertheless doing ethics; they seem not to understand, that is, that ethics is not really about leading "the good life"—a matter rather closer to aesthetics—but about how we should act toward others.) This fundamental point about association is what I had in mind when I spoke earlier of the right to freedom of association and the implications of this right for questions of political legitimacy. See note 51 *supra*.

Now these early conclusions—fundamental and far-reaching as a moment's reflection will suggest them to be—should come as no surprise to students of the common law; the right to be free from trespass against person and property—the right to noninterference—was at the very heart of that tradition. And as many have noted, the common law was thought to be securely grounded in reason: "Indeed, the notion that the common law embodied right reason furnished from the fourteenth century its chief claim to be regarded as higher law."<sup>73</sup> Insofar as Gewirth has plumbed the depths of that reason, drawing from it the very foundations of ethics, this congruence between legal tradition and rational ethics has a certain lovely and inspiring quality about it.

What is surprising, then, is that Gewirth should argue that the PGC generates rights and obligations that the common law would never have countenanced. In particular, he believes that in certain circumstances—those involving limited cost considerations—there are positive or "welfare" obligations even though there is no special relationship between the parties. To fail to act in these circumstances, he argues, is to harm others.<sup>74</sup> Now setting aside these cost considerations, which are altogether out of place in a deontological argument,<sup>75</sup> the causal theory Gewirth invokes here is simply counterintuitive, to say the least.<sup>76</sup> Certainly the common law, with its act requirement for causal liability, would never have tolerated this causal theory. (If it had, it would have opened a veritable Pandora's box.)<sup>77</sup> Moreover, as suggested earlier, these positive obligations lead directly to inconsistency, for they conflict straightforwardly with the right to freedom or noninterference that is implied by the

<sup>73</sup> E. CORWIN, *supra* note 14, at 26.

<sup>74</sup> Gewirth, *The "Is-Ought" Problem Resolved*, *supra* note 59, at 57-58. I have in mind here the Good Samaritan problem in particular; but the extrapolation from this to the welfare state is relatively straightforward. Notice also the difference between saying that one *ought* to assist others and saying that one is *obligated* to do so (a point to be developed in Part V). It is the latter claim that I am arguing cannot be justified.

<sup>75</sup> Deontological theories are as opposed to consequentialist (e.g., utilitarian) theories. They determine what is right or wrong not by looking at consequences or costs and hence at subjective values but by appealing to moral principles that are inherently correct because derived from reason. See Gewirth, *Ethics*, 6 *ENCYCLOPAEDIA BRITANNICA* 976, 990 (15th ed. 1974).

<sup>76</sup> For an excellent discussion of causation in the law see C. GREGORY, H. KALVEN, & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 247-323 (3d ed. 1977) (hereinafter cited as C. GREGORY).

<sup>77</sup> See Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151, 160-66, 189-204 (1973). Even in the case of special relationships it is doubtful that liability for omissions should be rooted in a causal theory rather than straightforwardly in the grounds that generate the affirmative obligation. But see H. HART & A. HONORÉ, *CAUSATION IN THE LAW* (1959).

PGC. An individual cannot enjoy his right to noninterference and at the same time be obligated to assist others. Indeed, to so obligate him is to *use* him for the benefit of these others! Thus the whole class of putative moral rights falling roughly under the rubric "welfare rights"—and this includes most of our modern so-called "social and economic rights"<sup>78</sup>—is unjustified in that (a) these rights are not implied by the ineluctable moral theory that is grounded in reason, and (b) *a fortiori*, they are inconsistent with the rights that *are* implied by those moral foundations.<sup>79</sup>

3. *Interference and Property.*—In a world of general relationships, then, no one is obligated to come into association with anyone else: indeed, we have a right *against* such forced association, a right *not* to be thus interfered with. But individuals are also at liberty to act, and so the question immediately arises, as individuals move out of the status quo and start to act, what exactly do we mean by interference, or coercion and harm? The term "harm," of course, is notoriously subjective, having been the ruin of many a philosophical system. What the law has traditionally tried to do—and not without success—is find objective lines in the world, not subjective (harmful) effects in the minds of men. Thus it has sought to define interference with reference to the property in the world and the lines that bound that property more or less clearly. I will follow that tradition, for it has proven, because of its empirical foundation (which avoids subjective and therefore possibly arbitrary wants and preferences), to be the most objective method by which to pursue the difficult task of interpretation, a method that thereby treats all equally.

If interference is to be defined with reference to property, then, we have to get clear (a) what we mean by property and how it serves to define interference, and (b) how property arises or is justified. I will take these issues in order.

(a) In defining property I will follow the classical theorists who spoke of life, liberty, and possessions as the sum of one's property.<sup>80</sup>

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<sup>78</sup> See Cranston, *supra* note 69.

<sup>79</sup> For a somewhat fuller treatment of these points see Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171, 1178-86 (1979).

Such positive actions as Gewirth is urging—acts of beneficence—can of course be fit under another, a different realm of morality: as noted above (*supra* note 74), there is a distinction between what one *ought* to do and what one has an *obligation* to do. This distinction was at least implicit in classical liberalism, though contemporary liberalism—with its welfare "rights" and correlative welfare "obligations"—has done much to obfuscate it. I will develop this point a bit more fully in Part V below.

<sup>80</sup> "Lives, Liberties and Estates, which I call by the general Name, *Property*." J. LOCKE, *supra* note 58, § 123. The idea of owning oneself is not at all far-fetched. It arises straightforwardly in the case of medical transplants. See Note, *The Sale of Human Body Parts*, 72 MICH.

Thus an individual owns his person, actions, and holdings—tangible and intangible—however unclear the reference and boundaries of this property may in some cases be (about which more below); and in owning his actions he owns all the uses that he can make of or that go with his person and holdings. Now we interfere with another when we *take* what he owns; for if what he owns is or is an extension of himself (as I will briefly argue below), then to take what is his is to involve him in a transaction without his consent and hence to violate the PGC. For all practical purposes, then, Gewirth's second basic right—against being harmed—collapses into the first. We objectify "harming," that is, by treating it as an upshot of the violation of the right to noninterference or freedom: to harm someone is to involve him in a transaction involuntarily, *i.e.*, to take what he owns.<sup>81</sup> Interference, then, is a *taking*. We determine whether a given event is a taking, and hence a case of interference, by clearly defining the object owned and putatively taken.<sup>82</sup> Proceeding in this way will help to clear up much of the confusion that surrounds questions of interference; for again, interference is defined with reference to that which admits of empirical description.

This approach will handle straightforward cases of interference

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L. REV. 1182 (1974). (Locke's position on the subject is less than clear. He argues that "every Man has a *Property* in his own Person," J. LOCKE, *supra* note 58, § 27; yet he also argues that we are God's property, *id.* § 6. Perhaps these positions can be reconciled. But whether or not they can, they both have to be justified; and on that score, the latter view is an undertaking of some dimension.)

<sup>81</sup> This approach will help too to clarify some of the harm issues that surround such anomalous cases as Good Samaritan rescue. Quite apart from *requiring* Good Samaritan acts—and the theory of rights does not—it is an unduly rigorous (and even perverse) deontology that *prohibits* benevolent interference when consent is not possible. At the same time, liability attaches to such acts, for the incompetent Good Samaritan, no less than anyone else, must be held responsible for the consequences of his actions. By construing the "interference" involved in such incompetent acts as takings, then, we not only have a more linguistically satisfying approach, but we avoid, in part, going directly to "harms." Nevertheless, in cases such as these we cannot avoid getting into the subjective theory of value; for the consent that would have obviated that is missing. See *THE GOOD SAMARITAN AND THE LAW* (J. Ratcliffe ed. 1966); Epstein, *supra* note 77, at 189-204.

<sup>82</sup> A distinction is often drawn between a complete taking and a partial taking, as when we completely take a piece of property or a life, as against taking only a *use* of the property or restricting (taking) only a *liberty* of the person. But the distinction turns entirely upon how broadly or narrowly we define the object taken, for what we own can be parceled in many ways. Those who want to take "only uses" often invoke this distinction—as in land use restrictions—hoping thereby to avoid compensation. But a taking is still a taking, however broadly we define that with which the owner is left. See B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation*, in *PLANNING WITHOUT PRICES* 63-111 (B. Siegan ed. 1977).



quite easily, of course, cases of injury or damage to person or property, or cases of trespass or theft of property. For each of these broadly defined actions can be defined even more broadly as a taking: what the proscribed act does is take the use and enjoyment of the property in question, to which the owner has an exclusive right (see (b) below). But the reduction of interference to a taking will help especially when we come up against what often pass as difficult cases of "interference," as two brief illustrations will help to bring out.

(1) If I build a fence on my property that blocks your view, do I interfere with you and harm you? On loose interpretations of these terms I do. But of course the same could be said, depending upon your particular wants or preferences, for almost anything I might do with my property. In order to avoid the arbitrary results we get when we start with subjective values, then, we follow the procedure set out above. Notice that "your" view runs over my property; only thus do you "have" it. But my fence-building depends not at all on anything that you own. Were you to prevail, however, it would be *my* use of *my* property that would in fact be taken. My building the fence, then, does not take anything that you *own*. (If you really want "your" view, buy the necessary conditions for it, *viz.*, my property.)<sup>83</sup>

(2) If I have a business through which I make lower market offers than you make in your business, thereby "driving you out of business," do I interfere with you and harm you? Again, on loose interpretations of these terms I do. Here too, then, we have to look closely to see if in fact anything is taken. I have not taken your trade with third parties (which just *is* your business) any more than I took your view in the example above, for in neither case can you be said to *own* these. Rather, you "enjoy" the view or trade at the pleasure of others, and these others have a perfect right—equal to your own—to use their property or their potential trade as they choose, provided those uses do not take what others own.<sup>84</sup>

We see, then, how useful this procedure is in sorting out—indeed, in objectifying—heretofore difficult cases of interpretation. But other difficult cases will remain, cases that arise not because of any

<sup>83</sup> Cf. *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 1959).

<sup>84</sup> See Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 423-41 (1975). Cf. *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); *Mogul v. McGregor*, 23 Q.B.D. 598 (1889), *aff'd*, [1892] A.C. 25.

shortcoming in the interpretive procedure but because the objects taken are not easily defined, having a substantial mental basis. Two such kinds of cases involve endangerment and nuisance. All but isolated action is risky to some degree or other and hence has the *potential* for interfering with others, however remote that potential may be. As action becomes increasingly risky there reaches a point—*some* point—after which it “takes” the uses that others can make of their holdings, at least insofar as these others no longer feel safe in exercising those uses.<sup>85</sup> You do not feel constrained to wait until something happens—some “real taking”—before raising objections to my experiments with dynamite next door. Similarly, all but isolated actions involve *some* invasion by noise, odor, smoke, vibration, or other forms of nuisance. My party upstairs may take your quiet, your sleep, and so forth.<sup>86</sup> But here the case is slightly different: whereas with endangerment we have potential takings that “shade into” real ones, as others come not to be able to live with the fear the action causes, here we have real takings from the beginning—physical trespass, however trivial. Were we to prohibit all potential or minor takings, however, life in reasonable proximity would cease, for all but isolated action would be prohibited. In cases like these, perhaps, we find a place for public law.<sup>87</sup>

(b) How is it then that we come to own what we do? How do we justify our ownership of our life, liberty, and possessions? Because of its importance to the larger issue before us, let me treat this subject at some length (though again, what follows is barely a sketch).<sup>88</sup> The idea of presumptions and burdens of proof plays a prominent role here (as it does through so much of the law). One would not think that self-ownership—ownership of one’s person and

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<sup>85</sup> Notice that acts that endanger involve some combination of two variables: the probability that the unwanted causal sequence will occur; the magnitude of losses if it does occur.

<sup>86</sup> Notice the crucial difference between these holdings and the “holdings” claimed in the earlier examples. Here the quiet, sleep, and “peace of mind” (in the dynamite example) can all be described without bringing in the holdings or actions of others. The view and the trade, on the other hand, were enjoyed only because others contributed with *their* holdings or actions. Thus we in fact have takings here of things held outright.

<sup>87</sup> See C. GREGORY, *supra* note 76, at 495-546. It is noteworthy, as an indication that this may be a place for public law to enter, that in the more ordinary tortious takings we apply the doctrine, “you take your victim as you find him”; *i.e.*, we tailor the liability (in a regime of strict liability) and the damages to the individual victim and hence invoke no “public” standard. In nuisance and endangerment cases, however, the ordinary-man standard is usually invoked; *i.e.*, the extra-sensitive plaintiff will not ordinarily get relief.

<sup>88</sup> A good place to start on this difficult subject is L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* (1977).

actions—would require much argument. True, Locke thought that we were possessions of God; I should not want to undertake a defense of that position, however. In fact, the presumption would seem to rest with self-ownership; for anyone who would argue that he owns us would have, not least, the burden of the language to overcome. Indeed, we are punished just because *we* committed the crime; it was *our* action. If we want to argue that someone else is responsible for the action *we* performed, the burden is on us to show it.

This, in brief, is the negative case for self-ownership, aimed at defeating opposing claims. A positive case can also be made along the lines of Gewirth's argument. For the generic claims that we necessarily apply to ourselves, and hence must apply to all who are like us in being prospective agents, include the element of voluntariness. To act voluntarily just is to act as the author and hence as the owner of one's actions. By the principle of universalization the same conclusion applies to all other agents; thus each of us owns his actions and hence the necessary means—the voluntary person—with which he performs those actions. Starting then with the generic claims that agents necessarily make in acting (Gewirth's dialectically necessary method), we can generate self-ownership.<sup>89</sup>

We come then to the ordinary sense of "property"—and in particular to land or resource acquisition—which is where the more difficult issues arise. In general, I follow here Nozick's historical or entitlement theory of justice in holdings,<sup>90</sup> whereby at any point in time a set of holdings is justly distributed if the process by which the distribution arose was itself just, *i.e.*, if it took place without violating anyone's rights. Holdings justly arise by (1) original acquisition (of unheld things from the state of nature), (2) voluntary transfer, and (3) redistribution in rectification of violations of the rules that apply in (1) and (2). I will treat (2) and (3) in subsection 4 below, since these involve special relationships. Here I want to discuss, very briefly, how original acquisition might be justified, *i.e.*, how things might come to be justly acquired from the state of nature.

It should be noted, before beginning, that there is some question as to how crucial the problem of original acquisition is in the modern world.<sup>91</sup> To be sure, it arises in the case of resource discovery and

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<sup>89</sup> Notice that in beginning with claims that agents make about themselves, Gewirth appears to be side-stepping (obviating?) the free-will issue. Undoubtedly he will address this subject in his *Reason and Morality*.

<sup>90</sup> R. Nozick, *supra* note 11, at 149-53.

<sup>91</sup> Regarding "the general economic importance of original appropriation," Nozick writes:

acquisition—a not insignificant issue—and in such areas as fishing rights or even sunken treasure findings. But in the contemporary economy most income, wealth, and holdings result from use of or labor upon things *already* held or from the transfer of such things by (2) above (or, increasingly, from redistribution based *not* upon past wrongs but upon “social goals”). Nevertheless, because these things retain a trace of the state of nature about them—a trace that is often exploited by critics of the free market—it is important at least to outline the subject. I regret that the brief discussion that follows will not dispose of the matter, but we have here a subject in need of much more attention than it has received to date.

Here again the idea of presumptions and burdens of proof enters. Recall that in our status quo no one acts in the beginning. But the question arises, by what right are these individuals *where* they are in this theoretical world? They are, *ex hypothesi*, standing at some spot on the earth. Why aren't they trespassing? The answer, I should argue, is that no one *else* has a prior claim to be where any *other* individual is. And indeed, if such a claim should be made, the burden would rest upon the *claimant* to make his case. For there being, *ex hypothesi*, no prior action, and hence no prior act of possession, the claim would appear to be gratuitous. Property arises, then, through some (complex) act of claiming, either explicit or, as in the case at hand, implicit—through occurrent holding in the absence of any prior claim. Thus the presumption rests with the occupant, since others can make out no case why it should be shifted to them.

This argument, then, is a blend of the negative and positive arguments set out above in support of self-ownership, for it combines the absence of any other claim with the presence of an (at least implicit) affirmative claim by the occupant. But the affirmative claim here is rather more problematic than the one above, for it is a claim not simply about oneself but about the world and one's dominion over the world, a claim to have a right not simply to own oneself but to *be* where one is and indeed to *own* where one is. Moreover, it raises

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Perhaps this importance can be measured by the percentage of all income that is based upon untransformed raw materials and given resources (rather than upon human actions), mainly rental income representing the unimproved value of land, and the price of raw material *in situ*, and by the percentage of current wealth which represents such income in the past.

He goes on to cite David Friedman, *The Machinery of Freedom* xiv, xv (1973), who “suggests 5 percent of U.S. national income as an upper limit for the first two factors mentioned.” R. Nozick, *supra* note 11, at 177-78.

questions about the *boundaries* and the *limits* of the claim—two closely connected questions that arise *a fortiori* as our individuals start to act, to move out into the world and make further claims. Thus while the claims we make about owning our actions generate a title to those actions, the claims we make to the things *outside* us with which we “mix” our actions do not straightforwardly, at least, generate a title to those things. I allude, of course, to Locke’s idea that property rights in unowned objects originate when we mix our labor with those objects,<sup>92</sup> when we work the land, pick the apple, catch the fish, mine the ore, and so forth. To be sure, Locke’s idea has an intuitive appeal; and indeed, it served, more or less, to justify original acquisition in America (setting aside the problem of the Indians). But enough embarrassing questions remain to suggest that more work on this subject remains to be done.<sup>93</sup>

In the absence of a theory that will show precisely how it is that this “claiming” and “mixing” serve to generate property rights in unowned things, let me simply offer a consideration against the alternative, that no private property is possible. If indeed we have a right against interference, then how would we ever realize that right if everything were public? In such a realm we would all be thrown together, as it were; there would be no private places to go to escape interference—we would have a claim on everyone else and everyone else would have a claim on us. For interference, recall, is a taking, even if the property taken includes, as here, only one’s life and liberty. But we live our lives and perform our actions against some *material* background; we do not live *in vacuo*. If that background is not ours to control, if indeed others have as much right to it as we, then we could act only at the pleasure of others. For every claim to move could be cancelled simply by a counterclaim. And we could offer no plausible reply, for there would be no material condition of action over which we would hold any exclusive right. Indeed, we go out and acquire property *just because* it insures us that condition: it is our property that *enables* us to be free.<sup>94</sup>

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<sup>92</sup> J. LOCKE, *supra* note 58, § 27.

<sup>93</sup> See R. NOZICK, *supra* note 11, at 174-75.

<sup>94</sup> Notice that this is precisely the reason there is decreasing freedom in the socialized countries and next to no freedom in the communist countries: the governments in these countries have taken the *material* conditions of freedom. In drawing the connection between freedom and its material conditions, which reflected the lot of much of the working class at the time he was writing, Marx was correct; so he and his followers proceeded to apply this insight to the whole of society!

In the text above I have put the issue starkly in order to draw out the fundamental point.

I want to proceed, then, by simply assuming that just as "*being there first*" seems to generate a property right in the status quo, so "*getting there first*" generates a similar right as individuals move out of the status quo. At the very least one could add that no one *else* has a *better* claim to what has been "staked out" than the person who has made the effort to do that; certainly those who have done nothing have no claim. Let us assume also that boundary problems will work themselves out with reference to economic considerations, economies of scale, and so forth. As our individuals move out of the status quo, then, property will arise, claims will be staked out, and the world will eventually get divided up—all of which can happen, in principle, without anyone's rights being violated. Or can it? Are there limits to what an individual can claim (or to what he can claim in combination with others), after which any further claiming will violate the rights of others? (Antitrust theorists take note!)

The tradition, at this point, is to invoke some version of Locke's proviso, that we can acquire provided there is "enough and as good left in common for others."<sup>95</sup> Thus Nozick pursues, with some invention, "the crucial point," which is "whether appropriation of an unowned object worsens the situation of others."<sup>96</sup> For Locke, "'tis very clear, that God, as King *David* says, Psal. CXV, xvi, *has given the Earth to the Children of Men*, given it to Mankind in common."<sup>97</sup> The problem before Locke, then, is to show how *private* property arises out of this *common* property. For it would appear that all must give their consent before such acquisitions can occur. At the least, the proviso would seem justified in this setting in that it insures that the situation of others is not "worsened," as Nozick puts it.

It is at this important juncture, I should argue, that the theory of rights must bite the bullet: the discomfoting conclusions must

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In the ordinary world, of course, we get around the difficulty that arises from everyone's having an equal right to control the public spaces by establishing rules of conduct for such spaces, which we determine according to some decision procedure. But this is a practical expedient only; i.e., the conduct set by these rules cannot be seen as a direct manifestation of our individual wishes—as is possible in our own private spaces—but is rather a reflection, in our society, of majority opinion (e.g., nude bathing prohibited in San Diego, California) or earlier-affirmed rules (e.g., Nazi marching permitted in Skokie, Illinois). The *democratic* device, in short, gives us nothing like the liberty insured by the *private* device. See Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118-72 (1969).

<sup>95</sup> J. LOCKE, *supra* note 58, § 27.

<sup>96</sup> R. NOZICK, *supra* note 11, at 175.

<sup>97</sup> J. LOCKE, *supra* note 58, § 25.

be squarely faced, especially as they surround the so-called right to opportunity. To begin, the idea that God gave the earth to all in common, like the idea that we are God's possessions, is hardly self-evident. Absent arguments rich enough to compel assent to this proposition, the presumption about original ownership must be parsimonious, *viz.*, that in the beginning *no one* owns the earth—which of course is not the same as all owning in common. Original ownership arises, then, through the performance of complex *positive* acts of acquisition, as mentioned above; if these have not been performed, then the earth lies unowned, not unlike the fish in the ocean. But if the presumptions are now correct, then what is the moral basis for the Lockean proviso? What *right* of others do we violate when we acquire as much as he want? Nozick points to scarcity: "if the stock of unowned objects that might be improved [when our labor is mixed in] is limited, . . . an object's coming under one person's ownership changes the situation of all others."<sup>88</sup> True, but where are the *rights* in the matter? We can certainly understand that others have *interests* here; but where is the property *held* by others that is *taken* by this acquisition? Here Nozick argues that others are made worse off because they no longer are *at liberty*—have the *opportunity*—to acquire or use what once they could.<sup>89</sup> This argument has an intuitive appeal—indeed we see it in rich variation every day. But if the presumptions above are correct, as an argument from rights it will not withstand scrutiny. For it implies that there is a right to the *conditions* of opportunity, and this cannot be justified.

The status quo is especially helpful in drawing this point out. In this theoretical beginning individuals own themselves, their actions, and the area immediately around them (however bounded). At this point they all have an equal opportunity, provided the world is not yet "full," to go out and make claims over the world, or parts of it, through the complex process mentioned above, an opportunity to *try*, to *compete* in the business of acquisition. But that opportunity is not something individuals have *tout court*. They "have" it simply

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<sup>88</sup> R. Nozick, *supra* note 11, at 175.

<sup>89</sup> *Id.* at 175-76. Nozick distinguishes two interpretations that the Lockean proviso might be given, one involving others being made worse off by their no longer having the opportunity to *appropriate*, another involving their being made worse off by their no longer having the opportunity to *use* (without appropriation) what previously they could. The discussion that follows, however, is less than clear. Use, after all, is just appropriation for a time; and those excluded are, during that time, every bit as much excluded as if the appropriation were permanent.

because at that point in time the world happens to be the way it is—unowned. Owing to that *condition*, their opportunity exists. The situation here is exactly parallel with the earlier cases on view and trade (except that there the conditions were held by others, not unowned). In none of these cases, that is, is the object which was putatively “taken” held outright but only because of conditions over which the “holder” has no rights (as yet). Now when individuals start to act, to go out into the world, to pursue their opportunities, to compete in the business of acquisition, this condition of nonownership, in a world of scarcity, may disappear—and so may the opportunities for which it was necessary. But nothing was *taken*, for nothing was *owned*. In short, no rights were violated in the process, for we do not have a right to the world’s being the way it is at any particular time in its history. It is irrelevant, then, whether the acquisitions were large or small, for in neither case can anyone show that he has a right that has been violated. Those who do not acquire simply lose “their” opportunities; they lose in the competition, and that is what I meant when I said that it is here that the theory of rights must bite the bullet.<sup>100</sup>

It is customary at this point to observe that far from worsening the position of others, acquisition most often *improves* their opportunities. For the owner of the previously unowned object mixes his labor with it, builds a factory, creates jobs and products that heretofore did not exist, adds to the GNP, and so forth. (Thus multinational or giant corporations, by being more efficient, create more opportunities than would be the case were they to divest.) The arguments are familiar and, I should argue, persuasive. In particular, they help to mitigate the complaints of those who have lost in the competition. But strictly speaking they are irrelevant to the point at issue and indeed to the theory of rights. For they take us straightaway to the theory of value, which is a theory grounded not in reason but in the sentiments, in our wants and preferences, in the subjective side of our being. Many, in fact, will not be persuaded by arguments from improved opportunities. They prefer the “unimproved” state of nature to the cultivated, the bucolic to the

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<sup>100</sup> Thus when equal opportunity does not arise accidentally (as here) or voluntarily, it is brought about only by taking from some and giving to others. Moreover, once this initial balance is upset—as it inevitably will be if individuals are allowed to express their differing tastes through acquisitive activities—the taking must begin all over again. With repeated applications, this equality of opportunity comes to the same thing as equality of results. See Flew, *The Procrustean Ideal: Libertarians v. Egalitarians*, *ENCOUNTER*, March 1978, 70, at 73-75.



industrialized, the simple to the complex, the slow-paced to the fast, to draw but a few of the contrasts. And in these disagreements there is, as Ayer correctly observed, no truth or falsity to the matter: they are simply expressions of preference. It is with reference to the theory of rights, then, not with reference to the "goods" we produce, that we must justify our acquisitive actions and disjustify the claims of those who would object. For in doing what we have a right to do we take nothing over which others can show they hold any rights.

The implications of these conclusions, of course, are far-reaching. We come into the world with rights against our parents (about which more below). But outside of these, and rights to our person and actions, we have no rights of recipience against the rest of the world, as brought out in subsection 2 above. Thus we do not have a right "to opportunity" insofar as this entails that others must provide us, through their positive actions, with the conditions of opportunity. Nor do we even have a right "to opportunity" insofar as this entails that others must *refrain* from acting in pursuit of *their* opportunities, the point just developed.<sup>101</sup>

Thus the theory of rights is strict. It does not appeal to the sentiments. It treats all equally. Some will go out and acquire; they will "improve" what they acquire, or they may "waste" it. Others will stay back, will lose "their" opportunities, and will become dependent upon the sympathies of the "successful." A world that starts out equal may end up very "unequal,"<sup>102</sup> depending upon everything from the natural lottery of abilities, chance, and, perhaps in part, attitudes, to the choices individuals freely make, and the risks they take on or avoid. All of this the theory of rights—which is the theory of freedom—will allow. If we want to mitigate any of these results, then we must go outside the theory of moral rights to do so. To try to do this in the name of these rights is to risk undermining the clear, consistent, and rational picture of the moral world they describe, and the equal freedom they insure. I will have more to say on this issue in Part V.

4. *Special Relationships*.—Thus far our theoretical world con-

<sup>101</sup> Clearly, then, the burden of responsibility that the theory of rights places upon those who beget children is considerable. Should it be any other way?

<sup>102</sup> To say this may be misleading; for the "inequality" that arises from a world that starts out equal may simply reflect different preference schedules: the industrious may end up with greater material goods, but at the price of foregone pleasure or recreation. Egalitarians who concentrate on the distribution of material goods at any point in time usually ignore these trade-offs.

tains general relationships only, described by general rights and obligations. I have drawn these in broad terms—involving, at bottom, negative and positive actions—in order to try to bring out the logical structure of the theory of rights: however more specifically these rights, obligations, and actions may be described, as required by various contexts, they will always come under one of these broad categories of negative or positive action. In sum, then, in the world of general relationships we are obligated only to not interfere with others, as specified above; as a corollary, we have a right to do anything that does not interfere with others.

Now as individuals leave the status quo they will do more, of course, than make their property claims in the world: they will come in addition to associate with each other, either forcibly or voluntarily, and thus will special relationships arise. Forced associations include torts, crimes (by which I mean intentional torts), and contractual takings (*i.e.*, takings arising from duress, misrepresentation, and nonperformance). Voluntary associations include the many kinds of contractual relationships, gift giving, and child-begetting (which is a unilateral, quasi-contractual relationship between parents and child). With the exception of the complex special relationships that arise when enforcement becomes a problem—*i.e.*, when obligations are uncertain or are not performed voluntarily<sup>103</sup>—this broad sketch exhausts the class of special relationships as these might arise in the state of nature; and since the class of moral relationships in the state of nature is exhausted by general and special relationships, we now have a complete outline of the moral world that obtains there, at least as this world is described by the theory of rights.<sup>104</sup>

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<sup>103</sup> The special relationships generated by the enforcement problem are too complex to treat here, involving as they do the rights and obligations that arise when there are uncertainties and disagreements over fact, law, ethics, and procedure, not to mention the morally uncertain role of the state in providing answers to these questions. (See note 51 *supra*.) Procedural rights have always had an unclear and difficult place in the theory of rights, and not surprisingly; for the epistemological issues that give rise to them are not easily resolved within the confines of the state of nature. (Nor are they easily resolved outside those confines; nevertheless, the forced association that is the state seems to be a necessary ingredient in whatever resolution we are able to give to them.) Cf. R. Nozick, *supra* note 11, at 96-101.

<sup>104</sup> This outline is complete for our ordinary world as well, with the one exception of the relationship between the individual (or groups of individuals) and the state. Now it should be noticed that in the contemporary state the enforcement relationships excepted above are a sub-set of the individual-state relationship (I ignore anomalous cases of self-enforcement), this because the state claims a monopoly on the use of force. (Adjudication may be private, of course; but then it is a contractual relationship.) Indeed, in the night-watchman state of

Before taking up the justificatory foundations of these special relationships, let me say something more about their broad features, especially as the possibility of conflicting rights and obligations arises. As noted earlier,<sup>105</sup> a special relationship arises because someone *does* something to bring it about, *e.g.*, signs a contract, commits a crime, begets a child, and so forth. Whereas the parties to the relationship stood *generally* related before this event, they now stand *specially* related,<sup>106</sup> at least with respect to the terms of the special relationship. (Those general rights and obligations not reached by the terms remain intact.) Thus the rights and obligations that describe these relationships are "created." And they are limited to the parties to the relationship: If *A* and *B* enter into a relationship that benefits *C*, it is *A* and *B* who hold the special rights and obligations, not *C*.<sup>107</sup> Now in the process of creating these special relationships we may "alienate" some of our general rights and obligations, just as we take on special rights and obligations that heretofore did not exist. If *A* hits *B*, *A* alienates his general right to that amount of his property necessary to make *B* whole again; *B* now has a special right to that property, whereas before this event he had a general obligation not to take it, an obligation alienated by the event. Thus it is in virtue of this "creation" and "alienation"—two sides of the process that brings the special relationship about—that conflicts of rights are avoided: complementary rights and obligations are at once extinguished and brought into being.<sup>108</sup>

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classical liberal theory these enforcement relationships are the *only* components of the individual-state relationship. But however more numerous the components of this relationship may have become, my reason for setting it and the sub-set of enforcement relationships aside—my reason for not yet leaving the state of nature—is simply this: I want to continue the inquiry into just what rights and obligations there *are*, quite apart from the issues (and further rights and obligations) of enforcement. Whatever the mechanism of enforcement, that is, whether private (as in the state of nature) or public (as in our ordinary world), we will need to know what it is that is to be enforced. These rights and obligations are those that constitute the relationships outlined above.

<sup>105</sup> See note 70 *supra*.

<sup>106</sup> I am assuming here that we are starting from a world of general relationships only, something like our status quo. Individuals can of course take on new special relationships with those with whom they are already specially related; and they can add on special relationships with others as well—all of which can lead not to conflicting rights but to overcommitment. The *theory*, that is, can sort these "conflicting" rights and obligations out, even if for practical reasons the individual cannot satisfy all of his obligations; thus the theory may on occasion require compensation in lieu of specific performance, which is tantamount to recognizing the existence of the relationship and requiring that its obligations be met.

<sup>107</sup> See Hart, *supra* note 30, at 180-81.

<sup>108</sup> A little more should be said about the extremely complicated question of conflicting

It is against the background of general relationships, then, that we go about creating our various special relationships. Thus it is with reference to our general rights and obligations that the justification for these special rights and obligations must begin. Since voluntary associations are somewhat more complicated than forced associations, let me start with the latter, setting aside the special case of contractual takings until after I have discussed voluntary associations. Now as we have seen, each of us has a general right against being interfered with by others. When the correlative obligation is not met, however, we do not leave the situation as it is. Rather, there arises a new, a special obligation resting with the tortfeasor or criminal to make his victim whole again, correlative to which is a special right of the victim to the necessary restitution from the wrongdoer. (Notice that these rights and obligations rest with and against these *special* people, not with or against third parties, as when losses are socialized in order to compensate victims.) What I want to do, then, is indicate how it is that these special rights and obligations are justified and hence come into existence.

There are at least two approaches that will serve to justify this special relationship. The first involves a straightforward implication from the obligation to not interfere. What this obligation clearly entails is that the status quo of holdings not be forcibly disturbed. But we bring about that result either by not interfering in the first place, or, failing that, by returning what was taken when we did interfere. Only so will the status quo be either preserved or restored and hence the general obligation satisfied. Thus the special rights and obligations that arise between tortfeasors or criminals and their victims are simply entailments of the general rights and obligations of these parties; they have been brought into being by the acts of

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rights and obligations. The theory of rights can resolve, with little difficulty, what often pass for conflicting-rights situations. Consider, for example, a common pro-abortion argument (and let us assume here that the fetus has rights), that the expectant mother's right to control her own body takes precedence over any right of the fetus. In this case, clearly, the question of precedence of rights should never even arise; for in begetting the child the mother alienated that right in the relevant respects. Hence, there is no conflict of rights to talk about. (For an interesting discussion of some of these issues see Swan, *Abortion on Maternal Demand: Paternal Support Liability Implications*, 9 VAL. U.L. REV. 243 (1975).) But there will remain cases in which the theory of rights will sort out conflicts in a principled way only by requiring what many might think heroic and even dubious means. Thus to require a rape victim to carry the baby to term, while imposing *all* costs upon the rapist, is tantamount to allowing the taking to continue; moreover, this "principled" solution is such only on the view that compensation does in fact satisfy unmet obligations, when of course it is only a practical expedient.

taking that infringed upon the general rights of the victims.

A second and somewhat richer approach appeals to the ideas of responsibility and equality of treatment. As we saw earlier, the PGC is a causal principle; in speaking of agents and recipients it implies that agents are the authors of their actions and are thus, in this sense at least, responsible for the changes those actions bring about in the world—agents *cause* their actions and hence those changes. (If agents were not thus responsible it would make no sense at all to address moral principles to them.) And indeed, nowhere do we see this sense of responsibility more readily acknowledged than when the changes are favorably viewed by their authors, when agents want to keep for themselves the desirable changes they have brought about, or at least those changes over which they can be said to hold a right:<sup>109</sup> with alacrity these agents claim authorship—and liability, which is a different sense of “responsibility.” They go on to claim, moreover, that if they are not allowed to keep those changes to which they have a right, then unequal treatment will be the result: those who have done nothing will end up having or at least sharing what has been created by and hence is owned by these agents. By parity of reasoning, however, the agent must also keep to himself the unfavorable changes he has brought about,<sup>110</sup> at least insofar as these involve takings. And this includes not only those changes that have fallen directly upon the agent but those that have fallen upon others as well. For if the agent, in pursuit of his own ends, is allowed to take from others, then here too unequal treatment will be the result: those who have done nothing will end up suffering the upshots of action that properly “belong” to others. Thus the equality of treatment required by the PGC entails that agents rectify the wrongs they have caused: it entails, that is, the special rights and obligations of rectification.

It is irrelevant, then, whether the taking was intentional or acci-

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<sup>109</sup> Here enter, *inter alia*, all the difficult questions of copyright, patent, and other forms of discovery retention. In general it is easier to keep agents tied to the destructive than to the constructive consequences of their actions. And not surprisingly, for the definition of property taken is often easier than that of property created, especially as the latter works its way into the market. See, e.g., L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

<sup>110</sup> Notice that a consistent behavioral approach to these issues, which seeks to mitigate our traditional idea of responsibility, will attempt to socialize both benefits (through various redistribution schemes) and losses (through various social insurance or “no-fault” schemes), this because in neither case, on this view, can we be said to “own” the upshots of our actions. It is against a view such as this that Gewirth’s dialectically necessary approach, which starts with claims that agents make about themselves, is especially useful and insightful.

dental; or, if accidental, whether it was due to negligence or altogether unforeseen. Moreover, it is irrelevant that the taking reflects the "most efficient" use of resources.<sup>111</sup> (*Whose resources?*) That the agent acted as a "reasonable man," that he was prudent in taking cost considerations into account, is of no consequence to the victim, whose property has been taken all the same. With respect to considerations of equal rights, then, only a theory of strict civil liability is justified; the negligence standard, which allows losses to be shifted to the wrongdoer only if the action was "unreasonable" (whether by a moral or an economic criterion), simply ignores the *rights* of the victim, preferring instead the *interests* of the wrongdoer.<sup>112</sup> The *victim* is not the cause of his losses; it was the agent, in pursuit of his own ends, who brought them about, however innocently. Thus it is the victim who is to be preferred, subject to certain principled defenses, for he is the more innocent of the two.

Now of course there are many ways in which takings can occur and numerous defenses and subsequent pleas that will all be part of a well worked-out theory of civil and criminal liability.<sup>113</sup> That task is quite beyond the scope of this Article. I do want to mention, however, that from the point of view of the victim there is no reason to treat intentional or criminal wrongs any differently than civil wrongs. There is no justification, that is, for leaving the victim uncompensated while the state imposes sanctions, or rehabilitation, or whatever upon the criminal. Criminal wrongs may very well call for punishment of the wrongdoer in addition to compensation of the victim by the wrongdoer; but they call at least for compensation if the general obligations not met are to be rectified.<sup>114</sup>

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<sup>111</sup> This rationale is central, of course, to the economic analysis or *explanatory* approach to law, which is very different from the *justificatory* approach being taken here. See, e.g., Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). See generally, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

<sup>112</sup> For a recent history of the erosion of strict liability in favor of the negligence standard, this to facilitate the "social goal" of economic growth, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

<sup>113</sup> For such a theory, as applied to the law of torts, see the following articles by Epstein, listed here chronologically: *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973); *A Theory of Strict Liability*, *supra* note 77; *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); *Intentional Harms*, *supra* note 84. For a review of these essays, placing them against a larger philosophical background, see Pilon, *Richard A. Epstein: Rethinking Torts*, LAW & LIB., Winter 1976, at 1. For more specific applications see Epstein, *Products Liability: The Gathering Storm*, AEI REGULATION 15 (September/October (1977)), Pilon, *Justice and No-Fault Insurance*, *supra* note 67.

<sup>114</sup> See Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977), where it is argued that restitution alone is sufficient by way of remedy for criminal wrongs.

Let me turn now to the special rights and obligations that describe voluntary associations, setting aside the special case of child-begetting. Here again the justificatory arguments begin with our general rights and obligations. Recall that the PGC implies that each of us has a general right to associate with others provided we do so with their consent. If *A* and *B* want to associate with each other and want to order that association by creating special rights and obligations between themselves, then they have a general right to do so, a right against third parties; these third parties have a correlative general obligation not to interfere with *A* and *B*, an obligation not to take or prevent those actions of *A* and *B* that will bring about this special relationship. In creating these special rights and obligations, after all, *A* and *B* are taking nothing that these third parties own;<sup>115</sup> hence *A* and *B* have a perfect right to go about creating them.

This much justifies bringing these rights and obligations into being—as against the claims that might arise from third parties. But it does not justify the special rights and obligations themselves—as against the parties to the relationship. Here the argument is simply this: these rights and obligations are justified because they are voluntarily accepted and hence created by the parties to the relationship. They are justified, that is, because the respective individuals, in the exercise of—indeed, as an instance of—their right to be free, accept and hence cause their existence. Thus the argument from acceptance or consent is straightforward here, unlike in the case of general rights and obligations.

It is a matter of some discussion just what happens when this acceptance takes place, whether it is a pure act of will or, at the other end, a more material transfer of titles. In truth, contractual agreements, in all their variety, involve both of these elements, at least implicitly. The acceptance itself is clearly an act of will, whatever the signs to evidence it. But there must also be an *object* of acceptance. On this point, however, difficulties arise, for if the object of acceptance is nothing more than subjective expectations, as

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But see Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, *supra* note 67, where it is argued that only a combination of restitution and punishment will rectify criminal wrongs. Cf. J. LOCKE, *supra* note 58, §§ 7-11.

<sup>115</sup> Again, I am starting from a world of general relationships only. In the ordinary world, of course, there may be cases in which third parties have special rights against first or second parties that will have the effect of precluding these parties from entering into particular voluntary associations: if *A* has agreed to sell *x* to *C*, he cannot subsequently sell it to *B*, although in and of itself the agreement between *A* and *B* is unexceptionable.

one line of argument would have it,<sup>116</sup> then all the arbitrariness we want to avoid can enter. And indeed, if the object of acceptance is in subsequent disagreement, then the original act of agreement itself is called into question.

In order to avoid these difficulties, then, we have to do what we did in the case of general relationships, *viz.*, look to the property foundations of the agreement. Not only will this give empirical and hence objective content to the interaction, but it will capture the transfer aspect of a contract as well. Expectations fit uncomfortably here at best; while it is true that we create expectations in others when we act, these can hardly be objects of transfer. (In truth, they describe only our views about what has in fact been transferred.) I suggest, therefore, that we treat each contractor as having transferred to the other the title to something he owns, some future act or course of action, some piece of tangible property. What each party accepts, then, is the exchange of titles between the parties, not the subjective expectations that this exchange may have created.

For the transfer to be morally legitimate, however, and hence for the rights and obligations that result from it to be justified, it is imperative that the acceptance that consummates it be voluntary. Thus the process must be free from duress, which occurs when one of the parties uses or threatens to use force in order to extract the agreement, thereby vitiating the act of acceptance itself. With duress we have two distinct takings: the use or threat of force in such a situation is an intentional taking; and the involuntary transfer of the object thus extracted amounts to a further taking. While it is possible, with care, to include "undue influence" under the concept of duress—for here it is arguable that consent is vitiated by the acts of one of the parties—it is *not* possible to include so-called "economic duress." That *A* was "compelled" by his own private necessity to enter into an agreement with *B* is no reason to set that agreement aside. (Necessity of one kind or another is what leads to *all* exchanges.) If *B* has a perfect right to make *no* offer—and of course he does—then he has a right to make the offer that *A* accepts. To be sure, *A* could accept *B*'s offer and then have it adjusted by the court on a finding of "substantive unconscionability"; but in

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<sup>116</sup> See, *e.g.*, 3 R. POUND, JURISPRUDENCE § 88, at 162-63 (1959). These disagreements in contract theory often relate as much to questions of evidence or proof as to substantive questions about the nature of the contractual agreement. But these are distinct issues, and should be kept so, however closely related they may be.



that case we *would* have duress, for *A* would be using force—that of the state—to get a term he could not get in the marketplace: the state, in short, would underwrite a private taking!<sup>117</sup>

Voluntary associations may be vitiated by fraud as well as by duress. But the case against fraud—a complex issue I will only touch upon here—is rather more difficult to make out. Let us be clear first, however, about what fraud is. It is *not* the nondisclosure of facts, even where those facts, had they been known, would have precluded the agreement. As we saw earlier, there is no affirmative obligation to act and hence no obligation to speak. Thus there is no obligation to help strangers in making their market decisions. Suppose, for example, that *A* makes a handsome offer to *B* for a painting *B* owns, thinking wrongly that it is a Rembrandt. *B*, having given no representations at all about the painting, accepts, and the exchange is made. Here, one could say, the painting represented itself; and if *A* was so rash as to buy it on this representation alone, then we haven't a case of fraud before us but a simple case of bad judgment. It is at his own risk that *A* makes an offer to *B* for something, *B* having made no representations about the thing.<sup>118</sup>

If in the process of negotiations, however, *B* does make representations, and he misrepresents the object under consideration, then the issue of fraud arises.<sup>119</sup> Yet even here it is by no means clear just what rights and obligations are at issue. While *B* misrepresents the object he wants to exchange, he does not *compel* *A* to accept that object or those representations. *A* may walk away from the offer, or he may check the representations out for himself; thus it is difficult

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<sup>117</sup> This is precisely what happens, of course, when the court sets aside or adjusts private agreements on grounds of substantive unconscionability, which is very different from the procedural unconscionability being sketched above. For an excellent discussion, see Epstein, *supra* note 18.

Notice too that the necessity that "compels" *A* to the agreement may be brought about even by the actions of *B*, provided *B* has an independent right to perform those actions. Again, the theory of rights is strict; it does not look to the motives behind an action in order to determine whether it may or may not be performed.

<sup>118</sup> It should be noted—prudent business practices aside—that the gathering and giving of information is itself not without costs. Just as in the broader case of action, then, the theory of rights does not require one individual to expend himself upon another—though of course he may do so if he chooses. Needless to say, the modern trend toward "full disclosure"—whatever that could possibly mean—is very much at odds with the strictures set by the theory of rights. See, e.g., Landers, *Some Reflections on Truth in Lending*, 1977 U. ILL. L. F. 669.

<sup>119</sup> On the related cases of partial disclosure, concealment, and innocent misrepresentation see Epstein, *supra* note 18, at 298-99.

to determine just what is *taken* by *B* when *A* accepts the offer.<sup>120</sup>

It is customary at this point to say that misrepresentation vitiates a contractual agreement because there is in fact no agreement when it is present—there is no “meeting of the minds.”<sup>121</sup> *A* and *B* exchange titles on the basis of their respective representations; had *B*’s representations been accurate, however, *A* would not have accepted (at least to just those terms). Thus the consent that brings about the exchange is spurious. What *B takes*, therefore, is the object *A* hands over in exchange, *A* not having given the appropriate consent.

Intuitive as this argument may appear—and perhaps it will suffice in a certain range of cases—it is less than satisfactory. In the first place, *A* and *B* *do* reach an agreement, but that agreement does not cover the transaction that is in fact performed by *B* (I will develop this point below). Moreover, the argument appeals to counterfactual conditionals, which may or may not be true (had the representations been accurate *A* might very well have consented to the identical terms). Finally, the argument does not really draw out the element of compulsion that is there to be drawn out. In order to do that, however, we will have to place a somewhat different interpretation on “misrepresentation” than is ordinarily provided, but one that more satisfactorily brings out the element of fraud involved. In brief, I suggest we treat misrepresentation not simply as a failure to accurately represent the object exchanged, as a narrow

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<sup>120</sup> Surely nothing is taken if *A* does *not* accept, unlike in the case of duress; there the use or threat of force is itself a taking, quite apart from whether it compels acceptance.

Notice that these questions arise in ordinary truth-telling cases as well, not excluding those involving news reporting. It is easy to say, of course, that we have an obligation to tell the truth. But that claim has to be fit within the larger generic framework developed earlier. As we have seen, there is no moral obligation to speak. But even if we do speak it is doubtful that there is any moral obligation to tell the truth, unless it can be shown, along lines developed earlier, that telling falsehoods *takes* something that others own. Moreover, it must be shown precisely how it is that this taking occurs, which is just the problem above. If that were able to be shown in some far-reaching way, then it would seem that our First Amendment speech and press (and religion?) guarantees would have to be justified not with reference to the theory of rights but on consequentialist grounds—say, that in the long run these liberties work for the best. This would be a less than happy result! (J.S. Mill invoked just such consequentialist grounds in his defense of freedom of expression. See J. MILL, *ON LIBERTY*, Ch. II. (1858), reprinted in 43 *GREAT BOOKS OF THE WESTERN WORLD* (R. Hutchins ed. 1952).)

<sup>121</sup> Notice that this cannot be said of the nondisclosure example above. To be sure, at one level there was no meeting of minds: the painting *A* thought he was getting was not the painting *B* thought he was giving. But at the level of description consistent with the example there was a meeting: for *A* offered to buy simply “that painting,” which is precisely what *B* gave him.

interpretation of the idea would have it, but as a withholding of the object in fact represented.

Notice first that in the example before us consent *is* given, but again, not to the transaction that is in fact performed by *B*. *A* and *B* have made an agreement, that is; they have agreed to an exchange of titles. Now a title just is a representation: it relates an owner to the object owned through a representation of that object. Thus when *A* accepts the title to something owned by *B* he accepts both the title and, in time at least, the object that stands behind the title. (He need not accept immediate *receipt* of the object, of course, though he does accept immediate *ownership* of it.) If what he receives, however, is something other than the object the title represents, then either *B*'s transaction is not yet complete or *B* has defrauded him. The compulsion, then, arises from *B*'s retention of the object represented by the transferred title (assuming there is such an object), *i.e.*, from his failure to hand over the object to which *A* now holds the title: *B*, in effect, is taking that object, and thus *A*'s right to the object he now owns is violated. We need look to no mental elements, then, but only to the representations given and accepted—the titles exchanged—and compare these with the objects exchanged. If one of the objects does not match the representations, then either it is being withheld or it does not exist; but in either case the agreement has not been satisfied. In short, in his misrepresentations *B* has in fact represented something, the title to which has been accepted by *A*; *B* now has the obligation to transfer the object represented by or standing behind the title.<sup>122</sup>

It should be noticed, then, that this interpretation of fraud locates the defect not so much in the process of contract *formation* as in the failure of contract *completion*. Still, the defect is in procedure, not in substance. The contract may be set aside, that is, not because of any finding relating to the "fairness" of the terms—the "substantive unconscionability" mentioned above—but because as a procedural matter its terms have not been satisfied. It is a very different thing to set a contract aside because its *terms* are found unsatisfactory by

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<sup>122</sup> Admittedly, this interpretation of fraud has more the flavor of nonperformance than misrepresentation; accordingly, it works better for those cases in which we want to require specific performance—however broadly understood—than for cases in which prior to the transfer of titles, *B* holds no title to be transferred. A full discussion of these issues would take us into problems of contract formation, evidence, and so forth, all of which are beyond my present scope. My aim has been simply to indicate how it is that fraud may result in a taking and hence in a violation of rights.

the court. When it does that the court is making substantive or value judgments, designed to supersede those that have already been reached by the parties to the agreement.

Now I have said little on this point because in truth it is a point about which the theory of rights has little to say—other than that the court has no moral right to intercede on behalf of one of the parties to obtain for him a term that he could not obtain voluntarily from the other party. If equal rights means anything it means that individuals—regardless of their respective “bargaining power”—shall be equally free from interference to reach whatever agreements they can with each other in the marketplace. This they presumably will do with reference to whatever theory or conception of value they bring with them into the marketplace. Thus the question of whether a particular term (*e.g.*, a price) is fair is for them and them alone to decide. Likewise, given that we are dealing with competent adults, whether a particular exchange is in the best interests of the parties to the exchange is for those parties alone to decide. It is basic to our conception of human dignity that we let individuals decide these questions of value for themselves, that we do not force them (*e.g.*, through the courts) to accept values they did not choose—whether they be poor and weak, or rich and powerful.

In the adjudication of forced exchanges, however, the theory of rights must eventually turn to the theory of value. Once a determination of responsibility and entitlement has been reached, that is, considerations of value will have to be introduced in order to redress particular wrongs. This applies not only to torts and crimes but to most contractual takings as well, including nonperformance. And of course it applies also to the special case of parent-child disputes.<sup>123</sup>

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<sup>123</sup> Very briefly, the argument that justifies the obligations of parents to their children borrows from both the tort/crime and the contract models. In performing acts of procreation, just as in performing any other action, the parents are responsible for the consequences should those acts create rights in others (the defense of ignorance will no more avail here than in any other tort case). We are responsible, that is, for the upshots of the actions we voluntarily perform. Of course, in many cases of begetting—one would hope in most—the consequences are not only voluntarily but intentionally brought about as well. Thus the contractual model is more appropriate here. But whether children are willingly or only reluctantly brought into being, the special rights they hold against those responsible for creating them are every bit as real as the special rights of tort victims or contractors. The difficulty here, however, is that there is no status quo, as in the tort case, or no agreed upon terms, as in the contract case, to aid in delineating the content of these rights. As a result, such ideas as “custom” or “community standards” enter, with all their attendant problems, not only of verification but of justification as well.

For in each of these cases the consent that ordinarily brings individuals together in the first place and then enables them to distribute values between themselves is missing. If *A* has hit *B* they are already in association; *B* has a right to be returned to the status quo, but just what that entails, beyond a certain level of description,<sup>124</sup> is a matter of values, not of rights. To be sure, *A* and *B* might agree about the value of, say, a life or a limb; but if they do not they cannot now simply walk away as if they had been unable to reach an agreement in the marketplace. Here enter the arguments for forced adjudication by third parties—including that performed by government.<sup>125</sup> This is not the place to develop those arguments. I mean simply to point out one additional and very important area in which the theory of rights and the theory of value come together.<sup>126</sup> In doing so, however, I want also to indicate just how far reason can go toward resolving moral issues, before we have at least to introduce consideration of value.

This completes, then, the outline of our moral rights and obligations. I have sketched arguments to show that there are such rights; and I have indicated broadly what there are and are not rights to. Again, the reader is encouraged to turn to the cited works for a more complete account of both the justificatory foundations and the details of application. What I want to do now is apply these findings to the corporate issues set forth in Part II. In order to do that, however, it will be useful to add a government to the moral picture thus far developed. In keeping with the classical liberal tradition—and hence with the American tradition—let us allow that the function of that government—its only function—is to secure the rights outlined above.<sup>127</sup> Thus it will be a government that has the

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<sup>124</sup> For an indication of how far the formal analysis can be pushed, before values have to be brought in, see Pilon, *supra* note 67.

<sup>125</sup> Anarchists sometimes argue that all of this might be worked out by contract and hence voluntarily, thereby avoiding the need for government. Individuals might, for example, make contractual arrangements for adjudication services *before* they have any forced exchanges. But of course—arguments from prudence aside, for they are not really moral arguments—the purchase of such services may itself have to be forced.

<sup>126</sup> Recall that public law may have to be introduced to resolve the problems that arise from acts of endangerment and nuisance; in developing “public” or “common” standards of endangerment and nuisance, value considerations will likely be necessary. See note 87 *supra*.

<sup>127</sup> Thus the enforcement of rights—against domestic and foreign threats—will be the only “service” provided by this government. For lengthy discussions about this service, including the problems of financing it, see R. Nozick, *supra* note 11, pt. I, at 3-146. Notice that such services as fire protection, garbage collection, education, insurance provision, recreation facilities, and even highways and central banking do not arise because of right violations; thus

authority to coerce individuals only when those individuals have violated the rights of others or are threatening to do so. It is difficult enough to justify even this amount of government. A more extensive government most certainly cannot be justified.<sup>128</sup>

#### IV. CORPORATIONS AND RIGHTS

##### A. *The Legitimacy of the Corporation*

We are now in a position to take up the fundamental questions raised at the end of Part II about the legitimacy of the corporate birth. Recall that on this issue turns both the legitimacy of the corporation itself—its right to exist—and the further question whether it is a private or a public institution. For if justice is historical, then whether the corporation is legitimate depends upon how it came about; and whether it is private or public depends upon the role of the state in that process. But that process is one of individual actions. Are these legitimate? Do they need to be “authorized”? Or are they performed by right? Answers to these questions have now been adumbrated; in order to develop them more fully, however, we need to be clear about what it is these actions are bringing about. We need to know more precisely, that is, just what the corporation is. Let us try first, then, to clarify this complex subject.

1. *Classifying and Justifying Associations.*—In exercising their rights of voluntary association and organization it is likely that individuals, given the inclination and the liberty to invent, will create as many different kinds or forms of association as necessity, desire, and human imagination will allow—marriages, clubs, partnerships, corporations, to mention only a few. But what constitutes a particular form of association is a matter of linguistic or social or legal convention, not a matter of reason. We can use concepts like

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they might more legitimately—and efficiently—be provided by private mechanisms, just like most other services. On the private provision of fire protection in Scottsdale, Arizona see Poole, *Fighting Fires For Profit*, REASON, May 1976, at 6.

<sup>128</sup> Assuming that this minimal state can be justified (*but see* note 51 *supra*), and that its function is limited to the securing of rights, this still leaves immense questions about what means may be employed in pursuit of that end. I have in mind not only the procedural or enforcement issues noted earlier (note 103 *supra*), but the considerable regulatory powers the state might take on in the name of securing rights. If these difficult questions arise even in the case of the minimal state, however, which is called upon to enforce what many would call the parsimonious theory of rights set forth above (there are none of our contemporary welfare or social and economic rights), they will arise *a fortiori* as the state takes on more functions, or as more rights are “found” to be enforced. It is thus no accident that the more the moral, legal, and political world is expanded, the more uncertain and hence unstable it becomes.

"marriage" or "corporation" to order the associations that have come about; but there is nothing necessary or immutable about either these concepts or those associations—they are not "bound up in reason," reflecting "natural" or "essential" features of the world. We might use the concept "marriage," for example, to connote a certain kind of association between two people of the opposite sex; but we could as easily expand the definiens to include polygamous, polyandrous, or homosexual associations under the definiendum. As a matter of rights, in fact, those who want to create these alternative "marriages" have a perfect moral right to do so.<sup>129</sup> The most we can say is that this is not what *we* mean by "marriage"; and of course we could go on to disapprove of these associations by appealing to some theory of value. But neither linguistic nor social nor legal convention can tell us anything about what forms of association might arise or what forms would be morally legitimate if they did arise.<sup>130</sup>

It is important, then, to distinguish these taxonomic issues, which are rooted in convention, from the justificatory issues that centrally concern us, which are rooted in reason. How we choose to classify the associations that arise, and how we use the terms of classification, are questions altogether separate from the question whether the associations that do come into being are legitimate—whether they have a right to exist. Just as in the case of marriage, then, what a corporation is is a matter of convention: this institution may vary in its features, and of course historically it has.<sup>131</sup> It is the current custom, for example, to say that a corporation is defined (1) by its entity status<sup>132</sup>—it exists and acts apart or separate from

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<sup>129</sup> Compare Mr. Justice Douglas: "Polygamous practices 'have long been branded as immoral in the law . . . They have been outlawed in our society.' They have been called by the Court 'contrary to the spirit of Christianity and of the civilization which Christianity has produced in the modern world.'"; with Mr. Justice Murphy: "[The form of marriage before the Court was] 'basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears.'" *Cleveland v. United States*, 329 U.S. 14, 26 (1946) (Murphy, J., dissenting). Cited and discussed in E. LEVI, AN INTRODUCTION TO LEGAL REASONING 52-53 (1949). On variations in the marriage contract see Gillers, *Making Marriage Perfectly Clear*, JURIS DOCTOR, March 1972, at 56.

<sup>130</sup> Cf. note 10 *supra*.

<sup>131</sup> See, e.g., Mason, *Corporation*, 3 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCES 396, 396-97 (D. Sills ed. 1968): In defining the corporation "[t]he law is prone to emphasize [certain formal attributes which] tend to compress the corporation as a historical and developing institution into too narrow a mold; . . . the corporation is an evolving entity, and the end of its evolution is by no means in sight."

<sup>132</sup> But see *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. 110, 220 N.Y. Supp. 532, 543 (1927): "[A] corporation is more nearly a method than a thing."

its individual members or owners; (b) by its continuous succession or immortality vis-à-vis its members, with free transferability of investment shares; (3) by its having been "created" by law, either through a special charter of the legislature or, more commonly today, a general permissive statute; (4) by its power to act under a common name—to accept, hold, and convey property, to make and take contracts, to sue and be sued; (5) by the limited liability of shareholders to the amount of their investment; and (6) by the location of authority with a board of directors who in turn delegate authority to corporate managers (a feature less common to the small, closely held corporation). In differing ways these features have come to distinguish the corporation from other forms of association and in particular from other forms of business organization—sole proprietorships, partnerships (general or limited), business trusts, and joint stock associations.<sup>133</sup> But again, whether each of these features is necessary for some particular association to be a corporation is a contingent and less than settled matter<sup>134</sup>—and is irrelevant to the question whether that association is legitimate. What we need to know, then, is whether individuals can legitimately bring about an association with features such as these, and in particular, whether they can do so without the aid of the state. If they can then both the legitimacy and the privacy of this "corporate association" will have been secured, the particular histories of actual corporations notwithstanding. Thus it is the theoretical issue that I want to try to clarify here, not the historical question.<sup>135</sup> Whatever the actual history of the matter, that is, I want to

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<sup>133</sup> See 18 C.J.S., *Corporations*, §§ 9-13 (1939); H. SOWARDS, *supra* note 47, § 1.01. Note that the Internal Revenue Service excludes items (3) and (4) above from their test of whether an "association" is taxable as a corporation. See Treas. Reg. § 301.7701-2(a)(1)(1960).

<sup>134</sup> 18 C.J.S. *Corporations* § 12 (1939);

The difference between a corporation and a joint-stock company is more in degree than in kind, and in many cases almost the full measure of corporate attributes has by legislative enactments been bestowed on joint-stock associations, until the difference has become obscure, elusive, and difficult to describe.

<sup>135</sup> As an historical matter, it seems that corporations were indeed here before governments "created" them. See, e.g., Berle, *Historical Inheritance of American Corporations*, in *SOCIAL MEANING OF LEGAL CONCEPTS* 189, 192 (E. Cahn ed. 1950):

It is a matter of dispute between British scholars whether the British Crown created corporations or found and assumed the control of preexisting collectivities. Most students incline to the latter view, and seem supported by the balance of evidence. Certainly there are in England corporations appearing to originate before the King put seal to charter giving them legal recognition.

Berle is using "corporation" broadly here to include, for example, the University of Oxford, whereas my concern in this essay, as stated at the outset, is with the modern business



show that the corporation *can* legitimately arise and rightfully exist, without the participation or even the sanction of the state.<sup>136</sup>

2. *The Corporate Birth.*—Clearly, it is through complex contractual arrangements that the corporation will arise. The right to associate with others and to organize that association contractually—provided no rights are violated in the process—has already been established. What we need to do now is flesh these rights out with reference to the corporate features listed above.

Feature (3), that the corporation is created by law, must be set aside, of course, for that is a central point at issue. Let us start then with feature (6), relating to the delegation of authority, for this is a relatively uncomplicated matter. Suppose that *A* and *B* want to place a two-dollar minimum bet on a horse, but they have only one dollar each. Surely they have a perfect right to pool their resources in order to be able to make that minimum bet. Moreover, *A* has a right to grant *B* the sole authority to decide which horse to place the bet on; he might even agree, in deference to *B*'s greater "horse

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corporation. Yet even this institution, or at least its close precursor, the joint stock association, predated government sanction. See, e.g., the statement of Manne in *Hearings Before the Senate Commerce Committee on Corporate Rights and Responsibilities*, 94th Cong., 2nd sess., 235-36 (1976):

It has been pointed out that there is literally no aspect of "corporateness," with the possible exceptions of suing and being sued in a corporate name, that could not be achieved through private contract rather than through the provisions of general incorporation laws. Indeed, English entrepreneurs, during the greatest period of industrial growth known in the history of the world, managed the organization of large business enterprises with little or no involvement by the state through the use of a business form known as the joint stock association. This form, which was the eighteenth and early nineteenth century English version of the modern American corporation, was constructed almost exclusively from the common law concepts of trust and private contract.

See also Hessen, *supra* note 1, at 7; H. SOWARDS, *supra* note 47, § 1.01.

<sup>136</sup> Thus Berle continues: "What is clear, and important, is the preoccupation of the English King-state to bring these [corporations] under its own control, and to propagate the doctrine that they could exist only by state creation." Berle, *supra* note 135. It is this authoritarian doctrine, resurrected by the Nader group (though assumed by many others), that I want to explode, not by appealing to the history of the matter but by bringing out the theory of the matter. For although the historians may be correct in claiming that the corporation predated state approval, this institution might still have been illegitimate if the process necessary to its creation was itself illegitimate, if rights were necessarily violated in bringing it about.

Before beginning, an ambiguity in "creature of law" should be clarified. Insofar as a corporation is a creature of contract, as I will argue, it can be construed as a creature of *private* law (assuming that some state would recognize that contract and enforce its provisions). But this is *not* to say that it is a creature of the *state*, i.e., that the corporation is *created* by the state, which is ordinarily what is meant when it is said that the corporation is a "creature of law." It is this ordinary (stronger) claim that I mean to dispel.

sense," to take a smaller share of the proceeds should the investment work out. There is nothing, in short, about this pooling of resources, this delegation of authority over the resources, or this arrangement for subsequent redistribution of the resources thus ventured that takes anything from any third party or from either of the parties to the association. To be sure, the atom of ownership and control has been split here, as Berle would put it. But who is to complain? Certainly not the parties to the arrangement. On the contrary, they would have grounds for complaint only if they were *prevented* from making whatever arrangement they thought best in their circumstances. For to own property, as we saw earlier, is to own all the uses that go with that property—to have the right to control it. But surely one manifestation of control is the delegation of subsequent control. If an individual has the right to alienate his property altogether, he certainly has the right to alienate control of it in whatever more limited respects he chooses. In short, this complaint about the separation of ownership and control, at least as it involves the parties to the relationship, is simply without foundation from a moral point of view; for far from anyone's forcing *A* to delegate authority to *B*, no one has a right to *prevent A* from doing so.

Now this simple example of delegation is no different in principle, of course, than the more complex forms that concern us here. When individuals pool their resources through voting and nonvoting common shares, preferred shares, bonds, future options, and so forth, they are simply entering into agreements to distribute among themselves varying combinations of risk and control with respect to those pooled resources. In doing so they violate no rights of each other, for no one is forced to enter into the agreement; if some elect to accept nonvoting shares, for example, we must assume that this is simply a manifestation of their particular preferences—indeed, most corporate investors do not *want* to be actively involved in the management of their corporation, a point the proponents of "shareholder democracy" altogether ignore.<sup>137</sup> But neither do these investors violate the rights of third parties when they alienate control over their property or take on control over the property of others. For the general obligations that go with property are functions simply of the control of that property; insofar as that control has been transferred, so also have the obligations—they have not, that is, disappeared.

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<sup>137</sup> See Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

(This subject will be developed a bit more when I take up the limited liability question.) By a simple contractual agreement, then, we can legitimately delegate control over our property. We need no authorization; we do it by right, as an entailment of our general rights to use our property as we wish and to enter into contractual relationships with others.

We need now, however, to bring in other of the features listed above; for this act of delegation alone, of course, as in the case of *A* and *B* above, will not create a corporation. Nevertheless, the germ of the idea behind the corporation is already here; for when individuals come together to pool their resources in some joint venture<sup>138</sup>—however broadly defined—and entrust the control of those resources either to a few among them or to some third party, they are taking the first steps toward creating a corporation. They can go on to divide those pooled assets into different kinds of shares, as suggested above. And they can make these shares transferable, feature (2), thereby giving continuous succession to the association. There is nothing exceptional about this step: for even though subsequent investors are not party to the original agreement, they become party to it through their acceptance of these shares, all of which, including the transfer itself, is legitimate if provided for in that original agreement. Again, these individuals can give to their association a common name under which it might “act,” feature (4), setting aside for the moment the questions that arise about the nature and scope of these various acts. And each of these steps is legitimate, for each is performed by right: the features are brought about contractually, in violation of the rights of no one.

There remain, then, features (1) and (5), entity status and limited liability, along with further specifications about the acts of the association. The idea that the corporation is an entity that exists and acts apart or separate from its individual members<sup>139</sup>—which of course is the heart of the issue before us—has long perplexed legal theorists.<sup>140</sup> To be sure, the courts have “pierced the corporate veil”

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<sup>138</sup> I am using “venture” here more broadly than it is ordinarily used in legal contexts, where it denotes a single transaction or project, usually of short duration. These lines, of course, are vague.

<sup>139</sup> For clear statements of the point see 18 C.J.S., *Corporations* §§ 1, 3, 4, 10, 11, 13 (1939); cf. note 132 *supra*.

<sup>140</sup> See, e.g., Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947), where it is argued that “the entity commonly known as ‘corporate entity’ takes its being from the reality of the underlying enterprise.” Cf. Conard, *supra* note 33, ch. 10.

when they have had to;<sup>141</sup> they have "reached inside" when individuals have attempted to hide behind the corporate entity,<sup>142</sup> thereby implicitly calling into question the existence of this *persona ficta*. At the same time, they have allowed and indeed encouraged this fiction in order, as Chief Justice Marshall put it, to "enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand."<sup>143</sup> The suggestion here, clearly, is that the corporation-as-entity is a *practical* construct, reified for purposes of convenience only. Much as this view may offend those who would seem to want to vivify the corporation in order better to crucify it, I submit that Justice Marshall's interpretation on the point is essentially correct.<sup>144</sup> We treat the corporation as an entity merely because it helps us to deal with this complex association.<sup>145</sup> In deference to Ockham's razor, it would be a mistake to read more into the entity status than this. When the corporation "acts," after all, it is not really some *persona ficta* that is acting. Only real human beings ever act. What these particular people do, of course, is act "on behalf of" or "in the name of" the corporate association. In so doing it may be that they give a certain "being" to the corporation. But could not the same be said for those who act "on behalf of" a joint stock association, a business trust, or a partnership? Is the corporation any more an entity than these? And when the corporation "holds property" it is but a simple next step to ask, Who holds the corporation?

Now it may be objected that this interpretation, which treats

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<sup>141</sup> See 18 C.J.S., *Corporations* § 6 (1939); H. SOWARDS, *supra* note 47, § 5.01.

<sup>142</sup> The courts have also reconstructed the corporate entity, when the paper "corporate-entity" has been found not to correspond with the "enterprise-fact." See Berle, *supra* note 140, at 348-50. In doing so, however, the courts in effect are rewriting corporate agreements according to their interpretation of the "enterprise-fact," which Berle generally approves, but which raises questions not unlike those that arise in the more ordinary "substantive unconscionability" cases.

<sup>143</sup> *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

<sup>144</sup> But the practical reasons that lead to the reification of the corporation do not necessarily entail that the corporation is "the mere creation of law," a conclusion that Justice Marshall also put forth in that opinion (see note 45 *supra*). Here we have to distinguish between the public corporation (e.g., TVA), which is created by law, and the private corporation (or so I want to show) that is the subject of this essay, a distinction that Nader and others want to conflate. See note 47 *supra*.

<sup>145</sup> "Courts have long recognized that, despite its long history of entity, a corporation is at bottom but an association of individuals united for a common purpose and permitted by law to use a common name." Berle, *supra* note 140, at 352. I will shortly call into question the justification for this permissive (and hence, by implication, prohibitive) function of the state.

these different "entities" equally as practical constructs, ignores the fact that it is precisely to distinguish the corporation from the others that the state gives it separate entity status. This objection begs the very question at issue, of course. Moreover, it suggests that the state has certain powers and rights that individuals do not first have. Where did these come from? Recall that the legitimate state has only those rights that individuals first had and then gave up to it.<sup>146</sup> If individuals cannot legitimately create a corporation, then how can the state do it? Conversely, if individuals can create a corporation, then the state can do so only if individuals have given it that authority, which is a further point the proponents of state creation have to demonstrate.

But it will help in getting to the bottom of these entity and creation questions if we look at what the state does when it "creates" a corporation; this will enable us to determine whether a similar act cannot be performed by individuals in their private capacities. In his case book on corporations Hugh L. Sowards points out that under general incorporation laws

subscribers execute an agreement regarding the organization of the proposed corporation ("articles of incorporation"). These articles are then sent to the office of the secretary of state for approval, and, upon approval and payment of certain filing fees and taxes, the subscribers receive a "certificate of incorporation." In the literal sense, no "charter" is now issued to a business corporation under the general incorporation laws.<sup>147</sup>

Clearly, when the state "creates" a corporation it does nothing more in fact than *recognize* it (as having satisfied certain rules of formation). The corporation itself, that is, has already been created by the private parties who constitute it, through their contractual agreement, their articles of incorporation. Now it is true that the registering of these articles—so often taken to be the corporate creation

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<sup>146</sup> See note 52 and the accompanying text *supra*.

<sup>147</sup> H. SOWARDS, *supra* note 47, § 1.02. See also Hessen, *supra* note 1, at 7:

The articles of incorporation (or charter) are a contract solely between the individual founders; the state is not a party to it. The articles contain purely factual information, such as the name and purpose of the business, its intended duration, the number of shares to be issued, and so on. The state does not give life or birth to the corporation. Just as the Registrar of Deeds records every sale of land, and the County Clerk records the birth of every baby, so the Commissioner of Corporations records the formation of every corporation—nothing more.

Cf. R. NADER, *supra* note 25, at 62-63 (quoted at pages 1260-61 of the text).

itself—is necessary for the *legal* legitimacy of the corporation, at least in the present legal context. (I will consider the possible justification for this in a moment.) But that legitimacy should not be confused either with the *moral* legitimacy of the corporation or with its creation. For again, its moral legitimacy depends only upon its having come about by a process that violates no rights; it does not depend upon any “authorization.” Through the recognition or acceptance inherent in the corporate agreement—no different in principle than the acceptance that justifies and brings into being any other contractual relationship—the corporation is morally justified and thus is created. The legal legitimacy that the state adds by its public recognition has nothing to do, then, with the actual creation of the corporation.<sup>148</sup> In sum, the corporation, understood as an entity only in the sense in which any other contractual association may be so understood, can be brought into being by private individuals alone, without the aid of the state. Far from being a “creature of the state,” it is a creature of private contract,<sup>149</sup> and as such is a morally legitimate institution.

But if the corporation is a morally legitimate private institution, then what is the justification for the state’s requirement that it be registered and approved? Registration raises disturbing questions, not unlike those that arise in the case of occupational or other licensure:<sup>150</sup> the power to authorize, after all, is the power to prohibit or otherwise control. (Note the use of internal passports in the Soviet Union.) And indeed, if legal powers such as this receive their justification only by first being the moral rights of individuals, then the existence of this power would seem to suggest that third parties in the state of nature have the right to prevent the corporation from existing until they have first approved of it or authorized it. As we saw in Part III, no such right exists; neither the size nor the form of the corporation will generate such a right. The corporation *per se* does not endanger, for example. What then will serve to justify this

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<sup>148</sup> Indeed, what does the doctrine of “*de facto*” corporation entail if not that individuals can create a corporation independently of state action. For the court is implicitly saying this when it recognizes an ongoing enterprise that has not been legally incorporated as a corporation in fact. See Berle, *supra* note 140, at 345-47.

<sup>149</sup> Notice that the privacy of the corporation has nothing to do with the breadth of ownership. The point is logical: if everyone in America owned a share of General Motors stock, or worked for General Motors, or drove a General Motors car, the General Motors Corporation would still be a private, not a “quasi-public” institution. Cf. note 45 *supra*.

<sup>150</sup> See, e.g., M. FRIEDMAN, *CAPITALISM & FREEDOM* ch. IX, at 149-60 (1962), where licensure of the medical profession, a seemingly sacrosanct state function, is thoroughly criticized.

power? Perhaps it is related to the state's enforcement function; the state registers automobiles, for instance, and records the births of babies. But why single corporations and a few other associations out? Why not register partnerships, say, or sole proprietorships? (I set aside local licensing requirements.) The historical explanation—that his power is a carryover from the period when corporations were created by special charter—is of course an explanation only, not a justification. Maybe the state requires registration in order to insure that its rules of corporate formation have been satisfied. But again, this could be said about any contractual formation. I submit, in short, that this registering and authorizing function of the state is of dubious moral legitimacy. At the least, those who would argue for it have the burden of showing that it is justified. Here again, there may be *reasons* for requiring that corporations be registered, but the *justification* for this requirement must be couched in terms of rights.

Now this conclusion is all the more interesting in that registration—"federal chartering" in particular—is the foundation of the recent manifesto of the Nader group. They would impose their sweeping new regulations on the corporation, that is, through a requirement that the seven hundred or so largest American corporations be "chartered" by the federal government. The assumption here, clearly, is that the state has a legitimate right to exercise some exclusive franchising power, that freedom of economic association, of which the corporation is but one manifestation, is a privilege granted by government.<sup>151</sup> In return for receipt of this privilege, Nader's regulations would be imposed—otherwise, no such liberty.

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<sup>151</sup> For a judicial expression of this view see Mr. Justice Brandeis, in dissent, in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-49 (1933):

The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen. . . . Throughout the greater part of our history a different view prevailed . . . [Incorporation for business] was denied because of fear. Fear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly . . . There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.

Notice that the fear Justice Brandeis speaks of here cannot be accommodated within the theory of rights set forth in Part III, for it is not generated by any specific acts of endangerment but is rather an unspecified anxiety about size. (It is not a little ironic that a similar or indeed greater anxiety is not expressed about thus increasing the size and power of government—the only institution with a monopoly on the use of force—which history indicates is far more to be feared than private institutions.) Notice too that we have here a good example of the failure to distinguish reasons from justifications.

Now to be sure, there are legitimate reasons to regulate some kinds of corporate behavior, just as there are legitimate reasons to regulate some kinds of individual behavior, as indicated in Part III. But there are also straightforward legislative or judicial routes to implementing those regulations, where presumably they would have to stand or fall on their own merits. To implement them through this antiquated and specious chartering route, however, is to build these ostensibly "moral" regulations upon a bed of moral quicksand, upon the assumption—which we have seen to be false—that the rights of property and association are functions simply of the public interest. Indeed, so thoroughly does the Nader group subscribe to this view as to assert, in as bald an example of legal positivism as one is likely to find this side of the Soviet Union: "The law creates and protects that bundle of rights called property or the corporation, and this same law can rearrange that bundle of rights if it is in the public interest."<sup>152</sup> Private property be damned: you will have it and use it at our pleasure!

Let us turn, then, to the limited liability feature, whereby shareholders are able to shelter their personal assets, limiting their liability for corporate debts to the amount of their investment.<sup>153</sup> This feature is often thought to be a major reason for incorporation;<sup>154</sup> and indeed, much of the entity status debate has limited liability closely in the background—the personal assets of shareholders are insu-

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<sup>152</sup> R. NADER, *supra* note 25, at 258. Those who think the comparison overstated are directed to the new Soviet Constitution (emphasis added). Article 1 establishes the positive foundations of the Constitution: the USSR "is a socialist state of the whole people, expressing the will and interests of the workers, peasants, and intelligentsia . . ." Article 13 limits "personal property" ("private property" is not used) to "articles of everyday use, personal consumption and convenience, the implements and other objects of a small-holding, a house, and earned savings" and then goes on to say that this property "shall not serve as a means of deriving unearned income or be employed to the detriment of the interests of society." To get a feel for what those interests might be, recall the logical connection between private property and our traditional liberties as brought out at note 94 *supra*, and then turn to Article 50: "In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations." In short, the Soviet Constitution has "rearranged" the bundle of property rights in the public interest. *Moscow News*, Supplement to issue no. 42 (2770), Oct. 22-29, 1977, at 4, 5, 10. For an indication of how primitive (and perverse) is the Soviet understanding of the theory of rights (*e.g.*, they simply do not understand that rights make no sense outside a theory of individualism), see the essays translated in 16 (3) *SOVIET STUDIES IN PHILOSOPHY*, Winter 1977-78.

<sup>153</sup> For a brief but perceptive discussion see Keeler, *Corporations: The Limited Liability Canard*, REASON, August 1977, at 48.

<sup>154</sup> See H. SOWARDS, *supra* note 47, §§ 1.01, 1.02, 2.01.



lated because it is the corporate entity that owes the debts, not the shareholders personally.<sup>155</sup> This "state-created privilege" in particular has been fastened on by corporate critics, for it seems to justify, as a *quid pro quo*, a greater measure of corporate control: if the state thus shelters corporate owners, in order to encourage them to invest, it is only right that corporate activities be regulated, this to protect the creditors and potential victims of the corporation who would otherwise be protected by the liability of its owners.<sup>156</sup> What we need to do, then, is sort these issues out very briefly, first with respect to contractual liability, then with respect to tort and criminal liability. More specifically, we want to determine whether this feature is justified—for on the surface it does not appear to be—and if justified, whether it too can be legitimately brought about by individuals alone, or whether it is indeed a state-created privilege.

Limited liability with respect to contractual obligations is a relatively straightforward matter, both as a feature of the corporation and as a condition under which it does business. Those who create and own the corporation can make it a condition of their corporate agreement that the corporation will contract with outsiders only on the basis of limited liability. This corporate feature can be brought about contractually, that is, in violation of the rights of no one. But to bring the feature about is not the same as to exercise it. Whether outsiders want to contract with the corporation on the basis of limited liability is for them to decide. If they do agree, however, if they contract with "the corporation," agreeing to look only to the corporation's assets for satisfaction of their claims, not to the shareholders or to those with whom they negotiate, then there is really little more to be said from a moral point of view. No one is forced, after all, to do business with the corporation.<sup>157</sup> Consequently, no one is forced to do business on any particular terms: in the case of small corporations, for example, creditors sometimes obtain the personal liability of shareholders over and above that of the corporation, or the right to elect directors, or whatever other condition they think will best protect their investment. Here, as in all contractual arrangements, the variety of conditions is limited only by consent.

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<sup>155</sup> In a number of jurisdictions shareholders may be held liable over and above the corporation; see, e.g., 1 Z. CAVITCH, *BUSINESS ORGANIZATIONS* § 3.05 [4] (1978).

<sup>156</sup> See, e.g., R. NADER, *supra* note 25, at 35, 63; C. STONE, *supra* note 25, at 46.

<sup>157</sup> My use of "forced" here is of course strict: it excludes cases in which one is "forced," because of personal circumstances, to accept terms one does not like. (Are the terms of obligation *ever* liked?) See the discussion of so-called "economic duress" at III.C.4.

When brought about by private agreement, then, there is no problem with justifying limited contractual liability, either as a condition under which the corporation will do business—and hence as a feature of the corporation—or as a condition under which the corporation in fact does business.

In the case of torts and crimes, however, limited shareholder liability raises quite different issues.<sup>158</sup> (Recall that I am treating crimes as intentional torts.) A first assessment would hold that no one—including a corporate association—has a right to limit his liability toward strangers. That assessment is correct, but it does not really get to the heart of the matter. For the question is not so much whether shareholders have a right to limit their liability, but whether shareholders should be held liable at all! Shareholders, after all, are not the ones who ordinarily commit “corporate” torts and crimes, for they are not the corporate actors. (The exceptions will involve those corporations in fact controlled and run by the shareholders.) In most cases, that is, they have transferred control of their holdings to directors and then to management, who have in turn delegated authority to other corporate employees, often along a very lengthy and complex chain of command. It is these people who, in varying ways and differing degrees, commit the torts and crimes. In principle, then, it is these people who should be held liable, not “the corporation”—which “acts” only metaphorically—and hence not the shareholders. Thus the issue of *limited* shareholder liability for the torts and crimes of corporate actors should not even arise, for liability from shareholders is not owing.

This conclusion is very much at odds, of course, with both the law of corporations and the relevant underlying law of agency. In essence, on a theory of vicarious liability this law treats the corporate employee as an agent of the corporation principal: thus is the corporate master held liable for the wrongs of its employee servant.<sup>159</sup> Because the corporate entity is treated as the principal, the

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<sup>158</sup> Unfortunately I must limit myself to a brief and quite general discussion of the theory that underpins this exceedingly complex subject. As a matter of perspective, however, let me note two points here. (1) It is not often that victims are left inadequately compensated due to the limited liability feature; on the contrary, compensation is usually more than adequate when it is a corporation that is held liable. (2) Although the emphasis of the discussion that follows may suggest otherwise, I am not at all unconcerned about the victims of corporate wrongdoing; but rectifying the injustice done them by doing injustice to someone else is no solution, however well-intended.

<sup>159</sup> The employee servant may be held liable as well; and of course the corporate master has a number of defenses available to it, but one of them is not that its servant rather than

shareholders are indirectly liable—but only to the limit of their corporate investment. One must suppose the corporate critics to be implicitly saying that if they are unable to obtain a greater measure of outside control of the corporation, the corporate entity should be eliminated when torts and crimes are at issue, thus eliminating the source of *limited* liability and enabling the victim to go directly to the shareholders. (At the least, this would encourage shareholders to take a greater interest in their corporations—assuming they would still be inclined to invest in these enterprises.) What I am saying is that even if we eliminate the corporate fiction here—which would be a healthy step if we want to place responsibility where in fact it belongs<sup>160</sup>—it does not follow that the shareholders are liable at all: thus the “limited” issue does not arise. I am suggesting, in short, that the difficulty is with the underlying law of agency.

This suggestion is not new, of course. *Respondeat superior* has always been easier to live with than to justify.<sup>161</sup> The two most common rationales have been from control and benefit (or profit);<sup>162</sup> but revenge, carefulness and choice, identification, evidence, indulgence, danger, and satisfaction have also been cited as traditional justifications for this doctrine.<sup>163</sup> It should be clear that the argument from control cannot work here; for again, most shareholders have delegated control to others—as a matter of fact, that is, they do not control the corporate actors. But even if the sharehold-

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the corporation performed the act at issue. It is less than controversial to suggest that the law of agency—or, as many would prefer in the case of torts and crimes, the law of vicarious liability—is replete with difficulties, and very much underdetermined from a moral point of view. For a good discussion see C. GREGORY, *supra* note 76, ch. 12. See also R. STEFFEN, *AGENCY—PARTNERSHIP IN A NUTSHELL* (1977); for a study comparing the civil law treatment to that of the common law, with special emphasis on the hybrid law of Louisiana, see Müller-Freienfels, *The Law of Agency*, in *CIVIL LAW IN THE MODERN WORLD* 77 (A. Yiannopoulos ed. 1965).

<sup>160</sup> Indeed, if we are genuinely concerned about “the reduced sense of responsibility for one’s own acts that occurs when men are brought together into large institutional frameworks” (C. STONE, *supra* note 25, at 1), if we are serious, that is, about improving corporate behavior, let us look to those who in fact are performing that behavior, not to those who, at some remove, are benefiting from it. “Spreading” the liability to the innocent is not only wrong, as I will argue below, but from a consequentialist point of view it encourages irresponsibility and hence the very wrongs vicarious liability seeks to remedy! The last thing we want to encourage is the kind of “the corporation will pay for it” thinking that vicarious liability generates.

<sup>161</sup> See, e.g., Holmes, *Agency*, pt. 1-2, 4 HARV. L. REV. 345 (1891), 5 HARV. L. REV. 1 (1891).

<sup>162</sup> R. STEFFEN, *supra* note 159, § 30, at 73.

<sup>163</sup> Listed in C. GREGORY, *supra* note 76, at 706, citing from Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 455-56 (1923).

ers did control the corporation, as is sometimes the case, the argument would succeed only on pain of the very odd theory of act ontology that is implied by the maxim *qui facit per alium, facit per se*: rather than individuate the acts of principal and agent, treating them as the discrete act-events that in fact they are, this theory conflates the two into a single act involving a principal who "controls" the act and an agent who "performs" it—a sort of mind-body composite over two (or more) individuals, as it were. Not only does this create a very curious fiction, but it reduces the agent to a mere extension, a property of his principal. (One would suppose, therefore, that as an instrument of his principal the agent could not be held personally liable.) But there are difficulties as well with the argument from benefit or profit, which holds that just as the principal profits from his agent's activities, so he should bear the losses from those same activities. Suppose the principal loses from his agent's activities. Does this negative his liability? (Are not the principal's profits complemented by his possible *business* losses, while his agent's possible tortious losses are complemented by his fee or wages? If the principal performed the activities himself he would assume the tortious risk; but he would also keep the fee or wage he now gives his agent.) Clearly, profit alone will not suffice: there are many in addition to shareholders who profit from the corporation—creditors, customers, taxpayers—beneficiaries we would no more hold liable for corporate wrongdoing than we would depositors for a bank's mismanagement. Thus the emphasis has to be placed on "*his agent's activities*," which brings us back to the control argument with its implicit identity thesis. The benefit test, in short, appears to be little more than a vague appeal to one kind of fairness adage—"you have to take the bad with the good"—designed to make more palatable an argument in fact rooted in other considerations. If that basic argument from control and identity will not serve to show why, to take a stock example, the owner of a business should be held liable for the torts (much less then crimes) of his deliverymen, the argument from benefit will add nothing to it.

One can always turn to variations on the "deep pocket" argument, of course; and indeed, the long but accelerating trend toward shifting losses to those best able to afford them—whether liable or not—or even toward the outright socialization of losses is all too evident.<sup>164</sup> If we are looking for a *justification* of vicarious liability,

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<sup>164</sup> See, e.g., Pilon, *Justice and No-Fault Insurance*, *supra* note 67.

however, I suggest it will have to spring more directly from justifiable principles of *individual* liability,<sup>165</sup> which are rooted in specific, identifiable, causal acts, supplemented perhaps by a theory of group undertaking that itself is couched in the language of action, not that of status. This is not the place even to adumbrate such a theory. I do want to note, however, that an approach of this kind would begin with a strong presumption *against* extending liability: this gets the emphasis theoretically right, placing the burden upon those who would extend it to show the justification for doing so. By virtue of its being grounded in action, that justification would not serve to extend liability to the many status cases that are today fitted uncomfortably under the law of vicarious liability.<sup>166</sup> It is not likely, then, that liability would extend all the way back to shareholders, for each step back would have to be independently justified. But if it did, these shareholders would stand *personally* liable, *liable because of what they did*, not indirectly liable as owners of the corporate principal. Hence the "limited" issue would still not arise.

Now one can think of cases—indeed, they are legion—in which a theory of group undertaking, consistent with morally justifiable principles of individual liability, would end by placing liability on some clearly defined "group as a whole."<sup>167</sup> Is this tantamount to

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<sup>165</sup> I have in mind the principles developed in the essays at note 113 *supra*.

<sup>166</sup> In general, the only kinds of "control" obligations that can be fit within the theory of rights—other than the obligation of self-control—are those that arise from some specific act of the obligation-holder which serves to justify them and set their course over time—*e.g.*, the obligation to control one's property, children, or animals. (The liability entailed by these obligations is justified along lines developed in Part III.) Notice, however, that the control relationship between employer and employee—varied though it may be—is of a quite different order than these, owing to the very real differences between employees on the one hand and, say, property, children, and animals on the other. Any attempt at analogy that does not take these crucial differences into account is bound to be specious.

<sup>167</sup> See, *e.g.*, *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), discussed in C. STONE, *supra* note 25, at 54-56. The evidence in this case indicated that test results on the drug MER/29 had been egregiously falsified, and that "responsible corporate officials, at least up to the level of vice-president, had knowledge of the true test results." C. STONE, *supra* note 25, at 55, citing *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 718, 60 Cal. Rptr. 398, 418 (1967) (denial of rehearing). But the drug was released all the same, causing multiple symptoms in many who took it, including cataracts in about five hundred of those cases. The remarks of Judge Henry Friendly, who on appeal disallowed punitive damages, are instructive in connection with the discussion above: "[A] sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." 378 F.2d at 841. Judge Friendly's cost-benefit approach aside, is there any reason why the *stockholders* should suffer these losses? If they had arranged to accept the risk through contractual or insurance mech-

placing liability on "the enterprise entity"? Notice the leap that is lurking here. Liability is shifting from the individuals collected to the collectivity of individuals—and hence, presumably, to the owners (controllers, beneficiaries, etc.) of that collectivity. Is that metaphysical leap warranted, or analytically (*i.e.*, descriptively) correct? I suggest it is not. It does not capture, that is, what in fact is the case. For again, it is *people* who commit torts and crimes, not corporate entities. The injuries run from the trivial to the horrendous, those who cause them from menial workers to upper-level management, or combinations thereof. Insofar as the law is content, however, whether for reasons of efficiency or from mistaken theory, to concern itself simply with assessing corporate treasuries or with placing sanctions upon (often innocent) top management, we should not be surprised that this behavior continues.<sup>168</sup>

I have ignored here the practical problems of "reaching inside" the corporation. They are often considerable, and even more often, I expect, have led to holding the corporate entity itself liable when neither the facts nor a justifiable theory of liability would warrant this finding. (Indeed, as we move along the continuum that runs from the one-man to the giant corporation, all corporate problems—but especially those of liability—become increasingly complex. Short of drawing arbitrary lines, however, the underlying theory remains the same.) I have ignored too the problem of financial responsibility; though intimately related to the liability question, solvency is (or should be) a derivative matter. Given its proximity to limited liability in particular, however, it may be well to broach this issue. Just what are the moral ramifications of financial

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anisms—about which more shortly—that is one thing. But absent such arrangements liability rests with those responsible, who in activities such as this should be required to carry very high levels of liability insurance. Admittedly, this would not solve the punitive aspect—nor should it. But victims would be compensated—by the right people—and stockholder investments would be protected as well. *See also* note 168 *infra*.

<sup>168</sup> In order not to be misunderstood here, let me repeat that the fundamental purpose of law is to secure rights (*cf.* II.B.2 *supra*): in this case the rights of victims to compensation from those who have wronged them and the rights of shareholders to the protection of their investments. As brought out earlier, this end is not to be confused with other goods that may result. It is well recognized, for example, that the tort law may also serve to control behavior and even to "punish" wrongdoing, though strictly speaking these are not its functions. (The claim, then, that insurance mechanisms—which I will take up presently—vitiate the "purpose" of the tort law misconstrues that purpose; nor is it clear that these other beneficial results are vitiated by such mechanisms, but that difficult subject is best set aside.) Thus in drawing out these other benefits, as I do above, I do not mean to be understood as abandoning the primary focus.

responsibility? If individuals have an obligation to compensate those they injure, does this entail an obligation to not act—or at least to not put others at risk—if that standing obligation cannot be satisfied? If not, then what is the force of the standing obligation? If it is right that you be required to make whole those you have injured, is it not also right that you be required to *be able* to do that *before* you put them at risk? I submit, in short, that the obligation to not put others at risk unless financially responsible is a direct entailment of our obligation to make whole those we have injured. A denial of the former, that is, is tantamount to denying that we have an obligation to compensate the victims of our actions. Thus the burden of insuring possible losses rests where it should, with those who choose to create the risk, not with those who may suffer from it.<sup>169</sup>

As a legal matter, then, it might be required that all group or corporate undertakings be accompanied by appropriate financial responsibility provisions, just as individuals might be required to carry personal liability insurance.<sup>170</sup> In satisfaction of this requirement, any number of intra-corporate contractual and extra-corporate insurance devices might serve to spread the risk, thereby nullifying the concern—however misplaced—behind the limited liability objections. (At the other extreme is a corporation all of whose “employees” are independent contractors unrelated by any risk-sharing scheme, which might be the best arrangement in some industries.) Although it is difficult to generalize over the manifold world of corporations, we should imagine that in many cases indi-

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<sup>169</sup> None of this is to suggest, of course, that we may subject others to *any* risk provided only that we are financially responsible. There are two issues here. (1) As brought out earlier (see III.C.3 *supra*), all but isolated action is potentially risky to others. Hence the first step is to determine how much risk we have a right to subject others to, beyond which we violate their rights. (2) Once that complex question is decided, whether as a matter of private or public law (see note 87 *supra*), action within those parameters may *still* put others at risk and so should subject actors to financial responsibility requirements. Even if actions do not violate rights *per se*, that is, the fact that they *may* do so gives rise to the problem of financial responsibility. *But see* note 170 *infra*.

<sup>170</sup> The difficulties that would surround the enforcement of a general obligation to be financially responsible before acting are beyond imagination. The most we can do, it seems, is try to prevent those who are not thus responsible from putting others at risk in certain specified ways, *e.g.*, through the use of automobiles or dynamite. Unfortunately, this piecemeal approach gives the appearance of shifting the grounds for liability from action to property ownership, which many applications of vicarious liability (*e.g.*, so-called “permissive use” statutes) only reinforce. But if liability is indeed grounded in action, then it is individual actors who in theory are ultimately liable and hence should be required to be financially responsible.

vidual employees, or perhaps groups of employees, knowing their liability requirements, would accept employment only on the condition that the corporate entity, and hence the shareholders, underwrite those requirements. We should imagine too that many corporations would simply make this a term of employment, for reasons of efficiency. In that event the practical result would come to the same thing as under our present arrangements.<sup>171</sup> It is important, however, that we get that result in the right way, that our legal arrangements reflect the underlying moral theory—in this case, that shareholders be held liable for reasons of contract, not for mistaken reasons of agency; for only so will those results be legitimate.

In sum, corporate entities do not commit torts and crimes; corporate individuals do, and should be held liable for those acts without limits, even though that liability may be spread through the devices mentioned above. The limited liability the state has granted appears to have arisen because the corporate entity is treated as the principal of those corporate individuals; but because the corporate entity is in reality the shareholders, who are not usually liable, it has seemed unfair to hold them personally liable and so the state has limited their liability. In principle, absent any agreement to the

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<sup>171</sup> Let me try to clarify a tricky issue that is buried here. Appearances to the contrary notwithstanding, involuntary mechanisms for spreading the risk to which we put others—*e.g.*, the compulsory liability insurance that is usually entailed by financial responsibility requirements, “usually” because the sufficiently wealthy need not insure, need not share among others the risk they cause—are *not* the same thing as involuntary mechanisms for spreading the liability for those losses, after the fact, by placing it (in part) upon those who have done no wrong, even when all of those upon whom the losses are placed are members of the relevant class of risky actors. To be sure, in the former case too the involuntary contributions of those who have done no wrong go toward compensating those who have been wronged by others: this is just the respect in which the two arrangements may come to the same thing (“may” because they will do so only under certain specified conditions not likely to be mimicked in the real world). But while the standing obligation to make whole those we have injured entails the obligation to not put others at risk unless we are financially responsible, it does not entail that we compensate those whom *others* have injured, even though the mechanisms we devise to make ourselves financially responsible may have that result. (If we want to avoid that result, *i.e.*, if we want not to contribute toward compensating those whom others have injured, then we have either to become financially responsible—thereby excusing ourselves from compulsory risk-spreading schemes—or to not perform the acts that put others at risk.) These risk-spreading mechanisms are “compulsory,” then, and our contributions to them “involuntary,” only in the sense in which our obligation to compensate those we have injured is compulsory or involuntary: when we choose to put others at risk, while not being financially responsible, we take on the obligation to *be able* to make them whole should that risk materialize, just as we take on the obligation to *make* them whole if it does. Put briefly, all those who put others at risk must be financially responsible; those not financially responsible must become so (*e.g.*, by spreading the risk they cause) or not perform the relevant acts; only those whose acts in fact injure others may be held liable.



contrary, there should be no liability at all from shareholders, except when, by their specific actions, they are personally liable—as might be the case in the small corporation or, paradigmatically, in the one-man corporation—and then the liability should be without limits.<sup>172</sup> Far from being a “state-created privilege,” then, limited liability for the torts and crimes of corporate actors is an unwarranted disability upon shareholders; unless they have arranged otherwise, they and their investments should be immune from such losses.

It should be clear from these many considerations, then, that limited shareholder liability will not serve to justify the kinds of regulations being called for by corporate critics. As a corporate feature, limited liability for contractual debts can be brought about contractually, in violation of the rights of no one. Limited liability for the torts and crimes of corporate actors can also be brought about contractually, as a corporate feature, but here the issue is more complex: liability for these acts is in the first place personal and without limits; but if the corporation agrees to underwrite that liability, to whatever limits, it can do so, in which case we might want to call this limited liability a “corporate feature.” As such, this arrangement would not violate the rights of the parties to the agreement, for it would be brought about contractually. Nor would it violate the rights of potential victims; on the contrary, by satisfying (at least in part) the financial responsibility requirements of corporate actors, this arrangement would amount to explicit recognition of those rights. But whether the corporation did or did not assume this liability, as long as the financial responsibility requirements of corporate actors are adequate and are satisfied—which is a matter for the state to determine—no rights of third parties are violated.<sup>173</sup>

In the next section we will take up various of the problems that

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<sup>172</sup> These conclusions should apply equally to partnerships or to any other forms of association in which the law presently treats the associates as agents of each other. Absent any agreement to that effect, why should partners be liable for each other's acts if in fact they themselves perform no acts that would make them liable? Note that modern common law decisions are moving in this direction in nonprofit joint enterprises, holding only active participants liable rather than all members of a club or lodge. See, e.g., *Lyons v. American Legion Post No. 650 Realty Co.*, 172 Ohio St. 331, 175 N.E.2d 733 (1961).

<sup>173</sup> In a very real sense, the approach I am taking here is a call for adequate capitalization of individuals. But insofar as individuals perform their potentially tortious or criminal behavior within the corporate milieu and satisfy through corporate underwriting the financial responsibility requirements this behavior necessitates, it is derivatively a call for adequate capitalization of corporations.

surround the ordinary entrepreneurial behavior of the corporation, as set forth in Part II.A above. Before doing that, however, I want to consider finally, and very briefly, an aspect of corporate action that was set aside earlier, but one rather more closely related to the question of corporate features—especially as the entity and liability issues are involved—*viz.*, the problem of standing. Can the corporate association, as described above, sue and be sued *as an association*? (Or, what is for practical purposes the same thing, can it accept, hold, and convey property or make and take contracts in its corporate name?) Is *this* the real reason for “incorporation” through the state? If the state did not register corporations, would corporate owners call for registration, for reasons of efficiency, just to insure standing? Suing and being sued are paradigmatically “state-related” or “state-infused” acts, meaning that state-of-nature theory, at least in its present state of development, cannot tell us a great deal about them.<sup>174</sup> Absent a body of work showing how procedural law might be derived from or at least related to state-of-nature theory, let me simply make two points. First, the law itself is in a state of some development at the moment on the question of standing: unincorporated associations are coming increasingly to be able to sue and be sued as associations.<sup>175</sup> But secondly, these developments aside, there is nothing in the theory above that should raise any serious difficulties in this connection. In the case of contractual obligations, if a contractor has made his arrangements with “the corporation,” then that should be sufficient to settle the matter of standing, whether the corporation does or does not have state recognition.<sup>176</sup> In the case of torts and crimes, because it is the individual wrongdoer(s) and not the corporation who is the defendant, the problem of standing should again be uncomplicated. Moreover, insofar as the defendant’s liability is underwritten by the corporation, the case should develop as it does when any third-party insurer is involved. In such a case, in fact, the plaintiff’s burden of proof would be considerably less onerous than it presently is when he is attempting to reach the assets of an unincorporated association; for in so attempting the plaintiff must now show that the association is in some appropriate sense an entity.<sup>177</sup>

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<sup>174</sup> See note 103 *supra* where the problem of deriving procedural rights is raised.

<sup>175</sup> See R. STEFFEN, *supra* note 159, § 78.

<sup>176</sup> When the corporation does not have state recognition, the result would be exactly as with “de facto” corporations; see note 148 *supra*.

<sup>177</sup> See R. STEFFEN, *supra* note 159, § 71.

On the theory suggested above, the defendant himself, in his own self-interest, will be compelled to give evidence of his insurance arrangements, thereby yielding the same result as a successful suit against an unincorporated association, but perhaps more often—and more correctly. It would appear, in short, that the problem of standing arises only if more is made of the entity status feature than is justified, especially as this feature plays its role in disputes over liability. When the parties to the suit have previously agreed to the construction of this fiction—as in the contract example above—then it should be recognized by the court as well. Otherwise, the court should not itself construct fictions but work instead with the facts of the case.

This completes, then, our inquiry into the legitimacy of the corporate birth. We have canvassed the features that are generally thought to describe the modern business corporation and have found that individuals, in exercise of their rights of property, association, and contract, can bring into being an association having entity status (as qualified above), continuous succession, with free transferability of shares, limited liability, delegated and centralized authority, and the power to act under a common name, and they can do this without violating the rights of anyone. Far from being a “creature of the state,” then, this corporate association can arise quite independently of the state: it is a creature of private agreement alone and is thus entirely private. In that it *can* arise through a just process, it is legitimate *as* an institution; insofar as actual corporations have arisen through such a process, they are themselves legitimate. (As a corollary, those corporations that have arisen through or have been assisted by an unjust process—*e.g.*, a private taking, perhaps with government sanction, or a monopoly grant, “technical monopolies” aside<sup>178</sup>—are to that extent illegitimate.)

In short, the corporation has a right to exist, just as the individuals who bring it into being have a right to make it exist. If it did not have this right, or if its right to exist were limited, then to that extent the rights of individuals to property, association, and contract would also be limited. For in the end, the rights of the corpora-

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<sup>178</sup> The “technical monopoly” issue is often much abused. There is no reason why telephone service, for example, should include a monopoly on the manufacture of telephone equipment (fortunately it no longer does). Nor under present technology do we need to “enfranchise” the electronic media; it is one thing if the oligopoly that presently obtains in that industry were to arise naturally, quite another when it arises through government licensure.

tion *just are* the rights of the corporate owners. (I will develop this point more fully below.) The right of the corporation to exist is nothing more—nor less—than an entailment of the right of individuals to make it exist, an entailment of their rights of property, association, and contract. In this fundamental way are the rights of the corporation bound up with the rights of the individual.<sup>179</sup> Those who challenge this basic right of the corporation do nothing less than challenge those basic rights of individuals.

Clearly, then, the “public instrumentality” thesis of Nader and others is without theoretical foundation: quite simply, it is not “our” corporation to do with as “we” wish, anymore than the individual acts from which the corporation is created are our collective property, to be treated as public instruments. To treat the corporation as a public instrument is to treat those who create or own it as public instruments, to *use* them for public purposes, and so to demean the rights of every individual. The corporation has been created by private individuals in pursuit of their own private ends; and of course others may subsequently have joined the association for the same reason. Unless individuals have an obligation to serve “the public interest”—and they do not—then the corporation has no such obligation either. As noted earlier,<sup>180</sup> in pursuing their private interests it is more than likely that these corporate owners will pursue “the public interest” as well; but even if that issue can be made sense of, it is irrelevant to the question of corporate legitimacy, to the question whether the corporation has a right to exist. It does. What we need to do now is take up the further question just how these owners may legitimately pursue their private interests through the corporation they have created, just what rights and obligations they have as they act through this institution—just what rights and obligations their corporation can be said to have beyond this fundamental right it has to exist.

#### B. *The Legitimacy of Corporate Behavior*

It is one thing to bring the corporation into being, another to set it in motion. Having established the fundamental right of the corporation to exist, and having located that right in the individual rights of the corporate owners, we now have to inquire about its further

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<sup>179</sup> Corporate management should note well this point: insofar as corporate behavior undermines individual rights—cost-benefit analyses notwithstanding—it undermines the very foundation of the corporation, for corporate legitimacy is grounded in those individual rights.

<sup>180</sup> Note 9 *supra*.

rights, and in particular about its rights of property and action. When the corporation begins to "act" the problems set forth in Part II.A will arise; hence it is in this section that we will take up at last those frequently heard criticisms and proposals. In doing so, however, it will be convenient to speak of "corporate rights" and "corporate action," except where confusion would otherwise result. Let us begin, then, by clarifying some of the conceptual issues that stand behind these idiomatic expressions, and in particular, by coming to grips with just what it means to say that *the corporation* has rights.

1. *Individual and Corporate Rights.*—As we have seen, "the acts of the corporation" are in fact the acts of various of the corporate people who act under its authority, *i.e.*, under the authority, ultimately, of the corporate owners, as manifest in their articles of incorporation; included among these actors are not only the corporate employees but the corporate owners themselves—acting under their own authority—insofar as these various individuals may be permitted to act under the articles and the rules of delegation therein contained.<sup>181</sup> Similarly, "the rights of the corporation" are the various rights of the corporate people as specified, however broadly, under the articles of incorporation as these articles manifest, in turn, the rights of the corporate owners,<sup>182</sup> in exercising these institutional rights—which will usually be their institutional obligations as well<sup>183</sup>—these people will be exercising the rights of the

<sup>181</sup> Notice then that "corporate acts" are by definition acts performed under corporate authority. Thus only certain of the acts of the corporate agent are to be construed as corporate acts; his "frolic and detour," for example, is an individual, not a corporate act. (A full explication of these points would involve drawing the complex relations between "acting under authority" and the "action-under-a-description" approach found in the theory of action; for a start on the latter see Davidson, *Actions, Reasons, and Causes*, 60 J. OF PHILOSOPHY 685 (1963); Davidson, *The Logical Form of Action Sentences*, in *THE LOGIC OF DECISION AND ACTION* 81 (N. Rescher ed. 1966).)

<sup>182</sup> To explain "corporate rights" it is not enough, of course, to point to the authorizations specified in the articles of incorporation, for those powers are *rights* only insofar as they first are rights of the corporate owners. (See below and note 52 and accompanying text *supra*.) Otherwise, in the articles they draw up the owners could grant their corporation any powers they desired—rightful or not—and simply call them rights.

<sup>183</sup> I say "usually" in order to allow for the "permitted" modality: an employee may be given discretion as to a certain course of action, in which case he would have a right but not an obligation to perform it. Notice that with respect to the performance of many actions we can be said to hold both a right and an obligation: A may have a contractual obligation to B to perform *x*, correlative to which is B's right to A's performance of *x*; but A's right to perform *x* has correlative to it the obligation of third parties not to interfere; with respect to the same act *x*, that is, A has both a special obligation (to B) to perform *x* and a general right (against third parties) to perform *x*.

corporation. Thus while the rights of the corporation may rest in or be exercised by these various corporate people, they can be traced ultimately to the articles of incorporation and hence to the corporate owners. In this way are the rights of the corporation bound up with the rights of the corporate owners: when we speak of "the rights of the corporation," that is, we are speaking, at bottom, of the rights of the corporate owners; just as the right of the corporation's owners to bring their corporation into being enables us to say that *the corporation* has a right to exist, so their right to own and act through this institution enables us to say that *the corporation* has these rights of ownership and action, delegated though the rights of action may be to the various corporate employees. The corporation's rights of property and action, then, are ultimately the rights of the corporate owners to own and act through the medium of their corporation, in exercise of their individual rights of property and action.<sup>184</sup>

To ground the rights of the corporation in the individual rights of its owners is not, however, to treat those two sets of rights as coextensive. The corporation's rights cannot be *more* extensive than those of its owners, of course, for as we saw earlier,<sup>185</sup> institutions have only those rights that individuals have given them and hence only those rights that individuals *have* to give them. Thus the rights of the corporation are limited in the first instance to the rights of the corporate owners: an owner cannot do through his corporation what he has no independent right *himself* to do. This is an important limitation, as we will see shortly. But it is only a first assessment of the extent and limit of corporate rights. For in truth, the corporation's rights are *less* extensive than those of its owners, this because the owner can do through his corporation only what it is *possible* to do through such an institution. Thus the rights of the corporation are limited in the second instance to the rights that the corporate owners are *able* to exercise through this vehicle. Through

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<sup>184</sup> Notice that this explication of what it means to say that the corporation has rights avoids treating the corporation as a "person"—artificial or otherwise—to which rights are then ascribed or denied *ab extra*. The reification of a corporate entity has led to much confusion concerning the source, justification, and content of corporate rights. Moreover, it has led to many of the same conceptual difficulties that arise when we speak, for example, of "society's rights," which usually turn out upon inspection to refer to the rights claimed by some members of society against other members. Of special interest, in this connection, is the grounding of corporate rights in the rights of the owners *through the articles of incorporation*, which are rather more real than the "social contract." This point will be developed more fully below.

<sup>185</sup> See note 52 and accompanying text *supra*.

their corporation they cannot exercise their right to marry, for example, or their right to vote, or to have children. But they can certainly buy and sell through this association, or exercise their rights of speech, or give to charity, or perform through it whatever other activity such an institution lends itself to, provided that they as individuals have a right to perform that activity. Yet this is not the whole story either, for the rights of the corporation are limited finally to those rights the corporate owners *in fact* have given it. If the corporate owners have included in their articles of incorporation certain limitations upon the activities of their corporation, then the corporation has no right to perform activities inconsistent with those limitations. In sum, then, the rights of the corporation are limited to the rights the corporate owners *have* to give to it (or to exercise through it), to the rights they *can* give to it, and to the rights they *do* give to it.

This much, in brief, explains what it means to say that the corporation has rights, by locating those rights ultimately in the corporation's owners, as entailments of the individual rights of those owners. (In subsection 3 below, when we turn to the internal relationships of the corporation, we will have to refine this picture somewhat.) Moreover, in thus locating and deriving the corporation's rights, this explication goes far, in conjunction with the theory developed in Part III, toward justifying them. Yet as we saw at the outset of Part II, it is not uncommon to find reservations about this idea that there is a right of individuals to collective ownership and action—expressed most often as a fear of the attendant power.<sup>186</sup> To this we need simply ask how it could be otherwise. If an individual has a certain body of rights against the rest of the world—including the rights of ownership and action—does he lose some of those rights when he acts in concert with others? Do two people, when acting together, have fewer rights (or more obligations) than one person acting alone?<sup>187</sup> Surely, power (the additional power that attends joint action) has no place in this analysis: if it did then powerful *individuals* could be said to have fewer rights than weak ones! Rights simply do not work that way: they go with individuals as such—powerful or weak—even when those individuals act in association with others. (Is there any relevant difference between an individual's right to speak and a group's right to speak?) As we saw

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<sup>186</sup> See also note 151 *supra*.

<sup>187</sup> See note 18 *supra*.

in Part III, individuals have, among their rights, the right to combine and act with others, however variously; for joint action, as such, takes nothing to which any third party can be said to have a right. It is these *individual* rights, then, that underpin and ultimately justify the rights of the associations that arise through their exercise. And as a corollary, it is these individual rights that are ultimately violated when the rights of associations such as the corporation are denied.<sup>188</sup>

Given that corporate rights find both their source and their justification in the individual rights of the corporate owners, it will be useful, in order better to fill in the content of those rights, to review quickly the content of individual rights as outlined in Part III. There we saw that the individual has a general right against the rest of the world to noninterference, a right to be secure in his life, liberty, and property against the takings of others; thus he has a right not only to be left alone but to do whatever he wishes that does not infringe this same right to noninterference as held by others. Correlative to this right of others, he has an obligation not to interfere with or take the life, liberty, or property of these others; but he has no general positive obligations toward the rest of the world, for even if these could be justified they would conflict with his own basic right to noninterference. This much, in brief, is the world of general relationships. In exercise of his liberty, however, the individual—intentionally or not—may change the world of general relationships, creating special relationships and special rights and obligations between the parties to the relationship,

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<sup>188</sup> Here again the entity issue is not germane: there is no significant difference between acting *with another* and acting *through the association that you and another have created*. You and another can exercise your individual rights of speech, for example, by jointly authoring an article, by editorializing in the newspaper you own together (which is probably incorporated), or by making a campaign contribution through the business corporation you jointly own. (And what are The New York Times and CBS if not *business* corporations?) Is there any material difference among these three cases? Notice that as much—or as little—can be made of the “entity-association” in the first case as the “entity-corporation” in the third. And where are the *rights* (not the interests) of others that are violated in any of these cases? (See *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978); *Burger’s Blast: Free-speech ruling stirs a row*, *TIME*, May 8, 1978, at 68.) Illustrative of the confusion that arises when too much is made of the entity issue are various legal prohibitions on corporate campaign spending. The underlying reality in these cases, as in each of the above examples, is one of people using their resources as they have a right to, however complex the authority structure from which flows the ultimate decision about that use. (If some of the corporation’s owners do not support the uses to which their corporation is being put they can always dissociate themselves from it, of course, just as individuals or groups can *join* the corporation in order to try to *change* its behavior.)



either by entering into voluntary associations with others—*e.g.*, contractual relationships—or by involving them involuntarily in transactions—*e.g.*, by committing torts or crimes. The form and content of contractual rights and obligations are limited only by consent; the rights and obligations that arise from involuntary transactions are determined by their function, to rectify the wrong done, to reestablish the prior world of general relationships, the prior distribution of holdings. Apart from the requirements of procedural justice,<sup>189</sup> this broad taxonomy exhausts the world of individual rights and obligations; more specifically described rights and obligations are subsumed deductively under this broad outline or else they cannot be justified and hence do not exist as moral rights and obligations. (Those “rights” and “obligations” that cannot be thus derived can be *made* to exist, of course, as positive legal rights and obligations, in which case they will conflict with the moral rights and obligations with which they are inconsistent.)

These, generally and in brief, are the rights and obligations of the individual and hence of the corporation as well, subject to the limitations indicated above (about which more in a moment). What we need to do now is flesh these individual rights and obligations out as they are exercised through and by the corporation, and in particular as they address the issues raised in Part II.A. In keeping with the moral theory developed in Part III, we will do this in two steps, first by considering certain of the general relationships in which the corporation stands, then by considering certain of its special relationships. It will be useful, however, in order to avoid the confusion that may arise from generalizing over the manifold world of corporations, to have a clear corporate model in view as we proceed. More precisely, we should work with a model rich enough to be theoretically interesting yet no more complex than is necessary for elucidating the issues at hand. In the case of general relationships that model can be quite simple: we can think of the corporation as a single entrepreneurial unit, in fact. Thus at the outset it will not be necessary to distinguish the groups that constitute the more complex corporation—shareholders, directors, management, employees—for the issues will be the same whether we are dealing with a one-man or with a giant corporation. (When we take up the special relationships that constitute the larger corporation, however, this model and the foregoing analysis will have to be refined.)

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<sup>189</sup> See notes 103 & 104 *supra*.

In order to elucidate its general rights and obligations, then, we will treat the corporation as an entrepreneurial unit that reflects and exercises its owners' rights and obligations. Thus it will have whatever rights and obligations its owners *have* to exercise through it, *can* exercise through it, and have stipulated in their articles of incorporation *are to be* exercised through it. With respect to this last factor, let us give our corporate model a charter allowing it the widest possible range of activities—e.g., “to engage in any lawful undertaking”<sup>190</sup>—for this constraint is a contingent matter in any particular case and hence, as such, is of little theoretical interest. Let us also take a liberal view of what *can* be done through the corporation, for this factor too is of limited interest for moral theory. (In most cases it will be able to be determined as a matter of *fact* whether a given individual right or obligation can be exercised through the corporate vehicle; hence no normative issue will be at stake.) What remains, then, is the further specification, in the corporate context, of the rights and obligations reviewed above and outlined more fully in Part III. We need to translate the rights of the individual, that is, to the corporate milieu. And in particular, we need to consider the question of corporate regulation as this

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<sup>190</sup> For our purposes “lawful” should be read as “moral,” of course, for what is lawful is to be determined by what moral rights and obligations there are.

Let me clarify a point here that may be a source of some confusion. To grant our corporate model this wide range of activities is *not* to say that any given corporate owner may exercise any given right of his through his corporation, provided only that that right *can* be exercised through such an institution: a corporate charter enabling *the corporation* to engage in so wide a range of activities, that is, is not the same as a charter enabling *every individual owner* to exercise his full range of rights through his corporation *subject to no internal procedural restraints*. In all but the one-man corporation there are bound to be conflicting interests among the corporate owners, not all of which will be able to be realized *through* the corporation. Ideally, then, the articles of incorporation, to which each owner will (in principle) have given his individual consent, will contain rules for determining how these conflicts are to be resolved such that the corporation can then proceed to act as a unit, as a “person,” exercising the rights of the owners as thus resolved. It is in this sense, then, that our corporate model will have the full range of rights and obligations that the owners can exercise through such an institution. (Cf. *Dodge v. Ford Motor Co.*, 24 Mich. 459, 170 N.W. 668 (1919).)

It should be noticed, then, that this third factor that limits corporate rights—the limits placed in the articles of incorporation—relates not to outsiders but to the internal relationships between the corporate owners; thus it serves to justify rights as between the owners, not as against the outside world. (Accordingly, it will be treated again in subsection 3 below.) Notice too how prior consent serves here to legitimate, as between the corporate owners, the corporate activities that flow from the exercise of corporate procedural rules; unlike with social contract theory (cf. note 184 *supra*), consent to these rules in fact is given, at least in principle, and thus can serve to legitimate (as between the owners) corporate policies as well as changes in corporate policies (cf. note 188 *supra*), even though not all of the owners agree with the specific policies or with the specific changes in those policies.

arises in the various forms set out in Part II.A above. We have already seen that the "public instrumentality" thesis will not serve to justify regulating the corporation; we can no more regulate private corporations as such than we can private individuals. But we *are* justified in interfering with and regulating individuals when they violate rights or threaten to do so (*see* II.B.2); insofar as corporations do the same, interference and regulation may be called for here as well. In order to determine this, let us look at various of the corporation's entrepreneurial activities. This overview can consider only a sampling of those activities, of course; as stated at the outset, however, my aim is not to canvass the issues that constitute the corporate debate but simply to place that debate within the general structure set forth by the basic and systematic approach that is the theory of rights. The conclusions that follow from doing so—in such areas, for example, as discrimination, or disclosure, or bribery, or antitrust—will not always be pleasing, a point also noted at the outset; but what we have a *right* to do is not always what it would be "good" to do, a distinction I urge the reader to keep in mind as these conclusions unfold. Unless we want our law to enforce some theory of good—with all the subjectivity and illegitimacy that that entails—and hence in principle to reach into and regulate every corner of human activity, we simply have to learn to live with the uses that some people and indeed some corporations may make of their rights.

2. *General Relationships.*—Recall that the corporation stands in a general relationship, described by general rights and obligations, with all those individuals and groups not specially related to it; included among these "strangers" are not only members of the public generally but prospective employees, customers, sellers, and shareholders. Moreover, even those who are specially related to the corporation stand generally related to it with respect to such rights and obligations as are not specified, either explicitly or implicitly, by the terms of the special relationship. Toward these individuals and groups, then, the corporation (a) has no positive obligations, *i.e.*, has a right to be left alone, to not be compelled (by them or their surrogates) to enter into special relationships with them or to bestow benefits upon them; (b) has a negative obligation to not interfere with them; and (c) has a right (is at liberty) to do whatever does not interfere with them. Let us develop and illustrate these points in order.

(a) The first thing to be noticed is that absent any special obligation to that effect, the corporation is not obligated to *do* anything

for anyone. It is not a service organization. If the individual owners from whom the rights and obligations of the corporation are derived are not *themselves* thus obligated, then their corporation cannot be either. For where would those obligations have come from if not from the owners? The corporation, then, is not an anti-poverty agency, or a job-training center, or a patron of the arts, or a general vehicle for community service. To be sure, if the corporate owners want to employ their corporation for such purposes they have a perfect right to do so, just as they have a right to be of service to others in their individual capacities. But as a matter of right the corporation cannot be *bound* or *used* by outsiders for these ends, however desirable they might be; for not only is there no *obligation*—individual or corporate—to do these things, but the corporation and its owners have a *right* against being thus used for the benefit of others.

Now there are many ways, as the examples above should indicate, in which the American corporation is currently being used by the state for public purposes. Most generally, of course, it is being used in the same way that taxpaying individuals are being used—as a source of funding for the government's many schemes for economic redistribution.<sup>191</sup> In the case of corporate owners, however, this taking is especially onerous because of our current "double taxation" policy. (If uses there must be of people, they ought at least to be equal uses, especially when they are done in the name of egalitarianism!) We have already noted the difficulty of justifying the forced association that is even the limited state;<sup>192</sup> when the state goes beyond the narrow function of securing rights to take on the business of transferring assets from some to others, it does nothing less than use those from whom it takes the assets, however noble its ends. If individuals do not have the right to take from some to give to others, then neither does the state.

But of the many more direct ways in which the corporation is currently being used for public purposes, perhaps none has generated more tension—and theoretical confusion—than the requirement that the (corporate) employer be a vehicle for insuring "equal opportunity."<sup>193</sup> The result is often forced association—not only be-

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<sup>191</sup> I set aside until Part V the question whether many of these same corporations are not themselves recipients of certain forms of public largesse.

<sup>192</sup> See notes 51, 127, & 128 *supra*.

<sup>193</sup> I have in mind here in particular the results that have flowed from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -17 (1974).

tween employer and employee but between employee and employee as well—imposed in the name of a right! As we have already seen, there is no “right to opportunity,” either in the sense in which others must provide the conditions of opportunity or even in the sense in which others must forego pursuing their own opportunities in order that those conditions be insured. Nevertheless, such a “right” is *made* to exist when the employer is obligated not only to ignore certain factors that *he* may think relevant when he makes hiring decisions but even to affirmatively seek individuals (some of whom he must also train) who fall into predetermined classes.<sup>194</sup> “Obligations” such as these compel the employer to associate with others for reasons not necessarily his own, and hence to use his business for reasons not necessarily his own, in direct violation of his own rights of association and property.<sup>195</sup>

It would be well to develop this discrimination issue somewhat more fully, so ubiquitous is the misunderstanding that surrounds it.<sup>196</sup> Before beginning, however, I want to make two points by way of background. First, let it be quite clear that the brief remarks that follow are aimed at defending the *right* to discriminate, not discrimination itself, or what ordinarily passes for such (*i.e.*, “unreasonable” discrimination). To paraphrase Patrick Henry, there is all the difference in the world between defending the right to speak and defending the speech that flows from the exercise of that right. Secondly, as with all rights, the right to discriminate is rooted in and hence is a function of private property—most fundamentally, the private property in oneself—a point I will develop below. Accordingly, these remarks do not apply to *public* institutions; because they are the property of *all* the people, these institutions may not discriminate except as may be required for executing

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<sup>194</sup> Those classes, as with all taxonomies, admit *in principle* of infinite variety; thus the employer can no longer discriminate against the handicapped, which HEW has recently interpreted to include even *unreformed* drug addicts and alcoholics who are “otherwise qualified.” See 42 Fed. Reg. 22675-22702 (May 4, 1977), 45 C.F.R. 84.

<sup>195</sup> I qualify this point with “necessarily” because there are many employers who will not discriminate, whether or not discrimination is proscribed. In such cases the employer’s reasons for hiring as he does might well be the “preferred” reasons, *i.e.*, the reasons implicitly preferred in some reading of the legislative or judicial intent.

<sup>196</sup> Most people are against “unreasonable” discrimination in hiring, for example, but they are also against quotas, which of course are necessitated by the fact that discrimination is ordinarily a mental phenomenon (it is the *reasons* that make discrimination what it is), the disproving of which requires such empirical evidence as is entailed by “guidelines,” “goals,” or “quotas.” (I ignore the outrageous burden of proof issue that is buried here.) Notice too the ambivalence we are currently showing toward discrimination based on sexual orientation; or the implications for the hiring of clergy by tax-exempt churches.

the functions set for them by public policy. To draw this distinction between private and public, however, is to raise an issue precisely at the center of so much of our current anti-discrimination/affirmative action debate: many who would like to see discrimination eliminated as a private right have fastened upon (encouraged?) the immense growth of the state in this century, concluding that the remotest of connections with the state (which is all but unavoidable, given its ubiquity) ought to be construed as rendering an otherwise private institution subject to public institution rules. Thus if students who attend assiduously private colleges obtain loans from private banks, but repayment of those loans is guaranteed *to the bank* by the government, the *college* is to be construed as the indirect recipient of federal financial assistance! So strained an interpretation as this all but obliterates the distinction between private and public.<sup>197</sup> In what follows, then, I will be speaking of private institutions only, by which I will mean institutions that are privately owned and operated. Surely these are the criteria for determining whether or not an institution is private, not the mere fact that it does business with some public institution.<sup>198</sup>

Turning to the substance of the matter, then, when used descriptively, "to discriminate" means simply to distinguish and then to choose between alternatives: we discriminate in countless ways every day when we decide to associate or not to associate with people, products, what have you.<sup>199</sup> But when we choose we do so for *reasons*, which others may disapprove of or otherwise think "unreasonable." When they go on to charge us with "discrimination," however, they are using the idea not in a descriptive but in an evaluative sense, to indicate their disapproval not so much of our choice but of our *reasons* for having chosen as we did. In its evaluative sense, then, which is the sense that has found its way into so much of our law, discrimination is very much bound up with the reasons that lie behind our choices and hence with a theory

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<sup>197</sup> For an indication that this trend may be reversing—though the issue is less than clear—see *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976).

<sup>198</sup> Notice that if there is no right against discrimination and indeed a right to discriminate—as I am about to argue—then the state cannot enforce an anti-discrimination policy even by the "carrot" approach of withholding business from those private firms that do discriminate. For to do so would be to discriminate against those firms—which is prohibited to the state—when what they are doing is simply exercising their rights. In what follows, however, my principal concern will be with the "stick" approach to enforcement, whereby some "right to nondiscrimination" (or "equal opportunity") is invoked in order to directly compel the employer to ignore certain factors when making employment decisions.

<sup>199</sup> Thus it is sheer nonsense to pretend that discriminating *for* does not entail discriminating *against*; to do one is logically to do the other.

of value that determines these reasons to be "good" or "bad."

As a matter of rights, however, it is altogether gratuitous to enter into this evaluative sense of "discrimination," into the subjective reasons that lie behind our choices. For our choices and indeed our right to choose are simply a function of our property: we have that right *whatever* our reasons for exercising it. In the employment context, the employer chooses to whom he will delegate a certain control over his property in his business; the employee chooses to whom he will delegate a certain control over his property in his labor. The reasons behind these choices are, strictly speaking, no one's business but the individual doing the choosing; for to own property *just is* to have the right to use that property for *whatever* reason, provided that nothing is taken from others in the process. If making choices about those uses does not *as such* violate rights, then how could the reasons behind the choices make a difference? Are we really to suppose that choosing a particular use for the "right" reasons does not violate rights but making the identical choice for the "wrong" reasons does?<sup>200</sup>

It should be noticed that when we ground this right to choose in the property over which the choice is made, the parties to the relationship are treated as equals. That balance is upset, however, when the state limits the conditions of choice of one of the parties while allowing free association to the other. Indeed, the state *discriminates* against that party, and not privately but with the force that is the state! By denying him his right to use his property for his own reasons the state takes that use while imposing no such restriction on the other party. In no way can this inequality of treatment be better appreciated than by simply turning the tables: we would surely think it an outrageous affront to privacy and to the right to freedom of association if the government said to the employee (employer) that he need not work (be in business) but that if he does hold himself out as seeking work (if he does seek employees), only certain reasons will justify his rejection of an offer (application), this in order to insure the right of employers (employees) to equal opportunity. Yet the inequality indicated by the parenthetical substitutions here is precisely what we are imposing upon the employer. When we add the burden of affirmatively seeking employees of certain kinds—imagine if the employee were required to af-

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<sup>200</sup> The parallel between the right to discriminate and the right to "impose" so-called "economic harms" by merely going into business is exact. What difference does it make

firmatively seek employers of certain kinds—the inequality of treatment becomes ineluctable.

Now there is no question that “invidious” discrimination—whether in its ordinary or in its “reverse” form—is an affront to dignity, as anyone who has experienced it will attest. And let me repeat that as a matter of personal values I loathe such discrimination. But unless those who are discriminated against can point to a right of theirs that such discrimination violates—and I believe I have set forth compelling reasons why they cannot—then like much else that is offensive, we simply have to tolerate it when it occurs. It is the price of freedom of association.

As a final example of the many ways in which the corporation is presently being compelled to expend itself for the benefit of outsiders, consider the problem of disclosure. Although there is some difficulty in treating so varied a subject broadly—disclosure takes on different aspects as it arises in the buyer, seller, shareholder, employee, or governmental contexts<sup>201</sup>—here too the general rule applies: except in the case of products or conditions that endanger, about which more below, toward outsiders the corporation has no positive obligations of disclosure. For the failure to disclose violates no rights; there is no general right to information, no right to the assistance of others in making our market decisions. As noted in Part III,<sup>202</sup> information is not cost-free, especially if the standard is “full disclosure.” Accordingly, there is no reason to suppose that it might not be provided for a fee by others—*e.g.*, private consumer or investor groups—and in a form more usable than that afforded by corporate advertising. Here, as in so many such cases, the absence of compulsion, where none can be justified, does not mean that the benefit compelled will not be provided by the market.

Now as a practical matter, the case of complete nondisclosure is likely to be rare. Simply out of good business the corporation will ordinarily provide information about itself through advertising or

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whether I go into business in competition with you and as a result you are “driven out of business” or I go into business *in order to* “drive you out of business” (if successful)? If I have a right to go into business *tout court*, then I have a right to do it for *whatever* reason. For if my act is not actionable *per se* (because it takes nothing you own), then it is not actionable simply because done from a bad motive. See Epstein, *supra* note 84.

<sup>201</sup> On some of the problems that disclosure requirements have led to in the consumer credit area, see Landers, *supra* note 118.

<sup>202</sup> See note 118 *supra*.



related means; if the prospective customer, seller, shareholder, or employee is not satisfied with these disclosures he can take his business elsewhere. Moreover, we ordinarily enter into special relationships with the corporation only after negotiations and hence after *some* disclosure—on both sides. As brought out in Part III, that information must be accurate, the determination of which in particular cases will often involve fine points of logic and language.<sup>203</sup> But disclosure need not be “full”—a standard impossible *in principle* to satisfy—for if there is no obligation to disclose *anything* there could hardly be an obligation to disclose *everything*. When such an impossible standard is imposed from without, however, the way is paved for subsequent second guessing and for the guilty findings necessitated by the standard. And even if the standard is weakened so as to impose a duty to disclose only “material facts,” the same theoretical difficulty remains; for the focus of the second guessing now shifts from “full disclosure” to “material facts.” In sum, given that there is no obligation to disclose anything, the parties themselves will have to judge how much is enough information.

(b) As with individuals, then, the corporation has no positive obligations toward outsiders; if it is not obligated to do anything at all, then it cannot be obligated to do any more specific kind of thing, such as give of itself for the benefit of others. Once the corporation does begin to act, however, to pursue its various entrepreneurial activities, it must respect in turn this same right of others to be left alone. It cannot engage in any acts of private eminent domain, for example, even if it can show that these would be “justified” by some

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<sup>203</sup> Notice that once disclosure of some kind occurs the “full disclosure” problem will often disappear, provided the analysis of the information in fact disclosed is correct. To say that you are selling an Oldsmobile, for example, is to imply that you are selling a car with an Oldsmobile engine, not an engine from your Chevrolet division. (I ignore whether in fact there is any difference between an Oldsmobile and a Chevrolet engine and concentrate instead upon the manufacturer’s representations.) The point here is one of logical entailment: to say the former *just is* to say the latter. Nondisclosure, that is, is not really the issue in this case since disclosure of the relevant fact has *already* been given, if only implicitly; what has *not* been given or handed over is the object in fact represented by the title that has been transferred, as brought out in the analysis in Part III. (Notice how this example differs from the Rembrandt example discussed there, which involved no disclosure at all.)

In other cases, however, certain information not explicitly disclosed cannot possibly be inferred from the information that in fact is disclosed: absent any such representations, for example, the selling of “an insurance policy” entails no information at all about how the premiums for that policy compare with the premiums of competitors. Nor, of course, do sellers have any obligation to reveal such information: it is not the duty of sellers to do comparison shopping for buyers!

"public good" criterion.<sup>204</sup> If governments are not justified in using individuals for the public good, then certainly private corporations are not.

Such straightforward examples of forced association are too obvious to require elaboration here. What I want to do instead is touch briefly upon the two more subtle forms of interference (or potential interference) that have generated so much discussion in recent years, endangerment and nuisance, especially as this last involves environmental issues. Once again, these are large subjects; my purpose here is simply to draw the general outline that is prescribed by the theory of rights, which might then serve as background for more detailed legal analysis.

As we saw earlier,<sup>205</sup> the problem of endangerment arises in principle whenever individuals perform positive acts in the proximity of others. (I will use "endangerment" and "risk" rather than the more subjective "fear" in order to suggest that I am talking here about a phenomenon with some real basis in fact.) In the corporate context, the acts that endanger often do so by creating conditions or products that endanger, conditions affecting workers, say, or homeowners living near industrial complexes, or products that may harm consumers. Thus the causal sequence is often complex, involving an intervening act of the victim, or of some third party, or of nature (which may or may not serve to negative liability, depending upon the complex rules of liability in such cases). Yet we allow a good many of these individual and corporate acts and the risky conditions they create; otherwise, life in reasonable proximity with each other would cease. What we want to know, then, at least in general outline, is how the theory of rights orders this problem. Just what rights and obligations are there in the matter?

What is required in general, recall, is that acts or conditions not take what others own. As the acts of one person increasingly involve risk for others, these others are to some corresponding degree unable to make peaceful use of what they own, even if the risk does not in fact materialize. But there is a large subjective element in all of this; moreover, the issues are context-specific, varying greatly from, say, nuclear power plant risks to products liability cases (and greatly in turn within this last category). We are faced, then, with a very difficult and complex line-drawing problem: in principle there are

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<sup>204</sup> Cf. *Eldridge v. Smith*, 34 Vt. 484, 492-93 (1861).

<sup>205</sup> See notes 85 & 86 and accompanying text *supra*.

lines there to be drawn; but by the very nature of the problem, there are no universal principles by which to draw them. To take a stock analogy, just as we know night from day, but not precisely where to draw the line between them, so too we know acts that do from those that do not endanger (much), but not precisely where to draw the line between them.

Owing to the peculiar factors involved here, then, we have to turn to "public" or "common" criteria; otherwise, as noted earlier, the extrasensitive plaintiff could quite literally shut down the world.<sup>206</sup> When we do so, there enter such (admittedly vague) common law concepts as "reasonable man," "open and obvious risk," and "normal and proper use." I suggest, however, that these lead in turn to the drawing of not one but two lines, separating three categories of acts or conditions. There is first that class of acts or conditions that involve a very low degree of risk to others.<sup>207</sup> These, individuals and corporations have a perfect right to bring about, without permission from or notice to others. A second category of acts or conditions, however, includes those involving a higher degree of risk. Here the acts may be performed or the conditions created by right, *i.e.*, without the consent of others, but only after a "duty to warn" has been satisfied. Since risk is often reduced substantially when we know of it, the obligation to disclose to others the risk to them that attends our acts or the conditions we create amounts simply to making that risk "open and obvious"—which might not be the case in the absence of that knowledge<sup>208</sup>—and hence to reducing the risk to a level below that which would otherwise violate their rights.<sup>209</sup>

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<sup>206</sup> See note 87 *supra*. I remain open to the possibility that private mechanisms can solve these problems, though I know of no satisfactory arguments to that effect.

<sup>207</sup> On "degree of risk" see note 85 *supra*.

<sup>208</sup> Thus the duty to warn is a function not simply of the degree of risk to others but also of the obscurity of the knowledge, the absence of which makes the activity or condition risky to others; for the degree of risk is often itself a function of the absence of the relevant knowledge. What we are seeing today, however, is an *ex post facto* extension of the scope of the duty to warn to cases in which the risk is manifest to the most ignorant of individuals, thus enabling plaintiffs to recover when the cause of their harm often is their own negligence. From a consequentialist perspective, moreover, it should be noted that a spate of such decisions will tend to produce a surfeit of warnings, with the result that the really important ones will likely go unheeded. See, e.g., Epstein, *Products Liability: The Gathering Storm*, *supra* note 113.

<sup>209</sup> A certain problem of theoretical inelegance may be thought to arise here. Have I not argued all along that there are no affirmative obligations to strangers? Yet is not this "duty to warn" (and the earlier duty to be financially responsible before putting others at risk, *supra* notes 169 and 170) just such an affirmative obligation? Not really. For those acts and conditions which require that warnings be given are such that without the warning they would be prohibited, this because they would then put others at a high degree of risk and hence would

Finally, there is a third category of acts and conditions which are so risky that they violate the rights of others even when warning has been given. Nevertheless, even these may be performed with the consent of those others. On a case-by-case basis, that is, crossings of the public line that separates these acts from those in the second category may be permitted—in either direction. For individuals have a perfect right to enter into voluntary special relationships such that one of the parties, in exchange for whatever, exposes the other to more (or less) danger than would otherwise be permitted. Thus, for example, workers, or consumers, or adjacent homeowners might elect to expose themselves to risks caused by some corporate activity or product, risks that exceeded those delineated by the public line, this in exchange, respectively, for higher wages, say, or lower prices, or some form of compensation. There is nothing that violates rights in this; on the contrary, rights of association would be violated if such interactions were prohibited.

Notice, then, that this outline of the endangerment problem fits squarely within the moral theory developed in Part III. There it was shown that it is forced association that is prohibited, while noninterfering acts are permitted. Acts that endanger others to too high a degree and hence force an association upon them are prohibited by the above analysis. Yet some of those acts—those which drop below the interference threshold when warning is given—are permitted when the appropriate disclosure reduces the risk, making of them noninterfering acts. And low risk acts are permitted without warning, for they do not interfere. Of course, a much more detailed, context-specific analysis of acts and their effects upon the property of others is required before particular acts or conditions can be placed within one of these three categories of risk and before it can be determined whether a warning is not required, or is required to make an act or condition permissible, or will not suffice, even if given, to permit the act or condition, absent the consent of those endangered.

Turning now to the closely related nuisance cases and the implicit environmental issues, here too the corporation has no more right to

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fall into the third category I am about to discuss above. In effect, then, the affirmative "duty" to warn is simply a means by which to make permissible what would otherwise be a prohibited act. In short, if the actor does not wish to disclose the risk then he has no right to perform the act, for *as such* (i.e., under that description) it would violate the rights of others by putting them at too great a risk. (The same argument applies, *mutatis mutandis*, to the duty-to-insure issue.)

pollute than does the individual, whatever the "social" cost-benefit analysis may indicate. As with "the public good," talk of social costs and benefits too often obscures the point that it is individuals and their rights that count. If individuals cannot be used for the noblest of reasons, then surely they cannot be used for ordinary economic reasons, even if those reasons are couched in terms of "social good."

Here again the outline of the issue will be brief and general; we want to know how the theory of rights broadly orders the manifold nuisance and environmental problems, especially as these involve the corporation.<sup>210</sup> The point of departure is the analysis of Part III, where we saw that individuals, and hence corporations, have a right to do what they wish with themselves and their property provided they do not interfere with others. Thus, corporations whose activities must pollute have a perfect right to do so provided they keep the pollution on their own property. In order not to violate the rights of adjacent landowners, then, or users of the environment generally, industrial concerns have to conduct their affairs in such a way as to keep the resultant smoke, noise, odors, vibrations, etc., to themselves, whatever the means for accomplishing this, including simply buying the necessary land. But merely to mention the invasions that ordinarily count as nuisances is to point to the impossibility of such an ideal solution; hence it is accepted by nearly all that a pristine environment, especially in an industrialized society, must give way to some degree to considerations of cost.<sup>211</sup> As in the case of endangerment, then, what is called for is some public line which defines, in quanta of particulate matter, or decibels, or whatever, just how much of these "externalities" will be allowed.<sup>212</sup> But here, perhaps unlike in the case of low- and middle-level endangerment, the line must be closer to zero; for nuisances *are* invasions, however minor, upon the property of others, not simply *potential* trespasses. That line, moreover, cannot itself be a function of some *social* cost-benefit

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<sup>210</sup> A vast literature has arisen on the environmental issue in recent years. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW*, ch. 2 (1972); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Coase, *The Problem of Social Cost*, 3 J. OF LAW & ECON. 1 (1960); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Kretzmer, *Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case*, 13 ISRAEL L. REV. 298 (1978); Michelman, Book Review, 80 YALE L.J. 647 (1971).

<sup>211</sup> In focusing upon nuisances, I ignore the more subtle ecological changes that civilization brings about. If we allow at least some level of nuisance to obtain, in deference to human life on the planet, then *a fortiori* that same justification will permit certain ecological changes.

<sup>212</sup> Again, I remain open to the possibility that private mechanisms may be able to solve some of these problems.

analysis, for once again, individuals get ignored in that averaging process. Rather, it must reflect a level beyond which no individual has a right to impose the nuisance costs of his activities upon *any* other individual, regardless of the benefit that may accrue to third parties (*i.e.*, "society") or to himself from his doing so.

Now a common objection at this point takes the form of the so-called "coming to the nuisance" defense.<sup>213</sup> If some industrial use was first in time and is of long standing, the argument runs, then at a later date some plaintiff—an adjacent landowner, say, who might be a recent purchaser, absent any relevant covenant running with the land—cannot now obtain injunctive relief, perhaps shutting the industry down.<sup>214</sup> His earlier silence, in effect, establishes an easement on behalf of the defendant industry, reflected often in depressed property values. Thus granting an injunction would not only destroy defendant's sunk investment, made upon the reasonable expectations generated by the silence, but will likely amount as well to unjust enrichment of the plaintiff.

Compelling as this argument may seem, it amounts nevertheless to sanctioning a taking. Given some public line defining the nuisance (about which more in a moment), the defendant here wants to construe the plaintiff's earlier silence as a tacit agreement to the invasion. Quite apart from the absence of consideration, however, these litigants remain strangers: except with regard to the nuisance complained of, that is, there is no special relationship between them, for "tacit consent" is no consent at all, at least as a point of strict theory. Moreover, even if plaintiff's silence were to be thus construed, how could subsequent owners be bound? This would amount to the defendant's placing a covenant in his neighbor's title by unilateral prescription, as it were. Rights run with the land; they do not come and go as "active uses" come to preclude "passive uses" on neighboring land which is already owned—whatever the economic value of these various ~~eases~~<sup>215</sup> ~~uses~~. The economic losses (and

<sup>213</sup> For a good discussion of this issue see C. GREGORY, *supra* note 76, at 532-36; Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, *supra* note 113, at 197-201.

<sup>214</sup> Cf. *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972), allowing such an injunction but requiring the plaintiff to indemnify defendant for the costs of moving or shutting down.

<sup>215</sup> See *Sturges v. Bridgman*, 11 Ch. D. 852 (1879). A special problem arises when the land over which the defendant is polluting is unowned, coming only later to be claimed by the plaintiff on a rule of first possession. Here defendant might prevail on a broad theory of prescription, aimed at defeating plaintiff's title and establishing his own. More narrowly, he might succeed in claiming that plaintiff's initial title contained an easement, that first pos-

gains) complained of above are unfortunate, but they are neither here nor there to the principle of the matter. In crossing the nuisance line defendant proceeded at his own risk; he now has no ground for complaint when he is asked to cease that wrong.

Given, then, that we have to tolerate to some degree the nuisances that arise from our living in reasonable proximity with each other, the foregoing is the morally optimal solution to the problem. Those who want more insulation than the public line affords will simply have to buy it, just as those who want to pollute beyond the line are at liberty to purchase that right from those who are willing to sell their immunity. To be sure, all of this assumes some public line, which of course has often not been established. Here enters the general common law problem of *ex post facto* legislation; it is especially onerous in the case of nuisance, however, for the line to be drawn, once *any* interference is allowed, is arbitrary. At this point locality rules often come into play, thus allowing for differing public lines. And at the time of remedy there enter such further practical considerations as transaction costs and the considerable cost disparities that often attend pleas for injunctive relief.<sup>216</sup> With respect to this last item, however, if the cost to the defendant of ceasing his activity is indeed so much greater than the cost to the plaintiff of the nuisance, then there is no reason why, if a permanent injunction is not to be given, this disparity ought not to be reflected in the compensation that is owing to the plaintiff. The remedy, that is, ought really to reflect the private taking that in fact is being sanctioned here, whatever the practical rationale behind it. For it is not by right but by reason of expediency that this remedy is settled upon at all: let those for whom the proper remedy would be too costly bear the full cost (to others) of the second-best solution.

Absent clear public lines, then, a private taking—with ample damages, perhaps even allowing the plaintiff to choose among those remedies that fall short of a permanent injunction—may be the only practicable solution when the cost of a permanent injunction would be too high. This is an uneasy solution, however, “justified” only because of the uncertainty of the line that defines precisely the right and wrong in the matter. But where public lines do exist, whether through case law or, more commonly today, through statute, there

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session by others was subject to the constraints established by his own prior use of unowned land.

<sup>216</sup> See, e.g., *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

is no reason to withhold an injunction when those lines are crossed subsequent to their declaration. Assume, for example, that in order to stay competitive an industry wants to introduce a new technology which will increase the nuisance beyond the line.<sup>217</sup> Then that industry simply has to buy the conditions necessary for keeping that nuisance within the line. It has no right, for instance, to effect those changes and then attempt to force a taking upon adjacent homeowners when the latter subsequently bring suit. In this case, the industry's sunk investment in a wrongful activity should in fact be sunk. On the other hand, when public lines do exist, industries have a right to be secure within them. Having set the standards by which industries have invested in plant and equipment, we cannot now, as a society, come along and change the rules. If we do, then we should bear the costs our rule changes impose upon those industries.<sup>218</sup>

(c) Just as the corporation cannot be forced to serve outsiders, then, so it may not, in pursuing its own entrepreneurial ends, interfere with those strangers, even when some "public interest" calculation suggests otherwise. But in pursuing its ends, the corporation is at perfect liberty to do whatever does *not* violate the rights of others. Thus it may do anything that does not take what outsiders own, as brought out in Part III. Stated somewhat differently, the corporation has no obligation to be mindful of the mere *interests* of others; it is enough that it respect their *rights*, however much the law of this century may be undercutting this crucial distinction between rights

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<sup>217</sup> Cf. Kretzmer, *supra* note 210, for a case something like this.

<sup>218</sup> When we do change the rules in this manner, it may be because we come to realize that we got them wrong the first time, as with antebellum slavery laws, for example. Ought *we*, then, to have compensated the slaveowners when we extinguished their investments by changing the rules? No; for the cases of slavery and nuisance are altogether different. As a matter of natural law, slavery was always wrong, whatever the positive law on the matter; hence those who invested in the institution did so at their own risk. With nuisance, however, we are in a peculiar line-drawing domain; here, the natural law cannot tell us *where* the lines are, as with slavery, but only that there *are* lines to be drawn. At this specific level, then, *i.e.*, within the domain, right and wrong just are what the positive law says they are. Hence, individuals must be protected when they invest in accord with those lines, only to find them subsequently "fine-tuned" to their detriment.

When we draw this distinction, then, between the general and the specific aspects of the nuisance problem, we can see that egregious cases of nuisance and pollution are to be treated differently than minor cases. Permanent injunctions are easier to justify in the case of egregious nuisance, because this behavior violates even the broad natural law conclusion; on the other hand, compensation for capital losses brought about by our fine-tuning is easier to justify in the case of minor nuisances, because this is an arbitrary matter, where we as a society have decided to redraw the line.



and interests. Let me illustrate this general conclusion with a few straightforward, followed by a few less obvious examples, briefly indicating in the process how far the current law has strayed from this normative ideal.<sup>219</sup>

Most fundamentally, perhaps, for it is a business undertaking, the corporation has a perfect right to make offers of whatever kind to the public (subject to the endangerment considerations discussed above, about which more in a moment). The variations upon this basic right are manifold, of course, many of which have fared less than well since the end of the last century. Either from paternalism or, more commonly, from "public interest" reasons, rooted in considerations of "unequal bargaining power" or "fair competition" or "promoting capitalism," the corporation lives today with a surfeit of legal restrictions upon its right to make offers.<sup>220</sup>

Consider, for example, the offers corporations make to prospective employees. Ideally, the corporation should be able to offer any terms it wishes, for the mere making of offers takes nothing that offerees or third parties *own*, nothing over which they hold any *rights*. To be sure, the terms of offer may not be in the *interests* of these outsiders—*e.g.*, offers of lower future wages, or higher wage offers that lure employees away from other employers—just as the counterterms of offerees may not in turn be in the interests of the corporation. But if no one has a right to force an association of *any* kind upon another, then there can hardly be a right to force any particular *terms* of association.<sup>221</sup> Thus the state has no right to

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<sup>219</sup> The issues and examples to be discussed here should not be confused with those raised at (a) above, however closely related they may appear to be. The emphasis there was upon permitted *omissions*, upon what the corporation need *not* do, while here the emphasis is upon permitted *commissions*, upon what the corporation *may* do. Although in both cases the states of affairs that "result" from these omissions or commissions can be characterized in terms of the "effects" upon outsiders—and this is just the way in which the issues in (a) and here appear to be alike—doing so obfuscates and indeed ultimately begs the crucial question of omission-causality. Moreover, it shifts the discussion ever so subtly from the theory of rights to the theory of value, from an objective consideration of acts and omissions to a subjective consideration of desirable or undesirable states of affairs, as in fact the legal conflation of rights and interests is increasingly doing. This is to be expected, of course, in a thoroughgoing positivist regime, where "rights" are seen simply as values—or interests—that have "found their way" into law. (Thus do interests "rise to the level of" rights.) We should not be surprised, however, that the ensuing law becomes increasingly uncertain—at least as uncertain as the theory of value upon which in fact it rests.

<sup>220</sup> See note 2 *supra*.

<sup>221</sup> Thus the absurdity of our current labor law which says that neither the employer nor the employee union is required to "agree to a proposal [or to make] a concession," 29 U.S.C. § 158 (d) (1976), but at the same time imposes a duty on each to bargain in "good faith,"

dictate or in any way delimit such terms as minimum (or, more recently, maximum) wage offers, or conditions of employment (subject to the endangerment warnings discussed above), or fringe benefits such as retirement programs (and in particular, public retirement programs), or even the conditions under which such substantive terms are negotiated (excluding force, of course, or breach of contract).<sup>222</sup> Rather, our rights in these matters rest simply in our right to walk away from such offers, if we are offerees, or in our right to be left alone, if we are nonofferee third parties; our rights, that is, rest in the absence of a right in the offeror to force an association upon us, to take what belongs to us.<sup>223</sup>

Similarly, offers of sale made to the general public call for no government interference (subject again to the endangerment warnings discussed above), for here too the terms of offer are no one's business but the offeror. This applies in particular to pricing decisions. If private property means anything it means the right to dispose of or exchange that property in any way that does not violate the rights of others. Charging "exorbitant prices" (in order to garner "unconscionable profits") hardly violates rights. Better that no offer be made at all (which the owner has a perfect right to do)? Such pricing violates rights only if those paying the prices have some right to have the goods at issue at a lower price—which calls into question, of course, the privacy of the property. Thus wage and price controls of any kind are simply an indirect method of socializing property—property in the ordinary sense as well as (more ominously) our property in our labor. (Indeed, such controls are fascistic in the basic sense of that term, for they allow nominal private own-

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with all that that has come to imply (*see, e.g., NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (employer required to give reasons for refusing a wage increase and to provide records supporting those reasons); *NLRB v. Katz*, 369 U.S. 736 (1962) (unilateral action of employer to increase wages and benefits, without prior discussion with union, construed as a refusal to negotiate)). This is tantamount to saying that as a condition of enjoying his right to be in business, the employer must negotiate with prospective employees under legally prescribed conditions, which is precisely what the Court implied when it found that in lieu of satisfying this requirement the employer had a right to go completely (but *only* completely) out of business! *See Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

<sup>222</sup> *See, e.g., T. HAGGARD, COMPULSORY UNIONISM, THE NLRB, AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS* (1978); Haggard, *supra* note 16; Vieira, *supra* note 16.

<sup>223</sup> Once again, I am using "force" here strictly. It does not refer to the conditions of existence under which we are all "forced" to live our lives, but only to the taking of what belongs to others; for again, private necessity is no justification for forcing others to associate with us. *See* note 117 and accompanying text *supra*.

ership, while control is in public hands.)<sup>224</sup> But if charging *high* prices for one's goods or services violates no rights, neither does charging *low* prices, or indeed gift-giving. To be sure, competitors may have an *interest* in a corporation's charging only "fair" prices, just as customers have an interest in "fairness" in the opposite direction; but neither competitors nor customers have any *rights* in this matter, for neither owns the object offered and hence has any ground for setting the conditions of offer.

These last-mentioned conclusions bring us straightaway, of course, to the antitrust law that has variously plagued and benefited the corporation for nearly a century now. I will not go into the minutiae—infinite in principle—of this area of our law because, quite simply, the theory behind antitrust enjoys absolutely no foundation in the theory of rights.<sup>225</sup> Quite apart, that is, from whether modern antitrust law has had the effect of protecting competitors rather than consumers, as has recently been argued,<sup>226</sup> the basic normative question is whether this body of law is justified *at all*. It will be justified only if there are rights that the proscribed acts violate. We have just seen that pricing decisions violate no rights. Neither then does "predatory pricing," or the market concentration that may (but only may) result, or the possible decline of competitors. For once again, if an act is not actionable *per se*, if it takes nothing to which others have a right, then it is not actionable even when done from a bad motive. Consumers have no more right to "fair prices" than competitors to "equal opportunity," as brought out in Part III. Likewise, price *fixing* violates no rights; nor do

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<sup>224</sup> Wage and price controls do not, of course, amount to complete external control of market behavior—or the uses that can be made of private property—as might be expected under a thoroughgoing fascistic regime. They do not, for example, reach out to the supply side of behavior. Accordingly, suppliers invariably respond to such controls by reducing their efforts (or directing them elsewhere), which gives rise, of course, to shortages. To have any hope of avoiding these shortages, then, wage and price controls have to be accompanied (at least) by forced supply—which moves the regime closer to thoroughgoing fascism, to the slavery that forced supply just is. (Alternatively, confiscation would enable the regime to move past fascism to socialism, thus eliminating the nominally private property altogether, though not the forced supply or slavery.) See R. SCHUETTINGER & E. BUTLER, *FORTY CENTURIES OF WAGE-PRICE CONTROLS: HOW NOT TO FIGHT INFLATION* (1979).

<sup>225</sup> For an excellent treatment see D. ARMENTANO, *THE MYTHS OF ANTITRUST* (1972). See also R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978), which unfortunately is vitiated by Bork's (implicitly positivist) assumption—no doubt historically correct, for all its theoretical difficulties—that the "purpose" of our antitrust law is to increase consumer welfare. That rationale, of course, could "justify" the violation of an endless number of rights. See II.B.1 *supra*.

<sup>226</sup> See R. BORK, *supra* note 225.

cartels, or tying agreements, or any other "combinations in restraint of trade." For these are simply contractual arrangements, which individuals and corporations alike have a perfect right to enter into:<sup>227</sup> if individuals have a right to perform the acts now performed by the combination (*e.g.*, setting prices, withholding products, etc.) then the combination does too; for rights do not get lost simply because they are exercised jointly (just as groups cannot *gain* rights that individuals do not first have). Further, the entry of a corporation into new lines of trade can hardly violate rights. This is true whether the entry is direct or by way of takeover or merger.<sup>228</sup> (Are we really to suppose that the Ford Motor Company has no right to produce kitchen stoves? Is it any different when Mobil Oil buys Montgomery Ward?) Conversely, then, divestiture is not obligatory and cannot legitimately be forced. In each of these cases the same principle applies: however the *interests* of others may be affected by the activities antitrust proscribes—concerning which the historical evidence seems to be very much against antitrust<sup>229</sup>—these others can point to no *rights* of theirs that these activities violate. Again, we do not have a right to force a weighting of the competition in order to make it "fair," even assuming we knew *how* to do this and would do it impartially (two *very* large assumptions). Indeed, each of us has a right *against* such forced interference.

There of course are many other corporate activities that critics have sought to restrict or prohibit, ranging from corporate speech<sup>230</sup> to corporate gift-giving<sup>231</sup> to corporate relocation (without community approval),<sup>232</sup> all of which can be analyzed along the lines developed above. I want finally, however, to apply this analysis to one of the more difficult but recurring issues in the corporate debate, the problem of bribes and kickbacks. This issue is especially important to American corporations doing business abroad, for in most parts of the world—market and "nonmarket" economies alike—these payoffs are simply a normal part of doing business. With the passage of the Corrupt Practices Act of 1977, however,

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<sup>227</sup> See note 84 and accompanying text *supra*.

<sup>228</sup> If our concern with reducing the concentration that results from takeovers and mergers is serious we will change the tax policy that encourages this. See M. FRIEDMAN, *supra* note 150, at 130; Jacoby, *The Conglomerate Corporation*, 2 CENTER MAGAZINE 41, at 46-47 (July 1969).

<sup>229</sup> See D. ARMENTANO, *supra* note 225; R. BORK, *supra* note 225.

<sup>230</sup> See note 188 *supra*; Deer, *State Law*, 2 CORPORATION L. REV. 56 (1979).

<sup>231</sup> See R. EELLS, *CORPORATE GIFT GIVING IN A FREE SOCIETY* (1956); Manne, *supra* note 9.

<sup>232</sup> See McKenzie, *Business on the Run?*, WALL ST. J., March 19, 1979, at 24.

American companies have frequently had to forego such business—unlike their foreign competitors—or try to fit these payoffs within the often inscrutable language of the Act.<sup>233</sup> Once again, then, I want to go to the heart of the matter and ask what is wrong, if anything, with bribes and kickbacks. In particular, do corporations have a right to offer these payoffs? Or, what comes practically to the same thing, do they have a right to make such payoffs when the request is initiated by others, *i.e.*, when the corporation is the offeree?

A conventional approach to this issue might attempt first to define "bribe," "kickback," "payoff," and so forth, which would move the argument very quickly to assumptions about "profit," "commission," and other such notions—as though the latter were in some sense "fixed," such that we could tell the difference between, say, a corporate kickback and a reduction in expected corporate profit. What I want to do instead is begin by describing the payoff model, in its simplest form, as involving (at least) three individuals and, more importantly, two relationships: that between, let us assume, the buyer-principal and his agent, the latter being the recipient of the payoff (call him the agent-payee); that between the corporation-payor and the just-mentioned agent-payee. Now if the corporation-payor wants to reduce its expected profit, however measured, on the transaction before it (or if its salesman wants to reduce his commission) by kicking part of it back to the agent-payee, that, in and of itself, violates no one's rights—not, that is, as long as corporations (or their salesmen) have a right to work at whatever rate they choose, including at a loss. For both payor and payee voluntarily consent to this arrangement and hence themselves have no basis for complaint.

The problem arises, if one arises at all, in the relationship between the agent-payee and his principal. If anything is *taken*, that is, it is taken not from the payor or payee but from the principal, and not by the corporation-payor, who has no direct relation with the principal-buyer, but by the agent-payee. For we assume here (but see below) that the agent is commissioned by his principal to get the "best deal" he can for the principal. If the agent "sweetens" his commission, however, by accepting a payoff from the corporation (regardless of who initiates the offer), *and does not pass that payoff on to his principal*, then he has failed to get the "best deal."

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<sup>233</sup> See *Business without Bribes*, NEWSWEEK, Feb. 19, 1979, at 63-64.

By not passing on the corporation's lowest offer—original offer less kickback—he has failed to satisfy his contractual obligation and hence has taken (kept for himself) what belongs to his principal.

Now of course many agent-principal agreements will be looser than in this example. Moreover, they may simply assume, as part of the background custom in these matters, that "payoffs" are part of the agent's fee. All of which will raise doubts not about who the wrongdoer is but about whether there is any wrongdoing at all.<sup>234</sup> If, however, there is a firm agreement between principal and agent, as depicted above, it is not the *corporation* that violates this agreement, either by paying a requested kickback or by itself initiating the kickback offer. For the corporation is not a party to the principal-agent agreement. Moreover, the corporation has simply made an offer, or met a request, which we saw above it has a perfect right to do. (Are we really to suppose that the corporation has a supererogatory duty to inquire into the relationship between the agent and his principal, to be solicitous of the principal's well-being, especially when it is likely that the parties wish to be dealing at arm's length?) Rather, it is the *agent*, who *is* a party to the agreement with the principal, who violates the rights of the latter as contained in that agreement. These rights, that is, are held not against the corporation but against the agent. Accordingly, legislation and sanctions directed at those who *give* payoffs, rather than at those who *accept* them, are simply misdirected. They single out the wrong party. Corporations, then, have a perfect right to accept requests for payoffs and indeed to offer them. Here again we have to distinguish between what it might be *good* for them to do, according to some idealized theory of value, and what they have a *right* to do.<sup>235</sup>

<sup>234</sup> Those uneasy about "payoffs" are often the same people who are uneasy about profits and commissions—and indeed about bargaining in the marketplace. The implicit assumptions—that there are "fair prices," which happen to be just the prices actually asked—are all but unthought-of in many parts of the world.

<sup>235</sup> Notice that the theory of rights finds the wrong not in the tempting (assuming the offer is initiated by the corporation), but in the yielding to the temptation. Thus, inducement—to alienate a contract, or affections, or whatever—is in itself not prohibited. Similarly, pornography may be a temptation to criminal behavior (but only may, for here the evidence indicates no real correlation); it is permitted, however, unlike the yielding to that temptation. The theory of rights, in short, is rooted in act morality, not in agent morality; it places great stock in—indeed is grounded in—the free will of the agent, in the view that human behavior is more than mere stimulus and response. (Would behaviorism enable us to hold liable those stimulating the response? But why? What stimulates *their* stimulating behavior? *Would anyone* be liable? Or responsible?)

3. *Special Relationships.*—We turn now to the special relationships in which the corporation stands. Here, however, we have to be careful about the reference of “the corporation”—whether it denotes shareholders, or directors, or includes (only) management or even ordinary employees.<sup>236</sup> Let us work toward these issues slowly, then, by raising a few general points first, and by continuing for the moment to view the corporation as a single entrepreneurial unit. In a short while we will go inside this unit, gradually refining the picture as it becomes necessary.

Recall that the corporation stands specially related to all those with whom it has contracts and to those whom “it” has injured, either tortiously or criminally, or who have injured it.<sup>237</sup> I will concentrate here upon the contractual relationships, since forced associations were treated earlier under the limited liability question. The corporation stands contractually related, then, toward those consumers, creditors, suppliers, employees (including managers), directors, and shareholders who have entered into contractual relationships with it. Since there is an order of increasing complexity

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Cannot this argument zip all the way back to haunt us, however? By logical extension, that is, it would seem that the employer of a hired murderer has violated no right: he, after all, has simply made a contractual offer, which the murderer, the real wrongdoer, has accepted. That extension can be stopped, I believe, by citing our rights against endangerment. Such a contract, that is, amounts to an assault: indeed, the mere making of such an offer amounts to a threat upon the would-be victim's life and hence is a violation of his right against endangerment. For under such a threat—just like living next door to a dynamite factory—he cannot exercise *his* rights as he might otherwise. On the other hand, inducements such as those above, though they “threaten” to violate rights, do so without giving rise to the relevant kind of fear, the fear that is generated by the threats that *are* violations of our rights against endangerment; for if the acts induced are carried out, there are remedies that can rectify the wrongs, unlike the compensatory “remedies” for murder, physical harm, and so forth. There are threats, that is, which if carried out can be fully rectified and hence give rise to no fear: other threats, however, cannot really be rectified if carried out and hence give rise to fear, to incapacitation, to the inability to exercise the rights we might otherwise enjoy. See R. NOZICK, *supra* note 11, at 65-71.

<sup>236</sup> See note 29 and accompanying text *supra*.

<sup>237</sup> Here I have put “the corporation's” tortious and criminal acts in the ordinary idiom for ease of statement. Recall, however, the analysis at A.2 above: it is not “the corporation” that commits torts and crimes but various of the corporate actors, who stand personally liable; when their acts make the corporation itself liable it is through contract, not through vicarious liability. Nevertheless, in the case of dangerous conditions, including products liability, corporate tortious liability may be constructed insofar as the corporation, through its representations, holds itself out as the author of the conditions and hence as liable for them and for any untoward consequences resulting from them. (Liability for such consequences may be waived or limited, of course, either through an assumption-of-risk defense in tort, as adumbrated in the discussion of endangerment above, or through explicit contractual devices that are sufficient to accomplish this purpose.)

here, let me take up each of these relationships in the order just listed. But first let me note that a delineation of the rights and obligations that constitute these relationships is not a terribly complicated matter: put most plainly, the individuals thus related hold only those special rights and obligations they have agreed upon, a point I will make repeatedly below; otherwise they remain generally related to each other. Beyond this there is not much that the theory of rights has to say. Accordingly, the discussion here will be more brief than in the previous section; I want simply to set forth a few issues and examples, taking each as far as that theory will allow.

Most of the complaints set out in Part II under "Consumers and the Public" have now been treated, for they arise, in large measure, between parties only generally related. When consumers and members of the public become specially related to particular corporations, however, either through consumer contracts or through "corporate" (or their own) torts and crimes, then the special rights and obligations outlined earlier come into play.<sup>238</sup> Let me simply add here that in the case of consumer contracts, the analysis can ordinarily proceed by treating the corporation as a single entrepreneurial unit, for these contracts are usually made with "the corporation." (These same general points apply equally, of course, to those creditors and suppliers who may be contractually related to particular corporations.)

When we turn to employee issues, however, at least as they relate to actual and not just to prospective employees, we are then talking not about outsiders but about members of the corporation.<sup>239</sup> Nevertheless, here too we can ordinarily speak of the relationship between "the corporation" and these employees, for by "the corporation" we will usually be understood as referring to management—or at least to some part of management—acting for shareholders and hence for the corporation. (Thus the analysis leads back, again, to shareholders, who ultimately just are "the corporation.") Taking up these employee issues, then, here also many of the complaints listed in Part II under "Employees" have now been treated, for these pertain

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<sup>238</sup> For a more detailed treatment of consumer contracts, which is consistent with the background theory of this Article, see Epstein, *supra* note 18, at 305-15, discussing "add-on" clauses, "waiver-of-defense" clauses, clauses that exclude liability for consequential damages, "due-on-sale" clauses, and "termination-at-will" clauses as these operate in the franchising context. For a delineation of tortious and criminal rights and obligations which is consistent with this Article see note 113 *supra* and Pilon, *supra* note 114.

<sup>239</sup> For an overstatement of this point see the quotation from Lodge, *supra* note 24.



likewise to individuals only generally related to the corporation, *viz.*, to prospective employees. When these individuals become actual employees, however, the special rights and obligations they now hold vis-à-vis their particular employer are defined, once again, by the terms that have been agreed to (or that are logically entailed by those agreed-upon rights and obligations). To be sure, the relationship here ordinarily exhibits greater intimacy and duration than the one-time interaction between a consumer and a corporate producer, or even the ongoing relationships that often arise between corporations and their regular customers or suppliers. Nevertheless, the underlying principle in each of these cases is the same: individuals stand generally related except insofar as their actions—contractual or tortious or criminal—have served to create special rights and obligations between them. (Hence my concentration on general relationships.)

Nowhere perhaps does this principle come more clearly into focus than in cases involving the "terminable-at-will" doctrine, where either employer or employee may terminate their association "at will," *i.e.*, without cause, "just" or otherwise. Typically, in these cases, the employer dismisses the employee, and he gives reasons for the dismissal; but those reasons are often unrelated to job performance or even to larger economic considerations. Indeed, they sometimes are reprehensible, as when employees are dismissed for their off-the-job political or literary activities,<sup>240</sup> or for refusing the sexual advances of their superiors,<sup>241</sup> or for "blowing the whistle" on defective products,<sup>242</sup> or even to enable the employer to cut off a salesman's commissions where the employment contract expressly permits this.<sup>243</sup> All of which gives rise to charges that the employee's civil, or political, or privacy, or some other rights have been violated.

Many of these cases are indeed odious. (And by no means are they limited to the world of commerce and industry, as only a glimpse of the academic world will affirm.) But here again we have to distinguish between what it would be *good* for the employer to do and what he has a *right* to do. The employee enjoys no general right to a job because there is no right to forced association. Accordingly,

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<sup>240</sup> *McIntire v. E.I. DuPont de Nemours & Co.*, 165th Judicial Dist. Ct., Harris County, Texas, No. 954,904.

<sup>241</sup> *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

<sup>242</sup> *Geary v. United States Steel Corp.*, 319 A. 2d 174 (Pa. 1974).

<sup>243</sup> *Fortune v. National Cash Register*, 364 N.E. 2d 1251 (Mass. 1977).

when employer and employee come together they do so only insofar as the agreed-upon terms of association specify. If these terms include the option to terminate the association without cause, then there really is nothing more to say on the matter. However unenlightened the employer's reasons—or indeed shortsighted, as when “whistle-blowers” are simply doing their job—these reasons are irrelevant to the employer's right, as the employee himself has expressly granted. He cannot now come back, through the courts, to force new terms of association upon the employer, anymore than the employer can force the employee who has quit his job, for whatever reason, to continue working for him. In short, if the employer can terminate the association for no reason, then he can terminate it for the reasons he cites.

Now I readily grant that these cases usually involve individuals with unequal bargaining power, and that employees thus fired are often greatly disadvantaged as a result.<sup>244</sup> But as we have seen earlier, these considerations do not serve to generate rights. (If they did, the first consideration would take us away from contract, back to status; the second would ground rights in murky consequentialist reasons, ultimately undermining the whole idea of rights.) Similarly, it will not avail to argue that corporations should be prohibited from firing employees without cause—or indeed, from entering into at-will contracts—“because they [these corporations] affect the public interest.”<sup>245</sup> For there is virtually nothing that does not

<sup>244</sup> See, e.g., Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COL. L. REV. 1404 (1967); Ewing, *Winning Freedom on the Job: From Assembly Line to Executive Suite*, CIVIL LIB. REV. 10-11, (July-August 1977); Holloway, *Fired Employees Challenging Terminable-at-Will Doctrine*, NATIONAL L. J. 22, 26 (Feb. 19, 1979).

<sup>245</sup> Ewing, *supra* note 244, at 11. See also Berle, *supra* note 33, at 942-43, for both “public interest” and “public creature” arguments for limiting the rights of corporations:

The Bill of Rights and the Fourteenth and Fifteenth Amendments would thus have direct application to and also throughout any corporation whose position gave it power. The preconditions of application are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree . . . . Under this theory certain human values are protected by the American Constitution; any fraction of the governmental system, economic as well as legal, is prohibited from invading or violating them. The principle is logical because, as has been seen, the modern state has set up, and come to rely on, the corporate system to carry out functions for which in modern life by community demand the government is held ultimately responsible. It is unlimited because it follows corporate power whenever that power actually exists.

Berle's approach here, of course, especially his treatment of private corporations as “fractions of government,” is variously called state capitalism, fascistic syndicalism, or social democ-

in some way or other affect "the public interest," a consideration, once again, that is irrelevant to questions of rights. Rather, the right of the employee against being thus dismissed, if he has one, must be found in the employment contract itself; for otherwise he holds only general rights against his employer (as against anyone else), among which this right is not included.

It is noteworthy, in this connection, that recent courts have tried to find such a right not in general public interest considerations but through just this contractual route.<sup>246</sup> They have attempted, for example, to locate consideration the employee may have given in addition to his services, from which they have inferred "agreements implied in fact allowing discharge only for just cause."<sup>247</sup> As examples of such consideration they have pointed to the employee's having given up one job and relocated at the employer's request,<sup>248</sup> or even to his past service of long duration.<sup>249</sup> Clearly, however, unless these inferences do indeed follow from the actual language of the contract, or perhaps from the background negotiations, they have all the marks of a retreat from contract and a return to status—which amounts, of course, to treating the parties as unequal before the law.<sup>250</sup> Again, in the important *Monge* case,<sup>251</sup> in which a woman was fired because she refused the sexual advances of her

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racy. It is a very long way from the regime envisioned in the American Constitution. So thoroughly has that document been democratized, however, as to have enabled Berle to add, with no apparent linguistic qualms, that "[i]nstead of nationalizing the enterprise, this doctrine 'constitutionalizes' the operation." This from the man who decried power without property!

<sup>246</sup> Courts have not been reluctant to find for the employee when the reasons for dismissal contravened public policy, as when termination was for accepting jury duty, *Nees v. Hocks*, 536 P. 2d 512 (Or. 1975); or was intended to dissuade other employees from claiming workers' compensation benefits, *Frampton v. Central Indiana Gas Co.*, 297 N.E. 2d 425 (Ind. 1973). Notice then how "public policy" intrudes upon private relationships. In a legal regime consistent with the background moral theory of this Article, there would be no state-imposed workers' compensation insurance, which of course was an early form of no-fault insurance; rather there might be private risk-spreading devices. Nor would there be jury "duty"; rather, all trial costs, including compensation for voluntary jurors, would be borne by the losing party, which would reduce substantially the overcrowding of courts and the delays in justice that result when the guilty demand trials. There of course is much more to be said on these subjects; I raise them here simply to suggest that "public policy" need not intrude upon private relationships as much as we have come to believe in light of the breadth of current public policy.

<sup>247</sup> *Holloway*, *supra* note 244, at 22.

<sup>248</sup> *Brawthen v. H & R Block, Inc.*, 52 Cal. App. 3d 139, 124 Cal. Rptr. 845 (1975).

<sup>249</sup> *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D.N.H. 1974).

<sup>250</sup> Notice that here again (e.g., as in *Foley*, *supra* note 249) the theory of rights is strict; gratuitous beneficence does not serve to generate obligations in beneficiaries.

<sup>251</sup> Note 241 *supra*.

superior, the court found the employer had breached an "implied duty of good faith and fair dealing which is implied in every contract."<sup>252</sup> Here too, I suggest, we appear to have a case of judicial overreaching, however reprehensible the employer's behavior; for whatever the "duty of good faith and fair dealing" might entail, a by no means insignificant question, unless such a duty were in fact implicit in some encompassing contractual language, serving to negate any at-will aspect, there is no warrant to infer it *as a feature of contracts per se*, especially when its effect is to negate explicit contractual language. We must assume, that is, that if the at-will provision is an explicit part of the contract, it is there for a reason—perhaps to give maximum flexibility—and that each party, knowing it is there, and knowing the implications of it, agrees to it all the same. Otherwise we are back at status, with all the paternalism and inequality implicit in that doctrine.

But suppose the at-will provision is not explicitly a part of the contract. Are courts then at liberty to impose a "just-cause" doctrine? The answer is no, not if that means imposing value judgments about whether the employer's—or indeed the employee's—reasons for termination are "good" reasons. Nevertheless, when at-will is not specified, just-cause may be discovered *formally*—if it is contained implicitly in the contract. At bottom, employment contracts relate three terms: service, a rate of pay, and some period of time. If all three terms are specified, the employer can dismiss the employee before the expiration of the time term only if the service term has not been satisfied. Determining whether that term has in fact been satisfied, of course, will often involve the court in a close analysis, for the language describing the service required will be more or less precise.<sup>253</sup> Nevertheless, one can easily imagine language narrow enough to preclude the employer from terminating the employee for reasons other than those relevantly related to the services performed. In that case, termination for irrelevant reasons, or for no reason, would amount to a breach of the employment contract. In effect, the contract already contains a "just-cause" provision; the courts do not have to impose one *ab extra*, invoking extra-contractual considerations. (Indeed, such considerations are no different in principle than the policy judgments courts try to

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<sup>252</sup> Holloway, *supra* note 244, at 22.

<sup>253</sup> Cf. note 203 *supra*, where an analysis of language in the advertising/disclosure context might yield the "good" result, though by right-respecting means.

eschew as "legislative.") A contract thus drawn, then, will bind the employer. But with equal force it will bind the employee as well. Unless otherwise specified, that is, he is not at liberty to accept employment elsewhere, at least as long as the time term is in effect, for that too would amount to a breach of the contract.

Where the language of the service term is more broadly drawn, however, the court is less likely to be able to find the employer's reasons "irrelevant." Moreover, when the *time* term is left open, then by implication the contract is at-will. The alternative view, that the employer is required to keep the employee as long as the service term is satisfied, is simply not a plausible reading of the original exchange between the parties; for it would mean that the employer could dismiss such an employee only by going out of business, making the employee, in effect, something like a civil servant. (I assume here, wrongly, that civil servants may be summarily dismissed for failing to perform the services for which they are hired.) Moreover, by parity of reasoning it would mean that the *employee* could terminate the association only if the employer failed to satisfy the pay term. Absent an explicit at-will term, then, or, on the other hand, terms delimiting the conditions of dismissal (if only by logical entailment), the background presumption in employment contracts must be at-will. For this presumption alone preserves the general rights and obligations that describe the relationship between the parties, save for those special rights and obligations they have agreed upon. To replace it with some other presumption is to undermine those general rights and obligations, replacing them with others, which only the parties themselves can do.

Corporations and their employees stand generally related, then, except insofar as they have specified otherwise; hence the terms thus specified, *i.e.*, the special rights and obligations thus created, are what constitute the special relationship, and what alone constitute it. This analysis applies not only to the conditions under which the employer-employee association may be terminated, but to all aspects of the association, such as control of the workplace, or participation in corporate decisionmaking. It should hardly surprise that the corporation is not a democracy—it was never intended to be. It is a business, not a political association. It is owned not by all of its "members" but by the shareholders, who conceived it and set it in motion with their capital, or subsequently joined it in the same way. Because it is *their* corporation, shareholders have the right to organize and direct it, just as anyone else has the right to control what is his. In the larger corporation, of course, that control

is ordinarily delegated to directors and then to management, whose right to control the workplace and direct the company is legitimate in virtue of that delegation. When thus delegated, however, management's rights of control are exclusive, even when others are seriously affected by the conditions controlled,<sup>254</sup> as when workplace conditions endanger employees. (Indeed, how else could management subsequently be held liable?) As was brought out earlier, employees have rights against such endangerment, and a right to be warned of it, which enables them to assume the risk if that is what they choose.<sup>255</sup> But they do not have a right to have their particular jobs without the risk, *i.e.*, to control the conditions of employment—not, that is, if they are unable to obtain that control, *i.e.*, to obtain those terms (those particular jobs without the risk), through negotiation. If management, having disclosed the risk, is unable to find employees willing to assume it, then those jobs will remain unfilled (and the company will suffer accordingly), or working conditions will have to be improved until they are acceptable to prospective employees. In short, management is obligated to disclose the risks, but not to yield control of the workplace. For the right of control, as with all rights, is rooted ultimately in ownership. Shareholders own the workplace, not employees.

With these last considerations, it should be noticed, we have moved more deeply into the corporation, which was necessary in order to show the legitimacy of management control of the corporation vis-à-vis nonmanagement employees. But of course managers themselves are employees, at least in their managerial capacity;<sup>256</sup> accordingly, the conclusions just developed for nonmanagement employees will apply to them as well. In these cases, however, at least with respect to the larger corporation, "the corporation,"

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<sup>254</sup> See note 190 *supra*. In a moment I will develop this point a bit more fully, not as it applies to employees but to shareholders.

<sup>255</sup> Critics of this arrangement will object that it permits employers to "take advantage" of the private necessity of employees. That is true, but again, the same could be said for virtually any market transaction. The test for legitimacy, as throughout the theory of rights, is found in consent. If employees agree to work at great heights, or with toxic substances, or to expose themselves to whatever kind of employment danger, in exchange for whatever kind of consideration, then what more can outsiders say? Are we to *prevent* such mutually agreeable arrangements? By right? And over the objections of the employees themselves? Or is it simply that we are to restrict the endangerment terms the employee may offer? That comes, of course, to the same thing, for it prohibits individuals from negotiating arrangements that go beyond those restrictions, if that is what they wish.

<sup>256</sup> When managers are also directors or shareholders, the issues are more complex, but the background principles remain the same, as we will see in a moment.

which holds the corresponding rights and obligations, will denote either higher levels of management, representing shareholders, or, in the case of the highest levels of management, will denote the directors, again representing or speaking for the shareholders. Inevitably, then, the analysis moves back to shareholders, to their rights and obligations as owners of the entity with which management contracts.

But is this analysis of "the corporation" right? Does this term, that is, inevitably denote shareholders? We continue to reach this conclusion by tracing back, by following the immediate corporate actor back to the wellspring of his commission, the corporate owner, who with his fellow shareholders has set the whole undertaking in motion. But does this tracing back not reverse itself when it is the *shareholder* who is disadvantaged by "the corporation," as in corporate freezeouts, for example? Indeed, critics of "corporate" behavior vis-à-vis shareholders seem in general to presume that *managers*, and not the shareholders, are "the corporation."<sup>257</sup>

The ultimate untangling of this issue takes us, of course, not to any body of SEC rules aimed at structuring the shareholder-director-management relationships from outside, much less to any considerations of fairness between the parties, but to the articles of incorporation, as brought out in section A.2, above. For setting aside the SEC rules that have intruded upon the matter, "the corporation" *just is* the complex contractual entity brought into being by the founders, as described in these articles of incorporation, and as owned by these founders or by others who have subsequently bought into the arrangement in the prescribed way. Now in these articles, along with whatever amendments may have been attached, the complex web of special relationships that hold between shareholders, directors, and managers will be set forth, in more or less detail. In general, as we saw in subsection 1 above, the founding shareholders are at perfect liberty to internally structure their corporation in any way they desire; and subsequently the shareholders are at liberty to amend that structure by methods that are consistent with the rules set forth in the original agreement, yielding results that do not violate rights of outsiders. Thus if they elect to settle corporate issues by a rule of unanimity, or by a majority rule, or by selecting a manager with plenipotentiary powers and no fiduciary responsibilities, that is their business and their business alone. For again, if

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<sup>257</sup> See text at II.A.1 *supra*.

an individual has a right to order his own affairs in any way he chooses, provided he violates no rights of outsiders, then he has a right to order his affairs with others in ways that are mutually acceptable, provided again that no rights of outsiders are violated.<sup>258</sup> The latter is simply a logical entailment of the former. In sum, then, these articles constitute "the corporation," and point to the shareholders who stand behind them, however complex the line from these shareholders to the various corporate actors.

Now this explication of the analytical and normative underpinnings of the corporation, general though it is, yields a broad range of immunities for the corporate owners; for their right to structure their corporation in any way they choose renders them immune from outside interference in these matters. Outsiders, for example, have no right to determine who shall sit on the board; if the owners want a board composed entirely of insiders, in the technical sense, *i.e.*, employee directors (despite the conflicts of interest to which this may give rise), or if they want a board composed of a number of "constituency directors," or whatever, that is their right. It is, after all, *their* corporation.<sup>259</sup> Similarly, provisions for internal accounting or for the transmission of information between the various corporate people are matters for the shareholders alone to decide, even if they decide on minimal provisions in this connection. Again, the shareholders are at perfect liberty to establish mechanisms to insure their involvement in corporate governance at every turn, or to remove themselves entirely from the governance of their corporation. In all such matters, in short, it is the shareholders, and not outsiders, who have the right to do the internal structuring of their corporation.

It will be objected, of course, that the ideal depicted here is very far from reality in most cases, especially in the large, publicly-owned corporation—which prompted Berle and Means to their thesis. This objection, however, misses the point. It is not the measure of corporate control that the average shareholder *in fact* exercises, or even is *able* to exercise, that is the basic normative question. Nor is the question whether "the corporation" acts in the interest of the

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<sup>258</sup> Cf. note 18 *supra*.

<sup>259</sup> By no means is it clear that so-called "independent" directors will be more likely to act in the interests of the shareholders than inside directors with a greater stake in the corporation. Nor is it clear that outside directors who depend upon their fee will be more independent than shareholder directors. See Bialkin, *Exaggerating the Moral Decline in Governance of Corporations*, NATIONAL L. J. 26-27 (Dec. 25, 1978). Such considerations, however, are irrelevant to the rights in the matter.



shareholders—the fiduciary question—unless this is specified as a substantive right of shareholders vis-à-vis directors, managers, or, indeed, other shareholders (which is ordinarily the case, more or less, and hence will be taken up below). Rather, the question is whether those who in fact are the corporate actors—directors or, more often, managers—are violating any *rights* of the shareholders. That depends upon just what rights the shareholders have, of course, which in turn is a function of the rights they have specified for themselves in the articles of incorporation they have drawn up or subsequently become a party to.<sup>280</sup>

We come, then, to the other side of the coin. Just as our explication of the analytical and normative underpinnings of the corporation reveals the immunities the corporate owners enjoy vis-à-vis outsiders, so too it reveals the disabilities these shareholders may have instituted vis-à-vis each other and vis-à-vis those directors and managers to whom they have delegated control over their assets. In pooling their assets, that is, and delegating a measure of control over those assets to their fellow shareholders and then to directors and managers—which they do in all but a regime of unanimity which permits the withdrawal of individual assets on an individual basis—these shareholders will necessarily expose those assets to possible uses about which they may be displeased—indeed, to uses that may diminish the value of those assets. This, after all, is the risk that goes with the delegation of control. Having made that delegation, however, the shareholders cannot now come back to complain when “the corporation”—*i.e.*, when those to whom control has been delegated—goes on to exercise that control in ways that are detrimental to them, or, more commonly, to some of them, not, that is, when these corporate acts conform to rules to which the shareholders themselves have given their consent, either explicitly, in founding the corporation, or implicitly, in subsequently joining the corporation and hence consenting to the articles of incorporation that constitute it.

To return then to the question whether “the corporation” does inevitably denote the shareholders, we see that indeed it does, even when (some) shareholders are disadvantaged by “the corporation,” *i.e.*, by themselves. I realize, of course, that it may seem odd to conclude that shareholders can victimize themselves. Our inclination, in these cases, is to pierce the corporate veil, to try to locate

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<sup>280</sup> See note 190 *supra*.

the *real* people—the directors or managers (or majority shareholders) who are acting to the disadvantage of the (minority) shareholders. But the issue at bottom here is really quite simple: when a body of procedural or substantive rules, such as may be contained in articles of incorporation, is agreed to, then those who thus give their consent must abide by the results yielded by subsequent applications of those rules, advantageous or not. This applies whether it is umpires calling batters out, teachers (in private schools) giving failing grades, or, in some cases, corporate managers deciding to “go private.”<sup>261</sup> For in each of these we have an individual being disadvantaged by someone else who is acting under a rule to which the former has given his consent, if only implicitly.

In order to illustrate these points let us look briefly at the issue of corporate freezeouts—of which this last example, going private, is a part—especially as this subject has been treated in the most recent work of Victor Brudney and Marvin A. Chirelstein.<sup>262</sup> “The essence of a freezeout,” these authors write,

is the displacement of public investors by those who own a controlling block of stock of a corporation, whether individuals or a parent company, for cash or senior securities. The public investors are thus required to give up their equity in the enterprise, while the controllers retain theirs. Freezeouts most commonly take the form of a merger of a corporation into its existing parent or into a shell corporation newly formed for the purpose by those who control the merged entity.<sup>263</sup>

Freezeouts fall, however, into three analytically distinct categories: (a) two-step, or integrated, mergers; (b) pure going-private transactions; and (c) mergers of long-held affiliates. Two-step mergers ordinarily occur through tender offers, especially when the target company’s management opposes the sale of the firm: the first step oc-

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<sup>261</sup> It does *not* ordinarily apply, however, to the relationship between the individual and the state, where the consent of the individual to be thus ruled is at best “tacit,” not implicit (as when an individual deliberately buys shares in a company and hence implicitly consents to its article of incorporation), much less explicit (as when an individual is a founder of a corporation). See note 51 *supra*; R. Wolfe, *In Defense of Anarchism*, *loc. cit.*; note 277 and accompanying text *infra*.

<sup>262</sup> Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, *supra* note 32.

<sup>263</sup> *Id.* at 1357. “Majority” (or controlling shareholders), the authors note, “is not meant to be confined to a person or persons owning a majority of the voting stock. It includes those whose control of the enterprise through stock ownership and domination of the proxy apparatus effectively enables them to determine the terms of the merger.” *Id.* at 1358 n.10.

curs when a majority of the shareholders of the target company accept the offer of an unrelated acquiring company; the second when the acquiring company, now the majority in the target company, acts "to eliminate the untendered shares by merging the target company with itself or with a wholly owned subsidiary created for that purpose."<sup>264</sup> Brudney and Chirelstein contend that this two-step process should be viewed as an "integrated plan," analogous to a unitary purchase of assets by an acquiring company (the purchase having been approved by the target company's board):

Tender by majority is the equivalent of a conventional majority vote; the subsequent merger merely gives effect to the majority's decision to accept the terms of the acquisition. The requisite "vote" has already been cast by the time the tender offer is completed, and the acquiring company is not really a voter in the original constituency at all.<sup>265</sup>

Thus there is no transaction between related parties and no self-dealing. Moreover, because the unrelated acquiring company is a stranger, no issues of fiduciary duty arise. Nevertheless, "to protect shareholders from being stampeded into accepting the tender price by the prospect of being forced to accept a lower offer on merger if the tender succeeds," the authors "think it appropriate that the price paid in the merger for the shares then outstanding be the same as the price offered on the initial tender."<sup>266</sup>

With pure going-private transactions, however, as well as with mergers of long-held affiliates, the parties are not strangers; hence the fiduciary duty comes to the fore. When a company goes private,

controlling stockholders who are responsible for the company's management, having determined that its shares are undervalued by the market relative to its prospects and expectations, seek to terminate the public stockownership and return the firm to the status of a closely held entity. Typically, the insiders [*i.e.*, controlling stockholders responsible for management] create a holding company, to which they transfer their controlling shares, and then propose a merger of the operating company into the holding company. The plan is that public stockholders of the operating company receive cash (borrowed by the operating company or drawn from its working capital)

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<sup>264</sup> *Id.* at 1360.

<sup>265</sup> *Id.* at 1360-61.

<sup>266</sup> *Id.* at 1361-62 (footnote omitted).

equal to the current market value of their shares plus a premium, while the insiders emerge as sole owners of the equity.<sup>267</sup>

Although the rationale the insiders advance for going private is ordinarily one of efficiency, Brudney and Chirelstein find little merit in these claims, arguing instead that the aim of the insiders is "simply to increase their investment from a controlling fraction of the company's stock to one hundred percent."<sup>268</sup>

In the third kind of case, however, involving mergers of affiliates, the authors believe the efficiency claims are more persuasive. These cases ordinarily involve a merger between a parent company and a subsidiary corporation that the parent has controlled for a more or less extended period of time. Unlike the two-step merger between unrelated companies, then, these transactions are not at arm's length: "both companies are managed, ultimately, by a single board of directors, whose obligations of loyalty and care run equally and concurrently to *both* sets of public stockholders."<sup>269</sup> Hence, the parent must deal "fairly" with the subsidiary's stockholders, the criteria for which the authors go on to explore. They conclude that fairness will be achieved

either by restricting the permissible consideration to a proper proportion of the parent's common stock, or by assuring that the subsidiary's stockholders are placed in a position, through the receipt of cash or debt, to reacquire an equivalent proportionate stock interest in the surviving entity.<sup>270</sup>

By way of policy, then, Brudney and Chirelstein would prohibit pure going-private transactions, but would permit two-step takeovers and mergers of long-held affiliates, provided the relevant "fairness" criteria were satisfied (which I have barely mentioned here). The justification they offer for these conclusions comes down, it seems, to three points: "the social value of the objective served by the elimination of the minority interest,"<sup>271</sup> which is a measure of both private and public efficiency; considerations of majority rule, which the authors view as reflecting both fairness and efficiency (about which more in a moment); and the implications of

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<sup>267</sup> *Id.* at 1365 (footnote omitted).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1370.

<sup>270</sup> *Id.* at 1376.

<sup>271</sup> *Id.* at 1359.

fiduciary considerations. Since the two-step takeovers do not involve a fiduciary duty, are generally regarded as efficient, and are accepted by a majority of the target's shareholders, they would be permitted. Pure going-private transactions, however, have no social value, and violate the fiduciary duty; hence, despite majority approval, they would be prohibited. Affiliate mergers, on the other hand, do have social value, are approved by a majority, and hence are permitted provided the fiduciary duty is satisfied through satisfaction of the fairness criteria.

This much, in summary, is the Brudney-Chirelstein thesis on corporate freezeouts, which comes down, as they say, to never permitting a "true" freezeout.<sup>272</sup> Our concern in this Article, however, is not with whatever policy implications might flow from some view of "social value," i.e., with what "we" should do through law to bring about some set of "social ends,"<sup>273</sup> but with the rights and obligations of the respective parties. Accordingly, we need to look more closely at the second and third of the justificatory reasons just listed, which will help to shed light on this issue. In particular, we want to know whether these majorities have a right to displace the respective minorities, or do the minorities have rights against this.

Now the view of Brudney and Chirelstein on majority rule is instructive:

Freezeouts, by definition, are coercive: minority stockholders are bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they may receive is less than the value they assign to those shares. But this alone does not render freezeouts objectionable. Majority rule always entails coercion. It is, nonetheless, an acceptable rule of governance if all members of the voting constituency share a common goal and if all will be identically affected by the outcome of the vote.<sup>274</sup>

In addition to these "fairness" considerations, however, the authors later raise a matter of efficiency:

The [sic] alternative—to permit a single nay-voter to bar the merger—is well-nigh unthinkable, for, by compelling or en-

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<sup>272</sup> *Id.* at 1376.

<sup>273</sup> For a useful critique of this "social engineering" approach to law, see Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L. FORUM 15 (1978).

<sup>274</sup> Brudney & Chirelstein, *supra* note 32, at 1357.

couraging stockholders to engage in hold-up behavior, it would, in effect, make mergers and sales of assets a practical impossibility.<sup>275</sup>

Whether unanimity and majority rule exhaust the category is not the issue, of course; nor are efficiency criteria even relevant to the question whether majority rule is justified. But neither will we discover the rights in the matter of majority rule by considerations of fairness; for even if we can get clear about a "common goal" and demonstrate that all members of the voting constituency share it, and show as well that all will be identically affected by the outcome of the vote,<sup>276</sup> we still will not know whether the majority has a *right* to exercise its will over the minority. Rights simply are not generated by considerations such as these, especially a right of this kind. Rather, a right to force someone to give up what is his can be justified only if that someone has done something to create that right in the right-holder—either violated some right of the latter, or, as in the case at hand, has given his consent. What justifies majority rule, then, and what alone justifies it, is prior consent, not considerations of fairness or efficiency.<sup>277</sup> It is not the case, then, that majority rule always entails coercion, as Brudney and Chirelstein seem to believe. For as brought out above, those who consent to be ruled by the will of the majority (or by *any* fraction of the whole) have no ground for complaint when subsequent applications of that procedural rule go against their immediate wishes, no more, that is, than anyone else who is bound by his promises can claim he is being coerced when those promises are called in. Coercion involves the violation of a *right*—which consent can alienate—not the mere frus-

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<sup>275</sup> *Id.* at 1359.

<sup>276</sup> It is no doubt useful, and for the most part accurate, to assume that shareholders have "a common interest in maximizing the returns on their stocks, whether through periodic dividends or through sale or liquidation of the firm." *Id.* at 1357. But by no means does this purely economic consideration capture the whole range of shareholder interests, which includes any variety of noneconomic values. Moreover, at only the first level of analysis—at which "equal treatment" is translatable into some uniform measure—is it true that all shareholders are "identically affected by the outcome of the vote." Different investment histories will point to a profit on the merger transaction for some shareholders, a loss for others, which undoubtedly is reflected in there being a majority and a minority. Indeed, that the vote yields winners and losers is itself a factor arguing that all are not "identically affected." Here again, the problem of the incommensurability of interpersonal comparisons of utility (or value), which prompts us to limit our attention to rights.

<sup>277</sup> Thus majority rule is not *intrinsically* rightful, as is often supposed. Prior consent justifies it, but it as easily justifies rule by unanimity, or by two-thirds, or by an elected monarch.

tration of a want or interest.

Ordinarily, however, prudent individuals do not consent to majority (or any) rule in its bare form. When they enter into associations, and agree to have the affairs of the association directed by the will of the majority of the members of the association, they rope that will in with various provisos, which serve to create positive rights, delimiting the scope of the majority's will. One could say that what they give by consenting to majority rule, they take back by positing these restrictions. This brings us to the third of Brudney and Chirelstein's justificatory reasons; for in the corporate context, these restraints on the will of the majority are often lumped under the fiduciary category: deference is given to the majority will, just as executive or operating powers are delegated to directors or managers, *provided* that will or those powers are exercised in the interest of the shareholders who grant it. When the fiduciary duty is stipulated, majorities or directors or managers have a right to exercise their will only if it satisfies the fiduciary criterion.

Let us leave the fiduciary issue in this broad form for the moment and return to the Brudney-Chirelstein thesis, as well as to our basic normative question. As brought out earlier, whether the majority shareholders have a right to displace the minority, again setting SEC rules aside, will depend simply upon the prior agreement between the parties. Thus even with pure going-private transactions, which may appear to be the clearest case, there is no way to determine *a priori* whether the majority shareholders have a right to engage in these; they may, if the articles of incorporation permit it. In a regime of bare majority rule, in fact, one with no fiduciary provisos, it is difficult to see what would prevent the majority from having a right to go private. Self-dealing is not the issue. Prior consent—its absence or presence—is.<sup>278</sup> For prior consent to major-

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<sup>278</sup> Here again, the theory of rights is not concerned with the motive behind the act, but only with whether the act itself is performed by right, whatever the motive. Brudney and Chirelstein rightly criticize recent Delaware courts for thinking that the presence or absence of a "business purpose" will enable them to distinguish "good" from "bad" freezeouts, Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, *supra* note 32, at 1356, focusing on *Singer v. Magnavox Co.*, 380 A. 2d 969 (Del. 1977) and *Tanzer v. International General Indus.*, 379 A. 2d 1121 (Del. 1977). But their own argument against going-private transactions points strongly to the absence of a "business purpose" as the basic reason for prohibition: "since their only aim is to enrich the insiders, they would be flatly prohibited in all cases." These transactions exhibit, that is, no "social value." Moreover, though they are approved by a majority, "[n]o fairness test can save them," *i.e.*, no payout that would satisfy the fiduciary duty will save them. That exhausts the authors' justificatory criteria, leaving the

ity rule, in its bare form, will serve to justify the submission of the minority to the will of the majority, whatever the content of that will.

When we assume, however, that a fiduciary duty between the shareholders has been included in the original agreement, thereby making it more complex (and realistic), an interesting thing happens to the Brudney-Chirelstein thesis. In the first place, it should be noted, their analysis of fiduciary duty in the two-step merger appears to be misdirected. What we want to know is not whether the unrelated *acquiring* company has a fiduciary duty to the shareholders of the target company: no one, I expect, would seriously argue that, for reasons cited by Brudney and Chirelstein themselves.<sup>279</sup> Rather, the fiduciary duty, if there is one in the original articles, rests with the *target* company's shareholders *vis-à-vis each other*. But given such a duty, why is the majority decision to sell to outsiders *not* a breach of that duty to the minority—certainly the minority thinks the sale not in its interest—while selling to oneself, which is what a pure going-private transaction comes to,<sup>280</sup> is a breach of the fiduciary duty? If the majority can “force” a sale to an outsider, why cannot it do so to an insider (*i.e.*, when the majority *is* the insider)? In both cases the minority thinks its interests, protection of which has been made a *right* in the original agreement, are being violated. Given a fiduciary duty as part of the original agreement, then, not only going private but two-step takeovers and affiliate mergers should be prohibited. In effect, a fiduciary duty, drawn as above, will serve to negate majority rule, to allow rule by unanimity only.

We return, then, to the notorious fiduciary issue, which as an externally applied standard has exercised the courts for so long. It is notorious in fact because, while clear in general, as above, its application in particular is notorious in principle. This is so because it entails our asking what particular values the parties *would* have chosen for themselves, before the fact, which only the parties themselves, in principle, could have decided. Moreover, the fiduciary

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“social value” criterion as the deciding one, which for all practical purposes is a “business purpose” test. *Id.* at 1376.

<sup>279</sup> *Id.* at 1361.

<sup>280</sup> The use by the insiders of a holding company, which enables them to sell the operating company to themselves, will generate no justifiable objection. For unless prohibited by the arrangements drawn up in the operating company's articles of incorporation, these steps are legitimate, violating the rights of no one.



issue in the corporate context is complicated by the fact that the possibilities for self-dealing are inherent in the very normative structure of the corporation. Shareholders have a right, as we have seen, to name some among them as directors and managers; if they exercise that right, then some may be granting powers to themselves that they otherwise would not have, but which are nevertheless legitimate. Any attempt to prevent this from without runs up against the objection that the individuals in question are simply exercising their rights. Shareholders have a right to draw up agreements that will work to their advantage—or that will lead ultimately to their having victimized themselves.

The justifiable solution, then, will not rest in the construction by outsiders of fiduciary standards to be forced upon the corporate participants, for the benefit of those who have gotten themselves in trouble. Rather, if the impasse of rule by unanimity is to be avoided, and yet majority rule constrained by fiduciary considerations, then the parties to the original agreement will have themselves to draw those fiduciary standards more narrowly. They might, for example, flatly prohibit going private, except under specified circumstances, while allowing sales to outsiders to be decided by simple majority, or by two-thirds. Or they might permit all freezeouts provided fairness considerations—perhaps like those put forth by Brudney and Chirelstein—were satisfied. The possibilities are many. But in all cases “fiduciary duty” would not be constructed and applied from without; rather, it would be a function of, *i.e.*, defined by, the terms of the agreement, as drawn up by the parties themselves. As in the earlier discussion of employment contracts, these terms would describe the special relationship between the parties, would denote the special rights and obligations held by the parties vis-à-vis each other; otherwise the parties would remain generally related.<sup>281</sup>

I realize, of course, that individuals, especially public shareholders, do not think of, much less investigate, every possibility before entering into corporate relationships. As with contractual relationships generally, however, this does not justify governmental imposition of standardized arrangements, especially when these serve to frustrate experimentation in different forms. As a practical matter, moreover, there is no reason to suppose that independent advisory and policing institutions might not arise under a regime such as is

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<sup>281</sup> For a related treatment of these issues, see W. CARNEY, *FUNDAMENTAL CORPORATE CHANGES, MINORITY SHAREHOLDERS, AND BUSINESS PURPOSES*, forthcoming.

envisioned here, which would serve the same function as the vast and often inscrutable SEC regulations, but better.

#### V. RESPONSIBILITY

Throughout this discussion I have taken the strict position required by the theory of rights, as I believe that theory must be understood—a theory rooted in reason, standing in contrast to the theory of good. This has led me to defend a number of unpopular positions, some of which do not give comfort. It would be well, then, to restate briefly some of my reasons for following this rigorous course. It is not that there is some intrinsic enjoyment in defending what many would consider indefensible—though there may be. Rather, it is that the problems that ultimately concern me, particularly when the force of law is lurking in the background, are problems of justification—and hence of moral epistemology. We need to know, that is, just which of our moral claims can be justified, particularly when they are to be realized by force.

These concerns take us, then, to moral theory, which has always swung between two extremes, but in this century has done so especially. On one hand, moral skepticism casts doubts upon our ability to justify anything, often resulting in the exercise of force to gratify immediate or dominant interests. Moral dogmatism, on the other hand, asserts our ability to justify manifold moral conclusions, resulting often in moral overreaching, in the exercise of force to bring about utopian visions. What I have tried to do here is chart a course between these two extremes, though one closer to the skeptical pole. For justification *is* a difficult and precarious undertaking. Accordingly, I have sketched, by way of background for the central concerns of this Article, a very lean theory of rights, but one that I believe can withstand the probings of the moral skeptic. *This* much, at least, can be justified. More ambitious claims cannot, and indeed would undermine those conclusions that can be justified.

But there is a realm of morality that lies beyond this basic theory of rights.<sup>282</sup> It is the realm in which the theory of good or value enjoys its place. Here the conclusions are rather less sure, for they are rooted not in reason, in considerations we must admit to be true on pain of self-contradiction, but in the sentiments, in what Hume called our “humanity or a fellow feeling with others.” There is no

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<sup>282</sup> I have developed these issues more fully in *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 GA. L. REV. 1171 (1979), at Pt. V.

rational demonstration, for example, of the conclusion that we ought to behave as Good Samaritans when the occasions present themselves, as there is a demonstration of our right not to become thus involved. Nevertheless, most of us would be favorably inclined toward the former conclusion, whatever we thought of the latter, this because we share a certain community of values. We would say, for example, that responsible people behave as they *ought* to, not simply as they are *obligated* to. And there is no contradiction in saying this, because "ought" and "obligation" are differently grounded, reflecting these different dimensions of morality.<sup>283</sup>

Responsibility, then, at least as I have just used it, is an idea that goes beyond the strict lines drawn by rights and obligations. It draws upon the realm of the good, to connote individuals and institutions that do more than they are strictly required to do, this because they are members of civilized society, sharing in a community of values. Not least among those values, however, is a respect for reason, for the limits of moral truth, and hence for the distinction I have sketched between these two dimensions of morality. While going beyond the strict requirements of morality in their personal behavior, then, responsible individuals will nevertheless seek to preserve the distinction before us.

Corporations, no less than individuals, can behave as they are obligated only; or they can exhibit that more civilized behavior that is the mark of a deeper, more enlightened perspective, the mark of a more responsible member of society. Here, however, we have to be careful. We have to be clear, in the first place, about what is obligatory and what we only ought to do. I have tried to show, for example, that polluting and endangering others beyond a certain level are not things that corporations merely *ought* to refrain from doing, as responsible members of society; rather, these are matters of *obligation*. On the other hand, corporations have a *right* to discriminate in employment, or to dismiss employees for irrelevant reasons, though responsible corporations will not do this. But we have to be careful too not to press these moral prescriptions too far, for corporations, like individuals, must survive. Corporate directors and managers are ultimately accountable to shareholders, who are ordinarily driven by less enlightened, by more pecuniary interests. Economic reality, then, will serve to limit supererogatory behavior, in individuals as well as in corporations, as undoubtedly it should

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<sup>283</sup> For variations on this theme see Hart, *supra* note 30, at 177-78.

in the natural order of things. It is worth noting too, in this connection, that history demonstrates that behavior beyond the minimum set by the theory of rights is best not forced, that it is wise to leave it to individuals and institutions to decide how far beyond they can go, before they are up against the truths of economics. When left free to make these decisions for themselves, moreover, individuals and institutions will be motivated as they should be, not by the threat of force but by the deeper concerns that make for civility—and indeed for a humane society.

But these further considerations can be brought to bear upon our behavior not simply out of respect for others. There is also, perhaps ultimately, the matter of *self-respect*, which the Greeks seem to have understood better than we do today. Included in this idea are such fundamentally aesthetic notions as self-development, running over the course of a lifetime, central to which is the development of the rational faculties—in particular, the development of an understanding of the world about one. There are great forces at work in the world today, which have been building since the middle of the last century, undermining not only the free-enterprise system but freedom itself. I regret to say, however, that these forces are too little understood or appreciated by members of the corporate community. When a corporate executive apologizes for making profits, or offers economic rejoinders to what are fundamentally moral criticisms, he indicates his profound misunderstanding of the issues at stake. When he goes to Washington for protections and subsidies, he undermines the very system by which he lives. When he rushes to offer his latest technology to the Soviet Union, which they will pay for with taxpayer-subsidized loans from us, he makes his contribution toward the fulfillment of Lenin's prophecy, that capitalists would sell their enemies the rope with which to hang them—and loan them the money to pay for it.<sup>284</sup>

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<sup>284</sup> While I have put this last point as a matter of moral responsibility only, it is, I believe, a matter of moral *obligation*, the argument for which I would develop, in a fuller account, along lines adumbrated in note 235 *supra*. The conclusion I am urging here has been forcefully stated by the 19th century libertarian theorist Lysander Spooner:

This business of lending blood money is one of the most thoroughly sordid, cold blooded, and criminal that was ever carried on, to any considerable extent, amongst human beings. It is like lending money to slave traders, or to common robbers and pirates, to be repaid out of their plunder. And the men who loan money to governments, so called, for the purpose of enabling the latter to rob, and enslave and murder their people, are among the greatest villains that the world has ever seen.

L. SPOONER, NO TREASON (1870); *quoted in* A. SUTTON, NATIONAL SUICIDE: MILITARY AID TO

If members of the corporate community are to be respected—indeed, if they are to survive—they must come to the defense of the free-enterprise system. And they must defend that system not simply because it works but because it is *right*.<sup>285</sup> Moreover, they must behave in such a way as to indicate that they understand the forces at work in the world about them. The self-development necessary to be able to do this is part of what it means to be a responsible member of a civilized community. On these issues generally, it may be well simply to close by quoting a man who has been close to them, former Secretary of the Treasury, William E. Simon:

From my own experience, as reported in this book, I conclude that most businessmen today, at least until very recently, have been more concerned with short-range respectability than with long-range survival. Most appear to be mortally afraid of antagonizing the egalitarian gurus of our society. They do indeed seek to protect their enterprises, *but with little understanding of the philosophy that justifies their actions*. Consequently, they do so secretly, and often guiltily, in the form of lobbying, financing politicians, and, not infrequently, bribing them. Even more disturbing, they also seek to protect their enter-

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THE SOVIET UNION 5 (1973). Compare the recent statement on this subject by The Business Roundtable (a group of 180 persons, each of whom is the chief executive officer of a major corporation, most of which are "Fortune 500" companies): "Corporations, corporate boards and corporate shareowners, are not the right bodies to resolve on their own, for example, issues involving relations with other countries or U.S. military policy." *The Role and Composition of the Board of Directors of the Large Publically Owned Corporation*, 33 BUS. LAWYER 2083, 2100 (1978). Whatever The Roundtable may mean by "resolving" these issues on their own, its statement suggests that its member corporations will do whatever the law does not prohibit, considerations of moral obligation, moral responsibility, or, indeed, long-range self-interest notwithstanding.

<sup>285</sup> Compare the statement of The Business Roundtable, *id.* at 2089-90, which is instructive on the business community's understanding of "legitimacy": "Corporate legitimacy derives in the first instance from the fact that in the context of the democratic system, the corporation has proved the most effective instrument for creating the products, services, jobs and earnings by which the members of society can improve their lives." What is the force of "in the context of the democratic system"? Does this mean that if a majority of the electorate decides that the corporation is not "the most effective instrument" toward these ends, it will cease to be legitimate? Or is the operative word here "derives"? *I.e.*, corporate efficiency, though not *necessary* for corporate legitimacy, is a *sufficient* condition of that legitimacy. That would make the efficient corporation legitimate, no matter how it achieved that efficiency. Whatever the correct interpretation of their statement, it is indicative of how far the corporate community has bought the Nader line, that the legitimacy of the corporation is a function of its serving "the public interest."

prises by endorsing the very values of their worst enemies and financing their causes. If American business consciously wished to devise a formula for self-destruction, it could not do better than this. This is appeasement on a breathtaking scale. The only saving element, in fact, lies in that growing nucleus in the business world which has come to understand the devastating futility of this kind of appeasement.<sup>286</sup>

## VI. CONCLUSION

I have argued in this Article that much of the criticism that has been directed at the corporation in recent years, especially that which is aimed at undercutting the legitimacy of this institution, is fundamentally mistaken. The modern business corporation, I argued affirmatively, is a legitimate institution, existing by right; and most of what it does is done by right. As a corollary, the extensive governmental interference and regulation that surrounds the corporation today is largely illegitimate. In support of these conclusions I sketched the outline of a theory of rights, building upon recent work in moral philosophy that is aimed at showing what it means to say that individuals have rights, that they do have them, and just what those rights are and are not rights to. Against this background moral theory I demonstrated how a corporation might arise as a result of individuals exercising their individual rights. This demonstration involved showing how each of the basic features that characterize the modern corporation, from entity status to limited liability for torts, might arise by right, *i.e.*, in violation of the rights of no one. Quite apart, then, from how actual corporations have arisen historically, the modern corporation, as an institution, is a creature of private agreement, not a creature of the state. I then explicated what it meant to say that this institution had rights, following which I set forth many of the rights and obligations it has, especially as these are at issue in the current debate, moral and legal, that surrounds the corporation. This part of the discussion covered a wide range of subjects, from taxation to discrimination to pollution and endangerment, disclosure, antitrust, corporate freeze-outs, and many more. Finally, I raised a few points about corpo-

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<sup>286</sup> W. SIMON, A TIME FOR TRUTH 229 (1978) (emphasis added). It is more than noteworthy that the "growing nucleus" Simon refers to has recently organized to form the Washington-based Council for a Competitive Economy, an organization of businessmen dedicated to reducing not only government interference with business but government subsidies of and special protections for business.

rate responsibility, which I took as connoting ethical considerations that take us beyond the theory of rights. Here I looked into some of what it means to be a responsible member of a civilized society, especially as this involves understanding the forces that are at work in the world—always, but especially today.