

GEORGIA LAW REVIEW

VOLUME 13

SUMMER 1979

NUMBER 4

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ORDERING RIGHTS CONSISTENTLY: OR WHAT WE DO AND DO NOT HAVE RIGHTS TO*

Roger Pilon**

I. INTRODUCTION

In the last two decades we have seen what at least one commentator has called a "rights explosion,"¹ culminating in the present administration's concern, at once, with "economic justice and human rights."² But are all these rights justified? And if they conflict with our older rights—or indeed with each other—how can we say they all exist? For to have a right, on the ordinary view, is to have a clear title; it is not to have that title compromised by a conflicting obligation. If my assets are in fact my own, for example, then I have a right to use them as I please; but that right is diminished by your right to have me contribute to your child's education, especially if he decides to make that an extensive education. And your right not to be terminated from your employment at age sixty-five may very well conflict with my right to "equal opportunity" from that same employer,³ just as both of these rights conflict most certainly with

* This paper was originally prepared for a conference on "Modern Rights Theory" which was held in San Diego on March 8-10, 1979 under the auspices of the Institute for Humane Studies and the sponsorship of the Liberty Fund. As the director of that conference I invited four additional papers, by Antony Flew, Alan Gewirth, Richard A. Epstein, and Edwin Vieira, Jr., each of which treated a particular segment of the overall theory of rights. (Those other papers will be found elsewhere in this issue of the *Review*.) My own paper, for example, was intended, as its title suggests, to treat the interpretive question—What are there rights to?—and to bridge the gap between Gewirth's treatment of the normative question—Are there rights?—and Epstein's treatment of rights and the common law. As originally written, however, the paper contained a long section in Part IV spelling out, at a general level, just what rights we do and do not have. Because that section was itself taken from Part III, section C of my article "Corporations and Rights: On Treating Corporate People Justly," which also appears in this issue of the *Review*, I have omitted it from the version of the paper that appears here. At Part IV I will simply refer the reader forward to the relevant section of my article on the corporation.

I want to thank the Institute for Humane Studies and the Liberty Fund for their support of the conference. I am grateful too to the editors of the *Georgia Law Review*, in particular Mr. Kevin Buice, Ms. Joan Grafstein, and Mr. Edward Krugman, for their considerable work in putting the entire symposium together.

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¹ Rod McLeash, CBS News "First Line Report," Jan. 22, 1979.

² President J. E. Carter, *State of the Union Address*, Jan. 23, 1979.

³ See "Sears Sues U.S. Over Job Bias Laws," N.Y. Times, Jan. 25, 1979, at 1. Sears,

his right to run his business as he chooses.⁴ In each of these cases, I suggest, we see the modern tendency to look to rights alone, the tendency to multiply rights without regard for the correlative obligations they logically entail—the analogue of which in the oratory of political economics is the tendency to look to benefits while ignoring costs. As a result, the whole theory of rights is seriously compromised; for it appears to lead easily, perhaps ineluctably, to internal inconsistency and hence to the “nonsense” about which Bentham so poignantly spoke.

This demise need not be so. For in the broad range of cases the theory of rights, at least the theory of moral rights, describes a principled, consistent, and even elegant structure of human relationships. It is strict, however, for it is grounded in reason, not in the sentiments, not even in the moral sentiments. Thus its conclusions are not always satisfying to those sentiments, and may even be repellent to them. Accordingly, the theory of rights may not be the final word in ethics. But let me save this point till the end.

In the meantime I want to focus upon the third of the basic questions in the logic of rights, What are there rights to? In this symposium I expect that Professor Flew will have ably addressed the analytical question, What are rights?⁵ No doubt he will have drawn too some of the distinctions that hold between the theory of rights and the theory of good or value, to which I have just alluded. I know that Professor Gewirth has more than ably addressed the normative question, Are there rights? For his article before me indicates that he has set forth not only the *basis* but the *content* of rights as well.⁶ Lest it be thought that my task has thereby been rendered superfluous, let me assure the reader that, as the adage roughly has it, there is many a slip between justification and interpretation.⁷ In

Roebuck & Co. “charged that Government laws, regulations, interpretations and policies [on equal-opportunity employment] were so confusing, conflicting, inconsistent and occasionally ‘arbitrary’ and ‘capricious’ that they could not be complied with.”

⁴ This last-mentioned right long ago disappeared, of course. See, e.g., L. E. Birdzell, Jr., Review of R. NADER, et. al., CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS, 32 BUS. LAW., 317 n.1 (1976) (“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.”).

⁵ See title footnote *supra*.

⁶ Gewirth, *The Basis and Content of Human Rights*, 13 GA. L. REV. 1143 (1979).

⁷ Undoubtedly Professor Gewirth has gone beyond his symposium topic in the belief—correct, it turns out—that in my own discussion I would put the normative foundations he

the course of my discussion of the interpretive question I will point to some of those slips, which when corrected will yield a rather different picture of the world of rights than Gewirth has drawn. Nevertheless, in developing this question I shall be building upon much of the justificatory groundwork he has established, for I believe he has located, drawn together, and solved some of the most basic problems in the theory of rights.⁸

As just suggested, then, my purpose in this essay will be to sketch the world of moral rights, at least in outline. This amounts to showing, at a general level, just what rights there are and are not and how those rights are related to each other. I will show that these rights are justified and hence exist by deriving them from a background moral theory that is itself justified. Moreover, I will relate them to each other in such a way that the overall picture is consistent: we do not want to be able to derive a proposition of the form "A does and does not have a right to x at the same time and in the same respect." The best way to avoid this is by seeing to it that there are no inconsistencies in the justificatory theory itself.

Finally, before we begin, a word about moral and legal rights. I will be concerned in this essay, as I have said, with moral rights, quite apart from whether those rights are recognized by any legal system and hence exist as legal rights. By "moral rights" I mean to denote those rights that describe both our general and our special relationships with each other and with the various associations and institutions we create. General relationships are those relationships that the common law treats as holding between strangers: the rights and obligations that describe them are sometimes referred to as our natural rights. Special relationships are those relationships that arise from some particular historical event involving the parties to the relationship—most generally, a tort, crime, contract, or the begetting of a child.⁹ I will be working, then, within the tradition of state-of-nature theory: whatever rights and obligations there are are held first by individuals as such; institutions, such as governments,

has developed to ends he would find disquieting. He has directed, more or less firmly, my doctoral dissertation. See R. Pilon, *A Theory of Rights: Toward Limited Government*, Ph.D. Diss., University of Chicago, 1979.

⁸ Gewirth's best discussion of the subject, in my view, is found in *Moral Rationality*, The Lindley Lecture, Univ. of Kansas (1972); I will try to indicate some reasons for this view in Part III, *infra*.

⁹ On general and special relationships see Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 183-88 (1955).

have rights only insofar as they have been given them by individuals—thus they have only those rights that individuals *have* to give them.¹⁰ Since governments, if they can be justified at all, derive their authority from the governed, from some grant of that authority, the relationship between individuals or groups and their government is a special relationship, however difficult it may be to locate the occasion that generates it.¹¹ Although I will have little to say directly about the rights and obligations that describe this relationship, what I say about the other relationships will speak indirectly to this issue. For with Jefferson I will be assuming that governments are instituted among men to secure rights. Just what rights there are to be secured will help to determine what obligations governments have in service of that end and what rights they may exercise in carrying out those obligations.¹² Thus the world of moral rights should be seen as a model for legislators, and in particular for jurists; it is the “higher law” background to the positive law.¹³

II. MORAL COGNITIVISM

Let us begin then with a few normative as well as meta-ethical considerations. The idea of a right is ordinarily thought to be rooted in nonconsequentialist or deontological normative theory:¹⁴ individuals have rights, if they have them at all, because these rights can be derived from certain “self-evident” principles, or because they arise from certain antecedent events, such as contracts or crimes, which themselves reflect the implications of these overarching principles. Thus it is not because a certain distribution of goods will

¹⁰ See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 6 (1974) (“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.”). This point holds not only for the state, of course, but for all associations and institutions. For the case of the corporation, for example, see Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245 (1979).

¹¹ See, e.g., R. WOLFE, *IN DEFENSE OF ANARCHISM* (1976).

¹² Note well the order the argument for rights of the state must follow. It is not enough, by way of justifying its “rights” of enforcement, that the state point to its *obligation* to enforce rights; for the government cannot violate the rights of some in the name of satisfying its obligation to enforce the rights of others, even if this means that some rights will go unenforced.

¹³ See E. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (1955); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

¹⁴ There is a vast literature on this point. See, e.g., W. ROSS, *THE RIGHT AND THE GOOD* (1930); R. NOZICK, *supra* note 10; Gewirth, *Ethics*, 6 ENCYCLOPAEDIA BRITANNICA (15th ed. 1974); A. DONAGAN, *THE THEORY OF MORALITY* (1977); C. FRIED, *RIGHT AND WRONG* (1978).

result from their having rights that individuals are thought to have them. Indeed, rights are intended precisely to stand athwart the utilitarian calculus, to brake the democratic engine: they allow for unpopular behavior of all kinds, for experimentation in life, for the various pursuits that will inevitably arise from the manifold world of individual values.¹⁵

In virtue of this deontological grounding, then, the theory of rights has sought to obtain a more secure place in epistemology than the theory of good. The difficulties of value theory in this connection are notorious; for the conclusions that flow from our sentiments are seldom thought to be true or false, at least among those who are given to think about such things. The conclusions that flow from reason, on the other hand, are said to have a better claim to cognitive grounding. Thus it is that the moral rationalism of recent years has sought to extricate us from the vicissitudes to which Hume and his disciples in the Vienna Circle consigned the whole of ethics; they have attempted to show that rather more of ethics than has heretofore been thought is rooted not in the third of A.J. Ayer's famous trichotomy of propositions—evaluative "truths"—nor even in the class of empirical truths, but in reason itself.¹⁶ This, after all, is where Locke, following a long tradition, had grounded his own theory of rights, however uncertainly.¹⁷

Now I understand Gewirth to be in the forefront of these recent developments in moral rationalism, especially in his earlier writings on the subject. Of late, however, he has begun to drift a little, to

¹⁵ To be sure, this view of the nature and foundation of rights is not reflected in the preponderance of modern legal thought, at least since Holmes, and as reflected not only in the schools of pragmatism, legal realism, and legal positivism, but even in the current rebirth, in the legal literature, of natural law thinking. In general, in all of this, rights are thought of simply as *values* or *interests*, which are distinguished from other values by their having "found their way" into positive law: we locate a value we want to protect, as it were, which we do by making it a legal right. Thus privacy, abortion, or the enjoyment of pornography will come and go as rights according as they happen to be valued at any point in our legislative or judicial history. This view, however, not only fails to sufficiently distinguish the legal *creation* of rights from their theoretical *justification*, but it tends to conflate rights and values, when those two concepts come from very different dimensions of morality. On this last point see Hart, *supra* note 9, at 186. For examples of contemporary treatments that conflate rights and values see Grey, *supra* note 13; Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979). For a partial critique of the instrumentalism implicit in this view, especially in its earlier versions, see Summers, *Pragmatic Instrumentalism: America's Leading Theory of Law*, 5 CORNELL L. F. 15 (1978).

¹⁶ See A. AYER, *LANGUAGE, TRUTH AND LOGIC* (1946), especially ch. 6.

¹⁷ J. LOCKE, *SECOND TREATISE OF GOVERNMENT* §6; the derivation of "ought" from "is" in this passage is direct.

offer a "blending" of rights theory and the theory of good—or so I understand his present argument. If I am correct in this understanding, then the danger may be that the epistemological foundations he has earlier secured will be shaken. Before developing this point, however, let me be clear that I think the moral skepticism of Hume and his followers a healthy antidote to the all-too-human penchant for moral overreaching. Accordingly, it is in this spirit that I will approach certain of Gewirth's claims, not in order to call the whole edifice into question, but in order to better secure those parts that can indeed withstand the probings of the skeptic. For if the battle against the skeptic is to be won—if ethics is to be given *any* cognitive foundation—it will be only by paying heed to what it is he has to say.

III. THE JUSTIFICATION OF RIGHTS

A. *Rights and Action*

I understand a right, then, to be a justified claim to stand in a certain relationship with some other person(s) such that that other has an obligation correlative to the right.¹⁸ The claim is that that person has an obligation to do or not do some particular thing. Thus even rights to property are ultimately claims to the acts or omissions of others: to their provision of the object immediately claimed; to their forbearance from interfering with the claimant's enjoyment of the object immediately claimed. Gewirth is perfectly correct, then, when he locates the theory of rights, and ethics generally, in the theory of action, when he asks "How does the consideration of human action serve to ground or justify the ascription and content of human rights?"¹⁹

He answers this question by following what he calls his "dialectically necessary method," which roots the justification—and, by implication, the disjustification—of these various claims in a theory of necessary acceptance. Thus he argues that individuals, in acting, implicitly though necessarily make claims about themselves, which they must admit or accept, on pain of self-contradiction, apply to all other agents as well.²⁰ It is in virtue of

¹⁸ See, e.g., Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning* 30, 38, 71 (ed. W. W. Cook 1946) (originally published in 23 *YALE L. J.* 16 (1913) and 26 *YALE L. J.* 710 (1917)).

¹⁹ Gewirth, *supra* note 6, at 1148.

²⁰ Gewirth's use of "agent" is not the standard legal usage—one who acts on behalf of a principal—but the philosophical usage—one who acts *tout court*.

this necessary acceptance that statements about the existence of the respective rights and obligations can be said to be true: for if the denial of the conclusion that others have the same rights that one necessarily claims for oneself—which follows itself from application of the principle of universalizability—leads to a contradiction, then by a *reductio ad absurdum* the negation of that denial is true. Hence, the agent *must* accept the implications of the claims he necessarily makes about himself; he must accept that others have the same rights he himself necessarily claims.²¹

Clearly, then, the question what it is we have rights to turns upon what it is we necessarily claim about ourselves, if only implicitly, when we act. And it is here that Gewirth's argument in recent years has shifted ever so slightly—but ever so crucially. In particular, he at one time argued that “justification-statements [as implicitly made by agents] are logically equivalent to attributions of rights only insofar as the latter entail negative obligations on the part of other persons, but not necessarily positive obligations.”²² (I do not know the force of “necessarily” here, especially as it contrasts with “only”; and I will assume Gewirth had in mind only generally related individuals.) The implications of there being no general rights of recipience are far-reaching, of course, and straightforwardly libertarian, for they undercut the normative foundations of the welfare

²¹ Notice that this argument from acceptance places Gewirth in the tradition of consent theory, whether in its legal or in its political applications. We explain and justify ordinary contractual obligations, for example, which at some point in time are brought into being, simply by pointing to the acceptance or consent that serves to generate them. (Much less plausibly, we do the same, *mutatis mutandis*, in social contract theory, whether in its traditional form, e.g., Rousseau, or in its modern version, e.g., Rawls.) The consent that justifies contractual obligations, however, is ordinarily both explicit and contingent (upon the particular wants that generate it). The acceptance that Gewirth locates, on the other hand, is implicit but necessary. Thus the obligations and correlative rights it serves to justify are atemporal, and they do not turn upon arbitrary wants, which has been a crucial desideratum of the whole tradition of moral rationality in general and natural law in particular.

Notice also the similarities between this argument and (a) Hart's recognition theory for the existence of a legal system (H.L.A. HART, *THE CONCEPT OF LAW* 59-60, 109-14 (1961)); (b) Locke's argument, from “the Judicious Hooker,” for the Law of Nature (J. LOCKE, *Second Treatise* §5); (c) Aristotle's argument that a denial of the Law of Contradiction only confirms that Law (IV METAPHYSICS, ch. 4). In drawing upon each of these—or so I understand him to be doing—Gewirth has nevertheless advanced the inquiry considerably; for his explication of the normative structure of action has put necessary content in Kantian universalization (just how much content we are about to consider).

²² Gewirth, *The Normative Structure of Action*, 25 *REV. OF METAPHYSICS* 238, 253 (1971). But see *Obligation: Political, Legal, Moral*, in J. PENNOCK & J. CHAPMAN, *POLITICAL AND LEGAL OBLIGATION: NOMOS XII* 55, 71 (1970). Here Gewirth argues straightforwardly for positive obligations.

state by undercutting our modern "social and economic" or "welfare" rights. As we see, however, Gewirth is now arguing for the full-blown supportive state, complete with measures "to rectify inequalities of additive well-being,"²³ this to bring about, or at least to "move toward, . . . dispositional equality."²⁴ I will argue below that there may be some scenarios in which some aspects of that state may be necessary; but that state cannot be justified from the theory of rights—indeed, it will be effected in *violation* of rights. For the present, however, I want to focus upon the claims we necessarily make as agents, which is the part of his argument that Gewirth has increasingly expanded. In acting, then, do we necessarily claim to have rights of recipience against persons with whom we are only generally related? Or is the right not to be interfered with the only claim that is necessarily entailed by action? (And indeed, is even *this* claim entailed in human action?)²⁵

B. *Necessary Claims and Property*

In an earlier version, this part of Gewirth's argument went, very briefly, as follows. All action is conative: when an agent acts he acts

²³ Gewirth, *supra* note 6, at 1165.

²⁴ *Id.*

²⁵ It may be well, at this juncture, to say a bit more about the distinction I have drawn here between rights of recipience and rights simply to non-interference. The issues that surround this distinction, and the implications of it, are manifold, some of which I will develop later; let me simply mention two points here. The distinction turns, at bottom, upon the further distinction between positive and negative correlative obligations: the obligation to contribute positively to the welfare of a stranger is of an altogether different order than the obligation simply to leave others alone, raising difficult questions about the origin (or justification) of such an obligation, as well as about its consistency with other of our rights. Moreover, if there are no such affirmative obligations toward strangers, as I shall argue, even in the Good Samaritan context, then the warrant for the welfare state (in all of its ramifications), which is the Good Samaritan context writ large, is undercut at its roots. Starting from state-of-nature theory, that is, Good Samaritan obligations have to first be justified if these are to serve in turn as the springboard to the welfare state. Now in his present attempt to derive welfare conclusions from a fundamentally libertarian principle—or so I will argue his Principle of Generic Consistency to be—Gewirth is following a path not unlike that taken recently by John Rawls in *J. RAWLS, A THEORY OF JUSTICE* (1971), and taken concurrently by Charles Fried, *supra* note 14, among many others. In this matter, however, we have the bullet that so many of the modern moral rationalists seem unwilling to bite: they want to have it both ways, that is, liberty *and* equality (of "treatment," or "opportunity," or "outcome"), notwithstanding the theoretical difficulties to which this leads, which the historical evidence serves only to buttress as a *posteriori* argument. For a much more detailed treatment of these issues see R. Pilon, *supra* note 7. See also Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 43-53 (D. D. Raphael ed. 1967); Flew, *The Procrustean Ideal: Libertarians v. Egalitarians*, *ENCOUNTER*, March 1978, at 70.

voluntarily, and for purposes which seem to him good (not necessarily morally good). To the agent, at least, these purposes justify his act; hence, from his internal standpoint, he implicitly makes a right-claim to perform it. (Otherwise, the seeming-good for which he acts would not serve to justify the act to him.)²⁶ But this "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."²⁷ From this Gewirth went on to derive rights against coercion and harm, reflecting, respectively, the generic features of action, voluntariness and purposiveness. (Thus there was no mention of the various goods—afforded by affirmative obligations—that we find in the present argument). In sum, because our actions are conative, when we act we cannot avoid implicitly claiming rights to the integral generic features that characterize that action.²⁸

In the present version, however, the agent is said to claim, by his action, not only the right to act voluntarily and purposively, but the right to have "as necessary goods the proximate general necessary conditions of his acting to achieve his purposes."²⁹ These "necessary goods" translate into rights to "freedom and well-being," the latter consisting in having the "general abilities and conditions required for agency."³⁰ Moreover, these goods are the agent's "due," something to which he is "entitled": "the entitlement he claims to freedom and well-being is grounded in his needs as an agent who wants to pursue his purposes."³¹ Thus it is in virtue of these wants and needs that others are obligated not only to not interfere with the agent but, in certain circumstances, to affirmatively assist him in realizing his purposes,³² in having the "general abilities and conditions required for agency."

Now a concern for these subtle shifts may be thought by some to be unduly pedantic. As mentioned above, however, the implications

²⁶ See Gewirth, *The Normative Structure of Action*, *supra* note 22.

²⁷ Gewirth, *Moral Rationality*, *supra* note 8, at 20.

²⁸ This is but the barest summary of the substantive argument (which was sketched formally in the text accompanying notes 20 and 21 *supra*). For a detailed treatment, see the articles at notes 26 and 27 *supra*.

²⁹ Gewirth, *supra* note 6, at 1149.

³⁰ *Id.*

³¹ *Id.* at 1152.

³² *Id.*

are far-reaching, suggesting that we ought, before turning to them, to attend to the foundations from which they spring. What we want to know, then, is what we *necessarily* claim in acting, *i.e.*, what we cannot *but* claim, if only implicitly. Now what agents might *in fact* claim as rights is of course unlimited. In explicating the idea of agency, however, Gewirth is "making not a phenomenological descriptive point about the conscious thought-processes of agents, but rather a dialectically necessary point about what is logically involved in the structure of action."³³ Still, the question of the limits of these claims remains very real. Nowhere does this uncertainty come out more clearly than when our putative claim to having a right to the "general abilities and conditions required for agency" is said to entail a positive obligation from others, provided that obligation can be performed "*without comparable cost*" to these others.³⁴ Quite apart from how these cost considerations enter an otherwise deontological argument, and who is to assess them, I suggest that the idea that a claim such as this is "logically involved in the structure of action" is not a little strained. With perfect consistency, in fact, the agent can deny that in acting he necessarily makes these kinds of claims, while at the same time affirming that his actions necessarily entail claims to act voluntarily and purposively. For even when these generic features are characterized as the "necessary goods" of action—freedom and well-being—and these in turn are claimed as rights, if they are *integral* to our action and thus are claimed *in* behaving conatively, we already *have* these goods, at least to a degree sufficient to be able to act and hence to be able to be claiming them in acting; thus we do not need to claim that others must afford them for us. (I will develop the property issues that are latent here in a moment.) Moreover, we cannot *but* claim them, for these generic features or necessary goods, again, are *integral* to our action: indeed, it would be a performative contradiction to deny claiming what in that very act of denial we are implicitly asserting to be held. For this would amount to voluntarily and purposively denying that we act voluntarily and purposively!³⁵ If we did *not*

³³ *Id.* at 1149.

³⁴ *Id.* at 1155, 1158, 1168.

³⁵ Notice then that even in the act of explicitly asserting his denial of his right to act voluntarily and purposively, the agent is implicitly asserting that right and hence contradicting his denial: his denial, that is, is contradicted by the facts in the matter. In this, the similarity to the argument from Aristotle (*supra* note 21) is striking—and of no small significance. If Gewirth has done for ethics what Aristotle did for logic, then we have come a long way indeed from the darker days of the Vienna Circle!

have these necessary goods, however, we could not be said to be claiming them *in acting*; for we could not even *be* acting since these are "necessary conditions" of action.³⁶ Yet all but decedents act to one degree or other; hence at all times we are at least implicitly claiming the right to act voluntarily and purposively, a right to the freedom and well-being that are functions of our actions.

This much, in brief, is directed primarily to the skeptic, who would deny even these implications of the normative structure of action. There remains, however, the question raised above about the degree or extent of the claims inherent in action, which leads in turn to the latent property issues. To sharpen the question a bit, are agents, in acting, to be seen as claiming some specific degree of freedom and well-being that would extend *beyond* the degree already inherent in their action? Or is the degree of freedom and well-being they necessarily claim in acting limited to just that—to what they in fact necessarily claim in acting *as such*? Clearly, the move from "generic features" to "necessary goods," if not illicit, is ripe for "content packing" and hence for circularity. In order to avoid that circularity, I submit that we have to limit the claims *necessarily* implicit in action to those that are *inherent* in action—in action *as such*. For again, the issue is what is "logically involved in the structure of action." It turns out, then, that the "necessary content" Gewirth has given to Kantian universalization is rather more lean than he seems to think in his present work: that content is limited, in fact, simply to the voluntariness and purposiveness that characterize action as such, and hence that characterize any particular action. In order to flesh the content of our rights out further, we have to look beyond these "necessary conditions" of action to what might be called its "material conditions." In particular, we have to recognize that action does not occur *in vacuo*, as Gewirth's treatment seems to suggest; rather, we act *in the world*, against some *material* background. In Part IV I will outline how this material or property background serves to flesh out our rights. At this juncture, however, I want to point to the property considerations that are present *already* in Gewirth's account, if only inchoately. These, in fact, are what help us to see what it is we necessarily claim in acting. For in proceeding from action and the claims implicit *in* action, Gewirth is beginning with some *agent's* action: it is *his* behavior that is conative, and the generic features, whether

³⁶ Gewirth, *supra* note 6, at 1149, 1150, 1152, 1156.

we call them voluntariness and purposiveness or freedom and well-being, are his property as well. What the agent *necessarily* claims, then, are those generic features of *his* action that are *his* to claim. On one hand he *must* claim these, in virtue of the conative nature of his behavior: for they are logically connected with his action and hence are his to claim and no one else's. But on the other hand he must admit that this is *all* he can rationally claim, based on his action alone. For to claim more would be to claim, based on *his* action, what is not his to claim: it would be to go beyond the foundation from which his claim springs, beyond the property—his action—in which the claim is grounded.³⁷ Intimately bound up with the normative structure of action, then, is the idea of property—the property we possess in our lives and our liberties (*i.e.*, our actions). How these devolve in turn to give property in estates—to afford the further material conditions of action and hence of liberty—I will consider shortly.³⁸ It is enough for the moment to have indicated how deeply rooted is the connection between rights and property, an insight that guided the classical theorists of rights, however rudimentary their understanding of the point.

C. Causality, Consistency, and the PGC

I have concentrated on the beginnings of Gewirth's argument because these parts are crucial to establishing that we have rights *at all*. In doing so I have tried to indicate that the core of the argument is sound, but that it has become overextended. This overextension can be shown in other ways too: in particular, by causal interpretations of the Principle of Generic Consistency (PGC), and by considerations of consistency, both of which we will take up next. But these arguments from causality and consistency—relatively more straightforward though they are—would not by themselves serve to justify the rights that *can* be shown to exist. At most, they would demonstrate what rights do and do not flow from the PGC, assuming *it* to be justified, and what rights are inconsistent with what other rights, but not which set is itself justified. Let us turn then to these two areas, which are prolegomena to delineating the world of rights and obligations. Since I

³⁷ For an application of this point see the text accompanying notes 84 and 85 in Pilon, *supra* note 10.

³⁸ I am construing "property" broadly here, and will do so throughout this essay, following Locke and other of the classical theorists: "Lives, Liberties and Estates, which I call by the general Name, *Property*." J. LOCKE, SECOND TREATISE § 123.

have developed these issues at some length elsewhere, I will simply sketch them here.³⁹

A common form of the causal argument for positive obligations between generally related individuals is really quite simple, at least in outline. It begins from the obligation not to cause harm and then argues that to refrain from assisting others is to cause them harm: hence the obligation not to harm entails a positive obligation to render assistance when others need it, the failure in which violates, if not their rights of recipience, at least their rights against harm.⁴⁰

The rejoinder is straightforward enough. It recognizes the obligation not to harm—at least as this obligation is appropriately explicated with respect to positive actions⁴¹—but denies that the various not-doings in question (refrainings, omissions, etc.) are causally efficacious. The conditions complained of—peril, hunger, ignorance, general want—can be accounted for by any number of causal explanations (often involving the “victim” himself); but the not-doings of the putative obligation-holder do not in principle figure in these accounts. For not-doings are not themselves changes in the world and hence do not meet the minimum condition for being a causally efficacious event.⁴² Moreover, whatever *positive* actions the agent performs—*e.g.*, withdrawing from a rescue opportunity—are counted as causally related to the losses in question only on pain, again, of ignoring the straightforward explanation(s)—*e.g.*, the victim fell out of the boat. None of this, to be sure, is to commend the attitude or behavior of the putative obligation-holder (about which I will have something to say at the end); rather, it is simply to say that a causal account will not serve to generate these obligations,

³⁹ See Pilon, *supra* note 7, especially ch. 3.

⁴⁰ See, *e.g.*, Gewirth, *supra* note 6, at 1155, 1158; A. GEWIRTH, *REASON AND MORALITY* 217-30 (1978). Cf. C. FRIED, *supra* note 14, at 17-20, 108-31; Richards, *supra* note 15.

⁴¹ See Pilon, *supra* note 10, at Part III, § C.3.

⁴² A bit more on this complex subject of agent causation is probably called for. In saying that some change in the world is necessary for a causal explanation to be made out, I mean that without such a change we cannot even individuate the causal event in question. (See the example in the next paragraph above.) Let me mention too that I would apply the causal analysis adumbrated here to the case of special relationships as well; in these, that is, we should hold the not-doer liable *not* for causal reasons, but for his failure to perform his obligation, as may be required by the special relationship. (The case of cessations is different; for these are not really not-doings at all.) Finally, it should be noted that ordinary language is not terribly reliable in these various contexts; for a less than satisfactory account of causation that relies substantially on ordinary language, see H.L.A. HART & A. HONORÉ, *CAUSATION IN THE LAW* (1959). For a fuller development of my own account, including its roots in action theory, see Pilon, *supra* note 7, chs. 1, 3.

and hence these rights, for such an account is just not plausible.⁴³

Now the PGC is a causal principle. It is addressed to agents as follows: "Act in accord with the generic rights of your recipients as well as of yourself."⁴⁴ Recipients are those who stand opposite agents, who are "affected by" or "recipients of" their actions. These are very loose idioms, to be sure, which we will tighten up shortly. But here we should note that in order for an agent to come under the prescription of the PGC at all, there must be a recipient of his action, a threshold condition the ordinary not-doing situation does not satisfy. Consider: at time t_1 , A is standing on the shore "doing nothing"; at time t_2 , B falls out of his boat; A could rescue B "without comparable cost," but instead he continues "doing nothing." If B is not a recipient of A 's "act" at t_1 , are we to suppose that he becomes a recipient of that same act at t_2 , in virtue of *his* (B 's) act? (If so, then who is the causal agent here?) We could always change the description of A 's "same act," of course; but that would beg a very important question. I submit, in short, that A 's "agency" here simply does not make B a recipient; thus absent a plausible theory of not-doing causation, the PGC is powerless to impose positive obligations between generally related individuals.

What then does the PGC entail? What actions does it prohibit, permit, or require? The actions it prohibits or requires are obligations, of course, correlative to which are rights; those it permits are rights, correlative to which are obligations. Now the first thing to be noticed is the point just brought out: the PGC does not require anyone to *do* anything. It is addressed to agents, but it does not require anyone to be an agent who has recipients. An individual can "do nothing" if he chooses, spending his life in idle contemplation. Provided there are no recipients of this behavior, he is at perfect liberty to perform it. And if there are recipients, the PGC requires only that he act in accord with the generic rights of those recipients, *i.e.*, that he not coerce or harm them. In sum, and stated most generally, in a world of general relationships, (a) there are no obligations toward others *to* act, (b) there are no obligations *not* to act when doing so involves no recipient, and (c) when there *is* a recipient there is an obligation not to coerce or harm him, *i.e.*, to obtain

⁴³ See, *e.g.*, Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-66, 189-204 (1973).

⁴⁴ Gewirth, *supra* note 6, at 1155. This too has changed; in earlier writings it went: "Apply to your recipient the same generic features of action that you apply to yourself." Cf. Gewirth, *Moral Rationality*, *supra* note 8, at 25.

his consent before involving him in transactions.

Thus the PGC, at bottom, is a principle of equal freedom: by placing the burden of obligation upon those whose actions have recipients, or are about to do so, 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.

Thus far, then, I have tried to show, on two counts, that there are no general rights of recipience. First, these right-claims are not grounded in agency, which is the springboard for all our rights. Second, they cannot be generated from causal considerations, which are central to the descriptions of our general rights against coercion and harm, our rights to noninterference, as captured in Gewirth's ultimate moral principle. A third and final argument, before turning to more specific interpretations, is from considerations of consistency.

By a consistent theory of rights I mean one without conflicting rights, as indicated at the outset. It is surprising how commonplace is the view that rights must conflict. One would suppose it part of "the human condition," which of course it is when right-claims are recognized quite in disregard of the possibility of their all being realized. Yet this impossibility of realization is precisely what happens when two rights conflict: one of the "rights" must go. It is illusory, then, to speak of these conflicting claims as "rights"; for a right that *cannot* exist is no right at all. Either it is an empty claim, or it is a "right" subject to the call of others, which is hardly what we mean by a right.

Nowhere does this conflict come up more clearly than in the case of these general rights of recipience. Take the simplest example. If I have a general right to assistance then you have an obligation to assist me when I need it, even if you should not want to afford that assistance. But you also have a right to freedom. "This consists in a person's controlling his actions and his participation in transactions by his own unforced choice or consent . . . , so that his behavior is neither compelled nor prevented by the actions of other

persons."⁴⁵ Well either your action is going to be compelled, in which case you do not enjoy your right, or it is not, in which case I do not enjoy mine. There are no two ways about it, for the rights are in straightforward conflict. It would be nice, of course, if everyone did what he *ought* to do. But rights describe what we are *entitled* to do, or not do, quite apart from what we ought to do. A theory that generates rights to freedom as well as general rights of recipience is a theory that generates conflicting entitlements, and hence is inconsistent. On the other hand, a world of general relationships described by rights to noninterference alone is entirely consistent. For in such a world each of us can enjoy whichever of his rights to noninterference he chooses while at the same time and in the same respect satisfying his own obligations not to interfere with others. Just what that world looks like we will take up next.

IV THE WORLD OF RIGHTS

As suggested earlier, in taking up the interpretive question concerning what it is we have rights to I have focused upon the foundational theory of Gewirth because I think it is the most sophisticated of the work going on in rational ethics today. At the same time, the arguments I have thus far sketched are perfectly general: they will apply, *mutatis mutandis*, to any theory of rights that attempts to derive affirmative obligations between strangers. For the basic question for any ethical theory that begins with the individual is how to explain association—indeed, whether there ought to be any association at all.⁴⁶ Given that human action is the basic subject matter of ethics, *i.e.*, that ethical rules function to direct action, and that human action is voluntary, in the sense that it proceeds from choice, the freedom entailed by that fact, and the claims to freedom implicit in our action, militate ineluctably against the forced association that "rights of recipience" involve. Voluntary action, in short, precludes the *using* of one individual for the benefit of another. This, after all, is the basic Kantian insight concerning the integrity of the individual (whatever Kant's own understanding of that insight). Individual integrity is the idea that served as well, more or

⁴⁵ Gewirth, *supra* note 6, at 1159.

⁴⁶ Those moral theories that do not begin with the individual have a much harder time getting off the ground (legitimately). For the various groups or "social entities" that serve as their springboard have rather less of an air of reality about them than does the individual, however burdened he may be with "social baggage." See, *e.g.*, P. GRIER, *MARXIST ETHICAL THEORY IN THE SOVIET UNION* (1978).

less clearly, as the foundation for the classical theorists of liberty.

We come at last, then, to the task of tracing out the more specific rights and correlative obligations that constitute the world of rights. As stated earlier, I will do this by building upon Gewirth's Principle of Generic Consistency. This amounts to showing what rights there are by showing what rights the PGC entails and hence justifies. (By implication, it also amounts to showing what rights do not exist by showing what claims are inconsistent with the PGC and hence are unjustified.) To outline the world of rights, then, is not simply to draw up a list of rights, as has been done in various political contexts.⁴⁷ Rather, it is to show that the rights there are owe their existence to, *i.e.*, are justified by, some overarching moral principle, which is itself justified by deeper rational criteria; moreover, it is to order those rights into some coherent and consistent scheme of things, taking into account, in particular, the material and historical background against which they are justified by the principle. As noted at the outset, I have undertaken such a task elsewhere in this volume, where I developed arguments to show how our various property, contractual, and familial rights can be thus justified, as well as our rights against torts and crimes, all of which can be reduced to rights to liberty—or better, rights to liberty, defined in terms of property.⁴⁸ What I want to do here is simply summarize that discussion, following which I will raise a few considerations that take us beyond the theory of rights.

If outlining the world of rights involves not only deriving those rights from an overarching principle but ordering them into a coherent picture as well, then the first thing called for is a scheme for classifying the many rights there are, a scheme that goes to the heart of, or closely reflects, both the justificatory theory and the material and historical background against which the justificatory theory operates. Such a scheme was mentioned at the outset. It divides the world into general and special relationships, described, respectively, by general and special rights and obligations.⁴⁹ This taxonomy is fundamental in that it fastens upon the two basic ways in which rights are generated and hence justified—"naturally" (which is ulti-

⁴⁷ I have in mind such lists as the American Bill of Rights (1791), the French Declaration of the Rights of Man and of the Citizen (1789), and the United Nations' Universal Declaration of Human Rights (1948).

⁴⁸ See title footnote, *supra*, and Pilon, *supra* note 10, Part III, §C. See also Pilon, *supra* note 7, ch. 3.

⁴⁹ See note 9 *supra*.

mately an atemporal, spatial notion) and historically (which introduces time into the spatial context). Our general rights, which is what the discussion to this point has concerned, are often called our natural rights; they are logically prior and are justified as direct implications of the PGC. These rights are all variations of the basic right entailed by the PGC, the right to noninterference; hence the correlative obligations are all negative. General rights are held by everyone, against everyone else (unless special relationships have arisen to alter this). And they are delineated by the material or property foundations that enable their exercise (about which more in a moment).

By contrast, special rights and obligations, which arise when individuals make contracts, create associations, or beget children, or when they commit torts or crimes, are logically posterior, for they arise from and hence presuppose the world of general relationships. They are justified, then, as *indirect* implications of the PGC, for their existence is contingent upon their having arisen historically, from the moral world *directly* implied by that principle. Moreover, unlike their general counterparts, special rights and obligations are held only by the parties to the events that create them; and the obligations correlative to special rights may be either negative or positive, according as those events, against the background of the PGC, will dictate. Finally, it is useful to distinguish two broad categories of special relationship—those that arise voluntarily, as permitted by the PGC, and those that arise nonvoluntarily, or by force, as prohibited by the PGC.

With this taxonomy in mind, then, let us turn briefly to the substance of the matter. If the most basic general right we have is the right to noninterference, and if all our other general rights are simply more specifically described exemplifications of this right, then the task of interpretation is one of tracing the connection between these specific rights and the basic right. This process was begun earlier when the basic right was explicated as a right to be left alone (or to do nothing), a right to do whatever does not interfere with others, and a right to associate with others provided they have consented. These are simply three more specific descriptions of the same right, the right to noninterference. But the lines have been drawn in such a way as to be useful for subsequent, more specific explications. For we have here a rough dichotomy, drawn with reference to action, between what might be called our "passive rights" (or rights to be left alone, rights to quiet enjoyment) and our active

rights; moreover, our active rights are divided into those that are exercised with the explicit consent of others and those that are not. Again, the lines that separate these categories are rough; but the categories are nonetheless useful, for they focus upon fundamental issues. Our passive rights, for example, are unproblematically entailed by the PGC, for by definition their exercise cannot involuntarily involve others; hence they enjoy a fundamental place in the moral order. Similarly, those active rights that are exercised with the consent of others raise no justificatory difficulties, at least with respect to those others who consent. The difficulties arise only in the middle category, and in the third category vis-à-vis strangers; for not only can the exercise of our active rights interfere with the exercise by others of *their* active rights, but active rights are notorious for interfering with the enjoyment by others of their passive rights (which is not the case when we are all exercising our passive rights).

If we attempt, however, to clarify these difficulties of interpretation by referring to action and interference alone, as is often done in discussions of the principle of equal freedom, we find ourselves either going in circles or positing arbitrary starting points.⁵⁰ What we have to do instead is give some real content to our rights—or better, as adumbrated at III, B above, we have to flesh out the real content that is already there, the material conditions that enable us to act, the property in terms of which our general rights of action are delineated in fact. Starting with the property we possess in ourselves and our actions, we have to show how the property in the world, against which we perform our actions, arises as private property, and how this serves in turn to distinguish those actions that are performed by right—because the agents own the material conditions of the actions—from those actions that are not performed by right and hence are not instances of our active rights—because their performance entails the taking of what belongs to others.

A brief illustration will help to illuminate these issues, and will bring out as well the ambiguity in the idea of “having” a right, the clarification of which is crucial to understanding the world of rights. As an instance of our right to noninterference, we all “have” a right to freedom of the press, in the sense that no one else has a right to

⁵⁰ This is not surprising since “freedom” is a fundamentally subjective idea, the arguments of those who distinguish “negative” from “positive freedom” notwithstanding. See Pilon, *supra* note 7, ch. 1. For a discussion of ten different attempts to come to grips with the principle of equal freedom, see Gewirth, *Political Justice*, in *SOCIAL JUSTICE* 119, 141-54 (R. Brandt ed. 1962).

interfere with our publishing what we please.⁵¹ But the actual exercise of that right will depend upon whether we own the full material conditions of the right's exercise (a printing press, paper, etc.).⁵² If we do not own those conditions, we cannot exercise our right, which has led many thinkers to conclude that we do not "have" the right. What has to be drawn here, however, is the distinction between the necessary conditions for *having* a right and the necessary conditions for *exercising* that right. Suppose, for example, that someone forcibly took control of another's printing press. Surely he could not justify that act by pointing to his right to freedom of the press. Yet we would still say that he *has* the right to freedom of the press, even though, at the moment, he could exercise the right, *ex hypothesi*, only by taking what belongs to another. And we would say that because there is all the difference in the world between having a *right* and having a *power* (to exercise that right). To have a general right, as here, is not necessarily to have the power to exercise that right; rather, it is to have simply a claim to the noninterference of others, which, in conjunction with the material conditions against which the agent acts, may or may not lead to the actual exercise of the named right at issue, according as the agent does or does not own those material conditions.

In tracing out the world of rights, then, it is imperative that the distinction between rights and powers be kept in mind. In general, the tracing should proceed in small, careful, and systematic steps if inconsistencies are to be avoided. Moreover, what has to be brought out in particular, as above, is how our general rights, though rooted not in temporal but in spatial considerations, *i.e.*, in the property we possess in ourselves and our actions, will nevertheless "unfold" or "develop" in time. We start out, that is, with the complete list of general rights (which are as numerous as we are inventive with definitions), though the actual exercise of those

⁵¹ Just to be clear, let me mention, but not argue for, the conclusions I intend here. The right to freedom of the press is the right to publish anything, provided no rights of others are violated by doing so, *i.e.*, provided doing so does not take what belongs to others. The publication of pornography takes nothing that others hold outright. Nor does defamation; "good names" are not held outright, but only because third parties contribute with their opinions, which they have a right to form, and change, and second parties have a right to influence. Censorship might be justified, however, on a case-by-case basis, when others would be endangered by the published material; for individuals have rights against being endangered (beyond some point) by others. See Pilon, *supra* note 10, at 1277, 1333-35. However complex and difficult this last issue is to make out, it is nonetheless real—and leads, of course, to the closely related issue of censorship for reasons of national defense.

⁵² I ignore here the possibility of owning *access* to a printing press, for this introduces a special relationship, unnecessarily complicating the example.

rights, as just indicated, will depend upon whether we have or have not acquired the necessary conditions of their exercise, which we will ordinarily do only in the course of time. Thus it is that a world of equal *rights* is not necessarily (indeed, is virtually never) a world of equal *opportunity*, a confusion of which can lead only to the most far-reaching of misunderstandings.

In outline, this is the world of general relationships, which again, is the background against which we create special relationships, by various of the acts we perform. We have a general right, for example, to create voluntary associations, such as contracts, partnerships, corporations, marriages, clubs, and so forth. In each of these cases the special rights and obligations created—the rights and obligations there are—are simply those that have been agreed to, or those implicit in the agreed-upon terms; otherwise, the parties to the special relationship stand generally related. When we act, however, we may also create forced associations, either unintentionally, as when we commit torts, or intentionally, as when we commit crimes. Here the special rights and obligations that are created are those that are required to rectify the wrong, to return the wronged party to the prior status quo (in which the parties were generally related), which is the state of affairs prescribed initially by the PGC.⁵³ Notice, then, that in the case of both voluntary and forced associations, the theory remains consistent, *i.e.*, no “conflicting rights” arise.⁵⁴ For in both cases, the agent(s), by his act(s), alienates some of his general rights and obligations, which are replaced by new special rights and obligations; thus no conflicting rights and obligations arise (or remain). Similarly, in the case of tort and criminal victims, the general obligation not to interfere with the wrongdoer or his property is replaced by the special right to do that (to the extent required to rectify the wrong), thus preserving the symmetry of rights and obligations, as the material and historical context may require.

This completes, in summary and very generally, the outline of what might be called our “first-order” moral rights and obligations, by which I mean the rights and obligations we have assuming we

⁵³ For a derivation of the criminal remedies of restitution and punishment, which does not depend upon introducing public law but proceeds instead from state-of-nature tortious considerations, see Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 *ETHICS* 348 (1978).

⁵⁴ Regrettably, this is not entirely correct, or is “correct,” in certain contexts, only at unacceptably high cost. For the case of the pregnant rape victim (assuming fetuses have rights), see Pilon, *supra* note 10, at n. 108.

all satisfy our obligations, or, failing that, that we satisfy our tortious or criminal obligations once having created them. The world of first-order rights, that is, is a world in which the problem of enforcement does not arise, a world in which no one has to be *forced* by others to carry out his obligations, even though he may have failed to carry out all of them at some prior time by having committed a tort or a crime. What I have tried to do, in short, is get clear about what the moral world looks like, about what rights there are *to be enforced, before* taking up the problems of enforcement—and in particular, before taking up the complex questions surrounding rights of enforcement, rights of accused persons, and the whole issue of procedural justice. It is important to be clear first about just what our first-order substantive rights are, for these will shed light in turn upon just what our “second-order” rights are, *i.e.*, our enforcement and procedural rights.

This world of first-order rights, then, looks very much like an overview of the common law—at least as that law stood at its theoretical best. And well it should, for the common law, as Edward Corwin has remarked, 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.”⁵⁵ That “right reason,” however, has often been easier to discern in the particular than ground in general; because of this, moreover, the particular has often proved difficult to order consistently. What I have tried to indicate here is how those particular conclusions can be derived from general moral and, indeed, rational foundations, such that their denial leads one to contradict oneself, and hence, by implication, to affirm them, and how those conclusions can be ordered in turn into a coherent and consistent scheme of things.

When we turn to our second-order rights, however, the issues are immensely more complex.⁵⁶ For here the problems of uncertainty and proof (proof to whom?) often seem intractable, and certainly do not lend themselves easily to rational explication. The problem of enforcement, then, is not simply the problem of the legitimacy of the state, which no one to date, I submit, has satisfactorily resolved.⁵⁷ More deeply, it is the problem of just what our enforcement

⁵⁵ E. CORWIN, *supra* note 13, at 26.

⁵⁶ See, e.g., R. NOZICK, *supra* note 10, Part I.

⁵⁷ The most sophisticated argument to date, by Nozick, *id.*, ends ultimately in a taking. See Pilon, *supra* note 7, ch. 4. Let me be clear, however, that in raising doubts about the

rights and obligations are in the state-of-nature, which in principle should be clarified before we can be clear about the rights of the state in this connection, assuming that the state itself could be shown to be legitimate. We are a very long way, however, from having an adequate theory of state-of-nature procedural justice.

V. BEYOND RIGHTS

Suppose we had a well-worked-out theory of procedural justice. Would we *want* all of our rights enforced, whether by a private instrumentality, as in the state of nature, or by a public agency, justifiably claiming a territorial monopoly on the legitimate use of force? This question is not as odd as it may seem at first blush. For as I mentioned at the outset, and illustrated with some variety elsewhere in this volume,⁵⁸ the theory of rights is strict, generating conclusions that give "reasonable" men discomfort, however grounded in reason those conclusions may be. Our rights are generated from our conative behavior, and in particular from the property foundations of that behavior. In explicating those foundations I have tried to elucidate the classical insight regarding the connection between rights and private property, which more deeply, of course, is the connection between rights and private persons. The theory of rights is intimately bound up with the liberty that is privacy; it depicts a clear, rational framework within which individuals may live their lives free from the interference of others. But those very virtues—clarity, groundedness, surety—do not always blend well with the vicissitudes of life.

What do we do, then, when we run up against the uncomfortable conclusions, when we follow reason to its logical end and realize, for example, that what we have an *obligation* to do is not what we *ought* to do? This is entirely possible because, as H.L.A. Hart has put it,

legitimacy of the state, I am making a theoretical point only. As a *practical* matter, that is, I cannot imagine a world without government, given that Rousellian man has not yet evolved. This theoretical point serves a useful function, however; for the air of illegitimacy that surrounds the state can serve as a brake upon its growth, at least so long as we are mindful of that illegitimacy.

It would be well to note too that if the forced association that is the state could be justified, and if its functions were limited to the enforcement of the rights set forth above, there still would remain immense questions about what means and indeed about what regulatory powers the state might legitimately take on in the name of providing this "service." If these difficult issues arise even in the case of the minimal state, which is called upon to enforce what many would call the parsimonious theory of rights sketched above, they will arise *a fortiori* as the state takes on more functions, or as more rights are "found" to be enforced.

⁵⁸ See Pilon, *supra* note 10.

these two ideas, "ought" and "obligation," at least as used here, come from "different dimensions of morality,"⁵⁹ reflecting respectively, I suggest, the teleological theory of good, rooted in what Hume called "sentiment" or "a fellow feeling with others," and the deontological theory of rights, rooted in reason and hence in foundations admitting of rational demonstration. One side of this matter is easy. The theory of rights sets the strict boundaries of ethics, within which individuals may pursue whatever "higher" morality they wish, whether egoistic or altruistic (in varying degrees), whether grounded in aesthetics or religion or humanism or whatever. Thus when individuals engage in Good Samaritan behavior they can easily say they are doing what they *ought* to do, as decent members of civilized society, quite apart from what they are strictly *obligated* to do (or have a right not to do). Here there is no difficulty because no issue of force arises—and indeed, only because they are *not* forced to perform these acts can genuine virtue arise.

The other side of the matter is more difficult, where we are reluctant to use force to secure the rights and obligations that are clearly demonstrable, or worse, are tempted to use force, in violation of rights, in order to secure some great good. Consider this example: *A* is drowning; *B* wants to rescue him, which of course he has a right to do; but doing so will require that he trespass on *C*'s property and (just to make the example more interesting) cause great harm to *C* by doing so. Now clearly *C* cannot be forced to rescue *A*, anymore than any individual can be used for the benefit of another. But can he forcibly prevent *B* from rescuing *A*, by preventing the trespass? Must *we* support *C* in this? Or can we *prevent C* from preventing *B*'s rescue attempt? (Who is the "we"?) If the concept of a right entails a further, second-order right to enforce first-order rights,⁶⁰ then *C* can prevent *B*'s attempt, and we cannot prevent *C*'s defense of his rights. (By what *right* would we do so?) That would be the strict position. A weaker position would prohibit *C* from using force, but would require *B* to compensate *C* for the harm caused him. (*A* would not be required to compensate *C*—though he *ought*

⁵⁹ Hart, *supra* note 9, at 186. In suggesting that "ought" is being used here in a teleological sense, which itself could be explicated more fully, I do not mean to suggest that this term does not also have a deontic usage, as well as prudential, aesthetic, and perhaps other usages.

⁶⁰ Would this lead to an infinite regress of rights—a right to enforce one's rights, an obligation to satisfy one's obligations, *ad infinitum*? Perhaps not; for in the case of rights, at least, these are, after all, different acts, *i.e.*, the right-object of the first-order right is not the same act as the right-object of the second-order right.

to—because gratuitous beneficence does not generate obligations in beneficiaries.) It is difficult, however, to make out a justification for this weaker position, for it amounts to permitting an intentional forced association, notwithstanding the compensation: it permits *B* to use *C*, however noble his motives. If here, why not elsewhere?⁶¹ But if this position is difficult to justify, then the still weaker position, requiring *C* to bear (even part of) the loss, as some “deep-pocket” thesis might argue, is even less defensible; for this amounts to permitting a straightforward use of *C*.

These justificatory difficulties notwithstanding, there remain occasions when we ought to do what we have an obligation not to do, and conversely, which we can say with perfect consistency because, again, these idioms are differently grounded, reflecting plainly the tension that sometimes arises between the theory of good, however uncertain its epistemological foundations, and the theory of rights. Until recently, Anglo-American law has sought, in large measure, to secure the theory of rights, no doubt in part for these epistemological reasons. That emphasis, in my judgment, has been entirely correct, and salutary too; for when individual integrity—and liberty—are compromised to accommodate someone’s or some group’s conception of “the good,” a Pandora’s Box is opened. Nevertheless, we have to admit that there will be times when rights must be overridden, both on a case-by-case basis and as a matter of social policy, which we do, for example, when we find debtors or tortfeasors insolvent and likely to continue so for eternity, or contracts *egregiously* unconscionable as a substantive matter, or when we grant that the indigent have demonstrably no place to turn but the state. In such circumstances, however, we should be clear about what we are doing: it is not *by right* that indigent debtors or tortfeasors are absolved of their obligations, or that the foolish are released from their contractual obligations, or the needy are given assistance by forced redistribution. There is no *obligation* that we do these things; they are done, to use an older idiom, by grace—and indeed, in *violation* of rights. It will do no good, moreover, to “bend” the theory of rights in order that the right and the good come out always the same, thus enabling us to say, as has become the recent fashion, that as a matter of social policy, rights always take precedence over

⁶¹ See Goldstein, *Lawyers Debate a Public Tithe*, N.Y. Times, Oct. 21, 1979 (proposal submitted by a special committee of the New York City Bar, to require lawyers to do compulsory pro bono work, using state licensure as the mechanism of enforcement). Compare Fried, *Fast and Loose in the Welfare State*, AEI REGULATION 13-16 (May/June 1979).

utilitarian calculations. (Perhaps they do, but perhaps not always over *consequentialist* calculations.) That will only clutter the moral world with rights, beclouding the underlying theory—and in time will probably undermine the good name of rights as well. In the broad range of cases the theory of rights directs us in our use of force. Only in extreme and rare cases do we have to forgo principle, not in the name of rights but in the name of shared values, which we should be candid enough to admit we are imposing upon those we are forcing to yield what is rightly theirs. It is unsettling, to be sure, that the lines between these exceptional cases and the broad range of ordinary cases are not more clear. But perhaps that is the way it was intended to be.