JUSTIFYING LAW:
AN EXPLANATION OF THE DEEP STRUCTURE OF AMERICAN LAW

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This paper is an attempt to describe what it is about law that makes it coherent. Each of us has a sense of the coherence of law. We sense it as a "fabric," as a body of rules and institutions that fit with each other. We bridle at the use of law *ad hoc* to engineer behavior. Laws must be justified; they must fit the pattern that allows us to feel that we are doing justice, not simply pushing people around.

How is law to be justified? In practice, we justify particular rules by fitting them in edgewise with neighboring rules according to the principles of *stare decisis,* statutory interpretation and so on. Edgewise justification is quite analogous to the justification process that a printer goes through in setting up a page. He checks left and right margins to see that they line up with each other, adjusting them until they do. This squares the page with itself, or, in law, squares laws with each other. But what justifies the pattern itself? *Must* it be that any body of law that fits neatly with itself is thereby automatically right? That could not be, for we know of clearly unjust regimes, organized around disgusting deep principles, that nonetheless had neatly functioning laws. The edgewise justification of particular laws is not enough to justify, or to give coherence to, law itself.

To unearth the coherent structure of law we must go deeper than the rules themselves. One possibility is to look for the deeper ideas – the "principles" – that are emobodied in a set of rules. We might, for example, do a sort of regression analysis on First Amendment cases and come to the conclusion that the idea inherent in them is the protection of a "marketplace of ideas." That idea would roughly square with our idea of democracy as a seething cauldron of competing interests and visions, and so would tend to be justified by our desire for democracy. Once formulated, the

idea of the marketplace of ideas adds perspective to the consideration of particular cases, so that a court wondering whether it is legitimate to ban yelling "Water!" in a crowded theatre would have more to go on than existing rules covering "Fire!"

We might expect that if we devoted enough time and effort to it, all law could eventually be justified in that way. Perhaps it could, but the body of law grows so rapidly that the phenomena to be accounted for make even decent edgewise justification very difficult. The base of the pyramid grows so rapidly that shaping the stones that go above it is a herculean task of geometrically increasing magnitude.

Another approach to justification solves this problem. It starts at the pinnacle of the pyramid with a normative proposition and works downward toward the base. Law, according to John Rawls, for example, either is or should be a way of putting into action the terms of an agreement that people would make in the Original Position.[1] Reasoning from that position, Rawls can map the general contours of the basic structure of law that is justified, grounded in a way that edgewise justification cannot be. Designing a pyramid from the top down assures that the blocks under it will support it.

It is not clear, however, what one would have if one finished building such a pyramid. What could one say about the rocks that didn't fit into it, about the rules of law that were not justified within the theory? Are they, therefore, *wrong?*

American law did not grow from the top down out of an idea. It grew from the bottom up, out of elemental disputes, judicial and political. It is coherent not because it was deduced from something but because there is something implicit in the process that allowed it to grow coherently. In what follows I will argue that the coherence of law is attributable to two things acting together – a fact and a process. The fact is that there is something universal about human nature that transcends the vagaries of individual

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[1] John Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press, 1971).

interests, values, attitudes, wants and needs. The universal fact is that each person experiences himself as the cause of what happens to him.[2] That fact creates the possibility of coherence in a law that grew without design. It is made effective because of a process – the creation of law by a response to individual, juridical and political, rights. Rights-based law grows not out of a *concern* by law makers for those who they would govern but out of a *respect* for the desires and actions of each person.

I will argue that implicit in every rights-based legal system is a single axiom and that the system can be seen to be coherently derived from that axiom. That axiom is the pinnacle of the explanatory pyramid that follows. The principles deduced from it are the deep structure of American law. They reveal the connections between the institutions of law and the basis for the laws themselves.

It does not count against the theory that follows that you do not like the axiom. This is not a normative theory. The axiom upon which it is based may not be perfectly desirable. It counts against this theory if there are durable bodies of law or legal institutions that cannot be explained within it.

In part 1, I set forth the axiom and the description of human nature upon which it is based. In the parts that follow, I derive the layers of principle that form the deep structure of law, ending with a set of general rules applicable by the judicial process. This is obviously a long journey for such a short paper. There is little in the way of illustration and much in the way of brief justification. The aim of the paper is simply to establish the skeleton of a deep structure.

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[2] Those who do not are not subjects, but only objects – objects of our concern, perhaps, that they regain their sense of themselves and their ability to control behavior, but objects nonetheless.

1. COERCION AND WILL

I take the law to be that set of statements that allocates the use of coercion under a claim of right, together with the institutions that make, remake and enforce those statements.[3] Statements that are not backed by coercion are not laws, so, "We declare Monday, May 7, to be National Poppy Day," is a sentiment, not a law. And statements backed by coercion but without a claim of right are not laws, so, "Hand over your money or I will shoot you," is a threat, not a law. To the extent that the members of a society understand and accept the claim of right, the law is legitimate. To the extent that they don't, the law is unjustified, unvarnished coercion.

Ordered coercion is the central aspect of law. Law may be much more. It may be the vehicle by which the dominant class exerts control. It may be a socializing force, teaching people how to behave in complex situations. But it *must be* a pattern for the use of coercion in society.

Because it deals with coercion, law is a uniquely human institution. Medicine is not. Physicians are veterinarians who specialize in people. Both dogs and humans have heart problems, but only humans have coercion problems. Dogs may fight with each other, but they don't *coerce* each other, at least not as we presently understand them.[4] Coercion requires something more than fear

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[3] Such a broad definition of law includes many statements that are not conventionally regarded as law. If you say to your child, for example, "Go to bed or I will spank you," that is law under this definition (presuming that, as a parent, you consider it right to discipline your child). For reasons made clearer later in this paper, I think it accurate to consider those statements law. The parent is a (limited) sovereign in the life of the child, which leads to an awkward relationship between the state and the parent.

[4] Robert Nozick (*Anarchy, State and Utopia* (New York: Basic Books, Inc., 1974) p. 35) argues that some consideration ("utilitarianism for animals, Kantianism for people") may be due animals. Should it be demonstrated through our efforts to communicate with animals that they are *subjects,* that to some extent they are self-aware of their own purposes, the theory presented in this paper would require that they be accorded legal respect.

and fighting. It requires the idea of will, that one is a *subject*, proceeding under the control of one's own plan. Coercion is the overwhelming of the *will* of one by another. That is the subject of law. Law determines when and under what conditions the will of one person will control another.

The will of each person is under many controls – we generally cannot do whatever we want. We may be limited by physical disabilities, a lack of resources or ignorance. Those limits are the business, respectively, of medicine, economics, and education, not the business of law. Law is involved when that which we will is limited by the will of another. Law determines when it is that the desires of an official, a competitor, a parent or a stranger may constrain us and when they may not.[5]

As its root, law is a scheme for answering a single question: Upon what basis is coercion justified?[6] Or, when is it right for the will of one to control another?[7] Many answers have been

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[5] This is the *necessary* ambit of law. But since law controls coercion, it *may* assert itself far beyond this ambit. It may, for example, overwhelm and subsume medicine, economics and education, directing them by force. Since the law controls coercion, it "trumps" the other institutions of society. *It* is the vehicle, not medicine, education or economics, by which one gains formal control of others.

[6] I use "coercion" broadly to connote not only the overwhelming of the will of another by force or threat of force, but also, the subversion or control of the will of another generally. Each of us may *effect* each other, as when your description of driving a Porsche arouses in me a desire to drive one myself. But we may not *control* each other without justification. The distinction between affecting and controlling is a continuously troublesome one, a central theme in the evolution of law and the revelation of science. I use the term "coercion" here because it signifies the clear high ground in this question.

[7] This question establishes the relationship between law and morality. Where morality asks, "What is right?" law is concerned only with a very specific subset of that question: "When is it right for the will of one to control another?" There is no *necessary* reason for law to confine itself to this question. There are prominent examples of societies in which law is used to drive every moral tenet. American law has purely moral laws (e.g., many of the vic-

proposed to that question. The anarchist says, "Never," refusing to recognize any *right* to coerce. The paternalist might answer, "When the one who is being controlled is better off as a result." The ultilitarian would say, "When it is part of a scheme for maximizing the general welfare"; and the traditionalist, "When it derives from the existing patterns of coercion."

It would be possible to derive from each of these answers an entire legal structure. None of them, however, would fit the American legal system at all well.[8] I suggest that the following answer generates a structure of propositions that fit our law quite well (and are hence an approximation of its deep structure): Coercion is justified when it is part of a general scheme for expanding the range and power of the will of each person. One may control the will of another only if that is justified somehow by an expansion in will.

In what follows I will explain American law as a scheme for expanding the ambit of individual will. There is no point, however, in explaining that which is unclear (law) in terms of something equally unclear (will), so I must explain what I mean by will.

Will refers to your experience of yourself as the cause of what happens to you. Will, to take a trivial example, is what is going on when you test the martini that you are making for yourself to see that it has "just the right amount" of dryness. You act upon the world to produce a feeling that conforms to a feeling you desire. If the feeling does not conform, if the martini is too dry when you test it, you act again to bring it closer to your desire, or you make

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timless crimes), those that are not a response to the coercion of one by another. They are, I suggest: (1) holdovers from an earlier tendency to use law to support a particular, uniform culture; (2) largely unenforced (and thereby, sentiments, not laws); and (3) nondurable.

[8] The free market liberal answer – "Coercion is justified when it increases the market value of goods by establishing a basis for fair transactions between people" – has been a remarkably effective explanation of public and private (particularly private) law. There is much, however, that it cannot explain (which is, therefore, *wrong* under this theory) and the connection that it makes to morality is cloudy at best.

do with it as it is, or you try to find someone else to drink it. Will does not lie in the feeling of drinking the martini or in the activity of making it.[9] It lies in the process of *bringing about* those feelings by formulating desires and the plans to achieve them, acting in conformity with the plan, and comparing the results of the action with the desires that drove it. It is from our experience of this process that we experience ourselves as the *cause* of what we perceive.

I wish to go into this process further.[10] While will is immediately a dimension of most of what we do, it is largely implicit, taken for granted, in a free society. For this discussion it is necessary to make it explicit. Figure 1-1 sets forth the essential aspects of will.[11]

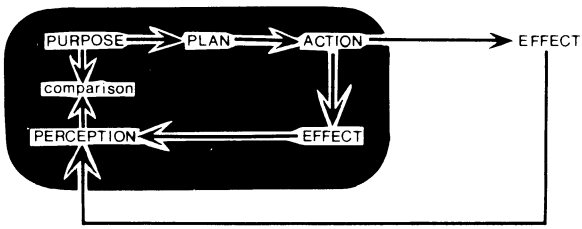

Fig. 1-1.

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[9] Most theories of justice are based upon either feelings or activities. Utilitarianism is a feeling-based theory (i.e., maximizing pleasure), as is paternalism (i.e., making the feelings of the one who is the object of care come out "right"). Libertarian theories, by contrast, focus upon activities.

[10] This is a statement of my desire, which is the first step in the process just outlined as "will." If the paragraphs that follow set out what I mean by will, then I will be "satisfied" with what I have written. But, of course, part of my desire is that you read and understand what I have written. You, then, are the judge of whether my intention has been achieved. Ultimately, any satisfaction that I receive will come not from what I have written, but from my perception of your response to what I have written. Any desire that involves others requires this tangled and contingent form of perception, which is the basis for saying that we have a "society" rather than a "collection of people."

[11] This formulation of will is based in substantial measure upon *Behavior: The Control of Perception* (Chicago: Aldine Publishers, 1973), by William Powers; and *Plans and the Structure of Behavior* (New York: W. W. Norton & Co., 1960), by George Miller, Eugene Glanater and Karl Pibram.

The process of will begins with a purpose, the formulation of an idea of a perception that is desired. The desired perception may be of an internal state, such as the quenching of thirst, or of an external state, such as approval by one's friends or the construction of a house. Not all thought and behavior is purposive. Much of it is simply responsive to the actions of others, or habitual, or entirely aimless, as with the random reflection that fills up the nooks and crannies of the day. But much behavior is directly purposive, oriented by a specific desire.

A desire may directly spark thought or action, in which case we say that we acted "impulsively" or "habitually." Generally, however, the desire will require the formulation of a plan. Planning takes into account our knowledge of the environment and of our own capabilities to form a set of instructions that will control our thought and actions. Where our desires are complex, requiring actions that involve others or stretch over long time periods or call for new types of action, planning may be a demanding process. We may formulate a plan, run it in our imagination in simulation, reform it and run it again to imagine whether or not it is likely to produce the perceptions that we desire. For simpler or more routine desires we may simply swing into action a plan that has worked in the past.

There is an innate economics involved at this stage of the process, for we must decide whether to act upon the plan. At any given moment we will have a number of plans ready to go into action, each driven by a different purpose. A decision to act upon one is a decision not to act upon the others, at least for the moment. We evaluate the desires against each other and take into account the likely success of achieving each within the social and physical context that we are in. On the basis of this evaluation we decide upon a particular plan of thought and action. This process is simplified when we have formulated a more general plan – ultimately, a plan for our entire lives – that arranges our purposes into a coherent overall framework of family relationships, career objectives, and so on. To the extent that we have no higher-order

plans, we resemble a molecule of gas, as capable of darting in one direction as any other at any moment in time.

The plan, once enacted, will control our thought and action. The action will have an effect. As indicated in Figure 1-1 that effect is either internal to the person (e.g., the feeling of euphoric exhaustion produced by distance running) or external (e.g., a change in a physical object or another person), generally both. Our perception of that effect will then be compared against the perception that we desired – the purpose that animated the action – to determine whether or not it has been satisfied. If not, as was the case with the martini that was not yet dry enough, we may reenact the plan, noting for the future what modification in the plan was required to bring our actions closer to our desires.

The strength of a person's will, the strength of his ability to cause his own perceptions, is dependent upon a number of factors, most of them unknown and perhaps unknowable. Some of those limits are internal, so a person may have a poor understanding of the world, leading to plans that are not appropriate. Or he may be poor at planning, so that he continually produces surprising effects, failing to modify his plans in the light of failure. Or he may be inept in action, suffering perhaps from a physical debility that severely limits the range of possible plans that he may enact.

Limits upon will may also be external. The person who desires to feel himself soaring unaided through space is up against the most powerful of physical laws. And the person who finds himself in a context of severe scarcity will find most of his actions controlled by desires that are biologically hard wired.

None of these limits upon will are legally significant, at least within the theory being set forth here. They are highly significant to the person, who will spend great effort, for example, to expand his repertoire of plans and to remove debilities, and to his parents, friends, teachers, doctors, engineers, and so on, who will help him thrust back the constraints that act upon him.

The limits upon will that are legally significant are those that result from the *will* of another. The will of one may control the

perceptions of another in any number of ways. The strongest example is hypnotism. The mechanism underlying hypnotism is not well understood, but it appears that a person in a deep trance hears the hypnotist's voice as if it were actually his own inner voice.[11] The person's normal critical faculties, which cause him to ask himself who this suggests that he, for example, stretch his body rigidly between two chairs, are at least partially suspended. This makes it possible to directly insert purpose into the person, taking over, in some measure, will.

In the more usual case, one controls the will of another by rearranging the contingencies that he faces, by physically confining him or harming him or by rearranging his environment so that his once powerful repertoire of actions is enfeebled, or by tricking him so that the perceptions that he receives are not the honest result of the actions that he undertook. In each of these cases, the will of one contravenes the will of the other. To the dumb (i.e., unwilled) constraints that the other must act within have been added constraints imposed willfully. Those willed constraints must be justified.

But why? Is it not an unalterable part of the human condition that each person can only experience another as an object? There is no way for you to *experience* my existence as a subject. You may *empathize* with my feelings as I exhibit them in behavior. You may *imagine* that I am having feelings that I do not evince. You may *understand* my statements. But you cannot experience me as I do. Why, then, do you have to justify your effect upon me? Why do I count for more than any other object that you come into contact with?

There is no satisfying answer to those questions, though they have received a great deal of attention.[13] American law has, in

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[12] Miller, Galanter and Pribram, *Plans and the Structure of Behavior,* p. 106.

[13] These questions have traditionally been within the domain of philosophy, but recently they have become interesting to some in mathematics and physics. Consciousness and subjectivity have become important concerns in the

effect, answered that question with an axiom: The will of each person is entitled to respect. This axiom, I suggest, is the implicit core of American law. The axiom is not a reason, for there is no further justification for it. It is a *choice.*

The axiom says that, while one may act upon another as an object, one must always allow that person to act upon and within himself as a subject. Only then does the person experience himself as a cause. There is no basis upon which one can experience the other as a cause, but neither is there any basis for *preferring* the will of one over another. One who would assert oneself over another must justify that, and he must justify it within the terms of the axiom.[14]

The axiom is the foundation for the answer to the essential question of law: Upon what basis is coercion justified? One may overwhelm or subvert the will of another only if that is part of a general scheme of respect for the will of the other. That obviously justifies coercion against one who would coerce another, who through his own disrespect for the will of another has yielded, to some extent, the respect due him. It says far more, but before getting into that we must look more closely at the axiom.

The axiom says three very important things. First, that it is our will, not our feelings, or bodies, or activities, or well-being, that is

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field of artificial intelligence, where an interest in designing machines to think like humans has placed them in a new perspective. Douglas Hofstadter, a mathematician working in artificial intelligence, and Daniel Dennett, a philosopher, have collaborated in a recent inquiry into these questions in *The Mind's I* (New York: Basic Books, inc., 1981):

It does seem then (doesn't it) that if your brain were transplanted into another body, *you* would go with it. But *are* you a brain? Try on two sentences, and see which one sounds more like truth to you:

I have a brain.

I am a brain.

[14] It is not legitimate, within the axiom, to justify coercion by its outcome. You may desire only to increase my well-being and your actions may demonstrably do so. But it is not legitimate for you to force me into it, to overwhelm my desire with our own vision of my well-being.

at the heart of legal concern. This is illustrated throughout law, but it is clearest in an illustration by Robert Nozick.[15]

> Suppose there were an experience machine that would give you any experience you desired. Super-duper neuropsychologists could stimulate your brain so that you would think and feel you were writing a great novel, or making a friend, or reading an interesting book. All the time you would be floating in a tank, with electrodes attached to your brain.

The Experience Machine responds to the likes and dislikes of the person who is inside it by producing a continuous stream of pleasant sensation. The gourmet will perceive himself dining on the finest food, until he feels full; the social activist will perceive himself organizing people toward the most important ends. The machine is capable of producing any perception, any sensation, in a way that makes it impossible for the person to tell that he is not experiencing the real thing.

If we satisfied ourselves that the Experience Machine performed according to these specifications, would it be legitimate to force people into it? If feelings were at the root of law, so coercion was justified if it produced pleasure, it would be legitimate to do so. In fact, applying a wierdly inverted moral logic we might even conclude that we are *compelled* to force people into the machine, since by allowing them to stay out when we could force them in we would be "condemning" them to a life of pain when a life of pleasure was possible.

The axiom allows no such results. It holds that coercion is justified to enhance will, not to produce feelings, however pleasant. It is not pleasure or pain which is at the root of law but the self-reflective experience of having brought about one's own experiences. But let us take the Experience Machine one step further. Let us say that, in addition to all the other experiences that it can trigger, it can also induce the occupant to feel the experience of will, to think that he, not the machine, is bringing about the perceptions that he is receiving. After all, if law is based upon the

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[15] Nozick, *Anarchy State and Utopia,* p. 42.

experience of will – the perception that one is a cause – what harm can there be in forcing people into a situation where they will be programmed to feel exactly that?

That question raised the second key aspect of the axiom: It requires a *respect* for the will of each person. It requires that we defer to the person, that we allow him that which we demand for ourselves – the right to pursue his prospects where he finds them. It surely does not allow us to overwhelm him to put him into the Experience Machine where he will be tricked into believing his own efficacy, thereby removing all possibility of will from him forever.

How far does deference go? We have seen that the axiom does not allow one to be forced into the Experience Machine. But what if the person wanted to go into it? Would the axiom require that we defer to him? Would it matter if entry into the machine was a one-way trip, so that, once inside, one could not get out, either because there was no handle on the inside or because its program was so powerful as to render one incapable of forming a desire? Is the requirement of respect so strong, in other words, that it forces us to desist from intervention in the person's decision, even when we know that is the last decision the person will ever make?

We will return to this question in several guises throughout the paper, but the general answer at this point is yes, unless the decision is to place himself under the control of the will of another. In that case, respect for the will of each person requires that he must be free to change his mind. He is free, in other words, to sell himself into slavery, but that agreement may not be enforced. In the specific case of the Experience Machine, whether or not we allow the person to enter (assuming that he may not or will not leave) depends upon how we characterize it. If we see it as an extension of the will of its designers or of its manufacturers, we would not allow the person to enter until we were convinced that it had been redesigned in order to let him leave at any time and not to engineer his will when he was inside. If we consider the machine to be dumb – a newly created natural condition – we would defer to the person's decision to enter it, just as we defer to his

decision to die. The former characterization is more compelling than the latter.

The third aspect of the axiom is that the will *of each person* is worthy of respect. Relativistic comparisons of the will of one against another are irrelevant. It is not that comparison is impossible. We surely could – and in our private lives we surely do – compare and weigh wills. Some appear stronger than others, more effective at delivering for themselves that which they desire. Some appear more purposive, less given to aimless meandering. And some are more sophisticated, pursuing complex, powerful plans that act over long periods of time and upon many people.

Tha axiom holds that these considerations are irrelevant. Coercion is not to be allocated according to the worthiness of will, so that the most worthy gain a preference over the less. That may be the way the world of natural law works, but it is not to be the way the world of human law works. The reason for this is that will is not a *trait* of human beings, to be weighted along with other traits that they possess, like beauty and a sense of humor. It is a *dimension* of the person; that dimension which animates him.[16] A person who loses his beauty must resort to other traits. A person who loses his will, his sense that he may bring experiences about for himself, is no longer a subject. He is an object to be controlled by the will of others. There are gradations of beauty. There are no gradations of not being a person.

It is important at this point not to go too far. I have said that the answer to this question, "Upon what basis is it legitimate for the will of one to control another?" hinges upon this axiom: "The will of each person is entitled to respect." A willed restraint must be justified by an expansion in the vigor of individual will. This is not to suggest, however, that human beings are free. The law is not

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[16] Goal seeking in this sense is not something extraneous that gets into the organism and makes it go. It is an objective system property which is implicit in the very nature of biological organization." Gerd Sommerhoff, *Logic of the Living Brain* (New York: John Wiley & Sons, 1974), p. 16.

based upon the proposition that people are, or may become, the self-caused causers of their consciousness or behavior. That is a proposition that I suspect is untestable. Law is based upon the *experience* of each person that he is the cause of his actions and ideas.[17] Whether or not that is true in any ultimate sense is irrelevant and probably unknowable. It is clear, however, that one's experience of himself as a subject can be eliminated by the will of another. *That* is the subject of law.

Law is, then, about liberty, not about freedom. A person is at liberty to the extent that he is free from the sensible constraints of others. It may well be that much or all of our lives emerges from the working out of imperatives in our genes and the playing out of past experiences. This causes the advocates of freedom a problem, but it presents no difficulty for liberty. Liberty simply requires that the particular cauldron of genes and experiences that is each one of us – if that is what we are – not constrain, as a result of our intentions, the will of others. We may, through our toilet training of our children, establish forces in their lives that they will have to contend with for the rest of their lives. That raises no liberty question. But if we *set out* to manipulate the lives of our children through a particular toilet training scheme, that does raise a liberty question.

It follows from the axiom that the interaction between people is to be characterized, to the greatest extent possible, by cooperation. The requirement of respect is a requirement of all members of society, not simply of the state. Respect means that, while we must treat people as objects since they are not of ourselves, we must simultaneously accept them as subjects. We may not attempt to bring them inside of ourselves by taking over their purposes, plans or perceptions. We must accept their autonomy, seeking out occasions on which we can cooperate – those instances when it serves the purposes of each person to be treated by others as an object.

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[17] "The life of the law," said Justice Holmes, "is experience, not logic." Logic may connect law, but subjective experience is the basis for it, the grist.

The principles and corollaries that follow are an attempt to bring the idea of cooperation to practice. Were the axiom of equal respect hard wired into our minds,[18] or put there effectively through religious or cultural training, coercion would not be justified. Cooperation would be a sufficient basis for human interaction. No state would be justified.[19]

That is not the case. Coercion is a fact, a fact that requires a systematic response. The response is law.

2. THE PRINCIPLE UNDERLYING PRIVATE LAW

Thus far we have the following: (1) a question – upon what basis is coercion justified?; (2) an axiom – the will of each person is entitled to respect; and (3) a main idea – relationships between people are to be, to the greatest extent possible, cooperative.[20] Coercion is legitimate only when it fosters cooperation. At this point our logic branches to produce two principles that apply the axiom to society. The first is the principle of cooperation,[21]

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[18] Rawls, *Theory of Justice,* p. 46, suggests that the sense of justice may be innate, analogizing to Noam Chomoky's idea of an innate sense of grammaticalness. He does not, of course, suggest that the sense is strong enough to eliminate the need for institutions of justice.

[19] Even with self-enforcement of the axiom, however, a state would still be required in order to establish rights between people and things, under the argument of the Coase Theorem (Ronald Coase, The Problem of Social Cost', *J. Law & Econ.* 3, (1960): 1). The question of arranging the relationship between people and things will be taken up at several places in this article.

[20] If it were not law that concerns us here but morality more generally, we could derive other principles from the axiom. For instance, the axiom suggests that parents and others who are responsible for children have a duty to engender in children a respect for others.

[21] John Rawls refers to his First Principle as the principle of cooperation, but it appears that he has a critically different idea of cooperation than the one set forth here: "The intuitive idea is that since everyone's well-being depends upon a scheme of cooperation without which no one could have a satisfactory life, the division of advantages should be such as to draw forth the willing cooperation of everyone taking part in it." *Theory of Justice,*

which, I argue, underlies private law. It applies to every person regardless of status and places upon him a legally enforceable duty to respect others. The second principle, taken up from part 6 of this paper, applies to those who, by virtue of their status within organizations, are not fully disciplined by the first principle. These are people who under certain circumstances will have the right to use coercion (e.g., judges). They are subject to the added discipline of the second principle, the principle that underlies public law.

The role of the principles is to provide an operational foundation for the axiom and the idea of cooperation. All rules of law, I argue, may be seen to derive from these two principles.[22]

The requirement of cooperation is applied to every member of society through this principle: Each person must gain the willing acquiescence of those who will be affected by his actions. This principle establishes the legally enforceable obligation of each person. From the entire spectrum of moral obligations that we may be thought to have, it names one to be enforced by offical power. We may not affect others without their willing acquiescence.

A number of implications are immediately obvious from this principle. First, it places the basis for justification in the hands of each member of society. Each person is in control of that which happens to him. There is no built-in esthetic pattern against which

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p. 15. This idea of cooperation is decidedly instrumental – cooperation makes people better off; it produces "advantages." The idea of cooperation set out in this paper is derivative from the requirement that each person is worthy of respect. It is not contingent upon its ability to maximize well-being. If we could devise a coercive regime that demonstrably increased well-being over a cooperative arrangement, it would be legitimate under the well-being justification in this quote from Rawls, but not under the axiom presented here.

[22] I do not mean to suggest that, historically, they *were* derived from these principles. They emerged from the resolution of conflict. I mean to suggest only that any legal system that recognizes rights, that resolves conflict by listening to the specific claims of individuals, will come to be based upon the subjective nature of people and to embody these principles. To the extent that law is used positively, treating people as objects to be ordered according to an authoritative pattern, it will not embody the principles.

we are measured, no independent external observer who determines what is good. That is for the participants in a practice to decide.

The principle establishes the *duty* of each person as a *subject* and the *right* of each person as an *object*. The actor must gain the acquiescence of those who will be affected. The subject must respect the subjectivity of those whom he would treat as objects. Only those actions which further the interests of all who are party to them may be undertaken. This forces each person to economize on the impact of his actions upon others. Knowing that he must gain their acquiescence, he must take into account the impact of his actions upon others. The less that impact, generally, the less effort he will have to expend to get others to go along with him. The person must weigh the importance of an action to himself against its impact on others, trimming away any unnecessary impacts and going ahead with the plan only if others agree.

At the same time that it defines the duty of the person as subject and his right as an object (i.e., as the object of the actions of another), it defines the role of the state.[23] The power of the state derives from violations of the principle. Its role is to enforce the principle. In this it must defer to the members of society. It has no power to define patterns of action, other than those that are necessary for it to do its job. Since it must enforce the principle, it is not fully disciplined by it. Disciplining the state is the job of the second principle.[24]

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[23] I use the term "state" to refer to that institution or set of institutions within a society that has the recognized right to use coercion. Historically, the right has resided in every sort of institution, in the family, monarch, church, community and business. In modern times, "stateness" has come to reside in, and to be monopolized by, government. It is, however, an ephemeral property, capable of leaving one institution and migrating to another, as it left Chang Kai-shek for Mao Tse-tung during World War II, and the Shah of Iran for the Ayatollah Khomeini in the 1970s.

[24] This general scheme of relations between people and between people and the state is familiar, having been given early treatment by John Stuart Mill and Immanuel Kant:

The principle imposes a negative duty, but no positive duty to act beneficially toward others. One may not drown another (at least not without his willing acquiescence), but one need not come to the aid of another who is drowning. The reason for that, in terms of the theory presented here, is clear: To impose upon a person the duty to act beneficially would be to substitute coercion for cooperation as a way of organizing society. A society is cooperative only if each person may decide when and in what way he will interact with others. Affirmative duties compel interaction; they justify coercion to force one to act toward another. There is great pressure to do this, for some actions are clearly good. But to compel a person to be good is to treat one person as an object in the provision of the welfare of others, which is a violation of the respect due him.[25] Benefits must be provided, where desired,

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"The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not sufficient warrent. He cannot rightfully be compelled to do or to forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others to do so would be wise, or even right ... To justify that [compulsion by the state], the conduct from which it is desired to deter him must be calculated to produce evil in someone else." *On Liberty*.

"Hence, the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone else according to universal law ... Consequently, if a certain use of freedom is a hindrance to freedom according to universal laws (that is, is unjust), then the use of coercion to counteract it, inasmuch as it is the preventaion of a hindrance to freedom, is consistent with freedom according to universal laws; in other words, the use of coercion is just." *The Metaphysics of Morals*.

[25] To put this in terms of will, a negative duty forecloses from the spectrum of plans that a person has those which will harm others. The person is left with those that are harmless or beneficial to others, plus any that he can get others to agree to. Affirmative duties, in marked contrast, foreclose the plans of the person, imposing upon the person a single desire (e.g., saving a drowning person) which he must enact. Both types of duties limit will, but the former is both far less severe and justified by the ***willed*** nature of others. Affirmative duties select the well-being of one over the will of another.

through willing acquiescence. If drowning is a problem, lifeguards must be found who are willing to protect swimmers. The axiom permits coercion to be used only to avoid coercion, not to produce benefits.[26]

The principle of private law makes an obvious connection with contract law and I will not belabor it. Its connection to property law and tort law are not so obvious, so I will go into them here.

The principle requires one to gain the acquiescence of those who are affected by his actions. That clearly applies to a situation in which the actions of one person affect the *person* of another. If I want you to help me with a project that I am doing, I must get you to agree to do it. I may offer you my friendship, or my help on a future project that you want to undertake, or compensation. (I may not offer not to hit you if you help me, for that places you under a compulsion; the requirement of *willing* acquiescence means that, whatever the pressures and compulsions a person is acting under, they may not be supplied by the person who would gain his acquiescence.) If what I offer suits your purposes, you may agree to it. We will probably dicker with each other to arrange a pattern of interaction that suits us both. But if what I hold out to you does not suit your purposes, you may refuse to help. Your decision is final. I may not appeal your decision to a

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[26] The question of affirmative duties is a common one in jurisprudence, though it has not received the clearest treatment. John Rawls says, "Negative duties have more weight than positive ones," (Theory of Justice, p. 114), without indicating why or suggesting later what weight, if any, positive duties may have. John Stuart Mill takes a stronger stand:

"Justice implies something which is not only right to do and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence, because we are not bound to practice those virtues toward any given individual." *Utilitarianism.*

But why aren't we bound to do so?

"Duty is a thing which may be ***exacted*** from a person, as one exacates a debt. Unless we think that it may be exacted from him, we do not call it his duty." *Id.*

It would be a waste of effort to impose affirmative duties. Or, in the terms of behaviorism, reward is seven times as effective a motivator as punishment.

higher authority, say on the theory that my plan puts your efforts to a better use than your own plans do, so you should be compelled to help me. You have, in general, *final authority* over the plans that you will participate in.

That much is clear. But what if I desire from you not your help, but some property that you have? You may have, for example, some white cedar planks that I would really like to have for a boat that I am building. Must I gain your acquiescence, or can I take them from you? The principle states that I may not affect you without your acquiescence. I can see that if I hit you, that would be cognizable effect. But how is it that I can affect *you* by taking your boards? What is the nature of the connection between you and your boards such that if I take them it affects *you*. If I use *my* boards, it does not affect you in any legally cognizable way; yet if I use *your* boards, it does. What idea is lurking behind these possessory pronouns that has such a powerful effect?

People are connected to things by the idea of ownership. Ownership vastly expands the ambit of the first principle, for it makes the term "each person" include not only the person but also everything that he owns. It means that I must respect not only you, but also the entire little empire of things to which you are attached. This is quite a limitation upon my will. How is it justified?

There are two types of justification for ownership, neither of which is adequate under this theory. The first type, which we might call "organic" justification, looks into the nature of the connection between people and things.[27] The person, it says, is surely

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[27] Frank Michelman calls them "desert" theories: by exerting his own labor to produce things, or by mixing his personality into the things that he has produced, the person "deserves" them.

"The labor-desert thesis, if we allow it to have any significance at all where accumulations and family successions are permitted, then has an unmistakably absolutist implication. It thus stands in marked contrast to our own notably contingent and relative doctrines of ownership. (Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law *Harv. L. Rev.* 80 (1968): 1165–1258.

connected to his arm. Cut off his arm and you have clearly affected him. So, too, the person is connected to his time and effort. Take those from him by enslaving him and you have affected him. But the person can turn his time and effort into money and things. Isn't he connected to them in just as real a sense as he is to his arm or his time? Is a person's snapshot album not as much an embodiment of himself as is his own memory?

Were we to follow this argument, we would have no trouble extending our idea of the person to include that to which he is attached in some metaphysical sense. But there are two problems with the argument. First, it is weak. We may be tempted to see that a person's snapshot album, or his clothing, or his wallet, embodies in some way his personality, but we would have to go to gargantuan levels of abstraction to see the same connection in his stock portfolio, his riding mower or his tract house. We could say that a person "owns" that which he has produced and the things that he has exchanged for what he has produced.[28] But that exchange is itself based upon the existence of property rules. We hardly find a basis for property rules in a process that is based upon property rules.

This suggests the second difficulty with the organic justification of ownership: It is ethnocentric. The arguments about "natural" connections between people and snapshot albums are convincing only because we have grown up in a society that recognizes individual ownership. The member of a communal society would be baffled by such a proposition. Our idea of what is natural has been formed by law. It would be intolerably circular to justify a law by an intuition that was formed by that law.

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[28] Robert Nozick embodies this kind of approach in his Entitlement Theory of justice in things (Nozick, *supra* note 4, p. 150). The fulcrum of that view is that "historical principles" of acquiring and transferring property give one a differential entitlement to a thing over another. If I acquire a good justly from one who has acquired it justly, it is right that I have it. But the "historical principles" are themselves the law of ownership, so they cannot be used to ground it.

The second justification for ownership is utilitarian. We recognize the connection between people and things, under this view, because it works out best if we do. If the farmer, for example, is treated as having the same kind of authoritative connection to his land that he has to his own body, the right set of signals is created to induce him to make the most of his land. He may invest his time and energy in it, secure in the knowledge that if at harvest time another comes to take the harvest, he can call in the coercive power of the state to back him up. Once secure, he will produce the maximum food for us, or transfer his land to someone else who will.

I do not doubt the happy circumstances that follow from ownership, but happy circumstances do not count for justification under this theory. Some perish even in the best of circumstances, while others see them as less than ideal, even though they benefit from them. Outcomes cannot serve as a justification for law, for law must be justified to the losers as well as the winners. Justification must go deeper to show that the rules underlying a practice (in this case, the practice of ownership) are fair to each person. Utilitarianism does this when it says that it is a set of rules which produces the greatest (average or total) common good.[29] This means that the losers will receive a justification that is of this general form: "You can't make omelettes without breaking eggs, and it just happens that you are an egg." The utilitarian justification for ownership does not satisfy the requirement of the axiom that the will of each person be accorded respect.

To justify ownership under the axiom we must see how it is that recognizing an authoritative connection between a person and things that are his "own" accords the greatest liberty to the will of each person. But why do it? As you will shortly see, the general idea of ownership is justified under the axiom. What difference

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[29] Or, in its free market version, maximizing "'value' – human satisfaction *as measured by aggregate* consumer willingness to pay for goods and services. ..." (Richard Posner, *Economic Analysis of Law,* 2d ed. (Boston: Little Brown, 1977), p. 10.)

does it make whether we ground ownership in the organic view, the utilitarian view or the respect for will view? The answer is that the shape of the property law that stems from each is very different. Under the utilitarian view, we would tinker with the laws of ownership to produce what we wanted. If agricultural output were no longer maximized by individual farms, we would change real property law to favor corporate owners. The organic view, in marked contrast, would view the connection between person and thing as, in some sense, sovereign. Public taking of property, a necessary inconvenience under the utilitarian view, would be regarded with deep suspicion and regret under the organic view. The way that law is grounded has consequences.

The grounding of ownership under the axiom begins with the observation that *someone* will control things, at least those things for which there is more desire than things to go around. Scarcity demands allocation and allocation means that the will of the allocator will effect others. Recognizing this, how is allocation to be arranged so that the domination of the allocator is minimized? We have, in general, only two allocation systems to chose from: a permission system and an ownership system. Each one has its own claim to being the best libertor of the will of each person.

The argument underlying the ownership approach is that it places the greatest control possible in the hands of each person. Decentralization of control means that one must deal with the personal idiosyncrasies of others. If I want your white cedar boards, to recall that example, I may have to contend with the fact that you don't like me, or my skin color, or my political attitudes, or with the fact that you will use your leverage over me to exact from me every bit of control you can. The first principle gives you *authority* over that which you own without any requirement that you be just or fair in what you do or don't do with it, so long as you don't hurt others. But by decentralizing control, ownership also assures me that there will be many people who have what I am after, and it assures me that I may forge whatever connections I wish with things, free from the gratuitous interference of others.

The claim of a permission system to justice is just the inverse of the claims of the ownership system. The permission system centralizes allocation in officials. If the officials are suitably governed by principles of justice, the allocation of goods can be freed of the idiosyncratic injustices that follow from individual ownership. Under a permission system, I can be confident that my skin color, political views, personal attitudes, and so on, will not be taken into account in my pursuit of white cedar boards. I can, at any rate, if the official permission system can be made to embody an equal respect for my will. My reading of history may indicate to me that this would, however, be unprecedented, centralized systems of authority having a tendency to embody personal desires for power rather than a deference to the will of each person.

The case for a permission system is strengthened if we take into account the impact upon the person of his genetic endowment and the vagaries of his social endowment. Neither of these forces are under the control of his will, but both have a powerful affect upon his prospects. An ownership system places great weight upon the person's ability to deal with and satisfy others. Those who, through no desire of their own, are poor at that will find their prospects very limited. And ownership allows for the accumulation of things under the control of others, who are limited only by the first principle. How these factors are to be taken into account is addressed later in this paper.

The strong claims of both ownership and permission to carrying out the requirements of the axiom mean that both will be in evidence in a just legal system. Choosing between them, choosing when individual ownership will be recognized and when it will not, is a question to be answered under the second principle. At this point, however, we can say that the recognition of ownership, of an authoritative connection between the person and that which is his own, is justified, in principle, under the first principle. I must gain your willing acquiescence when I effect that which is your "own." How far the empire of that which may be "your own" extends, however, is a question that is not yet answered.

3. THE REALM OF INDIVIDUAL AUTHORITY

Defining property ownership is a special example of a more general task: defining the zone of activity within which each person has authority. The first principle requires that each person gain the acquiescence of others when his actions will affect them. If we were to get sensitive and literal minded about this, we might demonstrate that even the most personal of decisions affects others, so their acquiescence is required. If I decide to go to bed very late tonight, for example, I may well be crabby tomorrow and through my crabbiness make your life just a bit more miserable. Being miserable, your decisions might be affected to the detriment of yourself and others, as in the standard "But for a shoe, the horse was lost; but for the horse ... , etc." way. Does this mean, then, that life under the first principle is a matter of constantly gaining the acquiescence of everyone who may be affected in any way by one's actions?[30]

Such an interpretation would be quite inconsistent with the axiom. It is no solution to the problem of coercion to create a system which itself dominates the will of each person. The axiom justifies public coercion (i.e., the law) only to the extent that it is justified by liberation from private coercion. Providing officials to pass upon our sleeping habits is no advance in the range and power of will.

Most of the effects that one person has upon another are not cognizable under the first principle. These include effects that are (1) not substantial, and (2) not "real," as these terms will be defined below. Defining these effects as not cognizable by law

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[30] This question is sometimes posed as the problem of "balancing" positive rights – the right to do or act as one will – with negative rights – the right to be free from the actions of others. An expansion in the scope of negative rights necessarily diminishes the range of positive rights. The problem is not so straightforward, however, for negative rights do not simply make power go away. They shift power to those who enforce them. This is taken up further in the context of property rights in section 12 of this paper.

defines for the person a sector of actions over which he has authority, an area of experience within which he is sovereign. Not having to justify those actions, he is free to undertake them without gaining the permission of others. That is what private ownership does. It defines a set of things that the person may exert control over at his own will.

Ownership isolates the effects that a person has from others and throws them back upon himself. If I, for instance, paint the inside of a house that I own black, there is a symmetry between my desires and my effects. I painted the walls in pursuit of my own esthetic sense, and the effect falls upon me. If I desire to sell the house, I must either repaint it to be more in harmony with the esthetic sensibilities of others or pay for the lower desirability of the house by receiving a lower price. In any case, the effects of my actions are contained by me.

If, on the other hand, I hold the house by the persmission of a public or private landlord, the effect of my decision will fall upon him. I must gain his acquiescence. He may take the trouble to deal with me, getting me to agree to repaint before I leave, or he may simplify matters by decreeing that all walls will be and will remain beige. In either case, my ability to arrange the world as I will, to control perception toward my own ends, is diminished.

The isolation of effects is one of the prime justifications for ownership. It is also the justification that underlies privacy. Privacy is the ability to control what others know about you. Given the duty to affect others only with their acquiescence, it is essential to allow people, whereever possible, to shield their actions from others. By recognizing the right of people to shield their actions from others and to control what others know of them, the law makes it possible for individuals to define for themselves an ambit of actions over which they have authority. One need not worry about offending others or exciting fear and wrath if one may act in secret.

Property ownership is itself one of the ways in which privacy is established. It gives the person a territory within which he may act in secret. Be demarking a certain territory as a person's own, it

announces to others that they are to ignore, where possible, what happens there. Just as people who live near a railroad track quickly learn not to hear the trains that pass by, the members of a society that has an ownership rule learn to ignore what others are doing with their property – or at least to keep it to themselves if they don't.

Property and privacy are strategies for creating a sector of relationships within which each person has authority, a set of actions that the person may take without answering to the first principle. This task may be visualized in this way: By implication the law defines the scope of individual authority by defining those effects of one upon another which are actionable or subject to regulation. This, in effect, creates a threshold above which actions must arrive in order to force the person who is the subject of the action to answer to the objects of the action under the first principle. The threshold is dynamic, continually changing, as actions once thought innocuous are revealed to be harmful and thereby the subject of law.

The continuum in Figure 3-1 runs from completely private action that affects no one (e.g., thought), to actions that destroy another and are clearly actionable. Somewhere between these extremes lies the threshold, that set of actions severe enough to justify formal coercion to control them. All legal institutions – courts, legislatures and regulatory agencies – are active in establishing the threshold. They do it by defining the set of wrongs that are actionable, by establishing standing requirements to bring suit,

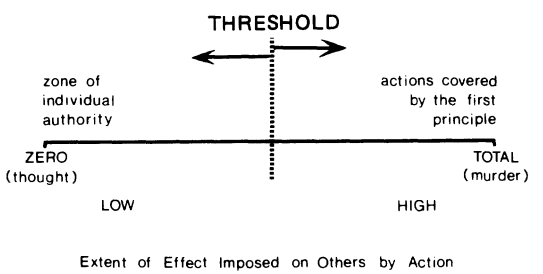

Fig. 3-1.

by defining interests that will be protected by regulation, and so on. In doing this they are guided by a few rules derivable from the first principle. (The actual location of the threshold is governed by the second principle.)

1. The action complained of must be one that dims the prospects, or immediately threatens to dim the prospects, of a person. Only negative effects are banned by the first principle, and only those that affect a 'person." The clearest example of this rule is *Roe* v. *Wade*,[31] in which the Supreme Court decided that, at least during the first trimester of pregnancy, the woman need gain the acquiescence of no one to abort the fetus (other than the doctor who would perform the operation, of course). This, in effect, shifts the threshold in Figure 3-1 to the right, expanding the scope of the authority of the pregnant woman. The opposite effect is achieved when the court liberalizes its standing requirements, allowing, for instance, a group to sue on behalf of the environment, or when the legislature creates a new cause or form of action. These changes shift the threshold to the left, reducing the sector of decisions that a person may undertake with impunity.

2. The effect complained of must be a "real" effect. A real effect is one that has an impact upon a person because of the fact that he is human. It is to be distinguished from an *esthetic* affect, one that happens to a person because of the particular attitudes, beliefs and understandings that he has developed. Esthetic effects are not actionable. Were this not the case, the actions of a person as a subject would be under the control of ideas that others had generated for themselves – the will of the potential objects of an action would control the will of the subjects. Were I to harbor the belief that all living things are part of a sacred body, for example, the sight of you cutting down the bushes in front of your house might give me apoplexy and make me physically ill. I might bring action against you, in which I could show two of the necessary elements of an action under the first principle: a demonstrable

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[31] 410 U.S. 113 (1973).

action on your part and a demonstrable ill on my own. But the thing that connected the two was my own belief. You are not responsible for my beliefs, only for my sanctity as a subject. You cannot constrain the beliefs that I have; the beliefs that I have cannot constrain you. This process is achieved in law through the "reasonable person" test.

The real effect requirement is, in fact, a very difficult one for any legal system to deliver upon. The legal system is part of a culture and every culture has beliefs, attitudes and understandings which, by dint of continuous reinforcement, are seen by people within the culture as true. There is an apparently irresistible tendency for culture-bound legal institutions to drive cultural beliefs with coercion. The person who does not pray conspicuously in public is not simply seen as *being* wrong, so we will not let our children talk to him, he is also seen as having *commited* a wrong, so we will force him to answer to the first principle for it.

American law has been relatively successful at avoiding the most flagrant enforcement of esthetic and cultural beliefs – probably because this nation is culturally diverse. An appeal to a belief ("But judge, the defendant worked on Sunday.") is likely to fall on the ears of a nonbeliever. But there is a common core of beliefs (e.g., the "naturalness' of heterosexual love and the sanctity of the family) which generate sporadic injustice in law. There is nothing, I hasten to add, wrong with cultural or any other type of beliefs. They are the way that we make sense of a confusing world and form strong bonds with others. The ill lies in driving them with coercion.

Distinguishing real effects from esthetic effects is not a simple task. The high ground of real effects is physical effects. Any person who is hit by a car is injured, regardless of his attitudes. But what about the parent who sees his child hit by a car and suffers physical ill brought about by the psychological trauma? Here, the causal chain has a mental link – the psychic bond between parent and child – but the link is not *attitudinal.* Parental affection goes with the territory of being a parent, so to speak, and is therefore an aspect of being human, rather than a

choice by the person. The ambit of "real" effects has been and will continue to be expanded by scientific understanding of human nature, which allows law to identify nonphysical effects that stem from natural law rather than individual choice.

Esthetic effects are not the only class of unactionable effects. Another worthy of note is monetary transfer effects. Modern societies are bound together with every manner of financial arrangement – public and private insurance, unemployment compensation, worker's injury compensation, and so on. None of these bonds, however, create a basis for action. Let me give an example. It is my habit, shall we say, to jog on the roads around my house after dinner. During the winter months it is dark when I run, which increases the risk that I will be hit by a car. When it is foggy that risk goes still higher. If I am hurt, I will be taken to a publicly-supported emergency room, my bills paid out of insurance premiums, my children supported by Social Security disability payments, all of which are paid for, in part, by you. My decision to run at night and in the fog increases the probability that you will have to pay. Is this not an effect upon you within the first principle?

Monetary transfer schemes, we may assume without investigation, are legitimate under the axiom as a way of prepaying for ills that are statistically inevitable. But to turn them back upon themselves, making them a basis for controlling the actions of those who could be assured by them, is not legitimate. These arrangements are not an inevitable result of what it means to be human. If they are convenient, they are legitimate. If they are not, if, for instance, automobile insurance turns drivers into irresponsible madmen, they must be eliminated. Financial arrangements, like all other arrangements, have no standing under the axiom to demand respect. It is human beings who are worthy of respect and human nature that forms the basis for an effect under the first principle, not the beliefs that humans create nor the financial institutions that they create for their convenience.

3. The third requirement is that the effect must be substantial. Trivial effects do not require justification. Here again the "reason-

able person" standard is used to distinguish the normal slings and arrows of daily life from actionable wrongs. Where the one who complains of the action is closely related to the actor, the standard of substantiality rises, for that person is in a position to affect the actor directly.

Science has had and will continue to have a major effect upon this question. It has revealed hidden connections between actions and effects (e.g., between asbestos and cancer) and it has quantified the effect of actions once thought trivial (e.g., air and water pollution). The effect of science has been to push the threshold in Figure 3-1 to the left, subjecting a greater portion of life to justification, reducing the scope of individual authority. We may expect science to drive law to greater intervention in private life, but to do so in a way that is both highly limited and generally understandable. Public land use controls, for example, have considerably reduced the authority of the owner of land, but they have done it in ways that permit a clear explanation to those whose authority is reduced. Science and religion both have the tendency to make law more intrusive, but only science has the ability to explain the intrusion.

4. The action complained of must be the willed action of a person. The person who is the "each person" of the first principle, is one who undertakes actions under the control of his own desires and plans. If the person is acting under the control of a reflex arc (e.g., self-defense in a barroom brawl), or is randomly under the control of plans with no externally discernible pattern (e.g., the person is "insane"), or under a compulsion placed there by another, there is no violation of the first principle. The person is responsible *to the extent that* the action complained of was the result of his will, so we distinguish degrees of culpability in murder, negligence, and so on.

This requirement raises very sharply the distinction between the axiom presented here and the outcome orientation of the utilitarian view. The purpose of law according to this axiom is to enforce a respect for will. Criminal law, then, is justified as a way of enforcing individual responsibility (if it is capable of doing that).

Where there is no irresponsibility, there is no crime. The utilitarian view, by contrast, would employ law to avoid unpleasant consequences. Criminal law should produce safety on the streets. The insanity defense is a hole in the scheme for producing safety. The victim is just as dead if killed by a deranged madman as by a cool schemer. Both should be prevented from acting by whatever means are necessary.

It is difficult to administer the requirement that we are responsible only for actions that flow from our will. Since we can never know the subjective state of any person (at least, not with existing technology), our judgment must be based upon an external interpretation of the person's statements and actions. This creates an incentive for the person charged to lie about his internal state. In those situations where it is not possible to reach a satisfying judgment, the utilitarian approach may be justified on a second-best style of argument.

Some of these considerations can be captured by rewording the first principle: Each person must gain the willing acquiescence of those who will be substantially affected by the real impact of his actions.

4. THE REALM OF NEGOTIATED DECISIONS

Actions undertaken outside of the realm of individual authority (i.e., to the right of the threshold in Figure 3-1) may be undertaken only with permission. The first principle requires that these actions be undertaken only with the acquiescence of those who will be affected by them. We are in "contract land."

The idea of contract under the first principle is slightly different from the way contracts are often conceptualized in contract law. In the conventional view, we have a state over here, with its monopoly on the right to use coercion, and contracting parties over there. The parties make an agreement for their mutual benefit, and, if the contract is "legal," the state stands ready to "enforce" it, to delegate to the parties some of its power to make things come out as agreed. But why should the state make such a private

delegation of power? Why should it use coercion on behalf of a person?

That is the wrong question, at least under the idea of contract embodied in the first principle. The person who engages another in contract is acting according to the dictates of justice – he is gaining the acquiescence of those who will be affected by his actions. Rather than getting others to contribute to his plans by force or deception, he evinces his respect for their will by engaging them in agreement. If they will not agree, he stands back from them in respect and looks for others who will agree.

To say that a state "enforces" a contract is to miss the point. The state "enforces" the first principle, the process of cooperation itself, so that when the process results in an agreement between subject and object, or between reciprocal subjects, the state carries out the just relations between the parties. This is no mere convenience, so that we hope that the state keeps enforcing contracts just as we hope that the ice cream store is open when we get there. The enforcement of the first principle is the justification for the state's use of coercion itself. It is the way that the state provides the basis for cooperation, for a society formed on the mutual respect by one for the will of another. It is the basis upon which the state is itself justified.

The question, then, is not, "How do we justify the use of public power to enforce private agreements?" but just the reverse: "How do we justify public power for any purpose other than enforcing private agreements?"[32] The axiom requires the state to stand back from the exercise of individual will, to use power only to provide the willing framework for the free flow of individual plans and

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[32] Robert Nozick (*Anarchy, State and Utopia*) argues that no greater state can be justified. His Minimal State would begin with establishing the social conditions underlying the process of private agreement (e.g., protection of the security of the group), and end with the enforcement of agreements. The state justified in this paper is more powerful and intrusive than the Minimal State, though I would suggest that the state justified by Nozick is not nearly as minimal as he would like to believe.

desires. But the state clearly does more than that, imposing through regulations and collective purchases its own patterns upon private interaction. How is that justified? Why is it that social arrangements cannot be left to contract? Why is it that simply standing back from private interactions is not enough to satisfy the state's obligations under the axiom?

The answer is that there are many interactions between people that cannot be governed by willing acquiescence. Cooperation requires more than that which can be hammered out in particular interactions between people. Accidents provide the clearest example. If I lose control of my car and crash into you, I have clearly "affected" you within the meaning of the first principle, but I have done so without your acquiescence. The first principle simply says that I may not do that. Does that mean that it bars any action which imposes any risk upon others? If that were the case, the first principle would bar all actions of any scope, for they always create some risk of harming others. Quite frequently, as in the case of driving a car, we have no idea who might be affected and hence, have no ability to gain their acquiescence.

The most obvious solution – banning all risky action – does not comport with the axiom. The axiom requires a respect for the will of another. One who drives carefully and keeps his car well-maintained is demonstrating a respect for others (or a healthy interest in self-preservation, or both). That he is confronted by circumstances that he cannot respond to does not indicate a failure of the respect due others. The axiom does not bar misfortune. It is not geared to protecting the well-being of others. It is geared toward protecting people from the *willed* misfortunes of others.

Accidents are willed only in the very weakest ("but for") sense: no one would ever be injured by your car if you never drove. The misfortune of an accident is not willed, simply the action which had the unanticipated effect of misfortune. Misfortune that resulted from the respectful behavior of the person is not unjust. It is not legitimate to ban it.

In this context, the language of the first principle, which

requires that a person is responsible if he "affects" another, is too strong. The person has a duty to anticipate his actions and their effect upon others, and to gain their acquiescence when they will be affected. But if he is unable to determine whether or not anyone will be affected, and, if someone is, who that will be, he satisfies this duty by acting with respect for their safety.

The requirement of respect also makes it illegitimate to take the opposite approach to risk – letting risk fall where it may. When the actions of one have affected another, the actor must demonstrate that his actions were done with respect, with care for the will of another. But how much care? How far does a subject have to go in loss prevention? What specific duties does the requirement of respect give to each person? Here, the law must specify a single standard that balances the nature of each person as subject and as object. A high duty protects the person as an object of the actions of others, but limits the range and power of his actions as a subject. The reverse is true for a low-level of duty. Between the extremes lies a level of duty that allows the greatest range of will, recognizing each person as both subject and object.[33]

The scheme that emerges from these considerations, then, is that decisions that have a legally cognizable effect upon others must be undertaken with the permission of the others, where that is possible, and undertaken with a respect for the will of others, where the situation makes it impossible to gain their permission.[34]

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[33] John Rawls's description of the Original Position (*Theory of Justice*, p. 17) captures best the mental standpoint from which questions of this sort are to be approached (though that is definitely not the use that Rawls intended for the idea). Not knowing whether he will be the subject or object of a particular risk, and knowing that at times he will be each, the fairminded person in a state of reflective equilibrium adopts a standard of care which will favor will on balance. It gives neither the greatest protection nor the greatest liberty of action but the greatest strength to the pursuit by the person of that which is his own. This is considered more fully in sections 8 and 9.

[34] It should be emphasized that "impossible to gain their permission" does not mean "failed to get their permission." If, desiring to use my car, you ask my permission and I refuse to give it, the first principle has worked as it

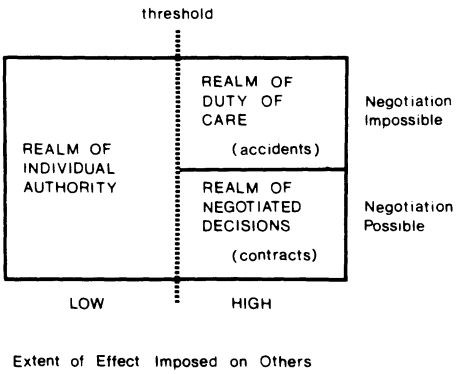

Fig. 4-1.

This scheme is set out above.

The horizontal axis in Figure 4-1 is the same as the continuum in Figure 3-1. The area to the right of the threshold refers to actions which come under the jurisdiction of the first principle. That area is differentiated into those actions which can be preceded by negotiation and acquiescence and those that cannot, in the light of the analysis that we have been through. This scheme embodies the rough idea that we keep our actions from affecting others, but where we can't, we gain their acquiescence, and where that is impossible we act with respect for their status as subjects.

Figure 4-1 is a general map of the legal environment within which private decisions are made. We could articulate it much more fully to connect it with all of the areas of private law. We could, for instance, look more closely at the realm of negotiated decisions. To this point, we have assumed that people gain the acquiescence of others on an instance-by-instance basis. That is, however, a costly process. Efficiency would dictate that we establish stable patterns of interaction so that we don't have to

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should, albeit not in a way that satisfies your purpose. There is no requirement that any person grant permission under the first principle. One may act without permission only if it is not *possible* to gain permission, as in the case of the accident where one has no idea who will be affected, if anyone.

dicker with each other from scratch in every case. So we witness the emergence of institutions that are a ready framework for cooperation: employment, which allows one to gain another's acquiescence in bulk rather than separately for each action that he would like the other to take; the firm, which is a set pattern of cooperation between people; printed contracts, recording acts, and the like.

This train of thought would raise some new questions of justice. For instance, is it not possible that institutions which were formed to facilitate cooperation, such as the corporation, begin after a time to dictate the terms of cooperation? Is there not a tendency for institutions to pattern interaction between people, so that while they were advantageous in principle, they become limiting upon the will as they become stable? Is there not a sense that the boilerplate in contracts, the SAT exams, bureaucratic job descriptions, and so on, pattern the interactions between people so that it begins to be impossible for the person to tread paths other than the ones they lay down? Could it be that the great virtue of law in stabilizing social relationships itself creates a justice problem? If that is possible, case-by-case, edgewise justification of law could lead us to produce law which was just in the particular case but is, by locking in patterns of behavior, solidifying class structure, and so on, tyrannical in general. These questions will be considered further in the next section.

I will go no further with the subject of private law here, for there remains the task of accounting for public decisions. The general scheme of Figure 4-1 does not include decisions that can be driven by power. We have accounted, in the abstract, for willing interactions between people. We must now account for those that are unwilling, for those that are backed by coercion but are nontheless just.

5. THE JURISDICTION OF THE STATE

The jurisdiction of the state – the rightful ambit of its actions – is derived from the first principle. The first principle establishes the

terms of cooperation between people. If the state enforces it, and does no more, it employs coercion only to enforce cooperation, which is consistent with the requirements of the axiom.

There are four circumstances that require enforcement of the first principle. Only actions by the state that are a response to one of these circumstances may be legitimate.

1. *Willful Violations Of The First Principle.* Willful violations of the first principle are of two very different types. First are those in which the person refuses to abide by the first principle. Knowing that his actions would affect specific others, perhaps even intending that the actions affect specific others, the person nonetheless refuses to deal with them to gain their acquiescence, or, having been denied their acquiescence, the person refuses to abide by that refusal. Here the person looks squarely into the inviolability of another person and refuses to respect it. The person acts unjustly and through his injustice yields, in some degree, the respect due him under the axiom. This basis for jurisdiction applies both to crimes and to national defense, where the ones who would employ coercion are noncitizens.

The second type of willful violation is the situation where one has dealt with another, has established by agreement a scheme of cooperation, but is unwilling to carry it out. That unwillingness may be straightforward, as when he simply refuses to perform, or subtle, as when he fails, through irresponsibility, to do something that is necessary to his performance. In either case, one who has failed to perform under the first principle is less of a threat to the scheme of justice than one who has refused to abide by it, both because he has demonstrated his acceptance and understanding of the principle and because, by engaging in interaction, he has placed himself to some extent within control by the will of others. This distinction justifies, in general, different approaches to the enforcement of contracts and the enforcement of criminal law.

2. *Ancillary Violations Of The First Principle.* A person may, as we have seen, pursue a particular plan responsibly and nonetheless

injure others in the process. There are two different situations. The first is the accident situation, discussed above. The second I will refer to as the "captive audience" situation. Here, a person, in the pursuit of his own plans, alters the environment in a way that it becomes a condition that limits the will of others. This may be intentional, as when a business, through predatory tactics, eliminates competition and becomes the only organization that others may deal with, in which case we have an example of a willful violation of the first principle.

More usually, the captive audience effect is an unintended consequence of actions. For example, a firm may become large relative to the markets and communities that it inhabits. To some extent, sheer size can free it from effective discipline under the first principle, making it capable of exacting more acquiescence from people than they would give the business were it organized into small chunks. It is one thing for a firm that employs one percent of the workers in a town to threaten to go out of business, and something completely different for a firm that employs eighty percent. The latter firm has itself become, in large measure, the economic organization of the town. If it fails, the economic organization of the town may die. Knowing this, it is able to exact support from people beyond what they would give if the economy were organized differently. Bigness need not be badness, in any predatory, willful sense, in order to constitute an injustice that legitimates state action.

The captive audience phenomenon is the problem, mentioned at the end of the last section, of institutional arrangements that become patterns upon the will of the members of society. Were we to become too finicky about this, we might see all patterns, even the patterns of language itself, as a limit upon human imagination and action. This would, of course, be nonsense. The essence of the captive audience problem lies not in the fact that our actions pattern the environment and that that pattern itself becomes the condition that others cope with, but in the fact that a particular pattern is unnecessarily – gratuitously – confining. If that is a fact, it may be changed.

Here is where the "problem" of the family lies. On the face of it, the family is an arrangement where the will – or at least the actions – of two people creates a third person who is, for a long period, subject to the will of the two. This does not mean, however, that the child is the captive audience of the parents, at least not in a sense that supports the jurisdiction of the state. That jurisdiction exists only if the control of the parents is gratuitous, if there is an alternative to the domination of the parents which is, in terms of the life of the child, less restrictive. It may be easy to show that in the case of a particular family the child is liberated by being put with another family. What is not easy to show is that the existence of this power in the state does not critically disrupt the politics of all families. It hardly improves matters to make people a captive audience of the state in the pursuit of the eradication of private captive audiences.

The captive audience jurisdiction of the state is the most difficult of all bases of jurisdiction, for the state can only respond to private patterns by establishing patterns of its own. To decide when an alternative pattern of human interaction is preferable to one that has developed from actual human interaction is very difficult. We must be careful, however, not to regard existing patterns with too much deference. There is nothing compellingly "natural" about the present structure of the family. It is the creature of industrialization, urbanization, and hundreds of other cultural forces which were themselves shaped by law. We may well respect them, as we would any interaction created by the love and desire of human beings, but they are not sovereign. Sovereignty lies in human will, not in history.

3. *People Incapable Of Willing Acquiescence.* The first principle places control over what happens to a person under the control of that person's will, as he expresses it. If he is unable to express his will, cooperation will not work. Whatever our scheme of justice, things will happen *to* that person. He will be an object. The axiom makes it clear that what should happen to the person is that he be treated in a way that makes it most likely that he will gain expres-

sion of his will, that he will function as a subject in cooperation with others under the first principle. The state may act legitimately when it acts toward *that* purpose.[35]

This power is limited by the axiom in this way: expressions of will by the person are final. The requirement of respect means that no inquiry is permitted into the sufficiency of the person's will. It is legitimate, as perhaps in a case where it is alleged that a person's will has been dominated by a religious cult, to place that person in a position where he is free from domination, as by bringing that person into court. The expression of the person's desire in that situation is, however, final. No comparison of his judgment or perception with the judgment or perception of others is legitimate.

It is understandable that parents who have spent fifteen years warning their children of the errors, depravities and dangers of the world should want to follow that up with state surveillance of their children as adults. Parents, however, are unable to do that themselves without the acquiescence of their children. The overenthusiasm of parents is limited by the independence and irascibility of maturing children. Such a limit does not fall upon the state. It is illegitimate to use state power to foster the desires of parents for control, however praiseworthy the desires.

4. *Definition Of Property Rights.* It is necessary, as we saw in section 3, for the state to define the enforceable relationships that people may forge with things. It is not necessary for the state to define the relationship between a "person" and his kidneys, or his time and effort, even though these may be treated by the *person* as property. In that case, there is a clear organic connection between "person" and the right.[36] No such organic connection

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[35] This basis of state action does not apply to people who are hopelessly incompetent, who suffer, for example, from Tay Sachs disease and will never develop a coherent central nervous system. State action on their behalf must be traced to other roots.

[36] The conventional organization of legal topics treats both one's right to one's time and to one's house as "property." They are alike in that both sets

exists between the person and external objects or abstractions that have been objectified (e.g., the ideas expressed in this paper, once published). Those connections are legal, not biological, in nature and must be defined by the state. Once it has defined them, it will enforce them through coercion. It must justify that use of coercion under the axiom. The second principle is the basis for this justification.

This concept of property rights changes the questions that are raised about the justification for the state's taxing and taking powers. If one conceives of a piece of property as one's "own," taxation and taking are felt to be a battle between the state and the person over that to which the person is organically connected. This conception may, in fact, be a very useful corrective to excesses of state power in an unjust regime. The unjust state will exhaust itself sending to the gallows those who will defend to the death their connection to that which is their own. The organic view of property, however, is a mythical artifact which, as the state becomes more just, produces an unjustified level of private power.

Individuals and associations are connected to things, under the axiom, according to the rules that the state makes in accordance with the second principle. The state has no power to "take" by eminent domain that which is the person's "own." The person has no power to "own" anything, other than under the terms specified by the state. The state may take whatever may be justified and in whatever way is justified. Those are part of the terms under which one "owns" something. Those terms are contingent upon the dictates of justice.

This is not to suggest, of course, that ownership, once established under whatever terms are just, may be altered at the whim of an official. People *are* connected to things. That connection is both an expression of will and an essential dimension of the working of one's will in the world. It is worthy of respect.

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of rights are alienable. This similarity, however, masks a critical difference between them: one is organic, while the other is a creature of legal convention.

The jurisdiction of the state derives from the four ways that coercion must be used to establish cooperation in society. To be legitimate, every state action must be derived from one of these four sources – it must address a failure of the first principle to enforce itself. Further, the actions of the state are limited by the basis that justifies its action in the first place. It may not, for example, point to the fact that those who are mentally incompetent can't participate in the world of willing acquiescence to justify warehousing them. It must act not to supplant private misfortune with public misfortune but to make more possible the expression of, or development of, the will of those who suffer the putative debility. If it cannot do that, its action is not justified.

The first principle establishes the jurisdiction of the state. It does not, however, provide a basis for determining when its actions within that jurisdiction are legitimate. That requires a second principle.

6. THE PRINCIPLE UNDERLYING PUBLIC LAW

The coercive power of the state is justified, as we have seen, by the fact that private uses of coercion are not self-limiting. The state provides the framework for cooperation by enforcing the principle of respect. This leaves us, however, with the problem of limiting the state. One possible strategy is to make the process of limitation reciprocal: the state limits the people; the people limit the state. This strategy, in general called, "democracy," conjures up something more than the ability of people to discipline the state by revolt and revolution. Democracy means that a deference to the "will of people" is woven into the fabric of rules that is the state. We could, then, say: "Those who would exercise power in the name of the state must gain the willing acquiescence of _____(half; two-thirds, etc.) of the people."

For a number of reasons, democracy is not a sufficient principle to limit the state under the axiom. The most obvious reason is that it is not possible to require the state to act with the willing acquiescence of all persons (we can safely assume that, when it

enforces the first principle, those against whom it is enforced would not generally acquiesce to it), and when it acts with less than unanimous consent it may well strategically exploit the will of a person or class of persons. Put another way, any nation in which the members were so strongly imbued with a respect for the will of each person that majority rule would create no risk of exploitation, would be a nation that did not need a state at all (other than for protection against external aggression). The same argument that justifies a state – an agency with the right to use coercion – undermines the supremacy of democracy. History is bereft of examples of such a circumstance.

In the theory that follows, democracy is treated as a strategy for achieving justice, but a strategy that is contained within – limited by – this principle: Each person has a right to the greatest liberty consistent with the same right in every person.[37] This principle recognizes in each person a right which is superior to the power of any majority or group, acting collectively. It is this right which forces the state, however it acts, to answer to the axiom.

The second principle contains three central ideas which will occupy us for the rest of this paper: A statement of purpose of

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[37] This principle bears a resemblence to John Rawls's First Principle: "Each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all." (Rawls, *Theory of Justice,* p. 302.) The two principles are more different than they seem. Rawls's "system of equal basic liberties" refers to something such as the Bill of Rights [his specification of them on p. 61 is as far as he goes in delineating them: "The basic liberties of citizens are, roughly speaking, political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law."] The "liberty" referred to in the theory presented here is a very different type of concept. It signifies a process, a way of looking at law, rather than a list of particular laws. And the "right" referred to here is a juridical right, while Rawls's is a more abstract right, an idea to guide us in shaping institutions.

the state – liberty; a statement of the distribution of that purpose – equality; and a statement of a mechanism for enforcing the principle – rights. Before getting into those ideas, however, I will attempt to capture the main idea of the principle.

The state may use coercion, as we have seen, only to enforce the first principle. It need not, however, demonstrate that its actions will be effective before it acts. Why not? Why is the second principle not this: The state may employ coercion only when it can demonstrate that the public use of coercion will result in less constraint upon each person than the private injustice that it eliminates? Why do we not require that the state demonstrate that when it equips its police force, for example, with laser-aimed weapons, that will increase the effectiveness of its actions against criminals without terrifying the innocent?

The answer is both obvious and critical to an understanding of what follows: It has no way of making such a demonstration. The state is plagued with the very same uncertainty as individuals acting under the first principle. The question we ask here is the public version of the question that we asked in section 4: Given that most actions that individuals take will expose others to the risk of injury, why do we not simply ban all behavior that has a risk of causing injury? There, we saw that the axiom requires that each person act with a respect for the will of others, so it imposed upon people a duty to act with care, not an obligation to guarantee the well-being of others. In a situation where the impact of one's actions upon others is unknowable, one must act with respect for them.

Similarly, where the effect of its actions is unknowable, the state must act with respect for those who may be affected, given that it may only act to enforce the first principle. The state need not demonstrate the effect of its actions. In fact, the second principle places the burden of demonstrating the effect of state actions upon the person. It grants him a right to the greatest liberty consistent with the same right in every person. The "right" referred to is a juridical right, one that may be asserted in court. To assert it the person must demonstrate that the state could

afford him a greater liberty by acting in a different way or ceasing to act at all.

The general scheme of the second principle, then, is that, if the state acts within the jurisdiction of the first principle, it may do whatever it will, subject to two constraints: (1) To the extent that its effects are certain, it must act to produce the greatest liberty for each member of society; (2) to the extent that its effects are uncertain, it must act with respect for the will of its members. The second requirement is the analog of the private duty of care and is the source of the requirement that the state act democratically. Respect for the will of its members means that, where the effect of a public action is uncertain, the judgment of those who will be affected is sovereign. This democratic judgment is contained to the realm of uncertainty by the individual right of the second principle. As soon as an effect is demonstrable, that effect is judicially cognizable and tested under the requirement of the greatest liberty.

This scheme places a different perspective upon the ancient battle between advocates of a rights-based, or principle-limited state, and utilitarians. It shows that there is a proper sector for each view in public dicisions. Democratic[38] decisions are unavoidably utilitarian.[39] They are based upon the perception by each

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[38] By "democratic" I mean a social process (in this case, the scheme of public decisions) that accords those who will be affected by the decision the greatest say possible in the process.

[39] "Just as the well-being of a person is constructed from the series of satisfactions that are experienced at different moments in the course of his life, so in very much the same way the well-being of society is to be constructed from the fulfillment of the systems of desires of the many individuals who belong to it. Since the principle for an individual is to advance as far as possible his own welfare, his own system of desires, the principle of society is to advance as far as possible the welfare of the group. ..." (*Theory of Justice*, p. 23).

Rawls makes it clear that he does not care for this process, which embodies a teleological approach: the good is defined and the right is derived from it to be whatever is necesary to produce the good. In a deontological (duty-based) theory, the right is defined independent of the good and acts to

person of where the good lies. Democratic decision is an exercise of the will of each person. The person may be motivated by a respect for the will of others or he may not. In either case, he acts in public decisions to produce the greatest good as he sees it. This is not troublesome so long as the decisions are within the realm of uncertainty. As soon as it is clear that the effect of democratic action is to dim the will of a person, however, the democratic, utilitarian process is at its limit and is enframed by the right of each person.

There is symmetry here between the principle of private law and the principle of public law. The first principle takes the pursuit by each person of that which he will as sovereign, but enframes it within the requirement that the person act with respect for the right of every person to pursue what he will. The second principle, having established the motivation of the state, takes the pursuit of the greatest good by the members of society as sovereign, but enframes it within the requirement that the state respect the will of each person. In both cases the idea of right enframes the pursuit of the good.

One implication of this is that while utilitarianism could never be a sufficient organizing principle for society (except perhaps during the heat of revolution, when nothing could be demonstrated), the idea of right embodied in the axiom could be a sufficient organizing principle, if we were capable of perfect understanding and information. If we knew the impact of every public measure upon the will of each person, we could know whether a given state action would result in a liberation of the will of each person, and so either require a state to do it, or ban it directly under the second principle. There are any number of reasons to suspect, however, that such knowledge is impossible,[40] so we are faced

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constrain the pursuit of the good. Rawls claims that his theory is of the latter type, and I make the same claim for American law.

[40] Two that are of particular interest are Kenneth Arrow's impossibly theorem, set out in *Social Choice and Individual Values* (New York: Cowles Monograph Series No. 12, 1971) and Gödel Theorem, as explained by Douglas Hofstadter in *Gödel, Escher, Bach* (New York: Basic Books, Inc., 1980).

with the relationship between the right and the good, between justice and utilitarianism, set out above.

It is obvious that courts presently exert exactly this enframing force upon the other branches of the state.[41] They trim statutes, trim agencies, trim regulations, to make them conform to an idea, or a set of ideas, that they call the "Constitution" and the "common law." What is not clear is that the fulcrum of the process around which they do their trimming is the second principle. To demonstrate that, we must see more clearly what it means.

7. THE GREATEST LIBERTY

The central idea of the second principle is liberty. You will recall from section 1 of this paper that liberty referred to the extent to which a person is free from sensible constraint by others. It is the word we use to signify a person who is acting upon his own will, rather than acting under the constraint of the will of another. It is critical to distinguish liberty from freedom. Freedom means that a person is free from *all* constraints, both those that stemmed from the will of others and the dumb constraints imposed by nature (e.g., gravity, hunger, genetic endowment, etc.). This theory takes no stand on freedom. Freedom from dumb constraints (to the extent that that is, on balance, possible) is the business of cooperation, of doctors and patients, farmers and consumers, parents and children.[42] American law is concerned with willed

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[41] The critical role of uncertainty in delineating the scope of judicial and legislative decisions is commonly seen in judicial opinions, for instance:

"Governmental decisions to spend money to improve the general public welfare in one way and not another are not confined to the courts. The discretion belongs to Congress *unless the choice is clearly wrong,* a display of arbitrary power not an exercise in judgment." [Emphasis added.] Matthews v. DeCastro, 429 U.S. 181 (1976).

The legislature is confined within the boundaries of that which is not "clearly wrong" or "arbitrary." Those bounds are tighter upon regulatory than upon purchase decisions.

[42] The removal of dumb constraints does not count as a justification for willed constraint. Could it not be that a bit of coercion could be used legit-

constraints, with the provision of a social organization within which it is most likely that a person plans, acts, and perceives under his own will rather than someone else's.

The pursuit of the greatest liberty is, I suggest, the central force in law. It is, however, deeply intuitive, deeply embedded in the behavior of law and lawyers. To understand it, we must have a way of thinking and talking about it. I propose the following concept:

1. *The Liberty Frontier.* The will of each person is subject to constraint by the will of others in two very different ways. First, there is private constraint, the actions of other individuals in pursuit of their own purposes and plans. Second, there is public constraint, actions by officials who would guard against private constraint. Simply put, the second principle requires that public constraints must both remove more in the way of private constraint than they impose and impose as little public constraint as is necessary to get the job done.

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imately to free someone from a dumb constraint? If we knew, for example, that x and y, husband and wife, had such defective genes that they were sure to produce a defective child, could we not prohibit them from having offspring or require that the offspring have genetic surgery? That is a slope down which this theory does not go. A restraint upon liberty must be justified by liberty, not by well being or freedom. In his second principle, by contrast, John Rawls would head down this slope (*Theory of Justice*, p. 302). From the moral neutrality of genetic endowment he derives the proposition that society should be arranged where possible to counteract the results that flow from differential endowments. Coercion is legitimate, within the bounds of the basic liberties, if it favors the least advantaged. But Rawls avoids this by resolutely refusing to treat his principles as juridical ideas. He calls them instead principles for arranging the basic structure of society. This is not a workable distinction, for the principles underlying the basic structure are what is daily tested in a court of law. If his Second principle is not a juridical mandate, it is not durable. If it is, coercion is justified for purposes other than liberty, though Rawls would presumably not go as far as allowing genetic engineering to be forced in the above example (there is nothing in his discussion of the basic liberties to prevent it, however).

The relationship between private and public constraints may be visualized as shown in Figure 7-1:

The vertical axis is composed of those constraints that created the jurisdiction of the state: the tendency of people to harm each other, violate agreements, monopolize, cheat, steal, lie and overwhelm each other toward their own ends. In the one-person society (Robinson Crusoe), these constraints do not exist. This is not to say, of course, that the solitary life is attractive, for, while there are no constraints from the will of others, there is no cooperation either, so one can anticipate being overwhelmed by dumb constraints (unless one is Robinson Crusoe).

The upper limit of private constraints is called, in Figure 7-1, the "State of Nature." This is the state of pure anarchy, in which there is no state, no institution which has a right to use coercion. This is not to say, however, that private constraints run wild in anarchy. There are many informal controls upon coercion, some of them apparently biological in nature like territoriality and monogamy, others social in nature, like shared language and beliefs. These informal controls may be highly effective, so that the anarchistic society is orderly, kind and pleasant. We might even imagine a society in which the members were so strongly imbued with respect for each other that anarchy produced such a

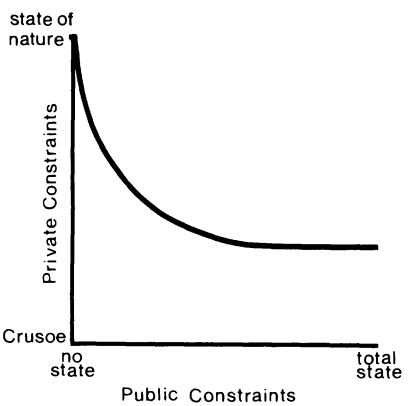

Fig. 7-1.

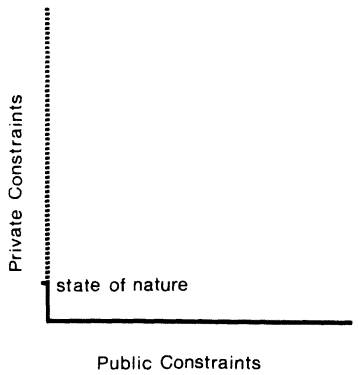

Fig. 7-2.

low level of private coercion that there was nothing much to be gained by having a state. Such a circumstance is pictured in Figure 7-2 – the happy nonstate.

That is not the general case. In the general case, pictured in Figure 7-1, there remains after all informal controls are in place a substantial amount of private coercion which can be eliminated by the creation of public constraints – the police force, army, courts, and other instruments of public power.

The horizontal axis in Figure 7-1 represents the range of constraints that may be imposed by a state. At the minimum, there is no state. At the maximum the state is limited by the technological possibilities open to it – the totality of power that it can wield is limited by the instruments available to it to impose coercion. Technological development stretches out the horizontal axis in Figure 7-3. For example it supplies the state with computers that it can use to keep closer track of citizens, surveillance satellites, psychosurgery, brainwashing techniques, and so on.

The greatest liberty is satisfied by the lowest total of private and public constraints. Ideally, then, a group of people would find itself at the origin. Informal controls would have eliminated private injustice and, in the face of this success of the first principle, the second principle would have forced the state to disappear. The state could comply with the requirement that it produce

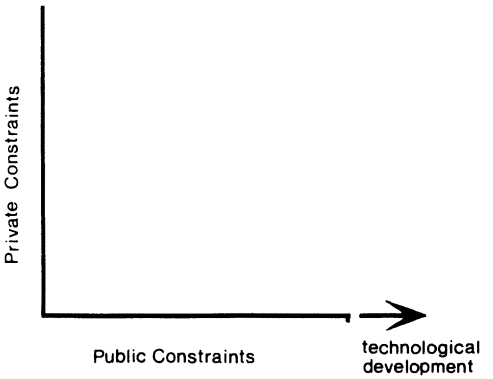

Fig. 7-3.

the greatest liberty only by imposing no constraints of its own – by "withering away."

But this characterization is overly simple. As we observed in section 5, even if each person were to accord others pure respect, the state would still be required to define property rights. The lack of an organic relationship between people and things means that this relationship *must be defined by authority.* That definition is inherently unstable. It is dependent upon changes in population, in values, in technology and in the availability and condition of natural resources. The relationship between people and things must be continually redefined. The state must, therefore, be at the absolute minimum a dynamic entity capable of adapting property rules to changing reality. We might be able to imagine a perfectly just people, abiding by their agreements and the duty of care, but even such a people would need an authoritative agency to define the material basis of cooperation.

There is no possibility of utopia. At an absolute minimum, a people may reach point A in Figure 7-4. Even at that minimal level of coercion, aspirations will be dashed and plans thwarted by the state's definition of property relations. Gone would be the gratuitous tendency of property rules to protect the power of a dominant class or to grant power to officals. But remaining would be the necessity to pay taxes to support the minimal state, the

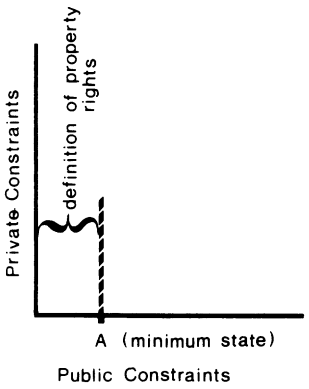

Fig. 7-4.

power of the state to take property, and the chance that the state would use its power unjustly.

If utopia is impossible, justice is not. Justice requires that the constraints imposed by the state must be justified; they must eliminate more constraints than they impose. This means that an increase in state coercion (say, by employing a full-time police force, where previously there were only part-time officers called out as required) from level m to level n in Figure 7-5, must result in a drop in private constraints (i.e., crime) from a to b, such that the reduction (a minus b) is greater than the increase (n minus m). If that is true, the society moves from point A to point B in total constraints. Since point B is closer to the origin, the state has (as a first approximation) acted justifiably under the requirement that it afford the greatest liberty. The move from A to B satisfies the second principle.

It is this fact – that the public use of coercion may increase liberty – that makes justice an interesting idea. Were this not true, *power* might be an interesting idea, if we were inclined, like Alexander the Great, to use it to translate our egos into the greater glory of our own ends. But justice would not be. Power would be a zero-sum property which could shift about among the members of a group, leaving in its wake only relative levels of misery. But power can be ordered in a way that increases the strength of every

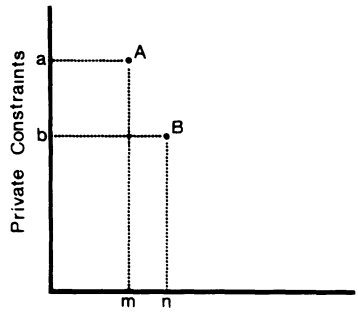

Fig. 7-5.

person. That is the possibility raised by Figure 7-5 and by the idea of justice.

The possibility of justice means that society is, in general, faced with the set of alternatives pictured in Figure 7-6. That set of alternatives – called the "liberty frontier" – is composed of the various possible levels of public constraints open to the society (given its wealth, technology and history) and the levels of private constraints associated with them. The shape of the frontier indicates, first, that justice is possible, that liberty may be increased

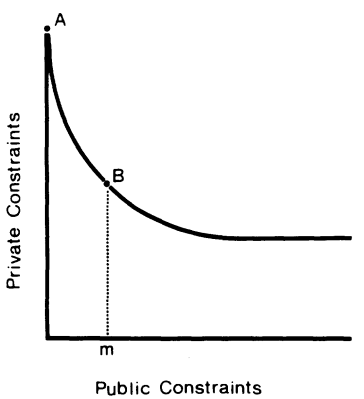

Fig. 7-6.

by state power. It is possible for the state to employ the "m" level of coercion and improve the liberty of citizens from point A (the "state of nature") to point B, which is closer to the origin.

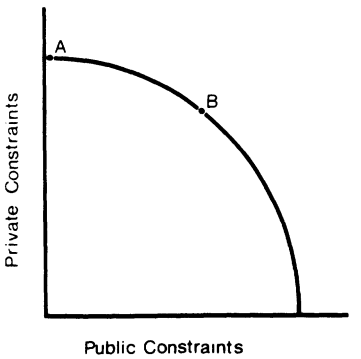

Fig. 7-7.

If the liberty frontier bowed outward from the origin, as in Figure 7-7, the state would not be justified. Any coercion employed by the state would simply substitute for private coercion that was avoided. Private injustice would be replaced by public power with no expansion in the prospects of the members of society. This unfortunate state of affairs may, in fact, face some societies. There may be a tradition of disrespect so deep that high levels of public power would be necessary to improve it even slightly. In such a situation, private injustice calls out for public control, but public control is unable to improve matters.

That is not the general case. In most places at most times it is possible for public power to produce justice. This is not to say, of course, that public power *must* be used justly. The liberty frontier is simply the *best* set of alternatives that a society faces. It may well be outside of the frontier, as is state A in Figure 7-8. There the state is employing a level of constraints at point m. This level of constraints (e.g., a judical system, police force, army, public administration) is sufficient – as we can see from our olympian perspective on this society – to reduce private injustice to point b. But the state is wasting its power. The police are having coffee,

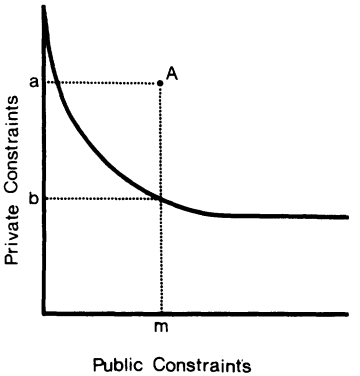

Fig. 7-8.

not enforcing the first principle. The courts are in disarray, the law incoherent, the dockets clogged, justice sporadic. State A violates the second principle through inefficiency or a gratuitous abuse of power, or both.

State A could act within the second principle in either of two ways: either by using power more effectively to enforce the first principle, thereby moving toward the liberty frontier at level b, or simply by relinquishing power and moving leftward toward a. Any combination of these two forces would result in movement in a southwesterly direction toward the frontier and would be consistent with the second principle.

The first requirement of public justice is that the state be on its liberty frontier, that it not be above the frontier, employing gratuitous or inefficient power. The most common case of this is where a state employs power outside of its jurisdiction set forth in section 5. When a state, for example, enforces laws that require businesses to close on Sunday, that is a gratuitous use of power.[43]

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[43] Not all laws fit within the deep structure of law set forth in this paper. The theory cannot justify all law. Some are unjust within the principles set forth here. What does that count for? It should prompt a search for a principle that does justify the laws not justified here. I suspect that if the principle were found that would support Sunday closing laws it would not be part of a general principle which would undergird law generally. So what? *Must* law be coherent?

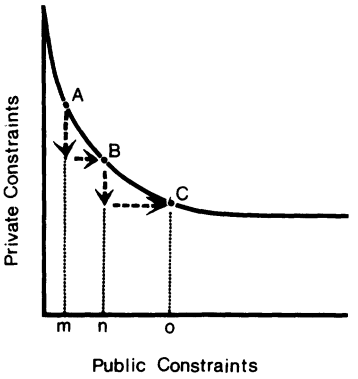

Fig. 7-9.

It may be every effective at keeping the businesses closed, but since there was no injustice, under the first principle, in having businesses open on Sunday in the first place, this enforcement results in no reduction in private constraints. When the state employs coercion to enforce a cultural value other than justice, it acts gratuitously.

Being on the liberty frontier is not, however, sufficient to satisfy the second principle. Consider the state at A Figure 7-9. It is on the liberty frontier. Its power is being used justly. But it is too weak. If its power were increased from level m to level n, private constraints would be reduced by more than the increase in public constraints (n minus m). Put another way, point B is closer to the origin than point A. Were this situation demonstrable in court, the second principle would justify an order by a court to the administration of the state to increase taxes and undertake specified public programs.

The same argument does not apply to an increase in state power beyond level n. If it went to level o, the increase in public power would exceed the decline in private injustice. Having, for instance, an effective police force at level n, it increases expenditures to provide the force with a full complement of technological gadgetry – television monitors for the street, computerized identity cards for citizens, laser-aimed weapons, and so on. These measures do

reduce crime somewhat, but only at the expense of deep intrusion by the state into personal plans, actions and perceptions.

Public power is not straightforward. It does not follow from the fact that some is good that more is better. The law of diminishing returns applies to coercion. The second principle calls not for maximum enforcement of the first principle – for the state to eradicate every possible injustice – but for that level of enforcement justified by the demand for the greatest liberty – the lowest level of willed constraints upon people.

2. *Justice and Stability.*[44] The proper balance between private and public constraints is the point where the slope of the liberty frontier is a -1, which is point B in the case of Figure 7-9. This is the point where public power has increased to the point where the last increase in public power was just balanced by an equal reduction in private injustice. At lower levels of state power the state is underpowered – more coercion in the hands of the state would produce greater liberty. At higher levels of power (i.e., to the right of point B), the state is overly powerful, wielding power that is not justified. Point B is closest to the origin, the single point, from the array of all those that are possible, that satisfies the right of each person to the greatest liberty.

The second principle demands that the state be organized (assuming, for the instant discussion, perfect olympian knowledge) at the point where the slope of the frontier is -1. This point is not, unfortunately, a stable one – no society will "fall into" justice. Justice is something that must always be strived for. The reason for this is as follows.

There are two very strong forces that push the state to a higher level of coercion than the level justified here. The first force is supplied by the members of society themselves. At the justice point the state is not doing all that could be done to eliminate violations

[44] This section draws heavily from an unpublished paper by Michael Rostoker entitled 'A Mathematical Simulation of Liberty.'

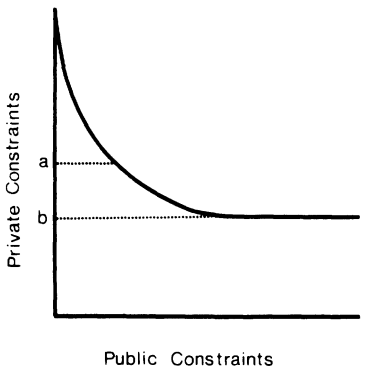

Fig. 7-10.

of the first principle. It is doing all that it can justify under the second principle, but private constraints are at level a in Figure 7-10, when they could be pushed to level b, to the level at which the liberty frontier is at its minimum, where its slope is zero. Instead of having a "tolerable" level of law enforcement, we could have a "war" on crime, disorder, lying and cheating.

Advocates of maximal state power will be able to demonstrate that it is possible to reduce crime from a to b. Advocates of the just position have a weaker argument, either: (1) that they "sense" that a war on crime would be too much; or (2) that they are unwilling to pay the taxes to support a government big enough to do the job. Lacking an idea like the liberty frontier, we have a public battle between people who sound like advocates of justice on the one hand and the minimal taxers and those who are soft on crime on the other.

The tendency to demand excessive state power coincides with a general interest in public officials in greater power. Even without adequate institutions of justice, this interest is kept in check by natural forces. I have treated the liberty frontier as going flat at high levels of state power. It is probably more accurate to picture the frontier as U-shaped. That is, above a certain level of power, m, increases in state power will tend to *disintegrate* private behavior. More public constraint will breed *more* private con-

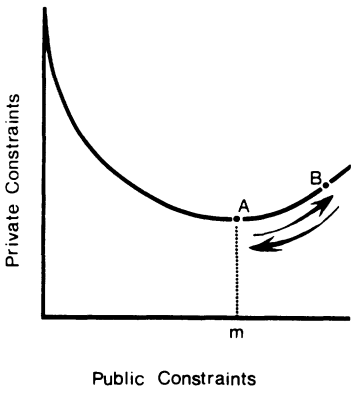

Fig. 7-11.

straint, as people brutalized by power withdraw their acquiescence. Public brutality is matched by private brutality, tax evasion, irresponsible thrill seeking, unstable agreement, power snatched for the moment. Private disintegration would limit all but the most irrational tyrant, for he would be undermining his power against outsiders. The greatest total power for the tyrant is at level m in Figure 7-11. The alternating periods of liberalization and tightening up in Communist regimes (indicated by the vacillation between points A and B in Figure 7-11) suggest a testing for this point. The liberalization of power moves the regime leftward on the axis, tending to repair social disintegration caused by excessive control.

The point of greatest effective power for the tyrant coincides with the point of maximum enforcement of the first principle – the low point on the liberty frontier. If any point on the frontier is stable, that is it. The state tends to run into the trough at the bottom of the frontier unless rigorously disciplined by a concept of justice and the institutions that make it live. This leads to the unpleasant conclusion that a stable society cannot be just, and a just society cannot be stable. Unlike the market, which tends toward an equilibrium that minimizes social waste, the state tends toward an equilibrium in which the will of some systematically dominates others.

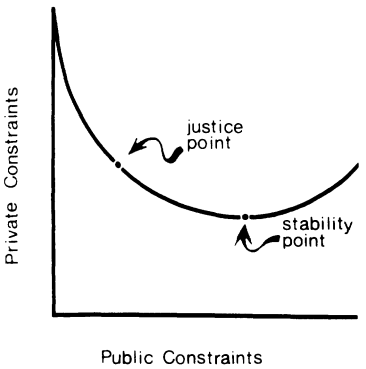

Fig. 7-12.

3. *Long-Run Considerations.* To this point we have considered only justice in the short run – at a particular point in time. We have taken the liberty frontier as fixed. But that is surely not the case. It may get better (i.e., move downward) or worse (i.e., move upward) in any number of ways.

The idea of a change in the frontier is not as abstract as it sounds. Consider the town depicted in Figure 7-13. For twenty years it has employed m amount of law enforcement – police patrols, courts, and so on – and has experienced, on average, two felonies per 100 citizens per year. During the past two years the

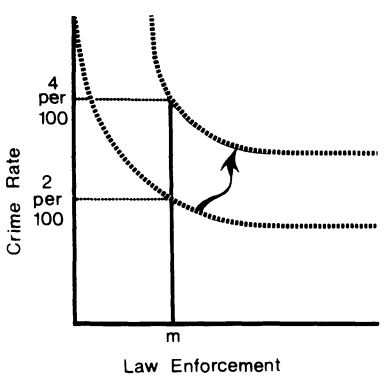

Fig. 7-13.

crime rate has doubled to four per 100. That may be accounted for by a weakening in a law enforcement, so that, while m amount of resources are still employed, they are no longer doing as much constraining (e.g., the police officers are spending their time playing cards). But let us assume that there has been no decline in the efficiency of law enforcement and that the increase is a real one, not simply an artifact of better crime reporting. What has happened? Assuming that the size and composition of the population has been stable, there has been an increase in violations of the first principle. This society has moved from a relatively preferable liberty frontier (#1 in Figure 7-14) to a relatively worse one (#2). The liberty frontier is the relationship between public coercion and private injustice. When, as here, the level of public coercion remains the same but the level of private injustice rises, there has been a shift in the liberty frontier. What could account for this?

A great many forces underlie the shape and dynamics of the liberty frontier. We will consider three: a change in social values; a change in the effectiveness of social values; and a change in technology. The state, as we have seen, is justified in acting only in response to a failure of the first principle. To the extent that a people willingly acts within the axiom, state constraints are unnecessary. This tendency is not, however, fixed. In some places and at

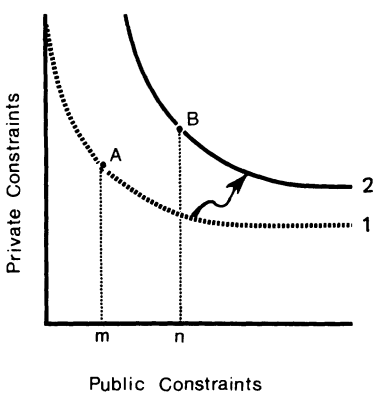

Fig. 7-14.

some times the necessity of respect is a strongly held value; self-control and informal social controls operate effectively. But the strength of informal controls may ebb.[45] Other values may be emphasized; a culture of egocentrism may develop that treats the self-constrained as "suckers." Socializing forces may weaken. Mechanisms of informal surveillance may be destroyed, so that people may do secretely that which was once monitored by those around them.[46] Social atomism may reduce the cost to the person of social castigation. All of these changes have the effect of raising the liberty frontier.

Donald Black observes that "Law is stronger where other social control is weaker.[47] In terms of the liberty frontier, a weakening in willing compliance with the first principle raises the incidence of private injustice, shifting the liberty frontier outward from #1 in Figure 7-14 to #2 and justifying an increase in public constraints – law." The "justice point" shifts from A to B, justifying an increase in state power from m to n.

The liberty frontier is also sensitive to changes in technology. Technology may affect either axis. It may affect a rearrangement of private relations so that, without intending to, individuals have a lesser impact upon each other or are more able to protect their interests. Examples abound: soundproofing and fireproofing of

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[45] Justice is a lively concept only because will is Janus-headed: We are able to control perception because we are conscious of ourselves and of nonself that can be acted upon by self. Most nonself is inert, but part of it is made up of other selves. The first principle requires that when we bump up against another self, we respect it. The first principle must be enforced. But the state is itself operated by people. The same force that required enforcement of the first principle drives those who operate on behalf of the state.

[46] A sharp example of this is given by Jane Jacobs in *The Death and Life of Great American Cities* (New York: Random House, 1961). She tells of the disintegration of life on her block in New York City when the old buildings across the street were replaced by an office building that was empty at night. This destroyed the informal controls of the neighborhood and resulted in a sharp upward shift in its microfrontier.

[47] Donald Black, *The Behavior of Law* (New York: Academic Press, 1980).

buildings; disc brakes and air bags in automobiles; credit information services; insurance schemes; and so on. All of these measures reduce the effect that individuals have upon each other, either by leading the subjects of action into safer behavior or by armor plating the objects of the actions of another.[48] These technologies tend to make up for the weakening of social controls in modern, mass society.

Technology may also improve the efficiency of public constraints. Police radios make it easier to coordinate law enforcement. Economic analysis of law makes it easier to demonstrate a violation of the antitrust laws (perhaps). Video technology reduces the cost and improves the accuracy of trials (perhaps). And perhaps computerized legal research improves the edgewise justification of law, reducing the likelihood of injustice caused by a mistake about law.

These considerations mean that the second principle demands more of the state than that it must be on the frontier at the -1 point. It must also be organized in a way that makes most likely a favorable shift in the liberty frontier. Justice is not a "problem" that can be "solved." There is no ideal liberty frontier, no ideal arrangement of public and private power, that can be locked in and captured. Justice means that technological change must be fostered, at least to the extent that it favors human will. Private associations of people must be respected, at least to the extent that they engender human respect in their members. And care must be given to the argument that state power *itself* destroys willing compliance with the first principle by engendering in people a feeling of powerlessness and irresponsibility.

The existence of both short-run and long-run justice considerations raises this question: Can an injustice in the short run be

[48] The ability of technology to supplant law, of individual sanctity to be produced by technnological arrangement rather than legally enforced individual responsibility, has been the source of both hope and fear. Is justice something that we must strive for as persons? Or is it enough that we are prevented from behaving unjustly by technological means? These questions are considered in section 8.

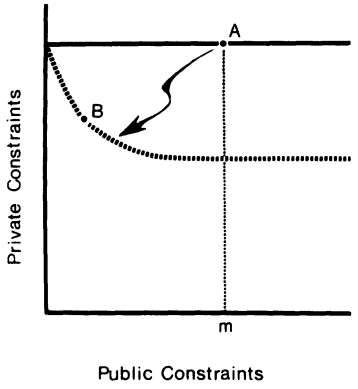

Fig. 7-15.

justified by the argument that it is necessary to produce the greatest liberty in the long run? This question is most commonly raised in connection with the situation faced by poorly developed nations (though it does come up in American cases as well, such as the Japanese internment cases of World War II). Consider the society faced with the horizontal liberty frontier in Figure 7-15. The horizontal frontier means that it has no opportunity to improve the prospects of its members in the short run by employing state power. Any level of public constraint will simply add constraints to the citizens. Nevertheless, an argument is made that a state with power m is justified. While in the short run it will simply add constraints (e.g., the taxes that will have to be exacted from people), those constraints will ultimately form the basis for the emergence of a preferable frontier and a shift from A to B. For awhile, collective purchase of highways, public health and education, and so on, will have to be made out of the private wealth of citizens. The rule of law will be inserted into social controls. The ability of people to act as the will will be reduced, but eventually the basic structure of justice will be forged and the will of each person strengthened.

This question raises questions about the dynamics of justice that will be taken up later. If we *knew* that the argument was true – that power would be used effectively to produce the greatest

liberty – this argument might compel a court to order the creation of a state with power m. But we cannot know that, and we do know that power both corrupts and is sticky leftward – difficult to diffuse once it has gone too far. A court cannot decide such questions. By what scheme of procedural rules should such a question be addressed? We will return to that question.

8. AN ILLUSTRATION

To this point I have argued that law can be understood to be an arrangement of controls on power to produce the greatest liberty. I have used the liberty frontier to explain how various legal phenomena are arranged to produce liberty. But the liberty frontier assumes an olympian viewpoint and our law has grown from the bottom up, not from the top down in olympian fashion. It remains for me to show how the ordinary processes of law, case by case, statute by statute, regulation by regulation, can be seen to embody the processes of the liberty frontier.

I am making an argument similar to Adam Smith's argument in *The Wealth of Nations.* He argued that the pursuit of the good by each person, if conducted under a set of rules like the ones that had emerged in England by 1800, would spill over good to other members of society without any intention on anyone's part to do so. People interacting under those rules (most importantly, private ownership, free speech and association and the enforceability of contracts) were characterized as a "market," the operation of which maximized the common weal. Similarly, I am arguing that legal institutions, acting under the rules of law lively today, act largely without intention to produce the greatest liberty for the members of this society.

Smith had to describe how it was that the band of ruffians and fundamentalist Presbyterians, who served as the entrepreneurs of the day, produced well-being for all, when all they intended was to aggrandize themselves or to demonstrate their salvation. Similarly, I must show how a diverse body of legislators, regulators, judges and lawyers, each acting under motivations from vain to grand and

under concepts of law far different from the one described here, act consistently to fashion a set of rules that expands liberty.

On the face of it, it is not difficult to see that this could be so. If, as I argued in section 1, every person has will, if every person has both the ability and tendency to create perceptions for himself, there is a value that is shared by, or more strongly, embodied in, every member of society: the desire to act upon one's will. However varied are individual values and desires, concepts and capabilities, there is a metavalue, one that every person has which exists quite without any public instruction or moral handwaving: the value of having and acting upon one's own values.[49] If, on top of that, public decisions are suffused with individual rights, so that judges, legislators and regulators must not simply consider the "people" but actually deal with and respond to them as persons, we could expect that the metavalue – the liberty of the will of one person from domination by others – would inform every decision. Whatever the particular values in dispute, resolution of conflict would be enframed by it. The metavalue is, in fact, the reason that are conflicts, the reason why the claims and interests of each person must be listened to and respected. We tend to focus upon the waxing and waning of particular values in dispute, failing to see that the general structure within which they operate embodies something beyond them.

Adam Smith was able to suggest the mechanisms by which the pursuit of individual interest promoted the common interest: the market. I am not yet at the point in this exposition to do that. The idea of the liberty frontier is a statement of the common weal in legal terms, just as Gross National Product is a statement of

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[49] The metavalue is sometimes taken to be life itself, so the "highest" right is the right to life. But life is morally relevant only in that it is a precondition to will (the number of dead people who pursue desire is as far as we can demonstrate, zero). Life alone is insufficient, or we would accord equal respect to leaves and paramecia. It is the life of those with will that is legally interesting. A focus upon life produces a hierarchical rank ordering of rights according to the "necessity" of things needed to support life. This concept of rights is rigid, antithetical to a process based upon a respect for will.

the common weal in economic terms. But the liberty frontier is also part of the dynamic through which the law produces the common weal, for it is a description of what is meant by the "greatest liberty" in the second principle. I now wish to illustrate through a mundane example, how the idea of the liberty frontier can be seen to underlie the resolution of a particular dispute. To do this, we must first develop the idea of the frontier a step further.

1. *Unbundling The Frontier:* To this point, we have treated the liberty frontier as an aggregate, as the general relationship between public and private constraints upon will (except in Figure 7-13). The law does not operate in terms of aggregates (with the possible exception of the Budget Committees of House and Senate). It does not ask whether the general level of government is justified by the general level of private constraint. It asks instead whether a particular provision of a zoning act, or arrest procedure, or power plant license, is justified. The law acts atomistically, issue by issue, just as buyers and sellers act atomistically, good by good.

This does not mean, however, that the aggregate notion of the liberty frontier is useless to describe particular disputes. To make it useful it must be disaggregated. This means that each public constraint must be arranged against the specific private constraint that it responds to. If we find a public constraint (e.g., the Sunday closing laws) against which we can arrange no private constraint (as those are defined in section 5 on jurisdiction), we have, without more, an unjust state action. We have the public use of coercion not to produce cooperation but to eliminate it. We need go no further with those questions.

Most public constraints are, however, matched against private constraints. Prisons are a response to criminal behavior. The Federal Communications Act was a response to the difficulty of assigning private ownership rights in airwaves. And so on. Each public constraint can be evaluated against its purpose.

2. *The Speed Limit.* To illustrate this process we will consider the case of the speed limit. The speed limit is a public constraint, a

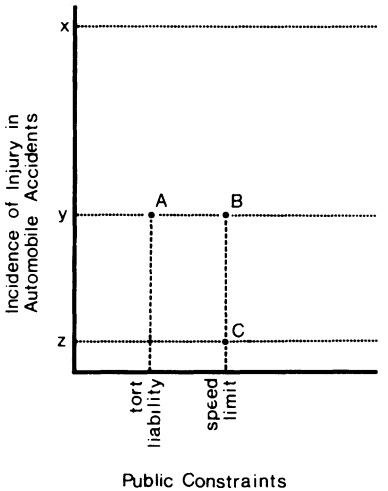

Fig. 8-1.

formal use of public coercion upon individual behavior. It must be justified.[50] Against what private constraint is it directed? Against, of course, the tendency of people to injure others unintentionally in the pursuit of other aims. But, as we have seen, there is already a public constraint that is directed at that objective: the duty of care and the private right of each person to enforce that duty through tort law. The speed limit is an *added* public constraint, a regulatory use of state power that adds to the adjudicatory use of state power in tort law.[51] How is this added constraint to be justified?

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[50] The fact that it is a constraint upon a publicly purchased good does not shield it from the requirement of justification. The public purchase of highways was a (legitimate) response to the inability of private property rights to produce cooperation (private highways, tried in colonial times, foundered as a result of the captive audience problem). That jurisdiction supports public purchase of highways, but not public regulation. The fact of ownership shields the use of property from justification (unless its use harms someone) only if the property is privately held. The state has no will that is worthy of respect. It must justify all of the actions that it backs with coercion.

[51] In adjudication the state *passively* enforces the first principle. It waits for action to be brought by the one effected by an action and it requires him to

This question can be visualized in terms of Figure 8-1. Tort liability alone, shall we say, will reduce the level of accidents from level x (the "state of nature," with no controls) to level y in Figure 8-1. The reduction of accidents is an *instrumental* justification for the duty of care. An instrumental justification is of this form: "Instrument X (e.g., tort liability) produces Objective Y (e.g., automotive safety), where Objective Y is a valued objective. But tort liability under the duty of care also has a far stronger type of justification: *formative* justification.[52] Enforcing the duty of care not only reduces the incidence of accidents (instrumental) but it also holds people to the first principle, teaching them responsibility for their actions and forming in them a respect for others (formative). So strong is the formative justification that, even if tort liability were quite ineffective in producing safe behavior, it could be justified on formative grounds alone. The reduction in accidents from x to y in Figure 8-1, then, does not fully capture the contribution (i.e., the liberty-producing qualities) of tort liability. That law "spills over" outside of accidents themselves to produce a just people.

The speed limit and its enforcement is a more restrictive use of state power than tort liability (i.e., it is further to the right on the axis). There are a number of reasons for this. First, it treats behavior (i.e., speed of driving), not effects (i.e., accidents). It eliminates much behavior that would be harmless. Second, it treats different people similarly. Some people, knowing their driving skills and capabilities to be excellent, can drive at high speed with full respect for others. But regulation treats them the same as the disrespectful, the thrill seekers and the absent-minded. Third,

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prove it. Regulation is *active* enforcement. The state goes into private relations to control behavior directly without any showing that an injury has occurred.

[52] See Laurence H. Tribe, 'Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality,' *So. Cal. L. Rev.* 46 (1973): 617–60.

regulation accords equal weight to all accidents according to their *objective* qualities. Regulations are based upon statistics about the incidence of deaths, soft tissue injuries, fender bumpers, property damage, and so on. Adjudication responds to subjective effects, so that action is brought not for accidents but for accidents that are felt by the victim to dim his prospects. Regulation responds to *objective* events.

These weaknesses in regulation require that it be employed only when a failure in the adjudicatory system can be demonstrated by argument. If adding a speed limit to tort liability fails to lower the accident rate, so we move from A to B in Figure 8-1, the speed limit is simply a gratuitous constraint and will be destroyed by the second principle. If, however, the danger of accidents is reduced so substantially that we reach point C, we will be inclined to say that, as regards auto accidents, the tort liability system (adjucatory process) was flawed in ways that justified the ills of regulatory scheme.[53] The downward move from y to z is greater than the rightward move from A to B.

That may well be true of speed limits, so they would be justified in the abstract. But our analysis is not yet complete. We have given an *instrumental* justification for the speed limit (it reduced accidents from y to z), but we have not yet examined its *formative* qualities. We have reason to be suspicious of the formative affects of the speed limit. For one thing, its tendency to treat everyone the same regardless of their level of responsibility is a telling weakness under the axiom. The axiom states that the will of each person is worthy of respect. The speed limit treats not will but car

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[53] The adjudicatory process is not a perfect mechanism for enforcing the first principle. To mention a few of its weaknesses: It requires people to limit their present behavior by a distant future contingenty – "liability"; it depends upon the financial responsibility of actors; it gives people little or no idea what safe behavior would be in a particular situation (e.g., how fast to drive). The weaknesses are more telling in some situations than in others. It is those situations in which the added constraints of regulation may be justified.

speed with respect – if your speed is within the limit you will not be subject to constraint. This induces people to respond not with a good will but by playing games – buying radar detectors, hiding behind other speeders, slowing down in areas where there are good hiding places for police cars. Regulation treats evaders with respect. Evasion and good will are two very different things.

The formative weakness of regulation leads us to treat it with suspicion. The state has no way of acting directly with respect for will. It must respond to actions. But when that response tends to draw forth ill will, the state action is suspect. This means that every instance of regulation is at all times subject to review under the second principle.

Our general considerations leave us with the conclusion that the speed limit might be a valuable corrective to weaknesses in adjudication. We do not stop there, however, to grant blanket approval to speed limits. We stand ready to reexamine them in the particular. We will do that shortly, but we must first pause to consider instrumental and formative justification more fully.

3. *Instrumental And Formative Justification.* The distinction between instrumental and formative justification is important to understanding American law. Were law based upon maximizing an objective axiom (say, Richard Posner's, "maximizing the market value of transactions"), instrumental justification would be sufficient. We would simply need a way of measuring the connection between cause and effect. Law could then be used to favor the most effective causes. A bad law could be distinguished from a good one by this instrumental test: "As between alternative laws L_1, L_2 ... L_n, select that law which produces the greatest sum of net positive effects, $E_1 + E_2 \ldots + E_n$, as measured by criterion C (the axiom)." If, like Frederick the Great, we knew that what we wanted was to have our soldiers wear clean uniforms, we could then measure the effectiveness of one rule – "All soldiers will blow their noses on hankies" – against another – "All uniforms will have buttons on the cuffs." If we knew that the axiom could be maximized by having people stand on their hands for an hour a

day, we could employ law positively to deliver it.

But the axiom underlying American law resides in subjective reality, not objective occurrence. It acts by embodying a respect for people and thereby inducing them to embody a respect for themselves and others. Its very action is formative. Its success lies not in itself but in the liveliness with which each person acts toward himself and others. Its application requires an intuitive, fair-minded judgment of the way that a rule will act in the lives of others.

Intuitive judgment will, of course, be informed by objective experience. I may feel that tort liability is enough to teach me to behave responsibly as a driver. But if it is demonstrated to me that speed limits significantly reduce accidents, I must question whether or not I have wrongly generalized my own formative sense to everyone else or have even been self-deceptive about the formation of my own sense of respect. Perhaps I really do drive responsibly only because of a fear of the state. Objective measurements cause us to test our ideas and through testing them form a deeper, richer and more accurate intuitive sense of human nature.

The nose of the instrumental camel having thus thrust itself under the edge of the tent, however, it is difficult to keep the rest of the camel from coming through after it. Objective description tends to intimidate intuitive judgment. Consider capital punishment: Murder is wrong; murder is to be eliminated; capital punishment reduces the incidence of murder; capital punishment is legitimate. But something is missing here. Murder was wrong because it was absolutely disrespectful. Is the state not evincing the same disrespect when it executes people? Could it not be that capital punishment would make of the state an instrument that may do anything toward an end? Formative considerations go off into the intuitive mists. They are brought back by a perverse, instrumental moral inversion: If you stand in the way of capital punishment, given its effectiveness in reducing murder, you are condemning so many innocent victims to death. How much is this sense of yours worth in human lives?

The instrumental camel takes many forms, the most noticeable

of which at the moment is cost-benefit analysis. It is a calculus of public decisions which requires that all benefits and costs be specified and objectified. It is embarrassing to law because it is embarrassing to admit that we can't specify with accuracy what all this taxing and taking and fining and jailing that we have been doing is *for*. We avoid embarrassment by saying *something*, and that something is promptly objectified by a science that has become adept at objectification. The camel thus born is quickly appointed to bench and agency because it never utters an embarrassingly intuitive word. Everything is clear to the cost-benefit camel.

Science is, in this one sense, dangerous to law. It is not science as a system of inquiry that is dangerous, for that augments the intuitive basis of judgment. It is science as a self-consistent source of answers that presents the problem. Science is self-consistent because it only allows itself to pose questions that it can answer. The questions that it has not figured out how to address are nonexistent. The question addressed by law – upon what basis is coercion justified? – is a scientifically nonexistent question. Its answer demands of law a logic – formative logic – different from that employed by science.

4. *A Particular Speed Limit.* Earlier we saw that speed limits may

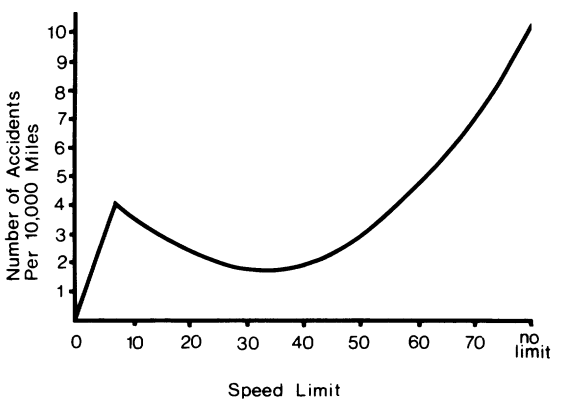

Fig. 8-2.

be justified in principle. Now let us imagine that we have been given the task of establishing a just speed limit for the secondary (two-lane, rural) roads in a state. Since the limit is justified, if at all, only as a response to accidental violations of the first principle, we review the accident literature to determine the empirical relationship between accident rates and the speed limit on roads of this type. We find, shall we say, the relationship shown in Figure 8-2.

At a speed limit of zero, the road is closed and there are no accidents. At very low limits, 10 to 30 mph (on roads of this type), the accident rate is fairly high, perhaps due to great differences in speed between law abiders and violators. The limit becomes more effective in the 30-50 mph range, presumably because the less restrictive limit is more likely to be followed, thereby equalizing the rate of speed between cars. Above that speed the accident rate climbs swiftly due to the fact that cars are more difficult to handle and accidents more difficult to avoid.

These data are helpful, but they do not in themselves suggest the right speed. We could set the limit at the safest speed – 35 mph. If we did this, however, we would be recognizing only one set of constraints – the private constraints imposed by the risk of accident. The constraints imposed by the speed limit must also be taken into account, else we could justify no speed limit above zero. Justice lies in a balance between these constraints.

To take them into account, we must convert the empirical data into its *meaning* in human terms. This conversion is usually done intuitively, but with our olympian powers we are able to generate the liberty frontier shown in Figure 8-3.

To convert from empirical data to liberty, the axes in Figure 8-2 must be recalibrated. On the vertical axis we now measure not the probability of accident but the constraints perceived by the members of the society to flow from that risk. I have treated (impressionistically) the constraints from the risk of an accident as not linearly correlated with the objective risk of the accident, on the proposition that people tend to ignore low levels of risk (say, below .0004), but get steeply more concerned as risk rises.[54] If

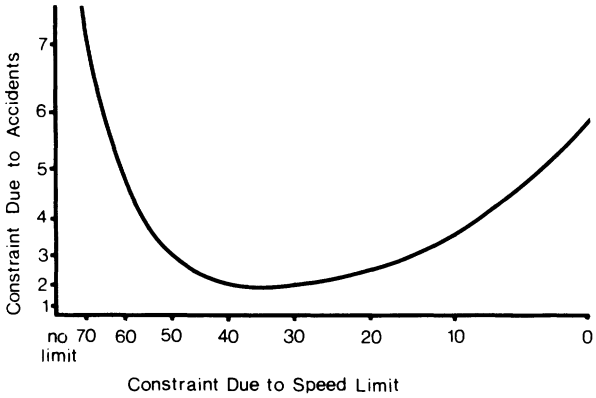

Fig. 8-3.

your perception about the way people feel about the risk of accidents is different from mine, we can discuss it and perhaps illuminate in microscopic detail the operation of will.

A number of things must be said about the process of conversion. First, we are dealing here in risks and probabilities and in the constraints associated with them. That is necessary because we are dealing with a regulation that will operate generally and prospectively. Were we dealing with an adjudicatory rule we would have a far easier time. We wouldn't have to speculate on the constraints imposed by accidents. We would have a specific plaintiff before us whose statements, actions and proof would demonstrate to us the actual effect of a constraint.

The second difficulty also arises from the fact that this is a regulation: From whose standpoint should we convert risk into constraint? From the standpoint of the risk-averse person who

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[54] The axes in Figure 8-3 mark off equal amounts of constraint. An inch along the private constraint axis indicates the same amount of constraint as nay other inch on that axis and the same amount as an inch on the public constraint axis. The various accident rates and speed limits are not evenly placed on the constraint axes because they are not perceived to be evenly constraining. A reduction in the speed limit from 70 to 60 mph is not perceived to be as constraining as a reduction from 20 to 10 mph, hence, the distance marked off along the public constraint axis is greater in the latter case.

won't drive on a road with a speed limit over 35 mph? Or from the standpoint of the risk preferrer who is bored unless he runs at least a .001 percent chance of having a wreck? The liberty frontier drawn by each of these people would be very different. We must take some weighted average in our own mind, some idea like the imaginary risk-neutral person or the "reasonably prudent" driver. We are forced to this approach, which is problematic under the axiom, because we are dealing with a regulation – a single standard of behavior which applies to every person, however responsible, skilled and risk averse. Regulation unavoidably over-constrains some and underconstrains others. The best that can be done is to look for the "reasonable" value of constraints.

To convert the speed limit in Figure 8-2 to the public constraint associated with the speed limit in Figure 8-3 we must first reverse the numbers. The higher the speed limit the lower the constraint, so "no limit" is at the origin – no constraint. The speed limits are not marked off in equal intervals along the axis. Reducing the limit from 80 mph to 70 mph is less of a constraint than moving from 10 mph to 0. An equal reduction in the speed limit is more constraining the lower the initial speed limit.

Once the axes have been recalibrated in Figure 8-3, the data from Figure 8-2 can be directly plotted onto 8-3. The result is a liberty frontier – a relationship between public constraints and private constraints. With this before us, we are able to apply the criterion of the last section. The second principle is satisfied if we set the speed limit at the point where the slope of the curve is -1, which is 58 mph in this illustration. Total constraints, public and private, will be at A, which is lower than any other point available to us. A higher speed limit would result in greater constraint from accidents than the public constraints removed – just the reverse for a lower limit. Fifty-eight gives us the greatest liberty.

If, after setting the speed limit at 58 mph, we found that the accident rate was 6 per 10,000 miles (point B) rather than 3.5 per 10,000 miles (point A), we would have to reevaluate. Either we made a mistake in our assessment of the frontier or the speed limit was not working as it should. Upon investigation we might find

that the state troopers charged with enforcing the speed limit were spending most of their time having coffee. If that were the case, the speed limits should either be raised to 70 mph (resulting in a reduction in constraints to point *C*), or the management of the state troopers should be given to someone who would see that they work efficiently.

9. UNCERTAINTY

The speed limit example illustrates the way that the second principle would be applied in law if all facts were clear. If the effects of our actions were clear, all public decision making could be done by a judiciary acting under principle. Speed limits, taxes, and every other public decision could be done under a concept of rights in a way suggested by the illustration.

But effects are not generally clear. I suggest that the speed limit example is a tolerably accurate description of the way that legal institutions as a whole operate, when adequate allowance is made for uncertainty. Uncertainty accounts for the different public decision-making processes – political, regulatory and judicial – and for the relationships between them. Taken together, they are different parts of a single scheme for providing the greatest liberty.

To see the effect of uncertainty, let us return to the speed limit example. You will recall that we met together to establish the just speed limit. But we met under olympian conditions, knowing all. If we relax the olympian assumption and imagine that we actually met to do the job under ordinary conditions, the effect of uncertainty upon our task becomes immediately obvious. We could probably agree that the data in Figure 8-2 were relevant, but problems would instantly emerge when we attempted to convert it to the liberty frontier of Figure 8-3. One of us would surely argue that the data in Figure 8-2 are sufficient to base a decision on. Why not set it at 35 mph, the minimum risk speed limit? If we set it at any other level aren't we tolerating accidents that could be avoided? This is the minimum private constraints argument mentioned in the discussion in section 6 of the stability point. I would

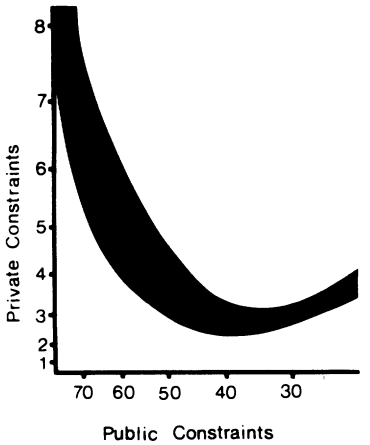

Fig. 9-1.

surely reply that, if all we had to take into account was private constraints (i.e., the risk of accidents), we could surely justify no speed limit other than zero. Picking the 35 mph limit ducks the hard question.

We would presumably press on to make some balance between public and private constraints. But we would run into trouble calibrating the axes of Figure 8-3. We would see the constraints differently. Some of us would be risk averse, some risk preferrers, some irritated by the state, some pleased by speed limits. To be fairminded, we might look for data from opinion research that indicate how people in general view the risk of accidents and the speed limit. We would ask what limit other states put on similar roads.

If we were rigorous in our efforts, we would generate, at best, the liberty frontier in Figure 9-1. Our different ways of conceptualizing the constraints would have generated not a clear libery frontier but a band of possible frontiers. Within that band, the just speed limit – the –1 point on the ideal liberty frontier – could be at any speed limit between 45 mph and 70 mph. How do we decide? We are outside of a straightforward application of the second principle because no person could demonstrate that any

limit within that range is preferable to any other, that 67 mph gives a greater liberty than 47 mph.

This is not to say, however, that uncertainty has knocked a court altogether out of action. Some things *can* be said with certainty on the basis of Figure 9-1, namely that speed limits above 70 mph or below 45 mph are clearly "unreasonable," the exercise of "arbitrary power" – the court's way of saying that coercion is here used gratuitously, There is no way that the –1 point could be outside the range between 45 mph and 70 mph, whereever the true frontier lies in the haze of Figure 9-1.

This does not tell us where the limit should be set in the range. This is the realm of *policy decision.* It is in this realm that utilitarian processes take over. What will our committee do? Take a vote, the most popular speed limit being the one chosen? Or draw straws? Should we have a footrace and the winner choose the limit? Perhaps the most prestigious or politically well-connected one among us should exercise the discretion?

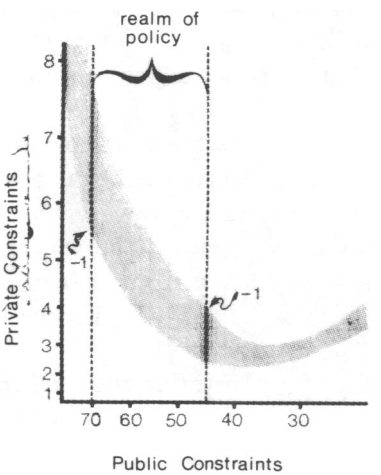

Fig. 9-2.

We reach here a logically different level of questions than those that have occupied us until now. Thus far, we have asked what speed limit (we could have asked what rule against perpetuities, or

level of taxation, whatever) satisfied the second principle. Our best efforts failed to give us an unambiguous answer. They did, however, delineate a territory of clearly bad answers. This is the realm of principle-driven decisions. The ambiguity lies in the range 45 mph to 70 mph. This is the realm of policy decisions. Now the question that we ask under the second principle jumps to a new level: How should policy decisions be arranged to make most likely a compliance with the second principle? This is also a judical question, but one that goes not to the thing itself but to the way the thing itself is to be decided.

On the face of it there is every reason to have these decisions made by the people who will be effected. The proper role of an administrative group (like our committee) is to conduct the study that we did in order to establish the range of policy decisions. But once that is done, discretion should be exercised by those whose wills will be effected. This suggests the following scheme for policy decisions under the second principle:

1. The political process generates areas in which public constraints may be legitimate (e.g., control of toxic waste, land use, etc.), passing the question to an expert group for their consideration.

2. The expert group reviews the question in the light of information acually available to determine the range of possibly justified public constraints. The range may be very wide, due to uncertainty (e.g., national defense questions); or very narrow, due to the emergence of a fairly clear liberty frontier (e.g., the speed limit).

3. The political process decides upon some level of constraint within the range.

4. The judicial process constrains the political process to the realm of policy decision by standing ready to review legislative action at the request of any person.

5. The public constraint is administered by a public agency, presumably different from the one that did the analysis in step 2 so that a conflict of interest is avoided.

The fact of uncertainty requires a scheme of decisions such as this one. I will not go further here to ask what arrangement of

policy-making power most nearly satisfies the second principle. I have gone this far only to support the proposition that American law can be seen to coherently embody a concept of justice. Much law is, in fact, based upon utilitarian grounds. This is most often pointed to as proving that there is some kind of a basic war in American law, a battle between the utilitarians – in their various guises of wealth maximizers, paternalists, environment protectors, and so on – and the principled human rightists. I mean to suggest that there is no such battle. The principles in American law go as far as they can, frequently leaving an area of discretion due to uncertainty, which is properly the business of maximizing something utilitarian. There is, to be sure, a conflict here, for some of those who would wield power would like to widen the realm of policy decision in Figure 9-2. This dispute is entirely healthy within a law that is based upon respect for the will of each person. It is the job of the judiciary to constrain policy decisions to the realm of uncertainty. It is also the obligation of the judiciary not to invade the realm of uncertainty in the guise of principle. Where it is not clear which decision comports with the greatest equal liberty, the judiciary must defer to the political and administrative processes or it violates the second principle itself. Unwarranted certainty is as dangerous to liberty as unwarranted discretion.

These considerations allow us to complete the picture of the general arrangement of decisions under the axiom that was begun in Figure 4-1. In that figure I mapped out the general arrangement of private decisions created by the first principle. To that map must now be added the arrangement of public decisions created by the second principle.

The left hand two-thirds of Figure 9-3 repeats the first principle scheme set out in Figure 4-1. The horizontal axis has been extended to include public decisions. They are, in a sense, the inverse of private decisions. Where private decisions affect only the subject who makes the decision (at least as that effect is cognizable in law), public decisions affect only the objects of the decision. The judge, the administrator and elected official make decisions for others. Their jobs are hopefully dependent upon making good decisions,

but the substance of their decisions affects the lives of others.

Between these two extremes lie decisions that affect both the subject – the one who makes them – and others. This is the area of negotiated decisions, when the effect of one's actions is so certain that one knows who to negotiate with, and the duty of care, when one doesn't know who will be effected. Between these two levels lie private organizations, which are stable patterns of acquiescence that come into existence to reduce the costs of uncertainty.

The three sectors of private decisions correspond to the three sectors of public decisions. Where some information is known, the administrative agency can bring its expertise to bear to delineate principle territory from policy territory. Policy decisions are the territory of the political process. Decisions on principle are the business of the judiciary.

The judiciary has an additional function. It is the body that establishes and enforces this scheme of decisions itself.

The borders between the different decision-making processes are, of course, far more hazy than Figure 9-3 suggests. A given private dispute may be covered by both tort and contract law. Administrative agencies are, in fact, given policy making, political

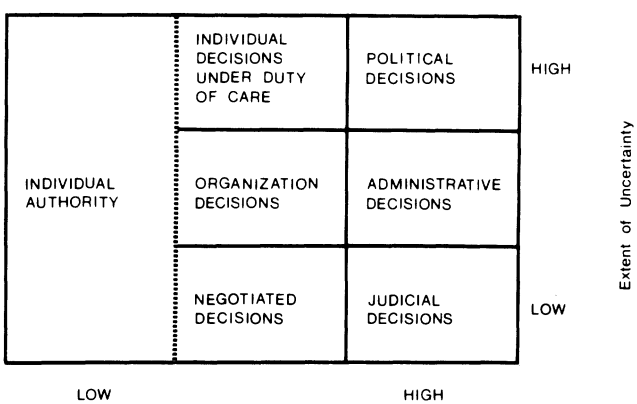

Fig. 9-3.

functions. I mean to suggest only that there is a coherent general pattern to the way that decisions are made and that that pattern can be understood to embody the axiom.

The liberty frontier described the purpose of public decisions and Figure 9-3 described the arrangement of decisions, but neither of them set out the dynamics by which they operate. How is it that a society moves toward the most just point on its frontier? What forces people to negotiate with those whom their action will effect? What keeps public officials from treating everything like a policy decision that may be made with arbitrary discretion? By what process are the dictates of justice translated into control?

10. DYNAMICS

Public decisions produce the greatest equal liberty only because they must respond to individual rights. Justice is *possible* because each one of us is, in one critical respect, identical: each of us acts through our will to produce that which we value. But that is not a *sufficient* condition to assure justice. Each person is capable of treating others solely as objects, enfolding them in actions without respect to their will. The subjective nature of each person is made lively through the authority of individual rights.

It is not enough under the axiom that one act with good will *on behalf of another.* One must stand back from the other in respect for his will. Rights are the mechanism by which one gains the authority to force others to stand back. Thus far, three types of rights have been generated.

1. *Private Rights Under The First Principle.* Private rights establish cooperation as the basis for society and hold people responsible for their actions. They give each person authoritative power to control constraints imposed by others. If they worked perfectly, they would be all that was required of the state to satisfy the second principle requirement of greatest equal liberty.

2. *Substantive Rights Under The Second Principle.* By asserting

his right to the greatest liberty, the person constrains public actions to the realm of uncertainty. Acting under these rights, courts review the purpose of statutes, evaluate whether the statutory scheme can achieve the purpose, determine whether a trial court should have allowed a question to go to the jury (could reasonable minds have differed? Was it in the realm of uncertainty?), and so on.

3. *Participatory Rights Under The Second Principle.* Policy decisions within the realm of uncertainty are ventilated by the right to participate in them. Public participation tends to force an administration toward the frontier by threatening inefficient regimes with replacement and checking gratuitous power.

These three sets of rights are not, however, sufficient under the axiom. Their effectiveness depends upon the extent to which each person has information about the state, resources to assert juridical and political rights, and access to the juridical and political processes. The difficulty is that a state may act legitimately under the axiom, but by doing so harm or eliminate the information, access or resources required by people to enforce their rights, thereby eliminating the dynamic process that underlies justice. For example, a state may, in pursuit of the greatest liberty, eliminate private property rights. A specific set of historical, technological or international (e.g., war) forces may make that legitimate. But that would also eliminate the authority of people over the resources required to enforce their rights. Each person would then have to ask permission of a public official to get a lawyer, pay court costs, mount a political campaign. The pursuit of the most extensive liberty would have destroyed the process by which it operates.

To this point we have assumed that the only effect of public constraints is to reduce private constraints. That *is* the justification for them, but public constraints have other effects as well. The one that concerns us here is that the level of public constraints determines the liveliness of rights. Figure 10-1 is a rough suggestion of this relationship. With no state, there are no (enforceable) rights.

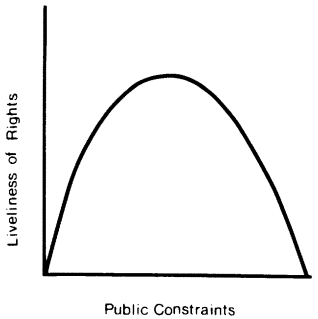

Fig. 10-1.

As a state is established (assuming that it is a just state), courts are established and private claims are adjudicated. As the state becomes more extensive, the enforcement of rights becomes more effective. Courts are more widely distributed, reducing the cost of asserting claims; legal information is published, making it easier for individuals to understand their rights; and so on.

Further increases in the extensiveness of the state, however, tend to reduce the liveliness of rights. The state becomes complex and that complexity alone shields it from the discipline of rights. How do you make a claim under the second principle against the Federal Reserve System? The question is almost silly. The System could be unjust; it could promote a cartel of the banking industry; it could thwart efforts by the political process to control the economy; it could do a lot of things. But how would you ever *demonstrate* its injustice to a court? How, in fact, would you insert political control into it, given its formidable claim to expertise? Your plan to build a house may have been thwarted by interest rates wrongfully set by monetary policies established by the System, but you will be unable to demonstrate this constraint unless you were somehow singled out for special treatment.

Rights penetrate very easily into simple social arrangements. The enormously complex arrangements of a modern state or corporation are not so easily penetrated. Consider the following example. From our olympian view, we see that the state pictured in Figure 10-2 faces a unique frontier. It is presently at point *A*.

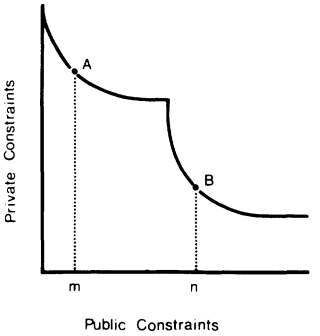

Fig. 10-2.

We can see, however, that if it massively expands the state from m to n it can move to point *B*, a point closer to the origin than *A* and, therefore, legitimate under the second principle. It must make the full jump from *m* to *n*, for any level of state power between them is inferior to either one.

What real world situation could this correspond to? There are many, but let us take the example of a state that faces the possibility of implementing a full-scale computerization of society. At the present, the society is on frontier #1, in Figure 10-3, organized by a mixture of paper and electronic communications. If the state instituted a total electronic information system, it could move to frontier #2. The system would make possible both far more effective enforcement of the first principle and more effective administration of the state itself. All transactions between people would

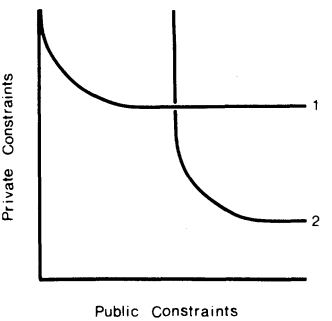

Fig. 10-3.

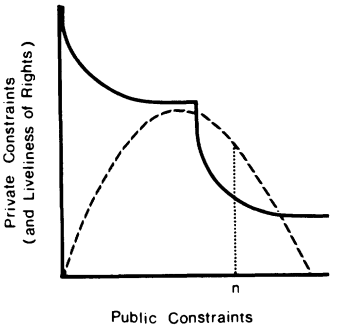

Fig. 10-4.

be tracked by computer, allowing the state to enforce the criminal laws more effectively by spotting dangerous behavior before it happened, to oversee private arrangements for fairness, to regulate dangerous behavior more effectively. The state could also monitor its employees more efficiently, allowing fewer interstices within which they could abuse power or ignore their duties.

If we were convinced of the truth of these prospositions, we could, as olympians, require that the state install the system by law. But the second principle is not pursued in olympian fashion. It is enforced by rights. So we must check the propositions in Figure 10-3 against the dynamics of rights suggested in Figure 10-1. When we overlay 10-1 upon 10-3, we see that we have a problem that goes beyond simple consideration of the liberty frontier, for now we see that the installation of the computer system will drastically reduce the effectiveness of rights. If we move to the n level of public constraints, we will have had a "chilling effect" upon the rights process. There are several possible reasons for this. One is psychological: placed under continual electronic surveillance, individuals may feel powerless, lacking a sense of personal mastery, locked in a "system." Another is informational: the computer system may be so complex that it is impossible for citizens even to imagine, let alone litigate or politicize, its impact upon their lives. Frontier #2 may be beyond the ability of rights to do anything about. Once the move has been made to frontier #2, there is no going back to frontier #1. The computer will become the organiza-

tion of society, just as nuclear weapons have become the terms of international relations. The case-by-case, rule-by-rule process by which rights are implemented will be ineffective. Perhaps.

The purpose of this example is to indicate that our reliance upon rights to enforce justice raises a second level of questions. A public decision – be it a new adjudicatory rule, regulation or collective purchase – must be evaluated not only for its compliance with the second principle but also with respect to its effect upon rights. This is done in American law, of course, through the application of another set of rights – the system of rights found largely in the Bill of Rights. These rights protect not the liberty of people directly but the dynamics of the system itself. The right to information, association, political participation, speech, belief, and so on, confine the actions of the state to a range along the public constraint axis within which rights may operate as a lively constraint upon the state. These basic rights are the legal equivalent of Odysseus' tying himself to the mast before hearing the Sirens' song. Knowing that we will hear some very good arguments for forming a highly intrusive state, we delineate beforehand those levels of power which we will simply not allow ourselves to go to.

The basic rights[55] are pictured in Figure 10-5 as a bar beyond which public constraints may not go. As applied to the example above, the possibility of organizing the nation under a single computer system might be barred by the right of privacy. In so barring the state, the court is not finding that the computerized state violates the second principle (we know, from our olympian perch, in fact, that it is legitimate under the second principle). There is no way for the court to make such a finding; the computerized state proposal is well into the mists of uncertainty from

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[55] The term "basic rights" as used here should not be confused with terms such as "fundamental" or "basic" rights used by the Supreme Court. Those terms represent an effort by the Court to develop a calculus of rights through a hierarchy of interests. "Basic rights" here are system-protecting rights derived from those qualities necessary to assure an effective discipline upon the state. The idea is similar to John Rawls' idea of the "basic liberties ".

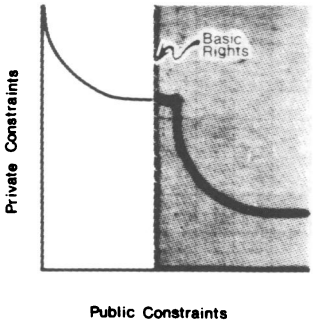

Fig. 10-5.

an earthly perspective. What the court is saying is that the right of privacy forecloses an experiment of this sort, because the experiment itself, whether successful or not, would destroy a critical underpinning of a free society.

The basic rights are prior to the three types of rights listed at the beginning of this section. The basic rights define the ambit within which the substantive rights operate. The first condition of justice is the maintenance of the dynamics by which a just state is produced. No specific pursuit, no law, project, or program may be allowed to destroy the dynamics by which justice is pursued.

I hasten to add that I am not suggesting that constitutional rights as presently defined function solely as basic rights. They have been filled up with substance as well because the Constitution does not set forth the thing itself; it does not set forth an equivalent of the axiom or the second principle. The Court has toyed from time to time with fashioning one, or with blowing a particular right up (usually the due process requirement) into a statement of justice. But it has backed away each time, preferring instead to fill the enumerated rights with substance. As a result, each right functions in both modes at once. The right to freedom of speech, for instance, functions both as a basic right when it is used to protect political speech, and as a substantive approximation of one aspect of the greatest liberty when it is applied to what people do in their bedrooms, say in their advertisements and spray paint on subway walls.

The basic rights are yet another response to uncertainty. They are an arbitrary (though deeply held) limitation of the realm of political discretion. We do not, in fact, *know* that it is wrong to join church and state. We *suspect* that it is because it has been uniformly so in the past. So we define that as forbidden territory.

The basic rights strategy bumps up against one severe difficulty. There is one circumstance that may well demand the creation of a maximally powerful state, far beyond the ability of rights to control: war. In war, the liberty frontier of a society undergoes a

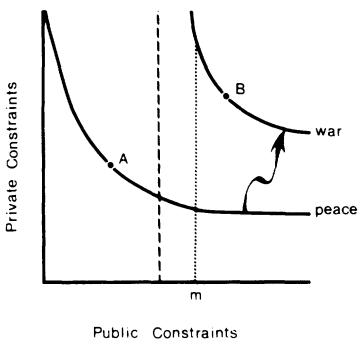

Fig. 10-6.

drastic shift to the right, as depicted in Figure 10-6. Unless it organizes at least at level m – with constraints upon travel, the draft, high taxes, taking without prior compensation, and so on – the state in 10-6 has no possibility of surviving. There is no liberty frontier at all at levels below *m*. It will cease to exist as an independent state and be subsumed within the liberty frontier of another state. Under such circumstances, it is just for the state to move to point *B*. But what sense does that make? Point *B* is far to the right of the basic rights limit. Most of the basic rights must be surrendered in war. But they are the rights that underpin the pursuit of justice. Which means that once the state has gone beyond them there is no effective way to control the state. We may all agree that point *B* is justified, but once a state has moved to that point it is far beyond our ability to hold it to that point. It may

use the army stupidly, take without compensation, draft more people than it needs, do chemical experiments upon prisoners, and not answer to any right for it. Once beyond the discipline of the basic rights, the state is disciplined only by its tendency to organize efficiently to defend itself and by the ability of people to rebel.

The situation is somewhat like the situation faced by Odysseus with the Sirens. We know what happened, but what if, instead, Odysseus had sailed along, tied to the mast with his crew made deaf by the cotton in their ears, and instead of coming to the Sirens he came to Neptune, who told him: "I have killed the Sirens and thrown them into the ocean. But their spirits have made a great tumult of the water. If you continue on the course that you have set, you will run into the tumult and surely die." We may expect that Oddyseus would have felt quite foolish during the last few minutes of his life. Should he have left himself an out, a way of changing course if he really had to? That is what we have done with the basic rights. The difficulty is that a stretchy idea of the basic rights may tempt us to relax them for reasons less compelling than war.

11. THE ROLE OF THE JUDICIARY

The four types of rights discussed in the last section define four different modes of operation for the judiciary. The basic function of the judiciary is the same in all four: it enframes the actions of all members of society – public and private – by demanding a principled justification for their actions. Private behavior is enframed by rules derived from the first principle. Public behavior is enframed by the basic rights, by substantive rights under the second principle and by the procedural right of people to participate in public decisions made in uncertainty.

The questions raised by each of these rights, and the mode of analysis necessary to answer them, is different. But it is possible at this point to map out the general framework of judicial analysis under the axiom. Figure 11-1 sets out the general structure of this

analysis. It is intended to apply to every state action, to provide a scheme for assessing every law, be it an adjudicatory rule created by a court, a regulatory rule created by an agency, or a collective

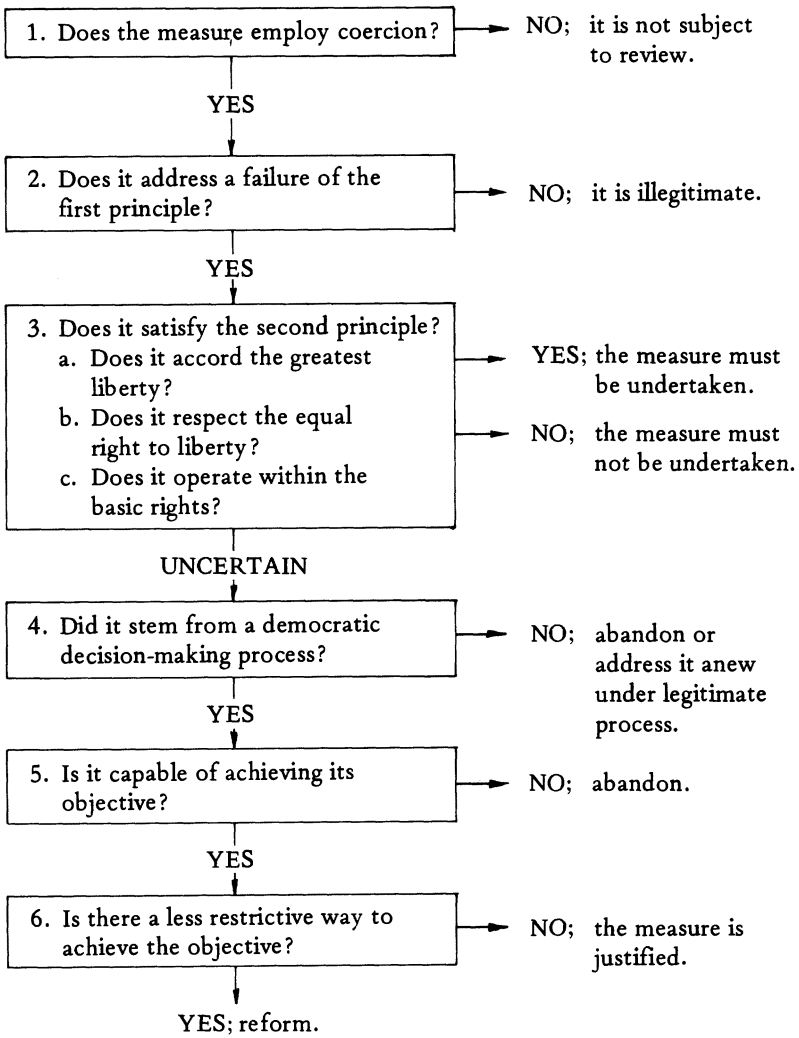

Fig. 11-1. The test of state actions.

purchase undertaken by a legislature. We will consider the test step by step.

1. *Does The Measure Employ Coercion?* Only coercive actions need be justified. As with any organization, most actions of the state do not employ coercion and need not be justified. When it employs people or material and organizes itself, the measures that it uses must be justified in a managerial sense to whomever is paying (e.g., taxpayers acting through Congress), but they need not be justified in a *judicial* sense under the axiom. If, of course, the state employs people not through willing acquiescence but through coercion, as by drafting people to serve in the armed forces, that does require justification.

Even when a state acts through what appears to be law, it may not be subject to review. An edict that businesses will be closed on Sunday or that May 1st is Law Day is not law unless a penalty is provided for failure to observe it (or public funds employed to promote it) and is not reviewable. Sentimental actions of the state may raise management concerns among the people who are paying, but they do not raise justice concerns.

2. *Does It Address A Failure Of The First Principle?* All coercive state actions must derive from a failure of the first principle or they substitute coercion for cooperation in violation of the axiom. Judge-made law creates little jurisdictional question, since it arises out of a dispute and is made on a case-by-case basis. The law that is made may be wrong, when viewed from the perspective of the principles embodied in prior law, but the judge lacks the capacity to go into society looking for instances in which he can make up law.

Legislatures and regulatory agencies are subject to no such constraint. Where judges respond in the first instance to claims of injustice, legislatures and agencies respond to "interests" – claims based upon values which may include, but are surely not limited to, the value of justice (i.e., equal right of respect). These claims may indeed arise out of injustice, out of the desire of some to have

the power of the states used to favor their own desires. This is an ancient tradition but not, under the axiom, a legitimate one.

In applying this step in the test, the judiciary constrains state actions to the range of actions which will foster cooperation. No end, however praiseworthy, may be pursued unless it is grounded in the first principle. Ideally, the statute or regulation should set forth the jurisdictional basis of its use of coercion. In practice, that is rarely done. The judge will look for jurisdiction and, if any coherent support for it can be supplied by argument, will allow it past this test. This judicial practice is itself highly questionable under the second principle.[56]

The jurisdictional basis forms the fulcrum for the rest of the test of state actions. It is critical to get it straight. Consider a state law which makes private adoption illegal and then provides that adoption will be conducted through an Adoption Service, which will take possession of all babies available for adoption and parcel them out to families according to standards that it promulgates.

This feels intuitively as though it is inspired by justice, but what, precisely, is the injustice that is guarded against? Private adoption requires the willing acquiescence of at least the natural mother and one adoptive parent. There is no violation of the first principle there. The violation could lie in either of two places. For one, practice reveals that private placement is usually conducted through a "baby broker," who signs up women while they are pregnant. The broker may very well exert legal and psychological duress upon the mother, so that her surrender of the child at its birth is less than willing. If this is the basis for the act, we could

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[56] It is questionable, as well, to a number of commentators. It is, for example, the central theme of Theodore Lowi's critique of American law in *The End of Liberalism* (New York: W. W. Norton & Co., Inc., 1969), p. 290:

"Considerations of the justice in or achieved by an action cannot be made unless a deliberate and conscious attempt is made by the actor to derive his actions from a general rule or moral principle or class of acts ... A general rule is, hence, *a priori*. Any governing regime that makes a virtue of avoiding such rules puts itself outside the context of justice."

expect the statute to provide for a procedure, such as a judicial hearing, to guarantee the willingness of the transaction.

The other jurisdictional foundation lies in the fact that the baby is worthy of respect and his acquiescence is not received in the private adoption agreement. We saw in part 5, section 3, that the state may act legitimately to protect the will of those who cannot participate in the cooperative process. If this is the ground for the statute, we would expect a demonstration that the statutory scheme was more protective of the *will* of the child than private adoption, or at least an argument sufficient to place that possibility within the realm of uncertainty. An argument that private adoption is not always beneficial is not sufficient.

The jurisdiction stage of analysis establishes the private constraint that a public action is directed against and thereby provides a foundation for the next step in the test. If a private constraint cannot be specified, or if the state action cannot be shown to address the stated private constraint, the measure is a gratuitous use of coercion.

The connection between public constraint and private constraint may be quite complicated, particularly in the case of collective purchases. Adjudicatory and regulatory rules generally can be seen to address a private constraint quite directly, or to address a need by the state to control itself, as in the rules of the General Services Administration. That is not generally true with the rules underlying collective purchases.

Consider the rule that subjects people to criminal penalties for tax evasion. Tax evasion evinces no disrespect by one for another. How are criminal laws against it justified? It is essential to collecting taxes (shall we say). But how is collecting taxes justified? We have seen that actions of the state may be justified. Actions, even just ones, require resources. Taxation is the way that resources are raised. But taxation takes things from people; why not fund the state out of the willing contributions of citizens? That is a misconception of the connection between people and things. People do not "own" things that the state takes by taxation. People are connected to things according to the rules laid down by the state. One

of the rules is that the property of people may be called upon to support the state. But how is that rule consistent with the second principle's requirement that the state establish property rules that extend the greatest liberty? Wouldn't the liberty of each person be expanded by a rule that protected property from the state? Such a connection between people and things would be overly strong. Just as we have seen that the state must be free to act without willing acquiescence in order to enforce the axiom, it is also true that it must be able to act without willing acquiescence to pay for that enforcement.

Justice is unalterably a collective good, a condition of social existence, which all who can must pay for. To require that the state be funded voluntarily would be to allow people to decide whether or not to pay for that which they receive whether they pay or not. Justice is based upon the respect for the will of people, not upon a presumption that each will is itself animated by a desire to do justice. The latter would have to be the case in order to require the state to be funded voluntarily.

As this imaginary dialog indicates, the justification for state rules over property raises questions considerably more complex than those raised by the other three bases for jurisdiction. It will be taken up in the next section.

3. *Does It Satisfy The Second Principle?* This step of the test is composed of three parts.

(a) *Does it accord the greatest liberty?* As we have seen in the discussion of uncertainty, it is rarely possible to specify the liberty frontier with precision. In practice, the greatest liberty question poses a negative test: Is it demonstrable that the state action could not satisfy the greatest liberty? To see this, let us return to the adoption example.

If the adoption act is based upon the fact that pregnant women may be compelled to part with their children by "baby brokers," the act falls clearly outside of the requirement of the greatest liberty. Even if it allows the state Adoption Service to take possession of babies only when willingly placed with the Service by their

mothers (which is not a limit included in most adoption statutes), it goes far beyond protection of the mother by putting the allocation of babies into the hands of the Service, rather than leaving it in a cooperative arrangement between the mother and the adoptive parent. This public constraint is far beyond (i.e., to the right of) the constraints necessary to achieve the objective.

If, however, the act is designed to protect the will of the child, the allocation of children by the Service is easier to justify. The Service may argue that the liveliness of the will of the child is dependent upon the qualities of the parents and that better qualities are likely to be achieved by state allocation than cooperative transaction. This is an exceedingly weak argument, but it may be enough to thrust the act into the realm of uncertainty, depending upon your judgment or mine.

First, it is based upon a concept – the "liveliness of will of the child" – which we do not fully understand. We have our own intuitions as to what it means, but we have not fully illuminated them. Second, it is based upon two unproven empirical propositions: the role of parental care in the development of will and the preferable effect of state placement. Third, it raises a potentially serious equality problem (under the next step of the test), since state allocation will surely be based upon characteristics (e.g., wealth, sexual orientation of the adoptive parents, "stability" of the marital union of the adoptive parents, race of the child and adoptive parents, and so on) which will foreclose a part of the populace to consideration without a demonstration that those characteristics are related to will. Fourth, the Service's argument is statistical, based upon "tendencies" of private adoption to dim the prospects of the child. Given the fact that the state already has child neglect and abuse acts, which act upon specific cases not upon tendencies, has the state not already done as much as is justified in the protection of the will of the child? Would those acts not adequately enframe private adoption? Is it not gratuitous to foreclose parenthood to people because of their membership in a statistically determined catetory when safeguards against their abuse of the first principle are in place?

These questions will be the way the judge determines whether a state act is clearly outside of the possible range of the second principle. His judgment must be backed by reasons and is subject to review.

Evaluating the justness of a given state act in a specific case is subject to a weakness that should be mentioned at this point. We observed in section 8 that in order to be made applicable to particular cases, the liberty frontier must be unbundled. State actions have to be judged against the specific private constraints that they were directed against, rather than against the entire scheme of public and private constraints. Unbundling creates a problem, a mathematical problem that tracks a real problem in the law: It is possible that just decisions will be made in each case, but that the aggregate effect of all those decisions will be unjust. It is possible, for instance, that every state action is, by itself, justified but taken together they require such a huge state that the taxes necessary to support it eliminate the worth of will to people by pauperizing them.

This possibility establishes a limit upon the judicial process. It may proceed, case by case, with its edgewise justification of laws. But its conclusions are not sovereign. It cannot tell, outside of the context of its own system, whether the system is itself justified. The aggregate decision can only be determined by the people as a whole who, through control over taxation, can establish the general level of public constraints and, through the power to amend the Constitution (in the specific case of American law), can change the context of law, jarring it out of a local loop into which it has fallen (e.g., by embodying male dominance in law). If the Constitution had not already created this process, a Supreme Court acting under the axiom would be required to create such a process and then to defer to it.

What if the people, exercising their ultimate sovereignty over the aggregate shape of the state, adopt a rule that is inconsistent with the axiom? American constitutional history contains at least one clear example of this: the 18th Amendment. The sale and consumption of alcoholic beverages does not violate the first prin-

ciple. By making it illegal, the 18th Amendment violated the axiom. This was an end which its proponents should have pursued without coercion. Would the courts have been justified in refusing to enforce it? Which, in other words, is sovereign – the axiom or the will of the people, properly constituted? The answer is obvious. The axiom is itself the creature of the people. It has no weight other than that which just people give it.

(b) *Does it respect the equal right of each person to liberty?* The idea of equality embodied in the axiom is the idea of the equal respect due each person. It derives from the axiomatic proposition that there is no ground upon which to choose one will over another. Will is not something that a person *has;* it is what a person *is.* To take it away or overwhelm it is to deperson the person.

Equal respect manifests itself in private relations as the right of each person to be acted upon by others only with his willing acquiescence and in relations with the state it is manifest in the right of each person to the greatest liberty. This means that the state must respond to the claim of each person and view that claim *from his perspective,* within the context of a body of law that applies to every person. He is entitled to every liberty that could be accorded simultaneously to every person.

This concept of equality makes of American law what John Rawls calls a system of pure procedural justice.[57] In a pure system the ends of the system are not defined. The ends are supplied by the people in the system. Justice inheres in the rules that guide their pursuit of ends, so that the ends that people reach are justified not because they are good in and of themselves (they are simply whatever people make of them), but because they resulted from a set of procedural rules that was just.

Rawls contrasts the pure system with a system of perfect procedural justice. In the perfect system a specific outcome, a pat-

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[57] Rawls, *Theory of Justice,* p. 85.

tern of conditions and behavior, is stipulated by the theory of justice as just. The rules of the perfect system then deliver (perfectly) upon this desired pattern. If they do it imperfectly, the system is one of imperfect procedural justice.

The perfect system is not consistent with the primacy of individual will. Will lies in the pursuit by each person of the perceptions that he desires. A perfect system directs coercion toward a particular outcome, not toward the protection of the process by which each person determines his own outcome. Under the axiom, no outcome is preferable to another, so long as it is from the set of outcomes that could be achieved through respect for the will of each person.

This is not to suggest, however, that there is no room for perfect concepts under the axiom. The realm of policy decision is made up of various perfect concepts of justice (as well as much that has no claim to justide at all). Political behavior must be motivated by a vision of specific outcomes (e.g., highways, armies, wealth distribution). Some of these visions will claim to be no more than good. But some will be argued to be *right,* so that income equality, protection of the environment, and preeminent national power are supported as being, in and of themselves, right. Outcomes supported by the claim of rightness are perfect outcomes, which justify whatever law is necessary to achieve them.

The realm of uncertainty is the realm of perfect concepts of justice. It is contained within the realm of the axiom, the pure concept of justice. There is no war between these realms, no battle over which it will be, pure or perfect justice, that animates the state. The pure realm assures that all visions of perfect justice will be heard and will be lively in policy decisions, that no one will win to the exclusion of the others. And the perfect realm assures that our idea of justice will constantly be tested and enriched. The contest over perfect ideas illuminates the pure idea. The ideas of due process, of civil rights, of equal rights for women, and far more, come to the law, to the realm of pure justice, from the seething cauldron of conflict over perfect ideas. There is in American law a dynamic harmony between pure and perfect ideas of justice.

This is not to say, of course, that there are no problems at the margin. There is a continual force to import perfect ideas into law itself. One recent example is the effort to weld the welfare state into law by recognizing a property right of welfare recipients in their entitlements.[58] Under the pure concept, citizens are seen to have *procedural* rights arising from policy decisions, but not substantive rights, for those flow from the axiom. If people are seen to obtain substantive property rights to transfer payments, decisions about transfer payments are taken out of the policy (uncertainty) realm and placed within the juridical (certainty) realm. This can surely be done under a pure system, but it would require a demonstration of the deterministic relationship between material wealth and will, for it would foreclose from willing control much of wealth determination. That demonstration has not (nearly) been made, so courts have resisted the idea that welfare recipients have substantive property rights in entitlements.

The relationship between the pure sector of law – the sector of principles – and the perfect sector – the sector of policies – is unsettled because every perfect idea of justice has the ability, if taken far enough, to eliminate the pure idea of the primacy of human will. By stipulating a desired outcome of society, the perfect idea establishes a pattern which must be driven by coercion. By insisting upon the right of each person to claim liberty, the pure system limits the perfect system to the realm of uncertainty.

(c) *Does it operate within the basic rights?* Every public act, whether it is uncertain or sure to satisfy the second principle, must operate within the bounds of the basic rights. No public measure (except national defense), however praiseworthy, may be allowed to violate basic rights or it creates the pact with the devil problem. The basic rights (e.g., speech, association, privacy, a minimum right to acquire personal property, etc.) are the means by which the state is held to the axiom. If they are yielded, there is no way

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[58] This idea was first suggested by Charles Reich in 'The New Property', *Yale L. J.* 73 (1964): 733–87.

to force the state to operate according to the axiom, or to force the state to require justice of individuals.

This step in the test is, then, logically superior to the others. A violation of the basic rights nullifies a state act, whatever else is to be said for it.

4. *Did It Stem From A Democratic Decision-Making Process?* A public measure that has survived to this step of the test is one whose conformity to the second principle is uncertain. At this step the test takes on a procedural, enframing role.

We saw in section 6 that the state is allowed to act when its impact upon will is uncertain for the very same reason that individuals are allowed to act when the effect of their actions is uncertain (i.e., when it creates a risk that others will be injured). The axiom requires a respect for the will of others, not a guarantee of the safety or liberty of others. For individuals, respect for others means that they must act within the duty of care. For the state, it means that it must act democratically: It must accord the greatest say possible to those who will be affected by a public decision.

The ability of the state to conform to this requirement is constrained by three natural forces. First, democratic participation is expensive. If full participation were required on every act, the state would be foreclosed at the outset from most of the minor acts that make up its work because any benefit that might ensue from them would be vastly overwhelmed by the costs of making the decision democratically.[59] Second, democratic process is

[59] This is the same type of argument that Frank Michelman advanced to justify the failure of the state to compensate for every bit of cost imposed by a taking ('Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law",' *Harv. L. Rev.* 80 (1968): 1165–1258). If the state had to pay for all loss from a taking, the cost of locating everyone who was effected, dealing with them, and figuring out how much to pay them would far exceed any possible benefit from the project. This is the reason, for example, why those who live in the neighborhood of a new highway are not allowed to recover for the effects of noise upon their enjoyment of their property (see, for example, Dennison v. State, 22 N.Y. 2d 409, 239 N.E. 2d 708 (1968)).

expensive in terms of time, so that an emergency situation allows only a rough approximation of it (e.g., the decision will be made by an elected official). Third, the empirical aspects of a decision require expertise. Democracy requires participation on the *value* aspect of decisions, not on their *empirical* aspect. Highly complex questions require great analysis before the value question can be framed. It is necessary to do the analysis without participation. But analysis can only be done within a value framework, so, even if the analysts are resolutely fair-minded, the question as ultimately framed will have values built into it.

So complex are the questions raised by democratic process that, in practice, this step of the test is largely a matter of judicial oversight to see that a decision was made within a process arbitrarily defined (by, for example, the Constitution) as being "democratic." The court will test whether a statutory scheme fits within the general scheme for making decisions. But it may go further, as when it requires that a regulatory agency include public hearings in its process. The unfolding story of Constitutional law is, in large measure, the unfolding discovery of democracy.

5. *Is It Capable Of Achieving Its Objective?* The court will review the connection between the purpose of an action and the means employed to achieve it. Since the measure has passed step 2 of the test, its purpose has been found to be legitimate. This does not, however, justify *any* state action, but only those that may (within the bounds of uncertainty) achieve it. If, for example, the purpose of a state act is to protect its citizens from dangerous food additives, the court will examine the means employed (e.g., banning the sale of milk which has had the milk fat replaced by vegetable fat) to determine whether it can achieve the objective if it is clear that filled milk poses no danger to health, banning its sale is a gratuitous constraint and it will be destroyed. The court may well look for the unstated purpose of the act to unearth a legitimate purpose that it might have served. But if (as with filled milk) it finds only an illegitimate purpose (e.g., the protection of domestic milk producers from out-of-state competition), the judicially-created purpose will not save the act.

6. *Is There A Less Restrictive Way Of Achieving The Objective?* The court may allow a state action to stand, but trim out the portions of it that are gratuitously constraining, unnecessary to the statutory or regulatory scheme.

This test is roughly descriptive of the role of the judiciary in carrying out the axiom. Its full articulation would be far beyond the scope of this paper, but it has been taken far enough to indicate, at least, how a judicial process which has grown little by little, case by case, could be seen to embody, in both its own procedural rules and in the substantive rules that it applies, a coherent concept of justice.

12. PROPERTY RIGHTS

In part 5 of this paper I set out the four bases of state power derived from the state's duty to enforce the first principle: enforcing the principle against those who intentionally or unintentionally violated it; acting on behalf of those who, because of some debility, were not capable of expressing their will; and defining property rights. The first two bases are straightforward and, have been the subject of most of the examples in this paper. The third – the state's "paternal" jurisdiction – is complex, but not unclear. The fourth is not at all obvious. More must be said to connect the two principles to the vast bodies of property rights, land use control, taxation, wealth transmission and collective purchase law.

The need for the state to define the terms upon which people are connected to things arises, as we have seen, from the lack of an organic connection between the person and things. The first principle requires that I gain your acquiescence when my actions will affect *you*. Property rights define the extent to which, and the way in which, I must gain your acquiescence when my actions will affect the things to which you are connected. Property rights extend the duty of the first principle to the connection between people and things.

We begin our discussion of the state's definition of the terms upon which people are connected to things with a discussion of

property rights (which is but one of many ways for the person to be attached), because the second principle establishes a general preference for rights. Property rights create individual authority over things. They allow a person to act upon a thing without first gaining the acquiescence of anyone else, which is, everything else equal, a greater liberty than any other arrangement. More restrictive connections must be justified.

Defining property rights is a two-phase process. The first phase requires the definition of the *human* right to property. This set of rights establishes the terms upon which people may acquire, hold and transfer property rights themselves, which is the second phase of the process. The right to own property is a human right because it applies to each person generally, whether or not that person owns property rights himself.

Recognition of the two phases of defining property rights simplifies analysis, because each phase raises different types of questions under the second principle. The first phase asks, what should be the shape of the human right? How should we define the right of people to acquire property rights? The axiom offers considerable guidance here, for a respect for the will of each person implies that each person should be able to acquire property rights and that acquisition must be cooperative – done with willing acquiescence. We are justified in limiting the right to protect those who, through a real disability, are unable to participate in cooperation, but we are clearly not justified in dreaming up disabilities that eliminate this right (e.g., the common law's debility upon the right of married women to hold property in their own name). The same rules of willing acquiescence applicable to individuals dealing with each other apply to their dealings over things, with whatever modifications derive from actual differences in the transactions.

The second phase is more difficult. The right to acquire property rights is important only if there is content to those property rights, only if they confer actual authority over things. Were it true that there was a one-to-one correlation between the strength of the authority granted by property rights and the attainment of the greatest liberty, our job would be a simple one.

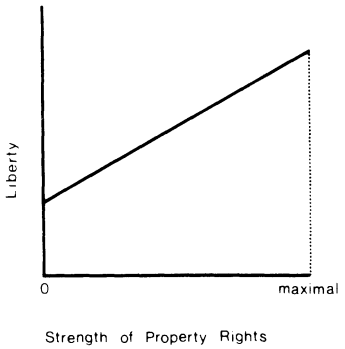

Fig. 12-1.

We would simply make property rights as strong as possible. (This situation is pictured in Figure 12-1: The stronger the property rights, the greater the liberty.) This would mean that the state would guarantee the exclusive use and control of the owner. He could use, abuse, and transfer his property however he would, limited only by his duty not to invade the property of others.

But the situation pictured in Figure 12-1 is not the case. There are at least three independent reasons why it is not true that the stronger the property rights the greater the liberty. First, a total rights system would eliminate the ability of the state to tax – to take money from people in violation of their exclusive rights in it. To the extent that the state is itself justified, taxation is justified, for it is not possible to fund a state by voluntary contribution (for reasons that I will not go into).

Second, the recognition of rights in property creates the captive audience problem. Connections to things are not limited in the same way as connections to self. While nature permits only one self per person (except for the troublesome case of the schizophrenic), there is no natural limit upon the amount of things that may be acquired by a person. If a person acquires, by accident or design, the entire supply of a desired good, that person is able to extract from others far more in acquiescence than could be extracted if ownership were split among many. The recognition of a total right to property would guarantee, in the abstract, the subversion

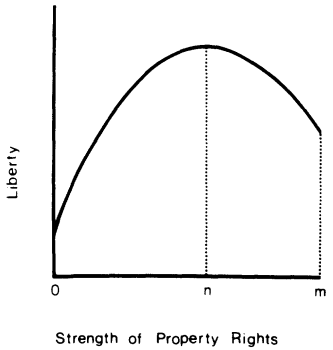

Fig. 12-2.

of the will of some by others through property, when a less restrictive set of rules was possible. Laws against monopoly and laws that allow the state to take property are two ways in which the captive audience problem created by ownership are controlled.[60]

Third, the use of property by one can spill over onto others. One's use of property is an "action" under the first principle as surely as any other action. Property rights cannot be defined so extensively that they are a "free fire zone" for the will.

The result of these considerations is that the relationship between property rights and liberty is more like that pictured in Figure 12-2 than Figure 12-1. There is some bundle of rights (n), less than the greatest bundle possible (m), that most satisfies the requirement of the greatest liberty. As we move to the left of the

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[60] Property rights have not, in fact, been defined coherently, The law exhibits a tendency to create overly strong property rights and then to turn them back by brute force when the captive audience problem surfaces. So, antitrust laws guard against the *use* of monopoly power, not its possession; excessive employer power was countered by creating excessive employee power, rather than making employment laws just; the power of landlords resulting from unjust laws is countered with laws unjustly favoring tenants. When private ownership really gets out of hand, the owner is treated as a government, as in the case of Marsh v. Alabama, 326 U.S. 501 (1946), in which the Supreme Court held that a company which owned an entire town could not treat everything in it as private property.

maximal rights point (m), we add more requirements for permission in the use of property. At the extreme left, there are no rights in things. Everything must be done with the permission of a state official. As we move to the left, the use of property is more closely hedged about with liability rules, permit requirements and taxes.

Figure 12-2 suggests that, at a given point in time, there is an ideal level of these constraints upon property. To get any sense of how the American legal system approximates this ideal, we must take Figure 12-2 apart into its components. Figure 12-3 treats the function in Figure 12-1 (dashed line) as the additive result of three different realationships. The first relationship (labeled "freedom to") maps the connection between the strength of property rights and one's liberty as a subject to pursue what one will with what one owns. The stronger the property rights, the greater one's authority, and hence, the greater one's liberty *as a subject* of action. Put the other way around: the more people one must gain permission from, the more one is dependent upon the will of others. But even at the extreme left, where one's acquisition and use of property is totally constrained by official state permission, one's will would be somewhat effective over property, or the state would have wildly violated the second principle.

The second relationship ("freedom from") maps the relation between the strength of property rights and one's liberty *as an object* of the use of property by another. This liberty declines with increases in the strength of rights, for it gives the one affected by property use (e.g., the one whose water or air is polluted by another) less control. Even with maximal property rights, however, this protection does not drop to zero, for one has the right to exclusivity over one's own property as a protection against the acts of others.

The third relationship maps state constraints upon people through the control of property. These constraints are all negative – reductions in liberty. They must be justified, as we have seen, in terms of liberty. As we move to the left from the total system of property rights, the authority of the owner declines. This power

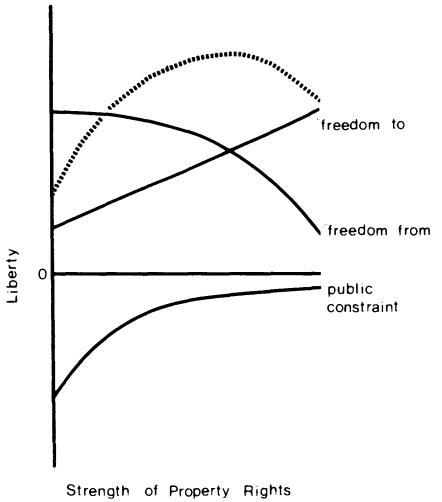

Fig. 12-3.

does not, however, disappear. It is shifted to the state and becomes a constraint upon private behavior. To a limited extent, state power can be made somewhat automatic, as it is, for example, when the state recognizes through adjudicatory rules the right of an owner to be free from his neighbor's pollution. To increase its constraints, however, the state must move to regulation (e.g., land use controls and SEC oversight of sales of securities). Public constraints increase in an accelerated way as we move toward total state control because the state increasingly gains the ability to pattern all private behavior as it gains control over things.

I have drawn the point of greatest liberty (entirely impressionistically) as lying between the most extensive bundle of rights possible (perfect, laisez faire capitalism) and a complete permission system (perfect socialism), because that is the way contemporary property rights are configured. There is no necssary reason for this to be true. The relationship between property rights and liberty is not fixed. It depends upon the cultural history, wealth, population density, and technology of a society, all of which change. In Figure 12-4 I suggest that the apparent decline in the strength of property rights over the last century (from m to n), is attributable

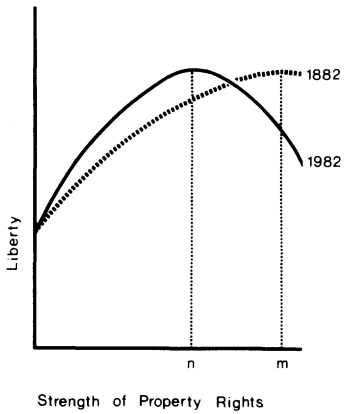

Fig. 12-4.

to a move to the left in the function, so that a less extensive bundle of rights in 1982 satisfies the second principle as did a more extensive bundle in 1882.[61] This could be caused by an increase in population density (which increases the risk from spill-overs), technological sophistication (which increases the magnitude of the effects that one may have on another), or scarcity (which, for example, converts water from a free good to one that must be rationed). If this process continues, we might eventually expect to witness the situation pictured in Figure 12-5, in which liberty requires that all individual authority over things be abolished in favor of state control. At some point, however, increasing state control over property would bump into the basic rights limitation.

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[61] The decline in the strength of property rights has been received with alarm by some traditionalists. This alarm is confusing, for, if circumstances change but laws remain constant, there must of necessity have been a change in the basic axiom of law – a result that one would expect the traditionalist to find abhorrent. A traditionalist might find a change in circumstances unpleasant, but one would expect that once the change was made clear the traditionalist would ***insist*** that the law be changed so that the traditional axiom underlying law could be applied to the new circumstance – unless the traditionalist felt that, by holding laws constant, circumstances could be kept from changing.

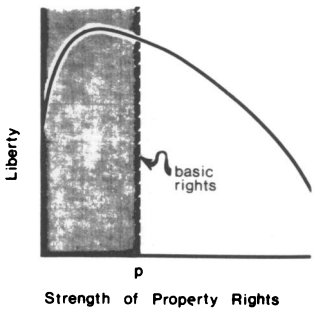

Fig. 12-5.

This is indicated as point p in Figure 12-5. As we have seen in section 10, a rights-based system requires that citizens have some authority over resources, for, at the very minimum, the assertion of juridical and political rights requires some money to bring suit, organize politically, and so on. Under a total permission system these resources would be under control of state officials, which would eliminate independent discipline by persons on the state. There may be no basic right to control real estate, for it seems hard to fashion an argument that one must be able to control land if one is to assert one's rights. But there is most assuredly some basic right to own personal property.[62]

I have included this discussion of property rights only to illustrate the general outline of their determination under the axiom. They are entirely instrumental under the axiom, contingent on their ability to produce liberty. They are shaped by law in accordance with the decision-making structure mapped in Figure 9-3 and the dynamic process outlined in Figure 11-1. This means that the enormous activity of courts, agencies and legislatures in defining property rights, testing collective purchases to see whether or not they are legitimate, and so on, is a dynamic process by which the rules that establish the terms on which people relate relative to

[62] This may be why John Rawls included the right to own property in his list of basic liberties (*supra* note 37) and why he qualified the right by the word "personal" in parentheses.

things are arranged to allow for the greatest force of will in each person.

13. CONCLUSION

Charles Darwin argued that human beings are what happen when physical laws act upon a planet with the characteristics that earth had five billion years ago. Similarly, I have argued that the primacy of individual will is what eventually happens when a society allocates and limits coercion based upon rights. From time to time particular visions of the good or the right dominate public behavior, but they are eventually enframed by rights – the authoritative claim of each person to respect.

I have argued that the propositional structure of American law – the laws themselves – can be seen to be a logically consistent system of propositions stemming from the axiom that the will of each person is worthy of respect. This is an explanatory, not a normative, proposition. The axiom was not put there by anyone and the law derived from it, any more than the human brian was put there and the theory of relativity derived from it. The axiom came to be embodied in it because of a fact – the single universal characteristic of human beings that is relevant to the question of arranging coercion is individual will – and a process – the right of each person to demand a justification for coercion used upon him.

Since will is universal to human beings, this would suggest that any rights-based legal system would evince a general structure similar to our own. Particularities of national culture, natural resources, population density, and so on would produce a very different liberty frontier from the one facing this country and hence, different laws. But the general structure of law – the relationship between principle and policy decision, the role of the basic rights, and so on – should be similar. This similarity should provide a common basis for cooperation between states, transcending particularities of economic structure, political structure and ideology. We have seen that a very broad range of economic and political institutions may be justified. The essential

difference between states lies not in the different ways that they *arrange* institutions but in the different ways that they *justify* them. Those that justify them to people as persons are similar. Those that justify them by conformity to a design are different.

The theory set out here is not a design. It is an explanation. One virtue of explanations is that they draw forth other explanations. More importantly, they offer perspective – they tell us what we are "up to." As the social relations which law must rationalize become ever more complex, perspective becomes ever more necessary. The simple laws have already been written. The connection between the doctrine of consideration and the first principle is obvious. The connection between the "hard look" doctrine of reviewing administrative agencies and the second principle is nowhere near so obvious (though it is a lovely example of the judicial process enframing the realm of uncertainty). The more complex and artificial the institution, the poorer the guidance of intuition and the more necessary are conscious guides to decision.

Justification comes easy to printers. Most of them don't know why a page of print that has straight margines left and right is "justified." They don't need to know, for the idea has immediate intuitive appeal; it is easy to accept and to remember, and, once remembered, it is an effective guide to behavior. It is easy to see that this line of print is not justified and to do something about it. It is not so easy to tell whether the "hard look" doctrine or the enforcement of a surrogate motherhood contract sits fairly on its page. Justification of law requires an understanding of the criterion against which it is being done. There is an intuitive core – a "sense" – to any act of judgment, but that core can be illuminated and developed by an understanding of the framework within which it operates.

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