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THE VIRTUE OF LIBERALITY IN AMERICAN COMMUNAL LIFE

Linda R. Hirshman*

The last straw for me was television producer Aaron Spelling's 600 square feet of closet space.¹ But the straw was really only a straw in the wind, a wind that has for some years carried signs of dissatisfaction with the extreme individualism of American life and law.² In

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1. Stein, *The House of Spelling: Massive Construction Project in Holmby Hills Flusters Some Neighbors*, L.A. Times, Apr. 8, 1988, § 5, at 1, col. 1 (home ed.) (Aaron Spelling has built an addition onto his home "to allow [room for] two clothes closet areas and adjacent balconies, approximately 28 feet and 42 feet in length and both approximately 8 feet in width.").

2. First life and then law, of course. Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873, 875-83 (1987). The impulse originally sprang almost simultaneously from philosophy, sociology, and history. In philosophy: See generally R. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS (1983); A. MACINTYRE, AFTER VIRTUE (1981); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); Taylor, *Hegel: History and Politics*, in LIBERALISM AND ITS CRITICS 177 (M. Sandel ed. 1984).

In sociology: See generally B. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART (1985) [hereinafter HABITS OF THE HEART]; M. JANOWITZ, THE RECONSTRUCTIONS OF PATRIOTISM: EDUCATION FOR CIVIC CONSCIOUSNESS (1983); Barber, *The Compromised Republic: Public Purposelessness in America*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 19 (R. Horwitz ed. 1977).

In history: See generally J. POCOCK, THE MACHIAVELLIAN MOMENT (1975); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); Pocock, *Virtues, Rights and Manners: A Model for Historians of Political Thought*, 9 POL. THEORY 353 (1981).

Legal scholars followed, and the connections to other disciplines and to each other are, as always, ambiguous and oblique, e.g., H. BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (1973), but any canon of civic republican jurisprudence must include: G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW (1986); M. TUSHNET, RED, WHITE AND BLUE (1988); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987) [hereinafter Michelman, *Possession*]; Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self Government*, 100 HARV. L. REV. 3 (1986) [hereinafter Michelman, *Traces of Self Government*]; Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979); Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963 (1987); Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537 (1983); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988); Sunstein, *Lochner's Leg-*

American legal philosophy and its first-born, constitutional theory,³ individualism reached its zenith in the rights-based theories and arguments that have dominated discourse since John Rawls' *A Theory of Justice*.⁴ The dissatisfaction is expressed most completely by revisionist scholars calling for the revival of commitment to the common, or public, good, beyond the sum of individual goods.⁵ These revisionist writings are generally categorized under the rubric of civic republicanism:⁶ civic, to distinguish the enterprise from capital *R* Republican-

acy, 87 COLUM. L. REV. 873 (1987); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986); Sunstein, *Two Faces of Liberalism*, 41 U. MIAMI L. REV. 245 (1986); Sunstein, *Madison and Constitutional Equality*, 9 HARV. J.L. & PUB. POLY. 11 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*].

In the disaffection with extreme individualism I include Professor Kenneth Karst's seminal work on community: K. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) [hereinafter K. KARST, *BELONGING TO AMERICA*]; Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986); Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) [hereinafter Karst, *Equal Citizenship*]; and the growing body of feminist jurisprudence: Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Minow, *The Supreme Court 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) [hereinafter Sherry, *Civic Virtue and the Feminine Voice*]; Sherry, *Women's Virtue*, 63 TUL. L. REV. 1591 (1989); West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986); West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986); West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) [hereinafter West, *Authority, Autonomy, and Choice*]; West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985).

3. See Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 189-212 (1988) (describing rights-orientation of American constitutional theory).

4. J. RAWLS, *A THEORY OF JUSTICE* (1971). As Robert Nozick described Rawls' influence, "[p]olitical philosophers now must either work within Rawls' theory or explain why not." R. NOZICK, *ANARCHY, STATE AND UTOPIA* 183 (1974); see also Collins & Skover, *supra* note 3, at 220-39. Collins and Skover "note that 21 of the 25 most-cited constitutional law articles in American law journals published from 1947 to 1985 are dedicated to individual rights issues." *Id.* at 220 n.121. The most influential examples of rights theories include R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); L. TRIBE, *CONSTITUTIONAL CHOICES* 165-266 (1985). I include in the category of individualists the law and economics theorists, because, although many critics categorize the law and economics movement as utilitarian, and thus not inherently individualistic, law and economics theory partakes of that subset of utilitarianism that equates social good with the sum of individual wealth-maximizing decisions. See, e.g., A. KRONMAN & R. POSNER, *THE ECONOMICS OF CONTRACT LAW* (1979); W. LANDES & R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986); R. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

5. See, e.g., Michelman, *Law's Republic*, *supra* note 2, at 1507-08 (distinguishing pluralism as not directed "towards any common ideal or self-transcendent end"); Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1554-55.

6. As Paul Brest pointed out recently, the phrase is redundant, but useful. Brest, *Further Beyond the Republican Revival*, 97 YALE L.J. 1623, 1623 n.1 (1988).

ism; and republican, to emphasize self-rule through political participation and deliberative decisionmaking.⁷

To this date, however, the revisionists' prescriptions for change have centered largely on directing the process of lawmaking and judicial review toward a public-regarding process, not on the substance of the good life for individuals or societies.⁸ There are at least two reasons for this restraint. First, the civic republicans are haunted by the ghost of Earl Warren.⁹ The revision began, and, to some extent remains associated with, the role of the federal judiciary as the most meaningful source of legal and social change.¹⁰ Yet, concerns of self-government, also a part of the civic republican position,¹¹ become most exigent when appointed, life-tenured judges are assigned the task of reading the Constitution to embody an affirmative theory of the social good. This institutional concern is related to the second and substantive barrier to change — the association of speculation about the nature of the good life with the apocalyptic horsemen so often decried by the liberal academic consensus: social hierarchy, elitism, exclusivity, and authoritarianism. In balking at the authoritarianism, the civic republican theorists reflect the strong appeal of liberal individualism; in balking at the elitism, the tug of liberal egalitarianism. For these reasons, having moved the discussion from the extreme individualism of rights theories to a more communal stance, civic republican scholarship stops short of articulating the ends to which the community should aspire, producing a theory accurately described re-

7. Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1541.

8. This is a point I have made before. Hirshman, *Brontë, Bloom and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 184-85 (1988) [hereinafter Hirshman, *Brontë, Bloom and Bork*] (citing Sunstein, *Lochner's Legacy*, *supra* note 2, at 918); Hirshman, *Foreword: Kicking Over the Traces of Self-Government*, 64 CHI.-KENT L. REV. 435, 443 (1988). Sunstein's recent *Standing and the Privatization of Public Law*, *supra* note 2, is typical in calling for greater citizen involvement in decisionmaking, in this case of the important "fourth branch" of government, but failing to articulate the goods that are to be sought in the review process. Most recently, Sunstein has proposed the goals of "nonsubordination" and "risk management," as alternatives to the traditional ends of compensatory justice. Sunstein, *The Limits of Compensatory Justice*, (forthcoming in *NOMOS*). Yet, even assuming that these phrases are stand-ins for the values of equality and security, even equality and security are ultimately instrumental to, rather than definitional of, the good. See *infra* Part II.

9. See Abrams, *Law's Republicanism*, 97 YALE L.J. 1591-92, 1597-98, 1604 (1988). As Professors Collins and Skover reminded us, in their timely and provocative essay, the publication of which corresponded almost to the day with the fifth (of six possible) national electoral victory of the representatives of American political conservatism, "Earl Warren is Dead." Collins & Skover, *supra* note 3, at 189.

10. See Michelman, *Traces of Self Government*, *supra* note 2; Sunstein, *Interest Groups*, *supra* note 2, at 49-59, 86. Lately Sunstein has been moving away from this narrow focus. Sunstein, *Lochner's Legacy*, *supra* note 2, at 886, 891-92.

11. See Michelman, *Law's Republic*, *supra* note 2, at 1504; Sunstein, *Beyond the Republican Revival*, *supra* note 2.

cently as "a muted hybrid."¹²

This article attacks the barriers to articulation of a theory of the good and advocates discussion of the substance of a good regime, specifically, a good American regime.¹³ Part I of this article addresses in some detail the civic republicans' revival of interest in the common life. I propose that it is dauntingly difficult, if not impossible, to articulate a satisfying version of a common life without a theory of the good life, an undertaking traditionally associated with authoritarianism and elitism. Rather than abandoning the enterprise, however, I propose to reopen the assumption that the association automatically rules out any undertaking. Toleration of some hierarchical ordering is required in order to open the dialogue over the meaning of a good life. Beginning with this assumption, I next assert that the classical vision of personal and civic virtue¹⁴ offers the best starting place for such a discussion.¹⁵ In addressing the American regime (although admittedly in the context of utopian speculation), I begin with the classical virtue of liberality because it is the virtue most pertinent to the failings of that regime.

The classical virtue of liberality is "the mean with regard to wealth."¹⁶ Liberality "resides . . . in the state of character of the

12. Abrams, *Law's Republicanism*, *supra* note 9, at 1591; *see also* Epstein, *Modern Republicanism — Or the Flight from Substance*, 97 YALE L.J. 1633 (1988); Fallon, *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1732 (1989); Lyons, *Substance, Process and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 763 (1987); Powell, *Reviving Republicanism*, 97 YALE L.J. 1703, 1710 (1988); Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1540-42 (1985).

13. Classical political philosophy differs from the modern because of its focus on the best regime. Since Aristotle, political theorists have known that a dialogue over the best regime begins with the participants' "primary concern" for their own regime. M. NUSSBAUM, *THE FRAGILITY OF GOODNESS* 240-63 (1986); Pangle & Tarcov, *Epilogue* in HISTORY OF POLITICAL PHILOSOPHY 932 (L. Strauss & J. Cropsey 3d ed. 1987).

14. *See infra* text accompanying notes 64-70.

15. As political philosopher Leo Strauss put it, well before the current republican revival: [D]emocracy is the regime that stands or falls by virtue: a democracy is a regime in which all or most adults are men of virtue, and since virtue seems to require wisdom, a regime in which all or most adults are virtuous and wise . . . Democracy, in a word, is meant to be an aristocracy which has broadened into a universal aristocracy.

L. STRAUSS, *LIBERALISM, ANCIENT AND MODERN* 4 (2d ed. 1989). The error in Strauss' identification of adults as men is beyond the scope of this article. *But see* Hirshman, *Brontë, Bloom and Bork*, *supra* note 8; S. OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1990). As Strauss students Thomas Pangle and Nathan Tarcov summed up recently, "[I]beral democracy remains a form of republicanism." Pangle & Tarcov, *supra* note 13, at 928.

16. ARISTOTLE, *NICOMACHEAN ETHICS* IV.1 at 79 (Ross trans. 1925) (World's Classics Paperback ed. 1980) [hereinafter ARISTOTLE, *ETHICS*]. In my references to the *Politics* and the *Nicomachean Ethics*, I am deliberately forgoing the traditional citation to the Bekker edition of the Greek text of Aristotle of 1831, which seem to me to be anachronistic at best and probably affected as well. The Oxford paperback edition of the Ross translation of the *Ethics* is readily available, as is the Oxford edition of the Barker *Politics*.

giver," not in the amount of wealth he possesses.¹⁷ The "liberal" man possesses the habitual disposition to exercise moderation with regard to money and property, a moderation amounting almost to indifference.¹⁸ He cares for money and property only to the extent that he may have enough to exercise the active virtue of giving the right amounts "to the right people, at the right time."¹⁹

Part I contrasts classical liberality with the modern treatment of distribution of wealth as a matter of right. In Part I, I show how each of the two most influential modern theories — Kantian individualism and utilitarianism — requires the giver to forgo distinctions among recipients and that this neutral viewpoint leads to an impasse between the demand for increasingly heroic behavior and the need for a cutoff to heroism. The escape, I suggest, lies in the judgment and moderation that are aspects of classical virtue. In this case, the virtue of liberality makes it possible to choose among contenders for redistribution, in the interest of a good common life.

Part II is an effort to apply the theoretical insights of Part I to the American regime. In Part II, I address what, I think, most observers of the American scene would agree is the nastiest contemporary American problem: the persistence of the underclass. The problem has two parts: it is a practical danger, and it reflects a failure of virtue, in an Aristotelian sense. Part II contends that this failure of virtue is attributable in substantial part to the treatment of all redistribution of wealth as a subset of modern distributive justice rather than as an independent virtue. As set forth below, American society, for historical, social, and political reasons,²⁰ fails almost entirely to articulate redistributive claims; the inability to make a claim of right for the underclass then closes the discussion.²¹ This failure of rights analysis to alleviate the plight of the underclass reached its high water mark in the Supreme Court decision in *San Antonio Independent School District v. Rodriguez*,²² rejecting a rights claim for equal funding of public schools. Despite the best efforts of legal academics to squeeze some redistributive claims into the language of the fourteenth amendment,²³

17. *Id.* at 81.

18. *Id.* at 36-40.

19. *Id.* at 79-82; see *infra* notes 80-105 and accompanying text. The use of the male pronoun is after Aristotle, not this author.

20. J. HOCHSCHILD, WHAT'S FAIR?: AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE 17, 20-21 (1981).

21. See *infra* notes 193-212 and accompanying text.

22. 411 U.S. 1 (1973).

23. See, e.g., Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988); Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor*

the avenue of constitutional rights claims has remained firmly closed. Further, even setting aside the issues of institutional competence and textual fidelity that always muddy a constitutional claim, the weakness of purely moral rights claims to redistribution has meant largely non-existent or ineffective legislative solutions.²⁴ The problem of the American underclass will never be solved unless analysts break the stranglehold of rights analysis on modern political thought and consider the claims of virtue — an analytic frame in which decisions are based at least in part on the moral well-being of the actor and the society, and in which discrimination among claimants is a desirable element of the virtue.

In Part II, I suggest that the preferred application of liberality to the problem of the underclass would be public, federal, and legislative. Public, because the laws help habituate people to virtue and because the virtue of liberality serves the common interest of social peace; federal, because, since the New Deal at least, social welfare has had a primarily federal locus and education to virtue will be undermined if people can easily avoid the laws; legislative, because the revival of the virtue of liberality in a civic republican state should lie with the representative branch, which comes the closest to the direct exercise of virtue by the citizens themselves, and because implementing liberality will require social and political judgments of some sensitivity that can be tempered and refined in the legislative process.²⁵ Proposals for redistribution are never in short supply; this article concludes by simply reminding the reader of two proposals afloat in the social science community for an impressive length of time: early childhood education and broad-based programs of ideological, behavioral and economic assistance for the estranged adults of the underclass.

I. THEORY

A. *Community Without Virtue*

Farber and Frickey tell us that legal scholarship is not only derivative, but, worse, takes up ideas from other disciplines just as they are about to be rejected there.²⁶ Certainly, legal republican theorists read-

Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969); Taylor & Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700 (1986).

24. See *infra* Part II.B.2.

25. See Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); Mikva, *Symposium on the Theory of Public Choice: Foreword*, 74 VA. L. REV. 167 (1988).

26. Farber & Frickey, *supra* note 2; see also Abrams, *supra* note 9.

ily acknowledge their sources in other disciplines.²⁷ First, they draw on the work of revisionist historians of the founding who purport to find a strand of civic republicanism running from Machiavelli through the English Whigs to the Framers.²⁸ This republican revival interprets the founding as including the value of deliberative democracy with an eye to a public or common good. This interpretation stands against the traditional understanding of the founding as a purely Lockean scheme for accommodating selfish or private interests.²⁹

In addition to relying on a revised version of the American constitutional story, legal republicanism also draws on contemporary criticism of the extreme individualism of American liberal society, a criticism that appears in a number of disciplines, including sociology, philosophy, and political theory.³⁰ The philosophical criticism of liberalism asserts that people take their identities from social institutions and social ends and that they desire to and can articulate a vision of the good from that communal frame.³¹ Theories, like John Rawls' landmark *A Theory of Justice*, which set to the side those truths about human nature in favor of constructing hypothetical individuals, rest on a false notion of humanity and are thus philosophically flawed.³² The sociological and political criticism asserts that, insofar as American society has evolved toward the liberal vision of human behavior, it produces lives for its members that are alienated, stripped of meaning, and devoid of significant human communities on every level, including

27. See, e.g., Michelman, *Law's Republic*, *supra* note 2, at 1494 & nn.3-4 (citing J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984); B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); F. MACDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); D. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); Shalhope, *Republicanism and Early American Historiography*, 39 *WM. & MARY Q.* 334 (1982); B. BARBER, *supra* note 2; *HABITS OF THE HEART* 28-31 & *passim*; R. BERNSTEIN, *supra* note 2; A. MACINTYRE, *supra* note 2; C. TAYLOR, *Kant's Theory of Freedom*, in 2 *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 318 (1985); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 *U. PA. L. REV.* 291 (1985); Herzog, *Some Questions for Republicans*, 14 *POL. THEORY* 473 (1986); Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81 (1984)).

28. See J. POCOCK, *supra* note 2; G. WOOD, *supra* note 2; *cf.* Shalhope, *supra* note 27 (discussing several historians' approaches toward republicanism).

29. See T. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 28 (1988); Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1540.

30. See *supra* note 27.

31. E.g., A. MACINTYRE, *supra* note 2, at 221 ("I find myself a part of history and that is generally to say, whether I like it or not, whether I recognize it or not, one of the bearers of a tradition.")

32. See Gutmann, *Communitarian Critics of Liberalism*, 14 *PHIL. & PUB. AFF.* 308, 309-10 (1985).

the level of politics.³³

In the years since the republican revival among historians, other scholars have undertaken to rebut the purported rediscovery.³⁴ Regardless of whether historical republicanism turns out to be a minor or major theme in the primal foundational myth,³⁵ the communitarian critique of liberal philosophy and society, being rooted in several strains of social theory, remains a viable and important development in contemporary American thought. The communitarian critique is compelling in part because it is but the most recent manifestation of long-standing social and philosophical concerns with community and the formation of communal values, a concern that reaches back at least to Rousseau and Nietzsche.³⁶ As the heirs of Rousseau and Nietzsche, the communitarians take their places as modern philosophers of the historicist school. They are modern, because, although searching for moral meaning and a theory of the good, they eschew the utopian speculation about the good life for humans and the best political order traditionally associated with classical political theory.³⁷ Within the modern classification, as historicists, the communitarians focus on human behavior in actual communities, rather than trying to create hypothetical social organization to promote understanding.³⁸

Still, a concern with community does not necessarily compel either modernism or historicism. As this article sets forth, the association of a concern for community with distinctly pre-modern speculation on the best life for human beings is certainly a well-established, indeed, perhaps the oldest, tradition in political philosophy.³⁹ As will be more

33. See generally HABITS OF THE HEART, *supra* note 2; B. Barber, *supra* note 2.

34. See J. DIGGINS, THE LOST SOUL OF AMERICAN POLITICS (1984); H. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981); Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20 (1986); Appleby, *The Social Origins of American Revolutionary Ideology*, 64 J. AM. HIST. 935 (1977-78); Kerber, *The Republican Ideology of the Revolutionary Generation*, 37 AM. Q. 474 (1985); Powell, *supra* note 12.

35. As Sunstein properly notes, "History does not supply conceptions of political life that can be applied mechanically to current problems." Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1539; see also Hirshman, *Brontë, Bloom, and Bork*, *supra* note 8, at 181-82 (describing the political rejection of interpretivism as espoused in J. ELY, *supra* note 4, at 43-44).

36. See L. STRAUSS, NATURAL RIGHT AND HISTORY 252-53 (1953).

37. Here I am self-consciously adopting Leo Strauss' position.

The classics understood the moral-political phenomena in the light of man's highest virtue or perfection, the life of the philosopher or the contemplative life. . . . The new philosophy takes its bearings by how men live as distinguished from how they ought to live; it despises the concern with imagined republics and imagined principalities." L. STRAUSS, THOUGHTS ON MACHIAVELLI 295-96 (1957).

38. See L. STRAUSS, *supra* note 36, at 13-16 (describing the relation of historicism to theory and actuality).

39. ARISTOTLE, THE POLITICS OF ARISTOTLE 5 (E. Barker trans. 1946) ("[M]an is by nature an animal intended to live in a polis.") [hereinafter ARISTOTLE, POLITICS].

fully set forth below,⁴⁰ classical communitarianism differs from historicist communitarianism in linking the value of community ultimately to human nature in general, rather than focusing only on the particulars of historical or existing societies.⁴¹ Communitarianism, therefore, is neither necessarily modern nor historicist. The contemporary communitarians, however, are both, and their theory has the strengths and weaknesses of both.

As historicists, they have the strength of the unassailably gritty, detailed, documented and compelling "tales" from real communities;⁴² compared to these concrete human experiences, the abstractions necessary to the systems-building communitarians reject seem improv-

40. See *infra* text accompanying notes 63-68.

41. Conversely, utilitarianism, a very theoretical and nonhistoricist theory about human systems, seeks the greatest good for the greatest number, producing results with a profoundly communitarian implication. See Fuller, *Jeremy Bentham and James Mill*, in *HISTORY OF POLITICAL PHILOSOPHY*, *supra* note 24, at 714-15.

42. Probably the best stories are in *Habits of the Heart*. Here is an abridged version of one of them:

Joe Gorman

... Joe has always lived in the small town where his father and mother have spent most of their lives: Suffolk, Massachusetts, a community of fewer than 20,000 people, about a half-hour's drive from Boston. Suffolk was founded 1632, and about six months before one of us interviewed Joe Gorman, the town celebrated its 250th anniversary. Joe had taken charge of organizing the celebrations, although he had not originally been asked to do so. During the early phases of planning the anniversary festivities, the town manager appointed a committee of locally prominent townspeople that did not include Joe. But the problem was that practically none of its members had much experience in planning such a complicated event. To make matters worse, according to Joe, about half of them were more interested in getting their names in the paper than in doing much work. As a result, the first event in the long series of planned anniversary celebrations had been a fiasco — a large community dinner with only enough food for about half of the people who showed up. Joe Gorman knew that he had the ability to organize the celebrations successfully, and he felt a kind of duty to do whatever he could to help. So he got himself on the committee and became, in fact if not in name, its head.

Under Joe's direction, the anniversary celebration turned out to be a grand success. The festivities stretched out for nine months. There were parades, concerts, a carnival, athletic contests, dinners, dances and ecumenical religious services, all well attended and smoothly organized. The fundamental meaning of the celebration was expressed for Joe in the slogan: "We are doing it together." As he put it, "That's so important — to work to get as many people as possible active." Another key theme was the importance of the family. The inspiration for many of the events came from the fact that that year had been proclaimed by the United Nations to be "the year of the family." For Joe, the highlight of the festivities was a softball tournament in which each team was made up of members of a different extended family. "We had eight clans — eight big families from Suffolk — in the tournament. In one of them some people came clear from Connecticut just to play softball on the side of the family. You know, for me the best time of the whole celebration was standing there back behind the bleachers after the softball games with members of the families that had played and talking with them about their families and drinking champagne. That to me was the ultimate. During the games between the clans, on many occasions, lots of people showed up besides the players to watch the game and see how people in the families were doing."

HABITS OF THE HEART, *supra* note 2, at 8-9. When feminist legal scholar Robin West went searching for a richer model of humanity than the law and economics scholars imagined, she found a universe of riches in the stories of Franz Kafka. See West, *Authority, Autonomy, and Choice*, *supra* note 2. Similarly, in describing the concept of equal citizenship for women, Professor Karst said it, Karst, *Equal Citizenship*, *supra* note 2, at 1, 32, 57-59, but Hawthorne said it

erished models of human conduct, indeed. But because shared notions of the good life are limited to those held by the members of any particular community at any given time, historicism has the weakness of being ultimately value-relative.⁴³ More significantly, being modern as well as historicist, contemporary communitarian theory lacks not only a universal standard for the good life, but *any* relevant standard of the good life, describing people merely as they are. Thus, although by intuition and experience we may agree with the communitarians that people derive their identities and satisfactions at least in part from membership in a community, we are ultimately driven to ask why we should care about a philosophy that instructs us to pursue ultimately meaningless (but communal) activities any more than we should care about the ultimately meaningless individualist goals of the theories the communitarians attack.

Predictably, the introduction of lawyers onto the civic republican scene has not changed the fundamental limits of the social and philosophical theory. As Richard Fallon has recently pointed out, the jurisprudential republican revival, operating as it does "at the border between constitutional law and political theory"⁴⁴ has produced to date a "watery"⁴⁵ hybrid, which resembles liberalism almost as much as it represents a new approach.⁴⁶

Thus, having spent several years trying to articulate a legal variant of communitarian theory, the two leading advocates of republican jurisprudence remain arrested in a procedural stance. Frank Michelman's most recent prescription, for an open and empathetic legislative and judicial dialogue that mimics the republican ideal of self-governance, founders on the Scylla of liberal criticism, that governmental dialogue, however elevated, inevitably culminates in coercion,⁴⁷ or the Charybdis, that "the concept can generate few guarantees as to substantive outcomes. Who knows what conclusions

better. Hirshman, *Brontë, Bloom and Bork*, *supra* note 8, at 217-24 (describing citizenship in Hawthorne's *Scarlet Letter*).

43. See Fishkin, *Defending Equality: A View from the Cave* (Book Review), 82 MICH. L. REV. 755 (1984) (reviewing M. WALZER, *supra* note 2).

44. Fallon, *supra* note 12, at 1733.

45. *Id.* at 1734.

46. *Id.* at 1730-31 ("Michelman's republicanism overlaps importantly with familiar elements of what would usually be regarded as the liberal tradition"; "Sunstein's republicanism . . . is avowedly 'liberal.' He accepts, for example, that a just society would recognize rights elevated above the debates characterizing ordinary politics, and he argues that the liberal commitment to government neutrality ought to be upheld at least in modified form.").

47. See *id.* at 1728 ("Professor Cover's stark diagnosis rings all too true: in a morally and politically pluralistic culture, losers in the judicial process . . . commonly experience their defeats as 'jurispathic' — as destructive of law and moral rights as they view them . . .").

might issue?"⁴⁸ Cass Sunstein has, for some years, been honing a jurisprudential theory of community that uses judicial review of legislation to enforce a civic republican concept of rational deliberation to reason toward the common good.⁴⁹ Here, too, however, without a substantive conception of the good, the theory remains little more than one of political good manners.

At this point, then, legal republicanism faces two problems: First, the individualist habit of mind is a hard one to break.⁵⁰ Second, although one might be willing and able to behave in an otherwise unacceptably authoritarian fashion for some secure notion of the good, the current republicans, being modern at bottom, claim to be agnostic as to the good.⁵¹ Thus, republican jurisprudence faces the same challenge as communitarian historicism: Why should we prefer an ultimately meaningless common enterprise to a meaningless individual one?⁵²

An increasing body of legal and related scholarship has turned once again to speculation about the good life for human beings. In separate writings, Owen Fiss and Anthony Kronman have each pursued such inquiries, looking to the education, training and inclination of lawyers as providing an opportunity for the exercise of practical wisdom in pursuit of a virtuous life.⁵³ Kronman undertakes to show

48. *Id.* at 1729.

49. Sunstein, *Interest Groups*, *supra* note 2; Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1579-81.

50. The conflict between autonomy and community is, of course, the sticking place. See Michelman, *Law's Republic*, *supra* note 2, at 1501 ("self-government . . . seems to express a demand that we are all bound to respect as a primal requirement of political freedom . . . the people's determination for themselves of the norms that are to govern their social life"); Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1554 ("The process of mediation is designed to produce substantively correct outcomes . . . through the ultimate criterion of agreement among political equals."). It is evidence of the thin ether of republicanism that Professor Martha Minow's recognition that "some voices will lose," Minow, *supra* note 2, at 92, is treated as a tough statement of political reality. And, compared to the "dangling conversation," Abrams, *Law's Republicanism*, *supra* note 9, at 1599, of civic republican discourse, it is a tough statement.

51. See, e.g., Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987); Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073 (1985); Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1986); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1156 (1983); West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985); West, *The Authoritarian Impulse in Constitutional Law*, *supra* note 2, at 543. Michelman put it more boldly. See Michelman, *Law's Republic*, *supra* note 2, at 1504 ("I do not know what is good for the soul."). I suppose Plato would be pleased at the concern, anyway.

52. I am hardly the first to suggest that we should not. See, e.g., A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 38-39 (1987); J. FISHKIN, *THE LIMITS OF OBLIGATION* (1982); W. GALSTON, *JUSTICE AND THE HUMAN GOOD* 7, 14-53 (1980); M. PERRY, *MORALITY, POLITICS, AND LAW* (1988); L. STRAUSS, *supra* note 36.

53. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986); Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987).

that the value of a "life in the law" is the opportunity to develop and display "excellence of character";⁵⁴ his work thus tracks the most private aspect of the classical tradition, the development of personal virtue.⁵⁵ Fiss makes a transition to a larger stage by asserting that such character and tradition enables the judiciary to give meaning to our public values at critical junctures:

In this account of adjudication I recognize that I am making an empirical assumption about the richness of the legal system in a country such as the United States. I am assuming that our legal culture is sufficiently developed and textured so as to yield a body of disciplining rules that constrains judges and provides the standards for evaluating their work.⁵⁶

Kronman's work is especially useful in reopening, in a modest context, the possibility of personal virtue as a general concept of the human good. I want to take the discussion to a more ambitious level by suggesting that the personal virtues Kronman and others invoke in this limited sphere play a role in guiding the behavior of citizens on the larger stage of the political community and ultimately shed light on what a good community should be. In this undertaking, I am consciously, and, I hope, critically, disagreeing with Sunstein's position that "modern republicans invoke civic virtue primarily in order to promote deliberation in the service of social justice, not to elevate the character of the citizenry."⁵⁷ It will be my contention, although hardly original, that the goal of social justice cannot be understood absent a conception of the good life for human beings and the role of the society in that life; the character of the citizenry is inextricably intertwined with the larger social issues.⁵⁸

In returning the discussion to the good life for human beings and the relationship between personal virtue and the public good, I consciously choose to engage in utopian political philosophy. Some years ago, in his neo-Aristotelian treatment of the subject, political philosopher William Galston restated the arguments for such an undertaking:

Utopian thought performs three related political functions. First, it guides our deliberation, whether in devising courses of action or in choosing among exogenously defined alternatives with which we are confronted. Second, it justifies our actions; the grounds of action are reasons that others ought to accept and — given openness and the freedom to reflect — can be led to accept. Third, it serves as the basis for the evaluation of existing institutions and practices. The *locus classicus* is the *Re-*

54. See Kronman, *supra* note 53, at 845-46.

55. Cf. Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1541 n.8.

56. Fiss, *supra* note 53, at 11.

57. Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1550-51.

58. See *infra* Part I.B.3 and text accompanying notes 286-92.

public, in which the completed ideal is deployed in Plato's memorable critique of imperfect regimes.⁵⁹

Galston also describes the characteristics of utopian thought that enable it to serve its purposes. "Utopias are images of ideal communities," whose purpose is to "make explicit and to justify the principles on the basis of which such communities are held to be ideal."⁶⁰ Accordingly, utopias are intended to be universal; they arise out of our experience but are not circumscribed by it; they are "cities of words," which may, but need not, exist, and they are constrained by the possibility of human and material preconditions neither illogical nor impossible.⁶¹

Now the enterprise of describing the good life for humans at all, much less as the ends of political community, immediately runs up against the objections set forth above: substantive notions of the good life do not respect individual autonomy and equality. Instead they are necessarily hierarchical, elevating certain behaviors and goals over others, which may be of equal or greater value in the eyes of the individual life-planner. Moreover, notions of the good life frequently reflect the current power-holding elite, who project their class, race, gender or other group "values" into universal truths. They are exclusive, in that the elite is usually exclusive, excluding people who do not share the characteristics valued by the elite. Finally, they are either selfish or totalitarian in that, insofar as each individual seeks personal virtue, he or she separates from the community of free and equal individuals; on the other hand, trying to create a virtuous community involves imposing one's will on the same other autonomous beings.⁶²

Upon closer examination, this cavalry of objections may be less formidable than it appears. First, the objection to a hierarchical ordering of human goals is greatly at odds with most peoples' experience of their own and others' direction of their lives. Everyone knows you can't have it all; ergo, all human lives involve ordering and therefore hierarchy. So the objection is not to the act of order, but, rather, to the act of imposing the order on other people. Thus, even if the vision of the good life were correct, the contention is, freedom is more important than virtue, even if we could know it (which, by the way, is a hierarchical ordering ranking autonomy over virtue).

The second line of argument asserts that, even if some lost freedom

59. W. GALSTON, *supra* note 52, at 14.

60. *Id.*

61. *Id.* at 15-16. There are other conditions, but these are the aspects material to this undertaking.

62. See Sunstein, *Beyond the Republican Revival*, *supra* note 2, at 1540.

were acceptable in exchange for a reliable version of the good life, the order imposed may reflect the intellectual hegemony of the elite, rather than an independently verifiable view of the good; in this worst case, one would achieve neither freedom nor virtue. This objection is certainly not without power. However, if the vision of the good is wrong, the first problem — conflict between virtue and autonomy — never arises. Accordingly, the objections from autonomy to any inquiry into the nature of the good, although not groundless, are at least premature. If and when philosophy reveals a reliable view of the good, the debate over communal avenues to that life may begin. Second, and equally important, as the revival of communitarianism reflects, even in America, autonomy has not always been trump. Instead, depending on the context, an acceptable resolution of the competing claims of virtue, in both its private and social roles, and individual autonomy may vary, and vary considerably.

Having thus tentatively justified the venture into utopian philosophy, I would begin with some of the principles developed by Aristotle. Aristotle's ethical writings are enjoying renewed status in American legal philosophy.⁶³ Writers and thinkers are once again willing to contemplate the possibility of a teleological explanation of human existence:⁶⁴ that people's reason, particularly practical reason, may be the quality of human life most productive of an understanding of human ends; that the capacity to reason carries with it the unique capacity to choose to order one's conduct among the claims of passion; and that such choosing, if done well, leads to a life of activity in accordance with virtue, which is the end, or goal, of human nature.⁶⁵

63. The most ambitious recent effort at confronting the nexus of law and Aristotelian virtue is Brosnan, *Virtue Ethics in a Perfectionist Theory of Law and Justice*, 11 CARDOZO L. REV. 335 (1989). See also Francis, *Virtue and the American Family* (Book Review), 102 HARV. L. REV. 469, 480 (1987); Kronman, *supra* note 53; Solum, *The Virtue and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988).

64. The teleological strain in several influential schools of contemporary legal philosophy appears in the works themselves and in the readings of those works by other philosophers of law. Thus, Roberto Unger's teleological thought in R. UNGER, *KNOWLEDGE AND POLITICS* (1975) provides fuel for the analyses of his followers, e.g., Cornell, *supra* note 27, at 340-41; Galston, *False Universality: Infinite Personality and Finite Existence in Unger's Politics*, 81 NW. U. L. REV. 751, 754 (1987). Michael Perry's classical intellectual antecedents, M. PERRY, *supra* note 52, are the focus of Martin Shapiro's analysis in Shapiro, *Morality and the Politics of Judging*, 63 TUL. L. REV. 1555, 1558 (1989). Teleological analyses have also surfaced recently in the context of a revived natural law approach, L. WEINREB, *NATURAL LAW AND JUSTICE* 7 (1987) ("The argument of this book restores the original understanding of natural law as a theory about the nature of being, the human condition in particular."), and feminist jurisprudence, Sherry, *Civic Virtue and the Feminist Voice*, *supra* note 2, at 543, 548.

65. The description of the role of virtue in ordering one's conduct among the claims of passion is very well presented in G. VON WRIGHT, *THE VARIETIES OF GOODNESS* (1963). The revival of virtue as an issue in legal philosophy has many strands. Most writers in legal journals attribute the revival to the earlier revival of virtue ethics in philosophy and social science. See, e.g., Francis, *supra* note 63, at 483 (Glendon draws on "the contemporary re-emergence of classi-

The revived interest in Aristotelian concepts of personal virtue, while valuable, stops short of the unanswered question of communitarian thought: what are the standards of a good common life? Yet here, too, Aristotle's work offers answers. Although the world abounds with writings about Aristotle's politics, the current jurisprudential neglect of the political writings warrants reiterating his basic principles here. Aristotle wrote that the state must reinforce education with the coercive power of the law if the whole world is to live in accordance with virtue⁶⁶ and that, in the pure realm of politics, the *polis* is necessary for a good human life, because it is the natural arena for the uniquely human qualities of language and justice.⁶⁷ Critical to the detailed treatment of the virtue of liberality set forth below is the little noted fact that Aristotle's *polis* depended in turn on the citizens' exercise of the virtues described in the *Ethics*:

The final end of men is the same whether they are acting individually or acting collectively; and the standard followed by the best individual is thus the same as the standard followed by the best political constitution. . . . The quality of courage and endurance is required for the activities of occupation: wisdom is required for those of leisure; temperance and justice are qualities required at both times⁶⁸

The current fashion for Aristotle certainly does not justify simply accepting his teachings, but the revival may indicate independent reasons for starting with them. First, the recent return to Aristotle's writings on virtue reflects the persistence of the human need "to know what we are doing and to be good."⁶⁹ For no matter how far philosophy has wandered from the Aristotelian beginnings, it has never been able to cast loose. The classical project has the endurance we associate with fundamental human concerns. Second, Aristotle's work, in contrast with that of the many who came after and the one who came

cal theories of virtue ethics"); Kronman, *supra* note 53, at 838 ("[I]t is my hope that what I say will contribute to the current revival of interest in the question of what it means, more generally, to live the life of a person, to have the cares and commitments, the character traits and dispositional attitudes, that give the lives of persons their distinctive shape.") (footnote omitted); Solum, *supra* note 63, 1735 ("In recent years, there has been a revival of interest in Aristotelian moral theory, and especially in Aristotle's theory of the virtues.") (footnote omitted). The revival appears in areas as divergent as the interpretation of the U.C.C., Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335, 339 n.14 (1988), and the law of criminal confessions, Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 739 (1988) ("[practical wisdom] is a translation of the Greek term, *phronesis*. Gadamer translates *phronesis* as 'the virtue of thoughtful reflection'").

66. ARISTOTLE, *ETHICS*, *supra* note 16, X.9, at 272; see also Brosnan, *supra* note 63, at 349-82 (how law promotes virtue by habituation and internalization).

67. ARISTOTLE, *POLITICS*, *supra* note 39, at 4-8.

68. *Id.* at 321.

69. A. BLOOM, *supra* note 52, at 238.

before, has a mixture of the theoretical and the practical that is appealing in a time and culture that is not yet prepared to choose between utopianism and modernism. Third, Aristotle's writings have a prudential and flexible quality that fits comfortably with other current philosophical enterprises.⁷⁰ Assuming, therefore, that we can open a discussion of virtue in American public life, what do Aristotle's writings add to an inquiry into the best American regime?

B. *Liberality, Ancient and Modern*

1. *Ancient*

I, for one, do not consider it a drawback that Aristotle's ethics were the discussion of "qualities admired or disliked by the cultivated Greeks of [his] time."⁷¹ One is hard-pressed, 2500 years later, to come up with aspects of the human character more promising for a desirable personal or communal life than courage, temperance, liberality, munificence, pride, good temper, friendship, truthfulness, ready wit, and justice.⁷²

Maybe Aristotle was onto something.

Not surprisingly, within the vast body of Aristotle's work, modern legal philosophy has focused on what Aristotle called justice in the particular sense, "honour or money or safety" in the dealings with one's neighbors,⁷³ rather than justice in the "wide" sense, "which answers to the whole of virtue."⁷⁴ There are several reasons for this. First, modern legal philosophy separates and emphasizes the public realm,⁷⁵ and, at least in the particular sense in which Aristotle used the term, justice is the closest analogue, in classical philosophy, to a purely public virtue. Second, Aristotle's categories of particular justice, distributive ("manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution") and rectificatory (concerned with "play[ing] a

70. Particularly legal philosophy, which, for example, seeks a common ground between teleological and deontological philosophies. See L. WEINREB, *supra* note 64; Barnett, *Foreword: Of Chicken and Eggs — The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POLY. 611 (1989).

71. W. ROSS, ARISTOTLE 202 (1923), *quoted in* W. HARDIE, ARISTOTLE'S ETHICAL THEORY 119 (2d ed. 1980).

72. W. HARDIE, *supra* note 71, at 118.

73. ARISTOTLE, ETHICS, *supra* note 16, at 110.

74. *Id.* at 110-11.

75. Both feminists and republicans repeatedly make this point. See, e.g., MacKinnon, *Privacy v. Equality Beyond Roe v. Wade*, reprinted in C. MACKINNON, FEMINISM UNMODIFIED (1987); Olsen, *The Family and the Market: A Study of Ideology and Legal Reforms*, 96 HARV. L. REV. 1497 (1983); Sunstein, *Lochner's Legacy*, *supra* note 2.

rectifying part in transactions between man and man"),⁷⁶ fit comfortably with the rights-oriented theories of the last generation of legal philosophy.⁷⁷

I believe, however, that legal, and thereby political, discourse has been impoverished by the concentration on Aristotle's particularistic justice, and that the time has come to cast off its hegemony openly.⁷⁸ Accordingly, I propose to mine other veins, equally rich, but somewhat less worked: Aristotle's writings — and those of others, of course — on the virtues other than particular justice, beginning, in this article, with liberality.⁷⁹

Aristotle saw liberality as one of the virtues pertaining to the use of money.⁸⁰ The excesses are prodigality, an excess of giving, and meanness, which can take the form of either an excess of taking or a deficiency of giving.⁸¹ (Since prodigality not accompanied by meanness usually ends in poverty, Aristotle recognized that meanness is the more common excess.⁸²) Being more interested in the ultimate uses of wealth than in its acquisition, Aristotle focused on giving rather than on refraining from wrongful taking.⁸³ The exercise of judgment in the virtue of liberality comes by giving to "the right people, the right amounts, and at the right time."⁸⁴

There is surprisingly little commentary on this aspect of Aristotle's writings.⁸⁵ While not all commentators agree that such virtues as lib-

76. ARISTOTLE, *ETHICS*, *supra* note 16, at 111.

77. See Areen, *A Need for Caring*, 86 MICH. L. REV. 1067 n.47 (1988) (citing Seidman, *Public Principles and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1007 (1987)); Hardwig, *Should Women Think in Terms of Rights?*, 94 ETHICS 441, 447 (1984); Olsen, *supra* note 75; Sherry, *Civic Virtue and the Feminine Voice*, *supra* note 2, at 543, 564-65 n.98.

78. In making this proposal, I do not want to understate the contrast between liberality and the traditional liberal world-view. As Judith Shklar has recently reminded us, the Kantian gentleman explicitly abjures "liberality or pity or noblesse oblige of any kind, because this might humiliate the recipients." J. SHKLAR, *ORDINARY VICES* 233 (1984).

79. See ARISTOTLE, *ETHICS*, *supra* note 16, at 79-85. In an ideal classical state, the law would command virtuous conduct: therefore, to focus on the virtues other than particular justice is to remain within justice in the broad sense. As Aristotle expressed it, "This form of justice, then, is complete virtue . . ." *Id.* at 108. But I am consciously choosing to redirect the discussion away from Aristotle's particular justice and, thus, as will be more fully set forth below, away from the modern concept of justice, which follows Aristotle's narrower version.

80. ARISTOTLE, *ETHICS*, *supra* note 16, at 79.

81. *Id.* at 82-84.

82. *Id.* at 83, 85.

83. *Id.* at 80.

84. *Id.* at 80.

85. See, e.g., ARTICLES ON ARISTOTLE (J. Barnes, M. Schofield & R. Sorabji eds. 1979); *ESSAYS ON ARISTOTLE'S ETHICS* (A. Rorty ed. 1980); D. ALLAN, *THE PHILOSOPHY OF ARISTOTLE* (2d ed. 1970); W. HARDIE, *supra* note 71; G. VON WRIGHT, *supra* note 65. Of course, it is difficult to search for what is not there. *But see Cox, Aristotle and Machiavelli on Liberty*, in

erality are "nonmoral"⁸⁶ issues merely depicting contemporary social taste,⁸⁷ commentators mainly discuss liberality for the light it sheds on Aristotle's attitude toward private property.⁸⁸ In the recent *The Crisis of Liberal Democracy: A Straussian Perspective*,⁸⁹ Professor Richard Cox provides a summary of the general understanding of Aristotelian liberality: it "presupposes the existence of and even the rightness of the private ownership of property,"⁹⁰ and it consists of "a kind of sustained and extensive moderation of the underlying and fundamental human passions,"⁹¹ thus making it, "in practice . . . exceedingly difficult to make citizens liberal in the true sense of the term."⁹²

Nor is passion the only barrier to liberality. Focusing on Aristotle's requirement that "the liberal man will give property only to the 'right' people,"⁹³ Cox concludes that "[r]eflection shows that the discrimination, the judgment, and the thoughtfulness required to separate the virtuous from the vicious prospective recipients of one's largess and to give only to the former make great demands on the moral and intellectual character of the giver."⁹⁴ Liberality involves, then, two of the critical aspects of virtue: moderation and judgment.

The connection between the virtue of liberality and the social order is less clear. Because Aristotelian political philosophy generally assumes the identity of personal and political virtue, the state "exists . . . for the sake of a good life"⁹⁵ and a political system must preserve itself by educating its citizens in the virtues that "support the best political system."⁹⁶

Although Aristotle did not elaborate on the role of the particular virtue of liberality in the public realm, the *Politics* reveals his assumptions about moderation in the pursuit of money and the objects of moderation in its retention. For example, in describing the household, Aristotle makes the point that wealth is limited to the resources neces-

THE CRISIS OF LIBERAL DEMOCRACY: A STRAUSSIAN PERSPECTIVE 125 (K. Deutsch & W. Soffer eds. 1987).

86. Cf. W. ROSS, *ARISTOTLE* 204 (1923).

87. Cf. *id.*

88. Irwin, *Generosity and Property in Aristotle's Politics*, *SOC. PHIL. & POLY.*, Spring 1987, at 37 (1987); Miller, *Aristotle on Property Rights* (Mar. 1986) (paper delivered to the Society of Ancient Greek Philosophers).

89. Cox, *supra* note 85, at 127.

90. *Id.*

91. *Id.* at 128.

92. *Id.*

93. *Id.*

94. *Id.* at 129.

95. ARISTOTLE, *POLITICS*, *supra* note 39, at 5 (emphasis omitted).

96. Irwin, *supra* note 88, at 48; *see also* ARISTOTLE, *POLITICS*, *supra* note 39, at 332-33.

sary for its subsistence.⁹⁷ He distinguishes the accumulation of wealth obtained by trade, which is potentially unlimited,⁹⁸ and concludes that people pursue the accumulation of excessive wealth due to anxiety about their livelihoods, an anxiety so great that they neglect their moral well-being.⁹⁹ In response to this problem, Aristotle reiterates the theme of moderation. Disputing Plato's scheme in the *Republic* of common ownership of property, Aristotle distinguishes between the love of money, which he accepts as universal, and the "excess" of such love, which he condemns. Immediately thereafter, he reminds the reader that the function of the form of goodness he calls liberality "consists in the proper use which is made of property."¹⁰⁰

It is important to note that, while disagreeing with what he portrays as an impractical and extreme suggestion regarding the proper allocation problem of property in Plato's *Republic*, Aristotle explicitly and repeatedly relies upon the public enforcement of virtue in moderating the acquisitive passions. Thus, while acknowledging that there may be social problems — of obsequiousness to the rich, for example, and disputatiousness with one's neighbors — associated with private property,¹⁰¹ Aristotle proposes that "the present system [of private property] would be far preferable [to communism], if it were adorned by customs and by the enactment of proper laws."¹⁰² As an "example"¹⁰³ of such legislation, Aristotle refers to the Spartan law, providing that each citizen must donate a particular share of his property for common meals.¹⁰⁴ In his favorable treatment of the Cretan constitution, Aristotle notes a similar, but superior, arrangement whereby common meals are provided from publicly owned property.¹⁰⁵ Although Aristotle does not elaborate on other arrangements, his use of the term "example" clearly implies the existence of other schemes for legislation of liberality, serving the general purposes of social peace and personal virtue through moderation of the excessive love of money.

97. ARISTOTLE, *POLITICS*, *supra* note 39, at 26.

98. *Id.* at 25.

99. *Id.* at 26.

100. *Id.* at 50.

101. *Id.* at 50-51.

102. *Id.* at 49.

103. *Id.* at 52.

104. *Id.* at 52, 82.

105. *Id.* at 52, 81-82.

2. Modern

For our purposes, modern political philosophy diverges from the classics in three important ways. Modern philosophy proposes the separation of private virtue and political morality; modern philosophy accepts the premise of man's imperfection; and modern philosophy contemplates the commensurability of all individuals. In this section, we will explore the fate of liberality in this modern context. The writings of John Locke reveal the metamorphosis of classical virtue under the impact of the separation of private and public and the premise of imperfection. The deontology of Immanuel Kant and the twentieth-century debates over utilitarianism reflect the development of concepts of altruism under the modern assumptions of imperfection and moral equality.

John Locke may stand as the paradigmatic modern social contract theorist. Although not the first, he is considered the most influential thinker to have separated issues of personal virtue from political philosophy.¹⁰⁶ Thus, in modern political philosophy, the personal virtue of liberality loses its status as an integrated part of a whole concept of justice.¹⁰⁷ This distinction separates the modern from the classical treatment of liberality, because, in a classical utopia, whose end is to promote the good life for human beings, the virtues are all encompassed in the broad justice of obedience to the laws of a good state.¹⁰⁸

In Locke's construct, a main nonpolitical source of moral direction is religion, and, although it is not Locke the theologian who is of interest here, one may note with Locke scholar Thomas Pangle that Locke appears to convert the traditional notion of charity as a duty of the giver into a very modern claim of right belonging to the subject.¹⁰⁹ Having noted the separation of the personal virtue from the political question of distributive justice, the remaining question is what Locke's redistributive intent was.

Here, there is much debate, largely centering on the so-called Lockean "proviso" that acquisitive individuals in the state of nature

106. L. STRAUSS, *supra* note 36, at 68-69 (Hobbesian rejection of classical unity); *id.* at 178 (Machiavellian rejection of classical utopianism); *id.* at 213 n.63 (separation of virtue and public pursuit of happiness); *id.* at 221 n.82 (Locke, a follower of Hobbes, replaces love and charity with refraining from harm); *cf.* C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 1, 3 (1962).

107. See T. PANGLE, *supra* note 29, at 144, 169, 306 n.2.

108. See ARISTOTLE, *ETHICS*, *supra* note 16, at 107-08.

109. T. PANGLE, *supra* note 29, at 144, 306 n.2; *cf.* R. ASHCRAFT, *REVOLUTIONARY POLITICS AND LOCKE'S Two Treatises of Government* 272 n.186 (1986). Although Pangle indicates a disagreement with respected Locke commentator Richard Ashcraft regarding whether Locke's charity is a duty or a right, both agree on its limited scope.

must leave behind "enough and as good" quality as that taken.¹¹⁰ At one extreme, Leo Strauss and C.B. MacPherson assert that the proviso does not survive the state of nature; thus, the right to appropriation of property in civil society is unlimited.¹¹¹ At the other, John Dunn states a generous conception of the ongoing right — to a "sufficient and commodious living."¹¹² Dunn has staked out the far ground; most discussion assumes a far less generous reading of Locke. Focusing on the whole sweep of his writings, rather than on an isolated passage, most commentators agree that the Lockean rights-claim to redistribution is limited to little more than subsistence, based on the natural right to life, with strict disincentives for laziness and improvidence.¹¹³

A passage in Locke's less well-known writings supports this limited commitment to redistribution. Locke unexpectedly raises the subject of liberality (even using the classical term) in his essay, "Some Thoughts Concerning Education."¹¹⁴ There, he advises the reader to teach children "to part with what they have, easily and freely to their friends."¹¹⁵ The interesting part of Locke's essay is that, in direct contrast to the classical teaching of liberality as an antidote to excessive attachment to property, Locke advises parents to "constantly tak[e] care that [the child] loses nothing by his liberality. Let all the instances he gives of such freeness be always repaid, and with interest; and let him sensibly perceive that the kindness he shows to others is no ill husbandry for himself."¹¹⁶ Thus, rather than inculcating a detachment from gain, Locke would use long-term attachment to gain to generate desirable short-term public behavior.

The distance between Locke's world and the world of classical philosophy lengthens in his reasons for the desirability of a liberal character. For Locke, liberality has no inherent value; instead, by inculcating a pattern of liberal behavior early, the parent prepares the child to forgo the more serious mistake of injustice: "But because chil-

110. J. LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* § 27 (1947).

111. L. STRAUSS, *supra* note 36, at 239-46; C. MACPHERSON, *supra* note 106, at 211-14.

112. Dunn, *Justice and the Interpretation of Locke's Political Theory*, 16 *POL. STUD.* 68, 82 (1988).

113. See, e.g., R. ASHCRAFT, *supra* note 109, at 272-73; R. NOZICK, *supra* note 4, at 174-82; T. PANGLE, *supra* note 29, at 169-70; J. TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 131-39, 166 (1980); Rose, "Enough, and as Good" of What?, 81 *NW. U. L. REV.* 417 (1987); Stick, *Turning Rawls into Nozick and Back Again*, 81 *NW. U. L. REV.* 390 n. 140 (1987).

114. J. LOCKE, *Some Thoughts Concerning Education*, in *JOHN LOCKE ON EDUCATION* (P. Gay ed. 1964).

115. *Id.* at 83.

116. *Id.* at 83.

dren cannot well comprehend what injustice is, till they understand property, and how particular persons come by it, the safest way to secure honesty, is to lay the foundations for it early in liberality"¹¹⁷ What is this injustice Locke is so anxious to avoid? "[P]ossessing themselves unjustly of what is another's, whilst there are in the world stronger and more men than they."¹¹⁸ Thus, liberality in Locke's world is nothing more than the preparation for participation in the Lockean regime of property.¹¹⁹ Liberality for Locke ceases to be a virtue in an Aristotelian sense — that is, a way of being that is good in and of itself and essential among the citizens of the good regime.

A second source of modern thought on the subject may be traced to Immanuel Kant. Like Locke, in discussing charity, or altruism — to use another modern term — Kant did not expressly concern himself with the issue of public versus private morality. Also as in Locke, issues of altruism were not particularly prominent in Kant's work. However, Kant's signal contribution to moral philosophy — the categorical imperative of moral behavior — and his fourth illustration of the imperative do speak directly to the question. The categorical imperative — that people must "act only on a maxim by which you can will that it, at the same time, should become a general law"¹²⁰ — dictates that we must exercise benevolence in anticipation of the occasion when we may anticipate needing similar treatment.¹²¹ Thus, Kant's treatment of altruism reflects the modern vision of man as having a limited capacity for virtue and sharing equally in a self-centered, but egalitarian, uniformity of rights and duties.

The third and final source of modern political philosophy — utilitarianism — reintroduces many of the issues of classical liberality. First, utilitarianism, while coexisting with a largely Lockean view of the state, is not inherently a philosophy of limited government. In fact, limited government is necessary only in one variant, which assumes that the invisible hand of wealth maximization would produce utilitarianism's goal of the greatest good for the greatest number.¹²² If

117. *Id.* at 84.

118. *Id.* at 85.

119. I am grateful to Professor Carol Rose for introducing me to the communitarian implications of participating in the Lockean regime. See C. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. L. & HUMANITIES 37 (1990).

120. I. KANT, *Metaphysical Foundations of Morals*, in THE PHILOSOPHY OF KANT 172 (C. Friedrich ed. 1949) (emphasis omitted).

121. *Id.*

122. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 288-89 (J. Burns & H.L.A. Hart eds. 1970); 8 F. COPLESTON, A HISTORY OF PHILOSOPHY 13 (1966); Fuller, *Jeremy Bentham and James Mill*, in HISTORY OF POLITICAL PHILOSOPHY,

government action were required for the utilitarian goal, utilitarianism would support such action. Thus, utilitarianism, like classical political theory, contemplates, at least, a much more expansive official sphere.¹²³ Second, in the period of utilitarian hegemony, most moral philosophers did not distinguish benevolence or charity, but accepted a simple scheme for acts of moral significance consisting of duty, prohibition, and permission and developed a catalogue of duties and prohibitions designed to produce the desired good effects.¹²⁴ In this exercise, utilitarianism suffered from its inability to draw coherent lines around duty, or between giver and recipient. If every action must be judged against a duty to produce the greatest good, any distribution has moral consequences, which makes it very difficult to make judgments.¹²⁵

About a generation ago, in a development interestingly paralleling the legal positivism debate,¹²⁶ philosophers began to chafe under the inadequacy of the utilitarian categories to account for desirable behavior not amounting to an enforceable¹²⁷ duty. In an influential little article, "Saints and Heroes," moral philosopher J.O. Urmson attacked this longstanding classification as "totally inadequate to the facts of morality"¹²⁸ because it does not account for acts of supererogatory saintliness and heroism, which, while far beyond "duty" as commonly understood, are entitled to some moral recognition beyond the thin title of "permission." As Urmson put it,

[W]e need to discover some theory that will allow for both absolute duties, which . . . can be exacted from a man like a debt, to omit which is to do wrong and to deserve censure, and which may be embodied in formal rules or principles, and also for a range of actions which are of moral value and which an agent may feel called upon to perform, but which

supra note 13, at 710, 723-24; Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769 (1985).

123. The current debate over the intrusiveness of utilitarianism goes back at least to the Smart/Williams debate in the early 1970s. See J.J.C. SMART & B. WILLIAMS, *UTILITARIANISM FOR AND AGAINST* (1973).

124. See Urmson, *Saints and Heroes*, in *MORAL CONCEPTS* 60, 67-68 (J. Feinberg ed. 1969).

125. *Cf. id.* at 71.

126. See Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

127. By enforceable, many modern philosophers adopt Mill's simile: one should be able to exact performance "as one exacts a debt." J. MILL, *UTILITARIANISM* 60 (1948); see J. FEINBERG, *Supererogation and Rules*, in *DOING AND DESERVING* 6 (1970). In *Supererogation*, Feinberg made the traditional positivist distinction between moral enforceability and legal enforceability, the latter involving "civil liability or criminal punishment for nonperformance." *Id.*

128. Urmson, *supra* note 124, at 60.

cannot be demanded and whose omission cannot be called wrongdoing.¹²⁹

In attempting to articulate a new terminology, Urmson referred back to the utilitarian debate that was his immediate intellectual backdrop. He noted that those acts the utilitarians detailed in attempting to describe the ultimate good for their theory — characteristics like promise-keeping, abstinence from murder, theft, and the like — actually had in common a more modest characteristic: they were the minimum qualities necessary for people to live together in society.¹³⁰ Here, he thinks, lay a possible insight into a new scheme of duty, including both those minimum requirements for living together, and actions beyond duty, like heroism and saintliness, which, while more elevated than permission, could not be exacted.¹³¹

Anticipating the criticism that his scheme lacked a certain moral ambition, Urmson defended it on the grounds that a modest moral scheme would help people as they actually are or reasonably can become, rather than overreaching in the name of an ideal and failing, with the predictable consequence of promoting relativism.¹³² Unlike more demanding schemes of moral value, Urmson's sphere of moral duties would give a special status to those matters where universal compliance is at a premium; his duties would be within the realm of normal human capacity, "formulable in rules of manageable complexity,"¹³³ and formulated in terms of enforceable rules.¹³⁴

Not surprisingly, contemporary political theory, heavily influenced by Rawls' emphasis on generally applicable rules of social organization, focuses on defining duties — in Urmson's terminology, the acts we owe to each other simply because of a common membership in society. Each of the major sources of modern political theory is represented in the contemporary debate. The scheme of minimal duties associated with the traditional reading of John Locke appears in *Anarchy, State and Utopia*, where Robert Nozick asserts that the only justifiable state is the minimal state, protecting its citizens against force and fraud in the form of "boundary crossings" against existing

129. *Id.* at 67.

130. *Id.* at 67-68.

131. *Id.* at 68.

132. *Id.* at 69-72.

133. *Id.* at 70.

134. *Id.* at 70-73. Although Urmson, like most of the philosophers in this area, was frustratingly silent on the obviously relevant legal positivism/natural law debate, his characterization of a modest sphere of moral duty sounds amazingly like Lon Fuller's recitation of the internal morality of law — the achievement of rules that are predictable, within human capacity, and stable. See L. FULLER, *THE MORALITY OF LAW* 41-44 (1964).

holdings. Although in a universe encompassing more than just the political sphere, moral claims may arise beyond this jural sphere of rights, *Anarchy, State and Utopia* is devoid of any reference to moral obligations beyond rights; hence, one may assume that no general requirement of even minimal scope exists in this theory.¹³⁵ By contrast, Rawls expresses an explicit — if somewhat laconic — version of what he calls “mutual aid.”¹³⁶ As free and equal moral persons, he posits, we owe each other a “natural duty,” which attaches without agreements, that, if we can help each other without excessive risk, we should do so.¹³⁷ Rawls justifies this principle on the watered down Kantian grounds that such benevolence would have a pervasive essential effect on everyday life, knowing that we live in a society where we can depend on each other.¹³⁸

Like Urmson, Rawls explicitly asserts the superiority of his theory to classical utilitarianism on the grounds that it provides a line between moral duties and supererogatory acts.¹³⁹ By contrast, a contemporary utilitarian, Peter Singer, embraces the heroic implications of utilitarianism, asserting that utilitarianism requires that, “if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.”¹⁴⁰ As Singer recognizes, “the revision in our moral conceptual scheme . . . would, given the extent of both affluence and famine in the world today, have radical implications.”¹⁴¹ And, as Singer also recognizes, the biggest change will be where the line is drawn between duty and charity,¹⁴² which, in Singer’s scheme, will entail “giv[ing] until we reach the level of marginal utility — that is, the level at which, by giving more, I would cause as much suffering to myself or my dependents as I would relieve by my gift.”¹⁴³

I sure wouldn’t want to live in Singer’s world, and Fishkin has even written a book to explain why not.¹⁴⁴ Singer’s theory, according to Fishkin, violates at least two fundamental intuitions about the basic structure of individual morality: first, that there is a “cutoff for heroism — the notion that there are limits on what any other person can

135. This is Fishkin’s reading of Nozick. J. FISHKIN, *supra* note 52, at 68-69.

136. J. RAWLS, *supra* note 4, at 114.

137. *Id.* at 114-15.

138. *Id.* at 339.

139. *Id.* at 117.

140. Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972).

141. *Id.* at 236.

142. *Id.* at 235-36.

143. *Id.* at 241.

144. J. FISHKIN, *supra* note 52.

demand of us as a matter of duty or obligation”¹⁴⁵ and, second, a “[r]obust [z]one of [i]ndifference: a substantial proportion of any individual’s actions falls appropriately within the zone of indifference or permissibly free personal choice.”¹⁴⁶

Fishkin’s insight into Singer’s theory would seem to send most thinkers running to the shelter of Rawls’ self-proclaimed limited altruism. But, according to Fishkin, even under Rawls’ minimal formula, heroic sacrifice of Singer’s type would ultimately be required.¹⁴⁷ First, all positions of neutral viewpoint mandate a formula of general obligation:

If we love our neighbors as we love ourselves, we are inexorably led to the admission of at least some positive, general obligations. . . . From any of [the neutral] perspectives, *some* principles of general obligation seem undeniable. How would one argue against the principle of minimal altruism [obligation to save a human life, if the cost is minor], for example, from such a perspective? If I have to consider whether to save a starving refugee at minor cost to myself, *after* I have put myself realistically in the shoes of the starving refugee, any reasonable calculation of the interests at stake will lead me to conform to the obligation.¹⁴⁸

Rawls’ version of neutrality does not escape the theoretical compulsion to admit general obligations:

I am to imagine myself choosing a moral principle out of self-interest from behind a “veil of ignorance” which, according to Rawls, makes it rational for me to take seriously the possibility that I will occupy the worst position. Clearly, I will wish to choose principles that ensure my survival and (at least) minimal well-being. The prospect of becoming a starving refugee provides a clear motivation for requiring substantial sacrifices from those who turn out to occupy the more fortunate positions. It should be obvious that a principle of redistribution far more demanding than minimal altruism would be chosen in the original position. Yet even minimal altruism is sufficiently demanding, at the large scale, to produce our dilemma.¹⁴⁹

Thus, any altruism above Nozick’s zero altruism slides inexorably into Singer-like self-sacrifice:

If every small contribution to famine relief will save a human life or prevent other serious harm . . . then I am obligated by the principle of minimal altruism to give — and to continue giving — until the marginal sacrifice involved in any individual act of giving is more than minor. The disparity in affluence between the developed countries and the world’s poor is so enormous that an American citizen of average means

145. *Id.* at 7.

146. *Id.* at 23.

147. *Id.* at 159.

148. *Id.* at 34 (emphasis in original).

149. *Id.* at 159 (footnote omitted).

. . . could give half his income — and it would still be the case that an additional small contribution would be a minor sacrifice. If I were reduced to half my present (junior faculty) salary, I could still afford to give five more dollars.¹⁵⁰

Yet so inconsistent is this result with our existing intuitions about the limits of self-sacrifice that Fishkin feels obliged to conclude:

[T]hese difficulties pose a challenge that is aimed more squarely at liberalism than at other ideologies and moral positions. To give up either the general obligations that are rooted in impartiality or the limits on moral requirements that are presupposed by individualism would represent a very great revision in liberal assumptions as well as in the way most of us think and act with respect to moral questions. Some great revision in our assumptions or in our action is required.¹⁵¹

3. *The Virtue Connection*

Well, it's an imperfect world.¹⁵² And therein, I assert, lies the answer to Fishkin's dilemma. While neutral viewpoints may illuminate a piece of the path toward a good life, they just do not light the whole way.¹⁵³ Neutral viewpoint philosophy having failed to solve the problem of altruism, either the neutrality or the altruism must be abandoned. Nozick presents us with a vision of a world without charity;¹⁵⁴ having rejected that vision, we are left essentially with the classical world of nonneutrality.

In an influential response to Urmson, contemporary philosopher Joel Feinberg has opened an avenue that may prove fruitful.¹⁵⁵ Feinberg would replace Urmson's scheme of spheres of duty and spheres beyond duty into a more neutral division of duty and nonduty, the latter being all acts not required, even those acts bearing no relationship to the acts that are required. Feinberg describes the acts of saintliness or heroism that inspired Urmson's attack on the earlier moral scheme as nonduties, involving excessive sacrifice, but, most significantly, distinct because also involving moral worth or praiseworthiness.¹⁵⁶ Feinberg gives several examples to illustrate the role of the distinction of moral worth; the most graphic is "the greedy adventurer

150. *Id.* at 72 (emphasis omitted).

151. *Id.* at 171 (emphasis omitted).

152. *Id.* at 161 & n.9. Cf. McGuire, *The Calculus of Moral Obligation*, 95 ETHICS 199, 199-200, 223 (1985) (altruism must factor in group behavior, which factor affects the linearity and equivalence of Fishkin's theory).

153. See Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POLY. 625 (1988) (arguing that communal bonds are not strong enough to hold our society together, and thus we need rights to "fall back on" in failed relationships).

154. J. FISHKIN, *supra* note 52, at 68.

155. See J. FEINBERG, *supra* note 127.

156. See *id.* at 12-13.

who sets off on an arduous journey into the heart of the jungle."¹⁵⁷ Such an action is not a duty under anyone's scheme and certainly sounds excessively hard; nonetheless, the adventurer's journey is not something we would consider saintly or heroic, because the critical third element — moral worth — is missing.

In grappling with this core issue of moral worth, Feinberg makes a distinction that bears directly on the tough, but seemingly unavoidable, task of choosing avenues of liberality. First, there is an "institutional complex" of concepts of merit, which

consists of (1) essentially jural or institutionally connected rules which enjoin, permit, and prohibit, and thus impose duties and obligations, and (2) other rules which prescribe procedures for determining merits and demerits [i]n such institutions . . . in which behavior is in part governed by such rules and regulations.¹⁵⁸

But Feinberg is more interested in "a quite different conception of personal merit and a quite distinct sort of rule."¹⁵⁹ Here "we are concerned with a person's merit or worth, not merely in respect to this or that job or office, skill, or function, but 'in the last analysis,' *all things considered*."¹⁶⁰ In order to make this calculation, Feinberg assumes that "there must be some special job of a man as such, so that being good at that job confers final, overall worth."¹⁶¹ Well, you knew it had to be in here somewhere: "Man is by nature an animal intended to live in a *polis*,"¹⁶² and judgments about acts of moral worth may be made based on what is necessary for a citizen of a good society in order to fulfill his nature.

Thus Feinberg, vocal defender of liberalism, articulates something very close to the classical formulation. The Aristotelian vision was of a unity of private and public virtue. The virtuous man, exercising moderation over his passion for money, is fulfilling not only his own nature, but also fits into the need for public peace and for a regime in which the middle class predominates.¹⁶³ This "good" society places us squarely between Urmson's minimal social world and Singer's millenarian vision, or, to borrow another locution, between "thin democracy"¹⁶⁴ and a smothering authoritarianism.

157. *See id.* at 12.

158. *Id.* at 14.

159. *Id.* at 15.

160. *Id.*

161. *Id.* at 19.

162. ARISTOTLE, *POLITICS*, *supra* note 39, at 5.

163. *Id.* at 181-83.

164. The locution is Barber's. B. BARBER, *STRONG DEMOCRACY*, *supra* note 2, *passim*. Barber analyzes American liberal democracy as inadequately oriented toward public participation.

In this good society, the exercise of liberality will serve three purposes which modern distributive justice cannot meet: First, where claims of desert do not extend much beyond that necessary for minimal social peace,¹⁶⁵ yet pressing needs exist beyond the recognized claims of desert to distributive justice, the exercise of the virtue of liberality may fill the gap. Second, in a good society, there is necessarily an arena for behavior that falls far short of the ideal. In the area of redistribution, such actions can be experimental, or simply insufficient.¹⁶⁶ Yet, modern distributive justice always focuses on perfection: a state of nature, a social compact, a veil of ignorance, all so that perfect equity pertains in all social arrangements. Liberality side-steps these utopian barriers to entry. Third, since Hobbes, and certainly since Rawls, political philosophy has focused so intently on the lowest common denominator of society that it has forgotten the interest of the fortunate in a life of virtue.¹⁶⁷ Liberality enables those capable of virtue to use their reason, *inter alia*, to select recipients of welfare, a decision not permitted by the perfect exigencies of rights-based claims at either extreme.¹⁶⁸

In sum, there is no shortage of candidates for the elements of the good life — for individuals or for societies. As a first step in examining some of these candidates, I have suggested the classical virtue of liberality: the vision of a society of citizens, moderate in their passion for property and enjoying some of the social fruits of peace and stability while avoiding the floodgates implications of modern altruism. Having made out the general claim for the virtue, I turn, in the next section, to the role of liberality in the American regime.

II. THE NATURE OF THE REGIME¹⁶⁹

The American economic system alone may have never developed

As a result, peoples' lives lack the discipline of communal dialogue, and political society lacks resistance to totalitarian truth. *Id.* at 24-25.

165. See, e.g., HOCHSCHILD, *supra* note 20, *passim* (Americans do not typically support significant redistributions of wealth); J. PATTERSON, *AMERICAN'S STRUGGLE AGAINST POVERTY 1900-1985* (1986), *passim* (same); L. KOMISAR, *DOWN AND OUT IN THE USA* (1974), *passim* (same).

166. Graham, *Justice, Charity and the Third World*, 311 *MODERN THEOLOGY* 21, 29-30 (1986).

167. See L. STRAUSS, *supra* note 15, at ch. 1; L. STRAUSS, *supra* note 36, at 168-69.

168. See Selznick, *The Idea of a Communitarian Morality*, 75 *CALIF. L. REV.* 445, 446 (1987) ("The difference principle is founded in rationality and reciprocal advantage, not in sympathy and benevolence.").

169. The regime is an arrangement of a city with respect to its offices, particularly the one that has authority over all matters. For what has authority in the city is everywhere the governing body, and the governing body *is* the regime. As Aristotle makes clear at the outset of his discussion, while the regime is in the first instance an institutional arrangement,

into a state of fatal inconsistency with republican political ideals without the addition of the "poison"¹⁷⁰ of black slavery. Today's reality is, however, that race and poverty together have produced one of the few social developments (the others being, for instance, aristocratic titles and military dictatorship¹⁷¹) inconsistent with even a minimal concept of a republican government: a permanent underclass, cut off by walls of discrimination, illiteracy, hopelessness, and, perhaps worst, lack of education for participation in the community.¹⁷² The thesis of this Part is that the persistence of this social development — radically inconsistent with minimum notions of republican politics — demonstrates the impossibility of separating, as the civic republicans seem to attempt, social justice from the character of the citizens.

A. Background

We Americans really love our money.¹⁷³ Apparently we always did.¹⁷⁴ As a commentator of the Jacksonian era expressed it, "In the United States the pride of wealth has more force than in any other country because there is here no other pride to divide the human heart."¹⁷⁵

On the other hand, the civic republican historians have pointed up an equally respectable American tradition, which tended to regard property as instrumental to the virtue of republican self-governance. A man could not be a citizen, this line of thinking went, if he did not

the regime cannot be properly understood in institutional terms alone. The regime reflects more fundamental political realities — the relationships of authority and subordination between the different groups that make up the city. For all practical purposes, the politically dominant class — the "governing body" (*politeuma*) — is the regime.

Lord, *Aristotle*, in *HISTORY OF POLITICAL PHILOSOPHY*, *supra* note 13, at 139 (citation omitted).

170. Gest, *Civil-Rights Drive Shifts to Low Gear*, U.S. News & World Report, July 2, 1984, at 27.

171. See W. WIECEK, *THE GUARANTEE CLAUSE OF THE U. S. CONSTITUTION* 11 (1972).

172. See NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY* (G. Jaynes & R. Williams eds. 1989); W. WILSON, *THE TRULY DISADVANTAGED* 8 (1987); Auletta, *The Underclass* (pts. 1-3), *NEW YORKER*, Nov. 16, 1981, at 63, Nov. 23, 1981, at 72, Nov. 30, 1981, at 101; Edelman, *supra* note 23; Karst, *supra* note 23; McLanahan & Garfinkel, *Single Mothers and Social Policy*, 501 *ANNALS* 92, 93-94 & nn.5, 6, 8 (1989); Wacquant & Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, 501 *ANNALS* 8 (1989); *Chicago on Hold: The New Politics of Poverty* (pts. 1-5), *Chi. Tribune*, Aug. 29, 1988, § 1, at 1, col. 2; Aug. 30, 1988, § 1, at 2, col. 1; Sept. 1, 1988, § 1, at 1, col. 2; Sept. 2, 1988, § 1, at 1, col. 2; Sept. 4, 1988, § 1, at 1, col. 3. See generally *The Ghetto Underclass: Social Sciences Perspectives*, 501 *ANNALS* (1989) (symposium on the underclass).

173. This should hardly require an authority, but should something be helpful, see T. WOLFE, *THE BONFIRE OF THE VANITIES* (1988). Some people even think we wrote the Constitution to protect it, C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

174. See T. PANGLE, *supra* note 29, at 93.

175. J. DIGGINS, *supra* note 34, at 145 (1984) (quoting W. GOUGE, *A SHORT HISTORY OF PAPER MONEY AND BANKING IN THE UNITED STATES* 30-33 (1833)).

have enough property to provide for his needs; if he were a "slave" in his economic relations with other men.¹⁷⁶ But two at least potentially inconsistent conclusions flow from this argument. Property holdings must be secure. But holdings must be relatively equal.¹⁷⁷

The Framers hoped that they had solved the worst of the equality problem with the abolition of entail and primogeniture.¹⁷⁸ However, under the relentless dynamic of capitalism, it early became clear to them that they had not; secure property would ever tend to inequality and inequality would, in turn, be the source of that threat to the common good: faction. Facing Shays' rebellion, Madison wrote that only a minority "can be interested in preserving the rights of property."¹⁷⁹ Madison's writings, at least, leave little doubt that he found the solution in size — the large republic would produce a multitude of factions, none dominant; the large government would produce a multitude of governors, similarly situated.¹⁸⁰ The size of the American continent would enable the Framers to "reconcile republicanism with reality"¹⁸¹ by the endless availability of western lands.

The ensuing two centuries reflect the enduring tension between the sanctity and equality of property. There is certainly evidence of separatism, consigning property and the social relationships it affects to the private realm, by, for example, eliminating property qualifications for acts of citizenship, like voting. By depriving property of its currency in the realm of citizenship, separatism attempts to reconcile the conflict between republican demands for wealth-based independence and the liberal concept of men as inherently free and self-governing.¹⁸²

One might guess that the separation of property from citizenship would have worked both ways, protecting property from all incursions from the state, as well as protecting citizenship from claims of superior wealth, thus creating a kind of pre-political or extra-political realm immune from politics.¹⁸³ Such a simple strategy, however, never pre-

176. L. BANNING, *THE JEFFERSONIAN PERSUASION* 51 (1978); D. MCCOY, *supra* note 27, at 68; F. McDONALD, *supra* note 27, at 74-75; *Historical Introduction to THE POLITICAL WORKS OF JAMES HARRINGTON* 54 (J. Pocock ed. 1977); Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 *J.L. & ECON.* 467, 470, 475 (1976); Michelman, *Possession, supra* note 2, at 1329 n.60 (citing D. MCCOY, *supra* note 27, at 60-62, 67-69, 126-27); Steinfeld, *Property and Suffrage in the Early American Republic*, 41 *STAN. L. REV.* 335, 338 (1989); Note, *Land Reform and Corporate Redistribution: The Republican Legacy*, 39 *STAN. L. REV.* 1229, 1232-33 nn.21-23 (1987); J. POCOCK, *supra* note 2, at 391.

177. G. WOOD, *supra* note 2, at 410-11; Note, *supra* note 176, at 1232-33 nn.21-23.

178. G. WOOD, *supra* note 2, at 410-11.

179. *Id.* at 411.

180. *THE FEDERALIST* NO. 10, at 82-83 (J. Madison) (C. Rossiter ed. 1961).

181. Note, *supra* note 176, at 1235.

182. See Steinfeld, *supra* note 176.

183. Michelman, *Possession, supra* note 2, at 1330-31.

vailed. Early police power cases reflect the old and deep roots of property's vulnerability to claims of the common good.¹⁸⁴ The development of the corporate form in the late nineteenth century produced a second kind of claim on politics — to curb the resulting unprecedented aggregations of wealth and power. In order to justify invoking the power of the state in the private sphere, the Progressives had to and did reforge the link between politics and property, focusing this time on the political nature of nongovernmental power relationships.¹⁸⁵ Because the federal courts resisted some of the progressive incursions on property, only after the acceptance of the New Deal did the American political system largely accept the communal claims on private property.¹⁸⁶

B. *The Poor*

The treatment of the poorest members of society, the actual paupers, reflects the diversity of American attitudes toward property as well as its own brand of complexity. From the standpoint of formal citizenship, even as the franchise was broadened through taxpayer requirements or, later, poll taxes, to include workers with a property in their labor rather than in capital, paupers were affirmatively and deliberately excluded from voting.¹⁸⁷ Even the partial inclusion of the poorest Americans into the category of voters, if not citizens,¹⁸⁸ really only took effect with the enactment of the Voting Rights Act twenty-five years ago.¹⁸⁹ Thus, at the extreme of pauperism, the republican conflict between property and citizenship was, for a time at least, subject to an exclusionary solution not applied to anyone else.¹⁹⁰

1. *Relief*

Turning to the converse issue — the use of public resources to alleviate poverty — I am tempted to achieve academic immortality as the first scholar to write about paupers without opening with the quote

184. Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER* (1988) (summarizing the developments, many of which Scheiber drew together in other works).

185. Michelman, *Possession*, *supra* note 2, at 1334-36.

186. See Ackerman, *The Storrs Lectures: Rediscovering the Constitution*, 93 *YALE L.J.* 1013, 1052-57 (1984); Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 *WIS. L. REV.* 1305, 1337. Sunstein, *Lochner's Legacy*, *supra* note 2, at 903.

187. See Steinfeld, *supra* note 176, at 335-36.

188. For a description of the distinction between citizenship and voting, see B. BARBER, *supra* note 2. *But see* K. KARST, *BELONGING TO AMERICA*, *supra* note 2, at 93-94.

189. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

190. See Michelman, *Possession* *supra* note 2, at 1331.

from Jesus ("The poor are always with us"). Here, however, it's not only the beginning, but probably the whole story. Certainly, the poor have always been with us. First, the capacity of mankind to provide has only recently, in historical time, begun to approach a level adequate to sustain most people at some objective level of comfort, if not luxury.¹⁹¹ Second, even if one limits one's self to a specific society, say, the United States, with adequate supplies, the political problem of redistribution to offset poverty is a devilishly tough one. Finally, as general supplies become more abundant, the idea of what constitutes poverty rises, so that even a society committed to raising its poorest members is chasing a moving target.¹⁹²

For a long time, the United States, like the rest of the world, was hemmed in by scarcity, so that the second and third problems were mostly hypothetical.¹⁹³ People were poor; perhaps as many as half the people lived at a level of absolute poverty.¹⁹⁴ When the poverty reached the level of pauperism, the towns offered alms houses, whose residents were expected to work for the town.¹⁹⁵ With the ultimate reality of poverty largely beyond reach, the charitable donors were free to discriminate among recipients. The focus was traditionally some variation of moral worth — for the churches, spiritual, for the towns, that life on welfare should be "less eligible [less desirable] than life enhanced by work."¹⁹⁶

To a surprising extent, these attitudes survived well into the industrial period, when the prospect of more generalized relief from poverty began to appear. The Progressives talked about environmental causes of poverty, but their prescriptions were largely directed not at alleviating the hardship directly, but, rather, at turning the poor into good members of the middle class by inculcating them with the work ethic. The movement toward providing pensions to mothers with dependent children — a world away from turning the women into workers¹⁹⁷ — still avoided confronting the prospect of simple relief by limiting the recipients to the "deserving" — largely widows, who would otherwise have been reduced to alms houses.¹⁹⁸

One would have thought that the poverty of the Great Depression,

191. J. PATTERSON, *supra* note 165, at 9-10, 15.

192. *Id.* at 11-12.

193. *Id.* at 15.

194. *See id.* at 16.

195. L. KOMISAR, *supra* note 165, at 10-11, 16-17.

196. J. PATTERSON, *supra* note 165, at 20-21 n.4.

197. *Id.* at 23.

198. *Id.* at 27.

with its obviously structural causes, would have disabused the society of some of its moralistic approach to welfare. The combination of an external economic cause of hardship with some real productive capacity to alleviate poverty might have produced a commitment to a minimum standard of well-being simply associated with the rights of citizenship, an arrangement similar to the European model developed since the nineteenth century.¹⁹⁹

This did not happen, however. The New Deal brought at least three categories of welfare programs, but none of them reflected a commitment to eliminating or limiting poverty based simply on social membership. First, New Deal programs reflected a strong belief that the Depression was a temporary emergency; as a result, most policy attention was directed to its most dramatic manifestation, unemployment.²⁰⁰ Second, even under the impact of a disastrous structural failure, American public opinion did not let go of the belief that property should be earned. Many of the programs contained a strong work element, however imperfectly realized.²⁰¹ (This category includes many of the insurance programs, which are, at least in concept, only a redistribution within a class as a provision against imprudence.²⁰²) Third, many of the New Deal reforms reflect a recognition that private property arrangements create power relationships with sufficient political impact to compel recognition in the public sphere. Accordingly, the federal government began involving itself as a kind of broker among interests.²⁰³

After World War II, two important phenomena occurred. First, without any conscious effort or commitment in theory, the plight of the poor began to improve.²⁰⁴ Analysts attribute the development to many sources: the existence of social security and the aging of the population made an enormous dent in the number of aged poor, a traditionally impoverished group; civil rights and other nonwelfare changes in attitudes greatly increased the knowledge and willingness of poor people to participate in what programs existed;²⁰⁵ " sleeper" programs like Medicaid turned out to be major vehicles for welfare; and a bureaucracy of welfare grew up, including the Social Security

199. *Id.* at 31.

200. *Id.* at 41-43.

201. *See id.* at 46-47 ("WPA," people said, stands for "We Piddle Around."); L. KOMISAR, *supra* note 165, at 53-56.

202. L. KOMISAR, *supra* note 165, at 60-61.

203. The classic example of this is the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1982).

204. J. PATTERSON, *supra* note 165, at 160-62.

205. L. KOMISAR, *supra* note 165, at 92-93.

Administration and state and local officials pressing the federal government for more and more relief.²⁰⁶

The second phenomenon is incongruent: attitudes toward poverty and poor people changed almost not at all. The most overt — one might say the only overt — effort to address poverty as an evil in itself, the War on Poverty, was always a one-man show by Lyndon Johnson, acting out the populist fantasies of his youth in the wake of an aberrant electoral victory.²⁰⁷ Never funded at a level remotely related to its aspirations,²⁰⁸ the most that can be said for the Office of Economic Opportunity is that its cadres of Legal Services lawyers contributed to the development of a “welfare rights” mentality, which at least allowed poor people to take advantage of the available, albeit piecemeal, relief.²⁰⁹

But, the poor are always with us. (See, I told you so.) Conservatives have attempted to address the problem with solutions consistent with traditional American rights-based individualism, solutions like reducing welfare payments to increase self-help²¹⁰ or creating “enterprise zones.”²¹¹ Milton Friedman, in a characteristically original assault on the conventional wisdom, proposed years ago to redistribute a reasonable amount of American surplus in the most neutral possible form — negative income tax — but, the neo-Friedmanian Family Assistance Program went to legislative defeat after a battle that one of its proponents characterized as like chasing the great white whale.²¹²

2. *Rights*

The rights-based individualism — unassailably linked in the American debates about poverty to issues of race²¹³ — that has characterized the public policy debate in the legislatures has also defeated efforts to address poverty issues in the courts as constitutional matters. As Professor Kenneth Karst has recently reminded us, the Burger and Rehnquist Courts have consistently fenced out any constitutional claim to relief from poverty under the equal protection clause of the fourteenth amendment, using traditional liberal pluralist concepts like

206. J. PATTERSON, *supra* note 165, at 162-64, 169.

207. *Id.* at 133-34 (“[W]hen Lyndon Johnson called for a ‘war on poverty,’ . . . 83% of Americans thought poverty would never be done away with . . .”).

208. *Id.* at 141, 151-52.

209. *Id.* at 153.

210. C. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY: 1950-1980*, at 227-33 (1984).

211. Temann, *The Origins of the Underclass*, *ATLANTIC MONTHLY*, July 1986, at 54, 66-68.

212. J. PATTERSON, *supra* note 165, at 194.

213. Karst, *supra* note 23, at 4.

a strict division between public and private spheres, an assumption of governmental absence from market developments, demanding standards of causation, and, most powerfully, the slippery slope of the neutral viewpoint.²¹⁴

Every Burger Court critic has a favorite candidate for the most poignant example of the Court's avoidance of the public implications of poverty;²¹⁵ mine is the Supreme Court decision upholding the unequal local financing of public schools in *San Antonio Independent School District v. Rodriguez*.²¹⁶ At the time, I thought *Rodriguez* was the worst of a lengthening list of bad Supreme Court decisions. It seemed excessively mean of the Court to rub the plaintiffs' noses in it, when they were really backing down a lot, agreeing to settle for equal schools 100 years after *Plessy*. Not even equal really. The *Rodriguez* plaintiffs merely sought to abolish the disparities in school financing between school districts attributable to disparities in the value of the taxable property in the various districts.²¹⁷ This most modest effort at equalization falls far short of the provision, for instance, of equal educational product or minimum educational product, or even of equal expenditures per pupil.²¹⁸ In any case, the Supreme Court by a vote of five to four rejected the plaintiffs' claim that the financing of education based on the taxable property in each school district violated the equal protection clause.²¹⁹ I now recognize that the Court was actually balking not at the reactionary return to the *Plessy* norm, but at a potentially revolutionary development — addressing unequal distribution of the conditions of citizenship and in its most egregious form: through an unequal public distribution network.

Plaintiffs' strategy of casting their radical claims in familiar rights terms — while perhaps the likeliest avenue to success at the time — simply gave the majority the opportunity to disguise their rejection as

214. *Id.* at 34-35.

215. *See, e.g., id.* at 33 (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)).

216. 411 U.S. 1 (1973). Just before this article went to press, I discovered that I was not the only claimant for that position. *See* Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275, 307 (1989) ("The process of doctrinal ossification [of equal protection theory] culminated in . . . *San Antonio Independent School District v. Rodriguez*."). Professor Balkin attributes the outcome in *Rodriguez* in considerable part to the rigidity of doctrine originating in the famous footnote four of *Carolene Products* and its "ideology of democratic pluralism" which excluded consideration of economic relationships from politics. *Id.* at 309. It is the thesis of this article that it is rights analysis generally that produces this result.

217. 411 U.S. at 47.

218. Note, *Strategies for School Finance Reform Litigation In the Post-Rodriguez Era*, 21 NEW ENG. L. REV. 817, 821-22 (1985-1986). All the *Rodriguez* plaintiffs sought to accomplish at the outset of this post-*Brown* era was "fiscal neutrality." *Rodriguez v. San Antonio Indep. School Dist.*, 337 F. Supp. 280, 283-84 (W.D. Tex. 1971), *revd.*, 411 U.S. 1 (1973).

219. 411 U.S. at 23-24.

an equally innocuous application of equal protection doctrine.²²⁰ Dividing the inquiry into the categories of suspect classifications and fundamental rights, Justice Powell, writing for the Court, first categorized the classification in *Rodriguez* as pertaining not to poor or poorer people, but simply to people residing in poorly endowed school districts.²²¹ To accomplish this classification, he separated residency from income.²²² Having separated the plaintiffs from a classification based on income, Justice Powell concluded that the classification lacked the indicia of suspectness: that is, the people affected by the classification had not been saddled with extraordinary disability or subjected to a history of purposeful discrimination.²²³ (One peculiarity of the opinion is that, having failed to find a wealth-based classification, the Court nonetheless added, apparently gratuitously, that the inability to pay becomes a constitutional disability only where the claimant is completely cut off from the service.²²⁴) One would have thought that the degree of deprivation would have more to do with Justice Powell's rejection of education as fundamental, and that position appears in the opinion also. His starting place was the assertion that the right must be explicit or implicit in the Constitution. Noting that the plaintiffs failed to allege education inadequate to exercise explicit first amendment or voting rights, he assumed that the claim to fundamental status rested solely on the importance of education,²²⁵ and, based on the Court's recent rejection of other welfare claims such as housing, he easily concluded that education makes no better claim of importance and therefore must also be rejected.

The decision elicited a scathing opinion from Justice Marshall.²²⁶

220. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 279 (1987).

221. 411 U.S. at 19-20.

222. There is some question about the Court's analysis of the facts, which rests on a record reflecting heavy concentrations of extremely poor in the poorest endowed districts and extremely rich in the best endowed districts, with less congruence between family income and district wealth in the middle. 411 U.S. at 26-27. First, the facts in *Rodriguez*, as most urban economic studies reflect, do demonstrate some congruence between family income and school district financing. See, e.g., NATIONAL COMM. ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 413-14 (1969). Neither precedent nor sense supports the contention that a governmental division must follow a suspect classification with mathematical precision to raise fourteenth amendment concerns. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); *General Elec. v. Gilbert*, 429 U.S. 125, 133-40 (1976); 429 U.S. at 161 n.5 (Stevens, J., dissenting); *Regan, Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1621-34 (1979). Under a less than foursquare analysis, one might say that a legislative scheme of local school financing which, on the whole, falls more heavily on the poor, violates the equal protection clause.

223. 411 U.S. at 28.

224. 411 U.S. at 20-21.

225. 411 U.S. at 30-37.

226. 411 U.S. at 70 (Marshall, J., dissenting).

Numerous state courts have exercised their federalism option and chosen to disagree with the Court, resting their holdings compelling some equalization of education funding on a reading of their state constitutions.²²⁷ More numerous commentators have criticized *Rodriguez* for everything from bad theory to bad morals.²²⁸ But *Rodriguez* is actually nothing more or less than a forthright acknowledgment of the role of extreme individualism in American public life. Obviously, the complete absence of public education would be a more graphic example. But, given the income-based mobility among widely differing local school districts,²²⁹ local financing encourages, if it does not actually produce, something resembling a private school system (with the kicker of federal tax deductibility for local taxes).²³⁰

As will be set forth more fully below,²³¹ the state court decisions to equalize school funding as a matter of state constitutional law suggest a very different vision of the common life, at least in some communities. But on a national level, the background understandings remain in the Lockean tradition: distribution of wealth is natural and can only be upset by claims of right from the beneficiaries; such legitimate claims are minimal.²³² The Court's decision in *Rodriguez* demonstrates that, in this Lockean context, where most extremes of wealth and poverty with all their attendant social consequences are accepted as normal,²³³ theories of equal protection will never fuel an evolution to a different kind of community.

227. See *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1976); *Rose v. Council for Better Educ.*, 1989 Ky. LEXIS 55; *Helena Elementary School Dist. v. State*, 769 P.2d 684 (Mont. 1989), modified, 784 P.2d 412 (1990); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W. 2d 391 (Tex. 1989); *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); *Washakie Co. School Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo.), cert denied, 449 U.S. 824 (1980).

228. Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662 (1979); Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261 (1987); Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973); Note, *Student Fees in Public Schools: Defining the Scope of Education*, 72 IOWA L. REV. 1401 (1987); Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987); Comment, *Inequality in Louisiana Public School Finance: Should Educational Quality Depend on a Student's School District Residency?*, 60 TUL. L. REV. 1269 (1986); Note, *supra* note 218, at 817.

229. See generally Inman & Rubinfeld, *supra* note 228.

230. Coleman, *Foreword to J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION* at vii (1970).

231. See *infra* notes 273-278 and accompanying text.

232. See *supra* notes 109-13 and accompanying text.

233. Sunstein, *Lochner's Legacy*, *supra* note 2, at 903-10.

3. *The Underclass*

While the legislatures and federal courts were pursuing their individualist, rights-oriented course, social scientists discovered the permanent underclass, a subculture of poverty, suspiciously congruent with concentrations of black Americans in the urban ghettos, and impervious to changes in the economic structure.²³⁴ Cut off from traditional entry level jobs by the flight of manufacturing from urban centers,²³⁵ allegedly abandoned by the black middle and stable working class,²³⁶ the underclass that remains is in a state of near total destruction²³⁷ and social isolation.²³⁸ Many unhappy political implications arise from the existence of the underclass; the worst are the perpetuation of poverty from one generation to the next²³⁹ and the persistent departure of behavior from middle class norms.²⁴⁰

Even before the social scientists gave the problem a name, rights-oriented constitutional scholars had offered variations on the fourteenth amendment theme as attempts to alleviate the condition of the underclass.²⁴¹ The earliest approach was Frank Michelman's effort to apply variants of Rawls' *A Theory of Justice* to establish a theory of minimum welfare: that the equal protection clause requires the government to protect the poor against the most extreme hazards of their impoverishment. Following Rawls' general approach, Michelman asks what people behind the veil of ignorance would risk being unable to afford. The answer identifies the category of goods Michelman would remove from the market and subject to an equality-based political allocation. Clever as this effort is in sidestepping the slippery slope and state action limits on the equal protection clause, it does, however, raise serious objections of inconsistency with both text and history.²⁴² Moreover, as set forth above, twenty more years of living with *A Theory of Justice* has revealed that Rawls' approach to distributive justice does not entirely avoid the problem of the slippery slide into excessive heroism either.²⁴³

Kenneth Karst has come closer to both text and history of the

234. See *supra* note 172.

235. Wilson, *supra* note 172, at 11-12.

236. *Id.* at 7.

237. *Id.* at 21.

238. *Id.* at 20-21.

239. Karst, *supra* note 23, at 4 & n.10.

240. *Id.* at 17.

241. Edelman, *supra* note 23; Karst, *Equal Citizenship*, *supra* note 2; Michelman, *supra* note 23.

242. Michelman, *supra* note 23, at 13.

243. See *supra* notes 147-50 and accompanying text.

fourteenth amendment in his "principle of equal citizenship," which forbids society from excluding individuals or groups as respected, responsible, and participating members of the community.²⁴⁴ Karst's principle requires that the society, including the judiciary acting under the fourteenth amendment, intervene "to foster the inclusion of the marginalized poor . . . as equal citizens."²⁴⁵ Karst's test for judicial action would inquire whether judges have "reason to believe that the government would have filled the need if the decision makers had regarded the claimant not as part of an outsider group but as a full member of the society."²⁴⁶

But, as liberal legal scholarship critics Collins and Skover reminded us, Earl Warren is dead, and the post-Warren Court is not far short of a generation old. As Karst freely acknowledges, the current Supreme Court likely will continue to reject claims to constitutional relief for marginalization through poverty.²⁴⁷ And, although one does not reject a political philosophy simply because of a few election returns, the failure of American liberal pluralism under any theory to redress decidedly undesirable developments like the underclass should certainly raise some doubts.

The answer lies, I think, in the crabbed interpretation of human possibilities that has monopolized modern thinking. Left with little more than self-interest as a guide to social justice, the best solution the liberals have been able to come up with is to blind each founder of a hypothetical regime to which selfish individual he or she will be.²⁴⁸ Worse still, demonstrating the communitarians' vaunted human capacity to ignore hypothetical constructs, the governors of American society²⁴⁹ have recognized themselves as the (largely middle class, white, male) persons²⁵⁰ they are and have simply cast the underclass into the role of the other — a group of strangers who have no claims on the regime. Thus, value neutral pluralism and value neutral communitarianism have produced the identical outcome. It looks like the character of the citizenry is a costly matter to ignore.

244. Karst, *supra* note 23, at 1-2; Karst, *Equal Citizenship*, *supra* note 2, at 5.

245. Karst, *supra* note 23, at 18.

246. *Id.* at 42.

247. *Id.* at 38. The Court's recent decision in *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990), affirming the authority of a federal judge to order local taxes to remedy school segregation, does not indicate any weakening in the Court's rejection of constitutional claims beyond the fourteenth amendment's well established prohibition of official racial discrimination.

248. This is, of course, the central tenet of Rawls' *A Theory of Justice*, and the focal point of communitarian criticism. J. RAWLS, *supra* note 4. A. MACINTYRE, *supra* note 2; M. SANDEL, *supra* note 2.

249. See *supra* note 169 for definition of governing body.

250. Karst, *supra* note 23, at 25-26, 34.

C. *The Liberality Solution*

Recognizing the role of the virtue of liberality in the American regime is the first step toward abandoning unproductive rights-based individualism. Although theory can only suggest what politics should do, sharpening the focus on the communal and virtuous aspects of public policymaking does seem to compel some consideration of the details of such an enterprise. For example, in the United States, there are several candidates for the active role in any public agenda. Most remote from the private citizen is the life-tenured federal judiciary. Public policy also comes from the federal legislature and its (putative) servant, the administrative state. For most of American history, much social responsibility lay with the state and local governments.²⁵¹ The state courts have until recently played a lesser role, but those times seem to be ending.²⁵² Finally, action from virtue in whole or in part might come from the private sector.

Taking the last position first, as between the government and the not-government, two lines of argument predominate. The first argument holds that, if the state coerces the behavior, it's not virtue. As classicist Terence Irwin puts it: "Even if the result of private generosity is the very same as the result that the wise legislator would prescribe, the fact that it results from the private generosity of many is a further good feature of it that is lost if the result is produced by legislation."²⁵³ Liberality, by this reading, would be strictly limited to voluntary charity. Depending on whom you read, Americans either give generously when the redistributive state does not get in the way²⁵⁴ or give in depressingly small amounts.²⁵⁵ The second argument against public liberality is, of course, that even if it could lead the citizenry to virtue through legislation, the state has no business inculcating virtue.

Each of these arguments rests on the essentially modern view of the state as existing simply to preserve the physical well-being of immutably separate human actors. Despite his real insight into the es-

251. J. PATTERSON, *supra* note 165, at 29-31.

252. *See, e.g.*, *Rose v. The Council for Better Educ. Inc.*, 1989 Ky. LEXIS 55 (state school financing system held unconstitutional); *Helena Elementary School Dist. v. State*, 769 P.2d 684 (Mont. 1989), *modified* 784 P.2d 412 (1990) (same); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (same); *cf.* *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390 (1983) (each municipality must take its fair share of regional growth including low and moderate income housing).

253. Irwin, *supra* note 88, at 45.

254. C. MURRAY, *IN PURSUIT OF HAPPINESS AND GOOD GOVERNMENT* 277 (1988).

255. *See* INDEPENDENT SECTOR, *GIVING AND VOLUNTEERING IN THE UNITED STATES: FINDINGS FROM A NATIONAL SURVEY 1* (1988) (average contribution to all charities was 1.5% of annual household income).

cape from altruism,²⁵⁶ ultimately this seems to be Feinberg's position.²⁵⁷ (In his ability to separate personal from public virtue, he thus remains essentially modern.) As set forth above, the classical concept of the polity — as cultivating and resting on human excellence — is far from the modern view. In a classical republic, virtue was both the end and the foundation of the good public order. Classical political philosophy recognizes that law has a role in providing the occasion for virtue.²⁵⁸ This function takes two forms: educating the young and habituating the society to virtuous behavior. Insofar as the civic republican revival has traced a continuous thread of concern with such virtue, both private and public, to the American founding, the assumption that American politics is devoid of such concerns simply does not stand up.²⁵⁹

Moreover, even without definitive evidence from history, the critical issue is not whether virtue may play a role in the formulation of public policy, but whether constitutional, political, or moral concerns preclude any particular action. Here, as in the virtue/autonomy debate set forth above,²⁶⁰ one must return to context. As far as liberality is concerned, I think, the answer is relatively easy. At least since the Progressive Era, and certainly since the New Deal, the American regime has included acceptance of the public construction and regulation of property.²⁶¹ Even in the redistributive models necessary to address the underclass, considerations of confiscatory taking or crossing the boundary between minimum necessary security and equality of property would not be pressing. That government regulation of property also fulfills public and personal virtue certainly should not invalidate otherwise legitimate action.

Moreover, although classical philosophy treats personal virtue as an end in itself,²⁶² the *Politics* repeatedly remarks on the role of virtue in promoting the value of social order. Thus, in his discussion of property, Aristotle emphasizes the ends of a moderate and private distribu-

256. See *supra* notes 158-61 and accompanying text.

257. J. FEINBERG, *HARMLESS WRONGDOING* (1988) (THE MORAL LIMITS OF THE CRIMINAL LAW vol. 4).

258. See *supra* notes 66-68 and accompanying text.

259. See *supra* note 2.

260. See *supra* note 62 and accompanying text.

261. See, e.g., Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Karst, *supra* note 23, at 22 (citing Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927)); Parrish, *The Great Depression, The New Deal, and the American Legal Order*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER, *supra* note 184, at 377.

262. See generally ARISTOTLE, *ETHICS*, *supra* note 16.

tion: social peace²⁶³ and industry.²⁶⁴ In describing the desirability of a moderate distribution of property as an actual constitution, Aristotle again emphasizes avoiding the anti-social extremes of contempt among the rich and envy among the poor.²⁶⁵ Under the classical construction, then, liberality, a virtue directed at achieving the best life for individuals and societies, does not require a mortal threat to the social order before actions may be characterized as directed to the common interest.

The role of law in inculcating virtue is the main answer to Irwin's argument that governmental redistribution robs liberality of its virtue. But, in addition, in a society governed by representative institutions, the distinction between the governors and the governed is blurred, and Irwin's "wise legislator" simply cannot be separated cleanly from the property-owners she represents. Thus, if the initial act of liberality takes the form of legislation, the processes of majoritarianism, however blurred, replicate for the society the self-governance represented by the virtues.

For this reason, Congress, not the judiciary, is the preferred instrumentality for implementation. In this, then, I dissent from the civic republican infatuation with the insularity of the governors.²⁶⁶ Life tenure plays a valuable role in the scheme, of course,²⁶⁷ but the post-New Deal elevation of the judiciary to rabbinic status may have had a hand in relieving the rest of us from our role as the people of the book. The second reason for preferring the legislature is a prudential one. Taking affirmative steps, even the very modest ones I suggest, involves social and political judgments of some sensitivity, judgments that can be, and sometimes are, tempered and refined in the legislative process.²⁶⁸ Finally, as set forth above, the liberality solution sidesteps the floodgates claims of perfect justice,²⁶⁹ and legislation, not judicial decisionmaking, has traditionally provided the solutions of partial and imperfect justice. This assignment of responsibility has stood up fairly well over time.²⁷⁰

263. ARISTOTLE, *POLITICS*, *supra* note 39, at 49.

264. *Id.*

265. *Id.* at 181.

266. *See supra* notes 9-10 and accompanying text.

267. Hirshman, *Brontë, Bloom and Bork*, *supra* note 8, at 193.

268. *See* Collins & Skover, *supra* note 3, at 201; Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988); Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988).

269. *See supra* notes 165-68 and accompanying text.

270. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (Maryland legislature not obliged to "choose between attacking every aspect of a problem or not attacking the problem at all.").

As between the states or municipalities on one hand and the federal government on the other, the choice is not so obvious. Local government has the longest history of providing for the citizens' well-being,²⁷¹ and there are long-standing arguments in favor of small communities as repositories of republican values.²⁷² As set forth above, since the Supreme Court's decision in *Rodriguez*, several state courts have found rights to equal education funding in state constitutions,²⁷³ and three such opinions, issued just within the past year, hold out some promise for the states as repositories of civic virtue.²⁷⁴ This promise rests more on the rhetoric than on the holdings in the cases, since the issues in this article are much broader than the outcome in *Rodriguez*, and each of the three decisions rests on state constitutional language quite different from the language of the equal protection clause.²⁷⁵

Nonetheless, even if treated only as pieces of political rhetoric, the opinions from the state courts articulate a vision of a common political life far superior to the impoverished vision of the federal decision.²⁷⁶ Thus, in *Rose*, the Kentucky Supreme Court quoted at length from the debates over the framing of the Kentucky provision:

If public schools have come to stay, if they are a part and parcel of our free institutions, woven into the very web and woof of popular government; and if they are in the future to be the dependence of the people of Kentucky for the instruction of their youth, what is the logic of the situation? Manifestly to encourage and improve them, . . . in so far as we love our children[,] to try to make their training-places fit nurseries of immortal spirits that have divine purposes to fulfill on earth, and cannot hope to succeed, unless their intellectual powers be properly developed.²⁷⁷

271. J. PATTERSON, *supra* note 165, at 29-30.

272. See Pangle, *Justice and Legal Education*, 39 J. LEGAL EDUC. 157, 161 (1989) ("[T]he republican culture of ancient Athens, like that of ancient Rome, of the medieval Italian cities . . . was much more tight-knit, more censorious and intolerant, and also more communitarian than our political system.").

273. See *supra* note 227.

274. See *Helena Elementary School Dist. v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W. 2d 391 (Tex. 1989); *Rose v. The Council for Better Educ. Inc.*, 1989 Ky. LEXIS 55.

275. The Texas Constitution requires an "efficient" system of public education to provide for "general diffusion of knowledge." VERNON'S ANN. TEXAS CONST. art. 7, § 1. The Kentucky Constitution requires "the General Assembly . . . [to] provide for an efficient system of common schools throughout the State." KY. CONST. § 183. Under Montana's Constitution "[e]quality of educational opportunity is guaranteed to each person of the state." MONT. CONST. art. X, § 1, cl. 1.

276. See *Helena Elementary School Dist. v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W. 2d 391 (Tex. 1989); *Rose v. The Council for Better Educ. Inc.*, 1989 Ky. LEXIS 55.

277. *Rose*, 1989 Ky. LEXIS 55. Similarly, in *Edgewood*, the Texas Court quoted one of the framers of the Texas Constitution: "I boldly assert that [education] is for the general welfare of

Moreover, each of the state education funding decisions sidesteps the institutional competence issue by entering into the now familiar pattern of give and take with the legislature, delaying the effective date of the decision about the problem to allow the legislature to address the specifics of the solution.²⁷⁸

Accordingly, nothing in my preferred solution should be taken to preempt a state level initiative, but several factors indicate that the states are not the first avenues of attack. First, the level of governmental action should reflect the reality of the American economy and society. Arguably since the ratification of the Constitution, and certainly since the New Deal,²⁷⁹ essential aspects of American economy have been subject to national regulation.²⁸⁰ With the New Deal, social service, harnessed to the power of the federal income tax, became centered in the federal government.²⁸¹ Finally, the Supreme Court decision in *Shapiro v. Thompson*,²⁸² striking down residency requirements on welfare as violative of the constitutional right to travel, put the constitutional seal on what had become socially apparent long before: America could not draw state lines around the underclass.

Conversely, the federal union retains the power to exclude people from its political borders, including for economic reasons,²⁸³ and the power to control its economic business, insofar as economic arrangements are ever subject to definitive political governance.²⁸⁴ Accordingly, since both the taxation/redistribution machinery and the community of potential recipients are national, it seems counterintuitive to break up any public policy suggestions by states. Finally, and most importantly, although liberality is not hung up on the free rider problem, the goal of inculcating virtue through public life will be weakened if citizens can escape by moving to another location within the polity.²⁸⁵

all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State." *Edgewood*, 777 S.W.2d at 395.

278. See cases cited *supra* note 227.

279. Parrish, *supra* note 261, at 380-83.

280. *Id.* at 379.

281. *Id.* at 379.

282. 394 U.S. 618 (1969).

283. U.S. CONST. art. I, § 8, cl. 4 (Congress has authority "to establish an uniform [r]ule of [n]aturalization"). See *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) (naturalization is an exclusively federal concern).

284. U.S. CONST. art. I, § 8, cl. 3 (Congress has authority "to regulate commerce with foreign [n]ations"). See also *Zschernig v. Miller*, 389 U.S. 429 (1968) (states may not regulate foreign commerce); *Trustees of the Univ. of Ill. v. United States*, 389 U.S. 48 (1939).

285. See Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Resources: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978) (discussion of the circumstances most likely to stimulate rescue behavior).

In addition to addressing the supply side of liberality, no public policy analysis would be complete without exploring the other half of the virtue: the moral and intellectual judgment about recipients. Throughout this article, I have linked the failure of liberality in the American regime with the continued presence of the underclass. One might, however, unpack the two phenomena, concluding, for instance, that the virtue of liberality should be pursued for its benefit to the giver, but that the distribution should be directed at any of a myriad of other social projects.

Classical political philosophy supplies at least two arguments in favor of choosing to address the underclass. First, classical philosophy asserts — and, as set forth above, this is a significant difference between ancient and modern theory²⁸⁶ — three premises: the individual has the capacity for practicing virtue, the society needs virtuous citizens, and the society must provide the occasions for virtue. In Book I of the *Nicomachean Ethics*, Aristotle states the premises: the good in life is related to the function of the actor;²⁸⁷ the function of humans apart from all other creatures is the activity of the soul in conformance with reason;²⁸⁸ anyone not maimed in personal potentiality for virtue may win it by study and care.²⁸⁹ Finally, and significantly for this part of the inquiry, Aristotle teaches that the exercise of virtue may require external goods, like friends and riches and political power as instruments.²⁹⁰ In the *Politics*, Aristotle links the exercise of virtue to the health of the state.²⁹¹ Man is political; the virtues have value in large measure because they are also the excellences of character which promote social life.

What does all this mean for the allocation to the underclass of the liberal person's wealth? The answer should be relatively clear. If virtue is of value, allowing people the means to become virtuous has the same value. Moreover, in a political society, the virtue of the people comprises the quality of the society. One option in political society is, of course, to exclude the people who, through maimed souls or a lack of external goods, have not demonstrated a capacity for virtue.²⁹²

286. See *supra* notes 66-68 and accompanying text.

287. ARISTOTLE, *ETHICS*, *supra* note 16, at 12-13.

288. *Id.* at 13-14.

289. *Id.* at 18.

290. *Id.* at 17.

291. See *supra* notes 68 and accompanying text.

292. This was a very real possibility to Aristotle; perhaps the greatest barrier to Aristotelian political philosophy in the modern world is his easy acceptance of human slavery as a natural condition of life. ARISTOTLE, *POLITICS*, *supra* note 39, at 11-12, 104, 111-12, 306. *But see* S. OKIN, *supra* note 15.

Here, I think, is the role of Kenneth Karst's principle of equal citizenship. Given the fourteenth amendment and the various Supreme Court decisions and civil rights statutes of the last generation, the solution of excluding the underclass from American political life is simply not available. Whether they vote in reasonable numbers or not,²⁹³ in a political society in which the right to vote is the mark of political belonging,²⁹⁴ the underclass remains part of the political society.²⁹⁵ In this construct, the cultural, geographical, gender and racial divisions, which have supported the continuing marginalization of the underclass from society defined other than politically,²⁹⁶ do not apply. Moreover, as the social science literature reflects more exigently each day, every urban society in the country is affected by the danger and disaffection of the lives of the underclass.²⁹⁷ Under these circumstances, considerations of individual virtue and of the quality of the communal life strongly support the judgment to distribute the wealth that liberality produces to address the problem of the underclass.

Assuming that federal legislation directed at the underclass were to be the vehicle for change, what might guide the actual choice of solutions? One answer might lie in the surprising resiliency of the concept of decent minimum education even in face of the Supreme Court's decision in *Rodriguez*. The roots of such a concept are deep: when the Framers were most engaged in how they would govern their new lands, they provided, in the Northwest Ordinance, that land be set aside for local school construction.²⁹⁸ During Reconstruction, serious debate focused on the possibility of providing federal education to the newly emancipated slaves.²⁹⁹ By the end of the nineteenth century, almost every state constitution included a commitment to public education, and over half the constitutions required it to be free.³⁰⁰ Since

293. See generally E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 97-113 (1960); K. SHIENBAUM, *BEYOND THE ELECTORAL CONNECTION: A REASSESSMENT OF THE ROLE OF VOTING IN CONTEMPORARY AMERICAN POLITICS* (1984).

294. K. KARST, *BELONGING TO AMERICA*, *supra* note 2, at 35-36.

295. In this, the members of the underclass are like Aristotle's citizens who have a claim to office, whether or not they give it away. See M. NUSSBAUM, *THE FRAGILITY OF GOODNESS* 349 (1986).

296. See *supra* note 247 and accompanying text.

297. See *supra* note 172.

298. M. YUDOF, D. KIRP, T. VAN GEEL & B. LEVIN, *EDUCATIONAL POLICY AND THE LAW* 566 (2d ed. 1982).

299. W. WIECEK, *supra* note 171, at 185-86.

300. Note, *Student Fees in Public Schools: Defining the Scope of Education*, 72 *IOWA L. REV.* 1401, 1402 n.16 (1987) (citing constitutions that require some form of public education: ALA. CONST. art. XIV, § 256, amend. CXI; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 6; HAW. CONST. art. X, § 1; IOWA CONST. art. IX, § 3; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MINN. CONST. art.

the decision in *Rodriguez*, numerous state courts have expanded the access to education under state constitutions in decisions striking down or limiting the imposition of fees for school-related activities and imposing various levels of funding equalizers.³⁰¹ Commentators have suggested that the Supreme Court's decision be reconsidered on the coattails of a softening of the levels of equal protection theory,³⁰² as an example of applying international human rights to illuminate fundamental constitutional claims,³⁰³ or as an aspect of incorporating Rawls' theory of equality of opportunity into the fourteenth amendment.³⁰⁴

Even if such a rethinking of equal protection were practical, each

XIII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; OHIO CONST. art. VI, § 2; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; WASH. CONST. art. IX, § 2; WYO. CONST. art. VII, § 1, § 9; and citing constitutions that require free public education: ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 1, § 6(b); MD. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1(3); NEB. CONST. art. VII, § 1; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, § 2; OKLA. CONST. art. XIII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; VA. CONST. art. VIII, § 1; W.VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3).

301. *Hartzell v. Connell*, 35 Cal. 3d 899, 911, 679 P.2d 35, 43, 201 Cal. Rptr. 601, 609 (1984) (imposition of fees violates constitutional guarantee); *Beck v. Board of Educ.*, 63 Ill. 2d 10, 15-16, 344 N.E.2d 440, 442 (1976) (financially able children must pay fees); *Chandler v. South Bend Community School Corp.*, 160 Ind. App. 592, 597-98, 312 N.E.2d 915, 918 (1974) (fee waiver makes book fees constitutional); *Bond v. Public Schools of Ann Arbor School Dist.*, 383 Mich. 693, 700-02, 178 N.W.2d 484, 487-88 (1970) (books and school supplies essential part of free education); *Attorney Gen. v. East Jackson Pub. Schools*, 143 Mich. App. 634, 637, 372 N.W.2d 638, 639-40 (1985) (nonessential activities can require fee if it can be waived by students who cannot afford to pay); *Concerned Parents v. Caruthersville School Dist.*, 18, 548 S.W.2d 554, 561 (Mo. 1977) (course fees are unconstitutional); *Granger v. Cascade County School Dist. No. 1*, 159 Mont. 516, 527-29, 499 P.2d 780, 786 (1972); *Norton v. Board of Educ.*, 89 N.M. 470, 471-72, 553 P.2d 1277, 1278-79 (1976) (all required courses must be free); *Vandevender v. Cassell*, 158 W. Va. 87, 93-94, 208 S.E.2d 436, 439-40 (1974) (concurring opinion) (materials must be provided free of charge to needy students); *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 617-19, 264 S.E.2d 106, 112-14 (1980) (appropriate fee waiver is constitutional right of indigent children); *Board of Educ. v. Sinclair*, 65 Wis. 2d 179, 187, 222 N.W.2d 143, 147-48 (1974) (fees constitutional if statutes provide waiver for indigents); *see also* cases cited *supra* note 227; *cf.* *Parsippany-Troy Hills Educ. Assn. v. Board of Educ.*, 188 N.J. Super. 161, 169-70, 457 A.2d 15, 20 (App. Div. 1983) (fee may be charged for nonessential course); *Marshall v. School Dist. Re No. 3 Morgan County*, 191 Colo. 451, 453-54, 553 P.2d 784, 785-86 (1976) (no constitutional duty to furnish nonindigent children books without cost). *But see* *Carpio v. Tucson High School Dist. No. 1*, 111 Ariz. 127, 128-29, 524 P.2d 948, 949-50 (1974) ("as nearly free as possible" gives legislature discretion), *cert. denied*, 420 U.S. 982 (1975).

302. This projection rests largely on the Supreme Court decision in *Plyler v. Doe*, 457 U.S. 202 (1982), striking down a Texas law refusing to fund public education for the children of undocumented aliens. However commendable the results in *Plyler*, the opinion does not even hint at reconsidering the class issue at the heart of *Rodriguez*.

303. Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987).

304. *Richards*, *supra* note 228, at 52.

of these solutions suffers most visibly from the perfectionist defects of rights analysis. Even assuming, as any city-dweller intuitively to be the case, that household poverty and school district poverty overlap, they do so imperfectly.³⁰⁵ So, redistributing from the wealthier school districts to the poorer ones is an imperfect way to address the problems of poverty, if that is one's underlying goal. On the level of simple equality of opportunity, for years the debate over education has been dogged by the social science data that pricier schools, divorced from other social factors like families and neighborhood, do not improve children's fates at all.³⁰⁶ Yet despite all of these flaws, access to meaningful education makes a claim on the sensibility of the American community that refuses to vanish. It is a need with immense implications for the community to which perfect solutions are rare. For all of these reasons, education is the paradigm case for replacement of rights analysis with the exercise of the virtue of liberality.

Although detailed public policy prescriptions are beyond the scope of this article, it probably pays to digress here for a moment to describe the Perry Preschool Study.³⁰⁷ In the study, the High/Scope Foundation of Ypsilanti, Michigan, followed the progress of 123 black children from poor families who had been randomly assigned to attend preschool or not to attend preschool in the sixties. The preschool program consisted of 2 1/2 hours per day five days per week, plus a 1 1/2 hour per week home visit, 7 1/2 months per year for two years.³⁰⁸ (As of the latest study, the children were nineteen.³⁰⁹) The High/Scope staff studied school records, police and court records, records of social service use, and interviewed almost 100 of the participants.³¹⁰

The results are compelling. Sixty-seven percent of the preschoolers graduated from high school; only forty-nine percent of the control group did.³¹¹ Fifty percent of the preschoolers were working at the time of the interview; only thirty-two percent of the control group were.³¹² Looking at undesirable life events, thirty-one percent of the preschoolers had at one time been arrested, while fifty-one percent of

305. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 15 (1973).

306. J. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

307. J. BERRURTA, L. SCHWEINHART, W. BARNETT, A. EPSTEIN & D. WEIKART, *CHANGED LIVES* (Monograph of the High/Scope Educational Research Foundation No. Eight, 1984) [hereinafter *CHANGED LIVES*].

308. *Id.* at 8.

309. *Id.* at xiv.

310. *Id.* at 5-12.

311. *Id.* at 31 (Table 8).

312. *Id.* at 47 (Table 12).

the control group had.³¹³ Female preschoolers had 49 teen pregnancies per 100; control group females had 64 per 100.³¹⁴ Moreover, and contrary to the now pretty completely discredited early negative evaluations of Head Start,³¹⁵ the latest Perry study reveals that, where data were kept, seven studies from communities across the country support the Perry findings of intellectual performance, avoidance of special education, and preventing dropout, along with mixed evidence of increased scholastic achievement.³¹⁶ A society composed of graduates of the Perry Preschool Program, half unemployed, thirty percent with arrest records, many pregnant in their teens, may not be Allan Bloom's notion of the civic republic,³¹⁷ but it sure beats the alternative.³¹⁸

Any consideration of specific social science remedies must also include the extraordinarily comprehensive recent study by the American Academy of Political and Social Sciences, *The Ghetto Underclass: Social Science Perspectives*.³¹⁹ Although the volume includes a number of serious and provocative essays suggesting policy initiatives ranging from computer job opportunity networks to housing vouchers, Jennifer Hochschild's essay, "Equal Opportunity and the Estranged Poor,"³²⁰ speaks most frankly of the political realities that produced and ignore the underclass and of how to address them.

Hochschild first reminds the reader that "[m]uch of American history can be read as a set of political choices that created and consolidated racial, ethnic, and gender disparities in wealth and power."³²¹ After a period of political decisions aimed at "opening channels of opportunity"³²² during the 1950s and 1960s, Americans made an "apparent rightward move";³²³ the real value of AFDC declined by 27% between 1970 and 1983, while between 1979 and 1985, "the annual median family income for the poorest 40 percent of the population declined \$918 (in constant 1986 dollars) whereas the wealthiest 40 percent of families gained \$2775, and the wealthiest 10 percent gained

313. *Id.* at 64 (Table 19).

314. *Id.* at 2 (Table 1).

315. See G. STEINER, *THE CHILDREN'S CAUSE* 32-35 (1976) (describing early studies critical of Head Start programs).

316. CHANGED LIVES, *supra* note 307, at 95-105.

317. See A. BLOOM, *supra* note 52.

318. See NATIONAL RESEARCH COUNCIL, *supra* note 172, at 346-48.

319. 501 ANNALS, *supra* note 172.

320. Hochschild, *Equal Opportunity and the Estranged Poor*, in *id.* at 143.

321. *Id.* at 146.

322. *Id.*

323. *Id.*

\$6369.”³²⁴ Hochschild’s main point is this: “Political choices ranging from slavery to a preference for unemployment over inflation in the context of a particular ideological framework helped to create a group of people with no resources, no skills, and no faith.”³²⁵

Hochschild’s essay is a prescription, not a condemnation, and therein lies its interest. As she puts it, “despite controversy over what the underclass is and whether and why it is growing, analysts surprisingly concur on what to do about it.”³²⁶ Each of the three programs she describes includes an element addressing a discrete problem — joblessness, teen pregnancy, or high school dropout — but also includes a broad range of social efforts to provide the kind of “care that is as multidimensional as the care that’s supposed to come from one’s own family.”³²⁷ As Hochschild sums up her findings, “[t]he common thread in these disparate programs and analyses is that successful efforts to aid the estranged poor cost a lot, last a long time, and involve a wide array of activities aimed at changing skills, views, and life circumstances.”³²⁸

Having thus frankly acknowledged the investment, Hochschild also admits that her suggestions will never produce the returns associated with perfectionism:

Some analysts argue that [remedial] programs “not only improve the lives of participa[nts] but ‘save public moneys as well’”

Other analysts are less sanguine about both the ratio of financial benefits to costs and the long-term social benefits of these programs. But the question is not whether these programs are as successful as we would like — they are not — or as successful as many programs that serve a less disadvantaged population — they are not. The issue is whether Americans are willing to let some fellow citizens destroy their own and others’ lives without using the available knowledge to stop some of the destruction.³²⁹

Although far from the world of classical philosophy, Hochschild ends her appeal with a description as good as any of the kind of virtue that would “adorn”³³⁰ the American regime: “Public opinion surveys have shown repeatedly that Americans want to be generous toward people in need; they want to be free from gender and racial discrimination; they want people to have jobs that support them and their

324. *Id.* at 147 (citing data from BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, CURRENT POPULATION REPORTS (Washington, D.C. 1985)).

325. *Id.* at 150.

326. *Id.*

327. *Id.* at 151.

328. *Id.*

329. *Id.* at 151-52 (footnotes omitted).

330. *See supra* note 102 and accompanying text.

children.”³³¹

CONCLUSION

As I write this conclusion, the shelves in my office at the law school are filled with the books I've been using — *Nicomachean Ethics*, *A Theory of Justice*, *Private Wealth and Public Education*, *Spheres of Justice*, *Belonging to America*. A couple of months ago, my dean wandered in, and, seeing me deep in a copy of *Justice and the Human Good*, he said (hope springing eternal in the decanal breast, no doubt), “I can't believe I even have to pay you to do such good stuff.”

The drawback, of course, is legalborophobia (fear of being a law review article falling in an empty forest). Yet even here, Aristotle has wisdom. In any society, the politically dominant class — the governing body — is the regime. These are the people “who ‘rule’ in a stronger or more precise sense than ordinary citizens and therefore require a training in prudence beyond what is available through the experience of ordinary political life.”³³² And in America, a century and a half of lawyers have had their heads swelled by Tocqueville's description of the regime:

The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice.³³³

But those of us whom the dean pays to educate the regime would do well to read on:

I am not ignorant of the defects inherent in the character of this body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.³³⁴

331. Hochschild, *supra* note 320, at 155.

332. Lord, *supra* note 169, at 139.

333. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 285-86 (P. Bradley ed. 1945).

334. *Id.* at 286.