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Of Chickens and Eggs––The Compatibility of Moral Rights and Consequentialist Analyses

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FOREWORD: OF CHICKENS AND EGGS—THE COMPATIBILITY OF MORAL RIGHTS AND CONSEQUENTIALIST ANALYSES

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CHICKENS AND EGGS

Philosophers are accustomed to thinking of moral rights and consequentialist analyses as fundamentally incompatible. They frequently debate cases—both hypothetical and real—in which rights and consequences are in conflict.[1] For example, suppose an innocent child knows the whereabouts of a terrorist who has planted a nuclear bomb in a city. Would it be permissible to violate the child's moral right to be free from torture, if this was the only way to save millions of innocent lives? If this is permissible, then do not moral rights yield to concerns about consequences? Or suppose that a community incorrectly believes that an innocent person is guilty of a heinous crime. If the beneficial consequences exceed the harmful consequences, would it be permissible to punish or even kill this innocent person? If not, then do not consequential concerns yield to moral rights?

Three approaches are commonly taken to handle the potential conflict between rights and consequences. Some, perhaps most legal academics, purport to "balance" these competing concerns in an unspecified manner. Others, perhaps most philosophers and economists, choose either moral rights or consequentialism as their exclusive mode of normative analysis. Still others allow the value of both modes of analysis, but they resolve potential conflicts by giving one mode of analysis priority within some hierarchical scheme.

The idea of avoiding conflicts between competing methods of evaluation by establishing the priority of one method is analogous to modern jurisprudential views of legal systems as purely hierarchical or, to use Lon Fuller's word, vertical.[2] This

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1. *See* Lomasky, *Rights Without Stilts*, 12 HARV. J.L. & PUB. POL'Y 775, 777-81 (1989).

2. *See* L. FULLER, THE MORALITY OF LAW 233 (rev ed. 1969) (distinguishing between horizontal and vertical forms of order).

contrasts with an older view that acknowledged both the legitimacy and importance of many rival legal systems coexisting within a single legal order.[3] Professor Fuller suggested that the conception of law as a hierarchical command is so appealing because it "expresses a concern with the problem of resolving conflicts within the legal system."[4] In all but international affairs (and even sometimes not there), it is difficult for many to understand or accept the possibility of the equal coexistence of decisionmakers within an over-all order that is ultimately nonhierarchical or, to use Lon Fuller's term, horizontal.[5]

The prevailing belief that conflicts, whether between competing legal systems or between competing modes of normative analysis, can be resolved only by establishing and then appealing to a "higher" authority accounts, I suspect, for the prevailing impetus to pose the question "Which mode of analysis comes first, moral rights or consequences?" Cast in these terms the problem appears to be both intractable[6] and reminiscent of the paradox "Which comes first, the chicken or the egg?" Viewed hierarchically, the chicken-egg problem—involving real chickens and their eggs—is also intractable. Neither can come first because, paradoxically, both need to come first.

In this Foreword, I will explore the possibility that it is useful to analyze problems pertaining to law from both a moral rights and a consequentialist perspective; that each of these competing modes of analysis complements the other, notwithstanding the fact that one mode will sometimes conflict with the other; that the mode of analysis associated with traditional "natural rights" theories contains both a moral rights and a consequentialist component; and that, just as both chickens and eggs are vital components of a process of biological evolution, moral rights and consequentialist analyses are vital components of a process of legal evolution—a process that includes both elements of change and elements of stability.[7]

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3. *See* H. BERMAN, LAW AND REVOLUTION 10 (1983) ("Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems."); L. FULLER, *supra* note 2, at 123 ("[M]ultiple [legal] systems [governing the same population] do exist and have in history been more common than unitary systems.").

4. L. FULLER, *supra* note 2, at 111.

5. *See id.* at 233.

6. *See* Alexander, *Comment: Personal Projects and Impersonal Rights*, 12 HARV. J.L. & PUB. POL'Y 813, 825 (1989) ("All of these philosophical debates have proven intractable . . ."). *See generally* Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263 (1985).

7. The existence of constant change does not preclude the existence of comparative

DEFINING TERMS

Let me begin by clarifying my terms. In the legal context, both moral rights and consequentialist analyses are used to discern when one person or group may properly use force against another person or group—including the enforcement authorized by legal institutions. Moral rights are typically viewed as describing claims to enforcement based solely on the protected interests of individuals or discrete groups. Once the scope of these protected interests is defined, any interference with these interests is said to be a violation of the rights of the person or group. On this view, the use of force is justified—either presumptively (prima facie) or absolutely—to prevent or rectify such a rights violation. Conversely, if an action is consistent with moral rights, force may not justly be used to prevent or alter it.

In contrast, a consequential analysis typically judges the merits of using legal force by the consequences such actions are likely to have for everyone in a particular society. Consequentialist analysis deems an action legally permissible if the beneficial consequences of permitting the action (less the harm caused by such actions) exceed the beneficial consequences of prohibiting it (less the harm caused by legal prohibition). Conversely, an action is deemed to be subject to legal prohibition when the net harmful consequences of permitting the action exceed the net harmful consequences of prohibiting it.

In jurisprudence, arguments from "justice" based on rights are sometimes considered to be matters of principle, while arguments from "utility" based on legal consequences are often referred to as matters of policy.[8] Those who doubt the value of any moral rights analysis are likely to assert that a change in the law exclusively reflects policy preferences and that courts are less competent than legislatures to render such "utilitarian" judgments. Even among those who accept the value of a moral rights analysis, the competency of courts to evaluate conduct

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continuity. *See* Epstein, *The Static Conception of the Common Law*, 9 J. LEG. STUD. 253 (1980). An adequate evolutionary account of law must explain both. The collective use and evolution of concepts is examined in great detail in 1 S. TOULMIN, HUMAN UNDERSTANDING (1972). Much of the account presented here is informed by Toulmin's approach.

8. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 90 (1977) ("Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal.").

according to some set of moral rights is controversial.[9]

Let me emphasize that these definitions greatly simplify a very long and very rich debate over the true contents of the two approaches. Indeed, in recent years thinkers on each side of the gulf between rights and consequences have taken strides to reduce the gulf that divides them.[10] Despite the undeniable sophistication of these approaches, however, it is the simple, not the complex, conceptions of these ideas that are persistently used to demonstrate the alleged incompatibility of rights and consequences. The appeal of examples such as those discussed above,[11] lies precisely in their ability to reduce the moral rights and consequentialist positions to the simple tenets I have just sketched so that the paradoxical question—which comes first, rights or consequences?—cannot be avoided.

What would it mean to claim that moral rights and consequentialist analyses are compatible? To the extent that adherents to moral rights or consequentialism are committed to a reliance on one of these modes of analysis to the complete exclusion of the other, these philosophies are truly and hopelessly incompatible. Consider this description by philosopher J. L. Mackie of the difference between rights-based and utilitarian analyses:

> The fundamental point of contrast, and conflict, between utilitarian and rights-based views is that the former, at least in their basic theory, aggregate the interests or preferences of all the persons or parties who are being taken into account, whereas the latter insist, to the end, on the separateness of persons. . . . .
>
> Of course this does not mean that a utilitarian must literally deny that persons are separate, or that any utilitarian has ever done so. What it means is that this separateness does no work in the utilitarian method of determining what is good or just, that in the utilitarian calculus the desires, or the satis-

9. *Cf.* McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 100 (1988) ("To say that there are principles of natural right is not to say that judges have the immediate power to enforce them."). Note that in his article, Professor McConnell consistently refers to "natural right" rather than the historically distinct approach to justice based on natural *rights*. For a brief description of the difference, see Mack, *Comment: A Costly Road to Natural Law*, 12 HARV. J.L. & PUB. POL'Y 753, 754-56 (1989) (distinguishing between classical theories of natural law or natural right and modern theories of natural rights).

10. *See* UTILITY AND RIGHTS (R.G. Frey ed. 1984); Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985); Gray, *Indirect Utility and Fundamental Rights*, SOC. PHIL. & POL'Y, Spring 1984, at 73; Laycock, *The Ultimate Unity of Rights and Utilities*, 64 TEX. L. REV. 407 (1985).

11. *See supra* note 1 and accompanying text.

> factions, of different individuals are all weighed together in the way in which a single thoroughly rational egoist would weigh together all his own desires or satisfactions: on a utilitarian view, transferring a satisfaction from one person to another, while preserving its magnitude, makes no morally significant difference.[12]

Reconciling these positions would be like squaring the circle. Showing that moral rights and consequences were equal partners within the legal enterprise would constitute a rejection, not a reconciliation, of these two views. A showing of compatibility would not, however, be a rejection of the central values or core concerns—protecting rights and achieving beneficial consequences—of each of these philosophies. To the contrary, it would simultaneously affirm *both* core concerns as opposed to one or the other and would try to show how and why each has an important role to play in the legal enterprise.

A truly "compatibilist"—to use Christopher Wonnell's helpful term[13]—account of these core concerns requires more than a showing that moral rights and consequentialist analyses reach the same results in most cases. The argument that moral rights are justified on utilitarian grounds—as both Richard Epstein and Christopher Wonnell argue in their contributions to this symposium[14]—operates well within the dominant hierarchical approach. Rather than trying to justify one mode of analysis in terms of the other, a truly compatibilist approach would, in my view, try to show how moral rights and consequentialist modes of analysis can both be useful components of a more comprehensive evaluative method. Nonetheless, if it is true that in most cases a sound moral rights analysis converges on much the same results as a sound consequentialist analysis, such a showing would suggest two important respects in which moral rights and consequentialist analyses are functionally compatible.

First, if both methods generally reach the same result in en-

12. Mackie, *Rights, Utility, and Universalization* in UTILITY AND RIGHTS, *supra* note 10, at 86-87. As Jeremy Waldron points out, utilitarianism is just one kind of consequentialist analysis. *See* Waldron, *Comment: Wonnell on Rights and Efficiency*, 12 HARV. J.L. & PUB. POL'Y 873, 874 (1989) ("Some rights may embody the indirect pursuit of good consequences . . . . Others may represent a commitment to a particular consequence taken to be specially important in itself.") (footnote omitted).

13. *See* Wonnell, *Four Challenges Facing a Compatibilist Philosophy*, 12 HARV. J.L. & PUB. POL'Y 836 (1989).

14. *See* Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989); Wonnell, *supra* note 13.

tirely different ways, then each method can provide an analytic check on the other. Because any of our analytic methods may err or may be used to deceive, we can use one method to confirm the results that appear to be supported by the other. Analogously, after adding a column of figures from top to bottom, we sometimes double check the sum by adding the figures again from bottom to top or by using a calculator. Just as we rely upon institutional rivalries between branches of government to protect against error and deception, we may rely upon "conceptual rivalries" between different methods of normative inquiry for the same reason. In sum, one way that moral rights and consequentialist modes of analysis may be functionally compatible is by providing a conceptual "checks and balances" mechanism by which errors in our normative analysis may be detected and prevented.

Second, only if we rely upon multiple modes of analysis can we assess the degree of confidence we should have in a conclusion recommended by any single mode of analysis. Because we know that no evaluative method is infallible, the more valid methods there are that point in the same direction, the more confident we may be that this is the direction in which to move. Conversely, a divergence of results between two valid methods suggests problems that may exist at the level of application of a method or deep inside the method itself. Divergent results from competing methodologies recommend not only that we proceed cautiously, but that we carefully reconsider our methods and their application to discover, if possible, the source of the divergence.[15] In sum, a second way that an analysis of both moral rights and consequences may be functionally compatible is that only when we rely on competing modes of analysis can convergence of results beget confidence and divergence of results stimulate discovery.

The ability of two completely different methods to reach the same results in most cases suggests that each method is grasping, however imperfectly, something "real" about the world it is seeking to explain. If each method were unrelated to any fundamental reality, we would expect only a random convergence of results. To put the matter less metaphysically, considering how different moral rights and consequentialist analyses are

15. I consider two examples of such divergence in Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37, 44-46 (1988).

from each other, only if both methods have an underlying validity would they so frequently converge on the same results.[16] Perhaps by better understanding the merits of each methodology we can begin to unravel the rights-consequences paradox.

The Appeal of Moral Rights and Consequentialist Analyses

To resolve any paradox we must take several steps back from the analytic framework that produced it. We have taken the first step by suggesting why most schools of thought have felt impelled to adopt either moral rights or consequences as their exclusive mode of analysis or have elevated one of these to the top of a hierarchical analysis. A hierarchy provides a way of resolving conflicts between the two modes of analysis and avoids the apparent need to balance two competing values. The next step is to examine why some gravitate to moral rights analysis while others are attracted to consequentialism. I suspect that adherents to one school or the other are attracted to the different truths that lie at the core of each evaluative method and that the preference for one method as opposed to the other depends upon the priority one attaches to these truths.

Moral rights analysis is appealing because it takes seriously the individual and the associations to which individuals belong. Moral rights are seen as protecting the highly valued "private" sphere.[17] Put another way, moral rights analysis views the actions of individuals and associations from the perspective of the individual and the association. The specialized evaluative techniques it employs are conducive to elaborating this perspective. Because we all are individuals and members of associations, the idea of moral rights has wide appeal. We have a natural interest

16. Loren Lomasky has suggested to me another possible explanation of this purported convergence: it is bogus. One analytic method is simply taking a free ride on the other. Either natural rights thinkers are doing seat-of-the-pants consequentialist calculation or consequentialists are seeking to justify just those rights that have come to be accepted as important on moral grounds. Although this possibility is worth serious consideration, in the balance of this Foreword I will assume that, when it occurs, the convergence of moral rights and consequentialist analyses is genuine.

17. *See* Lomasky, *supra* note 1, at 777 (arguing that rights are powerful because "they erect morally potent barriers that others are not at liberty to cross even if there are otherwise cogent reasons supporting such encroachment"); *see also* Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625 (1988) ("[T]he structure of rights is not constitutive of social life, but instead [is] to be understood as a position of fallback and security in case other constituent elements of social relations ever come apart.").

in the protection of our rights, and our empathy causes us also to be concerned about the protection of the rights of others.

In contrast, consequential analysis is appealing because it takes seriously the wide-reaching and highly dispersed effects that the actions of individuals and associations may often have on others. Consequential analysis is seen as protecting a "public" sphere. Although consequential analysis is often couched in terms of how "society" views the actions of the individual and association, one can avoid this anthropomorphic metaphor by saying that consequential analysis views the actions of individuals and associations from the perspective of the other persons with whom they live in society.[18] The specialized evaluative techniques it employs are conducive to elaborating this perspective. Because we are all affected by the actions of other individuals and associations of which we are not members, the consequentialist perspective also has wide appeal. We are concerned about the consequences to us of other persons' actions and our empathy causes us also to be concerned about the consequences of such actions for others.

Viewed in this light both moral rights and consequentialist analyses provide personal reasons for action.[19] At the risk of oversimplification, moral rights attempt to define a privileged sphere within which each person can act; consequential analysis attempts to gauge the effects that such privileged actions have on each person. At some point, however, both of these perspectives lose their appeal. Moral rights analysis is unappealing when it advocates the protection of moral rights "though the heavens may fall."[20] Most people care about the domain of discretionary actions that rights protect, but also would care about the falling of the heavens. Consequentialist analysis is unappealing when it sacrifices the domain of action protected by moral rights in the interest of a completely impersonal standard of value—utils, wealth maximization, etc. Most people do

18. Ardent communitarians who believe in a "public" entity and a "public good" above and apart from the persons and association in a given society are probably not consequentialists, so this recasting of consequentialism away from the "society-as-a sentient-entity" metaphor should not greatly disturb them.

19. The issue of personal and impersonal reasons for action is discussed in Alexander, *supra* note 6, at 815-17; Lomasky, *supra* note 1, at 781-94; and Mack, *supra* note 9, at 756-59.

20. *See* Epstein, *supra* note 14, at 713 ("[I]f consequences never count, then disastrous consequences cannot count either."); Lomasky, *supra* note 1, at 777 ("The willingness to countenance acceptance of the inferior [outcome] may be seen as the epitome of practical irrationality.").

not want to sacrifice all of their liberty to act even if such sacrifices significantly benefit others.

The paradox of rights and consequences, of justice and utility, may be viewed as an aspect of the alleged paradox of classical liberalism. On the one hand, in contrast with political elitism, liberalism sought to protect the dignity of the common person, meaning all persons *qua* human beings. On the other hand, liberalism always acknowledged the need to prevent the actions of some from adversely affecting the interests of others. Nor did individualist-flavored liberalism ever deny the importance of the community in which individuals reside. Liberalism always lay betwixt and between these two great concerns, a position that has led some critics of liberalism to complain of its internal dialectic, inherent tensions, or fundamental contradictions. It would be mistaken to conclude that this undeniable tension between individual and community, between self and others, is a contradiction in a logical sense. Aristotle, no stranger to logic (albeit aristotelian), held that virtue consisted in seeking the mean between extremes.[21] Far from representing a middle-of-the-road position,[22] liberalism, like aristotelian virtue, attempts to supply a conceptual and institutional structure that is exquisitely poised between the individual and others—a structure that is scrutinized from the perspective of both rights and consequences.

Given the impossibility of assessing the merits of each person's every action, the conceptual or intellectual aspect of the liberal endeavor must be able to assess *types* of human action from the perspective of the actor as well as from the perspective of those who are affected by these actions. Moral rights concepts and a consequential analysis of these concepts reflect these different perspectives. The institutional setting in which these concepts are developed and used must ensure that both perspectives are adequately represented.

Those actions that pass muster from both points of view—or neither—are "easy cases" in which we can be quite confident in

21. *See* L. FULLER, THE PROBLEMS OF JURISPRUDENCE 31 (tent. ed. 1949) ("[T]he central notion that virtue is a state of balance between forces that pull a man in different directions is one of the most important and fruitful parts of Aristotle's ethical thought.").

22. *See id.* ("For Aristotle, the middle way was not the soft way, but the hard way, the way that took skill and competence and from which the clumsy and ill-favored were most likely to fall.").

our judgment. The actions about which justice and expediency provide conflicting assessments, such as the hypotheticals given earlier,[23] are "hard cases" that call upon us to reconsider our analysis or further refine our analytic techniques. Until such time as a conflict between modes of analysis is resolved, we must tread cautiously, and the fact that caution is required is worth knowing. Indeed, one of the greatest virtues of moral rights analysis is its ability to obviate the need for costly and potentially tragic "social experiments" that may be recommended by faulty consequentialist analyses.[24] Even when such experiments are destructive, there is often no efficient way to terminate them. It is far better to use a moral rights analysis to look before one leaps.[25]

Still, the fact that we must act in the face of conflicting modes of analysis suggests that the compatibilist picture I have painted to this point is still seriously incomplete. How is it that we are not frozen in our tracks until conflicts between moral rights and consequentialist perspectives are resolved? Perhaps there is yet another mechanism of choice that functions alongside analyses of rights and consequences. Understanding the nature of this mechanism and its relationship to moral rights and consequentialist analyses will further help resolve the paradoxical relationship of these two competing techniques.

The Missing Link: Legal Evolution and The Rule of Law

I have suggested that types of human action should be assessed from the perspective of the actor and also from the perspective of those affected by the action and that these perspectives are represented by analyses of moral rights and consequences. However, the compatible roles of these competing modes of analysis cannot be fully appreciated without considering the shortcomings of any analytic technique, whether that of moral rights or that of consequentialism.

The rhetoric of philosophers and economists would lead one to think that a comprehensive analysis of moral rights or a com-

23. *See supra* note 1 and accompanying text.

24. I have argued elsewhere that the legal prohibition of intoxicating drugs is one example of this. *See* Barnett, *Curing the Drug-Law Addition: The Harmful Side Effects of Legal Prohibition*, in Dealing With Drugs 73 (R. Hamowy ed. 1987).

25. *See* Barnett, *Public Decisions and Private Rights* (book review), Crim. Just. Ethics, Summer-Fall 1984, at 50 (discussing the inherent weaknesses of public policy analysis unguided by moral rights).

prehensive analysis of consequences was capable of discovering the full panoply of norms on which law should be based. But neither mode of analysis can accomplish such a feat. Instead, both rights theorists and consequentialists get their starting points from conventional practice.[26] In the Anglo-American legal systems, the conventions of practice have typically been generated by the spontaneously evolving process known as the common law.[27] As Lon Fuller put it,

> [i]t can be said that law is the oldest and richest of the social sciences. . . . Economists who have exhausted the resources of their own science turn to the law for insight into the nature of the institutional arrangements essential for a free economy. Philosophers find in the law a discipline lacking in their own sometimes errant studies—the discipline, namely, that comes of accepting the responsibility for rendering decisions by which men can shape their lives.[28]

Although he uses a hierarchical metaphor, Charles Fried has made a similar observation:

> The picture I have . . . is of philosophy proposing an elaborate structure of arguments and considerations that descend from on high but stop some twenty feet above the ground. It is the peculiar task of the law to complete this structure of ideals and values, to bring it down to earth; and to complete it so that it is firmly and concretely seated, so that it shelters real human beings against the storms of passion and conflict. Now that last twenty feet may not be the most glamorous part of the building—it is the part where the plumbing and utilities are housed. But it is an indispensable part. The lofty philosophical edifice does not *determine* what the last twenty feet are, yet if the legal foundation is to support the whole, then ideals and values must constrain, limit, inform, and inspire the foundation—but no more. The law is really an independent, distinct part of the structure of value.[29]

That philosophical and economic analyses are typically used to subject established conventional principles to critical scrutiny is of methodological significance. It suggests that, even taken together, moral rights and consequentialist analyses cannot explain the discovery of legal norms that would satisfy their

26. The mechanism by which conventional norms spontaneously evolve is discussed in R. SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE (1986).

27. *See* L. FULLER, ANATOMY OF THE LAW 84-108 (1968) (presenting ten distinctive characteristics of the common-law process).

28. *Id.* at 3.

29. Fried, *Rights and the Common Law*, in UTILITY AND RIGHTS, *supra* note 10, at 231.

critical demands. It suggests that moral rights and consequentialist analyses are just a part of how legal norms are discovered. Something more is required. Two years ago in this space I suggested that the attempt to discover legal norms depends upon both tradition and reason.[30] Tradition provides us with a starting point—that is, a set of conventional norms that must then be subjected to critical reason. This observation may seem both obvious and hopelessly vague. The discussion to follow should render this approach more useful and more specific.

Moral rights and consequentialism are modes of rational analysis that are quite useful to criticize the "received" or traditional wisdom. Unlike philosophers or economists, however, judges must decide cases even in the absence of an iron-clad moral rights or consequentialist analysis. Indeed, for most of our legal history there was little such rational analysis available at all. The need to resolve a multitude of real disputes, each with its own peculiar facts, is the engine that drives legal evolution forward.[31] This engine produces a body of reported outcomes of countless cases in which contending parties have both laid claim to some resource (including the resource that would be used to satisfy a monetary damage award) and the reasons given by judges for these outcomes (as well as dissenting and concurring judicial opinions). From this diverse body of outcomes and reasons emerge dominant conventions—sometimes called the "majority rule"—and other rival conventions that may be called the "minority rule."[32] For example, the law of undisclosed agency developed in spite of, rather than because of, the prevailing theories of contractual obligation.[33] Yet most theorists who were puzzled by this "anomaly" were nonetheless generally in agreement with its content.

Once discovered by legal institutions, these evolved rules may then be subjected to critical reason in the form of a mixture of moral rights and consequentialist analysis. Yet, for the

30. *See* Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 281-86 (1987).

31. That the imperative of deciding actual cases leads to a distinctive and indispensable mode of analysis is explored in great detail in A. JONSEN & S. TOULMIN, THE ABUSE OF CASUISTRY (1988).

32. *See* L. FULLER, *supra* note 27, at 93-94 (discussing the constructive role that conflicting opinions play in the generation of legal norms).

33. *See* Barnett, *Squaring Undisclosed Agency With Contract Theory*, 75 CAL. L. REV. 1969, 2000-03 (1988) (discussing the law of undisclosed agency as an example of a spontaneously developed body of doctrine that is consistent with a rights analysis).

traditional conventions produced by the adjudicative process to provide more than a random starting point for a critical analysis based on moral rights and consequences, it is not enough that cases just be resolved. The *way* disputes are resolved determines whether the results reached by a legal system can evolve into promising conventional standards of right conduct that can then be subjected to and, in the main, survive the normative scrutiny of critical reason based on moral rights and consequentialist analysis. Only if the processes that resolve disputes do so in certain ways can we take the views we receive from these processes as a form of wisdom. Similarly, the way that legislation is enacted either supports or undermines the likelihood that such legislation is substantively legitimate.[34] The form that enables dispute resolution processes to produce "judgments" that are knowledgeable enough to usually withstand critical scrutiny on the basis of moral rights or consequences can be summarized under the rubric, "the rule of law." The best summary of these formal constraints was provided by Lon Fuller.[35] He called these constraints the "internal morality of law."[36] Decisions made according to the formal standards provided by the rule of law are capable of producing an elaborate set of decisions consisting of both results (the facts of the case plus who won) and articulated rationales for the results. When a sufficiently elaborate set of decisions (results and rationales) has developed it becomes possible to subject this set of practices to systematic rational appraisal—including the appraisal provided by what Fuller termed the "external morality of law."[37]

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34. *See* Barnett, *supra* note 15, at 47-64.

35. *See* L. FULLER, *supra* note 2, at 38-39 (listing eight formal characteristics of legality); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing the formal requirements of adjudication).

36. L. FULLER, *supra* note 2, at 96.

> What I have called the internal morality of law is in this sense a procedural version of natural law, though to avoid misunderstanding the word "procedural" should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term "procedural" is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.

Id. at 96-97.

37. *Id.* at 96.

THE LEGAL ENTERPRISE AND THE PROBLEM OF "SOCIAL ORDER"

At this point one can expect the following response from philosophers: although you say that moral rights and consequentialist modes of analysis are both useful ways of improving upon past practices that have evolved as part of a process governed by the rule of law, you have not identified your criterion or criteria of improvement. Although you say that the concepts that are the product of legal evolution according to the rule of law must serve the proper ends of the legal enterprise, you have not identified what these ends are. Unless we know the standard by which improvement is to be measured, how can we say that either method improves upon current practices? Unless we know the ends of the legal system, how can we know they are being served? To answer the question of ends, the argument proceeds, requires a choice between the normative standard of justice based on moral rights or the normative standard of utility based on the maximization of beneficial consequences. In making this choice we cannot escape the essential incompatibility of rights and consequences. Ultimately, one approach must be subordinate to the other.

Although I concede that some idea of "improvement" is needed to appreciate the roles played by moral rights, consequential analysis, and the rule of law, I reject the idea that our conception of improvement need be based exclusively on any one of these three perspectives.[38] All three approaches are problem-solving devices. Viewed in this light all of these modes of analysis are means, not ends.[39] To provide the requisite idea of improvement, one must identify, not so much an ultimate standard of value, but the ultimate *problem* that the enterprise of law with its particular blend of formal and substantive values is seeking to solve. We can then see how traditional processes based on the rule of law and such rational modes of analysis as those provided by moral rights and consequentialist methods

38. In this essay I have not considered the views of some that the rule of law is the ultimate source of norms, a view that today is associated with many judicial conservatives. I did briefly discuss this approach in Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POL'Y 599 (1988).

39. *See* L. FULLER, *Means and Ends*, in PRINCIPLES OF SOCIAL ORDER 47 (K. Winston ed. 1980) (discussing the contextual nature of the distinction between means and ends).

all contribute to solving the relevant problem.[40] Moreover, other processes and methods of rational analysis may be useful as well.[41]

To sum up the analysis thus far, the first step toward resolving the paradox of rights and consequences was to reject the hierarchical approach to rights and consequences and to entertain the prospect that both were equal partners in the legal enterprise. The second step was to appreciate why each mode of analysis is attractive. The third step was to acknowledge the role that an evolving tradition or practice governed by formal criteria known as the rule of law plays in providing cases and promising precepts that can be subjected to rational scrutiny on the basis of rights and consequences. The next step is to identify the underlying function or end of the legal enterprise so that we can better recognize moral and consequential methods that contribute to the improvement of the precepts produced by institutions governed by the rule of law. We need to discern the problem or problems for which moral rights, consequentialist analysis, and the rule of law are offered as solutions.

According to classical liberals, the fundamental problem facing every society may be summarized as follows: *Given that the actions of each person in society are likely to have effects on others, on what conditions is it possible for persons to live and pursue happiness in society with other persons?* "Social order" is the term that has traditionally been used to describe the state of affairs that permits every person to live and pursue happiness in society with others.[42] Unfortunately, this term has come to be associated

40. *Cf.* S. TOULMIN, *supra* note 7, at 185:

> Within a historically developing scientific enterprise, . . . the significance of our concepts can be adequately shown . . . only by viewing all the elements of the science—subject-matter, formal entailments, explanatory procedures, and all—within a larger framework, and by demonstrating how—on what conditions, in what kinds of case, and with what degree of precision—the explanatory procedures and/or arguments within which the concept is given a meaning can successfully be used to make sense of the relevant subject-matter.

41. Rational bargaining theory, for example, is an example of a distinctive technique that intersects both moral rights and consequential analyses. *See, e.g.*, Coleman, Heckathorn & Maser, *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. & PUB. POL'Y 639 (1989).

42. F.A. Hayek offers the following definition of the general concept of "order":

> [A] state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spacial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct.

1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 36 (1973).

with ordering schemes imposed from above by totalitarian regimes.[43] For this reason, perhaps, the term "coordination" better captures the problem of achieving an "order of actions."[44] Whatever the terminology, some way must be found to permit persons to act so that their actions do not obstruct the actions of others.

This rendition of the fundamental problem of human society contains a number of "liberal" presuppositions. First, liberals recognize the existence and value of individual persons. Second, liberals place value on the ability of all persons to live and pursue happiness. Third, liberals use the phrase "pursuit of happiness" because they reject the idea that one particular style of life is to be preferred above all others for everyone. Fourth, liberals recognize that people live in society with others and that the actions of one may have both positive and negative effects on others. Fifth, liberals maintain that it is possible to find conditions or ground rules that would provide all or nearly all persons living in society the opportunity to pursue happiness without depriving others of the same opportunity.

Of course, although they are widely shared, each of these presuppositions is and has always been controversial. For this reason, liberalism is and has always been controversial. Where controversy arises over any of these presuppositions, it must be thrashed out in the appropriate forum. Assuming, however, that a consensus is reached on these presuppositions, then the next step is to ask how it is that the problem of achieving coordination is actually to be solved. In the next section, I shall suggest the role that natural rights play in addressing this problem.

Resolving the Paradox: The Natural Rights Alternative

The term "natural rights" means many things to many people, and I shall not try to compare my conception with that of others. Indeed, given the many preconceptions about natural rights, it may well be best to abandon the term altogether. Current prejudices notwithstanding, however, the natural rights

43. *See id.* at 35 ("The term 'order' has, of course, a long history in the social sciences, . . . but in recent times it has generally been avoided, largely because of the ambiguity of its meaning and its frequent association with authoritarian views. We cannot do without it, however . . . .").

44. *See id.* at 98-101 (discussing the role played by legal institutions in maintaining "an ongoing order of actions.").

tradition has much of value to offer and it would be disingenuous to adopt a natural rights methodology without giving the tradition its due.

For present purposes it is enough to identify two significant features of natural rights thinking. First, writers in the classical natural rights tradition were attempting to address in a realistic manner the problem of social order. Sometimes they referred to this as the "common good," referring not to some public good that transcends the persons living in society with others, but to those basic requirements that all such persons share in common.[45] Second, they addressed this problem with a mixture of what we would today consider moral rights and consequentialist analyses.[46]

Let me briefly summarize the liberal approach to natural rights.[47] When living in society with others, humans need to act. Their actions will require the use of physical resources, including their bodies but, because of scarcity, their actions will unavoidably affect others. Given that nearly all human action will affect others in some way, how are actions to be regulated so as to permit individuals to act in pursuit of happiness without impeding the similar pursuit by others? To answer this, a natural rights approach attempts to establish an appropriate time and place for the actions of different persons by examining certain features of the world that are common to all, at least under circumstances we would consider to be normal. Normal circumstances give rise to precepts (rules and principles) that

45. *Cf.* D. HUME, A TREATISE OF HUMAN NATURE 484 (L. Selby-Bigge & P. Nidditch 2d ed. 1978) (1st ed. 1739-1740):

> Tho' the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call them *Laws of Nature*; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.

46. Because a strict dichotomy between rights and consequences had yet to solidify, these writers often moved from one mode of analysis to the other with little warning. For this reason, contemporary analysts committed to an unbridgeable dichotomy are likely to arrive at starkly conflicting interpretations of classical writings in the natural rights tradition depending upon which of the two dimensions of natural rights analysis is stressed. *Compare* Miller, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL'Y 401 (1987) (attributing to Locke a utilitarian approach) *with* Valcke, *Locke on Property: A Philosophical Interpretation*, 12 HARV. J.L. & PUB. POL'Y 941 (1989) (attributing to Locke a moral rights approach). According to a compatibilist approach, both these interpretations can be useful to understand Locke's theory of natural rights, except insofar as each interpretation denies the validity of the other.

47. I have presented a more elaborate application of this method in Barnett, *Pursuing Justice in a Free Society: Part One—Power v. Liberty*, CRIM. JUST. ETHICS, Summer-Fall 1985, at 50.

presumptively govern time and place unless it can be shown that extraordinary circumstances exist that would support the creation of an exception—itself defeasible—to the rule.[48] The contours of this scheme of defeasible precepts and exceptions define in general terms the natural rights of all persons—rights that are not themselves normally defeasible.

The basic precepts produced at this stage are quite abstract. For persons to live and pursue happiness in society with others, persons need to act at their own discretion. This is made possible by recognizing a sphere of jurisdiction over physical resources—including their own bodies—that provides persons with discretionary control—liberty—over these resources. Put another way, persons need to be at liberty to act within the realm of their jurisdiction—a jurisdiction that has both temporal and spatial dimensions.

The shorthand term for this jurisdiction is "property rights," with property given its older meaning of "proprietorship." One is said to have property *in* an object or one's body.[49] Property, in this sense, refers not to an object, but to a right to control physical resources—a right that cannot normally be displaced without the consent or wrongful conduct of the right holder. Some of these property rights are alienable and others are inalienable.[50] Persons need to be able to consensually transfer their alienable rights or jurisdiction to others.[51] The shorthand term for this precept is "freedom of contract."

Persons also need institutions that enable them to enforce their rights, but these institutions must be subject to substantive and procedural constraints to ensure that the institutions whose mission it is to protect rights do not end up violating them. The substantive constraints are provided by the general

48. The historical practice of using presumptive precepts within different stages of analysis and the virtues of this technique are discussed in Epstein, *Pleading and Presumptions*, 40 U. CHI. L. REV. 556 (1973); *see also* Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985) (distinguishing between "flat" and "structured" modes of legal analysis). I have used this method to resolve some vexing issues of contract theory and doctrine in Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 309-10, 318 (1986) [hereinafter Barnett, *A Consent Theory*]; *see also* Barnett, *supra* note 33, at 1993-99.

49. *See, e.g.*, J. LOCKE, *An Essay Concerning The True Origin Extent and End of Civil Government*, in TWO TREATISES OF CIVIL GOVERNMENT, ch. V, § 27 (London 1690) ("every man has a *property* in his own *person*").

50. *See* Barnett, *Contract Remedies and Inalienable Rights*, SOC. PHIL. & POL'Y, Autumn 1986, at 179 (discussing the bases of inalienable rights and the implication of inalienability for contract remedies).

51. *See* Barnett, *A Consent Theory*, *supra* note 48, at 291-309.

precepts of justice governing the acquisition, use, and transfer of resources. The procedural constraints are provided by the set of principles sometimes referred to as the rule of law.

A natural rights analysis does not rest content with generating a set of substantive and procedural precepts of justice and the rule of law from general observations about the nature of the human condition. It also "tests" the conclusions such an analysis provides by examining the consequences of adhering to these precepts. This may be done hypothetically or empirically. If it is revealed that a particular form of jurisdiction actually retards rather than enhances the ability of persons to pursue happiness in society, this showing does not automatically refute the rights being scrutinized. Instead, the analysis must return to the legal precepts used to elaborate moral rights to see if the original precept can be refined to better deal with the problem or if an entirely different precept would be better. Such a process seeks what John Rawls has called a "reflective equilibrium"[52] among competing considerations.

Let me offer an example to illustrate this multifaceted approach. The liberal natural rights analysis just presented suggests that the consent of the rights-holder lies at the heart of contractual obligation.[53] In practice, courts developed the "doctrine of consideration," which requires commitments to be "bargained for" to be enforceable.[54] Although this criterion of enforceability captures most consensual commitments to alienate rights, it gradually became apparent that this precept was underinclusive. That is, it left unenforced a variety of "serious" commitments on which people are likely to rely to their detriment—cases that came to be clustered under the rubric of "promissory estoppel."[55]

However, merely identifying a residual group of cases that seemed to be unsatisfactorily handled by the doctrine of bargained-for consideration neither solves the problem nor en-

52. *See* J. RAWLS, A THEORY OF JUSTICE 48-50 (1970).

53. *See* Barnett, *A Consent Theory*, *supra* note 48 (describing a "consent theory of contract").

54. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(1), (2) (1979):

> (1) To constitute consideration, a performance or return promise must be bargained for.
>
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

55. *See* Barnett, *A Consent Theory*, *supra* note 48, at 287-89.

sures that there is a genuine problem to be solved. Without some other analysis we cannot be sure that the source of our intuitive dissatisfaction does not lie in our intuitions rather than in the doctrine of consideration. When these aberrant cases are considered in light of a moral rights analysis, however, it becomes clear that, although they lack bargained-for commitments, many of these cases nonetheless involve some other manifestation of consent to be legally bound. From this observation we can begin to suspect that bargained-for consideration should not be the exclusive means of establishing a consensual transfer of rights. Other indicia of consent, such as a formality or even silence in the face of substantial reliance, may also indicate the presence of consent.[56]

This example illustrates how the rule of law and a natural rights approach to justice based on an analysis of both moral rights and consequences can work together. The institutions governed by the rule of law developed a doctrine of bargained-for consideration to help distinguish between enforceable and unenforceable commitments. Although this legal precept was not logically deduced from first principles of justice, it was nonetheless consistent with and justified by a moral rights analysis insofar as it was a generally efficacious method of determining the existence of consent to alienate rights. As this precept came increasingly to dominate contract law, however, certain unbargained-for, but consensual, commitments went unenforced. Dissatisfaction with this consequence of the doctrine stimulated a reexamination of the legal precept in light of a moral rights analysis. This critical analysis revealed the limitations of the doctrine of consideration and recommended ways by which the precepts governing contract law could be reformed.

The Right and the Good

In my view, the moral rights and consequentialist components of a natural rights approach support a view of rights as spheres of bounded individual and associational discretion to use physical resources. Rights allow persons and associations jurisdiction to decide how certain physical resources—includ-

56. For a fuller discussion of these issues, see Barnett & Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentation*, 15 Hofstra L. Rev. 443 (1987).

ing their own bodies—should be used. Such jurisdiction is bounded, and the boundaries must be enforced by institutions governed by the rule of law. These institutions, in turn, produce the cases and decisions that lead to important refinements of our understanding of the basic precepts of justice. Legal evolution requires a constant rotation among these modes of analysis—the rule of law and justice based on both moral rights and consequentialist analyses—and others as well. Viewed in static terms, this process may appear circular. Viewed as an evolutionary process, it more nearly resembles a bit on a drill, whose rotation permits it to penetrate solid wood.

Determining the content of the rights that define justice does not, however, exhaust the whole of moral inquiry. An analysis that identifies the rights people have with a bounded jurisdiction to control physical resources does not stipulate how people should go about exercising their rights. For example, should one be an egoist exercising one's rights solely to benefit oneself, an altruist exercising one's rights solely to benefit others, or somewhere in between?

Natural rights theorists sometimes distinguished between perfect and imperfect rights and duties. Perfect rights referred to those rights that created an enforceable duty in others. Imperfect rights created duties that did not justify the use of coercion.[57] The natural rights analysis described above addresses only the question of enforceability. The question of unenforceable moral duties must be addressed by the broader moral inquiry know as ethics.[58] Much needless controversy about moral

57. For a detailed treatment of the distinction drawn by classical natural rights theorists between enforceable and unenforceable duties in the context of the theories of James Wilson, see Hills, *The Reconciliation of Law and Liberty in James Wilson*, 12 HARV. J.L. & PUB. POL'Y 891 (1989). He summarizes Wilson's version as follows:

> [A] duty without a correlative right is an act that a person ought to perform to reach his natural end but that may not be extorted from him by force, because no other person is impartial enough to be trusted with the power to enforce the duty. Duties that *do* entail correlative rights result from those negative rights of strict justice (do not kill, do not steal, etc.), which can be implemented by force because all humans possess the minimum degree of impartiality necessary to curb the excessive self-love of a murderer or thief.

Id. at 924.

58. Lon Fuller made a similar distinction between the morality of aspiration (what I am calling the ethical or good) and the morality of duty (what I am calling the right or just):

> The morality of aspiration . . . is the morality of the Good Life, of excellence, of the fullest realization of human powers. . . . Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom. It lays down the basic rules without which an ordered society is im-

rights is generated by the idea that an adequate rights theory must address not only the problem of unjust conduct that justifies legal enforcement, but also the problem of good or ethical conduct that justifies nonviolent sanctions.

The general issue of good conduct far exceeds the domain of natural rights, with one significant exception. Although a natural rights analysis does not specify any particular theory of the good and seeks to permit the pursuit of differing conceptions of the good life, it does prevent, at least indirectly, certain conceptions of the good from being achieved. A natural rights approach solves the problem of social order by placing certain restrictions on the means one may use to pursue happiness. Consequently and unavoidably, those who believe that their pursuit of happiness requires them to use the very means that are proscribed cannot be permitted to do so. For example, those who find their gratification in having intercourse with others against their will may not pursue this course of action, because this pursuit runs afoul of the principles of justice that make human life in society possible. Of course, such action is not only unjust, it is also morally despicable. That an action is morally despicable, however, is neither necessary nor sufficient to justify its legal prohibition.

In sum, a liberal natural rights approach is neutral among those alternative ways of pursuing happiness, of which there are a great many, that are consistent with the basic requirements of social order. Because it prohibits conduct—whether viewed as morally good or bad—that violates the precepts of justice or right, it will unavoidably, but incidentally, prohibit some action that is morally bad. Persons who wish to pursue happiness by violating the rights of others may be condemned for acting badly (that is, contrary to the good); they may be forcibly coerced, however, only because they are acting unjustly (that is, contrary to the just or right).

That a natural rights approach restricts bad (as distinct from unjust) conduct comes as no surprise. However, a natural rights approach also restricts good conduct. Earlier I described the legal enterprise—with its rivalrous components of the rule

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possible, or without which an ordered society directed toward certain specific goals must fail of its mark. . . . It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.

L. FULLER, *supra* note 2, at 5-6.

of law and natural rights based on both a moral rights and consequentialist analysis—as the means by which we solve the problem of social order.[59] But social order is not the only problem facing persons living in society with others. What about the provision of food, water, shelter, and other material, not to mention spiritual, needs of life? Does not the legal enterprise have an important role to play in the provision or at least the distribution of all these goods as well?

A full answer to this question requires that one actually work out the natural rights approach. I have begun this project elsewhere and have addressed this question there.[60] Still, some basic methodological observations can be made here. First, one ought not use the mechanisms that enable social order to exist to address other pressing problems if doing so seriously undermines the ability of these mechanisms to continue to address the problem of social order. The attainment of social order is a prerequisite to effectively addressing the other problems of social life. A society in complete or near chaos cannot address any social problem effectively, however serious it may be. Elsewhere I have analogized this point to stealing from a building's foundation to add more floors to the top.[61] A very well-designed building can tolerate a bit of this type of activity without collapsing, but a policy of taking from the foundation to build a higher building increases the risk of collapse from the very first taking and ensures that a catastrophe will occur at some point if it is continued.

Second, if establishing and preserving social order actually prevented the effective pursuit of these other vital goals, we would seriously question the priority we place on social order. To the contrary, however, the achievement of social order based on the precepts of justice and the rule of law makes it possible for other institutions to pursue other goals without violating the constraints imposed by these precepts of justice. Indeed, a consequentialist analysis would reveal such institutions to be far more capable of addressing these problems than any known alternative.

Finally, the natural rights method I have described with its

59. *See supra* notes 38-56 and accompanying text.

60. *See* Barnett, *supra* note 47, at 60-63. I am currently in the process of developing this approach in the context of an extensive explanation of the liberal conceptions of justice and the rule of law.

61. *See id.* at 62.

consequentialist component allows the theoretical possibility that, in extreme and abnormal instances, exceptions can be made. I am skeptical that any exception to the regime of justice and the rule of law is necessary or prudent, but about this question reasonable people in the liberal tradition have and will continue to differ. In my view this disagreement at the margin does not undermine the basic approach to rights and consequences that I have sketched here.

Conclusion: Why Competing Modes of Analysis?

The approach I have sketched here is multifaceted. It consists of a process of dispute resolution that is governed by principles of the rule of law. The particular outcomes of this evolving legal process are then subjected to rational scrutiny provided by a natural rights analysis that has both a moral rights and a consequentialist component. The results of this process of critical reason are then folded back into practice to see how they fare. Why is a multifaceted approach necessary? If the rule of law is sound, why do we not just accept the results it recommends? If a moral rights analysis is sound, why do we not just accept the results it recommends? If a consequentialist analysis is sound, why do we not just accept the results it recommends?

Part of the answer has already been provided. The processes governed by the rule of law are needed to settle disputes before the results of an intellectual inquiry are in. This process generates a set of practices sophisticated enough to be subjected to rational scrutiny. Moral rights analysis permits us to discern, however abstractly, the conditions that are needed for individuals and groups to pursue happiness in society with each other without wasteful and tragic experimentation. Consequentialist analysis is needed to test and refine the conclusions recommended by a moral rights analysis.

Another part of the answer concerns the twin problems of human error and deception that I referred to elsewhere as the problems of knowledge and interest.[62] Because we know that the results of any mode of analysis can be mistaken, the more different modes of analysis that point in the same direction the

62. *See* Barnett, *supra* note 38 (discussing the role that liberal conceptions of justice and the rule of law play in solving the social problems of knowledge, interest, and power).

more certain we can be that the results of our analysis are correct. Because we know that some people are willing to lie both to others and to themselves to aggrandize their interests at the expense of others, we need ways to discern deception when it occurs—particularly when arguments are couched in familiar terms. Evil, as well as order, can be advocated on the grounds of tradition, morality, or expediency. It often takes a multifaceted analysis to show why such arguments are false, and, as we know, even a multifaceted analysis may not be enough.

Finally, social order requires the use of force in defense of the moral rights embodied in law against those who would violate these rights to serve their own interest. But permitting force to be used to address the problem of interest creates the problem of power. The problem of power is a special instance of the problems of knowledge and interest. For, once the use of power is permitted at all, we need to know when it is proper to use it. Using power raises the cost of erroneous judgment by imposing greater burdens on those who are mistakenly victimized. And the instruments of power are powerful means to enhance the interests of those who wield it. For both these reasons we must place limits or constraints on the exercise of power—constraints that are, in part, provided by the multiple criteria of justice, with its components of moral rights and consequences, and the rule of law. The other important constraint is the maintenance of competing institutions capable in extremes of using force against offending persons and institutions.[63]

In sum, the checks and balances approach to both concepts and institutions is the best way we know of to achieve and maintain social order in the face of the serious problems of knowledge, interest, and power. An approach that purports to solve other pressing problems while ignoring these will be unsuccessful in both theory and practice.

The IHS Law and Philosophy Issue

This is the fifth year that the Institute for Humane Studies at George Mason University and the *Harvard Journal of Law and Public Policy* have collaborated on an issue devoted to law and

63. *See* Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, Crim. Just. Ethics, Winter-Spring 1985, at 37-47 (discussing the need for and operation of a nonmonopolistic legal order).

philosophy. Volume Twelve marks a substantial change in our format. This issue commences with the article that received the 1988 IHS Lon L. Fuller Prize in Jurisprudence: Jules L. Coleman, Douglas D. Heckathorn, and Stephen M. Maser's *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*. This is followed by a "Symposium on the Compatibility of Rights and Consequential Analysis." The contributors are Larry Alexander, Richard A. Epstein, Loren E. Lomasky, Eric Mack, Jeremy Waldron (last year's Fuller Prize recipient), and Christopher Wonnell. This marks the first time that an IHS Law and Philosophy Issue includes a symposium devoted to a particular topic. Appearing after the symposium are two excellent papers by recipients of IHS Leonard P. Cassidy Summer Research Fellowships in Law and Philosophy: Roderick M. Hill's *The Reconciliation of Law and Liberty in James Wilson*, and Catherine Valcke's *Locke on Property: A Philosophical Interpretation*.

Thanks are, of course, due to the authors who produced such excellent papers. Thanks are also due to Jackson R. Sharman III, the Editor-in-Chief of the *Journal*, and his editorial staff. They have been a joy to work with. I also wish to express my appreciation to Walter Grinder of the Institute for all his assistance in planning this issue. Finally, I extend my deepest gratitude to the board of directors of the Veritas Fund, Inc. for providing the funding for this annual IHS Law and Philosophy Issue, the IHS Lon L. Fuller Prize in Jurisprudence, and the IHS Leonard P. Cassidy Summer Research Fellowships in Law and Philosophy.

Perhaps the collaboration between the several independent institutions that made this issue possible and the multifaceted creative processes that makes social order possible are analogous. Without the very different contributions of these distinct but equal partners it is unlikely that we would be able to achieve our common end.