A GENEALOGY OF LAW

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Abstract

The purpose of this dissertation is to trace the genealogy of our modern idea of law back to its logical and practical ancestors in order to understand liberal law. This is, of course, an analytical and synthetic rather than an historical genealogy.

The argument is at once a critique and a reconstruction.

Chapters Two and Three set forth a critique and reconstruction of liberalism as a logical matter. It argues that liberalism does not make sense as a conceptual doctrine.

The argument is made in terms of liberty as categorical limitations on the authority of the state. For such liberty to have conceptual quality, it would have to be based in some ontological ground which is outwith the contingency of either mundane human desire or mundane natural reality. That is, it will have to have a metaphysical ground. Chapters Two and Three argue that no serious metaphysical theory will support the categorical limitations on the authority of the state inherent in liberalism. Metaphysical argument will only inform us of the conceptual truth that we have a plenary obligation to do good. We cannot conclude as a conceptual matter that we have limits on that obligation. Limits on that obligation, and therefore the realm of rights and liberty, are practical. Liberalism should be properly understood as a practical doctrine.

Chapters Four and Five set forth a critique and reconstruction of liberalism as a practical matter.

Liberalism as a practical doctrine is properly based in a theory of the person which accounts for the experiential nature of thought. No theory of the person is adequate unless it is based in the ontological ground to human activity which is the conceptual conclusion of Chapters Two and Three. No such theory of the person is adequate which does not allow for the diversity and tolerance of human activity which is the experiential insight behind liberalism. Chapters Four and Five set forth a theory of personality which reconciles the non-mundane ground to good with the diversity of human activity. That theory of personality suggests that liberal law as a practical matter is mistaken and deleterious.
I composed this dissertation.  
The work is my own.

[Signature]
This work is dedicated to my parents, Francis and Mercedes Galbraith.
Preface

This dissertation is submitted to the Law Faculty of the University of Edinburgh as a requirement for the degree of Doctor of Philosophy.

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Most of all I am grateful to Neil MacCormick. He has been understanding, witty, patient, supportive and tolerant in supervising the composition of this dissertation. He has been gentle and insightful in his criticism, enthusiastic in his support and inspirational in his teaching. He has been an ideal friend and teacher.
A Note Concerning Form

A full citation is given for each work the first time it appears in a chapter. Thereafter, the work is cited so that the author and title are discernible. The bibliography includes all works referred to in the text.

The argument is a difficult and sometimes trying one and I have included devices to help the reader along. Cross references to the text itself are given in terms of Chapter, Part and Section (rather than to page numbers), usually omitting those labels. Thus 'Four, B, 3' refers to Section 3 of Part B of Chapter Four. Such references in the text are identified by 'above' and 'below' and in the notes by 'supra' and 'infra'.

I have included outlines by Part and Section immediately after the Table of Contents, and have included a list of Sections at the beginning of each Part.

At the end of Chapters Two, Three, Four and Five you will find summaries of the argument of those chapters. As is evident from the argument, the propositions of the summaries are not meant to state a syllogism of any sort, but to state those propositions which I judge ripe for agreement or disagreement. Each proposition has a reference to the text.

Like most authors, I have tried to use words in their normal sense. Like many, I have often been unsuccessful. Where a term is used in an odd way, I have tried to explain it in the text. The Terminological Note includes all such terms and either an explanation of them or an appropriate reference to the text.
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Chapter One

Statement of the Thesis

A. Theme

1. Law entails a theory of value and of personality.
2. Modern jurisprudence avoids them.
3. And avoids metaphysical speculation necessary to them.
4. Peroration.

B. Is Our Jurisprudence Based on a Mistake?

1. A summary of the dissatisfaction stated in Part A.
2. An apology for the simplification of 'liberal or modern jurisprudence'.
3. Modern jurisprudence considered as a mistake.
4. The nature of the mistake.
   a. Positivism (Hume).
   b. Natural Right (Kant).
   c. Whiggery (Hayek).
5. Peroration.

C. The Uses of the Liberal Mistake

0. Introduction
   1. The principle of liberty
   2. Understanding law
      a. Legal Dogma
      b. Institutions
      c. Law as duties and rights
      d. Juridical units
   3. Primacy of formal justice
   4. Denigration of public law
   5. The nature of the aspects of liberal jurisprudence
   6. The argument.

D. A Note

1. Such dissatisfaction widespread.
2. Natural right resurgence.
3. Natural law resurgence.

E. A Genealogy of Law

1. The purpose is to unravel the cloth of liberalism.
2. It depends upon a distinction between
   a. the logical or conceptual, and
   b. the experiential or practical.
3. The argument is at once a critique and reconstruction
   a. of liberalism as a conceptual matter, and
   b. of liberalism as an experiential matter.
Chapter Two

Natural Rights and the Authority of the State

A. Theme

1. Theme.
2. The nature of natural rights.
3. The argument aimed at
   a. the libertarian (Nozick), and
   b. the social democrat (Dworkin).
4. Theme -- bis.

B. Rights Are Substantive

1. Statement of the argument.
2. Formal natural right . . .
3. Presumes substantive morality.
4. Substantive rights . . . still presume substantive morality.
5. Rights do not consist of a state of mind.
6. The argument stated in ontological terms.

C. The Nature of Good -- Pervasiveness

1. The nature of good -- pervasiveness, integrity and content.
2. Pervasiveness stated.
3. Compared with natural right.

D. The Nature of Good -- Integrity

1. Integrity stated.
2. The nature of obligation.
3. Applied to Mill.
4. Applied to Dworkin.
5. Conclusion.

E. The Nature of Good -- Substance

1. Substance stated.
2. Rights assume that judgments about substance are problematic.
3. Therefore rights are no less problematic.
4. Examples.
5. Conclusion

F. Conclusion

1. Rights derivative from a plenary obligation.
2. Juridical units of rights are flawed.
3. Applied to Nozick:
   a. arbitrary limit to obligation;
   b. experiential basis not examined;
   c. avoidance.
4. Applied to Dworkin.

G. Summary of the Argument
Chapter Three

Scepticism and the Authority of the State

A. Theme

1. Theme.
2. The nature of positivism.
3. The argument aimed at the separation of law and morality.
4. Theme -- bis.

B. The Positivist or Liberal Project

1. Sense data characterized.
2. Sense data not a basis for ideas of logical quality.
3. Factual circumstances not a basis for tolerance.
4. No 'ought' from an 'is'.
5. Law as mundane fact has no implications.

C. Desire

1. Desire characterized.
2. Desire not a basis for ideas of logical quality.
3. Illustrated.
4. Alternatives to Desire, e.g., pleasure, not helpful.
5. Desire does not justify liberty.
6. No 'ought' from an 'is'.

D. Reasoning . . . or Alchemy

1. Theme.
2. Induction.
3. Deduction.
5. Imputation.
6. Consequentialism.
7. Certainty.
8. Alchemy.

E. Legal Reasoning

1. The critique applied to legal reasoning.
2. An example.
3. The realist insight.

F. The Concept of Law

1. Law as mundane.
2. Austin.
5. Law as institutional fact
6. Conclusion.
G. The Ontological Context of Positivism

1. The conceptual inadequacy of methods of reasoning other than substantive rationality.
2. In natural science -- the missing X.
3. In human activity -- the missing Y.
4. Either X and Y are arbitrary by nature, or else they have a ground.
5. If they have a ground, we need make three assumptions:
   a. ontological;
   b. epistemological, and
   c. sceptical.
6. Then positivist doctrines make sense.
7. Sense data revisited.
8. Induction revisited.
10. Implications:
    a. positivist doctrines presume denial of substantive rationality;
    b. thus, properly methods, not doctrines;
    c. that is, conceptually inadequate; and
    d. then of psychological rather than logical worth.
11. Peroration.

H. The Nature of Law and Legal Reasoning

1. The a. epistemological and b. ontological lessons . . .
2. applied to law.
3. Therefore, positivist doctrines are practical.
4. Reasoning from rules.
5. Law as mundane.
6. Applies to understanding as well as morality.
7. Realist insight.
8. Proper uses.
9. Improper Uses

I. Liberty.

1. Positivist doctrines presume a plenary obligation.
2. Conclusions apply to any scepticism.
3. Separation of law from morality:
   a. principle of liberty as derivative;
   b. law as a mundane entity.
4. Liberalism based in practical insights about human nature.
5. The principle of practical liberalism.
6. Its implications.
7. Liberalism requires a theory of personality.

J. Summary of the Argument
Chapter Four

Is There Some Quality of Personality which Limits Law?

A. The Story So Far
1. No conceptual basis.
   a. ontology.
   b. epistemology.
   c. power and prudence.
2. Practical basis.
3. Whiggery (Hayek).
4. Liberty as equality.
5. The theme.

B. Will
1. The problem.
2. Does will have quality?
3. No:
   a. physiological insight,
   b. psychological insight,
   c. sociological insight.
4. Nature of insights about the person.
5. Will rejected.
6. Act of will itself important?
7. Rejected.
8. Conclusion.

C. Justification ... or the Critical Fallacy
1. Theme.
2. Critical fallacy:
   a. reductionist;
   b. facile;
   c. proper reasoning.
3. The true nature of criticism.
4. Schematically.
5. Conclusion.

D. Personality
1. Personality as a justificatory unit.
2. Its ontological nature.
3. Personality has quality.
4. Hence ... the nature of morality.
5. Liberty not tenable as a primary principle.
6. Theory of person necessary to tolerance.
E. The Nature of Human Understanding

1. Everything said about activity also true of understanding.
2. An explanation of the beginning of this dissertation.

F. The Nature of the Relationship Between Thought and Personality

1. The problem --
   a. universals excluded;
   b. particulars excluded.
2. Two aspects in relation to personality --
   a. expressive, and
   b. constitutive.
3. The complexity of thought.
4. Applied to the liberal mistake . . .
   a. as a conceptual doctrine and
   b. as a practical doctrine.
5. Applied to Hayek's first argument . . .
   a. about the particular and the general,
   b. about the individual and social and
   c. about the conscious and the not-conscious.
6. Conclusion

G. Directive and Spontaneous Thought and Activity

2. The nature of directive thought . . .
3. does not imply tolerance.
4. The nature of spontaneous thought . . .
5. implies tolerance but not the principle of practical liberalism.

H. Conclusion

1. The liberal point of view is practically wanting.
2. Hayek's argument against social justice is a mean trick . . .
3. conceptually and
4. practically.
5. Conclusion.

I. Summary of the Argument
Chapter Five

Noble and Ignoble Thought

A. Fear and Trembling

1. Thought links the mundane and non-mundane.
2. The juxtaposition of enlightenment and depravity.
3. The ambiguity of thought.
4. Thought as inherently
   a. noble,
   b. ignoble and
   c. self-congratulatory.

B. The Ontology of Fear.

1. Nature of Fear.
2. Good.
3. Fear, ontologically.
5. The ontological nature of the person.

C. Fear and Human Understanding.

1. Thought as an expression of the person.
2. And therefore born of fear -- the three elements.
3. Applied to the scientific method.
4. Evaluating systems of understanding.

D. Morality and Fear

1. Morality as a product of fear.
2. Morality ignoble.
3. Morality noble.
4. Morality justificatory.
5. We ask the wrong moral question.
6. The proper task of morality is to overcome fear.

E. Fear and Personality

1. A conception of personality.
2. Needs:
   a. physiological,
   b. safety,
   c. belongingness,
   d. esteem.
3. Values:
   a. acceptance of oneself,
   b. acceptance of others,
   c. true relation with reality,
   d. spontaneity.
4. The nature of needs and values ...
5. related to fear.
F. Liberalism and Its Discontents

1. Morality born of fear.
2. 'Civilization and Its Discontents' ...
3. simplified.
4. Hayek's argument about conflict ...
5. defective for its ignorance of the integrating aspects of thought ...
6. and its ignorance of the centrality of fear.

G. On the Expression 'Power Corrupts'

1. The argument that power corrupts.
2. Corruption born of fear.
3. Directed at self, others and nature.
5. The relations and means.
6. The principle of liberty does not follow.
7. Is liberty corrupting?

H. Summary of the Argument
Chapter One

Statement of the Thesis

"Yes -- when you found me under the yoke you called Duty and Obligation; when you praised as right and proper what my whole soul rebelled against as something loathsome. It was then that I began to look into the seams of your doctrine. I wanted only to pick at a single knot; but when I had got that undone, the whole thing unravelled. And then I understood that it was all machine sewn."

Mrs. Alving in Henrik Ibsen's Ghosts

A. Theme

1. Law entails a theory of value and of personality.
2. Modern jurisprudence avoids them.
3. And avoids metaphysical speculation necessary to them.
4. Peroration.

1. Let me try to state the dissatisfaction that has occasioned this thesis as a way of stating the thesis.

Let us posit a jurist; he may be a judge, the head of a tribunal, a legislator of some sort, a practising lawyer of some sort, an advisor to the government, a legal academic. Let us call him Arthur. He is not a genius, but has the intellectual capacity somewhat about the average for a jurist. He went to school, that is, to particular schools. He has parents, that is, two particular people. He has a

sex; he is either male or female but not both, nor neither. In our instance we shall call him male. He has certain faults and vanities -- intellectual or social pretension, perhaps, or a propensity to eat too much, or whatever faults you may want to give him. Perhaps he is ambitious. Arthur is moderately serious as a person. Deep down he wants to do the right thing when confronted with a matter of justice, but would be frank in telling us that he is often befuddled as to what that just thing might be. In other words, he is very much like all of us. If law is to be made with the bad man in mind, then jurisprudence -- thinking about law -- should be done with a human, all too human, jurist in mind.

Arthur is confronted with legal issues. Should the United States Air Force be permitted to prevent one of its Jewish lawyers from wearing a Yamaka in court? Should the state of South Carolina be permitted to make criminal homosexual acts between consenting adults? Must the British National Health Service inform the parents of an underage girl of her endeavours to obtain contraceptives? Should the police be permitted to intercept the telephonic communications of an antique dealer suspected of dealing in stolen goods without a court issued warrant?¹

What would Arthur want to think about before he dealt with these issues? I cannot understand how Arthur could go about making decisions such as these without first having a theory of value and a theory of personality.²

The theory of value would not necessarily have to list that

²Throughout this part I have underscored the statements which make up the gist of this thesis.
which is worthwhile; indeed, it may be better if it did not deal in particulars. But it would have to presume that it makes a difference whether an issue is decided one way or another; that is, it would have to presume that the issue is important for more than the desires and wishes of the jurist, and indeed for more than the conceit of spinning out some legal reasoning that is part of the jurist's stock in trade. It would have to presume, then, that the issue has importance which is somehow grounded in something more than the satisfaction of various kinds of human desires. For instance, he would have to have an understanding that the practice of religion is valuable in the Yamaka case. He would have to have an understanding that one's sex life -- whether it consists of active sexuality or abstinence -- is valuable; that it is important whether or not a certain fifteen year old has sexual intercourse with her boyfriend.

And the theory of value would have to express some understanding of the relation between that which is worthwhile or valuable on the one hand, and legal decisions on the other. What is the relation between his own belief that the practice of religion is extremely important, and his legal decision about the practice of religion in an institutional setting? What is the relation between the moral belief of those who hold political power in South Carolina that homosexual acts are wrong, and a legal decision about making homosexual acts criminal? What is the relation between, on the one hand, the moral belief of a fifteen year old girl that she should have intercourse with her boyfriend and the moral belief of her mother that she should not, and, on the other hand, a legal decision about the obligations of a health authority that might supply contraceptives to the
The theory of personality, too, would also not have to list specific features of what it is to be a healthy person. Nor would it have to (or could it properly) give a mechanistic description of the person. But it would have to express an understanding of how a person works. Arthur would have to have some understanding of how he and his colleagues work in order to make a judgment about how he is going to go about addressing a legal issue. He would have to appreciate how he and his colleagues act as individuals, as members of groups (the legal profession, their class, their society) and simply as people. He would need an understanding of what makes up human behaviour and what conditions allow for better or worse behaviour. For instance, he might believe that stress caused by overwork tends to cloud thinking or that formality in the courtroom tend to restraint crass prejudice. He might believe that humans have a tendency to overestimate their ability to make moral judgments and that that tendency is fed by the power given to a judge in a courtroom, or restrained by the democratic pressures on a legislator.

He would also need a theory of personality to express an understanding of how his decision will affect those to whom it is directed. For instance, he would have to have an understanding of how his decision would act on whatever value there is to sexual intercourse in the life of the fifteen year old. Arthur would have to have an understanding of how a decision involving the Yamka would act on the religious practices and beliefs of a person, not simply on his ability to practice his religion, but on his whole person. And he would have to understand how the criminalization of homosexual acts...
would affect the people to whom it is addressed.

If Arthur does not have an explicit theory of value and personality then he must either have an implicit one (one that will become evident from the examination of any number of legal acts) or else he will be acting in a relatively arbitrary and naive way.

2. Modern jurisprudence -- and by that I mean the study of law in a broad sense as well as the more limited study which might be called philosophy of law -- leaves me utterly dissatisfied because, by and large, it avoids rather than addresses these issues. Most jurisprudential writings deal with the problems of value and personality by isolating them, by pushing them to some corner, rather than by addressing them directly. After isolating the problem of value by some theoretical framework, modern jurists tend to concern themselves with the easy part -- the theoretical framework -- rather than the difficult part -- the nature of value and the personality.¹

The response may be that my jurist cannot hope to deal with the legal issues I have posed without some conception of what law is and of some institutional framework with which the jurist is implicated. I agree with that statement. Not only do I believe that conventions (dogma) about contemporary law and institutional frameworks are essential to Arthur's effort to do justice. I also believe that we cannot hope to think other than in the historical context -- including that of law -- in which we simply find ourselves. No theory of law which is not sensitive to its historical place -- its contingency, if you will, -- would be satisfying, for it would not have dealt with the reality it is seeking to understand. But I cannot un-

¹I have listed examples of that process in Part C of Chapter Three.
derstand how that concept of law and that concept of legal institutions can be understood without a theory of value and a theory of personality; nor can I understand how we can hope to engage in a continual recreation of that law and those institutional arrangements without a theory of value and a theory of personality. The institutional framework and the conventional conception of law are but useful tools in light of some more profound theory of value and personality. I am not opposed to having conventions about law and legal institutions; but I am befuddled how any such conventions can hope to be successful if they are made without reference to an understanding of the nature of value and of the person.

Another response is that the jurist should be concerned with obligations -- moral and legal rights and obligations -- rather, than the substance inherent in the concepts of personality and value I am speaking of. I see this response as yet another way of avoiding the difficult issues. For I cannot understand how any theory of obligation can make sense without a theory of value and a theory of personality. Nor can I understand how we can construct and employ any theory of obligation without a theory of value and a theory of personality. Like precepts of formal justice, obligations -- whether moral or legal -- are derivative.

To the extent we act without implicit or explicit conceptions of value and personality, then I think that we are acting haphazardly. That is, I don't think that any idea of law and legal institutions which does not have behind it a theory of value and of personality is one worth consideration. I think that no idea of law and of legal institutions can be better than the theory of value and personality.
which is behind it (other than by chance). (I think it could be worse!)

My argument then is that the usual stuff of legal analysis -- obligations and formal devices -- are not sufficient to make up a theory of law and that they are indeed derivative from that which is sufficient to a theory of law. While in history, and perhaps in psychology, we may conceive of obligations and formal devices contemporaneously with value and personality, in logic ideas of personality and value precede any other constituents of law. Theories which deal in obligations and formal devices, but not in a theory of value and of personality depend upon the odd (though perhaps not totally wrong) premise that the best understanding of value and personality will come about as a result of the mind's not concentrating its energies upon it, rather like the idea that one is more likely to have a good time if one does not concentrate too much on doing so. But theories which attempt to justify law (as opposed to practise law) without resort to value and personality are simply wrong.

3. It is part and parcel of this disdain for a theory of value and of personality to eschew metaphysical speculation. The reasons or motives for this disdain are no doubt varied and complex. It seems to me that it has something to do with the belief that judgment about things which are transcendental are judgments which are not rational. It seems also that it has to do with a shrewd judgment about human nature; that is, that morality and justice are not so much about knowledge of the transcendental as they are about

1For instance, Hume. See One, B, 4a, supra.
restraining  human desires and passions. I know of no better state-
ment of this than that by David Hume on his death bed, as reported by
Boswell.

[He] added that it was the most ridiculous fancy that we should
exist forever. That immortality, if it were at all, must be gen-
eral; that a great proportion of the human race has hardly any
intellectual qualities; that a great proportion dies in infancy
before being possessed of reason; yet all these must be
immortal; that a Porter who gets drunk by ten o'clock with gin
must be immortal; that the trash of every age must be preserved
and that new Universes must be created to contain such infinite
numbers.

It is a mark of Hume's modern charm that he reason s from the drunk
porter to the silliness of immortality and similarly from human
foibles to a sceptical theory of law and morality.

This disdain for metaphysical speculation has an almost total
hold on modern jurisprudence. An instance is John Rawls' Theory of
Justice, which propose principles of justice which are not very ham-
pered by scepticism. Yet it nonetheless eschews the metaphysical.

I cannot understand how one can have a theory of value and per-
sonality without dealing with metaphysical issues.

It is not, of course, Arthur's job to read Plato in the morn-
ing and decide cases in the afternoon. I am not sure why this is so,
but I accept that it is. Nor can Arthur be expected to compose an
entire philosophical system. But I think that it is Arthur's job --
as a jurist -- to have well developed ideas of value and personality,
and that these well developed ideas ought to be no more individual to

1 For instance, Whigs such as Burke, Hume and Montesquieu. See One, B. 4, infra.
2 James Boswell, An Account of My Last Interview with David Hume, Esq.,
in Norman Kemp-Smith ed., Hume's Dialogues Concerning Natural Religion
97, at 98 (CUP 1935).
4 The failure is criticized in Micheal J. Sandel, Liberalism and the
Limits of Justice (CUP 1982)
him than his ideas of consideration or fee simple. It is my judgment -- and the source of my dissatisfaction -- that the works of modern jurisprudence are by and large utterly inadequate to help him in this regard. If I am correct that the essence of the enterprise of law is in these ideas of value and personality, then Arthur would be wasting his time reading modern jurisprudence. It would not inform him about what he really needs to understand. He would be better off gardening or playing with his grandchildren, for these two enterprises will give him more relevant insight than works of jurisprudence as its province has been determined. If he is keen on reading, I would suggest the poems of Emily Dickenson and the novels of Leo Tolstoi rather than the entire contents of an ordinary law library.
B. Is Our Jurisprudence Based on a Mistake?

1. A summary of the dissatisfaction stated in Part A.
2. An apology for the simplification of 'liberal or modern jurisprudence'.
3. Modern jurisprudence considered as a mistake.
4. The nature of the mistake.
a. Positivism (Hume).
b. Natural Right (Kant).
c. Whiggery (Hayek).
5. Peroration.

1. It is then, to me, a curious state of affairs that most modern jurisprudential works are better characterized by what they avoid than by what they confront. The modern jurist avoids questions about the nature of good and the nature of the person, which questions require metaphysical speculation. It makes me uneasy that the modern jurist avoids these matters, for I don't understand how Arthur can practice law, as opposed to the semblance of law, in the absence of this kind of inquiry.

2. My uneasiness is a bit like Mrs. Alving's, for it has resulted from picking at the knots of various doctrines and works of modern jurisprudence and finding that the whole cloth comes undone. The discovery is not only that the various seams of the doctrine are intimately connected in a cloth, but that there is such a cloth. The suspicion that there is a unity to sundry jurisprudential doctrines and principles which are based in the diversity of our moral aims is troubling in itself. For on the one hand it is no doubt a simplification of matters to speak in terms of some underlying unity to what are very disparate threads of thought. On the other hand, not engaging in such simplification seems to me to be denying an
underlying unity which is very real and efficacious.¹ Thus, I would like to offer an apology for the simplification that I engage in.

The simplification of reality into a set of doctrines seems to be an acceptable practice in jurisprudence. H.L.A. Hart, for instance, says that positivism is characterized by the proposition 'that no reference to justice or other moral values enters into the definition of law.'² And Joseph Raz characterizes positivism by three propositions, one of which is 'that the identification of the existence and content of law does not require resort to any moral argument.'³ And jurists who attack liberalism often characterize it by certain doctrines, and then criticize those doctrines.⁴ Such propositions enable a discussion which does bring about a certain clarity, but the resulting clarity concerns the relationship between certain propositions and the implications of holding certain beliefs. It is not a clarity about positivism and liberalism itself, for these are complex historical occurrences, comprised of ideas held by many different people in many different ways and for many different motives, reasons and purposes. The question is whether a simplification reveals more than it hides, or how to use a simplification while respecting the complexity of the matter.

I have found simplifications of this kind to be helpful. I have found, for instance, Max Weber's understanding of 'formal rational

¹Roberto Unger, Knowledge and Politics 48 (New York The Free Press 1975) argues that a preoccupation with particularities precludes dealing with the whole.
⁴See Part D, below.
authority to be enlightening. I have also found Roberto Unger's extended characterization of liberalism in Chapters One to Three of *Knowledge and Politics* to be very enlightening. They are particularly enlightening in the way they make manifest the connections between beliefs which are not apparent. Another such statement, which is more speculative, is Alisdair MacIntyre's description of the enlightenment project in *After Virtue*. Another, which is at once a critique and a defense, is in D.N. MacCormick's *Legal Right and Social Democracy* where he summarizes social democracy in four helpful propositions. Of course all such simplifications are inadequate to pick up the complexity of the reality they are dealing with.

These statements of the liberal or some other creed are more elaborate and insightful than any I have to offer. It seems to me that their effort is to say something about historical reality as well as about the logical relation between specific propositions. I consider them as a starting point. Each states a unity to historical phenomena which is no doubt a simplification but which, to me, is at the end of the day enlightening about that underlying historical reality.

3. My view of liberal or modern jurisprudence -- and by that I mean the traditional libertarianism as well as social democracy -- is perhaps slightly different from others. The unity I find to liberal or modern jurisprudence is not in dogma or doctrine. For instance, it is not odd to consider John Rawls, Ronald Dworkin, John Stuart Mill, and Jeremy Bentham to be of the same cloth, but it is odd that I con-

3 1 (CUP 1982).
sider them of the same cloth as F.A. Hayek and Robert Nozick. The former would allow for the redistribution of income in a way which would offend the latter.\(^\text{12}\) I find it very difficult to characterize the underlying unity to those jurists. It involves a series of insights about human nature and rationality; it involves a series of 'gaps' or blind spots or evasions which are bothersome; it involves responses which are united only in that they respond to the same problem. Any characterization of what nonetheless remains to me a category is problematic. Any characterization can be insightful, yet it can miss the puzzlement which is inherent in liberalism. For instance, Roberto Unger says that 'the second principle of liberal psychology is ... that desires are arbitrary from the perception of the understanding.'\(^\text{3}\) But I think that many liberals would not hold this proposition.\(^\text{456}\) I would consider any set of doctrines to be inadequate to capture the essence of liberalism. To the extent liberal jurisprudence is worthwhile, it seems to me to be so in its scepticism, puzzlement and wariness. And these are not captured -- either by supporter or detractors -- by considering liberalism as a set of doctrines. Thus, I do not think a reduction of 'modern jurisprudence' or 'liberalism' to a few propositions would respect the complexity of


\(^\text{2}\) Knowledge and Politics 42.

\(^\text{3}\) For instance, H.L.A. Hart notes that it is a mistake to fail to distinguish 'the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with power is beyond criticism and must never be resisted. Law, Liberty and Morality 79.

\(^\text{4}\) And F.A. Hayek is critical of those who 'know of no other criterion of justice than the will of the legislator'. 'Principles of a Liberal Social Order', at 166.
that historical reality.

The way I attempt to respect the complexity of what I consider to be a species is to try to appreciate that its essence is not only in ideas but in scepticism about ideas. For my point is that we are not concerned with some logically coherent doctrine, but rather with patterns of responses to intractable problems and ways of avoiding unacceptable avenues of thought. It is my conviction that these attitudes and responses are of a kind. That is, there is 'logic' of another sort to 'modern jurisprudence' just as there is a 'logic' to the 'modern times' of Charlie Chaplin's movie. 'Modern jurisprudence', like 'modern times', has a unifying quality which is real and efficacious, even though that quality cannot be captured, or especially because it cannot be captured, by a few propositions. That unifying quality, to my mind, cuts across various schools of thought - liberalism, positivism, Whig, natural right and realism; it is a quality of modern jurisprudence.\(^{123}\)

It is the thesis of this dissertation that what unites our modern way of thinking about law is not so much a chain of reasoning but certain failures of reasoning, not its logic in the sense of entailment, but some other logic. Modern jurists are more united in that which they avoid and the mistakes of reasoning which they make than in their shared coherence. The lack of logical entailment

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1. Note that Unger in Knowledge and Politics at 13-16 states that the liberal propositions do not entail each other, but that they are nonetheless related. Unger calls it an order of 'adequacy, harmony or appositeness', and calls his analysis an imitation of logical analysis. My attempt differs in that it seeks to explain how liberal thought is unified not in what it affirms, but what it avoids.
2. That avoidance can be grasped by examining the lack of logical entailment between various doctrines in order to find the structural gap. It is that gap which to me unifies and characterizes liberal thought.
between the different elements of modern jurisprudence is the subject of much of Chapters Two through Five, that is, the body of this dissertation. My effort is to use the conceptions of liberalism as a matrix so as to understand the interstices which are its essence. This means that despite radical difference among what I consider to be liberals, they are, in many significant ways, of the same cloth.

Thus, my characterization of modern jurisprudence is made in an odd way. It does not concern propositions so much as the avoidance of them, nor matters of logic so much as matters of what might be called practice or experience. This odd way of stating the matter is not capricious, but fits in with an idea of rationality propounded throughout this dissertation.

4. The first 'gap' that concerns me is the avoidance of certain fundamental philosophical issues. These have been mentioned above in Part A as the initial source of my dissatisfaction. They are turned into a positive faith by a leap of reasoning which is a mistake, a mistake repeated so often as to be worthy of remark. As an example take the following from George Santayana. First he states

[A] that the ultimate environment, divine or natural, is either chaotic in itself or undiscernable by human science, and that human nature, too, is either radically various or only determinable in a few essentials, round which individual variations play ad libitum. For this reason, no normal religion, science, art, or way of happiness can be prescribed.

He then continues:

[B] These remain always open, even in their foundations, for each man to arrange for himself. The more things are essentially unsettled and optional, the more liberty of this sort there may safely be in the world and the deeper it may run.

7 'Liberty and Culture' in Soliloquies in England and Later Soliloquies 173 (U. Mich, Ann Arbor, 1967). Although he is sceptical of the liberalism he describes, he does not seem to be sceptical of this reasoning. In these and the following quotations I have added the [A] and the [B].

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I do not understand how the second, [B], follows from the first, [A]. Why does the inability to make moral precepts mean that each person should arrange things for himself? It may mean that what is right for one person may not be right for another, at least in a way that we can ordinarily make articulate. But it does not entail that the subject is in the best position to determine matters for himself. Nor does it entail that such determinations should be undertaken individually rather than socially. This bit of reasoning depends upon an unarticulated conception of human nature -- in this case about understanding, play and individuality and how they fit into a human life -- which is necessary to conclude [B] from [A]. The reasoning is flawed because any such conclusion depends upon being able to have a conception of human nature in the first place -- the very assertion which the premises deny.

My critique deals with three types or instances of this mistake. I characterize them as the positivist (David Hume), the natural right (Immanuel Kant) and the Whig (F.A. Hayek). To me they are united in that they are all instances of the same mistake, even though views of law and justice of these writers and schools differ. (These views are in most instances not contradictory. That is, in any one case the three views might inform the same result, and so in that sense they are not different ideas. Indeed, I think that the modern jurist, whether of the right like Judge Posner and F.A. Hayek, or of the middle, like Professors MacCormick and Dworkin, deals in some combination of natural right, positivist and Whig sentiments. I also believe that most jurists are sophisticated (or troubled or perplexed) enough to hold some combination of these views. In some cases
they do conflict, but they all have seemed to lead to a core which I find fairly universal and also wrong.)

4a. The first is a scepticism which I shall call positivism. By it I mean a rejection of metaphysical speculation and a faith in sensorily derived data in the name of reason or knowledge (as opposed to the more practical scepticism of the Whig). That doctrine creates a radical dichotomy between fact and value. There is no better statement than that of David Hume.

[A] Reason is the discovery of truth or falsehood. Truth or falsehood consists in an agreement or disagreement either to the real relations of ideas or to real existence and matter of fact. Whatever, therefore, is not susceptible of this agreement or disagreement, is incapable of being true or false, and can never be an object of our reason. Now 'tis evident our passions, volitions, and actions, are not susceptible of any such agreement or disagreement; [B] being original facts and realities, compleat in themselves, and implying no reference to other passions, volitions, and actions. 'Tis impossible, therefore, they can be pronounced either true or false, and be either contrary or conformable to reason.

To Hume, and to the majority of modern jurists, substantive judgments that is, judgments about substantive issues of morality, are passions and volitions which are 'compleat' facts. Their basis is mundane. That is, human activity is separated from any serious ontological ground. That mundane basis for human activity is human rather than something other than human, and individual rather than common. And the substance of human activity is beyond rational treatment. Rationality can inform us how to attain our ends once we determine them, but rationality cannot inform the substance of our decision.

There is no logic to this argument. [A], that our rational faculty does not enable us to perceive the truth or falsehood of moral

1 A Treatise of Human Nature 458 (Selby-Bigge ed., COP 1888).
2 And also then other reality.
3 Hereinafter refered to as Compleat Facts.
precepts, does not entail [B], that volitions are Compleat Facts which have any moral standing. It is this illogical jump -- an instance of the liberal mistake -- that concerns me. Chapter Three argues that an examination of the suppositions behind positivism reveals them to be inadequate to support the ideas of law and justice which are said to follow from them.

4b. A second philosophical tradition -- and a second instance of this mistake in reasoning -- is natural rights theory. I shall use Immanuel Kant as an example. It pretends to a metaphysical ground which is deontological, that is, grounds rights and duties, but does not ground substantive moral judgments. Kant seems to differ from Hume in that to Kant moral matters are ones which have 'an origin entirely and completely a priori and must at the same time derive from this their sovereign authority.'

Thus Kant's maxim --

[A] Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.

pretends to a transcendental ground and is capable of being rationally understood and acted on.

The difference between Kant and Hume is no doubt a real one, capable of having different implications for law. Hume weaves a utilitarian case that restrains very human passion that is antisocial and gives effect to very human passion which is not. Kant an idea of law which respects the person as an end in itself. But practically, the doctrines are, to me, more remarkable for their similarities than for their differences. Both see human volition as something which is

\[Kant, \text{Groundwork of the Metaphysic of Morals (426) in H.J. Paton trans.}
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\[\text{The Moral Law 60 (London Hutshinson & Co. 1948).}
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\[\text{Id. at (429) 66--7 (emphasis in original).}
\]
to be respected and given effect to, rather than something which is capable of rational discussion. And both see law as justified in interfering with this volition only in extraordinary circumstances -- to Hume antisocial behaviour and to Kant behaviour which does not respect the person as an end in itself. At the end of the day 'antisocial behaviour' and 'behaviour that does not respect the person as an end in itself' are not all that different. To Kant as well as Hume, issues of law are not issues of substantive morality.

[B] The Notion of Law [Recht] ... merely respects the relation of choice to choice; ... in this reciprocal relationship of choices, no question is made as to the matter chosen. The form of the choice, i.e., the choice considered as free, is alone regarded, i.e., whether the action of one man is consistent with, and does not impair, the free choice of another.

Thus, for Kant, certain moral obligations are rationally determinable and justifiably restrict our desires, but these obligations are side constraints to the activity which has as its purpose something other than respect for moral obligations. They are what Lon Fuller has called morality of duty as opposed to morality of aspiration, and it is the effect of both Hume and Kant to establish this dichotomy. To both, the morality of aspiration that make up the bulk of our activity is to be considered as being beyond rational judgment. Comparable to this morality of duty is, to Hume, a positive morality of duty -- law and custom. At the end of the day, for Hume as well as for Kant, the substance of moral thought is to be treated as mundane, of human and individual determination, not susceptible to rational determination, and justified in limitation only in extraordinary circumstances.

And Kant's jump from [A] to [B] above is equally mistaken. No matter how hard I try, I cannot see the logic of the jump from [A], an obligation to treat people as ends, to [B], a concept of law which merely respects choice, and does not concern the substance of human activity. Chapter Two argues that an examination of the metaphysical suppositions behind natural right reveals them to be inadequate to support the idea of natural right.

4c. There is to me a third tradition, which I shall call the Whig tradition. I shall use F.A. Hayek as an example of this tradition. To a great extent it trades upon the same elements as the traditions of Hume and Kant, but I think that the Whig point of view merits particular mention for the emphasis which it places on the foibles of human nature as a basis for morality and law.

The gist of Hayek's argument, and why I consider it to be a distinct doctrine, is that it uses as the moving force for its approach neither natural rights nor a sense of formal rationality as an alternative to substantive rationality. The moving force is in certain insights about how people and society work in practice. The first is that power corrupts, that the power of the state and of state officials must be limited for the practical reason that when people have power they tend to abuse it. (That is a practical statement about how humans work, rather than a theoretical one about an ontological basis for morality.) The second is that a central organization like a government cannot achieve its aims because it cannot practically have the information needed to make intelligent decisions as can the individuals involved. The third is that a spontaneous order which arises from a culture is superior to a planned one. The fourth is a practi-
cal scepticism about morality -- that human goals are as a practical matter so divergent that an attempt at collectivity is doomed to failure as those goals are intellectually incalculable.

From these insights Hayek concludes that the substance of moral thought is to be considered as mundane, of human and individual determination and not susceptible to rational determination. In this he jumps to the same conclusion [B] as Hume and Kant. Like the others, he rejects the idea that we are capable of making rational judgments about matters of substantive morality. He then gives only two alternatives. The first is the 'deductive rationality' of the positivist and utilitarian. That rationality is not substantive, but it enables us to take the Compleat Facts of various people and rationally organize them. In this sense society would be the deliberate creation of conscious reason. He rejects this rationality as unwise and impracticable. He calls it a type of social engineering which is totalitarian.¹ The second is the Whiggery which is his brand of liberalism. The alternatives are then his version of justice which rejects redistribution of income or no justice at all, for every effort to effect a just distribution of income is an effort to create a totalitarian order.²

But there is no reason that the alternative to an abandonment of substantive rationality need be individualistic or else totalitarian. 'Central ordering' and 'liberalism' are not opposites. The opposition to rationalistic ordering is spontaneity. Both individualism and collectivism can be 'rationalistic' or 'spontaneous'. It doesn't follow from [A], 'human ends cannot be properly rationally determined', that

¹See 'Principles of a Liberal Social Order' at 169.
²Id at 171.
[B], 'therefore each person should decide for himself what to do.'

Here is the jump.

The central concept of liberalism is that [B] under the enforcement of universal rules of just conduct, protecting a recognizable private domain of individuals, [A] a spontaneous order of human activities of much greater complexity will form itself than could ever be produced by deliberate arrangement, and that [B] in consequence the coercive activities of government should be limited to the enforcement of such rules . . . . [This] spontaneous order based on abstract rules . . . leave[s] individuals free to use their own knowledge for their own purposes.

Why does [B] follow from [A]? That is, why do [A], the merits of a spontaneous order, require [B], leaving individuals free to use their own knowledge for their own purposes? I appreciate neither the individualism nor the selfishness implicit in this idea of cultural spontaneity.

I shall state Hayek's case at length in Part A of Chapter Four. Chapters Four and Five argue that even if the four points have insight (and I believe that there is much to them), they are inadequate to support the ideas of law and justice which the Whigs employ.

5. No matter how hard I work at it, I can find no metaphysical premises adequate to form this liberal ideal. That is, I can find no [A] which justifies [B] above. The jump in each case avoids difficulties about the nature of good and of the person.

My dissatisfaction is that Hume's desire and Kant's respect for humans as ends and Hayek's practicality all end up by treating the bulk of human activity as Compleat Facts. But these Compleat Facts allow for no meaning to the activity of the subject, once his limited moral obligations have been satisfied. That is, the morality of aspiration has no ground from which to aspire and no teleology to

\[^{1}\text{Id. at 162.}\]
which to aspire. I do not take these writers as asserting there to be no meaning to such activity, for all of them are at pains to protect the liberty of the subject, and such protection assumes that there is something worthwhile to protect. I also reject the view that legal theory need not account for that meaning since the content of the liberty of the subject is beyond legal consideration.¹ That is merely to beg the question. I find unacceptable the assumption that, although there is a ground for the morality of aspiration, the nature of that ground has no place in influencing the development of our artifact called law, for the two moralities must have a common ground. Thus, it seems to me, an investigation of the suppositions necessary for a morality of aspiration to have significance will provide insight into the nature of law, even if, at the end of the day, it leaves a large portion of human activity to the caprice of the 'individual' or the whims of 'society'.

¹As argued by John Rawls in response to Sandel's critique in an essay called 'Political Philosophy: Political not Metaphysical' (1983) of which I have a photocopy.
C. The Uses of the Liberal Mistake

0. Introduction
1. The principle of liberty
2. Understanding law
   a. Legal Dogma
   b. Institutions
   c. Law as duties and rights
   d. Juridical units
3. Primacy of formal justice
4. Denigration of public law
5. The nature of the aspects of liberal jurisprudence
6. The argument.

0. In each case I find the Whig, positivist and natural rights theories to be inadequate to support the conceptions of law and justice which are said to follow from them. These conceptions act to create a division between law and substantive morality. I concern myself throughout this dissertation with four aspects of liberal jurisprudence.

1. The first aspect is that we have used the idea of liberty as a primary principle to limit state authority. In some manner, doubts about the capacity or wisdom of making judgment about human activity have been fabricated into a principle of liberty which itself expresses no doubt about the capacity or wisdom of persons making judgments as individuals. We have taken limpid yarn and knitted a coat of mail around the individual. We see the essence of law as the placing of limitation -- whether formal or substantive -- on the authority of the state.

'Natural rights' state limits on the authority of the state grounded in specific conceptions of worthwhile human activity. The rights-bearing amendments to the United States Constitution, and the
rights stated in the European Convention on Human Rights are examples of such limitations. Another is the assertion of Robert Nozick that law is properly limited to protecting the rights of life, health, liberty and property. In a second sense, 'natural right' states a general claim to determine one's own conduct (short of a few necessary formal constraints), which claim has a transcendental ground. The notion of law of Immanuel Kant, quoted above, is an instance of this. And the positivist and Whig assert for the individual person an area of undifferentiated freedom grounded not in the transcendental, but in epistemological (positivist) and practical (Whig) doubts about the merit of making collective judgments as to what kind of activity is worthwhile. One example is seen in the sentiments of F.A. Hayek, stated above. Another is J.S. Mill's famous statement from the essay On Liberty.

[The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . . [T]he only purpose for which power can be rightfully exercise over any member of a civilized community, against his will, is to prevent harm to others.

Another expression is in the famous argument of H.L.A. Hart that 'human misery and the restriction of freedom are evils; for that is why the legal enforcement of morality calls for justification.' It is put into practice, says Hart, by the rights such as those in the U.S. Constitution as well as by the principle that the Member of

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1 Discussed at Two, A, 3a, infra.
2 One, B, 4b, supra.
3 One, B, 4c, supra.
5 Law, Liberty and Morality 80 (Stanford University Press Stanford, Calif ornia 1963).
6 Id at 81.
Parliament is the representative, not the delegate, of his constituents. It is also put into effect by that element of the rule of law that

no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

This is also stated as the doctrine of English law that 'that which is not prohibited, is permitted'.

They are much alike. Natural right, what Weber calls formal natural law, and the concept of liberty, what Weber calls formal rational law, do not lead to appreciably different outcomes. They all have as their premise a rejection of metaphysical speculation as the basis for substantive human activity and both depend upon the unwarranted jump from the limits of metaphysical speculation to the aim of the securing of the bulk of human activity from the interference of the state.

2. The second aspect is that we conceive of law in ways which make it distinct from substantive morality. By treating legal matters as ones devoid of substantive meaning, we respect our need for tolerance and diversity and yet avoid fundamental issues about substantive morality. There are many ways in which we accomplish this.

2a. One is that we have resort to conventional understanding of law. This has become known as legal dogmatics. It is expressed in the doctrine of precedent. It exists in various forms but its essence is that a court in considering a dispute is bound to decide in a way which is consistent with previous decisions of courts at (most often)

the same and (always) higher levels. Legal dogmatics is also based in generalizations that jurists make, which generalizations are called rules.

Legal dogmatics enable Arthur to decide a case before him by reference to convention -- the doctrines in prior cases -- rather than by judgments of substantive morality.

2b. Another, but related way of avoiding issues of substantive morality is to make decision by reference to an institutional framework. To state such a method has been the work of many legal positivists -- from John Austin and Jeremy Bentham to Hans Kelsen, H.L.A. Hart and Neil MacCormick. But to my mind even those who oppose the enterprise of legal positivism -- such as Ronald Dworkin -- depend upon this way of thinking.

The doctrine of Parliamentary Sovereignty in English law is a time-worn example of this device. It is

that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

The doctrine means that no person, body or idea -- not the Queen, not another legislature, not custom, not the courts, not religion, not
any idea of morality -- can overrule the will of Parliament.

[T]here is no legal authority for the view that judges, as exponents of morality, may overrule acts of Parliament. ... A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral, or because it went beyond the limits of Parliamentary authority.

Thus could Arthur use the doctrine of Parliamentary Sovereignty to avoid making decisions of substantive morality.

The jurist can treat even obvious injustices as matters for the legislature rather than for the courts. Thus, Sir Robert Megarry held that the police could tap the telephone of the antiques dealer even though it was palpably unjust and contrary to the European Convention on European Rights. He did so on the basis that Parliament had not enacted the Convention into British law, that that which was not forbidden in English law was permitted, that there was no established precedent or statute prohibiting such a tap and that to change the existing state of affairs was a matter for the legislature.2

2c. Another is a tendency to treat law as a matter of duties and rights, that is, as primarily concerning the relations between individual persons rather than as matters of substantive morality. An example is the law of contract where the effort is to allow individual persons to create the substance of the relation between them, rather than having the court determine the substance of their relationship.3

To my mind, the very nature of rights and duties is to enable the jurist to make decisions about human relationships in a manner which is somewhat removed from making judgments of substantive moral-

1Id at 62--3.
2Malone v. Commissioner of Police at 647--50.
ity. Contract is often seen as a method of creating obligations, but I think it is better seen as a device to limit obligations of any individual person as much as possible to those which he has voluntarily agreed to, and for which he has received some benefit. The doctrine of consideration, the requirements of offer and acceptance, the primacy given to express terms, the limits on implied terms to those created by the legislature or else necessary to the agreement, the doctrines relating to damages -- of mitigation, proximate cause, the presumption against specific performance -- are all ways by which we limit not only the obligations of the citizen, but thereby the need for the jurist to make decisions of substantive morality.

2d. Another method of avoiding issues of substantive morality is to employ juridical terms or units which have implicit in them the realm of individual discretion we are trying to establish and maintain. By employing these juridical units Arthur can avoid issues of substantive morality without even thinking about it. The units I am referring to are liberty, rights, interests, acts, facts, consent, will, wishes, equality and the like.

There are three characteristics to these juridical units which concern me.

i. The first is that they are **individualized**. This effort has been so successful that to many individual and person are synonymous. Rights and liberties are held by persons as individuals -- they are ways by which persons as individuals can maintain their areas of discretion.

ii. The second is that they are **negative**. They are by and large

\footnote{1}{A view which is criticized at Four, C & D.}

\footnote{2}{E.g., Hayek 'Principles of a Liberal Social Order', para 23 et seq.}
ways of holding others at bay. People as individuals are separated from others.

iii. The third is that they are particular. We are concerned with 'acts' -- occurrences which are discrete over time and space.

They reflect in law the decision to consider expressions of morality as wants or desires which are Compleat Facts -- that is, humanly made, individual, separated from a transcendental ground, and not susceptible to rational determination. We can look upon these units -- as the positivist looks upon law -- as not something we find, but something we make. We fabricate these units in order to create and protect a locus of discretion -- a realm within which the individual person can manufacture and give effect to Compleat Facts. Constitutional law, law relating to individual rights and liberties, law relating to companies, administrative law and property law all seem to have as their purpose the creation and protection of the 'recognizable domains' of Hayek, into which law will not intrude. The juridical units used to administer these areas of law can be seen as ways of formulating reality so that the issues presented to the jurist will concern the realm of discretion rather than substantive morality.

3. Third, modern jurists have relied on formal justice at the expense of substantive justice.

One view is that justice is a formal virtue only. If, for whatever reason, we adopt the view that desires are Compleat Facts, then we are saying that it is not a worthwhile enterprise for the jurist to make judgments directly about them. The proper role of the jurist is to act in a formal rather than substantive way, that is, in a way
which reconciles, protects and gives effect to Compleat Facts about which it is not worthwhile to say much. Then formal justice is all the justice there is.

I advocate the view that judges ought to adhere to the principle of formal justice, as a minimal requirement of doing justice at all. . . . [T]here can genuinely be a conflict between the formal justice of following the precedent and the perceived substantive justice of today's case . . . . I infer that both those working with [the legal system] do so for the most part adhere to the operational implication of the norm that like cases ought to be decided in like fashion, and that in doing so they are conforming to basic constraints imposed by acknowledgement of the concept of justice as a purely formal virtue . . . . I for my own part think that they ought to. I regard . . . . the choice to observe formal justice in such matters as a choice between the rational and the arbitrary in the conduct of human affairs . . . .

This has come to be known as the idea of pure formal justice.

Another is that formal justice is the way to substantive justice. It posits a vague notion of substantive justice which is the goal of the enterprise. Then formal justice is important not in and of itself, but for the substantive justice which it tends to yield. Lon Fuller understands the eight principles which make up his Morality of Law in this fashion. 23 It may be called imperfect formal justice.

But these expressions of imperfect formal justice are examples of the primacy of formality and the liberal mistake of which I am complaining. For the interesting thing is that ideas of formal imperfect justice are made without any concept of substantive justice having been formed. Lon Fuller's eight formal principles are set

2 See The Morality of Law Chap IV and pp 200--24 (New Haven Yale Univ. Press rev. ed. 1969). They are valuable not for their efficacy in bringing about the ruler's will, but because they tend to result in substantive justice. See the discussion in David Lyons, Ethics and the Rule of Law (CUP 1984) which ends at 108 with the remark that the rule of law is a 'necessary condition of justice . . . . [J]ustice is much more.'
forth with only cursory speculation about the nature of substantive morality itself, and constitute a formal rather than substantive natural law.\(^1\) And John Rawls sets forth principles of justice and of goods which are to be distributed fairly, but only remarking that they are necessary to any conception of the 'good life', the assumption being that any conception of the good life is up to the individual person to determine as he pleases.\(^2\) These expressions of imperfect formal justice are conceptions of means without having first made a concept of the end. I am not suggesting that the creators of principles of imperfect formal justice need to have a particular conception of what is good for humans, but that they need either a theory of the nature of good and the person or a well-developed perplexity about these matters. They are as architects fabricating cranes and hammers without having addressed the nature of building itself.

These ideas of pure formal justice and imperfect formal justice can both be seen as ways of making decisions by reference to some formal element in order to avoid judgments of substantive morality.

4. Fourth, the idea of law which has emerged from the liberal mistake has denigrated collective action and public law.

One attitude to public law is libertarian. It may be attached to the positivist, natural rights or Whig attitude. Writers such as F.A. Hayek and Robert Nozick, for instance, have devised an individualism so extreme as to allow for no public law at all, other than that immediately necessary to prevent violation of person and property, and

\(^1\) The Morality of Law 162--67.
\(^2\) A Theory of Justice sec. 63.
to sundry other innocuous matters.¹

Another allows for public law, but denigrates it as less important than individual rights. Ronald Dworkin distinguishes rights as principles from public law as policy goals, and then states that rights 'trump'.² An example in practice is administrative law. Modern jurists, presume that rights (individual, particular and negative) take precedence over social justice (collective, integral and affirmative) and that rights are susceptible to reason in a way that public policy is not.

A third is a strong egalitarian doctrine. It would seem to be a denial of Hayek's libertarianism, but is more properly considered as its cousin. Take as an example the utilitarianism of Jeremy Bentham or the radical egalitarian theory of John Rawls.³ They seem striking for the distribution of resources they would require from one individual person another. But the most important thing about them is that they conceive of public law in terms which are mundane, individualized and beyond rational treatment -- in Bentham's case units of pleasure and pain. They are a liberal expression, for they are framed so as to avoid fundamental questions about substantive justice which must be faced when dealing with the nature of good and the person. The utilitarian and egalitarian doctrines then are simply another form of private law which champions a different method of resource allocation.

We have been mistaken to use the liberal point of view to exalt the private action (including the market) and private law and to de-

¹See Two, A, infra, re Nozick and Four, A, infra, re Hayek.
²Set forth in Two, A, infra.
³See Rawls, Theory of Justice 302; and Dworkin's essays on Equality discussed at Four, A & I, infra.
grade collective action and public law.

5. What is the nature of these aspects of liberal jurisprudence? We should not take them as constituting law either in actuality or in the ideal. Take, for instance, Kant's notion of law above.

Law . . . merely respects the relation of choice to choice . . . No question is made as to the matter chosen. The form of the choice, i.e., the choice considered as free, is alone regarded. . . .

Implicit in it are the four aspects of jurisprudence stated above: i) that law is concerned to allow and forbid, ii) that law is to be conceived of as distinct from substantive morality, iii) that justice is formal and iv) that law concerns relations among private individuals.

Now compare that liberal idea of law with law as it is in the United Kingdom or the United States. There are many areas of public law which are not reducible to the above principle. Examples are regulation of industrial health and safety, labour law, environmental law and law relating to health. What's more, private law such as tort and contract are permeated with matters of substantive public welfare -- what are called policy goals -- aside from and often not reducible to matters of individual choice. Take for instance, the Unfair Contract Terms Act 1977 in United Kingdom law, or Section 2-302 of the Uniform Commercial Code concerning unconscionability. Law is not 'liberal' in the sense that it comports with the above conceptions.

We take these aspects as representing some heyday of liberalism but the falsity of this conception was stated long ago by Mr. Justice Holmes:

The case is decided upon an economic theory which a large part of the country does not entertain. . . . It is settled by various decisions of this court that state constitutions and

One, B, 46, supra.
State laws regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. United States and state statutes and decisions cuttings down the liberty to contract by way of combination are familiar to this court. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. The decision sustaining an eight-hour law for miners is still recent. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Nor should we take them as a blueprint to create a new order, even if jurists sometimes present them in that way. Merely stating the dichotomy between law as it is and the libertarian doctrines demonstrates how radically we would have to alter law to conform to this ideal. And the ideals of egalitarian liberalism are equally far fetched. Take the second principle of John Rawls:

Social and economic inequalities are to be arranged so that they are both:
   (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
   (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

And imagine the radical change it would entail.

It is not simply that conforming law to any of these

2Theory of Justice 302.
propositions would entail changes which would eliminate much of what we find valuable in our law as it stands. It is that the very enterprise of making reality conform to limited doctrines of any sort seems to be at variance with the scepticism which gave rise to the liberal impulse in the first place. We have noted above Hayek's assertion that altering society to conform to an egalitarian liberalism is an unacceptable 'social engineering' (which he calls totalitarian). But altering law to conform to Hayek's libertarian liberalism suffers from the same defect -- it seeks to engineer law in a way which does not respect the insight 'that we should not be able fully to shape human affairs according to our wishes ... that ... true rational insight into the role of conscious reason seems to indicate that one of the most important uses is the recognition of the proper limits of rational control'.

The effort to describe reality by relation to a few conscious propositions and the impulse to remake reality according to a few propositions are impossible and undesirable. Take the following.

(1) Law should be limited to establishing and protecting rights to life, health, liberty and possessions.

(2) The harm principle of John Stuart Mill, quoted above at One, C, 2.

(3) Kant's idea of law as respecting choice, quoted above at One, B, 4b.

(4) The two principles of John Rawls. The first is that 'each person is to have an right to the most extensive total system of equal basic liberties comparable with a similar system of liberty for all.' The second has been quoted immediately above.

2 Anarchy, State and Utopia 10.
3 Theory of Justice 302.
(5) The purpose of justice is 'wealth maximization'.

(6) 'The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain.'

Why do the authors assume that reality is such that there are meaningful statements of justice which can be made in a few sentences?

It is ironic that these myths of conceptual utopia, have been born of scepticism about human judgment and wariness of human nature. The condition of law at any time -- including future time -- is a complex cloth woven of historical contingency -- accidents, historically bound belief, the thoughts and activities of many, varied and historically bound actors as well as, I shall argue, of that which is more than contingent -- ideas, good, the nature of the person, the human predicament. The liberal doctrines above have affected this law, but they do not and could not constitute this law. They are jurisprudence -- notions about law -- not law itself. They are as food to the body. They are not the body, nor can they be. But they act to change the character of the body, gradually, as time goes by.

Libertarian and egalitarian liberalism are both dealing in myth at this level.

At another level, the aspects of liberal jurisprudence are used directly to govern legal decisions. That is, they are used conceptually -- consciously and for their content -- as if they stated a

3And why do others assume that reality is such that we could describe 'law' easily.
truth. In this sense they are doctrines. One way of proceeding is to show their conceptual inadequacy.¹ For they are simply wrong if they are meant to be conceptual doctrines. But this would be an incomplete argument. For most legal thought is sophisticated enough to accept that these doctrines are not truths but rules of thumb. Treating them as doctrines which are meant to be conceptually true misses what seems to me to be the essence of liberalism -- its wariness about the conceptual abilities of the mind. If the doctrines are born of that wariness, then they themselves must be practical methods, rather than conceptually true.

Thus, at a third level they are practical methods. As such, they are not properly propositions which claim to be true, but are tendencies which are at the same times ways of dealing with difficult legal problems in light of intractable philosophical issues and ways of avoiding the intractable issues concerning the nature of good and of the person.

The fourth level is structural. (By structural I do not mean invariable.) Without being aware of it, jurists use liberal ways of thought and such use affects law. I have presented the juridical units in this way. But each of the aspect of liberal jurisprudence can be seen as structural.

6. I am not suggesting that the separation we have made of law from substantive morality is without merit. I am not suggesting that Arthur should discard ideas of liberty, precedent, statute, rights, rules, obligations, formal justice and private law. For they are part of an ingenious system to put into effect the principles of tolerance

¹Used by Duncan Kennedy in 'Legal Formality', 1 J. of Legal Stud. 351 (1972).
and respect for the person, which principles reflect a profound view of the person. They do this by imposing liability not for status, but for particular acts, by use of the many means listed above.

But they are part of a mistake in reasoning which has us avoid fundamental issues. If they have merit, it is not for some conceptual quality which they have. It would be a mistake to think that the doctrines represent some transcendental entities, for that is at odds with the basic insight about them -- that human activity is not susceptible to such rational determination. And their merit as practical doctrines may be asserted and agreed to, but the truth of the matter is that their merit as practical doctrines is problematic. For the very basis for their merit -- profound ideas about good and personality which are necessary to their proper appreciation -- is avoided.

My suspicion is that our ideas of liberty are used to limit our idea of law in order to limit our obligations to each other. For when the fundamental issues are encountered rather than avoided, the conclusion must be that our obligations are much greater than our current method of thinking will allow us to conceive.
D. A Note

1. Such dissatisfaction widespread.
2. Natural right resurgence.
3. Natural law resurgence.

1. It would be misleading to suggest that the dissatisfaction with the melange of concepts outlined in Parts B and C is not widely felt. There are many critiques of this state of affairs. And indeed jurists might better be distinguished not by whether they are satisfied with this concept of law or not, but by how far they are willing to wander from the conventional in trying to reform or revolutionize law. Many works -- both of jurisprudence in general and of the philosophy of law -- have brought about a slow reformation of these concepts. I have learned as much from those that I criticize here as those that I follow. It seems proper to me to acknowledge the attempts to relate law to its metaphysical ground and to note how this work differs from them in important respects.

2. One group of writings are those which attempt to create a rational basis for law which is natural right oriented. They are either concerned with a rational, deontological basis to law, or with a very limited set of natural rights which leave the bulk of human conduct to the discretion of the individual person. The ones I am concerned with are Robert Nozick's *Anarchy, State and Utopia*, John Rawls' *A Theory of Justice*, Alan Gewirth's *Reason and Morality*\(^1\) and Ronald Dworkin's *Taking Rights Seriously*.\(^2\) These works would seem to address

\(^1\) (Univ. Chicago Press 1978).
my dissatisfaction, for they seem to seek to ground law in non-mundane reality. There is no need to deal with them at length here, for Chapter Two is devoted to them.

3. Another sets of works is natural law oriented. The best modern example is John Finnis' *Natural Law and Natural Rights.* Dr. Finnis posits seven basic values that are metaphysically grounded, though not 'universals'. He develops a theory of law using these basic values and the idea of basic values. It has served to refute many misconceptions about natural law theory which were expressions of the liberal sentiment. It also gives a coherent account of a natural law which does not do violence to our concern for tolerance. It has been formative in my own thinking.

But I don’t think that Dr. Finnis' theory addresses the real concern about the relation between universals and liberty. At the end of the day, the implications for justice of Dr. Finnis' values are not all that different than those of the quintessential liberal principle that no conduct should be prohibited unless it can be shown to cause harm. To be sure, Dr. Finnis' values would seem to allow for harm which is more than physical: his discussion of sexuality, for instance, suggests that he believes that pornography could cause emotional harm even where there is no direct physical harm. But that idea is not alien to much modern liberal thinking. What is more significant is that Dr. Finnis' values, although they relate to some universal, are instances of the liberal juridical units discussed above. They describe areas of human conduct: aesthetics, religion, friendship and community, search for truth. But they do not inform us, for instance, what is a good friendship or good religious
practice. The key statements about these values are (i) that we should direct our lives in a serious way toward 'participation' in them in a way that is appropriate to us; and (ii) we should not interfere in the pursuit of these values by another. When we realize that Dr. Finnis' values have been stated broadly enough to cover nearly all human activity, we can then translate his principle into ones which are very traditionally liberal -- each individual person is responsible to direct his own life in a serious way and no interference with another's activity is justified except to maintain freedom of action for all. In this regard, Natural Law and Natural Rights has restated the liberal creed with a metaphysical gloss but without any profound change. It is still characterized by the avoidance of profound questions about the nature of good and of the person, which questions, when addressed, raise the difficult problem of how diverse human conduct can be reconciled with a concept of good.

This avoidance becomes apparent whenever Natural Law and Natural Rights comes to a difficult point about authority and freedom. The dilemma is this. It would seem that any human enterprise (such as law) would require that human activity have a ground, that is, that the nature of reality is such that the meaning we give to an activity is not necessarily illusory. But if values truly have a metaphysical ground, then some actions will be wrong and some right by standards which are not merely human -- which are not those of the actor or of the legal system which is judging him. If that is the case, then a particular activity might be wrong aside from any harm it does to someone else; and its wrongness is a reason for doing something about
it. In other words, as soon as value is not merely a human artifact, then there is a reason for being authoritarian, and some special reasons are needed to explain why a foul activity should be tolerated. Another way of stating this problem is to ask how we are to judge whether an activity is worthwhile or not. When Dr. Finnis approaches this dangerous area, he avoids the dilemma by resort to those 'of superior understanding'.

If one is not so fortunate in one's inclinations or upbringing, then one's conscience will mislead one, unless one strives to be reasonable and is blessed with a pertinacious intelligence alert to the forms of human good yet undeflected by the sophistries which intelligence so readily generates to rationalize indulgence, time-serving and self-love. (The stringency of these conditions is the permanent ground for the possibility of authority in morals, i.e., of authoritarian guidance, by one who meets these conditions, acknowledged willingly by persons of conscience.)

Dr. Finnis does not tell us what those of superior understanding should do when they realize that drinking, smoking and eating food filled with fats and additives are injurious to physical health and self-respect. And what should they do when persons of conscience or not fail to acknowledge their superior understanding? Should they ban those goods or should merely make a statement of what the person of superior understanding thinks? In the tradition of liberal thought, Dr. Finnis avoids rather than deals with the implications of values that have some substance.

4. A third set is those critical legal scholars whose effort is to deal with the problem of good inherent in the legal enterprise. The most important work of critical legal scholarship to me has been Roberto Unger's Knowledge and Politics.

Professor Unger states a theory of good and of personality and

1 Natural Law and Natural Rights 125.
does so in terms of metaphysics. He deals with the issue of the reconciliation of the universal and the particular. I find Knowledge and Politics to have influenced me more than any other single jurisprudential work.

This dissertation differs from Professor Unger's treatment in three respects. First, the critique of consciousness contained in Chapter Four and Five has nothing comparable in Knowledge and Politics. Second, the theory of tolerance which I offer differs from all other theories in that it is part and parcel of a metaphysical theory of the person. Third, I employ a distinction between the conceptual and the practical bases for liberalism which, I think, results in a more profound critique and appreciation of liberalism.
E. A Genealogy of Law

1. The purpose is to unravel the cloth of liberalism.
2. It depends upon a distinction between
   a. the logical or conceptual, and
   b. the experiential or practical.
3. The argument is at once a critique and reconstruction
   a. of liberalism as a conceptual matter, and
   b. of liberalism as an experiential matter.

1. The purpose of this dissertation is to unravel the cloth of liberalism.

2. Crucial to this effort is a distinction between the logical or conceptual on the one hand and the practical or experiential on the other. For I have alleged that liberalism is better appreciated for its practical wisdom than for its conceptual truth.

2a. That an idea can act conceptually or logically (has logical quality) asserts the following. (i) It asserts that there is some way of forming ideas so that they will provide a proper ground for human understanding and activity. (ii) It asserts that ideas can embody a reality other than that given to them by the needs of the human psyche. And (iii) it asserts that ideas can act in this way by virtue of their content -- that is, that which we hold in our consciousness is somewhat equivalent to the reality we mean it to represent. It can be used in a syllogism, to give us more than a tautology, but to give us some insight about reality. Hence I call it having logical or conceptual quality, for then the use of ideas for their conceptual contents, and the use of ideas in logical reasoning makes sense.

We can assert that ideas are capable of having conceptual qual-
ity (potentiality) or that a particular idea has or lacks such a quality (actuality). Obviously, we could hold to the belief that ideas are capable of having conceptual quality, while doubting that they necessarily do so, they most often do so, and that a particular idea has such a quality.

An example of such an idea is 'Thou shalt not kill' considered as a commandment from God. Another is the belief of Renaissance artists that there are certain proper proportions for the human body. A third are the propositions of mathematics, say of Euclidean geometry. A fourth are Newton's laws. Each of these has been understood as being a true statement about reality -- that which we hold in our consciousness being somewhat equivalent to the reality we mean it to represent.

2b. On the other hand, we can consider ideas to be practical or experiential. That an idea can act practically or experientially does not deny (i) and (ii) above. That is, it accepts that ideas can act to provide understanding and as a proper guide to human activity. And it accepts that ideas are capable of embodying a reality other than that given to them by the needs of the human psyche. But it denies (iii) that ideas act properly by virtue of their content -- that that which we hold in our consciousness is somewhat equivalent to the reality we mean it to represent. To me the good sense of the scepticism inherent in empiricism and pragmatism is that ideas are worthwhile as guides to understanding and conduct -- not for some conceptual quality, but for some characteristics which we give them by virtue of some experience which is beyond ideas themselves. Ideas
are practical then both as an expression of experience and a guide to it. And when we appeal to such ideas, we are not appealing to their conceptual quality, but to human experience.

By 'experience' is not meant 'derived from sense data'. If we could have dependable ideas based in sense data and logical derivation from them, then these ideas would have, to my mind, a conceptual or logical quality. By experience is meant that between reality on the one hand, and an idea on the other, is a wealth of 'being human' so that the content of any idea should not be seen as equivalent to the reality we mean it to represent, but is the product of the person, for better or worse. Its being experiential or practical may give it a worth or quality it would otherwise not have. Rather than an idea being the product of a logical train of thought, it is seen as a product of the person in a way that cannot be traced back to any ontological entity.

All of the above examples of conceptual truths can just as well be seen be seen as experiential. The prohibition against homicide can be seen not as a commandment from God or as the representation of some transcendent entity, but as the result of practical experience that prohibitions of killing are necessary to maintaining a civilized society. And Euclidean geometry, laws of perspective, and Newtonian laws of physics can be seen in non-Euclidean geometry, 20th century art and the theory of relativity, as ways of looking at reality, but not as reality itself.

We can say that ideas are capable of having experiential quality (potentiality) or that a particular idea has or does not have experi-
ential quality (actuality). We could hold to the belief that ideas are capable of having experiential quality, while holding that it is not necessary that they do, and that a particular idea does not have such quality. In addition, we could hold that ideas are capable of having both experiential and logical quality. If we take faith as being not an instance of a method of thought but as experiential, then Aquinas' assertion that we can conclude there is a God both by reason (a type of the conceptual) or by faith (a type of the experiential) is an example of holding both.

That ideas are experiential does not mean that they are useless, but it does mean that we cannot use them in the same ways as ideas of conceptual quality. Some philosophers of morality argue that (i) there is no contradiction between x holding a belief that abortion is wrong and y holding the opposite belief and yet (ii) the beliefs are not meaningless. That ideas are experiential means that they are capable of being worthwhile, but that they cannot properly be used conceptually -- for instance, by application of the principle of non-contradiction.

This does not mean that practical ideas cannot be the basis for theory, but that the significance of theory based on practical ideas will be radically different than the significance of theory based on ideas which are supposed to have logical quality. Theory based in ideas which are supposed to have logical quality is meant to be taken very earnestly. Theory based in practical ideas is meant to be a tool, a rule of thumb, or even to be taken tongue in cheek.

Hence my distinction between that which is conceptual or logical
and that which is experiential or practical.

That ideas are practical or experiential has dominated British and American thought. Liberalism has been fashioned of this cloth. It seems to me that a great deal of criticism of liberalism is misplaced in that it concerns its conceptual quality when its essence is in its practical nature. It also seems to me that much of the defence and use of liberal insights is misplaced for the same reason. Hence what I propose to do is trace the genealogy of our modern idea of law back to its logical and practical ancestors in order to understand liberal law. This is, of course, an analytical and synthetic rather than an historical genealogy.

3. My argument is at once a critique and a reconstruction.

3a. Chapters Two and Three set forth a critique and reconstruction of liberalism as a logical matter. It argues that liberalism does not make sense as a conceptual doctrine.

The argument is made in terms of liberty as categorial limitations on the authority of the state. For such liberty to have conceptual quality, it would have to be based in some ontological ground which is outwith the contingency of either mundane human desire or mundane natural reality. That is, it will have to have a metaphysical ground. Chapters Two and Three argue that no serious metaphysical theory will support the categorical limitations on the authority of the state inherent in liberalism. Metaphysical argument will only inform us of the conceptual truth that we have a plenary obligation to do good. We cannot conclude as a conceptual matter that we have limits on that obligation. Limits on that obligation, and
therefore the realm of rights and liberty, are practical. Liberalism should be properly understood as a practical doctrine.

3b. Chapters Four and Five set forth a critique and reconstruction of liberalism as a practical matter.

Liberalism as a practical doctrine is properly based in a theory of the person which accounts for the experiential nature of thought. No theory of the person is adequate unless it is based in the ontological ground to human activity which is the conceptual conclusion of Chapters Two and Three. No such theory of the person is adequate which does not allow for the diversity and tolerance of human activity which is the experiential insight behind liberalism. Chapters Four and Five set forth a theory of personality which reconciles the non-mundane ground to good with the diversity of human activity. That theory of personality suggests that liberal law as a practical matter is mistaken and deleterious.
Chapter Two

Natural Rights and the Authority of the State

A. Theme

1. Theme.
2. The nature of natural rights.
3. The argument aimed at
   a. the libertarian (Nozick), and
   b. the social democrat (Dworkin).
4. Theme -- bis.

1. This chapter argues that the common practice of using natural rights to justify limits to state authority is a mistake. The argument that the state cannot legitimately interfere with my property, my person, my physical liberty, my freedom of expression or other alleged rights because it would interfere with my natural rights is wrong. This chapter assumes that basing rights in some metaphysical ground is a meaningful exercise -- that is, that in some sense the phrase 'natural right' talks about something that is real, not fanciful. The argument is that there is no coherent conception of natural rights from which one can draw the conclusion that the scope of state authority should be limited. The very assertions necessary to expound a coherent conception of natural rights entail powerful assertions about the state and state authority.

2. By natural (or fundamental) is meant formative as opposed to instrumental. We use rights instrumentally when we conceive of ends
and then create a legal or even moral right as a means of attaining that end. In this sense they are artificial (but not unimportant). Rights act fundamentally or formatively when we conceive of our end, or properly justify our end, by relation to rights. Rights are often used in law and morality in this way. Certainly, one may deny that rights act fundamentally at all (or at least do not properly do so). Also one may understand a right as being fundamental and instrumental at the same time. For instance, the right to expression in the First Amendment to the United States Constitution may act formatively in that it embodies something that is basic to humans -- a respect for persons and which therefore acts to guide legal decision. And it may act instrumentally in that it provides for political debate which, J.S. Mill argues, will bring about better government. Natural right theory appeals to rights as formative although it doesn't preclude rights as instrumental.

Natural rights can act formatively by virtue of a ground in a reality which is not of human making. They refer not only to natural as opposed to artificial, but to a reality which is not physical alone, but is metaphysically based. When we make reference to a right -- say, freedom of expression -- we are saying something more than that our society values freedom of expression, or our political system values freedom of expression, or our legal system protects freedom of expression, or I value freedom of expression. We are appealing to a sense of right that includes something additional to all of the above. That sense is that rights have a ground in something that exists logically prior to any manifestation of them in
space and time, either as a human artifact or as some physical reality. That existence in space and/or time I shall refer to as mundane or earthly. The something that exists logically prior to mundane existence, may be called the transcendental or metaphysical, but I shall also call it the non-mundane. Rights are alleged to be natural in the sense that they depend for their force upon a ground in a nature which is more than mundane, though that terminology is spoilt by our view of nature as the mundane.

I am concerned with four elements of natural rights theories. 1. Each of these theories appeals to the ultimate dignity of each person or the person being deserving of respect. 2. That respect or dignity exists by relation to a faculty of the individual to determine his own conduct and a view that self-determination is essential to the person. Chapters Four and Five question the practical insight that self-determination is the essence of the human person. 3. The substance of the individual's activity does not have a non-mundane ground, at least of any significance. It is a matter for the person to determine individually. 4. The respect -- the obligation itself -- nonetheless has a non-mundane ground. What characterizes natural right theory, as opposed to natural law theory, is the dichotomy between the transcendental ground for rights and duties and the mundane ground for the substance of human activity. Natural right is characterized by a claim for the logical quality of right which is not shared by the substance of human activity. This chapter argues that the dichotomy is a conceptually impossible one. Rights, to the extent

\[\text{\textsuperscript{1}}\text{Cf. Santayana as quoted in One, B.}\]
they pretend to a non-mundane ground, do not make sense without a non-mundane ground to the substance of human activity as well.

It is by virtue of their non-mundane ground that natural rights can act to legitimate law and justify action. But if we look into this ground -- a ground that is always assumed but never explained -- we shall see that it is inadequate to support the idea of law which it is used to support. Most importantly, it is not capable of justifying categorical limitations on the authority of the state. The jump from a non-mundane ground for human rights to categorical limitations on the authority of the state is an example of the logical mistake characterized in One, B, Above.

To the contrary, the non-mundane ground for law is such, it is argued, as to entail the plenary authority of the state. By the plenary authority of the state is meant that there is no argument for categorical limitations on the authority of the state which can be properly made by appeal to the non-mundane ground to law and morality. The use of natural rights to justify disabilities to the authority of the state then is flawed in that it depends upon an imperfect account of ground for rights. Limitations on the authority of the state will be properly made by relation to the practical or experiential. Natural rights theory is flawed for its failure to assess the practical nature of any proper justification for disabilities on the authority of the state. It is the effort of Chap-

2 The OED defines 'plenary' as meaning 'complete, entire, perfect, not deficient in any respect' ... 'absolute, unqualified ... a plenary ... power' ... 'possessing full powers or authority. Vol. OP941.
ters Four and Five to set out the proper basis for such limitations.

3. The argument of this chapter is aimed at two distinct groups.

3a. The first group uses natural rights to set up theories of the state under which rights are the sole legitimizing principle to law. Such theories are to my mind depraved in their effort to justify great and stark, categorical disabilities on the authority of the state in the name of the transcendental. Robert Nozick's *Anarchy, State and Utopia* is an example. Its argument may be restated in simple terms as follows. Humans are endowed with certain natural rights which have a significance beyond that given to them by civil society. These rights are to life, health, liberty and possessions.\(^1\) Humans are justified in taking individual action, and on the basis of that, collective action and then even collective action which monopolizes the use of force through the state of the title, in order to guarantee that individuals are secure in enjoyment of those rights, that is to avoid the interference with rights which results from the anarchy of the title. The rights of Robert Nozick are 'exclusive' -- they are the sole legitimizing force in the sense that the exercise of state power beyond that needed to secure these rights is unjustified because it necessarily results in the violation of these very rights as held by others. To put it more topically, the state's spending tax revenue on welfare payments unnecessary to preventing interference by one individual with the life, health, liberty and property of another violates the rights of taxpayers who

\(^1\) Id. at 9, citing as authority (?) John Locke, *Second Treatise on Government*, Section 6.
suffer loss of property in order to finance these endeavours.

This argument rests on a mistaken idea of the ground to morality. For Nozick's claim is not only that his are natural rights but that his rights state the entirety of human obligation. But if we think about the ground to natural rights, it becomes evident that property and liberty are not the complete content of (any human understanding of) morality and law which pretends to a non-mundane ground. The non-mundane ground entails ideas of what a healthy or good or valuable life consists of and such ideas cannot be limited to having property and liberty. 12

3b. The second group do not see rights as the entire content to law. They appeal to basic respect for the person by relation to some non-mundane ground to human rights. But they would not place the same kind of disabilities on state authority as does Anarchy, State and Utopia. They recognize social justice and public goals in some vague way.3 But they nonetheless distinguish between law on the one hand (as a manifestation of natural right) and policy on the other (which concerns that state power which is not constrained by natural right).

I shall use as an example Ronald Dworkin's Taking Rights Seriously.4 (It is not clear that Professor Dworkin grounds his conception of rights in the non-mundane, but that has been thought to

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1 F.A. Hayek is in this group in that he suggests that morality is not equivalent to Will, and yet considers social justice not to be justice at all. 'Principles of a Liberal Social Order', in Studies in Philosophy, Politics and Economics at 160--77 (London, Routledge and Kegan Paul 1967). He writes: "There is only a justice of individual conduct, but not a separate 'social justice'." Id. at 175.

2 Of course, many social democrats do not depend upon a non-mundane ground and therefore do not come within the targets of this chapter. (Cambridge, Mass., Harvard Univ. Press 1977).
be the case.) Although a champion of rights, Professor Dworkin nonetheless favours the use of state power for the redistribution of income and to bring about social justice in ways which Robert Nozick would find a violation of rights. Yet Professor Dworkin, to my mind, is guilty of the mistake of natural right theorists in giving primacy to protection of rights over the exercise of other state power. He accomplishes this through the use of the terms principle and policy. A principle is a standard which is to be observed because it is a requirement of "justice or fairness or some other dimension of morality"; "arguments of principle justify a . . . decision by showing that the decision respects or secures some individual or group right." "Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole." Principles as manifestations of rights, trump policies as determinations of collective goals. And legal matters which do not involve rights are beyond rational treatment (that is, justifying 'strong discretion'), in a way that really matters involving the rights of individuals or groups are not. (For instance, the rights thesis holds in civil cases where one of the parties has a right to win, but only asymmetrically otherwise: "The accused in a criminal case has a right to a decision in his favour if he is innocent, but the state has no parallel right to conviction if he is

2 Taking Rights Seriously 22.
3 Id. at 82.
4 Id. at 82.
guilty". 1)

My argument is that there is no non-mundane, and therefore conceptual, basis for the notion that there is a fundamental difference between law as practised in the law courts which superficially concern rights (about torts, crimes, contracts, property and natural justice) and the decisions of government in the modern areas of governmental action which concern social justice -- regulation of commercial and industrial activity, provision of welfare services and redistribution of income: 2 I do not totally disagree with Professor Dworkin's emphasis on human rights, but I find the ground for that emphasis to be mistaken, if it is grounded in natural rights, or inarticulate, if it is not.

4. It is the purpose of this chapter to show that no non-mundane basis to morality and law can be half-hearted. Natural rights theory is half-hearted in that it purports to use natural rights -- or some less bold equivalent -- to ground law and moral obligation while denying that the ground prescribes the content of our actions. It is conceptually mistaken and therefore conceptually inadequate. Although it allows for the relativity of human conduct which the modern jurist desires, it gives no account of the relation between the ground for

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1 Id. at 100. Professor Dworkin attributes this view to John Stuart Mill when defending Mill's 'On Liberty'. Id. chap. 6.

"The justification of decisions must take a certain form -- requiring judicial intervention only and always to protect determinable pre-existing rights." Taking Rights Seriously at 12.
morality and the diversity of (permitted) human activity.\textsuperscript{12}

\textsuperscript{1}This chapter does not address two types of natural right theories. The first is that of Alan Gewirth. It is addressed in Three, C; infra. The second is that of Jacques Maritain, The Rights of Man and Natural Law (London, Geoffrey Bles 1944), which I consider to be really a natural law thesis and therefore not liable to the criticism levelled in this chapter.
B. Rights Are Substantive

1. Statement of the argument.
2. Formal natural right . . .
3. presumes substantive morality.
4. Substantive rights . . . still presume substantive morality.
5. Rights do not consist of a state of mind.
6. The argument stated in ontological terms.

1. The first part of my argument is that natural rights do not have an inherent nature; they do not have a nature separable from human well-being. It would seem evident that rights and duties are important, not in themselves, but for the human well-being that they act to establish and maintain. What is less evident is the implication that rights and duties will be determined by relation to the nature of that human well-being. That is, rights and duties follow from and do not precede the nature of good.

2. First let us look at 'natural rights' as asserting a formal relationship between humans which is valid without reference to any substantive idea of what is good. Perhaps the best example is Immanuel Kant. His theory is characterized in Part B of Chapter One.

It is summarized in the (formal) maxim:

Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.

It combines a scepticism about the substance of morality with an a priori concept of rights. The primary implication of this view is that the purpose of law is to provide a neutral or formal framework within which the individual can make his own substantive morality. A

perhaps more weak example is found in H.L.A. Hart's essay, 'Are There Any Natural Rights?' He argues that if there are any natural rights there is one -- the equal right of everyone to be left alone. I include Professor Hart's offering because even though he is sceptical about a non-mundane ground for anything, he nonetheless reaches a conclusion strikingly similar to Kant's with much the same implications. As I have noted in Chapter One, I do not consider the three bases for modern jurisprudence to be mutually exclusive ones but rather ones which we find in different proportions in different jurists.

My argument is that rights are inherently concerned with a human well-being that is beyond the formal quality of the right itself. The denial of this (the deontological or formal view) is that natural rights have a special ontological status which makes respect for rights a binding obligation and which can be understood simply by reference to a mundane condition of the rights holder. That condition consists in the capacity of the rights holder to determine for himself his own activity by relation to his state of mind, which condition is fully determined by the formal right. The second position (the ontological or substantive view) would not doubt the special ontological status claimed for natural rights, but would add that creating and preserving a realm of human choice can only be understood in terms substantive morality, and in terms of the ground for that morality. While it may be that a ground for the dignity of the human's capacity for choosing is necessary to understand natural rights theory, that ground is not sufficient to understand natural rights theory.

\(^1\) 64 Phil. Rev. 175 (1955).
\(^2\) This is Kant's notion of law quoted in One, B, 4b, supra.
rights theory. Natural rights presumes a non-mundane ground to the substance of human activity.

3. No coherent, meaningful theory of personal ethics can be grounded upon the proposition that individual self-determination is valuable without reference to substantive morality. If individual self-determination alone were all that mattered to a personal ethics then why would it matter? If what we choose cannot be better or worse why does it make a difference whether we choose or not? If choice were important without regard to what we choose than we would exercise choice haphazardly and would not value choice. In practical terms we do develop coherent ethical theories which place value on types of activity -- both for ourselves and others -- and we disdain or pity those who do not act with a coherent idea of values in mind. In other words, the political theory of natural rights depends upon a concept of personal morality which one might entertain for purposes of stating a political theory, but which no one would entertain as the nature of substantive morality. Such a distinction is a conclusion which must be derived from some other basis, not a starting point of political and legal thought.

If freedom of choice were valuable without regard to substantive morality, then there would rarely be a problem of insufficient freedom, that is, if liberty were truly undifferentiated, then limits would be justifiable. Certainly one can always make choices -- in number -- such as what time to get up in the morning, what to have for breakfast, which tune to whistle; such choices could occupy our day even if we could not choose which newspaper to read, what to write about natural rights or which religion to practise. That is, as
long as we were capable of making choices at all, even within a very small range, we would still have freedom of choice. If the matter of choice is not ultimately tied to substantive morality, then the problem of a repressive government is not necessarily that it doesn't allow citizens to do what they want to do, but that citizens want to make choices about the wrong things. Given the premises, there is no basis for arguing that a person should be able to make decisions about particular matters, say his career, as long as he can make some choices. If citizens were reprogrammed, along the lines of Brave New World or Sleeper to have desires in less political areas, they would be just as well off. This is of course directly contrary to what is meant by the dignity of the individual and respect for persons stressed by natural right theorists.

The response of course is that the individual right to choose is important not for the number of choices that are offered, but for the ability to have a say in one's own fate. But then there is no way that this objective can be made important without the substance of what is being chosen being important. If a particular type of control over one's life, say deciding to practice a particular religious faith, is important, rather than the simple fact of choices, say how many flavours of ice cream to choose from, then there is something about the subject matter which is important. And it must be important aside from what the individual person determines to be important. That is, there must be some independent basis for it. Otherwise our mind game could work. For if the state could convince us all that ice cream flavour is important, but not, say, religious belief (which is mandated), then we would have satisfied this conception of formal
natural right by protecting freedom of choice of ice cream flavours. But this would not satisfy the philosopher -- because there is something important about religion even if not recognized by any particular person.

Without the idea of substantive morality, we cannot explain why we go about making decisions the way we do. The importance given to reflection and argumentation implies that what is chosen, rather than the fact of choosing, is important. If 'choice' were abstractly important we would be content to have that choice exercised in a frivolous manner -- we could not distinguish between caprice and reasoned decision. Not only do we engage in argumentation when we have to make a decision, but we do so within shared cultural patterns -- positive morality, religion, social custom and law. That we do so suggests that what we are after is not the fact of choice, but the quality of it.

4. Rights and obligations are often characterized by the nature of the relations between humans, rather than by the human well-being to be sought. That is, some natural rights theories do not assert a formal relationship between humans which is valid without any reference to any substantive ideas of what is good, but assert substantive precepts that govern human relations, such as rights to life, liberty and property. The rights of John Locke and of his successors such as Robert Nozick state a specific desirable relation between humans in that they protect the physical person, his liberty and his
property. The 'social primary goods' of John Rawls -- liberty and opportunity, income and wealth, and the bases of self-respect -- state specific proper relations. The First ten amendments to the U.S. Constitution and other bills of rights such as the European Convention on Human Rights can be looked upon as substantive in this sense.

But the substance of these rights is limited, for their content concerns the relations between people as opposed to the content of what is good for people. For instance, John Rawls' primary good of self-respect seems to concern the content of what is good for persons, but upon further examination it reveals itself as a vehicle for the individual person's determination of value.

First of all, it includes a person's sense of his own value, his secure conviction that his conception of good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions.

This is the archetypical rights point of view that life concerns determining one's own ends and then achieving them. These 'rights' add that there are specific and determinable relations among persons which are conducive to this enterprise.

We would still be mistaken to think that it is the right rather than the well-being which we are seeking to protect. The nature of

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1. One may contrast this with the concept of liberty in English law. There liberty is the residual power left to the citizen after the positive enactments of the legal system. This liberty seems to be undifferentiated. That is, the liberty to buy one brand of soap powder over another is of the same nature as the liberty to express one's dissent to the installation of nuclear warheads on English soil. One may argue that in deed English courts respect certain types of liberty more than others, and also that implicit in this conception of liberty, but unacknowledged, is some content.


3. Theory of Justice 440 (emphasis added).
the right, and therefore the substance of respecting the right, does not derive entirely from some feature or features of the relations between human beings rather than from what is good for humans. For example, suppose we view the criminal law, and specifically the crime of robbery, as a positive law justified as a protection of the natural right to physical security and property.¹

The normal explanation would be of the sort that every human has a right not to be robbed in that robbery denies the victim the physical security and control over possessions necessary to his well-being which does not consist solely of not being robbed. We could not describe robbery as an evil other than in terms of the detriment the act works on what is good for a human being, for instance, its interference with one's sense of community, care of family, appreciation of beauty -- that is, its interference with any concerted effort to live a 'good' life. Understanding rights in terms of that good may not be complete; there may be other elements to rights, but no understanding without reference to the content of what is good for humans would be satisfactory.

It would be difficult to understand the meaning of that right without reference to the content of what is good for humans. Does the mere respect of Cain for Abel's property and person (his failure to do something to Abel), manifest metaphysical propriety in the universe? One might say that it is proper for Cain to respect Abel's rights, or for Abel to respect Cain's rights, but can we say that the actual respect, the phenomenon of non-interference, manifests entirely the metaphysical entity of which we speak? The phenomenon of

¹I take that to be, for instance, the view of Robert Nozick.
me, sitting in Scotland and not robbing everyone in China would then be a sufficient description of natural right. Under this approach there would be much aright in the world and interestingly enough, more aright the more people we are! But there would also be much absurdity. For if natural right means, for instance, respecting the life, liberty and property of others and if natural right has meaning without reference to the substance of human well-being, then we would most further the right if everyone did nothing at all. We would seek to avoid not only intentional interference with another but also negligent and even innocent interference with others' lives, liberty and property. We would achieve the ideal of natural right theory if no one did anything at all. That view is absurd because such inaction would frustrate human activity which we consider necessary to that which is worthwhile in human life. No natural right theorist has argued that natural rights entail this cosmic lethargy. Indeed, Robert Nozick, for example, goes to great length in describing the utopia of his book in terms of human activity.

Thus, the relation between individuals described by any natural right or set of natural rights is not a 'category' of itself, but exists only in conjunction with the good it embodies and serves.

5. Nor does it do to assert that the propriety of respecting rights consists entirely in the state of mind of the one holding the obligation. An example of such a view would be that morality only comes of respecting the rights of others when we are tempted to do otherwise.1 This metaphysically based self-denial does not provide a coherent basis for natural rights theory. Certainly I am no longer

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being upright by simply doing nothing. I would be acting morally only if, for instance, I were tempted to rob my neighbour but resisted the temptation. But this view is nonetheless absurd. If self-denial on the part of the duty holder apart from any substantive good which we are trying to protect or maintain, constitutes a natural right, then we would have to place a value on frustration that we have never before placed. Not only would we have praise for those who resist temptation, but we would be acting better to seek temptation in order that we might overcome it. Instead of praying to avoid temptation as we do in the 'Our Father', we would seek to increase our incidence of temptation and, charitably, that of our fellow creatures so as to increase our ultimate denial of temptation. (At the same time we would seek to improve our self-discipline). The government, for instance, would be following natural rights theory were it to use modern advertising methods to condition us all into coveting each other's goods while at the same time disciplining us not to steal them. While the above may provide a certain cynical insight into the relation between advertising and criminal law in a modern consumer society, that relation is an affront to, not an example of, respect for human rights. It is just this sort of manipulation of the person that would most offend the natural rights advocate.

I am not arguing that self-denial is irrelevant to morality. My argument is that natural rights do not consist of self-denial alone without reference to the content of what is good for a person. They would have their character only by relation to that good.

6. We must distinguish an epistemological and an ontological point. We may conclude that any determination of what to do in any
instance is problematic. That is an epistemological conclusion (similar to the [A] of Santayana quoted in Chapter One). It does not entail the proposition that rights have a nature which is distinct from the nature of substantive human activity. Nor does it entail the proposition that there is no non-mundane ground for that activity. These are ontological assumptions. What exists is not determined by how we perceive it.

My argument concerns the ontology of rights. What is it to be a right which justifies (rather than one which is an instrument to some distinct end)? The right does not inhere alone in (i) a formal relation between people, (ii) a substantive relation between people or (iii) the state of mind of the actor. It also inheres in the well-being of the person. I am not alleging that rights are simply instruments which we create to achieve the ends of human well-being. To me the nature of the relations between individuals and the state of mind of the subject are essential to rights. But the substance of human activity -- the morality of aspiration if you will -- is also essential to any understanding of rights which purport to be fundamental, and therefore can be said to constitute their nature. No understanding of such rights is adequate other than in terms of the nature of the ground to human activity.
C. The Nature of Good -- Pervasiveness

1. The nature of good -- pervasiveness, integrity and content.
2. Pervasiveness stated.
3. Compared with natural right.

1. Natural rights theory must presume then a ground to human activity such that it makes meaningful the enterprise of fundamental rights. Let us call this necessary ground to human activity, Good. Without such a ground, rights do not make sense in their existence, for they would be absurd if the only end they embody is themselves. Nor do they make sense in their content. They are not conceptually 'whole', because they are not determinative.

My argument is that when you consider the nature of this ground to human activity, it is not such as will support rights -- either substantive or formal -- as a matter of logic. Nor will any conception of that ground justify the limitations on state authority inherent in rights.

This conclusion is reached by examining three characteristics of Good. These characteristics at once express the ground to human activity and, not surprisingly, state that which is implicit in any claims about substantive morality. These characteristics are self-evident in the sense that Good must have these characteristics if it has any nature at all. They are that Good is 1) pervasive (Part C), 2) has integrity (Part D), and 3) has substance (Part E).

2. The first is that Good is pervasive. If one accepts human activity merely as artificial or physical, then one can understand that some human activities can be characterized as Good, some evil while
some have neither characterization. But human activity could have no importance, because it is only mundane. But once we have accepted a ground to substantive morality, then every human decision, every choice of action, every activity properly aspires to the Good. It may be bad, or it may be Good, or it may aspire to be Good and fail, but in any case, we act in the belief that what we do next will be either Good or bad. Our behaviour cannot hope to be morally neutral. For example, let us say that I have accepted that there is a non-mundane ground to substantive morality. With that insight comes another -- that reading Balzac novels is Good; that is, not that I like Balzac novels -- I might or might not -- but that reading Balzac is Good. And let us say further that I have only these insights. In this case, all of my activity will be directed to reading Balzac (Good-in-itself) or to activities that are necessary to my reading Balzac -- for example, eating, housing, buying eye glasses, stealing a comfortable chair and a good lamp -- or it will be worthless. Whatever my conception of substantive morality, my activity can but have a limited number of relations to that conception of Good. (1) It can itself be Good. (2) It can be necessary to that Good. (3) It can be neither Good in itself nor necessary to that Good. If the possibilities are limited to those three, then any activity which doesn't fit into categories one and two, will fit category three; and there is no reason for undertaking any act which falls in category three. Thus, as soon as one has reached the conclusion that a ground to human activity exists, then every decision is one involving that ground.

This is a logical point and should be distinguished from psycho-
logical objections to it. We may at a psychological level deny that life has worth. If that is the case I suppose then that we proceed in an essentially passive way: our actions are governed by whatever our psychology happens to do -- when we get hungry we desire food and we seek it, not so much because food is Good, but simply because we desire food. We may also have psychological weaknesses -- we may feel that life is worthwhile, but nonetheless often have a sense of absurdity or may wander rather than direct our activity. We may have doubt about value, we may have a lack of will, we may have anxiety. (Also we may be convinced of the lack of worth of life, yet seek sometimes to undertake activity as if we are convinced that it has value). I do not doubt this psychological reality, but I doubt its relevance here, for the point being made is a logical one. If we recognize a ground for human activity (by reference to some entity or quality prior to our conception of morality), then what we recognize must -- in logic -- govern our activity. We ought to key our every action to comport with that Good.

We should also distinguish it from an epistemological objection to it. We may deny that we can have ideas which can properly determine our activity. But, as noted above, the limits of our perception do not determine what there is to perceive.

3. In order to explain the importance of this attribute of pervasiveness, let me suggest two views of substantive morality that purport to have a ground. The first is that what is worthwhile in human life are truth, beauty and love.¹ The poet's conception of that which has worth is meant to be real, not illusory. The second are the

¹See G.E. Moore, Principia Ethica Chap VI (CUP 1059).
values stated in John Finnis' *Natural Law and Natural Rights.*

Dr. Finnis suggests seven values basic to human beings:

Knowledge (or Truth);
Life (including health, survival and procreation);
Play;
Aesthetics;
Friendship (Community);
Religion;
Practical Reasonableness (reasoning with a view to decision and action).

These basic values are not universals in a philosophical sense. That is, they do not purport to be the ground itself. They are humanly created ideas, but they are not only humanly created ideas. They purport to have a non-mundane ground.

These value systems are comprehensive. Every human aspiration can be made in terms of these goods. We can either say that we are acting in a way that comports with the non-mundane ground or we are acting in a way that is worthless.

Now take rights as formal. It would be absurd to think that merely having choices, rather than the human well-being such choices might occasion, is worthwhile. The mere fact of having choices seems to state an absurd moral theory.

Now consider Mr. Nozick's conception of natural right as inher-
ing in life, liberty and property. If it is meant to expound a substantive morality in itself, then it is woefully inadequate. It conjures up a vision of Howard Hughes, utterly secure with his bodyguards, utterly at liberty with his money to do as much as any individual person on earth, utterly cared for in his health by a staff of doctors and nurses, utterly possessed of property as one of the richest men in the world, and utterly miserable. That which

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1 Chaps. Two and Three (CUP 1983).
Hughes lacked so does Nozick's conception of substantive morality -- a sense of play, a thirst for truth and religious significance, a sense of beauty, and an idea of friendship and community. A view of human nature by which the good life means dying a natural death, being free from interference from others and owning a lot of property is not a serious view of human nature, but a perversion of it. No philosopher can hold on to such a view for any length of time; Robert Nozick abandoned it in the third part of his book, but he does not explain why the same view of value which informs his utopia does not also inform his view of the state. Such a view contradicts all cultural insight -- literature, the arts, music and religion, whether high art or folk art -- and it leaves a terrible taste in the mouth when pursued with any seriousness:

People generally judge themselves by how they fall along the most important dimensions in which they differ from others. People do not gain self-esteem from their common human capacities by comparing themselves to animals who lack them. . . . When everyone, or almost everyone, has some thing or attribute, it does not function as a basis for self-esteem. Self-esteem is based on differentiating characteristics; that's why it's self-esteem . . . . First year students at prestige [sic] colleges may have a sense of individual worth based on attending those schools. This feeling is more pronounced, indeed, during their last two months of high school. But when everyone they associate with is in a similar position, the fact of going to these schools no longer serves as a basis for self-esteem, except perhaps when they return home during vacation (or in thought) to those not there.

This disgusting view of self-esteem results from taking Mr. Nozick's natural rights too seriously as a statement of what is good for humans. The hidden assumption is that human worth does not come from anything which is common to us, an assumption which does not follow from the idea that humans should be treated as ends in themselves and one which, indeed, contradicts it.

\footnote{Anarchy, State and Utopia 243--4.}
How does one justify this gap between a coherent idea of substantive morality and the ideas of natural right as inhering in life, liberty and property?
D. The Nature of Good -- Integrity

1. Integrity stated.
2. The nature of obligation.
3. Applied to Mill.
4. Applied to Dworkin.
5. Conclusion.

1. The second attribute of Good is its integrity. The ground is distinct from the mundane, both as physical phenomenon -- for instance, pleasure -- or any thought of an individual person. That is, if desires and wants and pleasures are considered to be mundane, then the ground for Good is non-mundane in the sense that it is independent of any such phenomenon.¹

For example, let us say that I appreciate apples. We may then say that to me apples are good in the sense of reporting a mundane psychological fact. But that cannot exhaust the meaning which we attach to Good. For if it did, then good would be whatever one happened to think it to be, and good would be incapable having the ground which a theory of natural rights aspires to and equally incapable of having any significance. Thus, my conception that apples are good to me does not exhaust the meaning of Good.

Let us further say that the eating of apples is good for me. This means that it is good for me to eat apples (say two a day), regardless of whether I think it good or not. We can all easily recognise occurrences which are good for us or others which we or they do not accept as good at the time. Most of them involve things like dentistry and cod liver oil. But this meaning of good, too, does

¹See G.E. Moore. Principia Ethica Chap III.
not exhaust the meaning of Good -- for if it did, then the ground for Good would entail no duty to others. It may be good for another that he eat two apples a day but it is not necessarily good for me that he eat two apples per day. If there are too few apples around; it is then good for me that he not eat apples and that I do. If I sell apples it is good for me that he eat two apples a day. It is totally consistent with this second view that we have no duty whatsoever to each other.

In its worst moments the utility of Thomas Hobbes and David Hume and Adam Smith is based on the first and second conceptions of good. For it accepts that good is recognisable in a human and social way but has no metaphysical ground, and it accepts that its meaning is exhausted by its being good to or for a particular person. From this can come a state which is ruthlessly utilitarian -- that it exists so that those who have power to create and sustain it can act in league to assure that they get what is good for them. And in that case, the state's importance is not only to increase the welfare of those in the league through some collective action, but also to increase the welfare of those in the league when it means doing so to the detriment of those not in league, whether they be the enemy within or the enemy without. The 'legitimacy' of this kind of state is a false one of power but also a false one of some sort of convention. It is certainly only legitimate to those who are in the league and even then only in a sense which bears little significance.

If the state is legitimate because I support it as a means of enhancing my own welfare, or if it is not because I don't, then the term 'legitimacy' has no independent meaning -- it simply signifies...
that I recognise that the state is better for me than it is worse. It certainly does not provide the legitimacy to which law aspires -- that you ought to obey and respect law even if it is not in your own interest; nor does it provide the legitimacy to which natural rights theory (say Robert Nozick's) aspires, that the majority ought to recognise the right to property of the minority and not view the state as a means for redistributing income, even though that might be in the best interests of the majority.

Also I do not think that Good will withstand the meaning that limits it to what is good to someone and good for someone. If something has worth only in terms of a human being, then it is difficult to see how it has worth other than as a self-fulfilling prophecy. It is utterly unsatisfying to say that it is good because I think it is, or that it is good for me but I can't say why. To be Good in any real sense, it must be Good other than in terms of any mundane aspect of the person. For then its value exists independently of the person and thus the act of 'participating in the Good' means going beyond one's mundane being, appreciating that which exists independently of oneself. Truth, beauty and love all have objects separate from the mundane individual person. Thus, one attribute of Good is its integrity. Eating apples may be good in a subjective sense to those who recognise it; it may be good for me in the sense that I experience the eating of the apple, but to provide a ground for natural rights, it must be Good (tout court), very simply, Good -- which means that its worth has a ground independent of any mundane human attribute.

This integrity of Good is then significant, for it is only by
virtue of its integrity that the ground has the capacity to justify at all. The integrity of Good implies that the obligations implicit in natural rights cannot exclusively be to leave other people alone, because such obligations are not grounded in the individual person, but in the non-mundane ground, that is, in that which is Good.

Ought a person stranded alone on a desert island drink himself to oblivion, or ought he to eat wholesomely? (Let us presume that he can obtain both drink and healthy food and let us presume that it is Good for him to eat well and not Good for him to drink himself into a stupor). Then of course he ought to eat well and not to drink himself silly because he ought to do that which is Good, not by definition but because Good demands it. Now let us say that there are two of us on the desert island, me and my friend Charles who wants to drink himself to death. What is my duty to Charles? Its source is in the truths that it is not Good for him to drink excessively and it is Good for him to eat well. It is Good regardless of who perceives it or who experiences the depravity of senselessness. There may be practical and psychological reasons why I am more concerned with myself than with my friend and more capable of affecting a change concerning myself. There may be practical reasons why I should be reluctant to steal his whiskey or lecture him on the evils of drink. But these are subsidiary to and play upon the basic obligation which arises out of the truth that he eat well, a Good that is independent of either of us. If Good has this integrity, then it makes no difference whether something is good for me or good for you; it is simply important that we respect Good. From that realization, my obligations follow, though we may bear in mind practical and psychological considerations. But
it is not the practical and psychological considerations that are the source of the obligation; it is that Good demands respect. That respect may be in refraining from taking food from my friend; it may be in providing him with food. Thus we do not so much have obligations to others as we do have an obligation to respect Good, without particular regard for oneself. No other view of obligation makes sense.

The importance of this insight for understanding the nature of obligation is that we do not begin with the principle that humans have obligations to each other and then seek to add content to those obligations. It is that Good demands human respect and that duties among humans manifest that respect for Good. Thus, if the life of the snail darter species is Good; or the shape of a tree in St. Andrews is Good; or the health of a person is Good; or literacy is Good, or physical security is Good; then there is a reason for acting so as to preserve the snail darter, to make sure the tree is pruned properly, to provide adequate health care for myself and others, to provide for education, and to refrain from interfering with the physical security of another or even to provide means for protecting the physical security of myself and others. Why does Mr. Nozick only recognise the latter? And why does Professor Dworkin give primacy to the latter? This is the unwarranted jump called liberalism.

\[E\]ven while the preface is being written, it is almost certain that in the name of improvement and with a complete disregard of the tenets of conservation someone in St. Andrews is cutting down, lopping or "tidying up" into an almost unrecognizable state some specimen singled out for special mention in the pages which follow. Nonetheless, it is hoped that despite or even because of its imperfections, the publication of a second edition will encourage everyone who cares for the amenity of the city to cherish to the utmost the trees which continue to give it so much of its special beauty and distinction."

2. What then is the nature of this obligation which arises from Good?

There are three possibilities which describe this obligation. The first is that there is no such obligation. The second is that we have an obligation to conduct ourselves with the Good of all (including ourselves) in mind. I shall call this 'plenary' obligation (for reasons explained in Part F), meaning that it has no limits in and of itself. The third alternative is a moderate one -- it admits that we do have obligations to others; but it rejects any plenary obligation and instead allows us to follow our own interests except for certain limited restrictions which natural rights places on our conduct. The latter I take to be the natural rights point of view and also the view of modern jurisprudence.

That we have no obligations follows from the denial of any metaphysical basis for our activity. It is a coherent way of looking at the world but certainly is inconsistent with substantive and formal natural rights. The second -- that our obligation is plenary -- is coherent and consistent with natural rights theory and indeed I argue is entailed by every assertion about legitimacy, whether of rights or of substantive morality. The third has no basis in metaphysical speculation and no basis outwith it.

If Good has this integrity, and if it is the source of obligations, then our obligation is not simply to leave others alone but to help others and ourselves. Natural obligations cannot be solely ones which require humans to forbear from certain kinds of conduct (robbery, knifing) with regard to others, but indeed must require us each to do Good for ourselves and others. For in the first instance our
obligations are not to each other, but to the Good. It is only in a
derivative way that they are to each other.\(^1\) This conclusion flies in
the face of the traditional view of law as protecting individualized
and negative rights, but it certainly makes sense of the fact that no
matter how hard we try to take Good and altruism out of conceptions
of morality, we don’t succeed. We continually feel shame in the face
of others’ misfortunes. Once we understand the integrity of Good, we
understand that obligations cannot merely be negative, and that they
can only be individualized as a derivation.

3. It has been the occupation of many political philosophers to
draw some theoretical middle ground between the position that humans
have no natural duty to each other and those who say that human obli-
gation is plenary.

Let me take two of the better known of these efforts and try to
show that they have no conceptual quality.

The first is that of John Stuart Mill:

the sole end for which mankind are warranted, individually or
collectively, in interfering with the liberty of action of any
of their number, is self-protection . . . [T]he only purpose
for which power can be rightfully exercised over any member of a
civilized community, against his will, is to prevent harm to
others.\(^2\)

This passage distinguishes between the prevention of one from harming
another, which is the province of law, and the prevention of one from
harming himself, which is not. I have shown above that it is concep-
tual nonsense.

The passage also distinguishes between obligations not to harm

\(^1\) ‘Obligation’ refers to the basic bond, which I allege is to Good.
‘Duty’ refers to that obligation as manifested in a relation between
humans.

\(^2\) ‘On Liberty’ in Utilitarianism, Liberty and Representative Government
72--3 (Everyman London 1910).
others, which are the province of law, and obligations to help others, which are not. Whatever merit this distinction may have as a practical guide, it is without merit as a conceptual distinction. We cannot distinguish between acts of interference and other acts. A device familiar to lawyers who have dealt with injunctions is that an affirmative act can be made into a restraint by the addition of a 'not'. Thus, a court may enjoin a divorcee from not making alimony payments, a striker from not working and a government official from not issuing a certain order. The negative duty not to harm others can as well be seen as an affirmative duty to conduct myself so as to avoid harming others. And the affirmative duty to share one's wealth can be stated as a negative one of not being stingy. This distinction may seem odd but it is theoretically correct. In each forbearance of a positive act of interference with another, I am essentially suffering a detriment so that another may have a benefit and natural right is requiring me to do so. But in each undertaking of a positive act to help another, I am also incurring a detriment in order that another may have a benefit. If natural right requires me to incur one, why does it not also require the other?

Conceptually there can be no distinction based on positive and negative acts: either we are obliged to incur detriment for the benefit of others or we are not.

4. A second attempt to limit the plenary nature of natural duty is to limit the scope of the duty. Ronald Dworkin argues that Mill's principle governs tort, criminal law, property and contract -- that is, private law -- but not how the state should distribute

1 Cf. the remarks on Kant, Hume and Hayek in One, B, 3, supra.
scarce resources, including income -- that is, public law. Whatever value this distinction may have as a practical precept, it has no conceptual basis. If Robert Nozick has added to the debate at all, it has been in his insistence that distribution of resources involves the same problems of natural rights as does criminal law. It is equally wrong for one to steal another's property, says Mr. Nozick, as to tax that property through the state for reasons at variance with the non-mundane ground to law, natural rights in Nozick's case. He is correct in the structure of his argument, but wrong in his understanding of what is required by that non-mundane ground. Whatever non-mundane ground there is, governs commutative and distributive justice both because each act in pursuit of commutative and distributive justice either violates or comports with that ground. To Nozick, natural right categorically prohibits redistribution of income and similar governmental acts; but once a comprehensive conception of that which is Good for humans is substituted for Mr. Nozick's truncated list of Lockean natural rights, and once the distinction between negative and affirmative acts is abandoned, we can see that no such categorical limit is justified. The issue in matters of distributive justice is the same as in commutative justice -- reconciling individual interests in comporting with a Good that is common to us.

5. The historical characterization of rights and obligations in negative ways, in terms of restraint, does not depend upon an actual difference between negative and affirmative obligations, but rather is a creation of ours in order to put into operation a principle that

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1Taking Rights Seriously, chap. 11, and hence that Mill's utilitarianism and harm principle can be reconciled.
legal and moral obligations should be limited. It should not then be used as a ground for those limited obligations. Search as you might for a basis for the distinction between affirmative and negative obligations and you will find no basis. If there is a basis for limited obligations between individual persons, then it must be found elsewhere, and then the question is purely the practical one of how this conventional distinction relates to that ground. The distinction between public and private, between self-directed and other directed acts and all other distinctions and limits to obligations are misplaced as logical doctrines. They are practical guidelines to achieving particular ends. They have no sanctity.

Suppose in an ancient Mediterranean city the populous became enamoured with the practice of weaving -- baskets, blankets or whatever. It was found that, although the people were happy in the practice of weaving, the tasks necessary to maintaining the city were not performed. Trade was intermittent, streets and houses were not cleaned, bakers did little baking, banks were mostly closed and the city was generally not prosperous. The city leaders hit on a scheme. They convinced people of the idea, through all sorts of educative techniques, that weaving should occur only in the afternoons. And they enacted legislation forbidding weaving. The scheme worked brilliantly. It became the practice for everyone to do their work, efficiently, in the morning, have lunch and a siesta in the early afternoon and then to weave in the afternoon until the sun went down. Everyone was happy. Some years latter, after the custom had been firmly established, weaving of all sorts fell off as an avocation. The truth was that the city suffered from too few baskets and
sweaters and the like, rather than too little energy devoted to other pursuits. A visitor suggested that weaving be done during the morning, but to no avail. His suggestion met with the response that, if mornings were meant for anything, they were not meant for weaving. But no one could tell him why they were not meant for weaving.
E. The Nature of Good -- Substance

1. Substance stated.
2. Rights assume that judgments about substance are problematic.
3. Therefore rights are no less problematic.
4. Examples.
5. Conclusion.

1. The third attribute of Good is that it has content or substance; that is, we cannot understand Good by reference to formal attributes alone.

This proposition is self-evident. For if an understanding of Good could be made by formal attributes, the attributes would not be formal, but substantive. It is a logical contradiction to claim that something is formal and also that it is (logically) determinative. The implication is that rights do not have logical or conceptual quality. They cannot guide our activity by virtue of some conceptual quality. For rights are formal. The argument above it that they are not identical to the Good. It must necessarily follow that these rights could not describe the Good. Indeed, the distinguishing characteristic of rights is that they are distinct from substantive morality. The very nature of natural right is that it is something less than substantive.

Thus rights are not logically determinative. The argument is important because although rights are not logically determinative, they can be psychologically determinative. Thus, they determine the decision in history, while avoiding the values necessarily implicit in any such decision. Specifically, the formality inherent in fundamental

\[\text{as formative, cf.Two, A, 2, supra}\]
tal rights acts psychologically to limit state authority. While it is a categorical limit to say that the state should act only to prevent harm rather than to engender well-being, that it should protect a person from harming another but not himself, or that it should recognize individual but not collective interests, it is also a categorical restriction to have law deal in the formal rather than the substantive. Natural rights then can be seen as a means of avoiding the value inherent in any legal decision.

2. I have argued that natural rights exist in relation to the ground for human activity.

There are two possibilities concerning the relation between ideas and the ground to human activity. The first is that humans can fashion ideas which have a quality by relation to that ground; that is, that ideas can have a conceptual or logical quality as explained in One, E, 2a, above. The second is that humans cannot; it is that ideas are either utterly useless, or else can have practical or experiential quality.\(^1\) What are the implications of these possibilities for the nature of natural rights?

Let us consider the first, which we call 'substantive rationality.' Substantive rationality means that by some conscious, intellectual act we can fashion an idea which embodies Good, that is, can form ideas which will have a quality which will provide a proper ground for human understanding and activity. The idea need not embody Good in some absolute sense, but need do so in a way that can guide human activity. By rational is meant that the correctness of the precept has to do with the nature of ideas themselves. Rational in

\(^1\) See One, E, 2b & c, supra.
this sense doesn't concern a relation between sensory perception, or a tautology but something more. It means that the resultant ideas have a quality in themselves which mandate a result. Because the ideas themselves have quality which relates to a reality distinct from the transient, they are a proper basis for some certainty or what we might call knowledge.

The implication of the acceptance of substantive rationality is that we would have no need for rights or any other formal ideas. For if humans had the capacity to fashion such ideas, we could embody that Good in an idea adequate for our situation. Our obligation would be to do Good. And our obligation would be identical to that idea. My true understanding that reading Balzac is Good would be identical to the obligation not to interfere with the reading of Balzac and indeed to further it. Such an obligation would exist without differentiation between myself and others. There may be a need for rights as instruments, but there would be no place for rights as formative, that is, for natural right.

(It seems that few admit to believing in this power of the mind called substantive rationality. But even if it is possible to fashion ideas which have a conceptual quality, it is not something we can depend upon happening. Substantive rationality at best applies only to a small sliver of human thought. That is, even if one allows for direct judgments about substantive morality, as I do, one must still deal with the complex make-up of nearly all human activity. To move on to the second possibility does not require a rejection of the possibility that reason can enable us to understand the Good. Only that we can reason and do so in some dependable way would make the second
possibility unnecessary. We should not design a legal system around the belief that we can make judgments of substantive morality which are conscious and dependable.)

Thus, the use of fundamental rights presumes that ideas about substantive morality are problematic -- either worthless, or experiential as I have characterized them in One, E. Rights are based in a scepticism that ideas can have a quality which will govern substantive morality. This scepticism is implicit in the distinction between rights and substantive morality and in the very importance attached to rights at all. For if we allowed that ideas could have this quality, then formal principles would not be important. We could make decisions as a matter of substantive morality. The essence of natural right as a metaphysical liberalism is the dichotomy between an asserted conceptual quality of rights and the problematic nature of substantive morality. This liberalism is based not in doubts about the general worth of human activity, but doubts about whether ideas can have the conceptual quality which properly determine that activity. Rights and duties are important to the extent one denies the importance of substantive rationality. And to the extent that one has faith in substantive rationality, rights and duties, as formative, are not so important.

3. What are the implications for rights of the second possibility -- that humans cannot, in any dependable way, fashion ideas that have a quality which will act as a guide to substantive morality?

The implication is that our ideas of rights will have no more conceptual quality than our ideas about substantive morality. To claim such a quality for an idea of right would seem to contradict

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the assumption that we are not capable of such ideas.

But even if we were capable of such ideas, rights, because they do not have an inherent nature distinct from human well-being, would not embody such an idea. For rights are complex and can be no more certain than that which constitutes them.

For as we have argued, rights and duties arise out of the nature of Good and the plenary obligation to respect Good but are not identical to that obligation. Formative rights and duties exist and hence have character by virtue not only of the ground to Good, but by virtue of the insight that law cannot be based in the capacity of humans to fashion dependable ideas of Good and therefore by virtue of some perplexity about the relation between ideas and the ground for human activity. It is this perplexity which is expressed in the liberal premises -- the [A] -- of George Santayana, David Hume, Immanuel Kant and F.A. Hayek quoted in One, B. In that 'the ultimate environment . . . is either chaotic in itself or undiscoverable by human science, . . . no normal religion, science, art or way of happiness can be prescribed.'

What does not follow is the [B] -- the efforts of Nozick and Kant and Dworkin -- to give primacy to rights (or right) on the basis of this logical quality. For rights exist by virtue of the ground to human activity, are understandable in terms of that ground and do not have an inherent nature distinct from it. And rights then exist by virtue of some perplexity about the relation between that ground and human ideas. In so far as we consider that the relation between human activity and its ground justifiably occasions perplexity, it means

\[\text{logically rather than psychologically}\]

\[\text{See One, B, 3.}\]
that we consider ideas about human activity not to have conceptual or logical quality, but to be practical or experiential. And in that rights are constituted (in part) by the ground to human activity and some perplexity about the relation between ideas and that ground, our ideas of rights themselves will be experiential rather than logical.

Let us return to the essential features of natural rights theory -- the dichotomy between a transcendental ground (and therefore a conceptual quality to) rights and the problematic nature of substantive morality. I simply don't understand how rights -- which are complex, constituted by the ground to human activity and derivative from it by virtue of a presumed experiential nature to ideas about human activity -- can be less problematic than ideas about the ground itself. I do not understand the dichotomies -- that rights have a transcendental ground while substantive activity does not, or that rights have a conceptual quality which our ideas about substantive morality do not.

4. It is certainly against convention to think that rights are as problematic as judgments about human activity. Is one saying that court's decisions about life, liberty and property are as problematic as personal decisions about whether to be a lawyer, whether to leave Torvald¹, and what kind of toilet training is Good for one's child. For it would follow from our denial of a conceptual quality to rights that they are not the stuff which can determine legal decisions. The answer is -- yes! Judgments about natural rights are as problematic as judgments about substantive morality. They may seem less problematic, but that appearance is due to convention, not the nature of

Let us take Nozick's right to life, one that Kant's notion of right would also protect for taking life precludes choice on the part of the victim. Take a cold blooded murder. We are certain that murder is wrong. We are certain that this act violated the right to life of the victim. In that sense, murder and torture seem to be ideas of rights which have a conceptual quality, that is, which can form our decision. But judgments about these rights are no less problematic than the basic judgment of substantive morality that it is wrong to murder or torture, that the very act itself denies respect for Good. In every case where you spot a right that you are certain of, or a particular violation of a right that you are certain of, it is because it is linked to a value you are certain of (or else your certainty is a mistake). Reasoning in terms of rights as opposed to substantive morality assumes that rights have a quality which the substantive judgment does not -- but that is not the case.

This becomes more apparent when we consider more difficult issues involving 'the right to life'.

Does abortion violate the right to life?

Does capital punishment violate the right to life?

Does operating a factory with toxic chemicals where there is a predictable loss of life violate the right to life?

Does manufacturing and promoting the sale of automobiles (or cigarettes, or alcohol) in the United States, where there are 50,000 traffic fatalities each year, violate the right to life?

Answers to these question are more difficult to make. Here, the right to life does not seem to have a conceptual quality, or a tran-
scendental basis which provides an answer. The reason is that the judgment about what is Good is not so cut and dry. However problematic our judgment about the substantive merit of making plastics or automobiles, then so will be our judgment about the rights involved.

Another example is Robert Nozick's right to property. We may feel certain that we have a formative right to property, but our certainty is due to convention or to a certainty about the underlying values involved, not to the character of the right to property. Having a property right to a suburban house is a right in the sense that it is individual and negative (separates others from my interest in the house). It is also a right in the sense that the nature of the property right is formal -- ownership of the house is distinct from judgments about how we use it. But, I argue, although the right to property may be justified in this example, it is justified because ownership of such houses brings an opportunity to lead a decent life, to raise children free of urban decadence and to keep a garden. That is, is justified in terms of the well-being which the right occasions. Our judgment about the importance of 'property' is not distinct from the well-being it occasions and is no less problematic than judgments about that well-being.

Compare it to property rights in stocks of companies, or in taxable wealth. To Nozick, it would be a violation of a natural right to take away such property. Are we then certain that we have a formative right to such property? We may feel certain that we have such a right, but such certainty is due to convention and a confusion of the instrumental with formative character of rights, not to the formative character of the right to property. This right, in the formative
sense, does not represent some nonmundane entity. It derives from the well-being that it occasions, and is no more logically certain than are conceptions of that well-being itself.

5. This is properly the critique that rights are not neutral but require values in their application. It is that rights do not have a conceptual quality which ideas about substantive morality do not. The critique cannot be that no judgment about value is worthwhile, for then there would be no need for the criticism. Nor can it be that rights are not worthwhile. But the criticisms rarely go on to explain how rights relate to substantive morality. For as I have stated above, the critique is only conceptual, not practical.
F. Conclusion

1. Rights derivative from a plenary obligation.
2. Juridical units of rights are flawed.
3. Applied to Nozick:
   a. arbitrary limit to obligation;
   b. experiential basis not examined;
   c. avoidance.
4. Applied to Dworkin.

1. The conclusion must be that if there are any natural rights, then there is an unlimited obligation of all to act individually and collectively to do Good without special regard for oneself. For if natural rights are grounded in any reality, then they are grounded in a Good which has pervasiveness, integrity and content and which therefore demands this conclusion.

   This characterization of our basic moral obligation as plenary is not all that different from the starting point of Immanuel Kant.

   [A] Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but also at the same time as an end.

   From it I have doubted that one can draw the conclusion [B] that law is a formal system which respects choice. I have shown that there is no logical basis for the distinction between the obligation to help others and the obligation to restrain oneself. Nor is there a logical basis for the conclusion that respecting choice is the equivalent of respecting the person as an end. The jump from [A] to [B] has no conceptual basis but an experiential or practical basis.

   Natural rights cannot be used as a justification for categorical limitations on the authority of the state. The ground which

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1Quoted at One, B, 2, supra.
natural right aspires to in transcendental reality does not compel the categorical limitations on state authority contained in these manifestations of natural right in law and political theory. It instead entails plenary state authority. Every natural right has implicit in it a non- mundane ground which mandates 'x' rather than '-x' and which therefore provides a ground for affirmative state action to secure the Good or prevent the evil.

In logic we should approach the question of the authority of the state in exactly the opposite way that we do. We should not begin with the presumption that the will of the individual citizen is to be honoured and then find reasons to justify limitations on that will (such reasons being, for instance, violation of other's rights, the necessity to maintain conditions necessary for the market, the concept of transaction costs). We should begin with the principle that state authority is plenary and then find reasons -- practical reasons -- for justifying limitations on that authority -- that is, for carving out a realm of the individual or non-state association.

It is a mistake to take rights as the starting point of political and legal theory. Natural rights can only work as derivative from some more profound idea of morality. In understanding rights we should not begin at the level of rights but should view rights as a derivative principle -- derivative to the ground of morality in Good. The protected sphere of individual power which rights seek to create or express cannot be justified by transcendental argument alone. The limitations which rights seek to place on the authority of the state need be justified, if at all, by resort to practical arguments.
Rights do indeed have their ground in obligations which arise from the nature of non-mundane ground to morality and law, but they do not have their character from that alone. Thus, natural rights, in that 'natural' refers to a non-mundane ground, is a slight misnomer. For though the weight of the right comes from its non-mundane ground, the form of the right as a negative, fragmented and individualised does not. While Good may be natural, right as we traditionally understand it can only be quasi-natural. Rights have a complex nature. Understanding of that nature will require a theory of Good and of personality.

For example, we may conclude that every person has a right to be considered for employment by the state without detrimental regard being given to race. This right places a categorical limitation on the power of the state. But the ground for this right qua right is difficult to comprehend (that is, how can we understand it as the manifestation of a non-mundane entity without assuming a non-mundane ground to human activity?) We should rather start at the point of a more basic Good presumed by the right. Let us say that basic to the person is the experience of one's own dignity, and that discrimination by race tends to act to deny that dignity. From the conception of what is Good for the person may be derived the percept that the state should not deny a job on the basis of race. It is not to deny an area of power to the state but to say that such power ought to be exercised in a particular way; and of course, it is not categorically true, because we are concerned with a decision which may affect people in a variety of ways. The insight of this point of view is evident from the other implications of the importance of ra-
cial dignity to the human person. One might derive from it that the state should act affirmatively to bring about that dignity in its hiring practices. Nor is it to limit state authority to concern about its own employment practices. The recognition that human dignity depends in part on one's racial view of oneself mandates state action to require also that those in the private sector act consistently with that dignity. A rights view would not enable one to make this conclusion, for the right against discrimination would conflict with the property right of the private employer. That conflict between rights dissipates when one understands the ground of natural right.

In order to determine the proper outcome, and in order to create a sphere of power in the individual, one must make judgments about Good and personality.

2. Thus the juridical units of rights (individual, fragmented, negative, areas of discretion, acts) are not valid in themselves, but only in light of some non-mundane ground to reality. These juridical units seek to create spheres of discretion -- in for instance the individual or a company -- so that substantive decisions are beyond law, or to avoid substantive decisions. But we have shown above that what the individual chooses is not self-validating, the origin of what is worthwhile is out with the individual and the concentration on Good shifts focus from individual acts which are the result of will to the personality as a whole, to which acts are of subsidiary importance.

We can understand the subsidiary nature of will by understanding the subsidiary nature of the individualized, fragmented and negative
conception of rights which it has engendered.

Rights are individualized; that is, are held by an individual person so that their exercise is considered to be primarily a matter particular to the individual. Our principle is that the ground for legal obligation has integrity. Thus, what is Good is beyond what is good to oneself or for oneself. One's obligation is to a common Good in the sense that its ground is independent of anyone. If one can conceive of natural rights, one can conceive of a Good which is beyond the individual person. The individuality of rights defeats the commonness of Good by structuring our thoughts in terms of an individuality of interests which have their origin in the individual person (and are therefore validated in terms of the individual person) and can be protected and effectuated through rights. Instead we should view our interests as an aspect of the common Good, and therefore rights as mechanisms which will only sometimes be appropriate, while other, collective mechanisms will also sometimes be appropriate. The individuality of the right will be justifiable by practical considerations concerning the nature of the person.

The concept of rights fragments our conception of human interests. It does this by concentrating on the power of the individual person to perform various acts and thus by forming the issue in terms of the validity of certain acts. But no coherent conception of Good can be acceptable if it limits itself to liberty and property and rights, that is, to a sphere which empowers the individual person to act for the sake of action alone or for the sake of some discrete goal. The fragmentation of human interests which is inherent in rights cannot be justified by transcendental ground.
alone. For that ground speaks in terms of the whole person in all its aspects and over time. We do not view a healthy person as one who is empowered to have property and is at liberty, that is, one who is empowered to act. The content of that Good must include as value things like 'understanding', 'friendship', and 'community' -- things which can only be viewed in terms of the person throughout spans of time and as integral with other parts of the person. Operating a legal system in terms of discrete acts of the individual -- that is, the fragmentation of human interest inherent in the concept of rights -- must be justified by the nature of human experience -- and hence require a theory of personality.

Rights are negative. They seek to create a sphere of action and to prevent others from interfering with it. The argument given above is that once the nature of the non-nondane ground of rights is recognised, there is no transcendental basis for distinguishing between an obligation not to interfere and an obligation to help others. Any grant to the individual of a sphere of power which excludes the authority of others over him will also need a practical ground.

Thus, the non-nondane ground for human obligation does not justify the individualised, fragmented and negative conception of rights that natural right has employed.

3. The above argument vitiates the thesis of Robert Nozick's Anarchy, State and Utopia.

3a. The appeal which Robert Nozick makes to natural right is flawed for recognizing some but not all of what a non-nondane ground to human activity entails. It entails a plenary obligation to do Good. Anarchy, State and Utopia acknowledges only some of this obli-
gation. It speaks of duties to persons rather than to the Good. It acknowledges that aspect which is individual, but not that which is collective. It acknowledges that aspect which is negative but not that which is affirmative. In short, it recognizes those aspects which we have embodied in certain rights -- due process, liberty, freedom of expression, property -- but not those embodied in what we call social justice. This is what I mean when I say that the liberal jump is a way of limiting obligation.

3b. The only way that such a jump could be justified is if rights embody an experiential or practical quality which judgments of substantive morality do not. That is, of rights are important, it is only to the extent that judgments of substantive morality are problematic and that rights are a way of dealing with the problem. Anarchy, State and Utopia does not address this possibility.

If rights are based in doubts about the worth of judgments of substantive rationality, then they are not capable of being logically determinative. Rights are important only to the extent that substantive rationality is not. Thus, rights assume that ideas do not have a conceptual or logical quality. Therefore, rights -- which are types of ideas -- do not have a logical quality. Therefore, rights are not capable -- in logic -- of determining the result of a legal issue.¹

Yet Robert Nozick uses rights as if they had conceptual quality in Anarchy, State and Utopia. The bounds of the law of nature require that 'no one ought to harm another in his life, health, liberty or possessions'.² He treats this statement as if it were a true

¹This is what is meant by the often made criticism that rights -- and formal rights -- are value laden and require value in application.
²Anarchy, State and Utopia 10, quoting Locke.
description of reality. He uses this statement conceptually, that is, he uses methods of reasoning to draw conclusions from it. He does not understand it as being a derivative principle. Nor does he understand it as a practical rather than conceptual principle. That is, he uses these rights to legitimate -- to be binding and to be logically determinative in thought -- when they are incapable of acting that way.

If rights are capable of legitimizing -- of being binding and properly determinative -- they will only be so by virtue of the nature of experience, not logic. The flaw is that these rights are proclaimed and their character set forth, without examination of the basis for them.

3c. In either case -- whether rights recognize only part of our obligation or whether rights are based in an unexamined idea of personality -- rights are used in liberal theory to avoid disturbing perplexities about the nature of Good and of the person.

4. The above argument vitiates the thesis of Ronald Dworkin that rights have primacy over goals of public policy. Rights do not have priority over social justice (collective, integral and affirmative legal relations as they might be); nor are rights somehow susceptible to reason in a way that public policy is not.

Both rights and social justice have a similar ground in a non-mundane ground for substantive morality. We hold rights in great esteem because of the obvious moral turpitude which they prevent (in some cases), but social justice is concerned with matters of equal moral concern. Social justice and rights simply proceed on a differ-

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1 Though one which would take a lifetime to explain. Id. at 9.
ent wager (if they proceed legitimately). The rights wager is that humans will flourish if left to themselves, with only a few, necessary constraints placed on them. The social justice wager is that humans will flourish if given the conditions for a healthy personality. Both are equally grounded in non-mundane Good. There is no basis in transcendental argument that the corporal works of mercy are of any less moral significance that the Bill of Rights. The choice between or mix of social justice and rights must be made on practical grounds.

It follows that public policy (social justice) and rights are equally susceptible to reason -- that is, to whatever extent one is susceptible to reason then so is the other. Both depend upon (i) a conception of the Good and of the personality which participates in the Good, and (ii) abstractions from that to actions of the state which will enhance that personality. Both conceive of the Good and then conceive of events in history which would respect that Good. In the rights case, the abstraction is to those constraints which will create the very minimal conditions to security of person, will restrict the free flow of the person as little as possible and will give it legal tools by which it can be efficacious (property and contract). In the social justice case the abstraction is to those conditions necessary to the health of the person -- say, food, clothing, shelter -- and perhaps more -- sense of community, cultural identity, career. In both cases, the use of reason is the same. Whatever reason is capable of in the first case, it will be capable of in the second case; whatever is beyond reason in the second will also be beyond reason in the first.

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If that is the case, we cannot say that the judiciary (and quasi-judicial administration) should be concerned with rights and the legislature with social justice. If the realm of the judiciary is that which is beyond popular taste, and the realm of the legislature is popular sentiment, then the realm of the courts will be rights and social justice and the realm of the legislature will be rights and social justice. The realms of the two are not separated by a distinction between rights based on reason and policy based on social sentiment, but on some other basis. The distinction will not be logical -- it will be practical. That is, whether to give power to the court or the legislature (like whether to give power to the individual person or the state) should be determined on the basis of practical considerations.

The conclusion must be that we have been mistaken to use natural rights to exalt liberty, the market and private law and to degrade collective action and public law.
G. Summary of the Argument

A. Rights Presume a Ground to Human Activity

(1) Rights establish relation between individual persons, but are not significant alone for the relation they establish between individual persons, but for the human well-being that they occasion. (Two, B).

(2) Natural rights purport to be formative -- deserving of respect and logically determinative -- by virtue of a non-mundane ground. (Two, A).

(3) It is nonsensical that such rights would be formative by virtue of a non-mundane ground that is formative and yet exist in terms of that which has no formative basis. (Two, C).

(4) Therefore, rights are formative (if at all) by virtue of a ground to human activity that is formative. (Two, C).

B. Rights Entail Plenary State Authority

(1) The ground to human activity must be pervasive, substantial and integral. That can be said to be the nature of a non-mundane ground to human activity. (Two, C).

(2) That the ground to human activity has integrity means that it is distinct from any mundane aspect of the person. Therefore, our obligation is not to a person, but to Good by its nature. (Two, D).

(3) That the ground to human activity is pervasive means that it applies to all human activity. Therefore, our obligation governs every aspect of our lives. (Two, C).

(4) Therefore, our obligation is plenary -- to do Good. It is not limited by considerations of self rather than another, of individual versus others or of negative versus affirmative. (Two, C, 2).

C. Rights Are Not Conceptual

(1) That the ground is substantive means that it can be formative. That is, it can be logically determinative and is deserving of respect. (Two, E, 1).

(2) One possibility is that we are capable of making direct judgments of the ground to human activity. That is, that we are capable of ideas which have a conceptual quality in that they embody this ground. Therefore, the idea can act logically or conceptually. (No one holds that we should design law as if we depend upon such a capacity, and many deny such a capacity.) (One, E, 2; Two, E).
(3) In that case, our idea of obligation would be identical to our idea of Good which would in turn be equivalent to the ground for human activity. (Two, E, 2)

(4) In that case, our idea of obligation would govern our conduct. Rights and duties would not govern our conduct, for by their nature they are distinct from substantive activity. If Good is substantively determinable, we do not need rights. (Two, E, 2).

(5) Another possibility is that we are incapable of making direct judgments of the ground to human activity, or that we can depend on such a capacity. (Two, E, 2).

(6) In that case, rights and duties make sense. Use of rights and duties only makes sense in that they are distinct from any idea of Good. That is, conceiving of law in terms of rights and duties, rather than simply as judgments about the Good, assumes that they are of a different character, for they are not plenary -- they are limited -- and they do not exist in terms of Good (alone) -- they exist in terms of persons. (Two, E, 3).

(7) In that case, rights and duties are formative only by virtue of a ground to human activity (proposition G, A, 4) but are necessary only to the extent we mistrust judgments of substantive rationality about that ground. (Proposition G, C, 4).

(8) In that case, rights and duties (as formative) are no more capable of rational determination than judgments of substantive activity, for they are derivative from judgments about human activity and such derivation is only necessary to the extent we mistrust judgments about human activity. (Two, E, 3).

(9) In that case, natural rights are not simple and complete ideas about a transcendental entity, but are complex. They exist by virtue of a ground to human activity and as an expression of the problematic nature of understanding human activity. Therefore they do not have logical quality. Therefore they are not alone formative: they are not themselves logically determinative or deserving of respect. They are not a category unto themselves. (One way of expressing this is that they are value laden and require values in their application.) (Two, E, 1 and 3).

(10) Thus, it is possible that judgments about human activity have a logical or conceptual quality. But it is not possible that natural rights have such a quality. Natural rights have neither a transcendental ground nor a logical character that distinguishes them from judgments about substantive activity. The dichotomy between the rational, transcendental nature of rights and duties and the mundane, non-rational nature of human activity is unjustified. If anything, the opposite is true. (Two, E, 3).
Chapter Three
Scepticism and the Authority of the State

"That the beauty of the cosmos derives not only from unity in variety but also from variety in unity."

(Brother William in Umberto Eco, *The Name of the Rose.*)

A. Theme

1. Theme.
2. The nature of positivism.
3. The argument aimed at the separation of law and morality.
4. Theme -- bis.

1. This chapter argues the paradox that any worthwhile response to the rejection of metaphysical speculation depends upon a ground to positive morality which ground is logically prior to human thought. Sceptical doctrines, to the extent they merit attention, are moral to the core; and the rejection of moral knowledge should be thought of as an instance of moral thinking.\(^1\) The argument assumes that we cannot depend upon a rational faculty of the mind to provide precepts of substantive morality;\(^2\) it accepts scepticism about statements grounded in a non-mundane reality. The argument is that doctrines devised in response to that rejection nonetheless aspire to a non-mundane ground. The main implication which we shall draw is that the rejection of metaphysical speculation is not a basis for limiting state authority and is not even neutral toward the issue; that rejection presumes a ground to morality which entails plenary state

\(^2\)See One, E, and Two, E. And assumes that we cannot depend upon a rational faculty to give us ideas of transcendentally created rights. Two, E.
authority of the sort asserted in the preceding chapter on natural rights.

2. The argument is made in terms of positivism, the most intriguing and influential of doctrines made in response to the rejection of metaphysical speculation. But the argument I make about each of them is an instance of an argument that can be made about any doctrine which arises from the rejection of metaphysical speculation.

The rejection of metaphysical speculation separates human enterprise from its ground. This rejection might have been the result of a realization that the religious enterprise had tied man's fate so closely to his view of God that this attachment had a stifling effect. This is not to say that the positivist enterprise entails a rejection of religion or a divinity, or that religion is necessarily stifling. But it does mean that the historical truth was that man was seen as too closely tied to God. It may also have been an insight about rationality itself which gave rise to this humanist enterprise. That is, central to the thought of both Hume and Kant is the tenet that substantive rationality -- the proposition that the human is capable of perceiving directly the basis for substantive morality -- is not a proper basis for morality and law. Again, this belief does not entail a belief that no ground to substantive morality exists, but that the person will not get anywhere by attempting the rational perception of that ground. My third suggestion is that the insight is one about human nature. It is that by concentrating on the foibles of human nature, rather than some abstract Good implicit in a human essence, that the most fruitful insights about civil society can be made. I would put Montesquieu and to some extent Rousseau in this camp, as well as the Whigs I have mentioned in Chapter One. I do not
want to argue which insight was the primary one, for I think they are not exclusive and are no doubt interrelated. They may very well be considered aspects of the same problem.

These insights and the concomitant decision to separate the person from his cosmic origins, or the concomitant perception that the person is separate from his cosmic origins, pose a problem. It is an ontological problem. What are justice, law, rights, good and other human activities once we have accepted this separation? Since we have become scientific, an answer must be made in terms of space and time. That problem can be seen as an epistemological problem. How do we know anything about human activity? More precisely, in this case, how do we know anything about law, justice, rights, good and obligation?

I am concerned with three characteristics of positivism as a response to this problem.¹

The first is that metaphysical speculation is not a meaningful activity where law and justice are concerned. The rejection of metaphysical speculation precludes knowledge of the non-mundane. And therefore it precludes knowledge of normative matters -- morality and law -- as aspects of the non-mundane. It does not preclude the existence of the non-mundane.

The second is that expressions of substantive morality (or morality of aspiration) are problematic.

The third is that some human enterprises, such as law, can be based in some kind of rationality or cognition. (I have stated the significance of rationality in One, E. Rationality depends upon a quality which ideas have in themselves rather than upon any attribute which we might give them. This quality that ideas have in themselves

¹ Positivism is described in Note A to this Part.
will mean that the idea says something about reality other than the reality of psychic need. This means that the idea is somehow trustworthy. It is for this reason that rational thought can be a basis for human action which has meaning -- that is, it is by reference to more than a mundane physiological pleasure or need -- and can be the basis for human interaction.)

What concerns me about positivism is the dichotomy offered between 'some kind of rationality' on the one hand and expressions of substantive morality on the other. Hume's statement quoted in Chapter One is an example. Here is another.

We are as profoundly convinced of the existence of logical entailments and implications in juristic thought as of the non-cognitive character of the personal convictions on which legal opinions are ultimately based.

The doctrines which are offered in contradistinction to expressions of substantive morality may vary, but they all have the same aim -- to create an area of certainty -- of a conscious and dependable mental process -- in opposition to the uncertainty which surrounds moral judgments. While natural right theory depends upon a dichotomy between right and good, positivism depends upon a dichotomy between rationality and good. The latter dichotomy is just as unfounded as the former.

3. The target of this chapter is the principle which separates law from morality, for it is but an expression of the asserted cleavage between the rational on the one hand and expressions of substantive morality on the other. I am concerned with the four aspects of the separation of law from morality which were stated in One, C, above.

The first concerns liberty. In its more assertive guise it is the doctrine of liberty as a primary political principle. In its more innocuous state it is that we should distinguish between the perception of the immorality of an action and the decision to make it illegal.

The second aspect of the separation of law from morality is that we understand law best without reference to morality; that is, in terms of facts and ideas, including facts and ideas about moral judgments, but not in terms of moral judgments themselves. This is how Raz and Hart characterize legal positivism. The effort is to consider law, as opposed to expressions of substantive morality, as a rational process. It is put into effect by considering law as ontologically mundane, and thus capable of rational perception. Part of making law mundane is to treat volitions as Compleat Facts, so that they can be rationally dealt with, once they have been made. And it is put into effect by means of juridical units which are manifestations of this idea of volitions as Compleat Facts.

The third aspect of the separation of law from morality is that justice is formal, that is, justice is achieved by following some rule, precept or practice which is not itself substantive.

The fourth aspect is that public law is a poor cousin of private law. This may seem an odd aspect to attribute to positivism. Certainly positivists such as Bentham have doubted the validity of natural rights, and by and large positivists would not ascribe to either the libertarianism of Nozick, or the claim of Dworkin that rights 'trump' over public policy goals. And Bentham's utilitarianism requires great public effort. Nonetheless, my argument is that util-

\[\text{See One, B, 2, supra.}\]
tarianism, by its use of individualized juridical units, acts as a private law which has a different principle of resource allocation.¹

Each of these doctrines, and the effort to separate law from morality in general, can be seen as an effort to distinguish between that which is rational and that which is not. For the presumption is that rationality concerns the relation between things, not judgments about substantive morality. But the separation of law from morality can also be looked upon as an effort to avoid the truth that law is not a rational process. Nietzsche refers to:

> those hodgepodge of philosophers who call themselves 'philosophers of reality' or 'positivists'. . . . all losers who have been brought back under the hegemony of science . . . and who now represent, in word and deed, honorably, resentfully, and vengefully, the unbelief in the masterly task and masterfulness of philosophy.”

And it is this unbelief -- in the form of an avoidance of the metaphysical speculation necessary for a serious theory of Good and personality that concerns me.

4. The previous chapter may have served to make more clear the issue that is presented by the view of rationality which excludes substantive rationality. The history of epistemological speculation can be described as a series of hypotheses of alternative conceptions of rationality -- made in the hope that they will ground some meaning and provide some basis for human interaction -- and a series of disappointments.

The theme of this chapter is that no alternative idea of rationality is adequate in the place of substantive rationality. To the extent one is sceptical of substantive rationality, one should be equally sceptical of any idea of rationality. That is, the dichotomy

¹See One, C, 4.
²Beyond Good and Evil, Sec .04, in Kaufman, trans, Basic Writings of Nietzsche 313 (New York, Modern Library 1968).
between the experiential nature of human activity and the rational nature of law is unjustified.

Note A. What is positivism? There is a point of view which is to me the quintessence of positivism. It is the rejection of metaphysical speculation and the stance that there is a fundamental difference between our sensory perceptions and other perceptions, including moral ones, with the former being more reliable. Thus, moral utterances are best considered 'positive' or artificial, that is, made, not found. There are many variations on this theme which will by and large be ignored. No variants on the theme will escape the implications alleged for the positivist point of view. That which is true of a very severe version of positivism will also be true of less severe versions. The arguments made here about positivism apply to any sceptical epistemology.

To the positivist, knowledge consists of or has its origins in empirical data. One may cite the criterion of verifiability — "a sentence is ... significant ... if, and only if [one] knows how to verify the proposition which it purports to express -- that is, if [one] knows what observations would have him, under certain conditions, accept the proposition as being true, or reject it as being false." "All statements aspiring to knowledge are descriptive of sense data (synthetic a posteriori); statements not descriptive may express formal logical relations, but as such are tautologies (analytic a priori). No statement whose meaning is not by reference to sense data and which purports to be descriptive (synthetic a priori) has significance. A. J. Ayer, Language, Truth and Logic 48 (Harmondsworth Penguin Books 1971). "[W]e may not assume that any insight formulated in general terms can have any real referents other than individual concrete objects." Lezek Kolakowski, Positivist Philosophy: from Hume to the Vienna Circle 13 (Norbert Guterman, trans., Harmondsworth, Penguin Books 1972).

This belief is equivalent to is a rejection of the possibility of knowledge of the non-mundane. "Many traditional metaphysical doctrines assumed that various observed or observable phenomena are manifestations of a reality that we cannot get to know in the ordinary way; this assumption justified the use of such terms as 'substance', substantial form, 'occult quality', etc. According to positivism, the distinction between essence and phenomena should be eliminated from science on the ground that it is misleading. We are entitled to record only that which is actually manifested in experience." Ayer, at 53. "[A]nyone who condemns the sensible world as a world of mere appearance, as opposed to reality, is saying something which, according to our criterion of significance, is literally non-sensical." Kolakowski at 11--12. "[I]f anyone maintained that absolutely unknowable objects exist, a positivist would consider him an incorrigible metaphysician on the ground that he has made a statement about reality that is by definition not subject to experimental control." Id. at 12--13. "[N]o statement which refers to a 'reality' transcending the limits of all possible sense experience can possibly have any literal sig-
nificance . . . ." Ayer, at 45. "We may define a metaphysical sentence as a sentence which purports to express a genuine proposition, but does, in fact, express neither a tautology nor an empirical hypothesis." Ayer, at 56.

The rejection of knowledge of the non-mundane includes a rejection of the possibility of knowledge of moral truths, i.e., "the rule that refuses to call value judgments and normative statements knowledge. Experience . . . contains no such qualities . . . as 'noble', 'ignoble', 'evil', 'beautiful', 'ugly', etc. Nor can any experience oblige us, through any logical operations whatever, to accept statements containing commandments or prohibitions, telling us to do something or not to do it. If it is possible to supply logical grounds for judgments made on the basis of a declared aim on the effectiveness of the means employed; evaluations of this type have a technical character and may be qualified as true or false to the extent that they have a technical sense, i.e., to the extent that they tell us what operations are or are not effective in achieving a desired end." Kolakowski, at 16. "Ethical judgments have no validity." Ayer, at 145 "If one wishes to affect another person . . . the question of truth or falsehood does not arise." Id. at 29.

The positivist doctrine as I have characterised it does not preclude beliefs about transcendental reality. But the positivist point of view attributes to sensory perceptions a qualitatively different status in the mind that other perceptions (including moral ones), so different a place that it may not be right to call the latter perceptions at all.
B. Facts

1. Sense data characterized.
2. Sense data not a basis for ideas of logical quality.
3. Factual circumstances not a basis for tolerance.
4. No 'ought' from an 'is'.
5. Law as mundane fact has no implications.

1. The first form of rationality I wish to consider is the empirical, and I shall use Hume as an example. The trustworthy way of perceiving, according to Hume, is by the senses. And then by simple relations among sense data.12

This cannot be an ontological doctrine. In relating rationality, and hence knowledge, to the senses, we are relating it to an attribute of the human rather than an attribute of any other reality. That is, sensory perception concerns human, not external reality, for the senses are of the human. An idealist position would seem to state that the relation between sensory perceptions and external reality is so tenuous that if such sense data are to have any meaning, they would have to do so by relation to something profound it is saying about our own nature. That is, that somehow it is an expression of our nature which is more than mundane.

But let us assume a realist position -- that is, assume that an external reality, rather than something we attribute to it, gives rise to sense data. Thus we can state the empiricist point as generously as possible by saying that our sense impressions are so immediate as to have a quality which is not clouded by our psyche.

That is, they are for all intents and purposes determined by external reality rather than by our psychic needs. Sense impressions are so immediate as to be effectively external.1234567

2. We can nonetheless doubt that sensory perception provides a rational basis for human activity. If we assume some external reality that gives rise to sense data, we have still said very little about that reality. We can posit that that external reality is capable of giving rise to sense data, but we can say nothing else about it. We cannot, even if we accept that sense data are determined by relation to external reality rather than (purely) the psychic needs of the subject, conclude that external reality exists as an 'is' -- as a distinct mundane occurrence. To make such a conclusion we would have to assume not only that sense data embody some external reality, but that no aspect of that external reality is hidden from us which would vitiate their use as an embodiment of reality.

Sense data, even if they represent a reality distinct from the person, have no moral implications. Indeed we can doubt that they

1 Brillat-Savarin counts six senses -- sight, hearing, smell, taste, touch and 'genetic or physical love . . . .
2 'It is surprising that, almost to the days of Buffon [1707-1788], such an important sense should have been unknown, and should have remained confounded or rather annexed to touch.
3 'Nevertheless, the sensation of which it is the seat has nothing in common with that of feeling; it resides in an apparatus as complete as the mouth or the eyes; and although it is singular that each sex has everything needful to experience the sensation, it is nevertheless necessary that the two should be in union to attain the object that Nature has proposed and if taste, which has for its object the preservation of the individual, is undoubtedly a sense, the same title must be given to the organs destined for the preservation of the species.
4 'We must therefore give to the genetic sense the place in the senses which cannot be refused to it, and we may leave to posterity the task of assigning its particular rank.
have any logical, as opposed to psychological or practical, implications whatsoever. This is because by their nature, sense data as sense data are appearances which by themselves tell us nothing about their reality. It is suggested in Part D, below -- on reasoning -- that as soon as we try to use sense data, we must alter them in a way which vitiates their important quality, their immediacy. For by their nature they are reliable because (or to the extent) they do not embody conceptions which are not sense data. Yet use of them presumes ideas such as causation and categories.

3. 'Facts' based on sense data are used in various ways. One is the belief that differing circumstances are a basis for the diversity of human activity. It is common sense that what is a Good act will vary with the circumstances. For, on day 1, at place 2, I perform act x. On day 3, at place 4 I perform act x again. It may be perfectly possible, and is indeed often the case that act x will be a Good act at one time and place but not at another. Shouting in one circumstance will cause an avalanche and in another will avert a danger. Reading a Thomas Mann novel on one occasion may bring about an insight and on another suicide. In Scotland it is Good to have a raincoat but in the Sahara it is not, for in Scotland it rains and in the Sahara it does not. Similar acts are important in different ways, depending upon the circumstances.

I can explain that such an argument is nonsense by a two step process.

First, mere contingencies, that is, space and time occurrences given by our senses and formed into facts by our mind -- even if they reflect an external reality -- cannot inform us how to group together species of acts which are worthwhile. (It does not help us if a par-
particular act is Good, aside from whatever species it belongs to. We might take every act as sui generis and understand that some are Good. But to do so gives us no basis upon which to guide our actions. We would directly perceive the Good in each particular act and that would be that). Let us posit a species of act (x) -- salad before the main course, torture. To recognize it as a species of act we would have to perceive (or attribute) certain characteristics common to the acts. Let us call these characteristics a, b and c. For these characteristics to help us, we would then have to postulate three things.

(i) We would have to recognize that act or occurrence x, recognizable by characteristics a, b, and c has a quality which is worthwhile or Good (or bad).

(ii) And we would have to recognize something implicit in our statement; that is, if a (salad), b (before) and c (main course) occur, they are worthwhile, no matter what other mundane characteristics might also occur. Such characteristics will at least be the time and location of the occurrence. That is, it makes no difference whether x occurs on September 21, 1986, or December 23, 1984; occurs in Lyons or in Dublin. It also makes no difference whether x is accompanied by other occurrences -- for instance, whether someone named Florence is at the table, whether fish is being served as the main course or whether there was a hailstorm in Istanbul at the same time.

(iii) And, for these characteristics to help us, we would have to postulate that behind the sense data there is nothing which would vitiate their use.

Then, if all of this is true, by recognizing characteristics a, b, and c, we can recognize Good and act well.
But we have no basis for making any of these assumptions. In order to make them we would have to postulate some Good that has a nature to which we could relate the sense data which give rise to what we call facts. But the very nature of sense data (but not necessarily of the reality which gives rise to sense data) denies to facts -- thoughts based on sense data -- any quality which would relate them to (i) value, (ii) to any other sense data, contemporaneously or over time, and (iii) to other reality which gives rise to the sense data.

Thus, no mundane occurrence -- if it is just that -- can enable us to know that any species of act is Good, for the finiteness of the characteristic precludes it from having that capacity.

Most everyone will agree to the first part of the argument but not the second. The second part of the argument is to reverse the process.

If mere contingencies cannot tell us how to group together species of acts which may be called Good; then they cannot tell us how to distinguish species of acts from each other, that is, Good ones from not so Good ones. That does not follow from the above; it is the above restated.

If we cannot conclude from the observation that two acts have the same characteristics a, b and c, that they are both worthwhile, then we similarly cannot conclude from the observation that two acts have differing characteristics that one is worthwhile and another not, or that we are somehow to have different attitudes to them. Let us take x1 with characteristics a, b and c and then x2 with characteristics a, c and d. The failure of x2 to have characteristic b, and the addition of d cannot tell us that x1 and x2 ought to be treated
differently. For that to be the case we would have to make the three postulates above, or corollaries of them. We have no basis for doing so, and indeed the nature of sense data as immediate awareness of external reality precludes the thoughts which (for all intents and purposes) arise from sense data alone from having a nature such as to justify our assuming these postulates.

Differing circumstances are not a ground for the varying morality of acts; differing circumstances cannot inform us how to reconcile validly differing acts and cannot justify liberty. Circumstances cannot perform these tasks as long as they are considered as mundane occurrences only.

The argument about circumstance enables us to understand the diversity of acts and practices in only a trivial way. For we can make the negative conclusion that a judgment about act x does not entail a similar judgment about acts similar to it. That is, we may perceive a similarity between acts but that does not justify the same moral judgment about them. Nor does it justify different judgments about them. Such an insight tells us that acts are logically capable of varying in their worth and desirability -- but tells us nothing about whether or not they vary. It is a paradox that contingencies are insufficient to ground the diversity of human activity and liberty.

I do not deny that an act may be Good in one set of circumstances but not in another, but I deny that any such statement says anything of importance. We cannot draw any important conclusion from it, for it is itself a conclusion, not a ground for a conclusion. The insight does not tell us anything that helps us for it does not tell us how to reason or think about Good nor does it tell us how to reconcile similar acts which are Good at one time but not at another.
The circumstances are facts a, b and c which don't have the quality which would enable them to determine an ought. As a fact -- rain is morally neutral; we can get wet or not. When we say that morality varies by the circumstance, we are stating a conclusion, a cliché, a convention; but when we say that morality varies because of circumstance, we are speaking nonsense. We may say that Sarah goes up on the see saw as David goes down, for that reports what happens; but we cannot say that Sarah goes up because David goes down. Sarah goes up and David goes down because of forces which we describe in the laws of physics.

4. This is simply the argument of David Hume that we can derive no 'ought' (for there is a moral imperative in the quality Good) from 'is's' (these mundane characteristics).

I cannot but forbear adding to these reasonings an observation, which may, perhaps be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of God, or makes objections concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be understood; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be derived from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and I am persuaded, that this small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relation of objects, nor is perceiv'd by reason.

It is also the naturalistic fallacy of G.E. Moore that no mundane occurrence or set of occurrences can signal Good to us, for Good is a simple property and we would be saying that a, b and c are Good.² And

¹Treatise of Human Nature 469--70.
it is the argument which I am making in a different form in this chapter that 'facts', 'mundane occurrences', 'contingencies' can have no implications -- moral or otherwise -- because they are creations of our minds by which we have abstracted the non-mundane from reality with the very design of creating logically impotent ideas which we call facts.

5. It is then a further restatement of the above to say that any concept of law which has been reduced to 'fact' arising from sense data, can have no implications, moral or otherwise.
C. Desire

1. Desire characterized.
2. Desire not a basis for ideas of logical quality.
3. Illustrated.
4. Alternatives to Desire, e.g., pleasure, not helpful.
5. Desire does not justify liberty.
6. No 'ought' from an 'is'.

1. A second effort at an alternative to substantive rationality depends upon speaking of conscious desires, wants, wishes, volition or will as immediate data about ourselves which are inherently reliable. (We shall refer to it as Desire in this chapter). Such a realization is not one of sense data but concerns the immediate contents of the consciousness. Having recourse to the immediate contents of the consciousness has been the refuge of different kinds of philosophies. The inherent and almost tautological reliability of such awareness of self is of course the theme of Descartes' famous maxim, but is also implicit in Hume's conception of Desires as Compleat Facts and in Kant's conception of the person as a self-generating moral (substantively) mechanism whose substantive morality is expressed in will. Reasoning is then instrumental to ends which are the product of that which is not itself rationally determined, but which has a quality worthy of intellectual or moral respect.

2. At the first level these formulations suffer from the same defect as sense data. They say something about what is perceiving rather than what is perceived.

But let us put aside such objections and accept that my perception of my own Desire to eat an apple at this very moment is true, that is, that it reports something about the reality of my consciousness. Even so, that reality is, by itself, an inadequate one upon
which to draw any further conclusions.\footnote{See Unger, Knowledge and Politics 51--3. (New York, The Free Press 1975). And Moore, Principia Ethica, Chap III.} The argument from Desire suffers from the same ontological mistake as the empirical argument. That I -- however accurately -- perceive that I want an apple states only one thing about the existence of what I am perceiving. That one thing is that it is a reality which is capable of giving rise to the perception that I want an apple. It doesn't tell me anything else about the nature of that reality. And that one quality -- even if we admit it to be a quality -- is not sufficient for us to draw any conclusions based upon it. To make any conclusion based on Desire we would have to assume not only that such Desire embodies a reality about oneself, but also that no aspect of that reality is hidden from us which would vitiate its significance.

This objection is not merely some abstract philosophical objection. It has its basis in the practical insight that people often desire things which are bad, for themselves and others. It has its basis in the insights, discussed in Chapter Four, that our activity is comprised of biological, psychological and sociological elements which are properly juxtaposed to the logical element. The content of the former is not available to our consciousness, and therefore not reported by this idea of Desires as Compleat Facts. (Indeed the Freudian ideas of repression and sublimation are that our consciousness is not trustworthy). In other words, it is a mistake to conclude from the proposition that we know (have a rational understanding of or perceive truly) our own consciousness, that our own consciousness has an ontological quality which is captured in our perception and which merits any conclusions being made upon it. The rationality of our understanding of our consciousness is one that is inadequate to
the tasks we have allotted to rationality. For even if Desire gains its quality from a reality (in this case the consciousness itself, rather than one outside it), that quality is inadequate to provide meaning to or a basis for determining human interaction.

Desires as Compleat Facts can have no moral implications. It is in their very particularity that Desires are not deserving of respect.

3. The fallacy of reasoning from the immediate contents of the consciousness to some moral precept is the hallmark of liberalism. I can illustrate this fallacy by three stories.

One story is of Ignatius Loyola as a youth travelling in Spain. At an inn he encountered a Moor who got the better of him in religious disputation. The Moor went on his way. Ignatius stopped at a fork in the road. The question was whether to take the road following the Moor and cut down the unbeliever or to take the other which led to a monastery where Ignatius could spend the night. He left the matter to his horse. The horse went to the monastery. It is supposedly there and that night that Ignatius determined to found the Jesuit order.

A second, less lyrical, story is told by Alan Gewirth. X undertakes action Y. He does so purposefully, voluntarily. Dr. Gewirth implies the following from his story. (i) That X undertakes an action

1 recollect this story from my instruction by Jesuits. I have found told as follows:

2 'So imperfect was his knowledge of his duties when he first renounced the world that, hearing a certain Moresco or Mahometan, speak injuriously of the holy Mother of God, when he set out from Loyola for Montserrat, he deliberated whether, being an officer, he ought to kill him, though the divine protection preserved him, from so criminal an action.,


Either version of the story makes my point.
voluntarily and purposefully presumes that the object of his action is good and hence that his acting is good.\(^1\) (ii) Implicit in the agent's action directed at good is a judgment that his freedom and well-being ought not to be interfered with.\(^2\) (iii) The agent must accept the generalization that others (who can act purposefully and voluntarily) ought not to have their freedom and well-being interfered with.\(^3\) From the above Dr. Gewirth eventually draws the principle, which I state in simple terms: act so as not to interfere with the freedom and well-being of others as well as to protect your own freedom and well-being.\(^4\) It is offered as a primary principle, that is, as a moral principle from which others follow and which does not depend on a prior moral principle.

That this argument is specious can be shown from a third story. What if good results from another's action in opposition to my own Desire? Suppose that the state requires that seat belts be fastened at the pain of a $50 fine. One morning as I enter my car I groan about government interference in my life; I nonetheless fasten my belt because I fear the fine. On my way down the Al67 I become captivated by Bach's Shepherd's Cantata, and drive my car into a telephone pole. I am spared death only by virtue of my seat belt. I decide that the law imposing a $50 fine is a good one.\(^6\) Am I then logically stopped from arguing that any interference with (my) liberty may be bad? Can I derive from this story a primary principle to 'act so as

\(^{1}\)"The necessary goodness of the freedom and well-being that are necessary conditions of his acting to achieve his purposes." Gewirth, Reason and Morality 48 (Univ. of Chicago Press 1978).
\(^{2}\)Id. at 48 & 80.
\(^{3}\)Id. at 48. (I have excerpted the term 'rights' from the discussion.)
\(^{4}\)"Act in accord with the generic rights of recipients as well as of yourself. [The principle] combines the formal principle of consistency with the material consideration of rights to the generic features or goods of action." Id. at 135.
\(^{5}\)Other obvious examples concern cigarettes and alcohol.
to interfere with the freedom of others as well as to enable interference with your own freedom? Further suppose that someone uses his freedom to bring about evil (to himself or another). For instance, he gets his group to lead a life of dissolution and then persuades them to commit mass suicide. From that am I to derive a primary moral principle that freedom of action is bad? Yet these conclusions derive from their stories in exactly the same logical steps as Dr. Gewirth's derives from his.

The fallacy is that we cannot conclude from a voluntary and free act that brings about a worthwhile end, that all freedom of action is always to be furthered. We can no more conclude from Dr. Gewirth's story that we should always respect the individual will than we could conclude from the story of Ignatius that we should always leave decisions to horses. Neither the fact of my original Desire (no matter how real the it was) nor my later reflection on it have any implications by virtue of their being immediately conscious to me. Neither of them tells us anything about the worth of the original Desire, or about the nature of Desires. We cannot conclude any primary principle from particular instances, no matter how we characterize them. It does not follow from

(1) A particular person exercised his will at a particular time, that

(2) will is always to be respected.

For a particular occurrence cannot ground a categorical moral truth. It would be equally specious to conclude from:

(1) Ignatius left the matter to his horse who took the better route; that

And hence some sort of Mill principle.
(2) we should always leave decisions to horses.

Or from:

(1) I attached my seat belt this morning against my will and only for fear of a $50 fine and thereby saved my life (which I value) when I ran into a telephone pole;

did that

(2) the state should govern our lives by a series of fines.

From Dr. Gewirth's story we can at most conclude that sometimes we should act so as to respect the freedom of others. And if we admit one case where interference has helped, then we must also accept that sometimes interference with others (and ourselves) is justified, even where we have acted purposefully and voluntarily. Given the nature of the immediate contents of the consciousness, we can only say that that given to the immediate consciousness does not entail either a principle of liberty or of authority. This leaves us where we started. For whether freedom or interference is appropriate in a particular instance can only be determined by resort to some moral reality which is (logically) prior to any principle about liberty. No principle of liberty can be a primary principle.

4. It does not help to give Desire another name. We can call the immediate contents of the consciousness pleasure, suffering or contemplation. Nor does it help to say that pleasure is distinguished from Desire in that it is not (simply) a matter of consciousness, but is a phenomenon which gives rise to sense data. For no matter what, in that it is considered an occurrence in space and time, and just that, then it can have no conceptual importance.

Is pleasure good? Is suffering? Is contemplation? Is action? We cannot take pleasure (at each mention of pleasure read the others) as
conclusion above -- but no more. It must be the ultimate relative principle -- for it means that eating is sometimes Good and sometimes not; fasting is sometimes Good and sometimes not, having sex is sometimes Good and sometimes not. It means that every (characterization of a) brain process might or might not be worthwhile. It is a ground for relativity, not of morality, but of judgments about Good made on the basis of contingent facts.

5. The immediate contents of the consciousness -- no matter how cleverly characterized -- cannot justify liberty. Yet that is precisely what is attempted by Hume, Kant, Santayana and Hayek in the liberal mistake characterized in One, B, above. There is no nature to the facts which tells us that the subject rather than the outsider -- or really one actor rather than another -- should make the decision. Mere occurrences of the consciousness cannot have that quality.

The lesson is of the futility of looking at the mundane in the first place. If Desire x1 has attributes a, b and c and Desire x2 has the same attributes, but x1 is acceptable in the circumstances and x2 is not, then we can conclude that we should mistrust our perception of the similarity between x1 and x2, for they are not really similar. Arguments about factual circumstances and desire tell us of our inability to properly perceive the nature of what we are doing (that is, discrete occurrences in time and space), not of the relativity of the act itself. If (as by the logic of our argument) the above is not only true of particular Desires, but of Desire by its nature, then we should not only mistrust our perception of the similarity between particular Desires, but of the similarity between any two Desires; that is, we should mistrust our perception in terms of Desire at all.

\[\text{sic}\].
If Desire by its nature is capable of being Good in one circumstance and not in another then Desire is an improper conceptual unit if it is meant to be a ground. Desires are conclusions about liberty and are preliminary working units, but they are not grounds. When we speak of Desires we have already concluded (for any number of reasons) that what is occurring is relative. Desires are then either apologies (conventions) or conclusions, but not properly justifications.

How can we make (judgments about) Desires which don't have this defect -- this defect of not being either of a species with or separable from other Desires? We cannot. Desire, by its character, is a crossroad where different worlds meet; if it were possible to place a Desire in a Good or bad category without anything else, it would not be Desire. All of this suggests that in speaking in terms of Desire we have chosen the wrong morsel, or as I have said above, an outmoded juridical unit. We should be speaking about something else before Desire, or else of Desire in its ontological context. The argument for liberty cannot be in terms of disparate elements, but only in terms of disparate elements in their ontological context.

All of this is equally true of thoughts based on sense data as of Desire. The argument for liberty cannot be in terms of disparate, mundane elements, but only in terms of disparate elements in their ontological context.

6. It is a false step to conclude from 'Good is not a matter of knowledge' and 'normative expressions are problematic', that 'normative statements are Compleat Facts'. It is also a false step to conclude anything of moral value whatsoever from normative statements that one has characterized as only Compleat Facts. We may say that
normative expressions are Compleat and then draw no lesson from that statement. We may also say that 'normative expressions are problematic or experiential, but have a non-mundane ground', and then draw lessons from that statement. The implications of the former are nothing whatsoever. The implications of the latter are that some of those expressions will be misplaced and some will not; that only those expressions which are properly grounded are deserving of respect; that the great difficulty will be to understand the condition of the person which brings it about; that is, that Desire and will are problematic as a basis for morality. We err when we say that 'normative statements are Compleat Facts' and then to say that those normative statements are deserving of any respect whatsoever. We also err when we demand that humanly created morality be treated with respect and yet not admit the implications of a non-mundane ground for morality.

This error is so widespread as to consider it a fallacy. If it is an error to derive 'oughts' from statements about physical nature -- the naturalistic fallacy -- then it is also an error to derive any ought from a moral tidbit which is the positive creation of the person -- the artificial fallacy.

I cannot but forbear adding to these reasonings an observation, which may, perhaps be found of some importance. In every system of artificial morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and denies the being of God, or disparages metaphysical speculation about the good; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it shou'd be understood; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be derived from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and I am persuaded, that this small attention wou'd subvert all the vulgar systems of mo-
rality, and let us see, that the distinction of vice and virtue is not merely the creation of the human will.

It is an instance of the liberal mistake that Hume's famous statement is taken so seriously when applied to 'nature' but forgotten when applied to human Desires. Yet, in logic, it applies equally to both. No matter how hard one may try, one cannot derive anything of significance from that created from no non-mundane ground. Everything written about 'second order' moral statements and the characterizations of morality as 'emotive' or 'will' or whatever can have nothing, when taken under their own terms, to say about first order morality. It is the artificial fallacy to think that they do. Nothing about Good and obligation which is deserving of respect can be derived from a system which takes moral statements to be artificial (humanly created) and nothing else.

*Treatise of Human Nature* 460--70 (emphasis indicates my editing).
D. Reasoning ... or Alchemy

1. Theme.
2. Induction.
3. Deduction.
5. Imputation.
6. Consequentialism.
7. Certainty.
8. Alchemy.

1. Another recourse is to rationality as reasoning. But there is no conception of reasoning which is adequate to the task. For every method of reasoning will require premises, and the result will be no better than those premises, and those premises can only have significance by virtue of some quality which their ideas have, and the rejection of substantive rationality precludes that result. Let us take five methods of reasoning one by one.

2. First, let us take inductive reasoning. The problem of induction restates the problem with sense data and the immediate contents of the consciousness. For as stated by Hume and many others, any generalization to be derived from any set of data depends upon the data having a quality which enables them to be put in one category or another. And yet, that is exactly what the idea of sense data doesn't provide. If the results of sense perception have a quality which enables them to be used in inductive reasoning, then they have it by virtue of something other than the quality which allows them to be perceived as sense data.

Sense data and desire are not only inadequate in themselves to justify them as having a logical quality. The problem of induction explains how they are inadequate in use. For from them we cannot make
logical jumps to other statements.

This can be explained two ways. First we cannot isolate the datum. To the extent we report sense perceptions, for instance, that a carrot is orange and fresh, we have, under the proposition that we are accepting (that sensory perception is sufficiently reliable to be called knowledge) knowledge of that datum. But having sensory perception depends upon some categories in the mind. That is, when we say 'carrot' we are assuming a certain kind of being -- a carrot; our very terminology is based on whatever we describe being an instance of some species. In order to avoid this result, we would have to describe each physical occurrence in its particularity; that is, at a place x and at time y the following sense data occurred (hard -- orange -- sweet -- loud -- blossomy). But each of the sense data descriptions is in terms of others -- presupposes others; any one perception depends upon it being placed in a context which has for its assumption a certain relationship between sensory perception. (That relationship either arises in the mind as a result of sensory perception, in which case it is illusory, for sensory perception by its nature cannot support any such relationship, or else it must be capable in logic of having a basis in some reality that is not solely based in sensory perception.)

The other way of stating the problem is that we cannot use such sense data. The very validity of their 'particularity' precludes gaining anything of value from them, for as soon as we relate them to anything else (in time and space) -- which we must to get anywhere at all -- then we have invalidated our process. Whenever we lump together sense data -- as in 'humans are mortal' or 'granite is hard.'
-- we encounter the problem of induction. That is, any generalization makes a jump from one set of data to another which aspires to logical quality which the data cannot have if they are to be reliable.

There can be no solution to this problem which is not a logical solution -- for the problem is a logical, not a practical one. That is, we can make all possible attempts to clear the modern scientists of all sorts of metaphysical rubbish left over from the prescientific era, we can take away all his bias, all his prejudices about the sun going around the earth, we can train him to be a scientist king, but in the end, if we totally succeed in limiting his statements to ones about sense data and induction, we will have created a very dull monster. For he can say nothing of interest at all; he can write tautologies and he can enunciate sense data about a particular place at a particular time, but he can say nothing more. The problem of induction cannot be solved as long as we accept the positivist epistemology (or any sceptical epistemology in its place) -- as truth.

3. Deductive reasoning suffers the same fate as inductive reasoning. The deductive syllogism will either be meaningless, tautological or dependent upon premises having a logical quality.¹

To the extent that reasoning supplies the relation between ideas which are (only) our creation, then it deals in truths which are meaningless tautologies. Such statements are true only in the sense that the results restate the premises. For instance, if I say that one plus one equals two, I am really not saying anything at all because the assumption that one plus one equals two is contained in

our understanding of one and two.

Let us take the syllogism:

(1) All humans are mortal.
(2) Socrates is human; therefore
(3) Socrates is mortal.

The conclusion is presumed in the premises. That is, we define humans by characteristics 1 to 50. Characteristic 26 is that humans are mortal. We define Socrates as human by characteristics 1 to n. Therefore Socrates has characteristics 26. That is,

(1) All H are 1 to 50.
(2) S is 1 to 50.
(3) S is H.
(4) S is 26.

It is then obvious that such reasoning is of no use. It will not result in a conclusion which has the quality we are looking for because by its terms it says nothing about any reality other than the syllogism itself. If this is the case, then, such reasoning tells us nothing about reality not contained in the premises. Such an exercise tells us nothing which would be of help in understanding natural reality or social reality or morality or law.

For the conclusion of the syllogism to have the logical quality we are looking for, the premises must say something reliable about reality. And we have just concluded that this is not possible. For we have rejected a substantive rationality which would result in ideas having a logical quality.¹ And we have also concluded that thoughts

¹One, E.
about sense data\(^1\) and desire\(^2\) do not have a quality which enable them to be reliable other than about the mere fact of their occurrence and in their particularity. Therefore, deductive reasoning, like inductive reasoning is not capable of resulting in conclusions which have a logical quality. They are not real rational methods, but hollow ones.

4. Reasoning as a matter of consistency suffers from the same fate. It is the haven for the substantially deprived, 'the losers who have been brought back under the hegemony of science'.\(^3\)

By reasoning as consistency is meant the principle of non-contradiction. In Kant's terms, it means that each moral decision should be universalizable.\(^4\) The appeal is that while we can say nothing about substantive morality, we can nonetheless say that no one ought to act in a manner which is contradictory (thereby creating the dichotomy between the non-rationality of moral judgments and the rationality of reasoning about them). This principle makes no sense in the absence of substantive rationality.

Let us say that you charge me with doing \(x\) today and not-\(x\) yesterday. For instance, let us say that I have robbed from Dominic yesterday, but I forbid you from robbing from Henry today, and you object to this hypocrisy. I pause and I think.

(a) If there is a contradiction, the fact of the contradiction does not tell me what to do about it. I may conclude that \(x\)

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\(^{1}\) Three, B.

\(^{2}\) Three, C.

\(^{3}\) For instance, Bruce Ackerman, Social Justice in the Liberal State 7 (New Haven, Yale Univ. Press 1980), takes this as an unquestionable fundamental principle.

was wrong or I may conclude that x was right. The fact of the
contradiction does not tell me which side of it to embrace.

(b) As I think about that, I realize that I have no way of
knowing what to reject or what to embrace.

(b1) We have rejected the substantive rationality that would
allow me to make that judgment.¹

(b2) Sensory perceptions have no quality which would justify
deciding one way or the other. There is nothing in the sense
data that make up the thought that Henry did one deed and I an-
other that justifies either making a distinction or not making a
distinction.²

(b3) Conscious Desires have no quality which would enable me
to make a decision. Desires are mere individual facts which have
no quality either demanding respect or being anything other than
individual.³

(c) If there is no basis upon which to judge between opposing
parts of the contradiction, because the opposing parts to not
have a logical quality, then there is no real contradiction.
The only alternative is to resurrect the possibility that we can make
judgments of substantive morality which are rational. But if that is
the case, we can make a direct determination that Henry should not
rob, or the like, and we do not need the principle of
non-contradiction to help us. That there is or is not a contradiction
will be a conclusion of our judgment of substantive morality.

The principle of non-contradiction is utterly hollow as a ra-

¹ One, E.
² Three, B.
³ Three, C.
tional alternative to substantive rationality. Its real appeal is in those instances where we are relatively certain of the side of the contradiction we want to embrace. If our judgment of the substantive morality involved is specious, then employing the principle of non-contradiction will make it no less so. If our judgment of substantive morality is not specious, then we do not need the principle of non-contradiction. The allegation of a contradiction can be no more reliable than judgments of substantive rationality! To the extent that we allege a contradiction we are alleging ideas which have logical quality.

Treating desires as Compleat Facts (or as non-cognitive) means not only that we have no basis upon which to choose between the opposing beliefs of two people, but that we have no basis upon which to choose between two beliefs of the same person. Here is an example of the quintessential liberal mistake. On pages 23 and 24 of Causing Deaths and Saving Lives, Jonathan Glover notes that rational argument runs out where two people hold opposing 'ultimate moral beliefs'.

These ultimate moral beliefs are like the axioms of a system of geometry: the other beliefs of a moral system are derivable from the axioms, but the axioms themselves cannot be 'proved'.

One page later he notes that it is rational to oppose (logical) inconsistencies in someone's moral beliefs. For instance, some general principles used in support of abortion provide an equally good justification for infanticide. Someone who holds such a principle, but who cannot accept the consequent rightness of infanticide, is trapped in an inconsistency. The general principle must be abandoned or modified or else the unpalatable

1 Cf. Unger, Knowledge and Politics 53 states that there is no universal and neutral principle. If it is formal it is an empty shell; if it is concrete, then it is not neutral. The use of formality, he says, depends upon some commonness which treating Desires as Compleat Facts precludes.

consequence must be accepted.\(^1\)

But if ultimate moral beliefs are arbitrary, then any logical inconsistency between two beliefs held by the same person will be an illusion. There is no logical basis upon which to say that any two beliefs are inconsistent. And if there is such a logical basis, then it would apply equally between two beliefs of two people as between two beliefs of one person.

5. Changing the form of the reasoning to 'if x, then y' does not alter the matter.

It is as barren as deductive reasoning above. That is,

(1) If one is human, one is mortal;
(2) Socrates is human; therefore
(3) Socrates is mortal.

is no less empty for the addition of 'if' and 'then'.

Nor does it make any difference if it is stated in terms of a command.

(1) If he moves, you should shoot him;
(2) He moved; therefore
(3) You should shoot him.

By our consideration of sense data, the sensory perception of someone moving cannot have the logical quality which would justify action. By our consideration of Desire there is nothing in either my Desire to shoot him, or in another's Desire to have me shoot him, which would have the logical quality that would justify shooting him. There is nothing more in the conclusion that you should shoot him than there is in the premises.

\(^{1}\)Id. at 25--6.
6. The fifth type of reasoning may be called consequentialism or instrumentality. It concerns the historical consequences, rather than logical implications, of an act. In each case the worth or lack of worth of a decision is determined not by the character of the act itself, but by what the act will bring about in history. By looking at what our decision will bring about, it is argued, we can reason to the best decision.12

The instrumentalist argument is as follows. If we want to bring about occurrence x which we posit as Good, there may be any number of human actions which may bring about that occurrence. Then there is no sense in stating that action of the type y is Good or bad, for we are concerned not with the action itself, but with what it will bring about.

Let us give an example of instrumentality.

Charles works as an investment banker earning $60,000 per year. The only aspect of the work which he enjoys is that it doesn't serve any reasonable social purpose. He holds the job in order to support his family, to indulge his passion for Victorian literature and to feed the hungry (he gives a third of his salary to charity). In other words, it is only common sense to admit that we humans undertake action the purpose of which is instrumental to some Good.

A second is consequentialism. A variant on instrumentality concerns the consequences of any particular action. By consequences, I mean the events on the causal chain of which an act is a link. This is distinguished from implications -- the conceptual significance of

1This is the response of Richard A. Wasserstrom, The Judicial Decision, Chaps 6&7 (Stanford Univ. Press 1961) and Neil MacCormick, Legal Reasoning and Legal Theory, Chap VI (CUP 1978) to the limits of other types of reasoning.
an act or thought. Regard for consequences raises the same problems as instrumentality — both are concerned with the causal properties of an act in space and time, or history. To me they are species of the same doctrine. The difference is that instrumentalism posits an end and then conceives of a method of attaining that end, while consequentialism conceives of an act and asks what its consequences will be.

A third is utilitarianism. It is really an instance of consequentialism. It is dealt with below as a particular of legal reasoning.

Now each of these efforts is the same. It states that we are not so concerned with the quality of the action itself as with its historical results. This is because the quality of the act itself is problematic — it raises the problem of making judgments of substantive morality. On the other hand, we can posit the consequences of an action and a relation between the act and its consequences. The effort in each case is to ascribe properties to the consequences and the relation that enable the decision to be rational. Thus, there is a dichotomy between judgments of substantive morality of act x, which are not rational, and decisions which are made on the basis of their historical consequences, which are.

The flaw in this kind of reasoning is twofold. First, the relation between future phenomena and the instant decision is not one which is determinable by reason. This is not simply a practical problem of trying to follow chains of causation from one moment in history to another. That is, even if one were an intellectual Hercules, one could not determine the consequences of an instant act.
by rational methods (once substantive rationality has been rejected).

There is a logical problem. The logical problem is that a concept of causation is necessary to make such determinations and no such concept of causation is given to us, either by sense data, or by the contents of the immediately conscious. This is simply Hume's argument on causation, which I paraphrase as follows.

(1) 'Reason is the discovery of truth or falsehood. Truth or falsehood consists in an agreement or disagreement either to the real relations of ideas or to real existence and matter of fact.'

(2) Knowledge as to matters of fact are derived from sense impression.

(3) Four relations -- resemblance, contrariety, degrees in quality and propositions in quantity or number -- are so direct as to be the objects of knowledge and certainty.

(4) Implicit in cause and effect are two relations -- contiguity and priority -- which are relations of reason. But these are insufficient to constitute the relation alleged by cause and effect. 'An object may be contiguous and prior to another, without being considered as its cause. There is a NECESSARY Connexion to be taken into consideration; and that relation is of much greater importance, than any of the two above mentioned.'

(5) Therefore, 'reason can never shew us the connexion of one object with another . . . When the mind, therefore, passes from the idea or impression of one object to the idea or belief of another, it is not determined by reason, but by certain principles, which associate together the ideas of these objects and unite them in the imagination.'

(6) The connection is a matter of convention or psychology, rather than a matter of logic.

1 Treatise on Human Nature 458.
2 Id. Bk I, Pt I, sec I.
3 Id. Bk I, Pt III, sec I.
4 Id. Bk I, Pt III, sec. II (emphases in original). I don't understand whether these two relations are meant to be examples of the four relations referred to in the previous paragraph, or whether they are meant to be in addition to them.
5 Id. Bk I, Pt IV, sec. VI.
6 Id. at 93. I think that this paraphrase comports with the account of J.L. Mackie, The Cement of the Universe, Chap. I (CUP 1980).
And of course Hume's argument on causation applies to any other type of effort to link disparate sense perceptions or Desires -- whether logically or historically. It applies to identity and therefore induction and deduction.

Secondly, we have merely put off the problem of substantive morality without dealing with it. Even if we posit that we can determine the consequences of an act, we must still deal with the problem of whether the consequences themselves are desirable or not. If act x has consequences a, b and c, and if we engage in consequentialist reasoning, then we no longer have to make a substantive judgment about the worth of act x, but we do have to make such a judgment about a, b and c. Why is it felt that our conceptions of a, b and c will have a quality which our conception of x lacks -- about its inherent worth or lack of worth? If a, b and c can only be judged in turn by their consequences, then we will be seeking to follow molecules of water down a very long stream indeed -- one without end. To avoid this eternal regress, our perception of the consequences will at some point have to aspire to some conceptual quality. The consequences do not have that quality by virtue of being thoughts which have arisen directly from sense data. Nor do they have that quality by virtue of being Desires -- whether actual or potential. As a method of reasoning, consequentialism is bad housekeeping. It merely has us sweep the difficulty of making judgments of substantive morality under a rug.

I should note that it is not my argument that it is a meaning-

1 Hume would except the four relations given in (3) above.
2 Three, B.
3 Three, C.
less exercise to attempt to regulate one's conduct with an eye to the future, but that it is only meaningful if one assumes a ground to human activity to begin with (or that undertaking such an activity presumes such a ground). In that case the consequentialist exercise is no more a matter of knowledge or rationality than is a basic judgment about the moral worth of any human activity. We are acting under an illusion if we undertake such instrumentalist or consequentialist reasoning as a rational enterprise.

7. That we hold so tenaciously to conceptions of rationality which are utterly inadequate to the task we give them suggests that rationality itself is more often than not the expression of a psychic need, rather than a means of grasping reality.

8. These methods of reasoning are a kind of alchemy. They suffer from the mistake that the result is meant to have a quality which is denied to its constituents. Induction is reasoning from particular to general. Deduction from general to particular. Consistency from particular to particular (or from general to general). Imputation is a type of deduction. In each case the reasoning depends upon a substantive rationality which has been denied. It makes no difference whether the reasoning is from descriptive to normative, normative to normative or descriptive to descriptive. If we cannot rely on the original ideas having logical quality, then the we cannot rely on the resultant idea having logical quality. To try to devise a method of reasoning which will have another result is to try to make gold out of base metals. If Wittgenstein is right that 'whereof we cannot speak we ought to be silent', then we simply ought to say nothing at all.
E. Legal Reasoning

1. The critique applied to legal reasoning.
2. An example.
3. The realist insight.

1. The problems raised in the previous parts apply equally to any type of human understanding or activity as to the effort to understand natural reality. Although they are often understood or accepted when stated one way, they are often denied or ignored in other contexts. But the truth is that once we deny the value of substantive rationality, then all efforts at rationality fail. Our effort to understand human activity -- whether in the past such as history, or in an ongoing sense such as anthropology, human geography, economics, politics, sociology, and of course law -- by means of such reasoning is flawed.¹ (That is the point behind parallel passages in Part B concerning sense data and Part C concerning volition.) Just as the scientist must depend upon an assumption that nature is ordered, even though he may doubt any particular statement about that order, so the moralist, including the jurist, must depend upon the assumption of a ground to value in order to understand the world of human activity, and in order to make meaningful any understanding he might assert. In this respect, the problem of deriving moral statements (oughts) from descriptive ones (is's) is just an instance of the problem of induction.

Thus, in applying our critique of rationality to morality and

¹See, e.g., H. Stuart Hughes, Consciousness and Society (London, MacGibbon & Kee 1959).
law, we are merely repeating ourselves.

2. We begin by rejecting substantive rationality and then seek to govern law by reference to some other sense of rationality. But no other sense of rationality will result in ideas which have the logical quality which we seek.

(i) From mundane phenomena available to our senses, we can conclude nothing. Any use of them, even in conjunction with something else, presumes a quality which they cannot have.¹

(ii) From our conscious desires we can conclude nothing. They do not without further assumptions have the logical quality which justifies respect. Any reasoning based on these Desires as conceived will be insignificant.²

(iii) By induction, deduction, consistency, implication or consequentialism, we can conclude nothing which has logical quality.³

Let me give an example

Let us take the following offence.

[A]ny person who in any public place or at any public meeting wears a uniform signifying his association with any political organization or with the promotion of any political object shall be guilty of an offence.⁴

We can understand it as a tautology (an analytic a priori statement). The rule states that the offence is made up of finite historical occurrences 1 to 25. This is act 23. Therefore it is an offence. Act 23 is an offence because it has been posited that acts 1 to 25 are such offences. As such it simply states and restates that which has been posited. It can tell us nothing about acts which have not

¹Three, B, supra.
²Three, C, supra.
³Three, D, supra.
⁴Public Order Act 1936, Sec 1(1), 8 Statutes 327.
been included in the definition and therefore can tell us nothing about acts which occur after the definition was made. It gives us no understanding about any imminent case -- the question in case 45 is whether or not we should alter the definition of a section one offence to include act number 45. (This is, quite simply, the logical problem with the doctrine of precedent.)

We can understand the legal occurrence as a phenomenon to be perceived by the senses. Such perception does not provide for an adequate understanding of law, just as sensory perception of natural events does not provide an adequate understanding of natural occurrences. For just as there is no way of using sense perception of one natural phenomenon to speak about another, there is no method of using sense perception about one artificial phenomenon to speak about another. We can describe the court sentencing someone as a matter of sense data: the gavel bangs, we hear the judge proclaim the decision of the court and the sentence, we see the prisoner being led away, and the prisoner himself smells the darkness of the prison walls and feels cold iron bars that hold him in. We can attach a label to these sense phenomena and call them a conviction. But if so, we can only state the legal occurrence in such a way that it is separate and distinct from others in space and time: on December 20, 1986, x judge in y court found z guilty of a section one offence for doing t and sentenced him to ten years in jail. If that is the case, we are reduced to stating that a particular event is a particular event, or that we have agreed to call a certain past event by a label which we have also attached to other past events. We cannot relate one event to another, other than by an agreed upon label, after the fact of
the event, for so far as we have done so we have left the realm of sense-data and tautology and have entered another realm of which we are uncertain.

Nor can induction, deduction, consistency or implication give a logical quality to our Desires.¹ Let us take the rules as an implication.

If
(1) a person,
(2) in (i) a public place, or
    (ii) a public meeting
(3) wears a uniform
(4) signifying his association
    (i) with any political organization, or
    (ii) with the promotion of any political object,
Then
(5) he is guilty of an offence and
Therefore
(6) subject to fine and imprisonment.

The facts to be put into the 'if' part of the equation do not have a quality which will enable them to go there. If we may report sense data of black, soft, circular, 5' radius as immediate and therefore having a logical quality, but we can do nothing with such sense data. We may consider a black beret to be a uniform, but that will depend upon characteristics about it that do not gain their force from sense data.²

The command, the 'then' merits nothing of itself. The communication of the conscious desire of the legislature or the court does not have a logical quality.

Nor can reasoning from precedent -- whether considered an instance of induction or non-contradiction -- give us a rational

¹The limits of deductive reasoning are set forth in Wasserstrom, The Judicial Decision, Chap. 2; MacCormick, Legal Reasoning and Legal Theory, Chaps 2 to 4.
answer. That a case is like or unlike a previous case will depend upon making a judgment about whether a characteristic ought to justify a distinction. That judgment is tantamount to a judgment of substantive morality about the case. Another way of saying this is that if one perceives that a finding of innocence in case 1 contradicts a finding of guilt in case 2, then one must still decide whether innocence or guilt is the correct decision. Such a decision is one of substantive rationality about guilt or innocence. If I can make such a judgment, I have no need of precedent to guide me. If I cannot, then precedent -- as a method of legal reasoning -- is fruitless.1

Thus, reaching a decision that x is guilty under the act is not a rational process.

3. The point being made here is a logical rather than a psychological one. It is not the insight that in practice judges often use personal and social values in making their decisions. The response to that insight seems to be to question how personal and social values of the judge can be limited in legal decision making and how other values, say those of the legislature or of another court, can be given effect. That insight poses a problem about human psychology which is one that can be dealt with in better or worse, but always practical, ways. The psychological truth is that a judge (or legal decision maker) is capable of giving up his values and assuming the values of a system or of something outside himself. Indeed, the problem does not seem to be that humans are not capable of such behaviour, but rather that they have a perverse tendency to it.

1An excellent dissection of the doctrine of precedent is found in Wasserstrom, The Judicial Decision, Chaps 3 and 4.
that is we seek to find ways to avoid moral responsibility by leaving moral decisions to some group.

The point made here is about the structure of reality. It is that the understanding of law as a rational process (i) entails (in logic) some ground in non-mundane reality and yet (ii) denies that to be possible epistemologically, and yet (iii) claims to be rational.

It is not an answer to this problem of logic that English jurists feel certain about 'the central core of law'.¹ That states a psychological condition which we may call 'certitude', but not a logical one such as might be called 'certainty'. The psychological condition of the jurist does not speak to the structure of reality which must support the syllogism. If one places faith in the syllogism (or any type of reasoning -- by analogy, by precedent) then one must recognize that value (real not artificial value) grounds the use of that reasoning in law. But the elements of the positivist's rationality are inadequate to constitute -- logically rather than psychologically -- the judicial decision.

4. Modern jurisprudence as characterized in Chapter One can be considered as a series of responses to the limits of rationality. But it can just as well be considered as a series of efforts to change into gold various ideas of rationality which are themselves base metals.

F. The Concept of Law

1. Law as mundane.
2. Austin.
5. Law as institutional fact
6. Conclusion.

1. What ontological status have moral entities such as justice, law, rights, obligations and other human activities once we have accepted this separation between human activity and metaphysics? One response has been to attempt to understand law without reference to moral expression. This effort may be called 'legal positivism'.

This part outlines the responses of various legal positivists to this problem. In each case I want to summarize how each of these theories answers the questions 'What is law?' and 'How do we understand law?' and then to relate it to justice. In each case, the theory will be defective for the same reason, for they are all variations on the same theme. \[123\]

2a. The first theory is that of John Austin's 'The Province of Jurisprudence Determined, etc.' and Jeremy Bentham's 'Of Laws in General'. They are so similar that they can profitably be dealt with together. They attempt to provide a method for understanding law, 

...
taking as a departure point the rejection of metaphysical speculation. It is generally referred to as the command theory.

The first element of Austin's theory is the command as a 'wish or desire' of some rational being to another. This element takes as given the idea of Desires as Complet Facts. Desires are a starting point not subject to dissection and hence must be taken by reason rather than given by it. Hence, law is an invention rather than a discovery.

The second element is that some 'evil' or sanction is threatened from the former to the latter. Note the sensory element to the reality of law. If you want to know that there is a table, then kick it, and if you want to know that there is law, then violate it and you will sense the result.

The third element is that the command is expressed by some word or sign; that is, that there is some manifestation of the will or Desire in a manner that enables it to be perceived.

The fourth element is that law consists in only generalized commands, that is, rules.

The fifth element is that law concerns only commands of the sovereign. The sovereign is the monarch or some other supreme authority.

The purpose of Austin's exercise is to exclude as the source of law a) rights and obligations which arise from the nature of being a

1Austin, at 13--16.
2Austin, at 15--18.
3Austin, at 18; Bentham, at 4.
4Austin, at 18--19, 24. '[A] law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a class.' Id. at 24.
5Austin, Lecture VI; Bentham, at 9, 18.
human being, b) other transcendentally based nonsense, c) positive morality and d) God. All of these are either undesirable, problematic from the point of view of the ends of rationality (conscious and dependable) or simply not believed. Hence, law does not include convention, international law and constitutional law, other than as rules stated by the courts. God's law, it is said, may be discoverable by asking what rules would have the best consequences in terms of happiness, but God's law is different from law as it is.

Under the command theory, the sovereign acts as the deus ex machina to bring about the touted separation of law and morality. By it law can be determined by rational faculties, which rational faculties do not include any capacity to make judgments about metaphysical entities like Good. "It is in this way that conveyances and covenants acquire all the validity they can possess... [A]dopted by the sovereign, they are converted into mandated law." In this way, 'every positive law, or every law simply and strictly so called, is set, directly or circuitously, by command of a sovereign person or body.' Hence it would include delegated legislation, the common law, the prerogative, convention, every contract and every free act of the citizen. It would include all of these because the sovereign could change that law.

2b. There are many criticisms of this idea of law. As an example of the type of criticism I am not interested in, let me take that in

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1 Austin, Lecture V.
3 Austin, Lecture II.
4 Bentham, at 26.
5 Bentham, at 26--27.
6 Bentham, at 26--27.
H.L.A. Hart's *Concept of Law*. Hart says that the idea of *command* doesn't get to the heart of the law relating to contract, wills and marriages other than in a contrived way. That criticism is in terms of saying that Bentham and Austin have not correctly characterized what law is. If criticisms are of this nature, then the answer is to state, as Hart does, another theory of what law is which purports to remedy these defects. The criticism presumes that the enterprise of defining law as an 'is' is a worthwhile enterprise.

A second type of criticism, the one that concerns me, is that the command theory of law is a specific instance of a general mistake. That mistake is to think that law is anything at all in a mundane sense. That mistake can be seen by asking who the sovereign is. Bentham tells us that he is

the person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person

and who himself is bound to no one.

Not a cook is but to dress a dinner, a nurse to feed a child, an usher to whip a school boy, an executioner to hang a thief, an officer to drive an enemy from a post, but it is by his orders.

But such a concept begs the question of how to distinguish the robber from the ruler. Stated another way, it begs the question of how to decide to whom we should give our habitual obedience. The assumption is that we find the ruler, rather than that we determine him. The theory allows for no ontological or epistemological basis upon which

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1*(CUP 1961).*

2*Concept of Law 26--33. Austin's jurisprudence fails to appreciate that some rules confer powers while some impose duties. Id. at 237.*

3*Bentham, at 48.*

4*Austin, at 212.*

5*Bentham, at 24. They are all authoritarian relationships.*
the habitual obedience to a ruler can have any meaning. The sense data of the monarch wearing certain robes or signing a certain document have no implications. My Desire to obey, or the sovereign's Desire to be obeyed are but mundane occurrences without implication. The prior fact of obedience has no implication for the present or the future. Habitual obedience can only relate to that which has already occurred. We will have to go beyond the realm of the mundane to justify obedience, or to understand why obeying the Queen-in-Parliament gives rise to law but habitual obedience to television commercials does not.

The conceptual inadequacy of this theory becomes evident when we consider the doctrine of Parliamentary Sovereignty in British law. It is that the will of the Parliament of the United Kingdom is the supreme authority in British courts. The absurdity of the sovereign binding himself has often been pointed out. It creates several conceptual problems:

If it is all powerful, then it could bind future Parliaments but then they would not be sovereign.

How can Parliament bind itself?

How can this basic constitutional fact be altered? Can Parliament alter its own sovereignty?

The inability to have any basis upon which to alter the doctrine demonstrates equally the lack of conceptual basis for the doctrine itself.

That mistake can be seen also in that law -- as characterized by Austin and Bentham -- can have no moral force. To the extent the positivist project succeeds and enables us to perceive law scien-

\[1\] Its inadequacy as a practical matter is another matter.

\[2\] See Bentham, at 68.
tifically, that law has no implications whatsoever. It has no moral force to either the judge or the citizen. If law is mundane, then it has been robbed of any quality which would justify any action whatsoever. There is no basis -- other than fear -- for obeying it. That the sovereign has commanded habitual obedience states no reason for anyone, including a judge, to obey the sovereign. And the lack of conceptual force, by the argument of Parts B to D, means that there is no basis upon which a judge can reason to a decision. The judge could only be bound by reference to something which is more than particular. Under Austin's theory, his decision will have to be an insignificant psychological fact -- one of obedience to the sovereign.

3a. The second theory I wish to deal with is that of Hans Kelsen. Kelsen seeks to create a theory of law which is pure. It is pure in the sense that it is a science distinct from other human sciences. Kelsen separates law from sociology of law and realism by distinguishing normative jurisprudence as the science of legal norms -- as the science of how people ought to behave according to law -- from how they do behave. Normative jurisprudence, to Kelsen, is no less empirical than sociological jurisprudence, both are concerned with positive law. But normative jurisprudence is logically prior to sociological jurisprudence in that sociological jurisprudence must assume a content to positive law in order to get on with its work.

Kelsen's law is also meant to be pure in the sense that it is separate from morality. But to the very extent that we can form an

2 Id. at 1.
3 Id.

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idea of law as pure, to that extent our idea has no purpose. The purity of law depends upon being able to describe law without reference to morality, that is, to separate the existence of law which can be determined by sense data and analysis, from moral attitudes to it.\(^1\) Whether that law exists is to Kelsen an objective truth, while whether it is right or wrong is wholly subjective; our moral attitude to it is a Complete Fact. This is a clear expression of the positivist distinction made in Three, A, above. The essence of the doctrine is in the proposition that the identification of law -- the existence and content of law -- does not require resort to moral argument.

Kelsen's effort to make law a rational system depends upon a unity of legal norms. Each norm within the legal system can be traced back to a basic norm, the Grundnorm.\(^2\) They are as particulars to a universal. A legal norm does not exist by virtue of its content. "Any content whatsoever can be legal; there is no human behaviour which could not function as the content of a legal norm."\(^3\) The norm is not so much a command as 'an hypothetical judgment expressing a specific relationship between a conditioning circumstance and a conditional consequence.'\(^4\) It depends upon a simple mental operation that 'if there is A, then there ought to be B.'\(^5\) Physically, Kelsen says this is called causality, but mentally, it is imputation. It is a measure of Kelsen's influence that this is indeed how statues are often written, at least in England.\(^6\)

\(^1\)Id. at 63--66.
\(^2\)Pure Theory of Law 115--118, 100-212.
\(^3\)What is Justice? 311 (Berkeley, Univ. of California 1957).
\(^4\)It is a Kantian hypothetical imperative. Id. at 324.
\(^6\)See e.g., the discussion of section one of the Public Order Act 1936, at Three, E, 2, supra.
Law then to Kelsen exists as a series of normative rules which are made by reference to a Grundnorm and which depend upon coercion of some sort. This concept of law cannot tell us whether law is just, but it can tell us whether law is valid. The question of validity can be answered by relating the norm to the Grundnorm. And the purpose of the exercise is to remove any metaphysical justification from the legal order.

3b. There are of course 'insider' criticisms that Kelsen's idea of law does not properly capture what law is, for it places too much emphasis on coercion.1 But these criticisms assume that law is solely a mundane entity. My criticism is that the whole concept of law as a mundane entity is mistaken.

Kelsen's theory, like Austin's, is an instance of the general mistake of thinking that law is anything in a mundane sense. That mistake can be seen by examining the idea of the Grundnorm. Like the concept of sovereignty, it acts as a deus ex machina.23 The only way of knowing what the basic norm is can be had by resort to the psychological fact of respect, with the same untoward implications. Kelsen's theory is an instance of the same effort to take intractable moral problems and sweep them off into one corner and ultimately under the carpet, in this instance a Grundnorm rug. It is more a psychological act of avoidance than any real insight into the nature of law. The Grundnorm suffers from the same criticisms as the concept of sovereignty, for it is an instance of the same mistake.

1 Hart, Concept of Law 35-41.
2 "It is valid because it is presumed to be valid; and it is supposed to be valid because without this presupposition, no human act could be interpreted as a legal, especially as a norm-creating act."
3 Pure Theory of Law 117.
If law is as Kelsen states it, then it can have no implications for either the citizen or the jurist. It can have no moral force. It can have no implications for obedience or respect. Nor can it have implications for legal reasoning. For acceptance of the Grundnorm is an occurrence which cannot make sense other than as a logically innocuous psychological phenomenon. If law is mundane, then it has been robbed of any quality which would justify any action whatsoever.

The imputation from x to y is to Kelsen a quasi-rational act. "The legislature relates the two circumstances in a fashion wholly different from causality. Wholly different, yet a connexion as unmistakable as causality."¹ This is an effort at certainty, at a dependable and conscious logical process which we can call rational and which will give a quality to the resultant ideas that can provide understanding and be a guide to conduct.

In what sense can Kelsen's law be considered a rational enterprise? It is not rational in the reasoning process it employs. There is, to be sure, no logical operation that requires a specific result from a general premise. Nor is it rational (at least as stated by Kelsen) in the sense that depends upon the use of ideas which have special validity for a quality they have, that is, because they embody some moral truth. That is exactly what Kelsen denies. If the ideas used by the judge embody anything, according to Kelsen's theory, they embody the Desires and wants of members of the legislature. And in that they are Complete Facts they have no particular merit.

¹What is Justice? 325. Causality is, of course, not unmistakeable. See Three, D, 6, supra.
Law, Professor Hart characterizes law as something that can be identified without resort to morality. Law is the union of two kinds of sources — primary and secondary sources. These sources are seen as rules. Primary sources have content; secondary sources are concerned with the division of power.¹ The most important secondary source is the rule of recognition.² It is the deus ex machina of Hart's concept of law, as the Grundnorm is of Kelsen's and sovereignty is of Austin's (and Dicey's). It is by reference to the rule of recognition that power is distributed in the legal system.

4b. What is the nature of the rule of recognition? Ultimately, like the Grundnorm, it is a belief.

There are ... two ... conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's criteria of validity must be generally obeyed, and, on the other, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.³

And it suffers from the same ontological defect as the Grundnorm. Neither the judges recognition of the rule of recognition nor our perception of the judge's recognition, is a matter of rationality in the sense we have thus far allowed. For such perceptions require unifying characteristics that enable us to understand that there is such a rule over time and that same one follows it over time. And neither sense data nor volition -- even if called commands or rules -- have that quality. Instances of obedience to the rule of recognition have no implications for each other.

If law ultimately depends upon a belief of no matter what kind, ¹Concept of Law, Chap. V. ²Id. at 97--103. ³Id. at 113.
then it is either a belief which has some basis, or one which does not. If it has some basis then it must be grounded in something other than the mundane. If the belief is merely mundane, then it is a physiological or psychological fact. It is that the jurist has followed the rule of recognition in a particular instance, or, at the most, that the jurist has a practice of following the rule of recognition. Law characterized in that way can have no implications. There is no reason for either the jurist or the citizen to obey or respect it. For each decision which depends upon a belief or set of beliefs which has no other than a mundane existence can be characterized only as conventional or as arbitrary, but not as rational. This concept of law provides no basis for obedience and respect and no basis for a worthwhile method of reasoning.

5a. The last group I wish to deal with describe law as an institutional fact. They are Richard Searle and Neil MacCormick. Let us take Searle's derivation of an 'ought' from an 'is'.

(1) Jones uttered the words 'I hereby promise to pay you, Smith, five dollars.
(2) Jones promised to pay Smith five dollars.
(3) Jones placed himself under (undertook) an obligation to pay Smith five dollars.
(4) Jones is under an obligation to pay Smith five dollars.
(5) Jones ought to pay Smith five dollars.

The idea is that just as Jones' promise has meaning by reference to an institution of promising, so does law have meaning by reference to an institution of law.

1 J.R. Searle, 'How to Derive "Ought" from "Is"', (1964) Phil. Rev. 43 -- 58.
3 Note that both Searle's and Gewirth's efforts to solve the is/ought problem conceive of morality as that created by the individual person.
5b. This theory too suffers from the same ontological mistake as the others. The 'institutional fact' is ontologically depraved. The institution is merely a posited one, one whose recognition depends upon a mundane occurrence -- either one which emits sense data, or one which depends upon the immediately conscious Desire of the subject. It is also born of the wish for knowledge in terms of data and desire, to make law that which is subject to rational analysis.

For us, the primary question is not that of the forces which constitute institutions, but rather that of the ontology of legal norms. Norms . . . and individual action or social arrangements in their character as externally observable are two sides of the same coin.¹

And Neil MacCormick's seminal article 'Law as Institutional Fact', begins ominously: 'E]very legal philosopher and jurisprudent is concerned to see law as fact . . . .'² As noted above, neither data nor Desire can be of any significance as conceived.

Searle's derivation has been criticized for the logical jumps that are needed to get from point to point. And it has been criticized for the ambiguous use of 'promise' -- as a participant in (1) and as a reporter in (2).³ My criticism is slightly different -- it is ontological.

It is utter nonsense to conclude from a promise to pay that we ought to pay. The institution, as characterized, gives rise to no moral implications. That is, the occurrences (i) that Jones made an expression of Desire or will, and (ii) that he did so by referring to a mundane 'institution' are not capable of giving rise to obligation.

¹ Innsitutional Theory of Law, at 25.
² Institutional Theory of Law 49.
To make it clear that moral obligations come about by reference to more than a reference to a mundane institution, we only need to restate Searle's bit of reasoning.

1. Henry utters the words, 'I promise to murder x in cold blood'.
2. Henry promised to murder x in cold blood.
3. Henry placed himself (undertook) an obligation to murder x in cold blood.
4. Henry is under an obligation to murder x in cold blood.
5. Henry ought to murder x in cold blood.

I can assure Henry that he is under no such obligation. He might feel some psychological compulsion, but, if anything, that is out of an authoritarian feeling imbedded in this type of thinking, rather than out of anything to do with proper morality. We are attracted to Searle's formulation because of a previous moral precept that by and large we ought to keep our promises. We are not attracted to mine because by and large we have a previous moral precept against murder. Neither decision will be more or less worthy of respect (or rational) for its having been derived from an 'is': both are as worthy of respect and as rational as the judgment of substantive morality on which they are based.

Law as institutional fact, like Desire as Compleat Fact, has no moral force. It cannot have. Either for the citizen or the jurist. This has been pointed out by MacCormick and Weinberger in their review of Searle's derivation.¹ Nor can it provide any basis for legal reasoning.

6. I object to this entire body of literature. It states that legal rules must be normative in order to what they have to do. Then it seeks an ontological basis for law, using as a paradigm the scien-

¹I nstitutional Theory of Law at 21-4.
scientific 'is' -- a mundane idea of ontology which precludes the normative quality necessary to law. The enterprise as posed allows for no success. The resultant conception of law must either be misused if it is meant to have any implications or trivial if it is not.
G. The Ontological Context of Positivism

1. The conceptual inadequacy of methods of reasoning other than substantive rationality.
2. In natural science -- the missing X.
3. In human activity -- the missing Y.
4. Either X and Y are arbitrary by nature, or else they have a ground.
5. If they have a ground, we need make three assumptions:
   a. ontological;
   b. epistemological, and
   c. sceptical.
6. Then positivist doctrines make sense.
7. Sense data revisited.
8. Induction revisited.
10. Implications:
    a. positivist doctrines presume denial of substantive rationality;
    b. thus, properly methods, not doctrines;
    c. that is, conceptually inadequate; and
    d. then of psychological rather than logical worth.
11. Peroration.

1. The doctrines discussed in Parts B to E are inadequate to produce ideas of logical quality. They are:

   1. empiricism, facts based on sense data;
   2. the contents of the immediate consciousness;
   3. inductive reasoning;
   4. deductive reasoning;
   5. the principle of non-contradiction;
   6. imputation;
   7. consequentialism;
   8. all of the above applied to legal reasoning; and
   9. law as a mundane entity.

This is so whether these doctrines are considered to be epistemological ones -- such as empiricism, and various methods of reasoning -- or ontological ones -- that reality consists of space and time, that Desires are Compleat Facts, and that morality and law are mundane. It is so whether we are concerned with natural sciences or humanities such as law. It is so whether we are concerned with the normative or
the descriptive.

For these doctrines do not address a reality which would give our ideas the quality that would allow them to be meaningful. They presume a mundane nature to reality which is an inadequate one upon which to base the categories of any resultant thought. They simply make no sense as they are expounded. Due to the lack of an ontological and epistemological context, every doctrine given above -- each of which appeals to 'rationality' -- will leave our ideas with no quality which would make them deserving of any intellectual or moral respect.

2. In terms of natural science, that is, knowledge of reality which exists outside the person and in space and time, what will be missing will be an ingredient that will enable us to use each of these doctrines. We will need to posit a nature to reality that will enable us to do something with facts based on sense data. That postulate will either tell us that there is no difference between appearance and reality -- a doubtful postulate -- or that there is. Our use of sense data will have to be in terms of the reality we postulate behind appearances -- an ontological postulate. And it will have to be in terms of a theory of the distinction between appearance and reality. This will be an epistemological postulate based on the foibles of or limits to human understanding.

We will need to posit a nature to reality that means that reasoning has some sense. Take inductive reasoning as an example. We will need an ingredient -- an assumption about reality -- which will enable us to reason from data to generalizations. Hume described this ingredient brilliantly, although negatively, in his argument about
causation in the Treatise, paraphrased above. We can look at Hume's argument -- that ideas which arise only from sense data and simple relations among them are inadequate for conceptions of cause -- in a positive as well as negative aspect. It may mean that ideas of cause have no basis in reality. Or it may mean that use of mundane elements is an inadequate basis for any human understanding. That is, in order to put reality together at all we need to posit some X and then to undertake our thinking in the context of that X. The X can be called categories or essence or cause or X. But whatever it is called, it will not be captured by the mundane alone. And our use of the above methods of reasoning only has meaning given the assumption of such a ground.

3. The situation is the same with human activity (which is the realm of natural sciences as well as the humanities, for engaging in the study of nature is a human activity). What will be missing will be an ingredient that enables us to act upon more than psychic needs. This missing ingredient we can call 'value'. We can indeed understand the concept of value in a negative way. Value is that which is necessary to get from a synthetic statement to a statement of action -- it is necessary to remedy all the defects stated in Parts B to E. Value will act with regard to human activity as cause and categories to natural including human as natural) reality. A theory as to the nature of value could tell us that there is no difference between Desire and value -- again, this is a doubtful but logically possible postulate -- or that there is. And if there is a difference, then we will have to understand Desire by relation to the ground to value which we postulate. This will be an ontological postulate. And
we have to give our consciousness significance in terms of the difference between consciousness and value. This will be an epistemological postulate based, again, on the foibles of or limits to human understanding.

And we will need to posit a ground to value in order to give some sense to reasoning with regard to human activity. We will have to postulate a theory of value in order to make, for instance, our use of the principle of non-contradiction something other than a meaningless exercise.

The gap to be filled by value must occur in every instance where human activity occurs by relation to thought rather then by impulse. That is, thought which governs human activity -- or which attempts to understand human activity -- must embody values. And thoughts which result from the positivist doctrines, in that they treat reality as mundane, lack that which is necessary to their purpose. That lack we can call value or good or Y, if you prefer. Whatever is necessary to fill the realist gap is value. And liberalism, as a logical doctrine, avoids dealing with that gap.

4. We can at this point go down one of two roads.

The first is that we say that this X and this Y are gaps which are filled by convention or by arbitrary behaviour. That is, we can plug the gap -- as Hume does with causation -- with mundane material. That road is a road to nowhere.

The second is that we can posit a ground for X and Y. This does not mean that our filling the gap accords with the ground. We can still call things convention or arbitrary. But it means that our at-

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I am not asserting that the postulated X and Y are fundamentally different.
tempts to plug the gap aspire to a real ground and therefore that they have meaning.

The point of the above exercise is that in order to fill the gap we need a theory of Good and of personality -- exactly what liberalism avoids. There is no road which allows us to avoid the difficult problems of the nature of Good and personality and yet ascribe meaning to the positivist doctrines. There is only an illusion of such a road.

5. We can only proceed by making three assumptions. The assumptions are metaphysical speculation about the nature of Good and of the person.

5a. The first is that there is an ontological ground to X, Y, essence, cause, category, value or whatever. It must be non-mundane. Without the assumption of such a non-mundane ground, none of the above doctrines can be understood, and none can be used other than in an arbitrary way.

5b. The second assumption is that there is some way of understanding this ground in how it applies to problems of knowledge and morality. For understanding of nature, it means that there is some way of understanding cause and categories -- X. For law and morality this means that there is some way of making substantive judgments about value -- the Y noted above -- whatever is needed to bridge the gap. Without the assumption of the possibility of such understanding, none of the doctrines can be understood, and none could be used other than in an arbitrary way.

5c. The third assumption is that there is no conscious mental process which we can depend upon to provide an understanding of that
ground. It is the rejection of substantive rationality as stated above.¹ By that is meant that substantive judgments of X (whether it be cause, categories, essence, value or good) are not rational. If such categories had a basis in reality, and if we could make them as a matter of rationality, then they would provide our thought with the quality which we seek. (Rational must be understood as we have stated it. It gets its results from a conscious mental process. What we are thinking has no element of psychic need which vitiates it. And it is dependable.)

We might assume the first and the second but not the third. (To do so, it seems to me, does not state the natural law position so much as a parody of the natural law position.) If we assume an ontological ground to reality and a human faculty of mind which enables us to produce -- with some reliability -- ideas which capture that ground, then all the doctrines stated above are superfluous. We can simply make the judgment of substantive rationality -- say, that capital punishment is wrong -- and no amount of reasoning -- inductive, deductive or whatever -- will add to that judgment. Thus, the use of the positivist doctrines, it seems to me, entails the third.² I have noted, in One, E and Two, E, the reasons for rejecting that view. Some are reasons for the rejection of substantive rationality altogether. But even if we allow for the capacity of humans to make such judgments, exercise of such a capacity seems so problematic that it does not really answer our problem. You might take it as a logical or practical truth that substantive rationality does not solve our problem. I take it to be a practical truth.

¹One, E, and Two, E.
²This is where we began in Three, A, supra.
But we cannot adopt the third without the first two. Moral scepticism of any sort without these ontological and epistemological assumptions is meaningless. A rejection of the first proposition would be an ontological nihilism -- that there is not ground for value or natural reality. A rejection of the second would be epistemological nihilism -- that our understanding of any posited ground is so problematic as to be worthless. Any sort of nihilism makes insignificant any moral scepticism itself.

6. These metaphysical assumptions enable us to make some sense of the positivist doctrines. (The argument will be the same for all and even for those not mentioned. The argument applies to all responses to the rejection of metaphysical speculation by their nature, of which certain are used as instances.).

7. Let us first deal with the empiricist doctrine which attempts to find a basis for rationality in thoughts which derive fairly directly from sense data. These thoughts are meant to embody facts, that is ideas which describe reality as it really is. And as I have noted, these facts are meant to be rational in a way that Desires are not. Facts are objective in the sense that two of us should be able to come to the same answer about a fact, while Desires are not in that we could not determine that my Desire is right or wrong.

Part B asserted that we cannot depend upon facts to be a report of reality, but only appearance which reality gives rise to. That is, facts are thoughts which report the mundane aspect of reality while attempting to limit comment on the non-mundane aspect. To the extent facts report only that mundane aspect, they are reliable, but have no

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1See the quote from Santayana in One, B, supra.
logical quality which would make them worthwhile. To the extent facts are useful in such thinking, they embody ideas about the non-mundane aspect of reality, which ideas do not arise from the immediacy of sense data, and which, therefore, are not reliable. This, to me is the genius and gist of Hume's argument.

What then is the proper use of facts? The perception of facts cannot be an instance of substantive rationality, but rather an alternative to it. If we trusted in a rational faculty of humans to make substantive judgments about reality, then we would make a direct perception of the X we are seeking -- one that had the non-mundane and mundane intact -- and we would have no need for considering reality as broken down into non-mundane and mundane. In using facts we create and investigate the mundane for how it will tell us -- not about itself -- but about the non-mundane: X. We learn about X in an indirect and sceptical fashion. This is rationality in a very limited sense. Hume's faith in sense data then, can be understood not because sense data report a worthwhile truth in themselves, but because they act against our psychic need. They are important for their psychological rather than logical effect. That is,

(i) We have an idea which is conventional (we find ourselves with it) or is determined by psychic need.

(ii) Sense data apprise us of the falsehood of that idea by an immediacy about external reality which we have difficulty denying;

(iii) We conceive a new idea which is at least in part constituted by that reality rather than by psychic need.

To the extent we make the object of our scientific endeavours an il-
illusion of mundane reality, our endeavour is misplaced. To the extent the endeavour is properly undertaken, its object will be reality in its mundane and non-mundane aspects, by the means of a constructed mundane reality.

If this is so, then 'facts' are not facts, do not represent any discrete reality themselves, but are a particular kind of human creation which enables us to try to figure out the puzzle of reality. Facts are an attempt to view reality absent its non-mundane ground, that is, to demystify reality, to take the magic out of it. The positivist epistemology and its variations takes this tendency to the hilt. Part of the purpose of it is to disturb convention -- for convention has the magic (and conventional view of value) built into it, part of its purpose is to halt the flux in a very artificial way. Thus, the idea of having facts -- positivistic facts -- is that they are reality made sterile (deprived of life); made profane (deprived of the sacred); made banal (deprived of magic); made static (deprived of an organic quality).

There are two types of explanation for this occurrence. The first is that we do it out of fear -- that is, some psychological motive of the nature that demystifying reality enables us to conquer nature and convince ourselves that we are not victims of nature or enables us to meet our lack of understanding with false understanding. There is a great truth in this (discussed in Chapter Five), but it is not a truth upon which legitimacy of either law or knowledge can be directly based. The second is that this demystification is a method which enables us to understand and deal with the sacred. It is akin to the coolness that a physician or a lawyer shows to his cli-
ent; just as that coolness allows the professional to act in a clear and decisive fashion, so the positivist method -- the fact method -- allows us to think in a clear fashion. Thus, if the positivist epistemology is worthwhile, it is worthwhile as a method, a method which enables us to appreciate reality in some odd way more clearly.

8. We can now understand the problem of induction -- that is, to pose yet another solution to the problem of induction.

It is properly the nature of empiricism to demystify reality, separating it into the magical and the factual. The very purpose of making the 'factual' means robbing reality of any significant quality of how it is related to that around it, that is, of the X. This is a worthwhile enterprise because it acts to counter our conventions and psychic needs mentioned above. Our extant ideas have an understanding of X in them and the purpose of the 'fact' is to create a (psychological) doubt by its immediacy. We cannot induce from the 'fact' that the sun has risen 50 billion times that it will rise again because the very purpose of viewing those first 50 billions times as facts is to conceive of the occurrence in a way that isolates them -- separates them from the flux and from any non-mundane ground. We cannot induce from the facts of billions of human deaths the conclusion that we are mortal for the simple reason that the design behind those facts is to make them sterile, to make them incapable of bearing conclusions beyond themselves. Once we conceive of the sunrise and of death the way we normally do, once we put the sacred back into them, it becomes evident to us that each of us is going to die, and that notwithstanding the vagaries of our lives the sun will rise tomorrow. The problem of induction is a problem cre-
ated by a certain view of facts. The very purpose of the creation of those 'facts' is to create gaps in the logical process so as to shock us into filling them in unconventional ways.

9. Reasoning by deduction, by consequentialism, by imputation and by the principle of non-contradiction will be of the same nature as reasoning by induction. As many logicians tell us, reasoning does not tell us anything new, it only tells us that which we didn't expect.¹

10. What are the implications of this view of these epistemological doctrines?

10a. They only make sense in the context of the three propositions given above, the third of which is that any understanding of the X and Y, of the ground, is uncertain.

10b. If that is the case, then the use of the above doctrines is a method -- a method used to understand reality and not a reality itself. These doctrines, then, do not concern so much the mundane, as the non-mundane, not verifiable propositions, but unverifiable ones. They concern the use of an epistemological method (not an ontological or epistemological truth) to deal with the difficult nature of the X and Y we are seeking. All of the above doctrines, properly considered, state methods by which to understand and deal with non-mundane reality just as do Buddhism², The Spiritual Exercises of St. Ignatius Loyola³ and the anonymous Fourteenth Century work, The Cloud of Un-knowing⁴. To the extent they are valuable, they act as a sort of

¹Morris Cohen & Thomas Nagel, An Introduction to Logic and the Scientific Method, Chap. IX, sec 1.
⁴(Harmondsworth, Penguin 1978).
spiritual exercise.

10c. If that is the case, then the rationality which these doctrines properly appeal to is very limited. The doctrines do not result in propositions of logical certainty. For the method is worthwhile not for how it creates certainty, but for how it creates uncertainty and incertitude. It is rational in the sense that by use of sense data, we create a condition of the person by which the content of our ideas is not determined by psychic need alone, but by another reality. In that sense, the idea is in part determined by external reality, but it is not (necessarily) wholly conscious or dependable.

Given the premises behind the adoption of these sceptical doctrines, the result of them will be of limited value. Any result will provide a limited understanding. It will because it is of a reality which has more to it than that told by our senses. Therefore, there is never a direct relation between the sense data (or the trigger of any other method) and either the reality itself or our conception of it.

10d. If that is the case, then we should value facts not for their logical quality so much as for their psychological quality. The truth of our ideas will depend not so much on reasoning as on the condition of the person. And our ideas of understanding reality should properly be made in light of a theory of personality as well as a theory of Good. That is, the three propositions above inform us that in addition to a theory as to the nature of reality, we will need a theory as to how a person comes to a realization of reality.

11. The criticism I have made above is not new. For instance,
one of the most famous such criticisms is that of Willard Quine in his essay 'Two Dogmas of Empiricism.' In it he argues against the conceptual validity of two doctrines.

One is a belief in some fundamental cleavage between truths which are analytic, or grounded in meanings independently of matters of fact, and truths which are synthetic, or grounded in fact. The other ... is reductionism: the belief that each meaningful statement is equivalent to some logical construct upon terms which refer to immediate experience."

I have in my own way criticized these here.3

What does Quine conclude from this?

As an empiricist I continue to think of the conceptual scheme of science as a tool, ultimately, for predicting future experience. Physical objects are conceptually imported into the situation as convenient intermediaries -- not by definition in terms of experience, but simply as irredicible posits comparable, epistemologically, to the gods of Homer. For my part I do, qua lay physicist, believe in physical objects and not in Homer's gods; and I consider it a scientific error to believe otherwise. But in point of epistemological footing the physical objects and the gods differ only in degree and not in kind. Both sorts of entities enter our conception only as cultural posits. The myth of physical objects is epistemologically superior to most in that it has proved more efficacious than other myths as a device for working a manageable structure into the flux of experience.

This is a defective bit of argumentation. The message is that the scientific method of thinking is a superior one. Yet the entire essay is devoted to establishing points which support (but do not establish) the opposite conclusion -- that the two doctrines upon which the positivist method is based are (conceptually) false. To make his conclusion requires an argument that even though there is no conceptual basis to positivism, it is a practically wise doctrine.

1 In *From a Logical Point of View* 20--46.
2 Id. at 20.
3 Though I would characterize them differently.
4 (Posits as a matter of epistemology and not metaphysics), *Forward*, at viii.
5 Id. at 44 (emphasis added).
And such an argument would have to be based on a theory of personality, for it would depend upon an understanding of how the person interacts with reality at something other than a purely conceptual level. Professor Quine does not make such an argument, except for the bare assertion quoted above. It is surprising that an essay by one of the world's foremost logicians which argues two points contrary to its message would, as the author reminds us, sell 40,000 copies in its first English edition, go into Spanish, Italian, Polish, German and Japanese translations as well as be 'anathologized to extinction' (25 times in six languages).¹

The lesson I draw is different. It is that

(i) the alternatives to substantive rationality do not make conceptual sense;

(ii) they do not make sense at all without the assumption of a ground to human activity, and then

(iii) they only make sense in light of that ground and some perplexity about our ability to perceive that ground and to govern human activity with regard to it, and thus

(iv) adherence to them must be based on a theory of personality, if it is to have any proper basis at all.

¹Id. Forward, at vii.
H. The Nature of Law and Legal Reasoning

1. The a. epistemological and b. ontological lessons . . .
2. applied to law.
3. Therefore, positivist doctrines are practical.
4. Reasoning from rules.
5. Law as mundane.
6. Applies to understanding as well as morality.
7. Realist insight.
8. Proper uses.
9. Improper uses.

1. How then do we best understand law? What ontological status does it have?

1a. The epistemological lesson is this.

Substantive rationality (or whatever) is not adequate to enable us to perceive moral truths which will enable jurists such as Arthur to make decisions.

Other doctrines (those named above and others) (both epistemological and ontological) (both descriptive and normative) are insufficient in and of themselves as alternatives to replace substantive rationality.

1b. The ontological equivalent of this lesson is as follows.

We cannot assume no non-mundane ground. We must assume a non-mundane ground. If the ontological doctrines (named above and others) (both descriptive and normative) have worth, it is to provide an understanding not of the (created) (illusory) object of the inquiry, but some more whole and mysterious reality.

2. Let us apply this lesson to law, first as an ontological matter.

Law cannot be only mundane. To the extent we form thoughts about
law as mundane, then those thoughts have no implications.

This is not to say that law does not have mundane aspects. Definitions of law that are in terms of mundane aspects are not wrong in what they say. They are wrong in what they don't say. That is, law may have mundane characteristics a to d (for instance -- command, rules, of a sovereign, by force), but any understanding of law by relation to those characteristics alone is an inadequate one.

(i) It is a mistake to think that law has only those characteristics. Law must have a non-mundane aspect to have any meaning.

(ii) A definition of law by mundane characteristics has no implications for issues of legitimacy, that is, for whether to obey and how to reason.

(iii) Such definitions are prone to use as if they were a complete understanding. That is, it is prone to misuse. To prevent such misuse, it is necessary to distinguish exactly what functions such a definition can properly serve.

3. The ontological and epistemological doctrines must be understood then as ways of dealing with the problems raised by the following assumption: that there is no conscious and dependable mental process by which this non-mundane ground can be perceived or embodied in ideas.

If this is the case, then the positivist doctrines as applied to law cannot be depended upon to result in ideas which have a conceptual quality. But each makes some sense rather than no sense at all.

Let us consider (i) reasoning from rules (deductive, imputation) (inductive), and (ii) law as a mundane entity.

4. Let us take the use of rules.
(Reasoning from rules to conclusions in particular cases can at once be looked upon as deductive reasoning or reasoning by imputation -- that is, from the general to the particular -- but also as inductive reasoning -- from particular data to the general conclusions necessary for a transaction to fall within the rule.)

Such legal reasoning cannot make sense in and of itself, for the rule in its mundane aspect is not worthwhile in itself, nor do facts have a logical quality which would justify some result.

Such reasoning can only make sense as part of a method of achieving a justice which is substantive -- has some relation to the non-mundane ground for law.

A decision which is the result of the application of a rule can aspire to sense in that it supplies the missing Y between the general rule and the particular facts, for that Y now has a ground. The rule and the particular facts (both of which are characterizations, with perhaps the failing of being conventions made of inertia, or vanities) are not important for their conceptual quality but for how they act on the jurist to bring about the best Y. In no case can rules and facts determine the result for us as a matter of logic.

You may object that it seems obvious that we do put together a rule against murder, and a young student's knifing to death of a mean old woman into a conclusion that Raskolnikov is guilty of murder and that we seem to do so as a matter of rational thinking. That might be so. But my point is that the division of the matter into a rule and certain facts adds nothing of conceptual quality to our judgment of substantive rationality that Raskolnikov ought to be punished for his

\[1\text{Three, D and E, supra.}\]
heinous act. My point is not that deductive and inductive reasoning results in ideas of no conceptual quality, but that they result in ideas of no conceptual quality by any logical, as opposed to psychological process, that distinguish them from a judgment of substantive rationality.

Thus, deduction from rules can act as a method to bring about in history -- rather than determine in logic -- the result. For instance, they can help us to take the propositions necessary to a decision and distinguish those which are readily acceptable from those which need further consideration. None of the propositions needed to make a decision are more certain to be just or true by any logic once substantive rationality has been rejected. To the sceptic -- one who has rejected the practical or theoretical worth of substantive rationality -- distinguishing between certain and uncertain propositions can only be a matter of psychology.

Thus, the application of a general legal rule to specific facts can be important for its aspiration to achieve a justice which is substantive in that it is related to (though not equivalent to) the non-mundane ground for law. The use of deductive (or some other) reasoning becomes significant, not because it can determine the result for us, because in no case can it do that, but because it helps us to take the propositions necessary to a decision and distinguish those which are readily acceptable from those which need further consideration. None of the propositions needed to make the decision are more certain to be substantively just in any logical sense. The purpose of legal reasoning then is to enable us to play with the various and many propositions which we could employ to make legal decisions.
in order to isolate those which occasion some anxiety. It is to isolate the magic needed for a certain decision. It may be that none of the propositions will cause us difficulty, in which case we can readily make the decision. But that does not mean that the decision has been made by deduction, but rather that we have simply decided that it is not worth re-examining the bases for that decision.

An implication of this understanding of the positivist epistemology (and of sceptical systems in general) is that deductive (or any other) reasoning is worthwhile as part of a practical method for making decisions rather than as a system of knowledge. As a practical method, its worth cannot be separated from the substantive quality of the decision made. No doctrine has worth aside from the substantial quality of the decision made.

5. Let us consider the efforts of the legal positivists to understand law as mundane. These were discussed in Part F: law as commands of the sovereign, as a Grundnorm, as a rule of recognition, and as an institutional fact. This includes rules derived from these commands, grundnorms, rules of recognition, and institutions in that those rules are then characterized as mundane.

There is no logical sense in a jurist being bound by a precept by virtue of any mundane attribute that precept might have — that is, that it is part of a legal system characterized as mundane. It might be, for instance, that Arthur accepts the characterization of his judicial role as being utterly subservient to the legislature. But he can distinguish no such precept from any other by mundane means. One judge may say "I ought to follow the wishes of the legislature" another may have a more complex rendering of his role: "I
will follow the legislature unless it has violated certain very basic values which I hold dear". Both of these statements are simply very basic determinations about the role of a person in moral decision making. To say that a precept is of the legal system, characterized as mundane, gives it no normative significance. For the precept is a posited 'fact' once fact has been robbed of any non-mundane aspect. If the statement is a precept of the legal system then it is so only because it is deemed to be so; then all that that precept tells me is that if I follow it I am following a precept that certain (numerous or not) other people are following. It does not tell me that I should follow it, for the question remains whether I ought to follow this precept which has been characterised to be part of the legal system. To conclude otherwise confuses that which is conventional with that which is moral.

(That something is conventional is a mundane characterization. My moral attitude to it cannot be. I may want to take into account how widely accepted this precept might be and how integrated it might be with other precepts, for I will want to judge the havoc my unconventionality may cause. But by their very nature these factors are mundane, for others' acceptance of any precept is devoid of any quality which in itself would make it either lasting or binding. For conventionality to bind me would require something to be gained out of being conventional; that is a moral attitude to the conventional which must be distinct from it, for that conventionality, by virtue of its nature of being conventional -- an attribute afforded it by humans -- could not have the quality which would make it binding. The relation between the conventional and the moral, like the relation
between law considered as mundane and the moral, is an instance of
the truism that that which is mundane has no moral implications.)

For a precept to be properly binding depends upon its ground in
non-mundane reality, one which is not understandable by relation to
the legal system or rules or social morality characterized as mundane. Every legal precept and every statement of the role of the
legal actor must then be of this nature. The rule of recognition, the
commands of the sovereign, the Grundnorm, the institutional fact are
all of this nature. Like the rule in a particular case, these are
posited realities. As such they have no logical claim to being fol-
lowed. They are starting points from which to distinguish that which
we don't want to re-examine from what which we do. And they are more
important for their practical than logical quality.

What insight does this give us as to the nature of law?

Law then cannot be any characterization of it in its
non-mundane aspects.

Law is not about facts and volitions, for they are merely pos-
it entities which we use in order to create and fill in gaps. It
is the understanding of the gaps rather than the facts and volitions
-- which by their nature are not the gaps -- which is the proper un-
derstanding to be gained from the doctrines discussed in this
chapter. Law as brute fact is meaningless; but as a tool by which we
aspire to a basic judgments about value, it is not. The very purpose
of the enterprise is to help us to make such judgments.

The positivist approach to law is then understandable as a
method, one which takes the non-mundane out of reality in order to
understand and deal with it. Just as we can 'solve' the problem of
induction by realizing that it is a false problem -- that the very design in creating 'facts' is that they not be capable of induction -- so can we 'solve' the problem of deriving an 'ought' from an 'is' by appreciating that we have constructed the 'is' so that it has no non-mundane aspect. It is not so surprising that the problem of induction and the problem posed by the realists arise; they are the very purpose of the method, not some regrettable side effect. If positivism is a sceptical system whose genius is to take the non-mundane out of our perception of reality in order to remake our perception, if the 'is' is a mental construct of reality with values removed, if the very purpose of conceiving of the 'is' the way we do is to be cynical, it should not then surprise us if we discover and rediscover the maxim that an 'is' cannot lead to an 'ought'.

6. All of the above is equally true of understanding legal judgments as of making them.

7. The above enables us to put the realist critique into context.

The realist critique assumes the conceptualist critique made above, that a Y is necessary, as a matter of logic, to every legal decision.¹

There are two reactions to this insight. One is that there is no basis upon which to determine this Y. There are no implication of such a view. The second is that there is such a basis (Proposition One above). If there is such a basis, and we can make judgments of substantive rationality to perceive such a basis, then the necessity

¹That is often stated. E.g., John Dewey, 'Logical Method and Law', 10 Cornell L.Q. 17 (1924).
of the Y is not problematic. If there is such a basis, but we cannot depend upon judgments of substantive rationality, then all doctrines short of substantive rationality will be experiential or practical in nature, not logical.

The realist insight then is not only a statement that value is of logical necessity to every legal decision. Nor can it be a statement that every decision has as an element, some personal or societal value which can be nothing more than that. For if the latter is the case then the statement in its particularity is of no importance. The statement that judges' decisions are determined by individual or class values is trivial if that is all that can happen.

The realist insight must properly be of the nature that in all cases moral decision makers employ values in making decisions, and in some cases they are values which we may say are conventional in terms of being accepted by a group to which the judge belongs, or personal in the sense that it is individual to that person, and some of those cases are important in that the values employed have not been re-examined when they should have been or they have been re-examined and they are downright mistaken. The realist insight only makes sense if the non-mundane ground to positive morality is assumed and if the positive value questioned is seen as posited in such a way as to suggest its falsehood. We complain of a privileged background in terms of how it shuts one's eyes to worth, not how it opens them.

8. The positivist effort to understand law is to separate out

1Propositions One and Two but not Three.
the mystical significance to the morality inherent in any legal system at any particular time. This position makes no sense if it is taken as a statement about the nature of the universe, but does make sense if it is understood as a determination of the jurist to look at law in this particular way in light of the mystery inherent in understanding any phenomenon.

The definition of law by relation to mundane perception rather than morality has very real, but limited, importance. It is an example of the creation of 'fact' with the design of excluding any transcendental element. It is a demystification of law. It is adequate for some purposes but not for others. This is not surprising since it is designed not discovered, made not found. Then positivism and realism should be taken as partial methods of understanding law.

For what is the positivist view of law adequate? First, the positivist definition of law provides an anchor for our understanding of law, once direct perception of the non-mundane ground for morality has been rejected. Once we say that we do not have the faculty of reason by which we can recognize some transcendental reality that would govern our understanding of positive law, then we are at sea. It is at this point that the impulse for the scientific view of the world arises. By means some combination of fact and posited precept, we can begin our discussion; we can recognise law after a fashion; we are still at sea but we have established a relativist bearing. The 'rule of recognition' (and similar concepts) are preliminary and functional concepts. They are valid as starting points -- convenient and perhaps (but perhaps not) methodologically superior ones -- but starting points nonetheless. (The starting point is oddly, the con-
vention as to what law is at the moment (that of the black letter lawyer), and the counter convention of sense data (of the sociologist) and social convention (of the realist). Both the black letter approach and the sociological have the same purposes: they provide a place to begin one's search for real understanding and they act as a vehicle by which a collective endeavour to understand can occur. But we use them contrary to their real purpose if we treat them as conclusory rather than preliminary. They do not have a conceptual quality which would justify a decision. By their nature, facts and volition can yield nothing that is obligatory or legitimate. Thus, law recognized as a method does not depend upon agreement about its content, for the very purpose of such a rule of recognition is to state a preliminary understanding of law which is not controversial. Thus I can recognize that L is law even though I think that it is immoral and unjust, but what I am saying is that L is law in one sense, which we use for some purposes, but not in a second, more serious sense.

The second purpose is to demystify law -- to take away the underlying implication that it is right. The positivist process (like any sceptical process) gives rise to certain dangers. The theme of this part has been that 'is' creating, that is, abstracting non-mundane elements out of reality in order to make provisional statements about it, is a basic organizing enterprise of the human

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1 Cf. Neil MacCormick:
A structural theory furnishes legal dogmatics with schemata for the exposition of the substance of laws . . . . It restricts itself to stating what has to be known about law in order that its content may be completely comprehended.
Institutional Theory of Law 17.

mind. It is not exclusive (it does not preclude other methods of understanding), nor is it an end in itself. We take it to exaggerated lengths when we rely on it as the sole basis for our reasoning and when we derive principles of justice solely from it. We especially misuse it when we fail to make the jump back to understanding reality with the mystical, sacred, and organic intact. It is the sin of the modern world that is has taken too much pride in its facts.

The third purpose is to place constraints on any particular jurist in the hope that he will thereby act in a better way.

The purposes depicted here which positivism (and other sceptical processes) serves are significant to law. Even the least sceptical should find them so. For even if (sometimes) our understanding of the non-mundane is direct, if it is only sometimes direct, then also sometimes our understanding of morality is problematic, and thus a sceptical approach is significant. It is only if our perception of the non-mundane can be said to be always direct that an understanding of law would always be complete without resort to a sceptical process.

9. What can these theories not do?

(i) They cannot provide us with ideas which would give rise to legal reasoning as a conceptual matter. In that ideas do so, they have a character different from the purported constituents of ideas arising form these conceptions of law.

(ii) They can provide no basis for the distinction between ideas about law which can be called knowledge as opposed to ideas about morality and justice which are something other than knowledge.
(iii) And therefore to the extent they are worthwhile, they are worthwhile for their practical character; that is, they are properly based on a theory of personality.

10. Let me try to summarize where we stand. There is something which we call the positive law. It is a creation of the human mind. It is our conventional understanding of the law -- an understanding which serves the function of a starting place and a convention for discussion. This positive law, one will not be surprised to find out, is distinct from morality -- for that is the very purpose of its creation. Positive law is not separate from morality so much as it has been separated from morality. Certainly our positivist conception of law is determined in part by our values, for we have created this understanding in order to use our values and the tool ought to be made with that in mind. The convention should not have a moral content, however, that (psychologically) determines the important matter for decision; it should have one that brings it to light. If the construct is taken too seriously as value free, then it cannot serve its function of distinguishing what is at issue from what is not. Furthermore, one statement of positive law may be apt for you but not for me in that it contains matters which are not controversial to you but are controversial to me.

We cannot say that law as positive is law. For then our positivist understanding of law could have no meaning. Once law as mundane is viewed as equivalent to law, then it becomes nothing at all other than our perception.

Law has a non-mundane aspect as well. Thus law is not an 'is' in any mundane sense. It aspires to a non-mundane ground. The positivist
epistemology then is properly understood as an attempt to deal with the problem posed by the experiential nature of our moral understanding; it is significant in its application to law in that it enables us to understand and deal with the experiential nature of law. This position is distinguished from one of trust in substantive rationality, whereby the perception of Good is direct, and therefore whereby the mental construct of a positive law is less important. In either case, the law we are ultimate concerned with has a non-mundane as well as positive aspect, a moral as well as factual aspect. The truth is that law is moral by its nature; to deny that is to deny that it has a nature.
I. Liberty.

1. Positivist doctrines presume a plenary obligation.
2. Conclusions apply to any scepticism.
3. Separation of law from morality:
   a. principle of liberty as derivative;
   b. law as a mundane entity.
4. Liberalism based in practical insights about human nature.
5. The principle of practical liberalism.
6. Its implications.
7. Liberalism requires a theory of personality.

1. The conclusion must be that if moral scepticism has any importance, then there is a plenary obligation of all to act to do Good without special regard for oneself. That conclusion follows from the following argument.

   Either the doctrines developed in response to the rejection of metaphysical speculation have no significance, or else they presume a non-mundane ground to human activity. If the doctrines have any significance, it is not due to a rejection of the non-mundane ground to human activity, but to doubts about the ability of humans to form ideas which embody that ground.

   The non-mundane ground, by its nature, must have the characteristics of pervasiveness, integrity and content and which, as described in Chapter Two, demand only the conclusion that there is a plenary obligation to do Good without special regard for oneself. It also follows that the authority of the state is plenary. No limits to this obligation and authority can be conceptual -- that is, based in the non-mundane alone. Every justifiable limit must be practical.

2. One might perform the exercise of this chapter on any system of knowing which originates in some sceptical impulse; positivism is
but a (topical) example. Upon rejecting the direct apprehension of moral truth, one must assume either a) that morality has no (non-mundane) ground (or that any possible perception of it is so tenuous that we may as well conclude that there is no such ground); in that case, nothing is really worthwhile, for to think that something is would be an instance of the artificial fallacy (which then is either a delusion or a vanity); or b) that morality has a non-mundane ground; then some ways of acting are better than others at putting us in touch with that ground; giving primacy to sensory perception and surrounding humans with formality are examples of such methods. There are no doubt other methods. Of each sceptical method, we can make the same type of points that we have made about positivism and the various principles that have been developed in response to the positivist insight -- that every such principle must be a practical one and therefore only as Good as it is practical.

3. What of the separation between law and morality?

3a. It is obvious from the above that one cannot hold the principle of liberty as the primary principle of justice; it cannot categorically be true. (Chapter Two has argued that such liberty has no ground in some transcendental right). Either the Desire of the individual person has no ground, in which case it is entitled to no respect; or else, if it is entitled to respect, it has a ground of some greater significance than the mundane would allow for. If so, that ground has integrity, that is, it is distinct from any thought in space and time. If that is so, then any Desire is entitled to respect only by virtue of that ground. The principle of liberty then is not a first order principle of justice from which we derive a concept
of law, but is a derivative principle formulated in response to other insights.

3b. It is merely a restatement of the conclusion of Part D that the contingency of the relation between law (positively viewed) and morality states an unimportant tautology. For the statement that there is no necessary relation between (positively viewed) law and morality (whether positive or natural morality), is contained in the characterization of law as mundane only -- as volitions and sense data. Once law is viewed this way, it can only have a contingent relation with anything, for such a characterization of volitions and sense data are, by their nature, made devoid of any quality which would enable them to have a logical connection to anything else.

4. It seems to me then that liberalism depends upon basic experiential (rather than logical) insights about human nature. It concerns the person which intervenes between reality -- non-mundane and mundane -- and human thought and activity.

These experiential insights concern the nature of liberty or freedom. The insight is that I should allow a situation to remain even though I think it is not Good. The problem is why to allow certain conduct even though I do not think it Good; or better yet, how to determine whether or not certain behaviour is simply beyond judgment. This I term the problem of tolerance.

A distinct question concerns the relativity or diversity of human activity. We are looking for ground for relativity as well as a ground for tolerance. The question of relativity is how to justify varied activity given the simple, integral ground of human activity. It is a problem of difference; it is not directly a problem of lib-
Tolerance, on the other hand, does not simply mean that varied conduct is justified, for variety could be mandated from the collectivity. The monolithic government could mandate so many green dining rooms and so many red ones and prescribe thousands of different colours on the basis of psychological research and latest design technique. Tolerance means not only that human activity ought to vary, but that individual persons and groups, rather than the state, ought to be the moving force behind the variations.

If there is no quality (of personality) which justifies tolerance, then all of what we call liberty is properly only delegation of authority. The monolithic state may operate well because it recognizes that in many instances it is necessary to delegate authority in order to bring about the correct result. This is not liberty any more than delegation of the job of tightening bolts on an assembly line is liberty. It may be justified as a specialization which enables us to act more efficiently. And it may be justified as a formal mechanism -- a separation of powers which has various groups checking each other like quality control experts in a factory. But any such justification posits ends and relegates 'liberty' to the function of bringing about those ends. It is not liberty.

The distinction between tolerance, relativity and delegation is significant for the different implications they have for law. That is why delegation, no matter how useful, should not be called liberty. For a delegation of authority does not entitle the actor to do as he pleases. It recognizes that for the aims of the collectivity to best be realized, we must distribute power to make decisions to those in the best position to make them. If delegation is the ground for what
we call liberty, then corporations have authority to make money and the private citizen to buy dish detergent and poets to write poetry for a utilitarian reason -- so that the goals of the collectivity can be reached (or the values of the collectivity can be realized). That idea of liberty is a very weak one. For if private mechanisms don't succeed in their task, it gives us no reason for the state not to intervene. If liberty is to be an independent principle, it must be grounded in something more compelling than utility.

In saying that these insights are experiential or practical, what I mean is that they have come about not by some logical process, but by our basic human experience. When we appeal to them, we appeal to that human experience. The argument of Chapters Two and Three is that the realm of ideas is inadequate to enable us to conclude anything about the diversity of human activity. I simply don't believe that anyone comes to an understanding of the nature and importance of liberty as a result of a logical thought process. I believe that it is the result of experience. Thus, the basis for that diversity and tolerance must be in something practical.

5. What is adopted in response to these (and perhaps other) practical insights is something like the following principle:

By and large we are better off to respect each individual person's determination of his own ends.

We might call this the principle of practical liberalism. It is not the starting point of morality and law, but a response to problems

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1 Because of Hayek's argument about knowledge.
2 Note that experiential and practical do not mean that the insight is the intellectual result of sense data. See One, E.
posed by insights about human nature. As such it should not properly be seen as logically true, but rather as a wise way of proceeding.

6. There are several implications of viewing liberalism as a practical principle rather than a logical doctrine.

The first is that liberalism is not inconsistent with a real ontological basis to morality and law. The practical liberal doctrine does not equate desire or will (or whatever) with the Good. It is totally consistent with a real ontological basis to morality, but sees the relation between human activity and that ground to be problematic in light of insights about human nature. The practical conclusion is of the sort that the best way to respect that ground is to respect each individual person's determination of his own ends.

The second implication is that deviations from the doctrine are not inconsistent with it and indeed that it would be a mistake to use it in a rigid way. If I allege that for instance eating beef is wrong as a logical matter, then anyone's eating beef is logically inconsistent with that doctrine. If I were to eat beef I could not justify it as long as I held that doctrine. I could excuse it as perhaps an act of weakness, but I could not at the same time allege that I was right to eat beef and still hold to my doctrine. If, on the other hand, I hold to a practical doctrine that eating beef is wrong, then deviations from the doctrine are not inconsistent with it. It would be possible at the same time to hold that as a practical matter we should avoid beef, yet justify an instance of eating beef. (Please note that I did not say that it would be justified, but only that it would be possible to justify it.)

The conception of law which follows from considering the liberal
principle as practical rather than logical will then be different. This is a particularly important point, for the deviations of liberal law from the liberal principle are not inconsistent with it. It means that Desires need not always be respected. It would mean that law should tend toward the formal, but that instances of substantive justice are justified. Thus, for instance in the law of contract, deviations from the classical doctrine vitiate the logical doctrine, but not the practical one.\(^1\) Indeed, despite the many deviations from the classical doctrine, it is possible to hold that the main purpose of the law of contract remains to respect the individual person's determination of his own ends.

The dominant view of law today in England and America is an unholy blend of the logical and practical doctrines.

The third implication is that a critique of liberal law cannot be purely logical. Unless one wants to adopt substantive rationality, the doctrine of intelligible essences, as the basis for law and morality, then one must treat liberal law -- in its defense and on attack, and for its implications -- as a practical doctrine.

It is then a mistake for its adherents to treat it as a logical doctrine.

And any criticism of liberalism as a logical doctrine is an incomplete one. Thus -- the criticism that 'a morality of desire is no morality at all'\(^2\), the criticism that formal precepts both assume value and require it in their application and the criticism that no system can do away with power -- are all sufficient to demolish lib-

\(^1\)And Cf. Holmes decision in Lochner v. New York, discussed at One, 3, 6, supra.

\(^2\)Unger, Knowledge and Politics 42.
eralism as a logical doctrine, but leave it unscathed as a practical one. Perhaps that is why many feel frustration that no matter how often formality is criticized, it is still maintained.

7. A proper critique and defense of liberalism -- the concept of liberty and its embodiment in law -- would have to reconcile its practical nature with the non-mundane ground for human activity. That is, the conclusions up to now are that (i) no defense or criticism of liberalism makes sense without the acceptance of a ground for human activity and (ii) that liberalism makes sense only as a practical rather than conceptual doctrine.

The difficulty is that doctrines of liberalism make sense only in the context of the non-mundane ground to human activity. Hence while we can accept the insight about tolerance as containing some truth, we cannot properly use that insight as an ad hoc one but only in the context of an understanding of the relation between human activity and the non-mundane. For instance, we can accept that there is insight to the statement that moral beliefs should not be translated directly into law. But the statement is logically useless -- it does not direct us that no moral beliefs should be translated into law, only that all should not be; 'law' and 'morality' as used in this sentence cannot have the logical qualities which would tell us which are to be translated into law and which not. It is not an untrue statement, but a trivial one. If the statement is to be worthwhile, it will be because we have an understanding of the relation between the practical doctrine and the non-mundane ground -- that is, of the basis for its practicality. That can only be obtained by an understanding of the nature of the person, and of the relation
between the person and the non-mundane ground. The above is true of all doctrines mentioned in this chapter.

Hence my belief that modern jurists are mistaken in avoiding a theory of personality with which I opened this dissertation. It is only through a theory of personality that one can reconcile tolerance and relativity with a real ground for morality. This problem of the universal and the particular is not properly answered by pretending that there is no ground to activity, yet concluding that human activity deserves a respect which assumes that ground. Nor is it properly answered by positing a ground to human morality yet avoiding consideration of the intolerance with which such a belief is liable to give rise. It seems to me that any theory that does not reconcile the acceptable relativity and tolerance of human behaviour to some real basis for morality is defective.

What are the grounds for tolerance, for liberty and therefore for limits on the authority of the state? For they will inform us of the nature of law, if it is anything at all in addition to the decision of what is Good in a particular case. Chapters Four and Five consider various grounds for relativity and tolerance.
J. Summary of the Argument

A. Positivist Doctrines Presume a Ground

(1) If positivist doctrines do not presume a ground to human activity (as well as to natural reality), they are of no importance. If they are significant, they presume such a ground. (Three, B to H).

(2) If they do not presume that there is some way of understanding this ground, then they are not significant. If they are significant, they must presume that there is some way of understanding this ground. (Three, B to H).

(3) If there is some dependable way we can make judgments about what is Good (substantive rationality), then positivist doctrines are of no significance. If they are significant, they must presume we cannot depend upon substantive rationality to provide a basis for human understanding and activity. (Three, G).

(4) Doctrines devised as alternatives to substantive rationality

1. empiricism, facts based on sense data;
2. the contents of the immediate consciousness;
3. inductive reasoning;
4. deductive reasoning;
5. the principle of non-contradiction;
6. imputation;
7. consequentialism;
8. all of the above applied to legal reasoning; and
9. law as a mundane entity.

-- cannot act in a conceptual or logical way with regard to that ground. (Three, G and H).

B. Plenary Authority of the State.

(1) If there is a ground to human activity, then it has pervasiveness, integrity and content. (One, C to E).

(2) If that is the case, there is a plenary obligation to do Good, individually and collectively, without regard for oneself. (One, D).

(3) If that is the case, then the authority of the state is plenary. (One, D).

C. The Practical Nature of Positivism

(1) If positivist doctrines are significant, it is not for their conceptual nature, but for their experiential nature. (Three, G to I).
(2) If that is the case, then we are mistaken to use such doctrines, just as we are mistaken to use natural rights, as if they had conceptual quality, but only as if they had an experiential nature. (Three, G to I).

(3) Also if that is the case, any critique of positivist doctrines (and other doctrines born of scepticism) for their lack of conceptual quality is incomplete. (Three, H and I).

(4) Thus, liberalism can only be understood by virtue of the nature of experience which is distinct from the nature of ideas. (Three, I).

(5) Thus, an understanding of liberalism requires a theory of personality which accounts for experience which is distinct from the conceptual content of thought. (Three, I).
Chapter Four

Is There Some Quality of Personality which Limits Law?

A. The Story So Far

1. No conceptual basis.
   a. ontology.
   b. epistemology.
   c. power and prudence.
2. Practical basis.
3. Whiggery (Hayek).
4. Liberty as equality.
5. Theme.

1. There is no conceptual basis for liberalism.

1a. There is nothing existent — either earthly or not (that is, there is no ontological ground) that limits morality and law. That is the argument of Chapters Two and Three. Either there is no ground for morality at all, in which case there is no basis for limiting any activity. Or else there is a non-mundane ground, in which case the primary principle of morality is that we each have a plenary obligation to do Good, without regard for ourselves.

The implications for law (and morality) of its non-mundane ground disturb us. Good must be pervasive, that is, every occurrence must either be Good or more or less so; thus every decision is a moral one and every act is a moral one. Good must have integrity; that is, whether or not an occurrence is Good must be independent of the beliefs of any individual person; thus the outsider (or the state) might be correct in its judgment that cigarette smoking is wrong for Douglas, while Douglas may be wrong in thinking that it is Good for him or in not caring whether or not it is Good for him.
Since every occurrence is either Good or not and since the outsider could be right in his judgment and the subject wrong, there is no ground for tolerance, at least, that is, in the realm of the conceptual. The outsider asks whether a particular occurrence is Good or not; if it is not, then by the nature of Good he has an obligation to do something about it. If it is Good, then he has an obligation not to interfere and indeed to support the occurrence. Every occurrence must then be of this nature. Acceptance of the non-mundane ground to law does not simply suggest that some acts which we now consider to be beyond the ken of law and morality should be within it. It suggests that every act should be within the ken of law and morality. There would be then no ground for tolerance, tolerance being allowing a situation to remain even though I think that it is not Good.

We cannot solve this ontological problem by positing some minimum natural law content to law and then leaving everything beyond that minimum content to the discretion of the individual person. The posited minimum content to law states an attempted resolution of the problem, but provides no ground for that resolution. Hence it provides no ground for tolerance and cannot inform us of the quality of the limitations it prescribes. Any ground for law will govern all activity -- we cannot coherently imagine a ground for morality that governs five percent of our actions but not the other ninety five percent, that grounds some of our human existence but not very much of it. To posit some minimum natural law content of law is to evade the issues posed by any real theory of value. How do we determine which


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aspects of non-mundane Good are to be dealt with by law and which are not? How do we justify tolerance of behaviour that offends our sense of what is Good? What is the relationship between non-mundane Good, positive morality and law?

1b. Nor can limits to law be grounded in a conception of how we know (epistemology). Chapters Two and Three assert that once we allow for morality at all in any real sense, we must accept a ground for morality which entails a plenary obligation. That is, if law can be justified, the authority of the state is plenary. This primary principle is true, no matter what one's epistemological starting point.

No epistemological (including logical) assertion justifies individual over state action. Any basis for scepticism at the individual level will also be a basis for scepticism at the collective level and vice versa. If we say that decisions of courts are not rational, then too, we must say that decisions of individuals are not rational. For people make up courts decisions people make up the legislature. Any quality of reasoning, thinking and understanding which the person has as an individual, then so does the person have as a jurist. If by some method -- whether rational or not -- the individual person has homed in on the non-mundane ground for morality which we have posited, then so can the jurist, and whatever has been understood will be of value for all -- not just for the individual person. For by whatever process the moral stance has been gleaned, if it is to direct our actions, it will have to do so by means of thought, and if it does so then that thought will have implicit in it a conception of Good which is either valid for all or valid for none. That is to say, any basis for tolerance will not be in the logical realm, but in the
practical realm.

1c. Nor can limits to law be justified by relating them to power and prudence. It may be that the state should not ban cigarettes because it would face a revolt or because the government would be voted out of power. (And it may be that the citizen should not follow his own judgment that embezzlement is attractive because he cannot stand up to the power of the state.) The resort to prudence also means that we have given up on the fundamental problems of law. To respond that the state is more powerful than the individual does not answer the question of why law is justified or legitimate. Prudence gives us no grounds for deciding what ought to be done, that is, what to be prudent about; it allows us no grounds for distinguishing between proper and improper use of state power. It suggests that we should do everything we can get away with! (If that is the attitude, then nothing is worthwhile and then there is nothing to get away with.) Prudence is acceptable as a subsidiary principle, for great opposition to an action can reveal some deep seated human need or worth that the actor has not understood and clashes of power can act as formal mechanisms to make us act more responsibly. But any proper use of power and prudence presumes a basis for morality and then some theory of how plenary authority ought to be limited. Prudence then is not itself a ground, but an index to something else. The question remains -- why do we not simply ask whether an act is Good or not and proceed from there? What grounds do we have for any other question?

2. The argument is that we can only ask other questions by virtue of experiential rather than conceptual insights. I have set forth the insight about tolerance as an example of such an insight.
Chapters Four and Five argue that there can be no [A], understanding of human nature which justifies [B], the Whig conclusions:

By and large we are better off to respect each individual person's determination of his own ends.

No matter how much insight is found in such practical insights, the insights do not lead to [B], the principle of liberty and individuality and the conception of law they are used to support. Liberty is but one of the conditions to human flourishing.

3. My critique of practical liberalism addresses exactly what I find distinctive in Whiggery. In order to proceed with a particular example, I shall address it in the guise of F.A. Hayek, though the points made here are meant to apply generally.

Professor Hayek places himself -- and Whigs -- in the philosophical tradition of Montesquieu and Kant, the British moralists -- Locke, Hume, Smith and Mill -- and the political tradition of Lord Acton, Walter Bagehot, A.V. Dicey, Edmund Burke, Blackstone, James Madison, James Monroe and John Marshall. These antecedents, and contemporary Whiggery, trade in pure liberalism as well as practical liberalism. Some Whigs, like Hayek, ground liberal law in an ontologically hard basis of natural right plus various insights about human nature. Others -- notably Judge Posner -- seem to throw various bases into his soup without regard to their harmony, as if he had hungry but indiscriminating mouths to feed. (As I have noted above, the three schools I have dealt with are not mutually exclusive.

1Hayek says that the liberal social order arose from natural law in ancient Greece and Rome and in 18th Century Britain, when justice was not considered to be an act of deliberate will. 'Principles of a Liberal Social Order' at 166.
and I find that each of us appreciates all of the aspects to some degree.) Below I treat Whig thought as entirely practical, not because it is, but because the distinctive aspect of it is practical, and because I have already dealt with it as a conceptual doctrine in Chapters Two and Three.

Let me state Hayek's [B], conclusion about liberty and his [A], basis for it. The Whig basis is distinctive in that it does not focus on abstract ontological and epistemological ideas of reason and rights, as the natural right and positivists (sceptical epistemology) discussed in Chapter Two and Three, but upon very practical insights into the human condition. They do not get their force from some conceptual quality, but rather are conclusions based on the practice of political societies. To me, for instance, this distinction is clear in Montesquieu's The Spirit of the Laws. In Book I of Volume One he speaks of natural law, but such ideas do not inform his work. His work seems to be more informed by practical ideas about how humans work -- from the bottom up.

Let me state Hayek's [B] conclusion about liberty.

[B] 'We are concerned . . . with that condition of man in which coercion of one by others is reduced as much as possible in society', he begins The Constitution of Liberty. That freedom is 'of the individual' and has its basis in the individual person's capacity to design his own future. It precludes interference so that 'he is

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2 'The love of our country is conducive to purity of morals, and the latter is again conducive to the former. The less we are able to satisfy our private passions, the more we abandon ourselves to those of a general nature. How comes it that monks are so fond of their order?'
3 The Spirit of the Laws 40.
unable to use his own intelligence or knowledge or to follow his own aims and beliefs.' Thus the essence of law is to set up this 'individual' sphere. From it follows his conception of law as concerning formal rules, property and private law, and negative rights.¹

This ideal cannot be fully attained, says Hayek. Some coercion is necessary to bring about and maintain this individual realm. To me, allowing for such exception on the Whig's part is justified. Since the basis for the conclusion is practical rather than conceptual, exceptions to such a practical principle do not vitiate it.

Hayek stresses his disagreement with positivists and utilitarians. They disavow metaphysics and he does not. They fail to make any clear distinction between public and private law and he makes such a distinction. Nevertheless I find them of the same cloth, as I noted in Chapter One, for their assumption of the person as individual; for their conception of knowledge as excluding substantive reason; for their treatment of expressions of morality as Compleat Facts from which we reason instrumentally and for their separation of the human from the metaphysical.

While [B], the conclusion of the Whig argument, is clear to me, [A], the bases for that conclusion, are not. As I have noted in Chapter One, the mysterious jump from one to another unites the Whig with the positivist and natural lawyer. Below I try to distinguish the bases which I take to be an expression of the basic insights about tolerance and relativity. [They are bracketed for future reference]. This listing of bases attempts to capture what is distinctive about the Whig view.

¹The Constitution of Liberty 19 & 148. See One, C, supra.
The first is that liberty results in a better -- because more complex -- social order. This idea was embodied in Adam Smith's 'invisible hand'. It is that under the right circumstances if we all follow our own interests, then the best social ordering will come about. This idea concentrates on the limited actual knowledge of the rulers. "Liberty is essential in order to leave room for the unforeseeable and unpredictable." The most powerful argument for liberty is the ignorance of our masters. It is a vague justification and I attempt to understand its three components as follows.

Liberty allows for the most complex -- because decentralized -- use of information.

Liberty allows for the most complex result in that it allows the non-rational to work. The appeal here is not to information consciously held, or to purposes consciously held, but to the importance of that which is not consciously held. A decision can be an expression of conscious and not-conscious aspects of the person, while a decision made by the state will be a planned, rational or engineered order. The idea is that such a planned order is too simple -- it does not have the complexity of 'culture'.

Liberty allows each to have his own values and aims. It is not clear whether this view takes values as Complete Facts. If it does this then liberal would allow each to pursue his values free from meaningless interference from others. Or it may mean that even though value has some underlying unity, in practice human aims and

1 Note that the problem seems to be limited actual knowledge, not logical capacity.
2 The Constitution of Liberty 29.
3 Id. at 28--29, citing F.W. Maitland, Col. Paper 1, 107.
4 See Constitution of Liberty 22--39.
purposes are so disparate as not to be susceptible to ordering.¹

[A,2] The second is that rules in terms of substantive ends, specifically distributive justice, are not a worthwhile enterprise. It is not clear why this is so, but the argument seems to be that substantive justice is not only invidious but impossible to attain and therefore fruitless to seek. What Hayek has in mind are rules which determine what individuals 'ought to have' even though the market fails to bring about that result. For instance, even where the relation between individual needs or merit and actual reward is clearly wrong -- the difference in salaries of stockbrokers and nurses, for instance -- efforts at substantive justice to mend this gap depend upon 'a unitary conception of relative merits and needs' for which there is no objective measure.² It is meaningless to speak of the value of a service to society. Therefore, the aims of welfare economics are fundamentally mistaken -- for the aims of justice should not be to achieve particular results concerning particular people.

[A,3] The third is that liberty, by allowing human interaction through the market rather than through law, enables a practical reconciliation of divergent views without resolving any underlying logical conflict. It makes no difference whether this underlying conflict is real or only apparent. But it is meant to be distinct from actual irreconcilability of values which I counter in Chapters Two and Three. The conflict may be capable of logical resolution, but such resolution may not be the best way of proceeding for any number

²'Principles of a Liberal Social Order' at 168.
of reasons. Or the conflict may not be capable of logical resolution. If the market extends the possibility of peaceful coexistence it would be justified either way. This is distinct from [A,1,iii] in that it concerns not only the complexity of the social order (for in [A,1] the social order has content as a result of such aims and values not being ordered from the top), but its peacefulness. This basis relies on [A,1,iii] above, but seems to add that law should not only protect liberty (by criminal law and police) but enable resolution of diverse Desires through the market (by contract and property). The market enables us to reconcile differences by considering them as divergent rather than conflicting, for the market can serve many different human purposes. We do not need 'common purposes' but reciprocity. 1

[A,4] The fourth is that power corrupts. This is a practical not logical insight. Its implication is that if the state is in the business of coercion, then the people who will be doing the coercion will either be corrupt when they enter office, or else will be corrupted as they enjoy power. 2 By this view the genius of the United States Constitution is that even though it has occasioned the selection of mediocre presidents, it has prevented these rulers from destroying the country.

(In all honesty I feel compelled to state that in treating such arguments as serious ones about the nature of justice I don't want to give the impression that I think they are not rationalizations for crass beliefs.)

1 Id. at 168.
2 See 'Principles of a Liberal Social Order' at 163; Bruce Ackerman, Social Justice in the Liberal State 12 (New Haven, Yale Univ. Press 1980).
4. Another idea of liberty which is criticized in this chapter is the liberalism of equality. Professor Dworkin argues, for instance, that liberty is based in a principle of equality, that 'liberalism consists in some constitutive political morality that has remained roughly the same over time . . .'. He contrasts his liberalism of equality with Hayek's liberalism of neutrality. To me they are both aspects of the same doctrine, for they are made of the same assumptions. (It is a measure of the influence of such arguments that the refutation of the libertarian argument takes place on its terms. For instance, the arguments of Dworkin, Rawls and utilitarians take as given the assumption that there can be no unitary conception of needs, merit or values, and instead base their theory on aims, values, wants, pleasure (whatever the unit) being determined by the person. That is why I consider them a one.)

The underlying unity is that matters of human activity are Compleat Facts. The underlying distinction is whether the state should redistribute the outward manifestations of these Compleat Facts -- the objects of Desire -- or simply let them fall as they might. But that distinguishing principle, whatever it may be, is not essential to the liberal theory, the essence of which is (i) that knowledge excludes substantive reason; (ii) that expressions of morality are Compleat Facts from which we reason instrumentally and (iii) that the human is separate from the metaphysical. Public law based on this concept is concerned with the transfer of some units -- money, entitlements or whatever -- which correspond to our discrete

juridical units. In that sense it is not properly public law at all; it is just another form of private law.

5. Chapters Four and Five set forth a theory of personality which refutes Hayek's argument while at the same time providing an alternative explanation for tolerance and relativity. The argument is that no matter how much insight is found in these four bases [B], they do not add up to [A], the principle of liberty and individuality, and the conception of law they are used to support. Nor do they add up to the egalitarian principles of Rawls and Dworkin. Unfortunately, the argument is a long and difficult one so that I will have to ask the reader to bear in mind its targets over the next two chapters.

The crux of the argument is that Hayek and others are dealing in the wrong currency. As long as the argument is stated in terms which are disparate -- interests, individuals, income, money, acts, pleasure, pain, entitlements and resources -- the Whig position will appear to have merit. But use of these terms is fallacious -- for such terms are the outcome of a particular conception of the person not a reason for that conception. We have created the disparate currency above as a means for implementing the 'liberal social order', then we cannot use them as a means of justifying it. To do so merely restates the conclusion.
B. Will

1. The problem.
2. Does will have quality?
3. No:
   a. physiological insight,
   b. psychological insight,
   c. sociological insight.
4. Nature of insights about the person.
5. Will rejected.
6. Act of will itself important?
7. Rejected.
8. Conclusion.

1. This part addresses the principle of practical liberalism:

   By and large we are better off to respect each individual person's determination of his own ends.

We have already argued that this principle cannot be conceptually true. Here the argument is that it is a flawed practical insight.

I shall refer to this capacity of the human to determine his own conduct as Will; it is a shorthand for will, volition, desire or wish. By Will is meant a faculty by which the human being can choose one action over another -- that is, which enables the human being to be the subject as well as object of occurrences. That faculty consists of the capacity of the person to hold thought and then to act on the basis of it. It depends upon a consciousness in which to hold the thought and a capacity to govern conduct by relation to that consciousness. By Will Theory is meant governance of legal theory by relation to the faculty of Will, that is, the theoretical principle that Will is the beginning point of morality and law. (A corollary of the Will theory is that the thoughts by which we direct our activity are to be considered Compleat Facts.)

We have rejected Will (and hence liberty) as a conceptual doc-
trine. (i) The contents of the consciousness, viewed as mundane, do not have a quality which would justify either intellectual or moral respect.¹ (ii) Nor will any use of it in reasoning bring about that conceptual quality.² (iii) Nor can we devise a conception of liberty which would enable us to reconcile all exercise of Will as a logical matter.³ Our preoccupation with liberty can be justified, if at all, as a practical doctrine -- one which expresses experiential insights and which is therefore best considered in its practical rather than logical nature.

The theme of this part is that Will theory -- considered as a practical doctrine -- cannot answer the questions posed in Part A concerning the ground of liberty. (Does it ground the diversity of human conduct? Does it ground tolerance? Does it ground moral understanding? Does it explain the relationship between non-mundane Good and human activity? Does it explain the relationship between morality and law? Is it the right juridical unit?) This part assumes that humans really do have the faculty to govern conduct by relation to the contents of the immediate consciousness. The argument is that Will theory as I have stated it cannot provide the ground for liberty which it purports to ground. It cannot ground the relativity of human action and tolerance, and cannot justify limits on state power. This theme is a prelude to the argument of the rest of the chapter that a quality of personality which can provide that ground supports a kind of liberty very different from that commonly supposed.

What then is the relation between Will and the non-mundane

¹Three, C, supra.
²Three, E to G, supra.
³Two, E, supra, and see Four, B, 6 & 7, infra.
ground to morality?

They are not identical. The lesson of Chapters Two and Three is that Will cannot be ontologically equivalent to Good. Good has integrity and therefore there can be no necessary connection between Good, on the one hand, and that which is thought and done on the other. If law and morality are grounded at all, they are grounded in a non-mundane Good which is separate and distinct from what we think is Good.

But the idea of Good as totally separate from Will is not convincing. For instance let us return to the point at which Ignatius has left to his horse the decision of whether or not to attack the Moor. We would prefer that the horse be left with the decision if Ignatius' would otherwise have attacked the Moor. But what if Ignatius would have gone to the monastery? In that case the difference of having one or the other make the choice does not strike me as only apparent. I have no logical basis for this but it seems to me to be an expression of the insight about tolerance made above. But what does the exercise of Ignatius' Will add to the matter?

In other words, I reject the position -- as logically unviable -- that Will is always to be respected. And I reject the position -- on the basis of experience -- that there is not something significant in the exercise of Will apart from any ideational content of Good. Will seems to me to be, rather than a Compleat Fact, the plain on which the problematic nature of human experience is played out. Our ideas of tolerance and liberty, then, by implication from the nature of Will, are not conceptual, but practical.

\[1\] Three, C. supra.
2. One way to explain how Will could ground liberty is to hypothesize that Will is capable of mediating between non-mundane Good and human activity.

What is the ontological nature of Will in this sense?

It is not mundane only.¹

It is not non-mundane only. The rejection of substantive rationality² and its implications³ mean that we cannot count on the ideas by which we govern our activity embodying some non-mundane Good, universals or essences. We do not view our thoughts as Ideas or Forms in Plato's sense.

Then the thoughts which govern the exercise of Will (or the exercise of Will itself) need to have a mixed ontological nature. They are of the non-mundane and the mundane -- that is, they aspire to embody in some way that which is eternal and immutable as well as that which is individual and transient. It is only by having this ontological nature that human ideas could mediate between human activity and the non-mundane ground to morality. If Will were no more than mundane then it would only exist as it occurs in space and time and only in that occurrence, that is, as it becomes a phenomenon recognizable by the senses. If, on the other hand, it is a bridge between the non-mundane and the mundane, then its occurrence consists of more than its susceptibility to sensory perception or its immediacy to the consciousness.⁴

This is what I mean by the term quality, without an

¹See Two, E, and Four, A, 1, supra.
²One, E, supra.
³Chapters Two and Three, supra.
⁴We are saying that we would view Will as having non-mundane and mundane aspects rather than viewing it as mundane. Three, G, has argued that viewing things as mundane is our mental game.
attribute. 123456

That Will has quality means that sometimes we exercise Will correctly and sometimes we do not. (Then it respects the integrity of Good.) It also means that its relation (or the relation of any resultant act of Will) to non-mundane Good is more than contingent. An exercise of Will may be wrong or right, but, the argument is, there is something about the nature of Will that enables it to mediate between the non-mundane ground and a resultant act -- when we do it well.

My argument is that Will does not have quality. And therefore it cannot do the tasks we have staked out for it. The argument of Parts C to F is that only the nature of being a person taken as a whole -- Personality -- has quality.

3. Will does not have quality because what we are doing differs so severely from what we think we are doing. That insight can be culled from a number of insights, each of which has us understand human activity as other than or more than that which is consciously in

1 Without the article, quality refers to 'that aspect of things under which they are considered in thinking or speaking of their nature, condition or properties ... all the attributes of a thing except those of relation and quantity'. Oxford English Dictionary, Quality, sec. 9.
2 It is 'une des categories fondamentales de l'Etre...oppose a quantite'. Le Robert, Qualite.
3 Quality is used to speak of the non-mundane and mundane together. 'The ancient school philosophers distinguish quality in the general ... into essential and accidental.' OED, quoting 1727 Chambers, Cyc. And therefore quality means the 'particular efficacy of an entity'. Johnson's Dictionary (1755), 'Quality', quoting Shakespeare: 'O' mickle is the powerful grace that lies/ In plants, herbs, stones and their true qualities and Locke: 'The power to produce any idea in our mind, I call quality [without an attribute] of the subject, wherein that power is'.
4 If a plant has quality, it has the power to produce attributes -- such as yellow flowers -- that are real. What has the power to produce ideas, occurrences or activities that embody good? Does Will?
the human mind at the time of acting. You may disagree as much as you please about how I characterize these insights and you may want to add to them, but the point will remain that what we are doing differs from what we think we are doing.

There is no sense in my going into these insights at any length. My purpose is not to prove them in any sense, or to persuade the reader of their truth. They express, to me, the crux of modern insights about the person. It is only repeating what I said in Chapter One to say that I am surprised that jurists have ignored these insights in determining the nature of law.

3a. One insight is that we behave physiologically. Much of human behaviour -- sneezing, the fight or flight syndrome, sexual behaviour, response to disease, anxiety caused by invasion of body space -- can be viewed as physiological occurrences. That is true even of instances where we tell ourselves we are governing our conduct -- in sexual matters, for instance. No matter what one thinks of any particular statement of the physiological aspect of human behaviour, one would be hard pressed to deny that our physiology in part constitutes our activity aside from what we are consciously thinking. The proposition is that human activity is constituted and therefore understandable, not exclusively but to some extent, by relation to the physiological aspects of the person, aside from what the person is consciously thinking.

3b. A second is that we behave psychologically. Sigmund Freud, for instance, based his psychoanalytical theory on two profound con-

Oddly enough, the insights I have used have by and large been generated by scientific thought.

cerns of the human psyche -- sexuality and death. The source of human behaviour is not simply Will (determining action by relation to consciousness), but some more profound reality about the person. This is so even when we think we are making choices. For instance:

Perhaps the most astonishing of Freud's findings, and certainly the one that has evoked the liveliest incredulity, repugnance, and opposition, was his discovery that certain traits of character may become profoundly modified as the result of sexual excitations experienced by the infant in the region of the anal canal. I imagine that every one on first hearing this statement finds it almost inconceivably grotesque, a fact which well illustrates the remoteness of the unconscious from the conscious, for of the truth of the statement itself no one who has undertaken any serious psychoanalytical study can have any doubt.

Our decision at the age of sixty to clean the dishes can be determined by occurrences at two years old which we may never have thought about. Indeed, Freud's ideas of repression, sublimation and projection tell us that among the most powerful forces of human behaviour is the force that impels us not to be conscious of the most important matters about ourselves. When we act, our actions not only embody our conscious beliefs and decisions, nor only societal beliefs and ideas, but also very primeval and unconscious yearnings or impulses. When we hate another it is out of hate of self and when we lose something it is because we are trying to avoid something. The proposition is that human activity is constituted and therefore understandable, not exclusively, but to some extent, by relation to psychological aspects of the person, aside from what the person is consciously thinking.

3c. A third insight is that we behave socially. We can say that

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2See Five, C to G, infra.
the social affects the individual person and therefore must admit that the person exists as a member of society as well as an individual apart from it. Emile Durkheim in Suicide tells us that wives with children have a suicide rate of 79 per million and wives without children have a suicide rate of 221 per million. He tells us that the suicide rate in urban areas is much greater than that in rural areas. He tells us that in Catholic countries there are 32.1 homicides per million while in Protestant countries there are 3.8 homicides per million. "Catholicism reduces the tendency to suicide while Protestantism increases it." He tells us that 'wars have a restraining effect on the development of suicide.' The point cannot be that these are interesting facts or, for instance, that being a married woman without children enables one to understand things that other people don't and therefore is more likely to bring about a decision to commit suicide. The point cannot be that wars give us an understanding that enable more people to choose to stay alive. The social origins of behaviour vitiate Will rather than explain it. The point is that what constitutes the person includes the social. That is, we are constituted by our language, social customs and social role. The proposition is that human behaviour is constituted and therefore understandable, not exclusively, but to some extent, by social aspects of the person, apart from what the person is consciously thinking.

4. These insights imply that a true understanding of human behaviour involves far more than an understanding of the consciousness. Their premise is not that an outsider can characterize the subject's activity in a way that the subject does not; that is, simply for the

purposes of the outsider. For if that is their premise, they are not an insight at all. Their premise must be that we can characterize an activity in a way that the subject does not, because in some real sense the physiological, sociological and psychological terms truly characterize what the subject is doing. When we use knives and forks for dinner we are engaging in a social ritual, and when we employ an accent we are creating social groups and when we build the Eiffel Tower we are acting phallically. The physiological, psychological and sociological insights are misused if they do not aspire to a true understanding of human activity.

5. If something like the above insights are true, then we are misleading ourselves when we ground freedom in Will, that is, the subjective mental state of the person (its consciousness) and governance of action by relation to that consciousness. If human activity is not properly understood by reference to conscious thoughts alone, then what we are really doing and what we think we are doing are different things. An activity is the fruit of more than the consciousness of the subject, it is the fruit of these other aspects of the person. Then that which mediates between the non-mundane ground and activity is constituted not only by Will, but by these other aspects as well. Otherwise we would be in the odd position of alleging that Will justifies activity which it does not wholly constitute. That is, what constitutes the person is more than the consciousness that makes up Will and therefore activity is the fruit of more than Will, and therefore Will cannot be the justifying factor we are looking for.

If Will were the only quality among the group -- if the physio-
logical, social and psychological were fixtures against which Will worked and where it worked well it resulted in activity that had a special relation with Good, then Will could act as a justifying factor. But if these other aspects have quality then they too mediate between the non-mundane ground and activity and human activity is truly constituted by them as well. And if we choose the first rather than the second, we have deprived the above use of 'constituting' and 'understanding' of any meaning; we would have denied just what the three insights have tried to establish -- that there are constituents of human activity other than the Will.

Thus the social, physiological and psychological insights vitiate Will as a justifying factor. We cannot say that Will is important because it enables the actor to decide between the different courses of action by looking at the consequences and implications of different actions. For along with a consciousness which is capable of determining human conduct, we must also posit not-conscious, social and physiological constituents which mean that every act is capable of having motives, implications, consequences and reasons which are other than the conscious reason or motive for it.

The point is not only that every act is capable of leading to events not foreseen; for although that is true, I don't think it vitiates Will. It is that the act is an expression of the person in a way that the person is not himself aware. What I am really trying to attain by my activity differs from what I think I am trying to attain by my activity. The consequentialist argument suffers not only from a defect in planning but from a defect in the nature of intent.¹

¹ Cf. Three, D, supra.
Therefore I reject the possibility that Will has quality in the sense that it mediates between the non-mundane and human activity.

6. An alternative that might save Will as a primary moral principle is the odd one that even though human behaviour is constituted by more than the consciousness of the subject, the act of Will itself is singularly important. This alternative would be concerned with Will not so much for the relation between consciousness and human activity, but for the mere fact of Will as the exercise of power, or of Will as the expression -- and hence occurrence -- of the whole person. It is not concerned with the actual thought in the consciousness of the actor, but with the importance of the individual person acting where that acting is essential to what it is to be a person. This alternative sees the exercise of power by the individual person as important.

7. But the truth is that behaviour is not properly 'individualizable' (capable of being understood as individual) and therefore liberty as the protector of power is not a proper primary principle.

One way of understanding this is to try to understand what eliminating power would entail. We cannot devise a system where there is no power exercised one over another by eliminating physical power alone. For we affect each other through the physiological, psychological and social realms as well; taxes on cigarettes, a frown, education, building styles, scent -- all exercise power. And we affect each other whether we are conscious of it or not; advertising,
psychological manipulation and the social structure of ideas and values -- all affect us whether we know it or not. Placing a warning on a cigarette pack is an exercise of power just as much as putting people in jail for smoking, for both change the behaviour of the person. It is for this reason that we fail when we try to divide self-regarding from other regarding acts. For the concept of self-regarding as opposed to other regarding is premised on a self that is individual and separate from others and on a consciousness (with which to regard oneself) which embodies the exercise of the power. But our idea of the person denies just that; it tells us that power is exercised psychologically and socially as well as by Will, and subconsciously as well as consciously. If the individual does not constitute the person, then we cannot reconcile power between individuals other than by some principle prior to individuality.

I am not claiming that it would be logically impossible that such power be minimized or even eliminated. If the person were individual and power were Good in and of itself, then the implication would be that we should minimize power over each other, even though we could not altogether do away with power of one over another. Perhaps a clever philosopher can devise a way in which a person could be isolated from other people and his physiology and psychology. I don't know and I don't care. My argument is that the elimination of such power would be a mistake for it would frustrate the nature of the person by treating it as 'person as individual' rather than person. We cannot hope to eliminate or minimize power of individual person.

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over individual person without doing great violence to our nature -- violence that, when it is properly stated, none of us would want. It would mean, for instance, that we would not have language or education and that we would not procreate. Confining the person to person as individual would be like creating a rose that consisted only of the stem.

It does not do to reduce the question of power to a matter of physical or direct harm and then argue that we should establish a system which protects individual power by reducing physical (or some other direct) harm to a minimum. However desirable reduction of physical violence is, that we should act to reduce physical violence is a conclusion based on other -- unspecified -- premises, not a ground itself. Reducing the matter to one of Newtonian physics allows us too easily to avoid the very real problems of power. That freedom is the absence of physical restraint is a myth we have devised to persuade ourselves that we have regulated that power, but a myth based on an illusion about the nature of power. For the sociological, psychological and physiological insights tell us that 'not-power' is not feasible. The difference between physical force and other power is not that one interferes with freedom and another does not -- both do; it must be something else.

Whether Dominic is exercising power over Charles is the wrong question. The proper question is what kind of power is worthwhile and what is not. It is not a valid argument to say that Dominic is exercising power over Charles (limiting the freedom of Charles) and
therefore that something should be done about it. The argument should be that Dominic is exercising power over Charles in a way that is wrong. It is not the deed of exercising power but the substance which is wrong or right. And that substance is by reference to something which is not the power itself.

Hayek's concern to reduce as much as possible 'the coercion of some by others' is based on a myth that coercion equals physical force. It concerns the coercion of the Will, not exercise of power over other aspects of the person which constitute behaviour.

The conclusion is that Will (as power) is not capable of grounding either relativity or tolerance. 'That Dominic should or should not have power' is properly a conclusion, not a premise. It does not explain how or what power is justified.

8. As long as what we are doing is not characterized by what we think we are doing, then the exercise of power cannot be a principle from which things follow, but only to which we sometimes aim. Freedom, liberty and Will are not first principles of law, but are derivative.
C. Justification . . . or the Critical Fallacy

1. Theme.
2. Critical fallacy:
   a. reductionist;
   b. facile;
   c. proper reasoning.
3. The true nature of criticism.
4. Schematically.
5. Conclusion.

1. This part is sort of an intermezzo which attempts to argue the following proposition. If these (or any other) insights are properly capable of vitiating a purported justification, then they themselves must be the makings of a proper justification. If that is not so, then they are hollow as critical insights.

The importance of this proposition to the argument of this chapter is that the psychological, physiological and sociological insights, if they properly vitiate Will as a ground for human activity, have implicit in them the following. (i) Conduct can be justified. And (ii) the justification for conduct must be in terms of these vitiating factors. Otherwise the criticism is a hollow one -- it can equally apply to any conduct as to its opposite.

2. Let me demonstrate what I mean by a hollow critical insight. Take the assertion which I call the psychological insight -- that human activity is understandable, not exclusively, but to some extent, by relation to the psychology of the person, aside from what the person is consciously thinking. Let me give an example.¹

   A boy is misbehaving at school and is sent to a psychiatrist.

¹From M. Scott Peck, People of the Lie, Chap. 2 (New York, Simon & Schuster 1985).
The boy's brother has recently committed suicide. The psychiatrist finds that the boy has been given a gun for Christmas. Moreover, the parents have given him that gun and it is the very gun which the parents had given to the brother and with which the brother had killed himself.

2a. The following is a false argument.

(1) The parents were well-meaning in giving the gun to the boy, for he wanted a gun, it would otherwise go unused and it is a good gun. (A certain person has undertaken a certain activity justified as being the product of a certain idea in its mind.)

(2) In their not-consciousness the parents wanted the son to kill himself. We can make this type of statement by the psychological insight. (That activity is also really a product of a psychological reality that is not of the person's consciousness.)

Therefore

(3) Giving the gun is not justified. (The activity is not justified.)

But (3) does not follow. It does not follow because the reasoning only establishes that there is a gap between the conscious and not-conscious motive.

That the activity is not justified would only follow from another proposition -- that the difference between thought of the person and the reality of its action invalidates every activity; that is, that the 'things not-conscious' have a quality which invalidates activity. This would be a very strange quality for a gap to have.

1It appears to follow if one begins with the assumption that activity is justified by relation to the ideas that have immediately governed them -- the assumption of Will theory. Then the insight that the conscious motive is a false one appears to vitiate the conscious motive. But what follows is that the activity is not justified if (4) it is justifiable by relation to only the consciousness. But (4) must be false if (2) is true. It is contradictory to hold that (4) activity can be justified by relation to the consciousness only and then to allege (2) a state of the not-consciousness which vitiates the conscious reason for any act.
What could it be? The gap would ground a strange but categorical truth that no activity can be justified for the gap between consciousness and reality. If this were the case, then no activity would be justified or capable of being justified. (This is logically possible). It also means that every criticism of this nature is in need of Ockham's razor. For every such criticism is merely the application of the categorical truth that no activity can be valid for the gap between conscious thought and reality, and then all the applications of that truth are long winded and redundant.

Criticism of an activity has as its proper issue whether or not the activity is something different than it ought to be, and therefore something different than it can be. If the assumption is that that issue is a meaningless one, then the criticism too is a meaningless one. A criticism has no significance unless the activity or an alternative is capable of being justified. That means that ideas (or sets of ideas) used in criticism which preclude such an outcome are empty ideas. And it means that the propriety of an activity will be justifiable by relation to vitiating elements if they are truly vitiating elements. An element cannot vitiate unless it can also justify.

My argument is that if Fl vitiates X, then X's proper justification will include the proper role of Fl. It does not mean that Fl will totally constitute the justification. For there may be F2 and F3 which are also vitiating factors. A proper justification will be made up of all the vitiating factors, plus perhaps whatever else was worthwhile to begin with -- that is, all of the actual and potential vitiating factors. Of any criticism we can say that to the extent
that the critical ideas do not allow for justification, they are hollow and the criticism is hollow.

2b. Now let me state a reasoning which is too facile. (I don't deny that the following statements are correct; I deny that they are insightful.)

(1) The parents gave the gun to the son.

(2) The affect of the gift was to make the second son think he should kill himself.

And

(3) They acted wrongly.

It is facile for this reason. If moral reasoning consists only of making a normative judgement about a state of affairs (3) and applying it in various circumstances (1) and (2), then there is no basis for tolerance. We revert to the unhappy conclusion of Part A that the implications of the characteristics of non-mundane Good are that there are no limits to law and morality.

2c. Now let me state a reasoning which has substance. Take the above example.

(1) The parents consciously gave the gun to the son as a gift.

(2) The true meaning of the act -- the true expression of the parents -- was that they wanted the son to kill himself.

(3) The conscious message and the true meaning were at variance and there is something special about the variance which vitiates the act (for instance, the parents could probably only hold the not-conscious meaning as long as they were not properly conscious of it).

The insight is that the activity of giving the gun is perfidious even though it is perfectly innocuous in terms of the consciousness of the parents, not because every variance between the consciousness and the

1 Remember the title of the book is People of the Lie.
not-consciousness vitiates every act, but because there is something about this variance -- about the relationship between the consciousness and the not-consciousness in this case -- which vitiates the act. If that criticism is a valid one, then the vitiating factors are necessary to and capable of somehow justifying an alternative activity. If an activity is vitiated for the gap between the consciousness and the not-consciousness, then, whatever activity is justified in its place will have to be justified in a way that presumes not that there is no gap, but that the gap no longer vitiates. If element Fl has the normative power to invalidate something (the activity is not proper because the consciousness is being used to hide the real nature of the action in the not-consciousness), then a proper justification will be by reference to Fl, because a proper justification will require that the vitiating factor no longer vitiate. For example, if some proper relation between the conscious and the not-conscious aspects of the mind had existed, the parents would not have given the gun to the son.

3. My point is not that the criticism must assume some proper answer as it is made. That would be to deny the proper basis of nearly all criticism. It would suggest that criticism is merely a means to an already held end, rather than a method of thinking part of whose purpose is to bring about a realization or insight new to the thinker. What's more, it would preclude, arbitrarily, exactly the kind of change that critical jurists are concerned with -- a change in our ways of thinking. Furthermore, if the criticism assumes some proper answer as it is made, then I think it runs afoul of the three insights made above -- for it takes us back to the point where we
simply make a judgment about what is Good in a particular instance and get on with it. But if we are to justify tolerance, and if we are to appreciate the three insights, then we must be wary about making such judgments.

So my point is that criticism, or critical ideas, do not have to assume some particular result. But they must assume that the particular result is capable of being right or wrong, or that there is some better way of dealing with the matter. To return to my example, to inform the parents that they are in effect seeking the suicide of their other son -- to make them aware, to state that the expression is a foul one and even to interfere with the matter and stop such messages -- is not really addressing what is at issue. It addresses a particular occurrence in isolation. If the parents agreed to withdraw the gift and to avoid gifts which would suggest violence, then that would not be enough. What is at issue is an entire way of thinking and feeling (let us say repression of violence within oneself, projection of the violence or lack of worth onto the child. It can be stated in any number of ways.) So the type of change which is allowed for (logically, not necessarily consciously) need not be known at the time, nor specific and determinable. In this case the critique implies that the parents need understand the violence within themselves and how that has corrupted their dealings with their sons. That is not a change of a particular occurrence, but of an underlying disposition. The critique may pose a more fine understanding of the human dilemma faced. But it will not, by the nature of the concepts it employs, preclude the issue from being a real issue.

Hence, no proper critique can be based in an epistemology that
only allows for the mundane. For the nature of the mundane is that it has no normative implications.¹

Nor can the criticism be structural, if the structure be incapable of change. And if the insight is that we are incapable of doing x (for example, justifying by logic or will), then the criticism is not for failure to do this but for something else.

Every proper critique must be normative. It must include normative propositions. Every proper critique must also be normative using a system of ideas which allows for the justification of activity.

Thus, if Freud's criticism of religion (as a matter of father figures) is valid, then it presumes some proper working of the conscious and not-conscious aspects of the mind that allows for contemplation of the infinite that is not an escape. And when Freud understands repression in a person, he needs to allow for some proper way of allowing not-conscious matters to seep into the consciousness and even some proper way by which the contents of the not-consciousness can be hidden from the consciousness.² And when sociologists criticize the social or gender make up of the High Court³ and judicial decisions as being dictated by a set of social beliefs⁴, they must mean that there is a make-up of the Court and a set of beliefs which will not have these perfidious attributes, or will at least be less onerous.⁵ Otherwise these are hollow criticisms. If the problem is alleged to be that the background of the jurist affects his decisions, then that

¹See, B and C, supra.  
²The psychological insight.  
⁵The sociological insight.
is a false problem, for no person is capable of not being affected by his background. The answer to the problem will have to be in having various kinds of people on the bench, not to balance our prejudices (that is hollow) but so that all judges will have a more enlightened attitude about the role of their particular backgrounds.

4. Let me try to state my point in schematic terms. Take X as the activity that concerns us. Take F(1-10) as elements of the human personality which we can affect in some way (psychological, social, physiological). Take G(1-10) as constituents of X which we cannot affect. (I do not allege that this will be an objective characteristic, but will relate to human potentiality at the time.)

(a) Critique and justification only properly concern that which could be different -- that which we could, either directly or indirectly, do something about. What composes a thing and what justifies it are not distinct -- unless it is composed of that which we can do nothing about.¹

\[
\begin{align*}
\text{if } F(1-10) \text{ and } G(1-10) \text{ constitute } X; \\
\text{and } G(1-10) \text{ are beyond human influence; } \\
\text{and } F(1-10) \text{ are not; } \\
\text{then, any criticism and justification of } X \text{ need be in terms of } F(1-10).
\end{align*}
\]

No structural critique is justified where the structure is deemed to be invariable.

(b1) If all the constituents of an occurrence are beyond human control, then no critique is possible and no justification is meaningful.

(a2) It is any empty criticism to say that the potentiality of a

¹What has composed a thing will be different from what could have composed it, as actuality is to potentiality. What could compose a thing is not distinct from what could justify it, other than as noted.
constituent vitiates any activity.

If F(1-10) have the potentiality to constitute X; then no criticism of the actuality of X is justified by the statement that F(1-10) constituted it.

(That X has a not-conscious constituent does not vitiate it.)

(b) No justification of an activity can be in terms of anything other than all of its (humanly influencable) constituents.

If F(1-10) constitute X; then no justification of X will be in terms of anything other than all F(1-10)

(Will cannot justify anything alone.)

(c) We have already rejected the proposition that an activity can be justified by a direct perception of its inherent quality.

No proper justification or critique of X can be in terms of X as an isolated occurrence.

(That is, 2b, above).

(d) Therefore whatever elements are used to vitiate a justification -- if they are proper criticism -- are themselves necessary and proper constituents of a proper justification.

If F(1-10) have the potentiality to constitute X; then X can be justified by relation to F(1-10); and X can only be justified by relation to F(1-10)

5. This no doubt seems to be a strange argument. The crux of it is that critique and justification of human activity as disparate is a mistaken approach.

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1 See 2a, above

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'I will tell you about the magic that will free your soul, But its like trying to tell a stranger about rock and roll.'

John Sebastian, 'Do You Believe in Magic?'

D. Personality

1. Personality as a justificatory unit.
2. Its ontological nature.
3. Personality has quality.
4. Hence . . . the nature of morality.
5. Liberty not tenable as a primary principle.
6. Theory of person necessary to tolerance.

1. If activity is justifiable, it will be by relation to all the conscious and not-conscious elements which comprise it -- that is, which are capable of vitiating and justifying activity. The totality of these factors I call the human personality; that is, what it is to be a human person, the state of being a human person. The human personality in all its aspects can alone act in a justificatory way because it alone constitutes the activities of the person.

2. What is the ontological nature of the person?

It is not mundane only. If it were only mundane, then it would not be capable of mediating between the non-mundane ground and human activity at all, it could have no implications and it could not ground tolerance.¹

It is not non-mundane only. It is evident that the nature of being a person includes being mundane. Humans are not gods, angels or devils other than metaphorically.

Then, the person is both mundane and non-mundane. (To me, all mundane entities have mundane and non-mundane elements, but it is only necessary to my argument to allege this for humans. It is easy

¹See Three, C; Four, B, supra.
enough to apply the argument here to dogs, dogwood and dogger.\textsuperscript{1}) Personality -- the nature of being a person -- concerns a meeting between the two.

The person is the continuous instant of the non-mundane being manifested in the mundane. The manifestation -- my cough, blue eyes, a muscle moving the lip -- is mundane -- or, that is, we can and do abstract out of the person occurrences in their spatial and temporal manifestations alone. The person itself is where the two meet and that touching -- an animation like the streetcar touching the electric cable overhead -- merits less mundane and more mysterious phrases -- the tragic sense of life, sadness, a sneer, a knowing smile, a laugh -- phrases that express that which it is that makes up a person.

The person will then be in time but not of time. Thus, the person is not at one time but a manifestation in time of something out of time. It is not right to say that Diana is not the same person at T1 and T2, nor to say that Diana is the same person at T1 and T2. Rather, Diana's person manifests itself at T1 and T2. The wave which hits the beach at T1 and the one which hits at T2 are not the same ocean but are of the same ocean. Personality does not concern acts as discrete occurrences in time, but something else entirely. That something else will not be discrete in time, either of a moment or several years. It will be timeless.

The person is composed of more than any instant of its phenomenal occurrence. The relation between a phenomenal instant and non-mundane reality is like a note (phenomenal moment) which has

\textsuperscript{1}Animal, vegetable and mineral.
meaning as part of a symphony (person) which has meaning as music (personality/ the touching of the non-mundane ground); (a dash of red -- a painting -- painting). The person is the touching of the non-mundane ground with the mundane, like Michelangelo's God the Father touching Adam.

Consciousness cannot be this touching, but can only be an aspect of this touching. What I think I am doing, my awareness of it, cannot be alone equivalent to the ground, or to the manifestation of the ground. For the consciousness occurs at a time and the lesson of psychology is that a certain thought is not an isolated occurrence which suddenly pops out into the mundane world, but is integral to some person which is more than consciousness and which exists over and above time. This is not to say that consciousness is not an aspect of the touching -- only that consciousness cannot constitute the touching. Therefore human activity is not of the consciousness, but of the person.

Any view of the person which does not allow for its non-mundane aspect is doomed to failure. It cannot connect the person over time, an obvious requirement for meaningful activity of any sort.\(^1\) Nor can it consider the person as worthwhile.

3. If there is a nature to the person -- that is, if there is such a thing as the person -- then personality mediates between the non-mundane and the mundane in a way that is not haphazard -- that is, it mediates. This means that there is something about personality which makes its relationship with the non-mundane ground more than contingent. Personality puts us in touch with the non-mundane ground

\(^1\)See the discussion of Hume's argument about causation at Three, D, 6, supra.
when it occurs properly. It is not like a die which can come up sometimes six and sometimes five. It is like a five iron that when hit properly sends the ball about 150 to 160 yards in the air with a backspin; the trajectory of the ball has something to do with the nature of the five iron. A person may occur well or poorly, the argument goes, but there is something about personality that enables it to mediate between the non-mundane ground and human activity. In short, personality has quality.

4. If the question is not what justifies an action but what has us occur as we ought, and if that concerns not-conscious aspects of the person as well as the conscious aspect, and if personality has quality, then what we are concerned with is how the personality works properly. And that working properly will mean some ways in which the different aspects work together. The first concern of law and morality then is what is personality, what it is to be a person and how the person occurs properly.

What has us occur properly? Aristotle cites five ways: by nature, learning, a kind of training, divine inspiration and luck. What seems to me of interest in this list is that of the two which concern the human mind -- learning and training -- neither concern exercise of Will so much as understanding and trained disposition to activity, that is, aspects of the person as a whole rather than consciousness.

The person then, not Will, is the proper unit of morality and jurisprudence. For that which is properly Good or not is not a result of Will, but an occurrence of the person. For that which it is to be a person is not of 'doing', 'acting' and 'choosing', but of

1 Aristotle, Eudemian Ethics, Chap. 2 of Book One (Michael Woods, trans., CUP 1982).

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'being' or 'occurring'. Thus the primary endeavour of law and morality is to enable us to live well -- to occur well -- rather than to enable us to act either i) as we wish or ii) well. These latter will be important not in themselves but in a way which is derivative. How we act will only be important in the context of how we live.

Once we focus on the insight that the totality of aspects which comprise the person comprises its activity, then the focus of the moral endeavour changes. Our landscape is not conscious thought and its actions based on it but the occurrence of the integrated person. Once we shift from thinking and doing to being and occurring, we are no longer first concerned with how the person constitutes himself, but rather with how it is constituted, how it occurs. Thinking and doing are but aspects of this occurrence.

The kinds of occurrence we are concerned with are, for example, i) growth and regeneration of cells (involuntary); (ii) getting angry (behaviour); and (iii) choosing a chocolate ice cream cone (activity -- which has conscious (act) and not-conscious (behaviour) components. The subject matter of morality is not the enabling of Will; (it cannot be until we get to Will as a derivative of personality and then only in the context of it). The subject matter is the life of the person.

5. Liberty then is not tenable as a primary principle of political morality, either in a practical or a conceptual way. For the moral endeavour as an effort of Will to govern activity, is a hopeless one. And the purpose of morality is to enable the person to occur properly. Liberty then is a practical principle based on a bet that it is the best way of enabling the person -- the whole thing --
to occur properly. I think that if anyone thinks about it they will see that it is not a good bet. They need only start with the stories of Ignatius and of the seat belt in Three, C, above, and then list all those everyday happenings which are necessary to our occurrence as a person and which are not grounded in liberty.

6. Now perhaps I can explain my dismay at the failure of modern jurists to address basic issues about the nature of the person. A theory of personality such as I have outlined is necessary to the concept of tolerance — and therefore any serious idea of liberty.

We have shown that no serious concept of law and morality can deny the assumption of a non-mundane ground to human activity. Thus, a denial of the non-mundane, whether as an instance of empiricism, nominalism or nihilism, is insufficient to ground tolerance or liberty.

We have rejected the idea of substantive rationality as a practical doctrine. Even if we are logically capable of making judgments of substantive rationality, we cannot depend on such a capacity as a basis for law. One expression of such a rejection is the experiential insight that our power to change a situation and our perception that the situation is wrong are insufficient to justify action — that is, the insight about tolerance.

There is only one basis I can find which reconciles a ground (logical and non-mundane) to law and morality with the insight (practical) about tolerance. It is by that which mediates between the ground and specific acts and thought. That is the person. And it seems to me either one comes to an understanding of the nature of the person which reconciles these two, or else one does nothing at all.
It surprises me that liberty is necessarily based in an understanding of personality, but liberal jurists in deed avoid any inquiry which would contribute to such understanding. Hence my remark in Chapter One that Arthur would be wasting his time reading modern jurisprudence it would not inform him about what he really needs to know.
E. The Nature of Human Understanding

1. Everything said about activity also true of understanding.
2. An explanation of the beginning of this dissertation.

1. Everything we have stated about activity and justification applies to understanding, for understanding is a human activity. We can apply the nine points made in Parts B to D to obtain the same insight into the nature of human understanding. Understanding properly involves not simply the consciousness, but the personality as a whole. Thus,

(1) Understanding is composed of aspects of the person in addition to the consciousness. The psychological, sociological and physiological insights vitiate the contents of consciousness as understanding of reality, just as they vitiate the contents of consciousness as a Will deserving of moral respect.

(2) Not all those aspects which vitiate understanding can be made conscious. Thus, if any understanding is justifiable (and any criticism of understanding justified), it is in part justifiable by relation to that which we are not conscious of. And therefore the effort to understand or have knowledge, as a purely conscious effort, is a hopeless one.

(3) If these not-conscious aspects of understanding are properly capable of vitiating understanding, then they themselves must be the makings of a proper justification.

(4) The human personality in all its aspects can alone be the makings of proper understanding, for it alone embodies the elements which constitute human thoughts.

(5) The person must have a mixed ontological nature of both mundane and non-mundane aspects.

(6) The person, then, not discrete contents of the consciousness, is the proper starting point for appreciating the nature

1 Four, B, 3, supra.
2 Four, B, supra.
3 Four, C, supra.
4 Four, D, 1, supra.
5 See Four, D, 2, supra.
of human understanding.¹

(7) Personality must have quality. That personality has quality means that there is something about it which puts us in touch with the non-mundane ground when it occurs properly. Then when we are concerned with the nature of human understanding, we are concerned with how the personality works.² Epistemology properly concerns personality development before it concerns conscious mental operations. It concerns the well-being of the person before it concerns facts based on sense data, Will and operations of reasoning thereon. We are better off to view ideas as matters of personality and their validity in terms of how they contribute to the person, rather than in terms of how they represent an external reality;³ that is as noble, useful, helpful, insightful, repressive etc, rather than as true or false.

(8) And then in concentrating on the holdings of the consciousness, we are making a bet that this is the best way of enabling the person to come to understanding. This bet, too, I think is a bad one.⁴

(9) A theory of personality is necessary to any concept of human understanding.

2. It is because understanding is 'of the person' that this dissertation appropriately begins with a statement of my dissatisfaction.

¹See Four, D, 4, supra.
²See Four, D, 2 and 5, supra.
⁴Cf. Four, D, 5, supra.
⁵Four, D, 6, supra.
F. The Nature of the Relationship Between Thought and Personality

1. The problem --
   a. universals excluded and
   b. particulars excluded.
2. Two aspects in relation to personality:
   a. expressive and
   b. constitutive.
3. The complexity of thought.
4. Applied to the liberal mistake . . .
   a. as a conceptual doctrine, and
   b. as a practical doctrine.
5. Applied to Hayek's first argument . . .
   a. about the particular and the general,
   b. about the individual and social and
   c. about the conscious and the not-conscious.
6. Conclusion.

1. What is the relation between thought (the aspect over which we have some control, our tool) and personality (that which composes our occurrence, the subject matter of morality)?

   The problem is this. Thoughts are important as moral tools because it is by them that we govern activity. But the understanding embodied in any thought will be problematic. For the lesson of Parts B to E is that thought is a product of the person as a whole. Thus, although it is possible for thought to embody truth by representing a reality which is not part of the mundane person, whether thought indeed does so or not is problematic due to its complex constituency. How can we deal with the content of the consciousness that is the subject matter of morality, when the components of consciousness are beyond us?

   No response to this problem will be worthwhile which does not respect that the true purpose of the enterprise is the proper occurrence of the person. And no response will be worthwhile which does
not respect the components of the person and of understanding. (Respect does not equal 'consciously take account of' -- but indeed 'allow for its proper working').

How then can we understand this problem of the relation between consciously held thought and the person as a whole?

1. One alternative is that thought aspires to embody ideas which are equivalent to universals or forms, or at least to embody universals or forms to the extent necessary to the purpose. Thought would then embody some transcendental entity in a way which could be applied to the situation at hand to give enlightenment and guidance.

We have rejected the proposition that humans have a capacity which we can depend upon to produce such ideas; that is, we have rejected substantive rationality as a basis to law and morality.¹ We have also rejected the proposition that our activity is tantamount to our thought; that is, we have rejected the proposition that ideas practically determine activity.² None of this is to deny that there is a ground to human activity, or that ideas are (logically) capable of embodying such a ground; it is to say that neither the ground, nor the logical possibility that an idea could embody such a ground, provide a sufficient base to law and morality. The above conclusions are equivalent to saying that human thought and activity are experiential rather than conceptual. It is naive to understand human activity as a process of (i) conceiving an idea which embodies some transcendental ground (or then, conceiving an idea at all) and then (ii) applying it in an instance to determine one's conduct in accordance with that ground.

¹ One, E; Two, E, supra.
² Four, B, supra.

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1b. Nor does thought have moral significance in its singularity alone. That alternative cannot be true because thought makes no sense in its singularity but only as a snapshot of the person and therefore in the context of the person as a whole. Thought is important for more than the thought and the resultant activity themselves. That conclusion is implicit in the conclusions of Parts B through E. It is the purpose of this part to make it explicit.

2. We must understand thought as having a complex nature. Thought has two aspects in relation to personality. The first is that it is expressive. The second is that it is constitutive.

2a. By expressive is meant that thought has meaning as a product of the person as a whole in its recondite as well as superficial aspects. That is, thought has meaning for more than its logical constituents, or has meaning for more than we are aware.

As an expression, it is an occurrence in the life of a person and therefore is important as such, aside from its content. Other occurrences which are not thoughts, are similarly important.

Thought is necessarily expressive in this sense.

2b. The second aspect is that thought is constitutive. As thought expresses the person, so also it in part constitutes the person. It constitutes the person (has meaning or significance) for more than its logical constituents, or, for more than one is aware.

Thought must necessarily be constitutive in this sense. Thought is at once constitutive and expressive.

The formative nature of thought is significant for how it affects the person in a way not captured by its conscious content, and for an expression not captured by its conscious content. Thought is
morally significant not for anything it readily achieves, but for how it composes (in part) the underlying person. It cannot compose a person the way bricks and mortar compose a house -- that is, mechanically. It can compose a person the way water composes a plant -- that is, organically. That is the difference between an animate and an inanimate entity.

3. Human thought must then be complex in the following way.

First, thought is a specific instance of the occurrence of the person. In this sense, we shall call it 'a thought'. Thought is irredeemably disparate.

Second, it must link aspects of reality as part of its constitutive and expressive nature. We shall call thought in this role 'idea'. No thought can hope not to have ideas implicit in it in this sense. That is, thought is necessarily expressive and constitutive, and that to be that way entails linking aspects of reality. It is the nature of thought. Thought is irredeemably integrating.

There are two possibilities. Either the linking nature of thought is purely a need of the psyche. In that case, anything other than a nominalism of thought is illusory. (This is Hume's argument concerning cause). As stated before, the implications of this are nil. Or thought as idea aspires to the X and the Y -- the hidden components of reality -- which are characterized in Chapter Three. In that case the links may be more or less real or illusory.

Thus, thought must consist of a particular aspect -- a thought -- and a general aspect -- one or more ideas.

I am concerned with four ways in which thought links aspects of reality. (i) It links particular phenomena over space and time. (ii)
It links the person as individual and the person as social. (iii) It links the conscious and the not-conscious. (iv) It links the mundane and the non-mundane. It will be evident that establishing such links will vitiate thought, and hence Desire, as particular, individual, conscious and mundane -- that is, as Compleat Facts with which we began Chapter One.

i. By thought, we seek to understand phenomena over space and time. Thought is particular\(^1\) as an effort of the person to deal with what is before it at that moment, but it is also general as an effort to relate that phenomena in space and to the past and the future. Linking is necessary for the person to understand the present event, and to re-evaluate the past and prepare for the future. Such a link cannot be made by sense data alone, but presumes some non-mundane ground for phenomena that would justify the link. It is necessary in that it is the nature of thought that this link be made.

ii. Thought links the individual and the species. Such linking presumes a non-mundane ground for phenomena that would justify the link. It is necessary in that it is in the nature of thought that this link occur.

In that thought links the individual and the species, it links the person as individual and the person as social. (I am David. I am a Galbraith. I am a lawyer. I am American.) It is basic to thought that it be in terms of how we are like or unlike others. Thought is not only an effort to deal with the matter before us, but a way of finding and stating likeness and difference, including how a person is like or unlike others -- from mankind, to nation, to race, to

\(^1\)Particular is as opposed to general; individual as opposed to social. See terminological note.
religion, to friends and family. Every instance of thought is an instance of the person being like and unlike others. For instance, the use of language, dialects and accents can be seen as an expression, implicit in thought, of how one is individual and distinct from others and in groups which are distinct from other groups.

iii. Thought links the conscious with the not-conscious aspects of the mind. Thought is not only an effort to deal with the matter before us, but expresses and establishes a relation between the conscious and not-conscious aspects of the person. For each moment of thought is an instance of how the contents of the not-consciousness are allowed or not allowed into the consciousness. And each moment of thought is an instance of how reality is faced and avoided by what we allow our consciousness to hold and what we relegate to the not-conscious.

iv. Thought links the mundane and the non-mundane. Thought is inherently concerned with the coming into phenomenal being and the going out of phenomenal being of things -- especially the person, its growth and demise. Putting our phenomenal being in context is basic to thought. It is basic to thought in that thought concerns change. Examples are the pervasiveness of birth, death, creation, decay, the passing of the seasons and the church calendar.

(All that has been said is equally true of human activity as of thought which occasions it. The study of human activity can be no more or less problematic than the thought which gives rise to human activity. Human activity is complex in that thought which occasions activity has both general and particular aspects, and in that thought is composed of recondite aspects of the person separately from
thought. And the extent our activity is problematic, so are our dis-
cussions about it, whether the discussions of the historian, the
sociologist or the moralist.)

Each of these states the same thing in a different way. Thought
by its nature integrates reality while at the same time being dispa-
rate. That thought does so by its nature means that the linking
occurs whether we want it to or not, or whether we recognize it or
not. We do it by thinking.

4. We can conclude that:

Thought is ineluctably particular, individual, conscious and
mundane. That is, thought is disparate.

Thought is also ineluctably general, social, not-conscious
and non-mundane. That is, thought is integrating.

The liberal mistake is to recognize the former in the premises of
Kant, Hume, Santayana and Hayek, but to ignore the latter. The jumps
from the former -- that thought is ineluctably particular, indi-
vidual, conscious and mundane -- to the liberal conclusions [B]
stated in Chapter One -- such as that the essence of law is to create
and maintain a realm of the individual -- are instances of the lib-
eral mistake. The jump from [A] to [B] seems to follow, but it only
seems to follow if we ignore the integrating aspect of thought. The
liberal jump is a means of avoiding the problems raised by thought
being ineluctably general, social, not-conscious and non-mundane.

Thought has these aspects because, by its nature, it seeks to link
aspects of reality by relation to its ground. Confronting the prob-
lems raised by these aspects of thought requires a theory of Good and
of the personality. Liberal theory is inadequate because it does not
treat thought in its integrating aspects.

The jump is expressed in the idea of volitions, passions and
acts as Compleat Facts, not subject to conceptual dissection, nor to
the application of the principle of non-contradiction, at least as
between persons. The proposition that Desire is a Compleat Fact
should be modified to say that Desire, like all thought, is necessarily complex. And the proposition that Desire is not subject to
cognitive determination should be modified to say that it is not di-
rectly subject to cognition. It cannot properly mean that there is no
ground to human activity, or that activity is only right or wrong by
reference to some mind state of the actor, or that activity is only
right or wrong by reference to some posited norm, or that it is mean-
ingless to condemn activity which differs from ours. It can only
allege that thoughts are of a complex nature such that any comparison
of thought is prone to misuse. That is, because thought has inelucta-
ably disparate aspects, simple comparisons of different ideas will not
make sense. But at the same time it must assume that imbedded in
every thought are ideas (including norms) of some generality that can
be compared to other norms -- similarly imbedded.

The liberal mistake is embodied in the principle of liberty --
that because we cannot think in terms of the immutable, we should be
free to determine, individually, our own ends. Let me take what I
think to be the argument and then state why I think it is a mistake.
The argument is this.

a. Let us take as the basis of liberalism the principle that De-
sire or Will has a conceptual quality which justifies respect. That
is, let us take liberalism as a conceptual doctrine. In that case,
the argument seems to be that because thought is ineluctably
disparate, 'volition, passion and act' are Compleat Facts. In that
case, volition, passion and act have a quality which outside moral judgments do not. This is the essence of Weber's idea of rationality and of Hayek's idea of the marketplace.

I have shown in Three, B and C, above, how this is not conceptually true. It may be that thought is particular — that is, has a character unique to that time and place. If it is unique because of its time and place alone, then it is not deserving of respect for that alone. If it is unique in the sense that it is uniquely appropriate to that time and place, then too there is no basis for the principle of liberty, for another can make that judgment just as well as I can. Let us say that I am going out to a dinner and I am choosing a tie. It may be that a tie will be particularly appropriate to that space and time -- my suit, my eyes and the type of occasion. But it does not follow that I should make that decision. Another may be able to weight up the matter and make a decision better than I can. If a thought can embody that which is particularly appropriate to a time and place, then what is appropriate depends upon a reality which is equally available to another as to myself. I turn to my mate for help with my tie.

It may also be that what we are concerned with is not only what is appropriate for that occasion, but what is appropriate for that individual person. This seems to be Hayek's idea of each determining his own ends. But it still does not follow that what is uniquely appropriate for that individual person will be best determined by him. To be conceptually true, we would have to believe that Desire is equivalent to the person, something we have denied in Three, C,

1 Three, B, supra.
above. Thus, it seems to me, we can deny the liberal principle a conceptual quality based in the particularity and individuality of thought.

b. Then the argument is a practical one. Let us say that there is a ground to human activity which ground is distinct from phenomena available to the senses and from Desire. Let us also say that any understanding of that ground is problematic, but not impossible. Then the argument seems to be that because thought is ineluctably particular and individual, we will all be better off if we allow each individual person to determine his own ends, that is, if we treat 'volitions, passions and acts' as Complete Facts. This is a jump which depends upon a judgment about the nature of the person; it is not a conceptual statement about thought as particular and individual. The judgment is that the nature of the person is such that if we leave each individual person to make judgments for himself, then by and large we will have made better judgments as to what is appropriate to that particular occasion and that individual person. Desire and Good are not identical. The liberal argument is then that Desire is, given the nature of the person, the best practical indication of what is proper, right and fitting. Such a judgment obviously depends upon a theory of personality.

5. The purpose of the above theory of personality is to show that the idea of personality behind the liberal jump is mistaken. When we apply this lesson to that part of Hayek's argument that 'liberty results in a better -- because more complex -- social order', we shall see that it is faulty for its failure to recognize the integrating aspects of thought.
5a. The argument that the **system of liberty allows for the most complex use of information** is faulty because it ignores the general aspect of thought. Implicit in thought are general ideas about the relation between phenomena in space and time. It takes some work to establish a nature of the person which makes the individual person best at judging what is appropriate for any particular space and time which it confronts. But it seems to me impossible to establish that the individual person is best at establishing the general relation between phenomena. Let us take cigarette smoking. Implicit in any purchase of a pack of cigarettes are certain general ideas. In its particularity it is an exchange of a particular set of coins for a particular set of twenty smelly Balkan Sabranie cigarettes. But implicit in the transaction are general ideas about health. For instance, an assumption about whether cigarette smoking causes cancer and emphysema or shortens one's life span? There is nothing in the generality of these judgments about the relation between smoking and human health which suggests that the smoker is a better judge of the relation than is someone else. Also implicit in the purchase is a general idea about the relation between smoking and human happiness. Do smokers generally enjoy extremely attractive mates, fast cars, the admiration and respect of their fellows and awesome mountain scenery, or are they neurotic? There is nothing in the generality of their judgments which suggests that an entity which is not the state -- such as an advertising firm -- is in a better position to make such judgments than is the state.

1 Obviosly there is a psychological as well as intellectual problem. That is, the smoker may know about the consequences for health of smoking but decide nonetheless to smoke. This aspect of personality is discussed in Five, infra.
5b. The argument that the system of liberty allows each to have his own values and aims is faulty because it ignores the social aspect of thought. Let us continue with our example of purchasing a pack of cigarettes. Smoking or not smoking necessarily has social components -- the activity is composed of ideas which are not simply of the individual person but of society. He will look like Humphrey Bogart! Also, smoking is social in the sense that it places one in groups and distinguishes one from other groups, whether one knows it or not. To see the essence of the person as an individual who determines his own ends is to engage in an illusion, for it denies that activities are in part socially composed. Is it the bet of liberalism that the personality works better if the social aspects of activity are ignored? On what idea of personality would such a conclusion rest?

The social aspect of thought not only means that some human activities are necessarily social. It means that the alternatives are not whether one individual person makes a decision or whether another does, but whether decisions are made individually or collectively -- by the person as individual or the person as social. The liberal assumptions do not allow for the second alternative. For instance, take the legal positivist's conceptions of law discussed in Three, E, above. All of them see law in terms of the alternatives of the state imposing authority on the individual person, and of the individual person deciding for himself. The units of thought used only allow for these possibilities. They do not see law as a social enterprise.

Thus, we should say that implicit in thought which governs activity are ideas which, in great part are social. And therefore, we
should recognize that our thought is not only of the person as individual. Thought by its nature concerns people affecting each other. Thus, the question is not whether such power ought to exist, but whether a particular kind of power is good or not.

5c. The argument that the system of liberty allows the non-rational to have effect is more difficult to deal with. But we shall see that it is faulty because an examination of the non-rational, whether it is considered the not-conscious or the experiential, will not support it.

Thought has both a conscious and not-conscious aspect. That thought has both a conscious content and a meaning distinct from it means that thought is expressive and constitutive in ways which are not determined by its conscious content.

Let us look first at the conscious content of thought. It is conceivable that the content could be determined as a matter of logic. In that case it is equally applicable to you as to me. One plus one equals two even if I think it equals four.

But it is more likely that the content of the thought is determined from experience, that is, that the content of the thought is the product of the person in a way that the production cannot be stated as a matter of thought, even though the resultant thought has conscious content. For instance, Ibsen may conceive of Nora, and have a complete and clear picture of her, and yet not be able to describe how he arrived at such a character.

During the winter months in Rome before he began work seriously, he was distant and nervous. His lonely world became peopled with the creatures of his imagination. Once he said suddenly to his wife: 'Now I have seen Nora. She came right up to me and put her hand on my shoulder.' 'How was she dressed?' asked his wife. 'She had on a simple blue woollen dress,' he re-
plied.

After the play was finished, John Paulsen asked him one day why Nora was called Nora. Ibsen answered: 'She was really called Leonora, you know, but everyone called her Nora; she was the spoilt child of the family.'

Artists and artisans traditionally practice trades in which thought is considered to be experiential. Law is often called a craft, and lawyers are said to be 'in practice'.

In that case, there is still no reason to believe that I make better ideas for myself than for another, or vice versa, nor that such ideas are best made individually rather than in some collective way. If an idea is a product of the person as a whole, then it has merit by relation to that person -- thus, my idea may be well or poor by relation to my person, but so may be another's. Whatever psychological weakness I have affects the quality of my thought (whether in its disparate or integrating aspects), and it can conceptually affect the quality of my thought as it applies to me or to another. I may use thought in a projective way, to fault another, to avoid truth about myself by projecting onto another. But I can equally use thought to treat myself in these same ways. Any psychological weakness that vitiates the content of my thought can vitiate it with respect to myself as well as to others. And any strength of another's thought can apply equally to me as to him.

There is no room to believe that the person is a better manager of himself than is another. That is, if I am in charge of whether I smoke or not, then my thought is in part constituted by my disposition to smoke and the underlying causes of that disposition. And therefore, I am in a rut. There are two possibilities. (i) The under-

lying components contaminate another's behaviour to me even more than my own is contaminated. In this case I am better off taking care of myself. And (ii) the underlying components of another's behaviour to me are less faulty and therefore the other is in a better position than I am to deal with me.

If thought is important for its content, that is, for how well it captures reality, then there is no reason to believe that I make (whether conceptually or practically) better ideas for myself than for another or vice versa. If thought embodies reality, then it does so by relation to everyone, not simply the creator of that idea.

What about the not-conscious aspect of thought? Thought will have a meaning which is distinct from its conscious content. It is difficult to deal with an aspect of thought the content of which, by its nature, we don't know. The question is whether there is something about the not-conscious aspect of thought which justifies tolerance and liberty. But we can doubt the meaning of the question, because it is difficult to interfere with the liberty of the person to have a not-conscious aspect to thought, since it is necessary. And it is difficult to be intolerant of that meaning since we don't know what it is.

But I cannot understand the argument that because there is a not-conscious aspect to thought and activity, the individual person should determine his own ends. The not-conscious meaning, like the conscious content, will be a product of the person as a whole. As such it can be robust or deleterious depending upon the condition of that person and therefore can be worthy or unworthy of respect. The

1 Either practically or conceptually.
not-conscious meaning of the parents giving the gun to their son, in Part C above, does not seem to be particularly deserving of respect because it is not-conscious. That thought has a not-conscious component does not tell us whether we should not be tolerant or intolerant, but that we should concern ourselves with the health of the person.

6. What then is the relation between thought and the person? It is such that the following argument is false.

[A] Human volition, passions and acts are disparate: particular, individual, conscious and mundane. Therefore
[B] By and large we should leave each individual person to determine his own ends.

The argument is false not because [B] does not follow from [A]. As a practical principle it might follow. It is false because [A] is false. Human volition, passions and acts have integrating aspects -- general, social, not-conscious and non-mundane -- as well as disparate ones.
G. Directive and Spontaneous Thought and Activity

1. Directed and spontaneous thought distinguished.
2. The nature of directive thought . . .
3. does not imply tolerance.
4. The nature of spontaneous thought . . .
5. implies tolerance but not the principle of practical liberalism.

1. This part suggests another set of relations between thought and the person.

There are two possibilities that I shall address. First, it may be that personality works better when thought governs activity and the person. Thus, not only does thought continually constitute the person (which I consider to be a logical necessity) but we can say that sometimes the relation between thought and our activity is such that thought directs our activity, as opposed to its being spontaneous. Schematically:

i. \( \text{Th} \rightarrow \text{P} \)
ii. \( \text{Th} \rightarrow \text{A} \)
iii. \( \text{Th} \rightarrow \text{Th(Logic)} \)

It is the case when one is engaged in doing the multiplication tables (iii), when one is following a new recipe (ii), or when I realize that I have made a mistake in my backhand and resolve not to do it again (i). I shall call this directive thought.

This does not mean that the meaning of our activity is equivalent to our thought. For our activity embodies more than we can understand. But it means that we are exercising the faculty of Will by which we began this chapter. So we should more properly say that the behaviour of the person, and his underlying person is best composed because of some direction or control exercised by the
consciousness on the person, even though the meaning of that thought is not equivalent to its content.

The second possibility is that one proper relation between thought and the person consists of the person not being directed by thought. That is, it may be that sometimes the person occurs properly when the directing qualities of the mind are suspended. It may mean that I am not in any real sense conscious of what I am doing. It may mean that I am conscious of what I am doing but that what I am doing is not the product of my consciousness. But it means that my consciousness is not directing my behaviour. Schematically:

iv. \( P \rightarrow \neg Th \)

v. \( P \rightarrow A (\neg P) \)

vi. \( P \rightarrow P \)

It may mean that the quality of the ideas which occur will be better because of the free play of the mind -- say in lateral thinking rather than logic (iv), or that in action my backhand will be better if I don't think about it too much as I swing (v), or perhaps in meditation (vi). The quality of the personality which enables the person to work properly in a way which requires (among other things) the suspension of the directing capabilities of the human mind, may be called spontaneity.

Spontaneity cannot simply be a negative or residual concept if it is to make any sense. It must embody some real aspect of personality by which the person left undirected will (not always but sometimes) work better due to the nature of personality itself. The quality thus involved is not so much a capacity to choose one action over another, but a quality of personality by which the person itself is constituted or is being constituted. It is not concerned with
thought so much as it is concerned with the person occurring in some spontaneous way. It is not directed so much at choosing but at 'appreciating', 'understanding' and self-realization. In that, it is not one part of the person directing the other to happen (an engineering view) but the person occurring and his psyche (any mix of conscious and not-conscious aspects) being part of that occurrence. Since it doesn't make sense for the person (either the subject or another) to direct this, then it is beyond direction (if it is to happen).

It seems to me that sometimes the personality works well in that it is directed and sometimes it works well in that it is spontaneous. What are the implications of these possibilities?

2. Let us look at thought and activity as directed.

How do you deal with that activity which does not have spontaneity as its base? For instance, an executive at Exxon decides to purchase 400,000 barrels of Saudi Light crude oil for $11.99 per barrel delivery to Houston on 19 March. We would reject the idea that this is justified as an activity which has as its essence that it is spontaneous. If the market for Saudi crude were $12.40 we would say that this fellow had made a good deal and if it were $10 his boss would find him very stupid. The boss would not say that the purchase was beyond judgment for it was so profound as to be beyond ideas. To the contrary, the whole purpose is that the purchase and the operation of the business be directed, not spontaneous.

If we are concerned with thought directing activity, then we are concerned with it for its conscious content. That is, we are concerned that the oil executive purchase crude oil at the best possible
price and that be will do so by his conscious thought comporting with that price. (Similarly we are concerned that a man angered at the noise of his neighbour's party, hold a conscious thought concerning mercy, tolerance or the law of homicide and decide not to go for his hunting rifle.)

(We have noted above that in terms of conscious content, there is no basis for tolerance, merely delegation.)

It would be wrong to say that this business arrangement is a rational one in the sense that it is totally governed by the conscious thought of the parties and their actions based on that conscious thought. It would be wrong because it would contradict the points made in Parts B and D that thought has significant integrating components that are beyond consciousness. That means that we cannot properly understand any thought as having meaning or significance equivalent to the contents of our consciousness. We cannot understand the activity as simply the result of a thought whose content is to purchase 400,000 barrels of crude oil at $11.99 per barrel. The activity (and thus the liberty to engage in it) cannot be justified on the basis of its 'rationality' alone -- the specific end which it achieves. Nor can interference be justified on this basis alone.

In other words if tolerance of the activity is to be justified, or if interference with it is to be justified, such justification will have to be not only in terms of the consciously sought goals of the activity, but in terms of its not-conscious components. If we are to understand this activity and then to justify either interference or not we will have to do it in terms of the relation of all aspects of the person. It can only be justified in terms of the personality.
in its totality, not simply in its not-conscious and conscious aspects, but in its timelessness. We can say that for the person as individual it may be justified as behaviour which is integral to his making a living, caring for others and as part of an activity which makes up our lives as social and productive beings — *homo faber*.¹

Thus, the justification will be that there is a certain type of human activity which depends for it as working properly on some relation among the different aspects of personality which is brought about not by spontaneity, but by the lack of it. What brings about the proper relation (proper occurrence) in some cases is control of the person by himself, others or the state.

To me 'rationality' is just such a control. Others are all the formal mechanisms which are available in law or in any organized institution like Exxon — from the doctrine of precedent, to flow charts, to hierarchy, to fear of the boss's displeasure, to fear of being overturned on appeal. Rationality (short of substantive rationality) and formality are important not only conceptually, but experientially.

(Thus, the benefit of the control will not be a direct function of its content. Take for instance the doctrine of precedent. We should understand it for both its conceptual and practical value. Its conceptual value is that the body of precedent captures an experience greater than can be understood by the decision alone and is therefore of special importance to the judge. The practical value is that it acts as a psychological check on the judge, aside from its content.)

¹We need social and economic theory to do so. Any such theory would have to deal with things like aggression and power, class and economic power.
I say this because we can always be sceptical of the particular result achieved, even if it has been achieved. We can be sceptical of it because the act will have consequences in space and time which are beyond its particular end and which are unknown. We can also be sceptical because the act is an instance of a social relation (power) which is not part of the thought directing the activity. We can also be sceptical because what we are doing and what we mean to do are different things. Thus the justification will have to be in terms of the underlying meaning and significance if it is to be worthy of some credence. I am not saying that the executive cannot intend to make a profit for Exxon and conform his purchasing acts to bring about that result and indeed bring about that result. But that his activity cannot be justified in these terms. For the meaning of his activity and therefore its justification will have to be in terms of the personality as a whole. What he is doing and what he is trying to do differ. Therefore the justification will have to be that by the various formal mechanisms we bring about a relation between the aspects of personality which has us occur as we should.

3. It is obviously difficult to determine what kind of directive thought and activity will bring about human well-being. The purpose here is limited to arguing that the use of formal and rational control does not justify tolerance, but intolerance. Directive thought is valuable for two things: the content of the thought and the control it exerts. To the extent we are concerned with the content of the thought, there is no reason for tolerance. Another could be a better judge than me, and the group could be a better judge than the individual person. To the extent we see it as a matter of control, we
similarly have no reason to believe that the individual exercises better control over himself than do other individuals or groups.

4. Let us look at thought and activity as spontaneous.

To me, spontaneity justifies tolerance in that it posits a proper working of the personality which depends upon lack of interference of the consciousness with the rest of the person. One may try to direct the person, but to do so only destroys that which we seek. We cannot direct ourselves to have fun, enjoy a concert, fall in love or enjoy sex. To do so there must be a suspension of the directive faculty of the consciousness.

There are certain types of human activity which we can single out as involving this quality of spontaneity. They are singled out because they involve some occurrence of the person which seems to depend upon a spontaneity which would be destroyed by the directing powers of the mind. (I do not mean to suggest that these types do not vary by individual and group, but only to say that they have a real basis). Then the problem seems to be to understand which types of activity depend upon this spontaneity. Indeed they are the traditional areas of special protection -- privacy, sexual matters, expression, religion and physical liberty.

Spontaneity provides an explanation for tolerance in that the activity of the person is beyond the capacity (either practically or logically) of the consciousness to control. Let us take the Wolfenden report on homosexuality and prostitution, since it is a famous example of the dichotomy between law and morality. It seems to me

that there are two reasons for the legalization of homosexual activity. The first is that homosexual practices are just as capable of occasioning Good as are heterosexual practices. The second is that matters of sexuality are so profound that regulation of them would destroy the quality necessary to the person's appreciation of his or her sexuality. The net result of the second argument is not to say that I believe, for instance, that homosexuality is wrong but that I recognize that it concerns matters so profound that I will tolerate homosexuality even though it conflicts with my beliefs. The net result will be that I will say that a) I believe homosexuality is wrong, then b) I recognize that it involves matters of privacy so profound that I will tolerate it, and therefore, c) since b is based on the idea that a crass moral attitude to homosexuality is inappropriate because what is going on is beyond ideas and indeed destroyed by the directing qualities of the person, it is inappropriate that I hold idea (a) at all. The premise of spontaneity is that the well-being of the person is in certain areas beyond the direction of thought altogether.

This explanation provides a reason for the principle that that which we consider to be immoral ought not to be made unlawful. It also provides a way of applying and limiting the principle.

5. But spontaneity does not justify liberty as stated above -- that the essence of law is the creation of the realm of the individual (Hayek) or that by and large we are better off to respect each individual person's determination of his own ends.

First of all, this ground for tolerance does not state a primary principle; it is 'of personality'.

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Second, this ground for tolerance applies to all persons, including the individual person. It is not concerned with the individual person as opposed to another individual, a group or the state, but with spontaneity as opposed to directing. To the extent that tolerance is justified on this basis, it is justified because what is occurring is properly beyond the conscious control of either the subject or an outsider. It is therefore a ground for the non-interference of all -- the state, the media, private companies, the subject himself. Thus, spontaneity argues for the suppression of noise pollution and manipulative advertising as well as the prohibition of state interference with freedom of expression. To the extent that tolerance is justified on this basis, it does not concern the person as individual as opposed to the person as social, but the person as thought directed as opposed to the person as spontaneous. The person can be thought directed either individually or socially. And the person can be spontaneous either individually or socially. This is the mistake in reasoning of Hayek, noted in One, B.

Spontaneity does not then concern a realm of self-regarding acts\(^1\) (which many have shown doesn't make sense), but a way of being. Liberty in this sense does not mean the absence of power, for there is always power. Power is exercised when we are spontaneous -- either individually or in society. For our spontaneity is made up of an underlying person which is constituted, in part, by our relation with others. Liberty concerns a quality of personality which is beyond thought. That is, there is an area beyond which thought -- rationality -- ought not go -- cannot properly go. This is not to say that\(^1\)

\(^{1}\)Cf. the discussion of individual and social at Four, B, 6 & 7; Four, F, 3 and 5b, supra.
the state ought not to act so as to affect, for instance, religious faith, sexual mores or freedom of expression. For my argument is that it ought to act so as to effect these human activities, and that it is unavoidable that it do so.\footnote{Cf. the issues raised at One, A, 1.} It is that some action will destroy the spontaneity which is the essence of these activities.

Third, the quality of spontaneity then states a reason for creating conditions necessary to it. To some extent the problem is eliminating state interference which inhibits this spontaneity. The conditions include the traditional liberal idioms of restraining (for instance, the criminal law) and enabling (for instance, the law of property). But the conditions are also more general, concerning welfare, housing, architecture, town planning, health and education. In that case, the quality of spontaneity states very strong reasons for state authority.
H. Conclusion

1. The liberal point of view is practically wanting.
2. Hayek's argument against social justice is a mean trick ...
3. conceptually and
4. practically.
5. Conclusion.

1. We have examined the nature of the person insofar as is necessary to explain the experiential nature of thought and activity. The lesson is that the liberal point of view is wanting in two ways. The first is that the experiential nature of thought and activity does not justify the principle that we should respect each individual person's determination of his own ends or any other statement of the liberal principle. That is not to say that establishing and maintaining a realm of individual power is not important. Indeed, I think we have established that it can be important (i) as a delegation of authority, (ii) insofar as it furthers the quality of spontaneity and (iii) insofar as it plays a formal role in checking and balancing power in groups or the state. But it is to say that the liberal principle is not a primary principle -- it is derivative from ideas of Good and personality. And it is to say that liberty is not an exclusionary principle -- it is one of several aspects of justice.

The second way in which the liberal view is wanting is that it does not appreciate the integrating aspects of thought.

2. If we apply these insights to Hayek's argument concerning social justice we can see that it is a mean trick. Specifically, I am referring to the second part of Hayek's argument.

Rules in terms of substantive ends, specifically distributive justice, are not a worthwhile enterprise. They are not only
invidious, but impossible to attain and therefore fruitless.\textsuperscript{1}

Hayek's argument -- the standard argument that redistribution of income is futile to obtain the end of substantive justice -- is a conceptual trap. It depends upon the mistake of thinking in terms of disparate juridical units -- of Compleat Facts -- and ignoring the integrating aspects necessary to thought.

This mistake also vitiates the liberal conception of law applied to certain egalitarian conceptions of justice.\textsuperscript{2}

3. Conceptually, the second part of the libertarian argument proceeds as follows.

(1) All we have to deal with are individual, mundane, uncognizable Desires (or some sort of Compleat Facts).

(2) Since they are arbitrary (or really subjective) by their nature, there is no basis for choosing amongst them -- Michael Jackson's 10,000,000 th dollar can not be said to be more or less valuable with Micheal Jackson than with a homeless, hungry, ill, penniless person.

Therefore,

(3) Any effort to take money (or any other mechanism which has the power to satisfy Desire) from one and give it to another is by its nature arbitrary.

You can play around with this reasoning as much as you please, but to my mind it is airtight. If you assume juridical units which are arbitrary, then action with regard to those units will be arbitrary -- there can be no basis for such action.

But there is a difficulty with this argument. If we assume the arbitrary nature of Desire, (1), then the arbitrary nature of the redistribution of income, (3), is not the only thing that follows. It also follows that

\textsuperscript{1}[A,2] stated at Four, A, 3, supra.

\textsuperscript{2}See One, C, 4 and Four, A, 4, supra.
(4) Any action to protect or respect disparate Desires is arbitrary.

And

(5) It is equally arbitrary not to redistribute income as to redistribute income.

If you switch propositions (3) and (5), you will have a critique of the egalitarian approach. It too ultimately depends upon juridical units which have no content and therefore are incapable of being anything other than arbitrary. Thus,

(6) If equality and liberty, as conceived of using liberal juridical units are each arbitrary, then any choice between them and any mixture of them is arbitrary.

We cannot find any distinguishing point between protecting juridical units and redistributing them -- between liberty and equality -- which is not arbitrary. Any basis for choosing between them must have resort to an idea or insight which is outwith the mode of thought that deals in juridical units which are disparate. We have misconceived the problem.

Why redistribution of income then is invidious to Hayek is unclear to me. In logic, it could not be invidious, for having income is either arbitrary or not. If it is arbitrary then it would be equally arbitrary to protect it through law as to take it away. If it is not arbitrary, then it has meaning by relation to some ground to value not addressed by the theory and antithetical to the juridical units used. Why distribution of income is justified to Dworkin and Rawls is also a mystery to me. It must similarly depend on assumption about the nature of value which these theories do not address, and indeed avoid.

4. The assumption which must be made by both the libertarian
liberal and the egalitarian liberal must be that the real nature of these Desires is not as have expressed them. They can only have moral and legal implications in that they aspire to real, not arbitrary value. It can only be worthwhile to protect property in that its use by humans has real, not arbitrary value. And it can only be worthwhile taxing that property and giving it to another because use of that money has, potentially at least, real value. If that is the case then these juridical units represent that which is not mundane (only).

Thus the assumptions must be something like the following.

(1) Human activity has a non-mundane ground understanding of which is problematic but not impossible and which is capable of giving rise to obligation.

(2) Given the nature of the person, we are best off treating such activity in our everyday affairs as if they were particular, individual, not rationally determinable and mundane.

Thus, liberalism depends upon the creation of juridical units in order to put into practice the decision that we should treat human strivings as Compleat Facts. Money, property, rights and liberty are means of effectuating that decision. These juridical units are things which we create, not things which we find. That which is necessary to both libertarian and egalitarian liberalism -- a theory of value and of personality -- is different from the conceptions which are used to put it into practice.

If that is the case, then it is merely a trick to use the conclusions of the libertarian argument as if they were premises to justify the liberal order itself. The argument of F.A. Hayek is then merely an elaborate tautology.

And the exercise of the egalitarian liberal is equally
5. How would we deal with substantive justice if we referred back to the proper ground for liberal theory -- the nature of value and of the person?

We would not see the issue as one of rules which bring about a particular result (egalitarian) or which protect a particular result (libertarian). The lesson of the complexity of thought is that in either case we would be acting naively. Substantive justice involves issues of value and personality. Substantive justice must first be stated in terms of values which we are justified in holding in common. It must be in terms of the conditions to the well-being of the person, which conditions we seek to bring about. In that case, we do not seek specific 'results', but a general environment within which the person can flourish.

If that is the case, we mischaracterize the question if we ask whether or not to redistribute income. The question is like arguing about how to ride a dead donkey. The question is how to effectuate values and bring about conditions that occasion the well-being of people. (An individual and social realm is necessary to both). It will be true that doing these things will result in a redistribution of income, but this will be a collateral consequence, not a justification. Asking the question in terms of the redistribution of income...
will give no guide whatsoever as to what to do.
I. **Summary of the Argument**

A. **Will Not a Quality Justifying Liberty**

1. Liberalism is based in the practical principle that we are better off to respect each individual person's determination of his own ends (Desire or Will). (Three, I).

2. Desire has no conceptual basis. (Two and Three).

3. Will, if it is to be the basis for political theory, must have a practical basis; that is, it must be capable of mediating between the non-mundane ground to human activity and human activity. It must have quality. (Four, B, 2).

4. Will does not have quality because what we are doing differs from what we think we are doing. This proposition is understood by the psychological, physiological and sociological insights. (Four, D, 3 to 5).

B. **Tolerance and Liberty Grounded in Personality**

1. If these (or any other) insights are properly capable of vitiating a purported justification, then they themselves must be the makings of a proper justification. Every proper critique must employ a system of ideas which allows for the justification of activity. (Four, C).

2. The personality in all its aspects can alone act in a justificatory way because it alone constitutes the activities of the person. (Four, D, 1).

3. The person has a mixed ontological nature -- it is the continuous instant of the non-mundane being manifested in the mundane. (Four, D, 2).

4. Personality mediates between the non-mundane and the mundane. Personality has quality. (Four, D, 3).

5. The first concern of law and morality is what is personality: what is it to be a person and how does the person occur properly. Personality, not Will, is the proper unit of morality and jurisprudence. (Four, D, 4).

6. Liberty is not tenable as a primary principle of political morality, either practically or conceptually. (Four, D, 5).

7. In that case, a theory of personality is necessary to the concept of tolerance, and therefore to any serious idea of liberty. (Four, D, 6).
C. Desires Are Not Compleat Facts But Complex Phenomena

(1) Everything stated above about human activity applies to understanding, for understanding is a human activity. Understanding involves not simply the consciousness but the person as a whole. (Four, E). Thought is necessarily expressive of the person and is necessarily constitutive of the person. (Four, F, 2).

(2) Therefore, thought necessarily has a linking or integrating nature -- a thought can only be understood as part of a series which (in part) constitutes the person. (Four, F, 3).

(3) But thought is also necessarily less than integral; it is ineluctably disparate. (Four, F, 3).

(4) Therefore, thought is complex. Desires, as thought, are not Compleat Facts, but complex phenomena. We are concerned with four aspects of the complexity of thought. (Four, F, 3).

(5) First, thought is complex in that it has both general and particular aspects. There is nothing in either the general or particular nature of thought that justifies tolerance. (Four, F, 3 and 5a.)

(6) Second, thought is complex in that it is individual and social. There is nothing in either the individual or social nature of thought that would justify tolerance. (Four, F, 3 and 5b).

(7) Third, thought is complex in that it has conscious content but also content in addition to that conscious content. There is nothing in (a) the conceptual nature of thought, (b) the experiential nature of thought or (c) the not-conscious content of thought which justifies tolerance. (Four, F, 3 and 5c.)

(8) Fourth, thought is complex in that it links the mundane and non-mundane (Four, F, 3). This aspect is dealt with in Chapter Five.

D. Thought as Directive Does Not Justify Tolerance

(1) Thought can direct activity. (Four, G, 1 and 2).

(2) To the extent that we are concerned for thought in its content, there is no justification for tolerance. (Four, G, 3).

(3) To the extent we value thought-directed activity for other than its conscious content, there is no reason for tolerance. (Four, G, 3).

E. Thought and Activity as Spontaneous Justifies Tolerance

(1) Thought and activity can be spontaneous. (Four, G, 1 and 4).

(2) Thought-and-activity as spontaneous justifies tolerance
because it posits a proper working of the personality which depends on lack of interference of the consciousness with the rest of the person. (Four, G, 5).

(3) But it does not justify liberty as normally stated. It depends on a distinction between thought-directed and spontaneous activity rather than on one between individual and social. (Four, G, 5).

(4) Also it does not justify liberty as normally stated because it states a reason for creating the conditions necessary to it. (Four, G, 5).

F. Hayek's Argument Against Social Justice Is a Mean Trick

(1) Libertarian liberalism concludes that it is arbitrary to take money from one and give it to another. (Four, I, 3).

(2) Egalitarian liberalism concludes that it is arbitrary not to distribute money equally. (Four, I, 3).

(3) One can mix libertarian and egalitarian liberalism. (Four, I, 3).

(4) If one assumes that Desires are arbitrary, then both arguments are right. Essentiality any and all action will be arbitrary. (Four, I, 3).

(5) The assumption must be that human activity has a non-mundane ground, but that, for some reason, we are best off treating activity in our everyday affairs as if they were discrete phenomena and ignoring their linking aspects. (Four, I, 4).

(6) If that is the case, then it is merely a trick to use the decision to treat activity as discrete phenomena as if it were a premise to ground the liberal order itself. The argument is a tautology. (Four, I, 4).

(7) In asking whether or not we should distribute or redistribute money, we are asking the wrong question. (Four, I, 5).
"Truth is that which ennobles."

"Just as the liver secretes bile, so our minds secretes thoughts."

Chapter Five

Noble and Ignoble Thought

A. Fear and Trembling

1. Thought links the mundane and non-mundane.
2. The juxtaposition of enlightenment and depravity.
3. The ambiguity of thought.
4. Thought as inherently
   a. noble,
   b. ignoble and
   c. self-congratulatory.

1. Thought and activity are inherently concerned with the coming into and going out of phenomenal being of things, including the person. Implicit in thought is a relation between the mundane and non-mundane aspects of reality. (This is the fourth of the relations discussed in the previous chapter.) We achieve some peace of mind if we see this non-mundane aspect as a ground for our phenomenal existence. But the modern lesson is more despairing.

2. Perhaps I can make the problem real by a story.

The story is told of the Nazi SS Officer. He returns to his home from a day's work in a concentration camp. He has spent his day willingly undertaking some of the most grisly deeds known to humanity, including the arbitrary murder, by asphyxiation by gas.
of those chosen by virtue of their race. He hates Jews to the point of dedicating himself to the eradication of that race. For his evenings' enlightenment he plays on his gramophone recordings of Franz Schubert which he has carefully selected and maintained. He has a profound appreciation of Schubert's music. How does this depravity exist alongside this sublimity?

We are confronted with this problem as a means of doubting the efficacy of enlightenment, that is, understanding bettering behaviour. For those who find the possibility of enlightenment in poetry, drama, literature, music, philosophy, painting, dance, sculpture, theology, history, mathematics -- even physics and biology -- this problem is a grave one. It suggests that my understanding of Shakespeare's plays will be limited to exactly that -- an understanding of Shakespeare's plays; that an understanding of Brutus' speech in Act IV of Julius Caesar will not enlighten the other dark aspects of my mind. While an education in Elizabethan literature might enable the scholar to recognize a lost poem of Shakespeare, or enable the lawyer to draft a will, or a geologist to discover the whereabouts of petroleum, such education will not amount to anything that we might call enlightenment. At worst our learning is a functional matter, each bit of information a lost cog in an awesome mechanical device the purpose of which is too far off to be appreciated. At best it is a means of throwing light on an isolated patch of a void so profound that as soon as we distance ourselves from the patch we find ourselves in total darkness.

The problem has familiar, less dire, variations. George Elliot's

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\text{in George Steiner, A Reader 31 (Hammondsworth, Penguin 1984).}
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Casaubon seeks the key to all mythology and completely misses the joy that is before him. The American Secretary of the Interior professes fundamentalist religious beliefs yet is dedicated to the destruction of God's creation. It is a lesson that each child learns very early on that love can be mixed with cruelty and that those who are to be trusted are not those without fault but those whose faults are so gentle that they might be called vanities.

The problem is so universal that one will have great difficulty to find exceptions to it. The sublimity with which Francis of Assisi treated his fellow monks was matched by the sublimity with which he treated Sister Clare and even nature itself in the way of animals. Yet a psychoanalyst can understand Francis in terms of sexual repression, hatred of his father and then hatred of his poor donkey, the body. Ghandi's understanding seemed to be equally universal yet even a well-disposed biographer can see in his nonviolence the expression of great violence against his father, taken out on his own body in the form of sexual denial and the fasts for which Ghandi was so famous. However harsh we find such evaluation, we should not dismiss them, for to deny them may require us to adopt a wilful ignorance of the principle stated above -- that is, that the person is based in and constituted by far more than the consciousness, and indeed by more than that which the consciousness can understand. Unless we are willing to deny the importance of that which is not-conscious in all human activity, we are bound to suffer the disclosure of the dark underbelly of fear in the human person -- in every human person. Acceptance of that principle allows us to appreciate the courage of

Francis and Ghandi in meeting the fear that was within them.

3. The truth which I suspect underlies the concurrence of sublime music and genocide and which is the theme of this chapter is a much more disturbing one. It is that the officer's appreciation of Schubert's music and of his family are part and parcel of his genocide, that Secretary Watt's belief in God and his degradation of nature are of the same cloth, and that our lesser vanities are part and parcel of our virtues. Appreciation of Schubert's music is not necessary to the genocide as a 'sine qua non' (certainly one can have genocide without sublimity and sublimity without genocide). But the appreciation of Schubert's music is necessary to the occurrence in that no explanation of the event would be complete without it. It would not be complete because the appreciation of Schubert's music enabled the officer to do what he did -- that is, he did it in terms of Schubert's music, not in spite of it.

What's more, it was not any particular evil inherent in Schubert's music which enabled it to occasion such grisly deeds, but rather its very beauty. Given that the problem of the SS officer is but a gruesome example of a widespread occurrence, my suspicion may be generalized to the following speculation: ideas serve to conceal the Good and the true at the same time as they serve to reveal them. It is not so much that ideas are sometimes capable of serving falsehood and evil and sometimes capable of serving truth and goodness, as that ideas serve both purposes at the same time. That is, that while truth is ennobling the human personality it is also embodied in ideas which are secreted as the liver secretes bile.
Ideas are ignoble as well as noble.

(The concurrence may occur in one idea, in a group of ideas or in a system of thought. That is, what one idea doesn't accomplish in the way of concealment a second might and the first may only be acceptable to the person if the other is there to guard against too much light.)

Let me try to explain this speculation using Schubert's music. The appreciation of Schubert's music is an appreciation of beauty pure and simple and may have all of the clarity and simplicity which characterises appreciation of beauty. In this aspect it manifests an understanding, even a goodness (even an enlightenment) which we admire. This is not to say that some ideas are not just perverse, but that this is not one of them. Our officer can really -- not as a rationalization or an affectation -- claim an appreciation or understanding from listening to Schubert's music. And this idea may serve to convince him that he is noble, even though he commits misdeeds.

Also that understanding is Teutonic -- that is, it is cultural. It is a beauty through which the officer can perceive some very transcendent reality, but the mechanism of that viewing (at least to the officer and certainly not of necessity) is particularly Teutonic. It is the result and expression of a particular culture. Thus, although the music does not state a reason for genocide and does not even suggest a threat to Teutonic culture, it performs another function, another disservice. It says that the guard can aspire to nobility and enlightenment through ideas that separate him or distinguish him from other cultural groups. He can be enlightened as
a Teutonic and hence feel affinity (community) for others and can do all sorts of things to other groups without jeopardy to his dignity. Thus, he can aspire to enlightenment while at the same time feeding his perversity. It would be tremendously difficult for a creature of any sensitivity whatsoever to engage in insensitive activity of either a venial or cardinal nature without the benefit of ideas which enable him to believe that his own dignity can somehow be held intact.

It may well be that certain rather base creatures are entirely capable of being utterly perverse without the least concern for anything even purporting to be human dignity. One doesn't need much in the way of ideas in order to be utterly perverse. And although this kind of perversity is of note, I think that the greater depravity comes from those -- the vast majority of us -- who have some conception of human dignity. For the cool truth is that once the seed of human dignity has entered our mind, perversity is not as easy a matter as it once was. And we must employ mechanisms to help us out; for instance, the separation of ourselves from our evil acts by an intermediary, such as the state, or the use of myths to justify the violence.

We need conceptions of enlightenment which enable us to be somewhat perverse. Our ideas of what are Good and noble are also and at the same time about what is evil and what is ignoble. And if we are not always successful in embodying those two aspect is one idea, then we will have to take several into our minds at a time in order to allow us to be only as Good as we can stand to be at a time. The

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1. It is difficult to have conceptions of beauty which are not cultural.
conjecture of this chapter is that almost any thought at any level -- of religion, of social morality, of politics and of law has both noble and ignoble aspects.

4. The elements of this conjecture about the quality of personality are then as follows.

4a. The first element is that our minds seek to understand reality, including what is Good. This effort the mind undertakes by its nature. It is a logical possibility that some never seek to apprehend reality, just as it is logically possible that some seek not to eat or to survive. But seeking truth and survival are part of our nature. (It might be more important to note that there are many for whom this exercise is fairly trivial.) Nor do I think that understanding reality, as an intellectual act, is the major difficulty. The quality of our minds may be (and I think is) such that we are logically capable of understanding a fair piece of reality, including Good. Thus, I appreciate the maxim of the natural lawyer that the Good is writ large in the heart of every person, and the Socratic belief that truth is in every soul and the true teacher acts as a midwife.

4b. The second element of the conjecture is this: that the reality which our mind would seek to understand poses a threat to our being. That is, reality is of a nature so as to make it very difficult indeed for human beings to accept it. For instance, the reality of both sex and death, the two great drives according to Freud, are such as to mean the disintegration and ultimate futility of any one human person: through love and sex its disintegration to mate and successors; through death its extinguishment (at least in its mundane manifestations). As to morality, I believe that we must ultimately
conclude that there is no other than an arbitrary way to distinguish our own interests from that of others -- that when left with a single piece of bread we have no basis other than fear for putting into our own mouth rather than that of another. Hence understanding and insight pose a real problem for the person, for they are about its demise. Real understanding and real moral obligation place an unbearable burden on human perception. And thus we can doubt the wisdom of the statement that that which is Good is writ large upon the heart of each person, for between that which is written in the heart and the consciousness is such a storm of blinding fear that we ought to have little faith that that which we are perceiving is divine script rather than a product of self-delusion.

Now it is certainly true that some few people are capable of overcoming the barriers to understanding -- we can point to Ghandi, Jesus of Nazareth, Buddha and can certainly understand the point that those who overcome such barriers aspire to divinity. We may say that genius consists of this special understanding. We may even say that many are capable of flashes of insight while generally placid. I think that great artists actually often perceive in a manner in which the concealing element of ideas becomes insignificant. When Schubert wrote Death and the Maiden, when Mozart composed his Requiem, when Hume wrote A Treatise of Human Nature, when Nietzsche wrote Beyond Good and Evil, they created without any significant concealment factor -- they may have been perceiving, and using their ideas to perceive reality as directly as one could imagine. (Indeed it is something of this white heat that many authors try to capture in stating the necessity for thought not to be bound by any type of
categories.) But the fact that they are created as the result of a special insight does not mean that they are not capable of being understood in a way which conceals as well as reveals truth. For instance, I think that Hume's scepticism, Smith's invisible hand and Bentham's utilitarianism were all in their infancy ideas which revealed much more than they concealed. But today I think that they are all ideas which conceal more than they reveal. So my conjecture is not that every idea -- either in logic or history -- is vain because it conceals. Some thoughts provide real insights, and some thought provides insights which are psychologically acceptable only because they incorporate an ignoble element. The cause for despair is that the idea may be used in a way that provides an illusion of nobility while occasioning ignoble activity. The insight which a great person can safely have (or even in Nietzsche's case the reality which one experiences when one abandons psychological health for reality) may be one that another is not capable of or not willing to undertake.

Some people depend upon noble ideas for perverse lives -- Hitler, the SS Guard -- and some look into reality without protection and seem to go mad as a result -- Nietzsche, Weber, artists, philosophers and saints -- and some few seem to glare almost directly at reality -- Ghandi, Mother Teresa, St. Francis -- and have somehow accepted the demise of at least the more garish elements of their personalities. But most of us maintain psychological health and avoid corruption by not understanding too much. "Any society which contains any substantial percentage of saints, philosophers and artists is inherently unstable."¹ There is little place in an ordinary, healthy

life for profound insights. They are systematically excluded because we could not carry on our day to day activity with a constant awareness of our disintegration. For the human being to function, that is, for all but the exceptional persons (not intellects) among us to function, we must control this natural inclination to understanding by means of what Freud calls illusions. An illusion is that which is not necessarily false so much as a belief in which 'wish fulfilment is a prominent factor in its motivation, while disregarding its relations to reality . . . .'.

It is said that each one of us behaves in some respect like the paranoiac, substituting a wish-fulfillment for some aspect of the world which is unbearable to him, and carrying this delusion through into reality. When a large number of people make this attempt together and try to obtain assurance of happiness and protection from suffering by delusional transformation of reality it requires special significance.

4c. Thus, to function properly, ideas, or sets of ideas, must have a third element. First, they must have a noble element. That noble element provides the understanding that our mind seeks and without which our mind is not satisfied. Second, they must have an ignoble element, one that conceals the true nature of reality and moral understanding. And third, they must convince us that they are noble in order for the concealment to be effective.

B. The Ontology of Fear.

1. Nature of Fear.
2. Good.
3. Fear, ontologically.
5. The ontological nature of the person.

1. What then is the nature of this fear that inspires ignoble thought, and what is the Good that inspires noble thought? For their meeting will tell us something about personality and its implications for law.

2. Chapters Two, Three and Four assert a non-mundane ground of (truth, and therefore) Good. That ground will have at least the three characteristics mentioned: pervasiveness, content and integrity. Integrity is the characteristic that is important here. Truth, and therefore Good, must exist separately and distinctly from our conception of it. For truth to be real it must be other than by virtue of a human mind. And for Good to be binding, that is to have any ground for human morality whatsoever, it must be other than by virtue of wishes or thoughts of the human mind.

This then is my argument. To understand -- to apprehend truth -- means that I apprehend that which is separate from my mundane person (that is, the transient aspect of my person). (It may be intimately tied to my person, but it is more than my person -- at least the transient aspect of my person.) For me to understand, appreciate and act concerning Good means for me to act in a way which denies the phenomenal 'me'. When I appreciate flowers and plants in my garden, I

1 See Two, E, supra.
am denying the 'me' for the beauty of the plants. If I am an historian, understanding a past separate and distinct from myself, yet one which speaks to myself, ties me to a reality which is distinct from my mundane self. When I love, whether in a romantic or friendly way, I am painfully and often ecstatically aware that I am losing the 'me', giving myself to another. That which is Good is external to the mundane 'me'.

It is not necessary that I wish to lose the 'me' or even that I be conscious of losing the 'me'. I can become involved in an enterprise, say the study of history, only to realize later that it has happened that I am in a sense beyond myself. I find myself in a relation with my parents that I have not consciously made, but which forms a great deal of my life and which is often the cause of such anxiety because it is the first and most powerful loss of self. I am not me as determined by me; I am many things and greatly made by my parents -- by their laughs, and their habits. Certain characteristics describe this loss of mundane self: a) I do not constitute myself (logical); b) I am not in control of my constitution (psychological); c) I am a result as well as a cause (the ontological integration of self with reality).

What is worse is that we would have it no other way. If we could abstract out of a life all of these losses of self -- friendship, community, beauty, religion, understanding, play\(^1\) -- we would merely have removed that which is worthwhile. What would be left is a mechanism that occurs -- the transient self. A life without this dissipation would not be much of a life.

\(^1\) Underscored are the six basic values of John Finnis, Natural Law and Natural Right (CUP 1980) (missing is practical reason).
Nor is it necessary that the dissipation appear as suffering. Loving, having pleasure, contemplating -- as well as suffering, each are ways of giving up, or of realizing that the giving up. Marriage and falling in love causes stress and therefore colds.

To make sense of this fear we must distinguish between the mundane and non-mundane aspects of the self. One aspect is the self in space and time -- the mundane self. Another is the self that is more than that which is in space and time. (It is still possible to believe that without phenomena there would be no David -- that the space and time occurrences are necessary to my being me.) The self as transient and fear laden, the self in time and space is not Good in itself. To the extent we can appreciate it as Good, we can do so in that it partakes of an element which is not only transient, not only in space and time. To the extent we accept our passing, that is, accept our non-mundane element, we need have no fear of its disintegration, because it is not of time. It is the pain of understanding that we are transient which creates fear.

Thus I can appreciate myself even though that self is not determined by my consciousness and even though I am transient, for the self I am appreciating has an aspect, a noble aspect, which is separate and distinct from the transient self and the consciousness. We all recognize a distinction between a self-love which is part of self-respect and a self-love which is inspired by vanity. We are familiar with a self-love which treats that which is external to the transient self as unimportant and which revels in what are essentially vanities -- looks, talents, wealth, fame, Three, B, supra. Three, C and Four, B, supra.
all those elements described in Boethius The Consolation of Philosophy\(^1\) and in Ecclesiastes. There is another self-love which is manifested in self-respect, a self-respect which may involve very much the same elements as egotistic self-love -- caring for one's physical person, developing and caring for one's talents, and even caring for oneself which involves reputation and wealth. There is a difference between vanity and self-respect: in vanity, the transient ego is loving, in a perverse way, transient aspects of the person -- not loving in the sense of giving up, but loving in the sense of clinging for security to the transient out of fear of its transience. In self-respect the self is taking care of these aspects in the understanding of their transient nature, that is in the context of, rather than against, their transience.\(^2\)

3. What is fear?

It is a condition of the person experiencing that the self is transitory, that is, a phenomenal being. Calling it experience means that it concerns more than awareness -- it concerns our whole being, psychological and physiological. That experience is so endemic to our nature as a phenomenal being, that it is a quality of personality.\(^3\)

Death, the knowledge and anticipation of death, sickness, physical vulnerability, the gradual growth and decay of our bodies, the coming into and going out of being of other beings are such expe-

\(^1\) (Hammondsworth, Penguin 1984).
\(^3\) Cf. quality in Four, B, supra.
riences. The very nature of being in space and time, that is, of change, provides a continual experience of the transience of the person. Freud gives

the three sources of human sufferings, namely, the superior force of nature, the disposition to decay of our bodies, and the inadequacy of our methods of regulating human relations in the family, the community and the state.

(These are the relation of self to self, to other and to nature.) This fear gives rise to needs for physical security and basic health. It also gives rise to sexuality as a means of 'procreating' oneself to overcome death.

It can be seen in simple requirements like the need for nourishment. Transience is nowhere more apparent than in our stomachs -- from appetite, to procuring food, to eating and once again to appetite. It is a cycle that cannot be overcome. We cannot do away with our need for nourishment. Nor can we satiate ourselves sufficient for the appetite to be doused for any length of time. Nor can we secure enough food to guarantee us against the future, for it will waste and decay.

In religion, we express this as the continual search for meaning and the continual disappointment.

In philosophy, we express this fear in the problems of meaning and change. Our experience of meaninglessness is in that we cannot understand and articulate ideas of values which would satisfy us. Nor can we understand reality in a way that does not convince us that we are its victim. Our experience of change is that we cannot step into the same stream twice -- we cannot grasp reality in a way that enables us to understand it or deal with it. Our failure to under-

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stand and our powerlessness are all felt in the transitory and ephemeral character of our identity -- what we are escapes our grasp.

This experience of fear gives rise to what psychologists call 'control'. It refers to efforts to act so as to convince ourselves that we are controlling reality when in truth all we are doing is changing reality. In terms of food it would be seen in, oddly, excessive concern with weight control, as well as over-eating. In epistemological terms it would be seen in need for prediction and certainty. In terms of physical needs it will be seen in terms of excessive concern for brute force. But any effort to impose our will upon nature is vain not only because we cannot know the consequences of what we are doing, but also because we cannot really even understand why we are doing that which we do, for upon examination it turns out that our purported reasons for doing things are very different from our real reasons.

Fear also gives rise to basic destructive impulses. In terms of fear of death -- Freud's death wish and hence violence against oneself and others and nature. In terms of nourishment, anorexia, boleemia, smoking, alcohol consumption.

What is the proper attitude to the relation between the transient and transcendental self?

Pyrrho used to say that there is no difference between dying and living; and a man said to him, Why then do you not die? Pyrrho replied, Because there is no difference. ¹

4. The truth is that people are more often and more strongly moved by reference to fear than by reference to Good and truth. If you want to win an election, influence the outcome of a vote in

the legislature, sell cars and mouthwash, make a popular television show, advance your career, or make money or attain fame -- if that is you want to move people -- then do it by reference to fear and human vanity rather than by reference to truth or the Good. And this is not because people hate self-righteousness; rather people hate self-righteousness precisely because it seems to ignore fear and vanity.

The truth also is that the most powerful insights are insights about this fear: that the devil in Paradise Lost captures us more than does God, that Thomas Hobbes understands the human condition more than does Thomas Aquinas, and that Dr. Freud touches us more than does Dr. Jung.

It is also, I think, true that one can better understand human behaviour by understanding this fear than by any other method. Murder, rape, theft, destruction of nature, war can better be understood by reference to some profound fear (or if you will an inability to deal with this deep seated fear) than by any factor or reason attributed to the actor by himself. Nor are other human acts, less perverse ones, any less explicable by means of fear. The institution of property, the practice of shaking hands, gossip, and most disagreements from the petty to the violent are more about this fear that about anything else. Perhaps the damage caused by the fear is so venial that we call it vanity, but nonetheless the principle is true that we can better explain human activity as a manifestation of fear and hence of the nature of being a person than as the pursuit of truth and Good.

The insight about fear can lead to an admiration for those who
are capable of maintaining grace in adversity. We may respect people who are loving and caring and good-natured, but we especially respect people who are these things with the understanding of the human condition. This courage, if I may call it that, consists of a state of mind and a human solidarity in the face of fear, but not a faith in human the human capacity to govern his own fate. This insight about fear is a source of humility -- of the sort of humility for instance which one finds in religion -- that is, humility before that which is not transient. The insight enables us to appreciate the vanity which is behind most human actions. Even where fear is not so great as to result in perversity, it occasions. Therefore, understanding the person concerns understanding the little mechanisms by which one avoids or puts off this fear. The insight I am talking about leads one to a sense of irony and comedy in human affairs. Each of these -- pettiness, comedy, irony -- concerns the futility of human action. Each of them laughs about human action in its own way. That is, the realization that fear is a greater motivation than is the wish to do Good, leads -- logically -- to a doubting of Will rather than a faith in it.

5. The human personality is the field upon which the transient aspect of the person meets the non-transient aspect. The person arises out of its experience (conscious and not) that it is transient -- that I am going to die, that I get hungry and cold and wet, that I am insecure and that any satisfaction of this insecurity through transient matter is itself transient, that I can never be made secure but can only hope for the illusion of security or else for the strength to live with that insecurity. The person is
transient as he comes face to face with reality; hence the person is what he becomes by virtue of this cosmic meeting. But that becoming is undertaken on a stage of reality on which the person and the externals are real, including the reality that that which is worthwhile is distinct from the mundane, including the consciousness as mundane.

Hence human understanding and activity must be taken as the crops of this field of personality.
C. Fear and Human Understanding.

1. Thought as an expression of the person.
2. And therefore born of fear -- the three elements.
3. Applied to the scientific method.
4. Evaluating systems of understanding.

1. We can appreciate human understanding then not only in how well it captures reality, for that is but an aspect of it, but in how well it works in relation to the person. We can appreciate thought, not in how well it reports some external reality -- some 'is' -- but in how well it contributes to the person.

2. In order to appreciate a system of knowledge we must understand three elements of it.

First we must recognize that it is grounded in fear. Thought is a response to this fear.

In order to deal with fear, the system of knowledge must exclude a certain amount of reality -- that which is unacceptable to the person for any number of reasons. Freud's idea of sublimation expresses this exclusion of that which is psychologically disturbing. In that sense it will filter out certain types of disturbing reality.

The system of knowledge will also use categories of thought to exclude at a less Freudian level reality which is inimical to us. It will impose an order of ideas on the chaos of reality for that order is necessary to our psychological health. That need for order means that we may seek categories where there are none and find explanations where there are none to be had. It will bring about the illusion of (logical) certainty which we can call (psychological) certitude. Systems of thought are in part tools by which our minds
perceive what we need it to perceive and ignore that which would disturb us, that which exposes the frailty of our mundane existence. It means that our ideas are vain for they give us an illusion of reality and are necessary to our illusion of controlling reality.

One way it brings about certitude is by being a closed system, one that allows us to explain everything. An example is the economic theory of law which speaks about how law maximizes the wealth of society, because essentially there is no decision which cannot be explained in those terms. The theory explains both the result and the contrary and therefore it says nothing at all. One need not even go this far however. One can simply note that the attraction of a system may be not the insight it provides but that it provides an explanation for every decision -- for every problem. Its attraction may be as much in that it explains every decision as in how it explains every decision, for in explaining a decision a burden has been removed from our shoulders -- the burden of all the frightful elements which go into every decision and the burden of no explanation whatsoever. It seems to me that many systems in their vulgar embodiments have this attraction -- utilitarianism, Marxism and egoism.

Thus, thought is ignoble in so far as we use it to avoid perceiving reality.

Second, thought is the product of a propensity to understand reality in spite of our fear. Our minds are posed with the problem of how to respond to our cosmic fear while at the same time satisfying our appetite for insight. Thus a system of thought must provide some understanding, must provide some ignorance and must convince us
that it is providing understanding. The beauty of the noble element is that it creeps into even the most repressive of systems, irritating where there is repression and resulting in some understanding despite our most exaggerated attempt to avoid reality. Thought is noble in so far as we can use thought to perceive reality despite our propensity to avoid such perception.

Of course the obverse is true: since we make systems of knowledge so that we will not understand too much, ignorance will creep into every system of knowledge. We could just as well appreciate ideas as systems of ignorance as appreciate them as systems of knowledge.

Third, the system of knowledge will have to persuade us that that which results is indeed understanding which is worth having. That understanding which does not fit within the system will be demeaned as a means of reassuring oneself that that system is indeed one which brings about knowledge. Hence Wittgenstein's statement that about which we cannot speak we must be silent and Bentham's derogatory statements about natural rights can be seen as puff.

3. Let us take as our example the scientific method. It depends upon sensory data as the starting point of thought. It is characterized by a dichotomy between the theory used in a case and the facts used to fill up the theory which are based on sensory data. The scientist will begin with a theoretical statement, or an hypothesis, which is meant to have no other basis than its ability to comport with sensory data. The hypothesis is modified by its relation to sensory data. The scientific method and the great criticisms of
the scientific method -- that scientific insights are really made by intuition, that scientific discoveries relate to the values of the time, that the scientific method can only result in negative truths (that is that the facts can be used only to disprove an hypothesis rather than to prove one) are stated as if the method were a process of thought which has some logical quality which enables it to produce some truth when properly performed. I do not think that it can have this quality. It is more appropriate to describe this system of thought in terms of noble and ignoble thought, that is, as an experiential rather than a logical process.

The scientific method enables me to exclude certain reality from consideration. The ability of the scientific method to exclude reality is essential to it. By the scientific method I exclude from my consciousness that which is mystical or magical. The means by which the scientist does this is to conceive of things without their essence, that is to conceive of things as 'facts' in the sense we mean them today. Chapter Three, above, presents the 'is' of Hume as a human artifact that enables us to deal with nature by demystifying it.

The reason for this exclusion concerns the personality, not the logical properties of thought. That is, if we were to perceive reality without protective glasses, we would be too dazzled by the light. To lessen the intensity of reality, to remove the feeling of futility of dealing with nature and to have the confidence needed to do whatever we are going to do, we need to remove the magic from reality. The scientific way of thought, like primitive mythologies, is a

1 See Three, supra.
method of dealing with mystical forces beyond our control. Just as
the myths of the ancients explained and characterized nature in a
way that made the worst elements of nature acceptable to the human
psyche, so science attains the same result. But instead of taming
the magical elements, science simply eliminates them.

Necessary to this effort is the exclusion of moral concerns. The
scientific method has us deal in 'facts' and a process of thought
which excludes the non-mundane and brings about results which we can
state in 'neutral' terms, that is, results which do not depend upon a
normative commitment for their statement. We end up saying that if
you let go of an apple (while standing on the earth) then it will
fall to the floor and if you break into another house then you will
have engaged in an act which will at law entitle a judge to put you
in jail. The scientific method enables us to think and speculate and
act without having to deal with the moral aspects of that thought and
action. It enables us to think and act and speculate without so much
understanding that we would be paralysed by our own fear. It does
this by distinguishing 'is's' from 'oughts' and alleging that the
truth of 'is's' are separately revealed to us by means of the scientific method -- experimentation, hypothesis. In the abstract, the
'is' is distinct from the 'ought' and therefore the scientist learns
the doctrine that he can play (we have given him a playfield in
which morality is excluded) with the 'is' without being concerned
with the moral results. This is of course a fiction. The method
eliminates values psychologically, but not logically.

My contention is not that some scientists are not concerned with

\cite{footnote}

\footnote{Though by the argument above, values are implicit.}
how their results will be used. It is that that concern does not come from the method which is employed, for the method which is employed eschews moral considerations as it is being employed. The scientific method deals with intractable moral problems by eliminating them from the consciousness for as long as is necessary to enable the speculation to continue. In one respect it can be viewed as the most the most gigantic system of avoiding moral responsibility (Sartre's bad faith) imaginable.

That is why scientists are portrayed as cool characters in white jackets speaking in quiet tones -- the language of the defense department, the language of cost benefit analysis, the language of the doctor about to operate. The fact is that the chemist who is constantly concerned with the morality of what he is doing will do almost nothing at all.

Secondly, the scientific method does indeed respond to the need of humans to understand reality. In several ways, the scientific method enables people to have insights they wouldn't otherwise have. In part it attains this result because of the security it provides by insulating us from the moral significance of our thoughts and actions. In part it achieves this through the distance it gives us from that which we are trying to understand. In part, 'facts' provide a foundation (with perhaps an illusion of certainty) upon which some insights can be made -- that is, they act as a conventional starting point. In part, 'facts' and the scientific method are sufficiently non-emotional that they enable the thinker to find new thoughts without having to fear them. The scientific method provides a sort of ritual which enables us to deal in a cool way with things that are
very hot.

These are experiential rather than logical occurrences. The scientific method minimizes the obstruction of fear, dread and anxiety. It is not concerned with the logical process which one must follow to reach a conceptually true result, but with creating a condition by which we distance ourselves from the black magic in them. It may create a condition akin to dancing or playing music, and be a method of perception like meditation, prayer, Yoga, and church ritual.¹ Or it may create one which is more of a discipline and restraint, what I refer to as formality. Methods of reasoning restrain the mind of the thinker by effectively having others -- his fellows, his society -- looking over his shoulder as he works, or thinks. The logical process is a method of having one think in society. But in either case it concerns the proper working of the personality, not the machinations of thought.

Third, no system of knowledge has been more successful than the scientific method in persuading the thinker that what he has attained is actually knowledge. The certitude with which the scientist grasps his facts and theories is astounding. What is even more astounding is that those who have little grasp of what any particular scientist is up to have this same faith that the work of the scientist will provide an answer to the most horrible of problems.

The scientific method brings about that illusion of certainty which is so often remarked to be so important to human needs. Facts are those items which have their major element

¹Like spontaneity, above.
of uncertainty extracted from them and which are by and large under the control of the human mind. The system of facts is a system by which we can characterize things in a way so as to make them acceptable to us.

4. You will recall that I have said that the 'proper importance of rationality' is that an idea will have a quality to it which it gains from a reality other than psychic need. The point of the last two chapters is that ideas will have this quality not as the result of some logical or rational process. They may have it as a result of the person being emotionally secure enough so as not to avoid reality. They may have it as the result of a particular method which suppresses fear for some moments. This to me is the value to methods of thought.

If we want to know how a system of ideas deals with fear by sublimating some thoughts and by bringing about certainty in the human mind, we will look to the system of ideas as a method relating to the person (not 'individual'), not the logical properties of thought. If we want to understand how the system of ideas brings about the illusion of understanding, we will have to do the same. And if we are to understand how the system of ideas brings about real understanding, we will have to do the same. The real importance of a system of ideas as a method of bringing about understanding is in how it creates a condition which overcomes fear and allows the mind to see reality.

The importance of this argument is this. The judgment of the worth of any system of thought cannot be made by reference to its logical properties, nor by reference to its supposed ability to
result in some sort of truth, nor its characteristics as a system of suppressing true reality. The worth is by reference to personality. Does it make us secure enough to get on with things? Does it pamper us and therefore act unnecessarily to avoid reality? Does it reveal reality? Are its methods of vitiating fear venial rather than cardinal in nature? It is a complex and qualitative judgement -- it is not an all or nothing proposition. That is, it is practical, not pure.
D. Morality and Fear

1. Morality as a product of fear.
2. Morality ignoble.
3. Morality noble.
4. Morality justificatory.
5. We ask the wrong moral question.
6. The proper task of morality is to overcome fear.

1. We can appreciate systems of morality not only by how well they embody a ground to human activity, but by how well they work in relation to the person as a whole.

2. A moral system is ignoble in how it hides the unpleasant and difficult reality that Good is of a nature which is threatening to our person and that our moral obligations are such as we can never hope to fulfil them. We simply cannot live with the idea that we have an obligation to do Good without regard to ourselves.

The purpose of a moral system is to limit our obligations as much as to establish or extend them. Nearly every discussion concerned with moral principles is concerned with how one's moral obligations are not as great as they really are. (The moral system is also meant to eliminate the nagging problem of continually dealing with moral issues. On the one hand this is necessary in order to get anything done; on the other it is because our persons cannot take the anxiety which is occasioned by moral problems (to me they are not so much moral problems as problems of reconciling personality to morality) -- moral systems are more concerned with eliminating moral difficulties from the consciousness than dealing with those problems).

I can use the example of religion to explain this point. For we
are all familiar with religion, belief in God and practice of that belief as an escape from as well as venture into reality. That is, one can use faith, and the idea of a divinity as a means of avoiding the difficulty of coming to terms with the disintegration of our person.

The liberal way of viewing morality acts to eliminate the greater part of our obligation from consideration. The plenary obligation to do Good without special regard for oneself is reduced to a duty

- owed to others, not to Good;
- to leave them alone, not to help;
- as individual persons, not collectively;
- in terms of physical harm to person and property, not other types of effect.

3. A moral system is noble in how it enables us to perceive and act upon that which is Good. In that Good is inextricably tied to the disintegration of the person and that the basic moral truth is imical to the mundane person -- that is no mean achievement. Let me take religion as an example. Church ritual and dogma can all be explained as means on individuals getting beyond themselves, breaking down the barriers of the mundane person. Systems of morality enable us to grasp some moral reality which is a threat to our person.

The beauty of the noble element is that it creeps into whatever we are doing no matter how great the ignoble element. No matter what psychological reasons went into the original impulse to practice a religion, that noble element will be found.

4. Finally, the moral system must convince us that our actions are justified. The system of morality will have to persuade us that
that which results from the moral system is indeed moral or justified.

One aspect of ignoble thought is to answer a very deep seated desire to be moral. That deep desire is in the simple truth that we find ourselves with power -- the power to make decisions, the power to affect others through argument and approval and disapproval, the power to affect people through law; not only must we exercise that power but we must convince ourselves that we have done so correctly. In moral terms we justify our actions and in legal terms we make action legitimate. Thus moral principles conceal from us that part of moral reality which is unacceptable while at the same time convincing us that we are acting in a justifiable fashion.

Liberalism justifies conduct by separating it from other aspects of human activity. The system of negative rights -- rights which constrain conduct -- is first and foremost a moral system which tries to fulfil the purpose of a moral system described above. The liberal system does this in several ways. First, it draws a boundary around the person. That boundary is meant to deal to some extent with the problem of fear, for to some extent it makes the individual person secure. The system of property and personal rights makes the person somewhat secure from outside interference and allows the person to be somewhat secure physically and in terms of food, clothing and shelter. It also creates a certain psychological security. All of that may act to enable the individual to reach some level of understanding simply because he feels more secure.

One particularly important element of this scheme is to hide the
fact that the true purpose of most acts is to avoid reality rather than to deal with it. Acts are not seen along a continuum of recognition-avoidance, but in one of two categories—allowed and prohibited. The yes/no nature of this system is very attractive for it works to eliminate the great doubts and uncertainties which arise from the impossible nature of morality and the primeval psychological fact concerning the disintegration of the personality.

5. This appreciation of fear and truth makes rubbish of the great questions of morality. How does one know what is Good? How does one balance or weigh goods?

First, why do we think that knowing what is true or what is Good is such a great intellectual difficulty? More precisely, what is the difficulty? If truth, and thus Good, exists—and it is difficult to ask the question in a way that does not mean that it does—then why is there at all a problem of perceiving it? Its existence means that it reveals itself. Problems about the ability of the human mind to apprehend truth state the problem in a false way. We would not ask of anyone in a cosy room with a blazing coal fire if he had the capacity to feel heat. If he did not feel heat we would seek to find out what was between him and the heat. In the same way I am not sure that it is even a real question as to whether we are capable of perceiving that which exists. The question is how are we shielded from that which exists, or more precisely how we shield ourselves from that which exists. The greater problem of morality is not how to perceive Good but how to remove the barriers which prevent Good from being evident. The problem of knowledge,
the problem of perception of the Good, is a problem of personality rather than an intellectual one. The real problem in morality is almost never whether X is Good, or how to balance values, it is how to overcome fear. My difficulty in knowing whether X is Good comes from my emotional fear that once I realize it I will have a great difficulty in living with myself and not acting accordingly. (If you want to judge the truth of this argument, then simply note the next time some one seeks to persuade you of something, or you seek to persuade someone of something, how nearly all the objections made can be traced to psychological concerns rather than to intellectual ones; they may come out in intellectual terms but they will not down deep be that. You will note that the great lawyers, the great orators, the great persuaders are those who understand the psychological difficulties that everyone has in accepting any change of thought -- the questions are not be "Is this true?" but "How will this affect me, my thought, my thought systems?".

Second, why do we think that conforming our activity to certain prescriptions is morally significant? We ask the question in terms of what reference or standard for conduct we use. Yet conforming our activity to certain prescriptions or rules sees morality in fragmented and naive terms. Human activity concerns the condition of the person, not the ability to use an epistemological system, or to conform one's conduct to certain principles.

6. The proper task of human morality then is to overcome fear, not to prescribe conduct or the right.¹

And this is then how I explain Sartre's 'Bad Faith' as well as

¹Compare this to the point of view of Santayana at One, B, supra.
all other readings of existentialists. Governing one's own actions by reference to some externally declared Good can simply be an effort to deprive oneself responsibility -- an effort which is, given my idea of fear, a motive behind all systems of morality. But also, governing one's actions by reference to some external Good can be (or might be at the same time) something real and admirable. The two statements depend on different ideas of Good. If Good is real, and if it is really perceived, then Good may not be the denial of responsibility but the taking on of responsibility. The task is not creating the Good, or perceiving the Good or acting in terms of the Good -- for they are not so much tasks as occurrences. The task is overcoming fear, that is, taking responsibility for (accepting, recognizing) the inevitable degeneration of my own, transient person. And Good does not so much inform us how to do it and does not make our decisions for us. It only informs us that it must be done.

From this I conclude that moral systems are about ignorance as well as knowledge, about avoiding Good as well as doing Good. They need also be about aspiration, that is dealing with fear and overcoming it.
E. Fear and Personality

1. A conception of personality.
2. Needs:
   a. physiological,
   b. safety,
   c. belongingness,
   d. esteem.
3. Values:
   a. acceptance of oneself,
   b. acceptance of others,
   c. true relation with reality,
   d. spontaneity.
4. The nature of needs and values . . .
5. related to fear.

1. Let me give a conception of personality. It is not offered as true, but as a conception from which, as an instance, we can understand the relation between law and personality. In particular it will help us understand morality and law in terms of a unified conception of the person and one which takes into account the ontological nature of the human set forth above.

The one I shall present is adapted from the work of Abraham Maslow. It is not a systematic philosophical conception, but one which is truly experiential -- the fruits of Maslow's work as a psychiatrist. Compare this conception of the personality to the conception of the person that is implicit in modern jurisprudence and you will understand my point that Arthur should not seek his enlightenment in jurisprudence, but elsewhere.

2. The Person is understood in terms of 'needs' and 'values'.

There are four types of needs:

a. The first are physiological needs such as food, health, exercise, and sex. No list will do justice to the simple needs of the person in its physiological aspect.

b. Next are safety needs -- security, stability, dependency, protection, freedom from fear, anxiety and chaos, and the need for structure, order, law and limits.

We may generalize and say that the average child and, less obviously, the average adult in our society generally prefers a safe, orderly, predictable, lawful, organized world which he can count on and in which unexpected, unmanageable, chaotic or other dangerous things do not happen, and in which, in any case, he has powerful parents or protectors who shield him from harm.

Lack of order manifests itself in mistrust, 'jungle world view', insecurity and 'being on guard'. Safety needs refer not only to physical security but to an emotional view of the world as friendly rather than hostile.

c. The third are belongingness or love needs. They concern being rooted in terms of geography and in terms of people. Hence they involve need for friendship, sense of community and love relationships.

d. The forth are esteem needs. We need self-respect, that is, a sense of our own worth. Maslow uses the following words to describe these types of needs -- strength, achievement, mastery, competence, confidence in the face of the world, independence and freedom.

We also need the esteem of others. He characterizes it by reputation, prestige, status, fame, glory, recognition, attention, dignity, appreciation.

3. At another level are values. They are characterizations of:
the self-actualizing person, or in my terms, they are manifestations of the proper working of the personality. The self-actualizing person has a *Wholeness* as opposed to the disintegration of, for instance, the SS Guard. They are characterized by a *simplicity* as opposed to complexity which manifests confusion. Simplicity manifests an acceptance of oneself, of others and of nature.

a. Acceptance of oneself is manifested in a lack of artificiality, pose or straining for effect. It manifests an ability to have a perception of oneself which is not too far out of line with reality. Maslow calls it 'a superior awareness of one's own impulses, desires, opinions and subjective reactions'.

Acceptance of oneself means having a clear understanding of one's relation with others and with natural reality.

It involves a sense of *Uniqueness* as opposed to loss of self. And *Autonomy* or *Self-Sufficiency*, that is an independence of the physical and social environment. Self-actualizing persons are detached from the conventional and like solitude. They are not dependent upon the society for satisfaction, but on the use of their own potentiality. They do not give up, or seek to give up, responsibility. They are more problem centred than ego centred. They are not a problem for themselves and not so much concerned with the self. They are concerned with some mission in life, some task 'outside themselves'. They are concerned with basic issues, eternal questions, with important values. They are not concerned with petty matters.

The ability to have a clear conception of oneself is also called

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1 Id. at 158.
2 Id. at 62.
3 Id. at 158--9.
Detachment. It is characterized by a need for solitude or privacy, by an ability to concentrate, and by being self-governing and self-disciplined.¹

b. Acceptance of others is called **Friendship** (Community). Self-actualizing persons have a flavour for mankind, a sympathy, identification, affection for humanity. They are capable of fusion or bonding in interpersonal relationship. Hostility is not character based, but deserved -- for the benefit of someone or for something real and practical. They relate to others regardless of class, education, political beliefs or colour.

c. Acceptance of reality is manifested in an appreciation of (i) **Truth**; self-actualizing persons have no difficulty in distinguishing between right and wrong, reality and irreality, in everyday life, even if the distinction is not conventional; (ii) **goodness** is as opposed to evil which is selfishness; and (iii) **beauty**.

The relation with reality is manifested in what Maslow calls **Perfection**, that is the ability to take on and complete tasks. It is as opposed to a feeling of helplessness. And **Meaningfulness** as opposed to despair.² Such understanding of one's relation with external reality depends upon a recognition of one's power as well as an acceptance of the limits of one's power.³

d. This proper working of the person is manifested in **Aliveness** and **Playfulness** as opposed to humourlessness which manifests itself in 'lack of zest in life' and 'loss of ability to enjoy'), **Richness** (as opposed to a poverty which manifests itself in loss of interest

¹Id. at 161.
²'A Theory of Metamotivation', at 308--09.
in the world), and Creativeness, not in the sense of some special talent, but in their fresh and naive way of looking at life. They have an ability to lose themselves in what they are doing.

4. What is the ontological nature of these needs and values? They are certainly not meant to be taken as Forms or Categories or Ideas. It would be a mistake to subject them to some conceptual test. They are not 'is's' in a non-mundane sense.

Nor are they mundane entities. By Aliveness, for instance, is not meant some purely space-and-time characteristic. They are not an 'is' in the positivistic sense, and indeed the terms used will seem odd to the scientist. They are not real or imaginary Compleat Facts such as wishes or Desires.

Nor are they 'oughts'. They are not metaphysically based imperatives. They do not command a person to do anything.

My contention is that they are ontologically mixed. They express the meeting of the non-mundane and the mundane that I have said constitutes the person. Thus, it is not fair to treat them as either contingent or categorical. While it is fair to say that they are based in modern industrial society, it is not fair to condemn them as hopelessly contingent. To do so is to deny their non-mundane character.

They manifest the workings of the personality in a way that cannot be captured by concepts. They concern the occurrence of the person through the medium of personality in a way that is more than mechanical, and in that sense are experiential. It is therefore a mistake to look at these needs and values as stating some conceptual truth against which we can measure reality.
They can be characterized as an effort to understand the underlying condition of the healthy person by resort to external manifestations of that condition. Thus Playfulness is not concerned with the capacity to win at chess, but a manifestation of some underlying (and difficult to perceive) disposition to living -- what I would call the state of the person working properly. This underlying well-being which manifests itself in Playfulness is a condition of the person which is distinct from any metaphysical entity, any state of consciousness, or any relation between the two. Thus, it is not some determinable realm of play which we seek to protect, but some underlying condition of the person which we seek to promote. Maslow's list attempts to state not external or eternal things which are valuable, but a condition of the person which reflects the proper workings of the personality and which states a relationship with reality which is not of knowledge in a conceptual sense, but of the person as a whole, or of experience.

These needs and values then concern the person as a whole, in all its integrating aspects, as well as in its disparate aspects. The needs and values attempt to state a condition of the person which appreciates the links between the various aspects of the personality.

5. Ontologically, the important matter is how the self-actualizing person is an example of overcoming the fear of transience noted above -- a fear that is central to the notion of the person. Needs and values concern dealing with the insecurity of being transient and at the same time concerning oneself with what is worth
while. Needs tend to describe the former and values the latter.

Needs can be seen as an effort to deal with the most immediate aspects of our humanness -- an insecurity in that we are transient creatures who are painfully aware of our transience. Hence the need for physiological things -- not because they are more important -- but because they are more immediate. By them we are more immediately aware of both our own transience and of the beauty of it.

The more fully developed person is not motivated by basic needs -- that is, by insecurity -- but by basic values. Tasks are the embodiment of intrinsic values and are not means to ends. The focus of our effort is not on acts which are disembodied from the underlying person, but an activity which is an expression of some underlying unity. The fully developed person is one who has transcended the distinction between self and other.

Cognition is not viewed simply as a means of perceiving reality, but as a relation between the person and reality. You will note that Truth, Beauty and Goodness do not refer to entities, but to a condition of the person. Goodness is not something which one has, or which one perceives, but is a condition which is the opposite of selfishness. And Simplicity refers to a condition of the person by which he is aware of his own desires and impulses. This is brought about by acceptance of oneself (others and nature) -- which is a condition of the person -- rather than by some simple process of perception -- a logical process.

One's relation with the world is seen in terms of tasks. To my mind, it refers to interacting with reality at an experiential rather than conceptual level. This too requires an overcoming of the self.
Maslow notes that self-actualizing persons are not so concerned with self as with some task 'outside themselves'. Necessary to that overcoming is self-esteem, but also an emotional view of reality (natural and social) as friendly rather than hostile.

One's relation with others is seen in Esteem (needs) and Friendship (value). They too are stated in terms of overcoming the self: overcoming one's individuality in bonding with another, and in overcoming one's cultural place by an identification with humanity at large. Necessary to that overcoming is a strong sense of self which is characterized by esteem needs.

6. The above is a conception of personality which I offer as an instance of a coherent conception. My argument is that some such conception is the proper focus of morality and law. Yet the dichotomy between, on the one hand, a morality and law which focuses on such a conception of personality and, on the other, the prevailing conception of law and morality, is striking. (Just how striking it is can be seen in how the concepts themselves are foreign to the jurist.) It is so striking as to lead me to conclude that our conception of law and morality is misdirected.

Compare needs and values as we have been considering them with the notion of Desires as Complete Facts. Considering Desires as Complete Facts means conceiving of human activity in terms which are discrete in time, to the person as individual and to the conscious expression of them. The conception of the person set forth here would consider needs in light of the person as a whole, even thought needs might manifest themselves in ways which, if taken only in their individuality, might appear Complete. Human Desires are properly
understood in terms of the basic nature of the person and appreciated in the context of the growth and development of the person. They are seen in terms of the person's experiencing and responding to its own transience. It is because jurisprudence is seen in terms of isolated acts and aims, rather than in terms of this integrated person, that the liberal jurists see aims as not common. The above statement of needs and values are an attempt to appreciate the person as an integrated entity.

Compare needs and values as we have been considering them with the notion of morality as stating that which one must or must not do.¹ This notion of morality goes hand in hand with the notion of Desires as Complete Facts. It concerns the 'ought' of the is/ought dichotomy, while Desires as Complete Facts expresses the 'is'. I have noted that this dichotomy is our way of breaking up reality² and I have suggested both noble and ignoble reasons for it.³ The Kantian view tends to see things in terms of that which is allowed (and about which nothing can be said) and that which is forbidden. Such a concept of morality has influenced our view of law as discrete commands, orders and rules which govern activity. If suffers from the same defect as Complete Facts, for it ignores human activity as expressing and constituting the person as a whole.

Both the Humean and Kantian concepts of morality and law are fundamentally flawed in that they ignore the true nature of human activity. They do not conceive of the effect that activity and thought must have by their nature. This is true when dealing with instances

¹We have considered this in terms of natural rights and the categorical imperative in Chapter Two.
²Three, G, Supra.
³Four, D & E, supra.
of activity and thought -- the frustration or satisfaction of Desire is not significant in and of itself, but in terms of the person as a whole. Thus we misconceive the nature of an enforcement of a right or the protection of liberty if we see it as simply that. We need see it in terms of the person as a whole.

Viewing human activity in terms of a dichotomy between that which is permitted and that which is not misshapes the person. It acts to chop up the person -- in time, to exacerbate his separation from others rather than to enable him to transcend it, and to separate him from his more profound nature.
F. Liberalism and Its Discontents

1. Morality born of fear.
2. 'Civilization and Its Discontents'...
3. simplified.
4. Hayek's argument about conflict...
5. defective for its ignorance of the integrating aspects of thought...
6. and its ignorance of the centrality of fear.

1. We can appreciate systems of morality not only by how well they embody a ground to human activity, but by how well they work in relation to the person as a whole. This part addresses the liberal system of morality in the context of personality.

2. In 1929, Sigmund Freud, bored, in his eighth year of suffering from cancer of the jaw, four years before Hitler’s rise to power, wrote Civilization and Its Discontents. The argument of the essay is this. Civilization is necessary to alleviate human suffering on three counts:

   from our own body, which is destined to decay and dissolution, and cannot even dispense with anxiety and pain as danger signals, from the outer world, which can rage against us with the most powerful and pitiless force of destruction; and finally our relations with others.1

Civilization is brought about by the consciously undertaken union of individual persons to subdue others and nature. Part of that union includes conscious renunciation of our desires. But it also depends upon a more profound process of 'modification of our instinctual dispositions'.2 Among the strongest drives is that of genital

1Civilization and its Discontents 28.
2Id.
eroticism which is the focus of human gratification because of its power, and free play of which would destroy both community and family. Yet civilization depends upon restrictions on auto-eroticism, incest, perversions, homosexuality, and requires monogamous and legitimate marital unions.\footnote{Id. at 75. It is very much due to Freud's work that this sentence is so dated.}

Another drive is aggression, yet civilization depends upon a sense of community and solidarity. The command to love thy neighbour is opposed to a temptation . . . to gratify their aggressiveness on him, to use him sexually without his consent, to seize his possessions, to humiliate him, to cause him pain and to kill him. Homo homini lupus; who has the courage to dispute it in the face of all the evidence in his own life and in history?\footnote{Id. at 85.}

\footnote{Id. at 86.} \footnote{Id. at 87} \footnote{Id. at 91.}

Civilization requires control of genital eroticism in favour of 'aim-inhibited love relationships'. It depends upon the command 'to love one's neighbour as oneself, which is really justified by the fact that nothing is so completely at variance with original human nature.'\footnote{Id. at 86.} Civilization requires sacrifices of sexual and aggressive instincts.\footnote{Id. at 91.}

What is so disturbing about Civilization and Its Discontents is the profundity and intractability of the conflict it poses between
the need for gratification and the importance of controlling it. At a superficial level, the conflict is between desires and the commands of an external authority (a mirror of liberal law). But both sides of the conflict are more profound. On the one hand, are instinctual needs. The need for sexual gratification (which to Freud is not simply for carnal love) is an instinct -- it is the focus of a basic need for survival and preservation of oneself and the species. This need is expressed in desire for food, clothing, shelter and physical security, but is, to Freud, concentrated in genital sexuality because of the power and immediacy of the desire, its clear relation to an object of satisfaction, and its relation to procreation. But, Freud says in an eerie passage,

there must exist another in antithesis to this, which would seek to dissolve these units and reinstatetheir antecedent inorganic state; that is to say, a death instinct. The death instinct, directed to the outer world, shows itself as an instinct of aggression and destruction...2

It is the derivative and main representation of the death instinct...we have found alongside of Eros, sharing his rule over earth... Culture is the struggle between the instincts of life and the instincts of death... The evolution of civilization may be simply described as the struggle of the human species for existence.

[The tendency to aggression is an innate, independent, instinctual disposition in man... It constitutes the most powerful obstacle to culture.]

On the other hand is authority -- the occasion for renunciation of desires. The need for parental and other approval is internalized...
by the development of a conscience. Freud calls this an 'internalized dread' which gives rise to 'lasting inner unhappiness'. The outer conflict is turned inward, so that it can't be followed. Every internal renunciation gives power to the conscience which demands further renunciation and gives rise to a resentment of the authority and yet to a sublimation of the cause of it. Guilt is turned inwards and is unrecognized. It creates profound anxiety, and hence a continuous battle between anxiety focused inward and anxiety focused outward.

Another psychoanalyst, Alice Miller, describes the process as follows:

The scorn and abuse directed at the helpless child as well as the suppression of vitality, creativity and feeling in the child and in oneself permeate so many areas of our life that we hardly notice it any more. Almost everywhere we find the effort, marked by varying degrees of intensity and by the use of various coercive measures, to rid ourselves as quickly as possible of the child within us -- i.e., the weak, helpless, dependent creature -- in order to become an independent, competent adult deserving of respect. When we reencounter this creature in our children, we persecute it with the same measures once used on ourselves. And this is what we are accustomed to call 'child rearing.'

3. Civilization and Its Discontents is one explanation of that which I call the quality of fear. By abstracting out particularities such as the sexual and patriarchal aspects, we can appreciate the structure of the argument. The essential propositions of the argument are these.

10. at 108.

(1) Fear is essential to our nature. (It need not be termed an instinct. I have simply argued that it arises from the experience of the self as transitory, which experience itself is necessary to being human.)

(2) The condition of fear is an essential constituent of our relation to self and others and nature. In relations with others it is expressed primarily in aggression. (It is not necessary to consider fear as determinative.) (Freud does not consider aggression as only a physical matter.)

(3) The conditions which give rise to fear and aggression are profound -- they are practically and logically beyond our awareness and thus control of fear and aggression is problematic. (One does not have to subscribe to Freud's internalization of the conflict between instinct and authority through activities like toilet training to subscribe to this point.)

(4) The processes by which we respond to fear -- either sometimes or by their nature -- are corrupting. (In Freud's case the corruption is an escalation of covert hostilities between desire and conscience.) Thus, not only is fear disturbing because it is beyond our awareness, it is disturbing because it tends to corrupt the person.

4. Let us apply the above points to the third part of Hayek's argument. That argument is that the system of liberty brings about peace and order by allowing for a practical resolution of divergent interests.¹ This is accomplished by free exchange. If my interest is

¹See Four, A, supra.
horses and yours in money, I can give you $400 and you will give me a horse.

It is a quintessential liberal attitude to see social conflict in this way. The following is an instance.

Whenever anybody questions the legitimacy of another's power, the power holder must respond not by suppressing the questioner but by giving a reason that explains why he is more entitled to the resource than the questioner is.

Social conflict then involves: (i) Desires of individual persons that (ii) find a physical object -- resources. (iii) It is a given that resources are limited. And hence (iv) conflict results. The libertarian liberalism of Hayek, the egalitarian liberalism of Rawls, and any mixture, are sketched in terms of this problem. For instance, Hayek argues that libertarian liberalism will result in more gratification for all. And Rawls argues the difference principle.

5. These liberal theories are mistaken not so much in how they resolve the problem they have set out to resolve, but in the way they state the problem in the first place.

The problem is posed in terms of three entities. (i) The Desire of one person, which Desire is seen as particular, individual, of the consciousness and mundane; (ii) Desires of others with the same characteristics; and (iii) natural phenomena, limited in supply, which have the characteristics of giving rise to sense data and sensual satisfaction. If things are as posed, then indeed there is no conceptual means of resolving disputes. The Desire of one cannot be compared with the Desire of another. They are Compleat Facts. Nor

Bruce Ackerman, Social Justice in the Liberal State 4 (New Haven, Yale Univ. Press 1980).
does the object of Desire (whether human or not), in its phenomenal character, have a nature which would inform us of its proper end. Hence any resolution will have to be practical: it will accept the Desires as valid and seek to resolve the dispute, not by declaring one as right and the other wrong, but in a way which, as much as possible, respects the Desires of the disputants and which respects the Desires of others for peace and order.

Hayek's conclusion that the market is the best way of resolving disputes is pretty much determined by his premise that Desires are Compleat Facts.

(1) Conflict consists of desires as Compleat Facts and natural entities which give rise to sense data.

(2) As such there is no way of reconciling them conceptually.

(3) Therefore, peace and order can be maintained by a practical resolution.

(4) The best practical resolution is in the market place.

Whether the jump from (3) to (4) is justified is the argument between the libertarian and egalitarian liberals. But to my mind the game is prejudiced by the initial assumption.

The mistake in the argument is that if things are as the argument poses them, then there is no significance to the Desires and hence to resolving the dispute at all. Hence, the argument must be that Desires have a nature which gives them significance, but that they should be considered as if they had no content -- as Compleat Facts. If Desires have significance, then, as I have argued in Chapter Four, they have general, social, not-conscious and non-mundane aspects. By treating Desires as Compleat Facts, we ignore these as-
pects. If that is the case, then we have merely set up a system of dispute resolution which states the problem in a way so that we ignore the salient aspects of the dispute. The alternatives are not to resolve the practically conflicting Desires of the disputants or to make a normative judgment about the conflicting desires. The alternatives are to treat disputes as matters of conflicting Compleat Facts and thereby ignore the integrating aspects necessary to thought, or else to recognize the integrating as well as disparate elements implicit in any social activity. The odd bet of the liberal is that we will resolve disputes better if we put major aspects of them out of our minds.

Thus, liberalism enables a practical reconciliation of divergent views only as a trick. It conceives of views as divergent, then finds it necessary to reconcile them in practice by means of the market. It can just as easily be stated that liberalism brings about the conception of views as divergent when they really are not. If human strivings are seen as Compleat Facts, then it is seen in terms which are not conceptually reconcilable. But if we recognize our strivings in the context of the person as a whole, we shall see that human interests are remarkably similar. Conceiving of human interest in terms of Compleat Facts is a way of creating conflict, not solving it.

6. This chapter has added to the liberal sins by its consideration of fear. For treating Desires as Compleat Facts is a way of ignoring the role which fear plays in human conflict.

First, we are wrong to consider disputes as a conflict of dispa-
rate Desires. The three propositions above tell us that the conflicting Desires concern not only an object, but a profound condition of the person called fear, which is expressed in destructiveness and aggression. Much of this fear is internalized -- it is beyond our awareness and control.

Second, each resolution of a dispute contributes to the patterns by which we deal with fear. Just as each perception of natural reality contributes to integrated ideas of how reality works, so does each resolution contribute, not only to patterns by which we resolve disputes, but to patterns by which we deal with fear.

Third, how we deal with fear can destroy our capacity to deal with fear. It can be corrupting.

The question is this: Is the liberal method of considering disputes the best way of dealing with fear? Or does it simply avoid the problem?

The response is that we cannot answer that question because we have been considering the wrong question.

We can say that the liberal method of resolving disputes has not been justified on a proper basis. That does not mean that it could not be justified, or at least some aspects of it are not worthwhile. The liberal method may appear somewhat successful, but that may be misleading because it is successful in how we have defined the problem (that is, not in terms of well-being and health, but in terms of rights and per capita income). Hence, we may simply not recognize its failure.

But we can note that the liberal method of considering disputes
may give rise to conflict by ignoring the integrating aspects of thought and activity. By ignoring the integrating aspects of thought, we can only see our relations with others in terms of Desires which have no nature that would allow them to do anything other than conflict. We see nature as the object of our Desire and others as competitors for those objects.
G. On the Expression 'Power Corrupts'

1. The argument that power corrupts.
2. Corruption born of fear.
3. Directed at self, others and nature.
5. The relations and means.
6. Principle of liberty does not follow.
7. Is liberty corrupting?

1. We have postponed consideration of the following archetypal liberal argument until now.

[A] Power corrupts;
therefore

[B] State authority should be limited to creating a sphere which protects the individual.

The implication of the insight that power corrupts is that if the state is in the business of coercion, then the people who will be doing the coercion will be either corrupt when they enter office or else will become corrupted as they exercise power. This part addresses that argument. I don't want to deny the insight, which again is experiential, but simply to argue once again that it is a mistake to think that the liberal principle follows from it.

The effort of this chapter has been to understand the aspect of the person which gives rise to this corruption. The theme has been that fear based in the transitory nature of the person gives rise not only to corruption, but to a humanness or vulnerability endemic to being human. The argument is that fear is basic to the person and acts to compromise our understanding and morality, and as a result our thoughts and actions. To the extent we appreciate the nature of fear, we tend to realize that behaviour and beliefs which differ from
mine are not necessarily to be condemned, but are to be considered part of the compromise necessary for the health of the person. Then we can be tolerant. To the extent we do not appreciate fear as the basis for behaviour, we tend be intolerant.

My argument is that the aspect of personality which I call fear might give rise to corruption, but that corruption is not of a nature which would justify liberty. It would not justify the principle that:

by and large we are better off to respect each individual person's determination of his own ends.

Nor does it justify Hayek's conclusion that the essence of law is to establish and protect a private domain of individual action. What it does justify is a system of checks and balances, not only between branches of the state, but between the individual person and the collectivity. There are four steps to this argument.

2. The concept of corruption makes no sense in the absence of a concept of the personality, for it is the person that is corrupted. Corruption does not make sense in a mechanical or nominalist world, for such a world would not allow for the connection over time which corruption addresses. Nor does corruption make sense where morality simply concerns rational judgments about substantive morality. For the question would always concern the judgment about to be made and the failure to make decent judgments in the past would not necessarily impair one's rational faculty in the present.

The argument of this chapter is meant to state the nature or condition of the person which we can call fear. Corruption concerns

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1Four, A, 2, supra.
2One, B, 3c, supra; Four, A, 3, supra.
the fear engendered by the person's experience of himself as transitory. That fear is the occasion for thought and activity which is noble and ignoble at once. Having power may make one liable to misuse it as an expression of fear. And such misuse may occasion a degeneration of the person which we call corruption. It concerns not so much the severity of the misdeed as the damage done to the person -- the violence to personality. That is, it concerns a misrelation between the aspects of the personality.

Corruption concerns a state of the person. It concerns an organic rather than mechanistic state of the person. It posits a deteriorating of the person in a way that is somewhat irreversible, in that it cannot be cured by a mere mechanical adjustment. It is like an apple which has decayed\(^1\) rather than like a building which is missing a stone. Corruption cannot easily be rectified, for it concerns a deep-down condition. In this the corrupted person is distinguished from one who has made a single mistake. Corruption concerns the person over time. It also concerns the proper working of the personality and therefore presumes a concept of personality, that is, concept of the nature of a person.

The corrupt person may be characterized as the opposite of Maslow's healthy person. The corrupt person is incapable of getting beyond mere needs, that is, has not come to terms with his transitory nature, and hence may be flawed in terms of his acceptance of self, reality and others. But what is more, his method of dealing with this insecurity has had a deleterious effect upon his person. The corrupt

\(^1\) Cf. The OED entry for corrupt: 'to spoil or destroy ... by physical dissolution or putrid decomposition.' It uses as an example fruit.
person will have developed dispositions to misuse his relation with reality -- his perception of reality, his interactions with reality and his acceptance of self, other and nature.

For this, corruption is particularly dangerous. Not only does it have a particular and lasting deleterious effect on the person concerned. It effects other persons. The corrupt person will misuse power as a means of dealing with, or rather avoiding, his own fear.

There are many ways in which corruption manifests itself. My purpose is to discuss a few which explain how power corrupts.

One is control. Because we cannot come to terms with our own transitoriness or vulnerability as transient beings, we seek to obtain a mastery over ourselves, others and nature. There is a certain way in which mastery is healthy, for it enables us to interact with reality. But there is a certain way that mastery is an effort at controlling reality in a way which denies our acceptance of it.

Another is projection. We project onto others our own inability to come to terms with our insecurity. For instance, an academic who is insecure about his own talent will tend to criticize others as a way of avoiding issues about his own work. In other words, we have in our nature a core of fear and one way of dealing with that fear is to externalize it.

It is obvious how control and corruption can result in the type of misuse of power which is alleged.

3. But fear and corruption can find their object in self and nature just as well as others. There is equal merit to the claim that power of X over himself tends to corrupt as to the claim that power of X over another tends to corrupt. Self-destruction is a powerful
human impulse, captured by the death wish of Freud: from the serious like suicide to the trivial like biting nails and scratching; from the physical to the spiritual; from the conscious to the not-conscious -- reckless driving, heavy drinking, smoking, drugs, unhealthy eating, promiscuity. The tendency to self-destruction is as great as the tendency to destruction of others.

Why is one a matter for law and the others not?

The response is to say that destructiveness aimed at others is the concern of law, and of self is the concern of the individual person. But it follows from the integrity of the non-mundane ground to human activity that they are of equal importance.

4. Moreover, it is a mistake to think that they are separable.

(i) Fear and corruption are general conditions of the person which can be expressed in relations of self to self, others, and nature.

(ii) Power is endemic to being human. It is necessary to the relation between individual persons, between the person and nature and between the person and himself.

(iii) Power is exercised not only in ways appreciated by Newtonian physics, but by activity, cultural patterns and ideas.

Thus, if power is endemic to the relation of self to self, others and nature, it is the occasion for corruption of the person in all three relations (ii) and in all means of exercise (iii). The corruption of the person may be characterized as a lack of acceptance of one's true relation to self, others and nature -- that is, one's transience and powerlessness. There is nothing special about the re-

\footnote{Four, B, supra.}
relationship of state to individual that gives rise to corruption, but rather something about power and human nature which does. For instance, an inability to accept oneself may be expressed in self-hate, resignation, and a sense of hopelessness. But it may be expressed in hate of others, in a compulsion to mastery, and in a sense of control which is out of touch with reality. Thus, the possibility of corruption arises in all of these relationships. Self-destruction, destruction of others and destruction of nature are three ways of dealing with the same fear.

The first is in the relation of persons -- whether individually or in groups -- to others. This includes the relationship of state with the individual person. Indeed that is the archetype of misused power.

But it also includes the relation of individuals to individuals and group relations:
- spouse/spouse;
- parent/child;
- corporation/ consumer & worker;
- advertising agency/consumer;
- media/ viewer and reader.

Power in these relations may be exercised by various means: physical power, ideas, psychology, money.

A second is the power of person over nature. Corruption may manifest itself in that relation by the destruction and consumption of natural reality. Science and technology are epistemological ways of stating the relation. Such power is exercised by various means: physical power, ideas, psychological power, consumer spending power.
A third is the relation of self to self. Corruption may manifest itself in that relationship as anorexia, alcoholism and drug abuse. They are manifestations of fear just as is aggression.

A way of limiting the problem of power is to understand it in terms which sweep most of the problem under the rug. The Hayekian argument reduces the various relations to two: state/individual and individual/individual. And it reduces the means of exercising power to that which is Newtonian: physical harm to the person and property, statistical harm to the bank account. Hayek defends the liberal principle for how it limits its concern for corruption to these relations and means.

But liberalism can best be seen as a way of avoiding awareness of some power relations and means. It can also be seen as a way of controlling some types of power and giving free reign to others.

The liberal principle ignores (i) person to person relations other than those specified, especially, group to individual relations; (ii) person to nature relations; and (iii) self to self relations.

It also ignores other types of power: epistemological, the structure of ideas; emotional, the health of the person. It does this by ignoring the integrating aspects of thought.

The effect of this ignorance is to enhance some power relations and means while limiting others, for those which are recognized are controlled while those which are ignored are given free reign. The liberal view tends to leave unchecked, because unrecognized, power of non-state groups over persons, persons (individual and in groups) over nature and of person over self.
6. The principle of liberty does not follow from the insight that power corrupts. The notion that power corrupts states an argument for checks and balances, rather than for liberty.

If it were an argument for liberty -- for some categorized limitations on the authority of the state -- it would depend upon the person wielding state authority being corruptible in a way the person otherwise is not. But this is not true. Since power is endemic to the human experience, and since fear is basic to human nature, the tendency to corruption is found in every walk of life. People who run companies are corruptible, people who run unions are corruptible, people who run nothing but some aspects of their own lives are corruptible. Corruption is basic to human experience. The assumption cannot be that those in state positions are corruptible while others are not, but that the existence of any power carries with it the susceptibility to corruption.

Thus the remedy will be in terms of all relations of power as well as for all means. The argument is that

[A] power corrupts;
therefore
[B] we need checks and balances on all relations of power in all means of exercising power.

7. Is liberalism itself is corrupting?

First, the concept of arbitrary Desire is as corrupting as Montesquieu's harem. I have described above how it can be so. And earlier on I have argued how it can be corrupting to sever the links which thought and activity naturally make in the person. It separates the person as individual from his other aspects.

Second, the breaking of reality into 'is' and 'ought' is
corrupting. I have argued above that the false nature of 'is' gives us the feeling that we can understand nature. And the ought gives us the false feeling that we can control it. In separating is from the more profound nature and in separating ought from our deeper selves, we enable ourselves to act against natural reality in a false way.

Hence, the notion that power corrupts argues for tolerance but not for liberty of the type it has been used to justify. The remedy for corruption is not to create a dominance of the individual sphere, but to check and balance (not eliminate) power at all levels.
H. Summary of the Argument.

A. The Noble and Ignoble Nature of Thought

(1) Thought and activity are complex -- they have, by their nature, many constituents and aspects, some of which are not-conscious. Therefore, they are 'of the person', rather than 'of ideas'. (Four, B to F).

(2) The non-mundane ground to truth and Good is distinct from our phenomenal existence. By our nature we seek to understand and act upon such ground. (Two, E).

(3) One aspect of the person is fear. Fear is the condition of the person experiencing that the self is transitory -- goes in and out of phenomenal being. It is a condition which we experience by our nature. (Four, F, 3; Five, C, 3).

(4) The human personality is the field upon which the transient meets the non-transient, the mundane the non-mundane. The meeting gives rise to fear. (Five, B).

(5) Morality and knowledge can be appreciated then not only by relation to a reality distinct from the person, but by relation to personality -- hence terms like noble and ignoble are more appropriate than terms like true and false. (Four, E; Five, C & D).

(6) Thus, thought is noble in how it provides an understanding that our mind seeks and without which the mind is not satisfied. Thought is ignoble in that it conceals the true nature of reality, including the nature of our obligations.

B. The Nature of Human Conflict

(1) Fear is proper to our nature. (Five, A & B).

(2) It is an essential constituent of the relation of self to others (as well as self to self and self to nature), primarily expressed by an urge to destructiveness and aggression. (Five, F).

(3) The conditions which give rise to aggression are profound -- they are practically, and to some extent logically, beyond our awareness and our control of them is problematic. (Five, F, 2).

(4) It is therefore a mistake to view conflict as conceptual, for thought is 'of the person' rather than of the consciousness. (Five, F, 3).

(5) It is also a mistake to characterize human conflict as one of conflicting disparate Desires about a particular object of Desire.
(resources). To do so it (a) ignores the integrating aspects of thought and activity; (b) mistakes the relationship of self to other as one of a clash of fragmented Desires, (c) misstates the relation of self to nature as one of Desire and satisfaction and (d) ignores the centrality of fear. (Five, F, 5 & 6).

(6) Thus the liberal method is not defended on the proper basis and may give rise to dispute by the way it considers them, i.e., ignoring integrating aspects. (Five, F, 6).

C. Power Corrupts

(1) The condition of fear tends to occasion a deterioration of the person which can be called corruption. (Five, A, 2).

(2) One of the liberal grounds for limiting the authority of the state is that 'power corrupts'. (Four, A, 3).

(3) By the argument about fear, corruption is expressed in a way that cannot be clearly separated in relations of self to self and self to nature as well as self to others. (Five, G, 3).

(4) Thus, it is not power of the state over the individual person which gives rise to corruption, but human nature and unchecked power which does. Therefore, liberty of individual from the state does not follow from the notion that power corrupts. What follows is the need for checks and balances on all types of power. The curative to power corrupting is not a realm of individual liberty, but several competing realms which act to check each other in a way which limits corruption. (Five, G, 5).

(5) Liberty is not properly defended and indeed the liberal method may give rise to corruption, for instance, in the relation of self to nature. (Five, G, 6).

D. Fear as a Basis for Tolerance

(1) It is a legitimate purpose of knowledge, morality and law to assuage fear. It is necessary to the health of the person.

(2) Therefore, it is legitimate that thought have a concealing element. This states a ground for tolerance.

(3) Also therefore it is legitimate that we act to limit moral obligation. Moral duties and rights need not be conceptually true, but better for the person. This states a ground for tolerance.

(4) Also therefore it is legitimate that we protect the physical person as necessary to our dealing with fear. The means of such protection -- such as physical liberty and consent -- need not be conceptually true. This states a ground for tolerance.

(5) Therefore the proper basis for tolerance and liberty is in a sort of mercy or forgiveness.
(6) And therefore, the need is for an integrated condition of the person. Thus (a) liberty is not an exclusive principle, (b) each is constitutive of the person in the four aspects named, and (c) our duties should properly be affirmative as well as negative.
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Terminological Note

Logical and conceptual are opposed to experiential and practical in a special sense described in One, E. Logic is also used in its normal senses. Logical and conceptual are not opposed to empirical.

Thought (without an attribute) refers to the contents of the consciousness in a generic sense.
A thought refers to the contents of the consciousness at a particular moment.
An idea refers to that content which is common to different thoughts. (See Four, F, 3).
To deny the distinction means that you would have to assert (i) that there is no common element between any two states of consciousness, whether of the same person or not, or (ii) that there is no particularity to a state of consciousness. It is obvious that my argument is that thought can only be understood in its dual nature.

Desire (Three, C) and Will (Four, B) are used synonymously with wants, wishes, volition and the contents of the immediate consciousness. They refer to the capacity of the person (i) to hold a thought in its consciousness, and (ii) to direct its activity by relation to that thought. Desire emphasizes the former, will the latter.

Thought, and hence Desire as a type of thought, is alleged to have the following aspects. (Four, F, 3).

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<thead>
<tr>
<th>Disparate, discrete or fragmented</th>
<th>Integral or linking</th>
<th>Insight</th>
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<td>Not cognitively determinable</td>
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(Individual is an ambiguous term. It is commonly used to refer to a person. Philosophically it is used in opposition to general or universal. In this text individual refers to an aspect of the person which distinguishes it from other people. Social refers to how the person is like others. Particular is used in opposition to general.)
(Not-conscious and the not-consciousness are used generally to refer to the contents of the mind which are not conscious or not of the consciousness, covering the unconscious and subconscious but begging questions as to their nature. No sharp distinction between the consciousness and the not-consciousness is intended. That which is or is not available to the consciousness may be so logically or practically.)

In relation to the activity of the person, thought may be directive or spontaneous. (Four, G).

Thought has ignoble and noble aspects. (Five).

Thought is expressive and constitutive. (Four, F, 2).

Good in upper case refers to the non-mundane ground for human activity. (Two, C, 1).

Obligation refers to the basic moral bond, which I allege is to Good. Duty refers to that obligation manifested in relations between persons. (Two, D, 2). Rights are described at Two, A, 2, where the distinction is made between formative or natural aspects of rights, on the one hand, and instrumental aspects of rights, on the other.

Power refers to the general ability to make reality (whether self, other or nature) change. Authority refers to the exercise of power which aspires to justification (morality) or legitimation (law).

The notions of plenary authority and plenary obligation are explained at Two, A, 2.

Quality (without an attribute) is explained at Four, A, 2, and Four, D, 3.