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POLITICAL MORALITY AS CONVENTION

By Norman Barry

I. Introduction

A remarkable feature of contemporary political discourse is the dominance of morality. One legacy of logical positivism (which was dominant from the mid-1930s until the end of the 1960s) and analytical (or linguistic) philosophy was the reluctance of political theorists during the twentieth century to engage in substantive argument about appropriate social ends or individual rights and values. Philosophers were content to describe the linguistic framework within which related political proposals were discussed without offering any proposals themselves. It was felt that the philosopher was not especially qualified to give political advice or make any recommendations. The technical political theorist was properly confined to the *second* level of inquiry, that is, explanation of the meaning of concepts, not the *first* level, which was concerned with questions of how we ought to live, or issues of public policy. Economists and sociologists might have the technical skills appropriate for inquiries into public policy, but as to the big questions—such as the ends and purposes of man and society—almost anybody could make pronouncements. The important point was that *reason* was incapable of adjudicating between rival versions of the good life.[1]

This emotivism, or subjectivism, in ethics, which decreed that carefully considered statements about freedom and justice were, linguistically, no more valuable than advertising slogans, was carried over into politics and jurisprudence.[2] In jurisprudence, for example, all of the claims of natural lawyers to ground the criteria of proper law in a set of universally true moral principles were replaced by explications of the notion of sovereignty or by complex descriptions of validating processes in ongoing systems of positive law. Under legal positivism, morality is sharply separated from law, so that questions about the values that *proper* law ought to serve or what is *proper* law are thought to be irrelevant or unanswer-

[1] See A. J. Ayer, *Language, Truth, and Logic* (1936; reprint, New York: Dover, 1952); and Charles L. Stevenson, *Ethics and Language* (New Haven, CT: Yale University Press, 1944). Even R. M. Hare, who argued that ethical statements had a logic, conceded that their ultimate foundations were beyond rational demonstration: See R. M. Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963).

[2] See Norman Barry, *An Introduction to Modern Political Theory*, 4th ed. (London: Palgrave Macmillan, 2000).

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able, and certainly distinguished from objective, logical inquiries into law's meaning and status.[3]

During the heyday of logical positivism and linguistic philosophy, the public debate about politics was dominated by Marxism and by various forms of collectivism. Both of these political movements led to the expansion of the state. There was also a burgeoning libertarian movement that produced persuasive arguments from mainly, but not exclusively, economics specifically addressed to the adverse effects on liberty that this statism would have. Philosophers took little part in these debates, preferring to concentrate on narrow technical issues about the meaning of concepts and the logical coherence of statements about political values. While it is true that most political philosophers went along with the statist tendencies of the time, they would sharply differentiate their approval from their purely philosophical work. The exception was Karl Popper (1902–94), whose critique of Marxism was partially derived from philosophy. It is certainly true that jurisprudence had little or no influence on public debate, except in the narrow area where law and morality might interact. H. L. A. Hart (1907–92), the leading legal positivist, was very much involved in the debate in Britain in the 1960s and 1970s about homosexuality and prostitution, but he did not regard these issues as questions of legal philosophy.[4]

All this has changed since the publication of John Rawls's *A Theory of Justice* (1971).[5] Now, political theory, even of the analytical kind, is dominated by substantive programs, of varying degrees of generality. Marxism might have been discredited theoretically and practically, but the Left has replaced it with communitarianism or revived the role of the state with expanded notions of liberal "rights." The libertarian Right has been equally fecund in its, in effect, antipolitical recommendations. Gone is that modesty and reticence that were once features of political philosophy whenever normative questions were raised. We are now faced with a welter of conflicting and ultimately irreconcilable moral ideals. The questions discussed are no less intractable now, but under the dominance of linguistic philosophy they were regarded as (logically) meaningless. However, they are now thought to be well worth asking, and the replies have produced quite different methodological approaches. Ethical disputes, perhaps unlike those in economics and the other empirical social sciences, are much less amenable to definitive resolution, but the subjective and ideological features of these disputes, against which the positivists so effectively railed, have diminished and now the normative arguments are more sophisticated. Normative talk is not thought to be merely a matter of personal opinion. In addition to the revival of rights talk, there has

[3] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).
[4] See H. L. A. Hart, *Law, Liberty, and Morality* (London: Oxford University Press, 1963).
[5] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

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been a resuscitation of contractarianism and of aggregative ethical criteria. The range of morality has expanded too. Until recently there was a paucity of moral argument among professional philosophers, but we now have a veritable plethora of ethical claims covering almost the whole of public life. Thus, we have medical ethics, business ethics, professional ethics, a revived natural law (or at least a moralized legalism), and many other "ethics." Where once unanalyzed notions of conventional right and wrong governed public and professional decision-making, we now have a variety of moralities, under the aegis of which these traditional notions are challenged and extra duties are imposed on the practitioners of, for example, business and law. Most important, these moralities aim at a kind of universalism, even if it is restricted to a particular country. In other words, statements about appropriate values are thought to be applicable, and are turned into law, for a whole community, thus eliminating the variety and possibility of dissent that would be permitted if decentralized decision-making flourished. A variety of different decisions among component states was once a feature of genuine federal systems of government. But in America, a controversial decision about abortion was imposed on the whole country by a judicial decision, precisely because it was felt to be authorized by morality.

A similar thing has happened to welfare in most Western liberal democracies. A particularly expansive view of morality has authorized a much greater expansion of state provision than would conceivably have happened if political authorities had followed simple convention. Furthermore, in this area in particular, the emphasis on morality led to ignoring certain frailties in the human condition. Important here is 'moral hazard': this occurs when the attempt to do good encourages people to become dependent on public welfare. As the authors of the *British Poor Law Report* (1834) put it: "Every penny bestowed that tends to render the condition of the poor more eligible than that of the independent laborer is a bounty on indolence and vice."[6] It was the aim of the Poor Law reformers to discourage people from becoming eligible for poor relief. One important result of their efforts was the substitution of relief within the workhouse for "outdoor" relief, which was a cash payment requiring no reciprocal duty.

Skepticism about morality, however, goes back a long way in the history of political thought, but we do not have to refer all the way back to the Sophists or to Machiavelli to demonstrate its intellectual potency. The anarchist-utilitarian William Godwin (1756–1836) once said: "Actions in the highest degree injurious to the public . . . have often proceeded from motives uncommonly conscientious. The most determined political as-

[6] See S. G. Checkland and E. O. A. Checkland, eds., *The Poor Law Report of 1834* (Harmondsworth: Penguin, 1974), 36. For a summary of the arguments, see Norman Barry, *Welfare*, 2d ed. (Buckingham: Open University Press, 1999).

sassins . . . seem to have been penetrated with anxiety for the eternal welfare of mankind."[7] We are all familiar with the misery caused by people acting from good intentions, but persuasive doubts about the efficacy of morality emerge from economics. There has always been, and still is, a serious questioning of the consistency between individualistic striving in the marketplace and our highest moral endeavors. Is not the efficiency of the private enterprise/market system bought at some cost to ethics? Does not the lure of profit distract us from our social duties? Is not the anonymity of the capitalist system a reason to eschew even the basic moral duties, for example, of promise-keeping while allowing us to evade prohibitions against deceit and unfair dealing? Such complaints against the morality of capitalism have been, at least since the 1980s, more effective restraints on its vitality than Marxism ever was. In fact, Marx had nothing but contempt for moral criticisms of the market that ignored economics and the "laws" of history.

It was Bernard Mandeville (1670–1733), in his notorious *The Fable of the Bees* (1705),[8] who clearly suggested the incompatibility of the market and morality through his paradox of "private vice and public virtue." As he poetically described the market: "Each part was full of vice/But the whole mass an earthly paradise."[9] Envy, selfishness, pride, and conceit were to be valued because they provided the spur for man's achievements, and greed the motivation for productive activity. "Contentment," a psychological state of affairs much admired by his contemporary moralists, was despised by Mandeville precisely because it led to sloth and inactivity. Of course, in *The Fable of the Bees*, when the bees were moralized, they became fractious and unproductive.

Still, Mandeville must not be misunderstood: he was not advocating a generalized contempt for rules of behavior or a rejection of conventional standards. He was simply alluding to a distinction between the morality of his day, which was particularly puritanical, and the necessary rules of conduct recognized by all societies. These rules are not necessarily puritanical. He made a distinction, therefore, between the harmful and the useful "vices,"[10] and it was the latter that he was encouraging.

Of course, as Adam Smith (1727–90) was eager to point out, Mandeville made far too stark a distinction between vice and virtue and presented the latter in an extremely rigorous light. Mandeville could easily show, then, that the demands of morality were against human nature, that they were impossible to meet, and that those who recommended them were being hypocritical. Thus, Smith's ethics of the

[7] Quoted in Robert E. Goodin, *Motivating Political Morality* (Oxford: Blackwell, 1992), 160–61.

[8] Bernard Mandeville, *The Fable of the Bees* (1705; reprint, Oxford: Oxford University Press, 1924).

[9] Mandeville, *The Fable of the Bees*, 24.

[10] Ibid., 10.

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market—encompassing the rules of justice, respect for property, and the virtue of prudence—were genuine moral values that traders relied on for their transactions to be completed. But he did little more than sanitize Mandeville, and when it came to describing how the market operated, Smith used Mandeville's language: "It is not from the benevolence of the butcher, brewer and baker that we get our dinner, but from their regard to their own interest. We address ourselves not to their humanity but to their self-love."[11] Still, some critics have said that ultimately Smith cleansed the market too effectively and admitted into his thought certain 'republican' (the eighteenth-century term for what we would today call 'communitarian') notions, which drained individualism of some of its vitality.[12]

In fact, the greatest achievement of Smith and the other Scottish economists and political theorists of the eighteenth century was to replace the idea of virtue by the value of *liberty*. More importantly, they redefined liberty so that it no longer resembled the classical notion of political *status*, best exemplified by active engagement by citizens in the political process. Instead, liberty was thoroughly individualistic and linked to commercial freedom. The common good was not the result of positive and deliberate action for the community, but the unintentional outcome of individual striving. Self-interest was not necessarily antisocial once we recognized the benign effects of Smith's "invisible hand." It is worth stressing, here, the final part of Smith's famous statement of the value of spontaneous processes: "I have never known much good done by those *who affected to trade for the public good*."[13]

Still, in Smith the program was incomplete. There was no satisfactory explanation of the rationale of the ethics of the market, that is, how it was that self-interested individuals could coordinate their actions. Nor was there a complete explanation of morality in conventionalist terms. And there was no proper explanation of the link between human nature and morality. Of course, Smith's earlier work, *The Theory of Moral Sentiments* (1759), described an ethics that was clearly derived from a theory of human nature, and although there was no incompatibility between this and his economics, there was a different emphasis. There had to be, then, a theory of ethics that retained the rationality of ethical conduct without licensing the moralist to engage in that rationalistic social experimentation which was to become the bane, and often the ruin, of the twentieth century. It is not at all clear that contemporary moralists are aware of this

[11] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, R. H. Campbell and A. S. Skinner, eds. (1776; reprint, Oxford: Clarendon Press, 1976), 27.

[12] See Donald Winch, *Adam Smith's Politics: An Essay in Historiographic Revisionism* (Cambridge: Cambridge University Press, 1978); and Istvan Hont and Michael Ignatieff, eds., *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1983).

[13] Smith, *The Wealth of Nations*, 456. My emphasis added.

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vital distinction. However, before Smith, the utilitarianism of David Hume (1711–76)[14] had provided answers to these questions, and it is to his work that contemporary apologists for the morality of capitalism should look for solace.

II. Hume and Indirect Utilitarianism

It is well known that Hume did not believe that ethics could be founded upon reason. He had little time for the natural law and the philosophical foundations of liberalism supplied by John Locke (1632–1704). His skepticism about abstract values derived partly from epistemological reasons, which were reproduced in the twentieth century by the logical positivists, and partly from practical reasons. Epistemologically, reason was limited to two roles: the manipulation of analytic truths and the evaluation of empirical data. The demonstration of ethical truth was, therefore, impossible since it fell outside these two criteria. Hence Hume was able to say, "'Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger."[15] Yet this skepticism about the foundations of ethics did not turn Hume into a subjectivist or an emotivist. Ethics could not be given an *ultimate* rational foundation, but rival claims could be evaluated by a modest reason and a proper understanding of human nature. As he said on many occasions, he wanted to use reason to "whittle down the claims of reason." At the more directly political level, Hume was concerned to show that "enthusiasts," or, as we might say, ideologues, had a defective understanding of the mainsprings of human action. A particular target were the contractarians who had mistakenly thought that the Whig Government in England, established in 1688, had a rationale in social contract theory.[16] The Whigs had created a form of government that Hume might have been thought to admire. This might be so, but he had no time for its philosophical foundations. Indeed, Hume even had some respect for absolute monarchies that preserved liberty. The expediency of government was a function of experience, not heady moral philosophy.

Connected with his skepticism about rational demonstrations of forms of government was Hume's insistence on the more or less unchanging features of the human condition. The rationalist philosophers assumed that human nature could be molded to fit circumstances and that this malleability licensed writers to recommend almost any political organization or political morality. But Hume wrote: "[A]s it is impossible to

[14] Although Hume's and Smith's ethics look similar, they had a different intellectual foundation.

[15] David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, rev. P. H. Nidditch (1739–40; reprint, Oxford: Clarendon Press, 1978), bk. 2, pt. 3, sec. 3, p. 416.

[16] See David Hume, "Of the Original Contract," in *Essays Moral, Political, and Literary*, ed. Eugene F. Miller (1777; reprint; Indianapolis, IN: LibertyClassics, 1985). 465–87.

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change or correct anything material in our nature, the utmost we can do is to change our circumstances and situation and render the observance of the laws of justice our nearest interest and their violation the most remote."[17] He put it even more decisively when he said, "All plans of government which suppose great reformation in the manners of mankind are plainly imaginary."[18] Against Hume's realistic view of human nature, we have seen counterposed Rousseau's claim that a change in self will accompany a change in circumstance, that is, that the signing of a democratic social contract will result in almost automatic promotion of the public good (or "General Will"). Marx's argument that the abolition of the market, private property, and the division of labor will remove all causes of dissent among people and presage unending classless harmony was similarly utopian.

For Hume, an accurate description of human nature must underlie any recommendation of social change. Thus, he was not a blind follower of tradition, as Edmund Burke might have been, but a theorist who believed that reform must be founded on correct analysis. What he wanted to do was to describe, and prescribe, those institutional arrangements that are best suited to advance social cooperation.[19] He was a believer in the market, strictly limited government, and the rule of law, but these are not a product of reason. Rather, they are the product of spontaneous evolution. Thus, Hume argued for a proper *science* of ethics, which would encompass a description of how moral judgments are made and whether they comport with a correct account of human nature. Arising out of these considerations, modest suggestions for improvement might be made.

Hume's assumptions about human nature were more expansive than those of either Hobbes or Mandeville. There are some Hobbesian elements in Hume, but Hobbes could not see that social cooperation could emerge from naturally self-interested people: it had to be imposed by the sovereign. For Hobbes, people are in constant fear of each other and do not play "repeat games." For him, there is only one round of the "prisoner's dilemma," as we moderns call it, and this induces us to obey whomsoever can guarantee our security. While in no way denying the self-interested features of man, which were insisted on by both Hobbes and Mandeville, Hume's addition of the feature of *sympathy* enabled him to show how rules can develop that enhance social cooperation;[20] they emerge spontaneously and are not the product of an absolute sovereign (as in Hobbes). With assumptions that were not vastly dissimilar to those of Hobbes and Mandeville, Hume was able to show how man can, in

[17] Hume, *A Treatise of Human Nature*, bk. 3, pt. 2, sec. 3, p. 537.

[18] Hume, "The Idea of a Perfect Commonwealth," in *Essays Moral, Political, and Literary*, 514.

[19] For an excellent modern theory of ethics as a form of social cooperation, see Leland B. Yeager, *Ethics as Social Science* (Cheltenham: Edward Elgar, 2001).

[20] Hume, *A Treatise of Human Nature*, bk. 3, pt. 3, sec. 1, pp. 586–91.

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effect, be self-governing and his social relationships predictable. If we did not have a minimal sympathy for others, then we could not trust one another to follow rules that are for our mutual advantage. In the Hobbesian model, individuals are assumed to meet only once, in situations of dire emergency, and "trust" will not have been developed. In such circumstances, individuals will assume that their fellows will always act in egoistic ways even when self-interest would require cooperation.

Nevertheless, the partiality of our affections determines the grounding of Hume's ethics. The genius of his innovation was to show that self-interest could be advanced by a scheme of social cooperation. Thus, (the artificial) rules of justice and property derive from "*the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants*."[21] Hume's three rules of property—the stability of possessions, the transfer of ownership by consent (and not by force or fraud), and the performance of promises or contract[22]—were shown to emerge naturally from human interaction. The important point is that these rules are not specifically designed by anyone, but they develop through repeated plays of the "social game." Unlike Hobbes, who saw the social game as a once-and-for-all experience, with no repetition, Hume envisaged it as an ongoing process in which people can shun noncooperators. Most important is Hume's account of the development of 'reciprocity', a crucial feature of market society if people are to cooperate without central direction or control. He imagined two neighboring farmers, who might have no liking or affection for each other, but who quickly learn the advantages of a scarcely conscious collaboration:

> Your corn is ripe today; mine will be so tomorrow. 'Tis profitable for us both, that I should labor with you today, and that you should aid me tomorrow. I have no kindness for you, and know you have as little for me. . . . Hence I learn to do a service to another, without bearing any real kindness, because I foresee that he will return my service. . . .[23]

Notice here that no change in human nature is proposed. People are as selfish as they always were, but they have discovered a new way of advancing their self-interest. In Mandeville's amoral, unsophisticated world, people would miss opportunities for advancement. In the way that Mandeville described them, people are too myopic to see the advantages of reciprocity.

Another feature of the human condition that Hume noticed was the universal tendency of people to value present consumption, be it for

[21] Ibid., bk. 3, pt. 2, sec. 2, p. 495.
[22] Ibid., bk. 3, pt. 2, secs. 4 and 5, pp. 501–25.
[23] Ibid., bk. 3, pt. 2, sec. 5, pp. 520–21.

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goods, services, or social rules and practices, over future benefits. In the language of modern economics, people have too high 'time preferences'; they sacrifice the future for the present, and they need to develop some rules for lowering their time preferences. A thief or cheat may get temporary satisfaction from the breach of a rule, but in the long run everybody, including the cheat, will suffer from the decline in security that occurs. Admitting that private remedies are ineffectual, Hume observed that we embrace with pleasure rules, and magistrates to enforce them, as devices "by which I may impose a restraint on myself, and guard against this weakness."[24]

Hume also developed an early theory of public goods,[25] and this once again illustrates how his normative arguments stemmed directly from his account of human nature. The predilection that we have for our own interest may be so powerful that it leads us to misunderstand what this interest is. Furthermore, our relationships with others may be insufficiently close to guarantee voluntary cooperation in the supply of things that we all value. Given, then, the possibility of what we now call "free riding," Hume was prepared to countenance coercive, communal action to meet with demonstrable, collective needs.

It is accurate and enlightening to describe, as Hume did, the self-generating normative rules that govern property, the enforcement of justice and of contracts, and legitimate collective action as 'conventions'. They belong properly to *artificial*, rather than natural, morality. The latter represents the kind of conduct that is appropriate to close marital and family relationships. But because of the exigencies of the human condition, we require public execution of some common rules that have to be artificially constructed. Much of our social life, however, especially in its economic aspects, is orderly and predictable because these artificial conventions require little or no public enforcement.

It is better to use the word 'conventions' rather than 'morality' to describe Hume's normative principles, for the same reason that he railed against rationalism. In his view, rationalism simply led to exuberance, enthusiasm, and the delusion that the human mind could devise institutional arrangements in defiance of indubitably true facts about the human condition. In a similar vein, modern ideas of morality have produced doctrines about, for example, law, welfare, and social justice, in ignorance of well-established theories of human coordination and the limits of collective action. At the very least, such doctrines have paid less cognizance of the truth and relevance of these well-established theories than is necessary for reasonable reform suggestions. But it should be borne in mind that when I speak of Hume's theory of conventions, I do not mean *mere*

[24] Ibid., bk. 3, pt. 2, sec. 7, pp. 536–37.

[25] Ibid., 538. Hume's example is the draining of a meadow. Each farmer has an incentive to avoid paying his share of the cost of draining, but each grasps the mutual benefit of cooperation, otherwise it would not be done.

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conventions. Although they are not natural and irresistible, like the weather, they cannot be discarded at will without very serious consequences for society. Indeed, Hume, on at least one occasion,[26] was prepared to countenance calling his principles of justice 'natural laws', so compelling did he think they were. He would have done so more openly had he not so effectively demolished the basis of traditional natural law thinking.

Hume was undoubtedly a utilitarian:

> [T]hat the circumstance of utility . . . is constantly appealed to in all moral decisions concerning the merit and demerit of actions: that it is the sole source of that high regard paid to justice, fidelity, honor, allegiance and chastity; that it is inseparable from all other social virtues . . . it is the foundation of the chief part of morals, which has a reference to mankind and our fellow creatures.[27]

But he was not a hedonist, for the pleasure that we experience from the relief of the suffering of others is as significant as that which we get from our own happiness. While the motivation to act morally toward people whom we know little about is undoubtedly weak compared to our virtuous action toward family and friends, Hume insisted that "[n]o man is absolutely indifferent to the happiness and misery of others."[28] Indeed, if people acted from entirely selfish motivations it is unlikely that they would be able to internalize the rules and conventions that are essential for an orderly, predictable, and flourishing society.

It is important to stress, however, what type of utilitarian Hume was, for it is this special conception as much as anything else that makes him modern. He was an *indirect* or *rule*-utilitarian who believed that the general good is generated by following established rules, of which we might not be consciously aware. This obligatoriness is essential even if greater immediate utility could be produced by the breach of a rule. He often said that the following of a rule of justice might be against the public interest, but that regular obedience to its rigor always advances utility. The more or less inflexible nature of conventions is the key to their evolutionary success. Hume would argue that to license anybody, least of all government, to abandon conventions, whose usefulness is validated by experience, would be as disruptive of social order and long-run utility as would be the rigid enforcement of supposedly rational, deontological principles irrespective of consequences. And Hume was certainly no deontological ethicist.

In the same way, Hume cannot be identified as an *aggregative* utilitarian. He was not interested in a "sum of utilities" allegedly derived from

[26] Ibid., bk. 2, pt. 2, sec. 1, p. 484.
[27] David Hume, *An Enquiry Concerning the Principles of Morals* (1751; reprint, Chicago, IL: Open Court, 1930), sec. 5, p. 66.
[28] Ibid., sec. 5, p. 53.

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individuals' utilities, as Bentham later proposed.[29] Least of all would Hume have sanctioned the use of an individual's well-being to advance some artificially and rationalistically constructed aggregate. Indeed, it is by rejecting the aggregation argument that utilitarians can make their doctrine consistent with the oft-quoted claim that ethics should allow for the "separateness of persons": individual values and purposes should not be conflated into a single utility function appropriate for a whole community. By taking account of consequences only as they apply to individuals, indirect utilitarianism has a defense against this charge.

III. Hume in Modern Dress

The same complaint against morality that Hume addressed to rationalism can be detected in modern skeptical writers. Just as he castigated natural law and the social contract theory, today's game theorists press for an analysis of coordination via the development of conventions with little or no reference to controversial and infinitely contestable metaphysics and morality. It is really an attempt to make the theory of the market serviceable, outside the range of normal goods and services, to explain the production of socially desirable rules and practices. Phenomena of this sort, hitherto, were thought to be impervious to such reasoning. Socialists today do not deny that the exchange process coordinates economic activity much better than does the state, but they still maintain that this coercive institution, the state, is required for the design of the rules of the game, for their enforcement, and for the provision of a wide range of other public goods. Individuals cannot do these things for themselves, so the state and the political philosopher step in. The fact that both will almost always do more than what is required has encouraged modern skeptics to take up from where Hume left off, that is, to provide a coherent explanation for voluntary collective action. As we shall see, all that the skeptics have added to Hume's original analysis is considerable sophistication and some elementary evolutionary theory (which was already implicit in his doctrine).

Modern analysis proceeds from proposed solutions to the prisoner's dilemma in game theory.[30] In this game two suspects, Smith and Jones, are questioned separately by the district attorney about a robbery that they have committed. If both suspects remain silent they will face a less serious charge, carrying a short prison sentence of three years; if both confess to the offense they will get ten years each. If one, for example, Smith, confesses and implicates Jones (who remains silent) in the offense,

[29] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789; reprint, with an intro. by Laurence J. Lafleur, New York: Hafner, 1948).

[30] Anatol Rapaport, "The Prisoner's Dilemma," in John Eatwell, Murray Milgate, and Peter Newman, eds., *The New Palgrave: A Dictionary of Economics* (London: Palgrave Macmillan, 1987), 973–76.

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Smith will get off lightly (one year) but Jones will receive a sentence of twelve years. The best cooperative outcome—that is, the outcome that involves the minimum combined prison sentences (a total of six years)—would require both prisoners to remain silent. However, since they cannot trust one another, rationality dictates that they confess, each hoping to implicate the other in order to get a reduced sentence. The interrogator has so arranged the "payoffs" that whatever strategy is selected by Jones it is better for Smith to confess, and vice versa. Confession is the "dominant" strategy for both.

This imaginary example has analogues in the real world, where the egoistic pursuit of rational self-interest leads to undesirable outcomes for the egoists themselves. A familiar example is the supply of internal and external defense: I would rather not pay for it, so I rely on others, who eventually refuse to pay for it, so nobody is protected. Other examples include the difficulty in controlling pollution in the absence of a legal system that permits efficient redress to harmed individuals and the preservation of endangered species when each individual has a rational incentive to exploit a niggardly nature (the "tragedy of the commons"). A more concrete example occurred in the United Kingdom during the 1970s. In industrial relations there were regular social contracts between government and trade unions to control inflation. (I leave aside the mistaken economics of such strategies.) These arrangements always failed because very soon at least one union would break the contract, leading to mass defection. It was the regular recurrence of such problems that gave government and political philosophers the legitimate excuse, according to orthodox social theory, to impose collective solutions to coordination problems.

Of course, the differences between such problems and the classic prisoner's dilemma are that, normally, the social game is repeated and, equally important, the players can communicate with one another. The classic prisoner's dilemma is a theory that can explain much social behavior. However, the iterated prisoner's dilemma provides individualist theorists with a solution that does not require collectivist action by the state. These theorists also maintain that decentralized individuals can develop Humean conventions by which their activities are coordinated and defectors from agreements punished. Produced collectively, these conventions have a rationale in people's choices and not in a ukase of government or the political philosopher.

There are many demonstrations of how people might overcome the prisoner's dilemma and coordinate their activity by voluntary methods, but I have chosen for my argument the demonstration by Robert Sugden in his *The Economics of Rights, Co-Operation, and Welfare*.[31] I have done so largely

[31] Robert Sugden, *The Economics of Rights, Co-Operation, and Welfare* (Oxford: Blackwell, 1986).

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because he presents a specifically Humean theory, with as much skepticism about morality and natural law as Hume himself had. Reason cannot determine objective morality, but we can use our rational faculties to understand how societies will develop conventions to solve coordination problems. These conventions include traffic rules, the assignment of property titles in circumstances of potential conflict, the provision of welfare through "mutual aid," and even the production of some public goods.

Crucial to the argument is the idea that a convention is self-enforcing: over a period of time people see that following it maximizes their utilities, and this realization will secure their support. Since a particular convention is a product not of reason but of experience (and our approval of it a function of the imagination), it is not the only and necessary solution to a coordination problem. It simply survives the evolutionary process, and although adherence to it produces a kind of equilibrium, this need not be "a state of affairs that anyone would choose; it is simply the unintended outcome of the choices of many individuals, each of whom is seeking to satisfy his wants."[32] In this approach, Sugden subverts a whole tradition of welfare economics and moral philosophy (including Rawlsianism) that seeks a *unique* solution to any aggregative problem.

Conventions emerge through the repeated playing of games. For example, the traffic rule in the United Kingdom "give way to the right at crossroads" develops when drivers see some *asymmetry* in the game they are playing, that is, when they conceive of themselves as playing different roles. If the game were symmetrical, drivers would simply slow down. This would produce an equilibrium but it would be very inefficient. The search for asymmetries in repeated games can be extended throughout almost the whole of social activity, including areas of potential conflict such as the original assignment of property titles. A convention will be successful to the extent that it appeals almost immediately to the imagination, hence the "finders keepers" rule[33] and some version of the Lockean principle of first acquisition to govern legitimate property holdings. One can easily imagine the golden rule (do unto others as you would have them do unto you) emerging in this way. A rule's survival prospects will depend on its clarity; the more ambiguous a rule is, the weaker are its survival prospects. Natural selection is crucial here, and Sugden claims that "the relationship between conventions . . . is rather like that between seedlings in a crowded plot of ground: whichever is the first to show vigorous growth can stifle the others."[34] Of course, there will always be some ambiguity, and I will show in the next section how the influence of morality on law has clouded a once useful clarity.

As Sugden argues, in extended games, where there is a low probability of the game ending, the tit-for-tat strategy, which punishes defectors from

[32] Ibid., 22.

[33] Actually developed by Israel M. Kirzner, *Discovery, Capitalism, and Distributive Justice* (Oxford: Blackwell, 1989).

[34] Sugden, *The Economics of Rights, Co-Operation, and Welfare*, 43.

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a rule, has great survival prospects.[35] In an argument borrowed from Hume, he shows how reciprocity can emerge. A brave reciprocator is prepared to initiate cooperation but is always willing to retaliate against defectors. A sucker's strategy of "turning the other cheek" would be fatal because it would allow cheats to prosper. As long as brave reciprocators meet enough cautious players, mutual cooperation can get going. Indeed, regular defectors and cheats will be bred out; they will soon run out of people to exploit. Reciprocity then emerges as the dominant strategy. Even some public goods could be provided in this way. As long as enough people get the benefit of a public good, it will be supplied. People can even provide welfare to each other; today's benefactor may be tomorrow's recipient. All of this is possible, even in the face of free riders, if the providers are held together by reciprocity.

However, a serious problem is that large numbers make a difference. If the group gets too big, then free riding is much more likely and monitoring costs accordingly higher, whereas in smaller, more intimate societies, people can be held to their moral obligations by informal pressures. This presents something of a problem for classical liberal social and moral theorists. In the ideal version of a classical liberal model of society, more or less anonymous people coordinate their activities by abstract rules (Friedrich A. Hayek's "extended order"[36]), and this is thought to be the great achievement of market civilization over a primitive, "face-to-face" society. It might be that, for efficiency reasons, in the case of large numbers, the survival of some features of more primitive orders might be appropriate. But another solution, which I will suggest below, might be to decentralize the supply of public goods, that is, to transform the monopoly state into a loosely linked collection of "clubs."

IV. Law, Constitutionalism, and Morality

Throughout the twentieth century, even in nontotalitarian regimes, the tendency was not to adapt political arrangements to the spontaneously developing rules that I adumbrated above, but to devise a rationalistic set of principles of universal application that could be used as criteria to evaluate morally any preexisting practices. Constitutions were not used as constraints on central authority, within which decentralized legislative bodies competed with each other in the supply of laws and policies. Rather, constitutions were used as *licenses* for government to act in what it considered to be the public interest. Undoubtedly this process was hastened by the rise of majority-rule democracy, which has proved to be a very weak constraint on the exercise of political power. Today it is a

[35] Ibid. See also Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984), for an extended analysis of the tit-for-tat strategy.

[36] See Friedrich A. Hayek, *The Fatal Conceit: The Errors of Socialism*, ed. W. W. Bartley (London: Routledge, 1988), 16–21.

very unimaginative political party that cannot find a moral philosophy to validate whatever program it might adopt for purely electoral purposes.

The worst feature of the moralism that drives contemporary politics is that once a decision is justified on abstract moral grounds it becomes *compulsory* for a whole nation. 'Federalism', a political arrangement that is supposed to encourage competitive jurisdictions in which various conventions and practices may flourish with no one predominating, scarcely exists in the Western world.[37] Thus it is that the U.S. Supreme Court has constitutionalized many things, especially civil liberties and related matters, that were once the responsibility of the states. The developing "constitution" of the European Union is proceeding in the same direction, though at a much faster pace.[38] Of course, in any liberal society there has to be a basic set of rules that forms the background against which jurisdictional competition takes place, but the tendency of modern moralism is to widen the scope of these rules so that every individual and every community is compelled to accept them. This enforced uniformity eradicates many rival conventions.

The most obvious feature of this triumph of moralism is the almost complete elimination of constitutional protection for economic liberties. In the historical development of classical liberalism, property and contract were regarded, legally and morally, as important as free speech and liberty of religion. Of course, a constitution is a kind of convention that protects individuals from the possibly malign consequences of pursuing short-term goals: it lowers people's time preferences. This is why the rules for constitutional change are much stricter than they are for the passage of ordinary legislation. But the rise of moralism has systematically attenuated this constitutional rigor.

It is in the theory of law that moralism has been most effective, and its impact has been greatest in the United States. This is largely because the country has a written constitution that is loosely worded in parts, and this allows for morality, which is often highly controversial, to creep into interpretations by the Supreme Court. This phenomenon happens less often in the United Kingdom, which has no written document and whose courts have much less power of judicial review. However, the common-law system, which permits a certain judicial creativity in the interpretation of hard cases, itself is now beginning to reflect moralism, albeit in a small way.

Jurisprudence has always been riven by the classic dispute between natural and positive law.[39] Briefly, natural lawyers do not merely criticize positive law on moral grounds; rather, they say that the very *meaning* of

[37] Switzerland might be the one exception. There, expenditure by the federal government is still less than that of the cantons.

[38] See Norman Barry, "A Classical Liberal's Conception of Political Liberty: America and Europe Compared," *The European Journal* 9, no. 3 (2001): 13–17.

[39] See Mark Tebbit, *Philosophy of Law: An Introduction* (London: Routledge, 2000), chap. 4.

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law turns on its content or moral quality. Proper law is supposed to reflect universally true moral statements: in theory, a judge would not have to apply legal propositions that breached these standards. Natural law propositions have to be broad in order to accommodate the wide variety of laws in the world, many of which could be said to be consistent with natural law. Positive lawyers have good reasons for making the meaning of law turn entirely on the objective features of its validation: a valid law can have any content,[40] but this content still can be evaluated by external moral principles. With the exception of Lon Fuller (1902–78),[41] traditional natural lawyers are rare in the modern era, but *pragmatic* lawyers[42] have good reasons to reject at least one of the sparse implications of pure positivism: that judicial activity consists of reading off the statutes and the cases and applying them to new problems in a mechanical manner. This is a most unrealistic description of judicial activity, and it can be rejected without abandoning other important features of positivism. These days, morality enters law not through an understanding of supposedly true universal moral principles, but by interpreting hard cases through a more modest ethic. To maintain a foothold on legality, these interpretations are claimed to be consistent with community practice and with a rationalist understanding of traditional principles.

It might be thought that some version of natural law, or at least a notion of law that absorbs much from ethics, would be appropriate for an understanding of social order in terms of conventions. But I think that this is mistaken and that conventionalism fits better with at least a version of legal positivism. I say this for two reasons. First, the influence of morality on law has produced great uncertainty, indeed controversy, when the courts have been asked to produce uniform and compulsory verdicts on issues that divide people. Since there is no one decisive answer in some cases, the judiciary is ceasing to be a neutral arbiter. Second, the critique of positivism has tended to understand all positive law systems as types of 'command', in which the orders of some authoritative body, such as a parliament, are the *sole* source of law. But not all positive law is command, and a proper understanding of legality in nonmoral terms would concentrate on *rules*, especially those rules that authorize people to commit certain acts (marry and leave wills, for example) and allow legislative bodies to do certain things (pass laws and make regulations). They are called 'power-conferring rules' in order to distinguish them from 'duty-imposing rules', such as the criminal law; only the latter are clearly understood as features of the command model. It is my contention that a

[40] Ibid., chap. 3.

[41] Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969).

[42] Richard Posner presents a normative theory of law based on economic reasoning, and although it is not positive law, it has emphatically nothing to do with morality. See Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, MA: Harvard University Press, 1999).

proper understanding of social order in terms of conventions is more explicable in positive law language than it is in terms of law as morality. An additional but crucial point is that the 'theory of competitive jurisdictions', in which a variety of conventions can flourish, is more efficaciously described in the language of positive law.

A brief account of the classic debate in jurisprudence between the positivist legal philosopher, H. L. A. Hart (1907–92) and the legal moralist, Ronald Dworkin, provides the perfect venue for the issues that I want to discuss. Dworkin is not an orthodox natural lawyer, but he is a fierce critic of positivism and a firm believer in the view that correct legal decisions reflect notions of morality. He also writes in the context of ongoing legal systems characterized by significant judicial creativity: an intellectual environment that might be thought highly appropriate for the development of a theory of conventions. It is the case, however, that Hart has provided the most sophisticated critique of the command theory of law. Furthermore, it is clear that a perusal of Hart's writings outside the field of formal jurisprudence reveals his political views to be rather close to American liberalism, a doctrine of which Dworkin, ironically, is perhaps the most prominent exponent. But Hart never confuses these political views with his theory of law. And it is the latter that provides the intellectual framework for a conventionalist theory of society, not the overt moralism of Dworkin.

Hart understands law as a system of rules, and validation consists in tracing back a purported legal proposition to its ultimate authorization by a 'rule of recognition'.[43] Thus, even under a sovereignty system, the claim of a parliament's utterances to be lawful rests upon a rule of that system. The sovereignty of Parliament in the United Kingdom derives from the courts' acceptance, dating from the eighteenth century, that they would enforce its law against any other purported claim, for example, a claim from the common law or from an international treaty. In the United States, the rule of recognition lies not just with the formal Constitution but with Supreme Court interpretations of its meaning. Thus Hart's rule of recognition, by replacing the sovereign of the command theory, can encompass a much wider range of legal phenomena. In fact, all ongoing legal systems can be analyzed by the rule of recognition model. It is a strictly positivist theory, for the appeal to the rule of recognition to establish claims to lawfulness does not depend in any way on the moral qualities that a claim may, or may not, have. In hard cases, where the meaning of rules may be in doubt, judges exercise considerable discretion. But they are not "discovering" law when they so act, for however plausible their decisions are, they are not strictly law until they have been embodied in the system and recognized in future litigation. The judiciary

[43] H. L. A. Hart, *The Concept of Law*, 2d ed. (1961; reprint, Oxford: Clarendon Press, 1994), 87–107.

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would be advised in difficult cases to make its innovative legal rulings consistent with contemporary ethics and practice, but this recommendation has no strict legal status. Of course, it is always open to a legislature to change a ruling, again by the authority of the rule of recognition. As a legal positivist, Hart thinks that the separation between law and morality is essential for clarity and predictability in a legal order.

It is this positivism that is Dworkin's target.[44] He makes an important distinction between rules and *principles*, but principles are not features of an abstract natural law, rather, they are located in the moral tradition of a community and are actually part of the law. Whereas rules apply at all times and are readily observable in statute or common law, principles need not be; they also may conflict and judges might have to "weigh" their significance. Principles have their most important role in hard cases where there is considerable doubt about what the law is. In effect, in a theory that bears an uncanny resemblance to Hayek's jurisprudence,[45] judges "discover" the law. Of course, Dworkin's and Hayek's theory of law is most appropriate for common-law systems in which judges are constantly searching for 'nonarticulated rules', Hayek's expression for nonformalized principles. Indeed, the charge that common-law processes involve an element of retroactivity, since no one can know what the law actually is until a judge has decided, is in principle avoidable in a Dworkinian or Hayekian approach. The law was always there; it simply had not been articulated or brought to light. Thus, for Dworkin, judges are always creative or activist, though he might deny this: "So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts."[46] Dworkin, here, means moral philosophy because he insists that ethical standards are part of the law. Allied to this position is his argument that every legal problem has one, unique answer. This is why judicial decisions can be universalized.

In Dworkin's early work there is a certain plausibility in this view. He cites a nineteenth-century New York case, *Riggs v. Palmer*,[47] in which someone who had murdered his grandfather was denied his inheritance, even though there was nothing in the formal rules that would have precluded him. However, in the face of an obvious moral iniquity, the judges invoked the principle that "No man should profit from his own wrongs." This principle need not always apply. Someone who jumped bail and invested his own money in the stock market would not be denied any

[44] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

[45] Friedrich A. Hayek, *Rules and Order* (London: Routledge & Kegan Paul, 1973). That Hayek and Dworkin should have opposite social philosophies is a reason for doubting the efficacy of their common jurisprudence. See Norman Barry, "Dworkin's Unbounded Legalism," *Ideas on Liberty* 52, no. 11 (2002): 35–38.

[46] Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), 90.

[47] *Riggs v. Palmer*, 115 N.Y. 506; 22 N.E. 188 (1889).

profits that might accrue. Again, the principle of 'adverse possession' allows people to keep, under certain conditions, that to which they were not formally entitled.

However, the argument is also used quite erroneously to justify the incorporation of highly contestable principles into American law, especially. Dworkin is a rights theorist and argues that rights always "trump" utility in hard cases. Correct answers are found by the discovery of appropriate rights. This position again derives from a superficially plausible distinction that Dworkin makes between principles and policy.[48] Judges are concerned with the protection of principles, and policy is a matter for legislatures, though even here, in a constitutional order that embodies rights, their discretion is strictly curtailed. The principle that is highly contestable is equality: "Legal argument must proceed on the basis that the best way to make sense of the law must be to read it so that it represents the state's striving to treat people as equals."[49] Thus the vague and ambiguous "right to equal concern and respect" becomes the linchpin of Dworkin's legal philosophy. Of course, it has some validation in the U.S. Constitution: the Fourteenth Amendment guarantees the equal protection of the laws and forbids the states to deny fundamental constitutional rights to persons without due process, but Dworkin uses it to justify a whole range of social innovations that are highly controversial. White males who might feel that their right to equal concern and respect has been deeply compromised by affirmative action programs that benefit women and ethnic minorities cannot expect much philosophical assistance from Dworkin.[50]

It is hardly likely that Dworkin's principles would count as Sugdenian conventions. For one thing, a convention must be prominent and survive a process of natural selection if it is to secure adherence. Dworkin's principles are guaranteed to sustain, indeed promote, controversy and contestability, but he also deliberately eschews a constitutional convention that might do something to assuage the heated debates that are generated by "rights" arguments: jurisdictional competition. In the model described by Sugden, it is quite plausible to imagine a convention emerging that prescribes that the institution closest to the people should generate appropriate rules, at least rules that would be less likely to generate internal tension. Indeed, the Tenth Amendment of the U.S. Constitution,[51] by reserving to the states or to the people, all matters not *specifically* delegated to the federal government, originally guaranteed this, but the gradual de-

[48] Dworkin, *Taking Rights Seriously*, 22–28.
[49] Dworkin, *Law's Empire*, 263.
[50] Barry, "Dworkin's Unbounded Legalism," 36–37.
[51] There is evidence that the authors of the Tenth Amendment to the U.S. Constitution were influenced by Hume's political writings. See Douglass Adair, "That Politics May Be Reduced to a Science: David Hume, James Madison, and the Tenth *Federalist*," in *Hume: A Re-Evaluation*, Donald W. Livingston and James T. King, eds. (New York: Fordham University Press, 1976), 404–17.

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mise of this legal convention, largely because of Supreme Court activism, has deprived the states of the opportunity of offering competing practices. The rise of a deontological rights mentality has produced rules that apply to everybody, with a much reduced possibility of exit. A clear example is *Roe v. Wade*,[52] under which all fifty states were compelled to follow an entirely judge-made law. The case made abortion a constitutional right; prior to that it depended on particular states. A small number of states did allow the practice. Of course, the controversy over abortion itself is morally insoluble, but the invocation of an absolute rights mentality has made it worse. Both sides of the debate invoke implicitly Dworkinian rights: pro-abortion activists cite the "woman's right to choose," while their opponents talk of the rights of the fetus. Who is right? The disagreement existed before 1973, but it was not until *Roe v. Wade* that the debate descended into physical violence on both sides. The one institutional arrangement that might have averted this discontent—competitive jurisdictions—is dismissed as "checkerboard law"[53] by Dworkin.

Furthermore, Dworkin is selective about the rights that he wants to protect. They do not include economic rights. It might be thought that the (short-lived) constitutional right to contract, which was created in the *Allgeyer v. Louisiana* decision of 1897[54] might have survived: it has exactly the same constitutional rationale as *Roe v. Wade* (both depend on a substantive interpretation of the due process clause of the Fourteenth Amendment). But the right to contract is now rarely mentioned. In fact, there never was an unlimited right to contract and a number of state restrictions were upheld by the Court even after *Lochner v. New York* (1905), the most famous case in this line. Why does Dworkin admire *Roe* so much but has so little time for *Lochner*?[55] It is much more likely that people would generate the convention of economic liberty—in this case, freedom of contract—than the right to abortion, since the latter involves deeply felt questions about life and death. Under a constitutional convention guaranteeing federalism, abortion would likely be available somewhere. It is also true, of course, that by the same argument some states might want to restrict severely the right to abortion. But it is unlikely to be abolished everywhere and jurisdictional competition is almost certain to preserve it somewhere. However, the convention of *economic* rights, by whatever method they emerge, has been made less sustainable by the Court's decision in a 1938 case, *United States v. Carolene Products*,[56] and its famous footnote 4, in which a distinction was suggested between civil and eco-

[52] For Dworkin's defense of *Roe v. Wade*, 410 U.S. 113 (1973), see *Law's Empire*, chap. 6.

[53] Dworkin, *Law's Empire*, 178–84.

[54] *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). See Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980), 111.

[55] 198 U.S. 45 (1905). See Dworkin, *Law's Empire*, 398.

[56] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See Siegan, *Economic Liberties and the Constitution*, 185–88.

nomic liberties. Although economic liberties were not denied, the Court speculated in footnote 4 that legislation adversely affecting civil liberties might be subject to a more stringent, less deferential standard of review than legislation affecting economic liberties. The democratic process was thought to be an adequate guarantor of economic liberties, but a less reliable protector of civil liberties. Since *Carolene Products* the Court, indeed, has been less solicitous of economic liberty and has virtually abandoned economic substantive due process. Still, contract, tort, and property ownership remained constitutionally protected, and there has recently been a revival in the Supreme Court's protection of the rights of property.[57] Under Dworkinian law, just as under *Carolene Products*, legislatures are more or less unrestrained in economic matters.

It should be noted that I do not maintain that Hart's positivism would *necessarily* lead to a legal environment favorable to the emergence and protection of economic conventions. After all, a legislature, acting perfectly legitimately by positivist standards, could implement socialism overnight. However, by making a firm distinction between law and morality, Hart's model prevents courts from constructing rights and turning them into "positive" law without any legislative action whatsoever. Also, Hart's avowed utilitarianism is a further bulwark against the claims of absolutist and invincible rights. What is decisive in Hart's dispute with Dworkin is the fact that Hart makes a distinction between law and morality for *moral* reasons. In other words, if we fuse law and morality, then we are disabled from giving the former necessary critical appraisal (and in his nontechnical work Hart was a persistent critic of positive law in the United Kingdom). If law is a part of morality then it is protected from scrutiny. In an implicit criticism of American rationalistic liberalism, Hart says that "it is folly to believe that where the meaning of law is in doubt, morality always has a clear answer."[58] In a pluralist society it is an illusion to think that deep differences can be adjudicated by law.

Neither do I mean to suggest that there is no place for a properly formulated rights doctrine in a utilitarian conception of law. All I wish to maintain is that rights should not constitute the ultimate foundation of law. Rights are, in a sense, "argument stoppers,"[59] and their invocation defeats all rival claims, especially those deriving from utility. There are good rhetorical reasons why proponents of state welfare argue for symmetry between ordinary civil rights and welfare rights, both to be satisfied by the state. But they are not symmetrical. This difference is not established by the claim that civil rights are more or less costless while expenditure on welfare seems to rise almost exponentially in democratic

[57] See Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* (New Brunswick: Transaction, 1997); and Norman Barry, "Constitutional Protection of Economic Liberty," *Ideas on Liberty* 50, no. 11 (2000): 26–30.

[58] Hart, *The Concept of Law*, 204.

[59] Barry, *An Introduction to Modern Political Theory*, 243.

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societies. After all, the protection of civil liberties does require some expenditure (except for genuine anarchists) on police, courts, etc.

The real difference between the two concepts of rights relates to personal conduct. All welfare rights theorists say that welfare recipients should have made some effort to avoid the possibly penurious situation in which they find themselves. As philosopher Alan Gewirth says, the agent "cannot rationally demand of other persons that they help him to have basic well-being unless his own efforts to have it are unavailing."[60] Yet we would not say that a person sacrificed his right not to be accosted, or worse, because he foolishly walked into an area known to be plagued by muggers. It is easy to imagine how rights would be protected in a utilitarian society; they are essential instruments for social cooperation and would emerge by convention rather than by philosophical reasoning. This also explains their persuasiveness. A modest utilitarianism demonstrates that they would be protected but not inviolable. This is no better illustrated than in the world of economics and commerce, where the traditional business enterprise of capitalist society has been the constant target of moralists. Because the object of commerce is obviously worldly, it has never been thought to exhibit more than the crudest of utilitarian rationales. However, as I shall show below, this ethical modesty is the real virtue of business enterprise. It far exceeds the ersatz grandeur of "business ethics."

V. Business and Morality

Presumably few today believe in Marxist predictions, or prophecies, about the ultimate downfall of capitalism or imagine that a socialist planned economy can compete with the market in the production of wanted goods and services. But criticism of capitalism has not abated; only now the attention is focused on its ethical failings. There has been in recent years a systematic attempt to moralize market capitalism: to hold it up to very high standards of ethical appraisal, to scrutinize it critically, and to make recommendations for its improvement. Where once capitalism had to be licensed by the economist it now requires the imprimatur of the moralist. As with other attempts to moralize social relationships, what is known as business ethics imposes 'supererogatory duties', that is, those that exceed normal ethical obligations, on business agents. The morality here is specifically anti-utilitarian.

Business has been particularly troublesome for classical liberals because ever since Mandeville there has been the persistent claim that economic success depends not only on the absence of supererogatory morality,

[60] Alan Gewirth, "Private Philanthropy and Positive Rights," in *Beneficence, Philanthropy, and the Public Good*, ed. Ellen Frankel Paul, Fred Miller, and Jeffrey Paul (Oxford: Blackwell, 1987), 68.

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but also on the suspension of familiar and uncontroversial ethical duties. As I shall show, it is only by an understanding of morality as the following of conventions that this difficulty can be resolved. Of especial critical concern are the stockholder-owned corporation and the individualism that drive the Anglo-American market. Even some nominally pro-capitalist writers compare it unfavorably with the apparently more communitarian and less "greed-driven" market systems of, for example, Germany and Japan, and they would be willing to sacrifice some efficiency to achieve these much-vaunted moral aims. It is never clear how much efficiency, nor what should determine the connection between efficiency and morality.

It is easy to see how the corporation emerged spontaneously from the free actions of individuals transacting under legal conventions, especially contract. Individuals pool their assets and create an artificial, legal "person," the corporation. They hire other persons to manage their assets and subject these individuals to strict, *fiduciary* duties: the managers must always act in the best interests of the owners, that is, the stockholders. All of the features of the modern corporation, including limited liability, were originally created spontaneously. As historian Robert Hessen writes: "At every stage of its growth the corporation is a voluntary association based exclusively on contract."[61] Adam Smith had very serious doubts about the efficiency, not the morality, of the joint-stock company.[62] He thought that the managers would not act in the interests of the owners and favored owner-managed enterprises. However, he did not anticipate the development of methods for dealing with rent-seeking managers;[63] the most important of these methods is the takeover threat. But as we shall see shortly, the problem remains serious for modern corporate capitalism.

The moralists have always maintained that the properties of the corporation do not emerge spontaneously but are a gift of the state and positive law.[64] Corporations should not be constrained only by fiduciary duties, and they must earn their "privileges" by acting for people other than stockholders. Corporate status is a kind of license, or contract, between business and society, which has to be paid for: hence the "social responsibility of business" thesis. But it is not a feature of economic conventions that business should be responsible to society or to the community. These are far too vague and ambiguous entities for the attribution of genuine obligations.

Of course, business personnel are bound by strict conventions to respect property and to honor contract and related obligations, but the

[61] Robert Hessen, *In Defense of the Corporation* (Stanford, CA: Hoover Institution Press, 1979), 43. See also Norman Barry, *Business Ethics* (London: Macmillan, 1998), 43.

[62] Smith, *The Wealth of Nations*, 720–58.

[63] 'Rent-seeking' is the activity by some of capturing extra market value created by others. Those who argue for economic protection, and many government employees, are rent-seekers.

[64] See Thomas Donaldson, *Corporations and Morality* (Englewood Cliffs, NJ: Prentice Hall, 1982).

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moralists have endeavored to put the supererogatory duties in the same category as the compulsory ones. These moral duties properly belong to individuals in their private capacities and ought not to be imposed on employees who already have fiduciary obligations, determined by contract, to their employers. It is the latter's money that will be used for the employees' achievements. Thus, modern business ethics creates an immediate conflict of interest for company employees. This conflict is complicated by the predominant feature of the corporation: the separation between ownership and control.[65] The normally passive stockholder has little rational incentive to exert his ownership rights. His only sanction against management is to sell his stock to a corporate raider. And this is why the moralists condemn takeovers and why Germany and Japan are so popular; takeovers are not a significant feature of corporate life in these countries.

An increasingly popular demand of business moralists is to supplement the stockholder within the decision-making structure of the corporation with the notion of 'stakeholder'. For the moralists, the owner is only one of a selection of interested parties who may share decision rights. Of course, this completely undermines ownership and thence any determinate authority structure in the firm. It is true that management in firms replaces the market;[66] persons do not freely contract within the company, and they have to obey orders. They are, of course, free, in capitalist society, to leave the organization, but while they remain in it they have to submit to authority. It is perhaps this minor moral problem that the moralists have in mind when they recommend the democratization of the firm via the idea of stakeholders. But stakeholders are not limited to employees. The list typically includes suppliers, members of the community in which the firm is situated, and any group that can claim some interest in the firm's activities.

The idea of the stakeholder, however, makes no practical or logical sense, for a stakeholder-driven firm will not speak with one voice. Instead, it will have a great variety of ends and purposes, disparate values, and no determinate authority structure. The purely logical conundrum relates to Arrow's general possibility theorem and problems that are bound to occur whenever there are at least three alternative decisions with at least three decision-makers.[67] No consistent decision will emerge after successive rounds of voting and one will have to be imposed by a "dictator." This does not matter in the conventional firm, for it can be assumed that the stockholders will normally speak with one voice and with one purpose—to maximize stockholder value. Some stakeholder moral-

[65] Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (1932; reprint, rev. ed., New York: Harcourt, Brace and World, 1967).

[66] See Ronald Coase, "The Nature of the Firm," *Economica* 4, no. 16 (1937): 386–405.

[67] See Norman Barry, "The Stakeholder Concept of Corporate Control Is Illogical and Impractical," *The Independent Review* 6, no. 4 (2002): 541–54.

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ists seem to be dimly aware of this problem. In a specifically Kantian analysis, William Evan and R. Edward Freeman recommend that a "metaphysical director" should be appointed to the board to adjudicate impartially between rival groups of stakeholders.[68] But nobody is impartial. The metaphysical director will be a rent-seeker who will divert income to himself (by prolonging disputes between stakeholders) up to the point at which the viability of the firm is threatened.

This is not to say that all is well with the business community, least of all that its standards are beyond reproach. It is too early to make detailed comments on the business scandals, especially those involving Enron and WorldCom, that occurred in 2001 and 2002, but it is clear that they relate to the oldest problem in business conduct: How do we ensure that agents (managers and other employees) work in the interests of the principals (the owners)? In the much maligned 1980s this was guaranteed by the takeover mechanism.[69] Predators noticed that agents were not acting in the interests of owners. In contrast, the takeovers of the 1960s and 1970s had not been designed to enhance shareholder value, but rather the wealth and power of managers, who behaved like bureaucrats in a government department. The predators of the 1980s simply broke up the unwieldy conglomerates that had been created by irresponsible managers and returned money, in the form of higher dividends and higher share prices, to stockholders. This offended the lofty ideals of the moralists, but was quite consistent with the conventions of capitalism.

This was not so of the scandals of the early twenty-first century, for then (like now) stockholders were again victims of exploitative managers. Every business convention was broken, by means including dishonest accounting, fixing of share prices, and the deception of employees about the value of the companies. The motive for these breaches was genuine greed as opposed to the notion of "greed" used by today's moralists, who use it to denigrate anybody who does well or whose earnings exceed favored criteria of social justice. It is also noticeable that the perpetrators of the recent egregious scandals had very high profiles within the charitable community.[70] Concededly, there is a problem in leaving business to be regulated entirely by convention for, although the market system is self-correcting, it is likely that there will be injured parties before its therapeutic effects operate. The problem is exacerbated by the fact of large numbers and the relative *anonymity* of business enterprise. These two facts make it more difficult for conventions, voluntarily accepted, to achieve

[68] William M. Evan and R. Edward Freeman, "A Stakeholder Theory of the Modern Corporation: Kantian Capitalism," in Tom L. Beauchamp and Norman E. Bowie, eds., *Ethical Theory and Business*, 4th ed. (Englewood Cliffs, NJ: Prentice Hall, 1993), 82.

[69] Barry, *Business Ethics*, chap. 6.

[70] Norman Barry, "What Capitalism Needs Is a New Gordon Gekko," *The Business*, September 15, 2002. See also Norman Barry, "The Right Morality for Capitalism," *Ideas on Liberty* 52, no. 12 (2002): 33–37.

the prominence that is required for their efficacy. But even here, regular criminal law (itself derived from convention) is likely to be a more effective remedy than an ambitious morality.

VI. Conclusion

The demise of positivism has produced new, and fiercely competing, moralities for the appraisal of particular public policies and generated new metaphysical rationalizations to ratify more general ethical outlooks. But it has been the aim of this essay to show that not all varieties of positivism produced an arid subjectivism or amoral relativism. Indeed, as we have seen, the historical founder of logical positivism, David Hume, was far from being a relativist, but was the creator of a complex normative doctrine of human conduct, which involved the demonstration that certain rules and practices have an almost *universal* appeal. They might be, in a purely logical sense, no more than superstitions, but if certain rules and practices are grounded in utility, they are highly serviceable. Thus, to replace the heady ideals of contemporary "morality" by the more realistic demands of convention is not to endorse any kind of ethical arbitrariness or subjectivism.

In fact, a much greater uncertainty about standards and practices comes about through the attempt to appraise them by high moral principles. The contemporary obsession with "morality" in the law has generated great dissent and confusion not only about the meaning of law, but also about the range of legal rules and their applicability to social affairs. When once much of human interaction was regulated by informal rules and practices, it is now a matter of formal legal control, either by statute or by creative decisions of common-law judges. The arbitrary assumption by early legal positivists that the only genuine law had to be a product of command not only made it difficult to explain regimes that are governed by constitutions and are, therefore, subject to significant judicial review, it also made it difficult to appreciate the potency of accepted conventions. The U.S. Constitution has historically illustrated the creativity of a system of law not solely derived from command. However, the current dominance of substantive ethics has led to the replacement of more or less informal mechanisms of social control by a much more extensive and invasive constitutionalized morality. The social disturbances generated by abortion, antidiscrimination, and other civil rights decisions show just how divisive this moralization can be.

Business has been subjected to the same moral appraisal as law, but here the critique would have been more effective had it focused on breaches of established conventions rather than the creation of supererogatory duties and novel notions of "stakeholders." In fact, capitalist enterprises have not been remiss in fulfilling supererogatory duties; on the contrary, corporate charitable activity (with or without direct stockholder ap-

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proval) has been a remarkable feature of corporate capitalism. Instead of their misdirected critiques, moralists should have focused on cases of managers who breached the conventional duty of acting in the interests of owners.

The obvious solution to this breach of duty is the activation of the business convention that stockholders should be more active and reassert their legal powers of ownership. Here, however, stockholders face another problem, one frequently analyzed in the social sciences: rational ignorance and passivity in the context of large numbers. The difference that any one person's actions might make is so small that it is not in his interest to act. His only sanction is to sell his shares to a corporate raider. However, activists, especially in the United Kingdom, are often not interested in maximizing stockholder value but in pressing for a moral cause. The stockholder activists of this type are actually anticapitalist. In the long run, capitalism will spontaneously develop solutions to these problems, but the solutions will not come from business ethics. Only a reexamination, and a reassertion, of conventions will lead to progress in genuine business morality.

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