

UNSPEAKABLE ETHICS, UNNATURAL LAW*

ARTHUR ALLEN LEFF**

I want to believe—and so do you—in a complete, transcendent, and immanent set of propositions about right and wrong, *findable* rules that authoritatively and unambiguously direct us how to live righteously. I also want to believe—and so do you—in no such thing, but rather that we are wholly free, not only to choose for ourselves what we ought to do, but to decide for ourselves, individually and as a species, what we ought to be. What we want, Heaven help us, is simultaneously to be perfectly ruled and perfectly free, that is, at the same time to discover the right and the good and to create it.

I mention the matter here only because I think that the two contradictory impulses which together form that paradox do not exist only on some high abstract level of arcane *angst*. In fact, it is my central thesis that much that is mysterious about much that is written about law today is understandable only in the context of this tension between the ideas of found law and made law: a tension particularly evident in the growing, though desperately resisted, awareness that there may be, in fact, nothing to be found—that whenever we set out to find “the law,” we are able to locate nothing more attractive, or more final, than ourselves.

My plan for this Article, then, is as follows. I shall first try to prove to your satisfaction that there cannot be any normative system

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** Southmayd Professor of Law, Yale Law School. B.A. 1956, Amherst College; LL.B. 1959, Harvard University.

THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974) [hereinafter cited as R. NOZICK];

Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) [hereinafter cited as Posner].

ultimately based on anything except human will.¹ I shall then try to trace some of the scars left on recent jurisprudential writings by this growing, and apparently terrifying, realization. Finally, I shall say a few things about—of all things—law and the way in which the impossibility of normative grounding necessarily shapes attitudes toward constitutional interpretation.²

Consider what a “finder” of law must do. He must reach for a set of normative propositions in the form “one ought to do *X*,” or “it is right to do *X*,” that will serve in, indeed serve as the foundation for, a legal system. Once found, these propositions must themselves be immune from further criticism. Of course, once the finder finds what it is he is looking for, his work is not necessarily over. He may still work with the propositions, show their interactions, argue about their reach and implications, rationalize, restate, and reflect. But the propositions he has found are the premises of his system, and once found they cannot just be dispensed with. That which is found becomes a given for the system, however the system may be systematically manipulated. It is not created by the finder, and therefore it cannot be changed by him, or even challenged.

Imagine, now, a legal system based upon perceived normative propositions—*oughts*—which are absolutely binding, wholly unquestionable, once found. Consider the normative proposition, “Thou shalt not commit adultery.” Under what circumstances, if any, would one conclude that it is *wrong* to commit adultery? Maybe it helps to put the question another way: when would it be impermissible to make the formal intellectual equivalent of what is known in barrooms and schoolyards as “the grand sez who”? Putting it that way makes it clear that if we are looking for an evaluation, we must actually be looking for an *evaluator*: some machine for the generation of judgments on states of affairs. If the evaluation is to be beyond question, then the evaluator and its evaluative processes must be similarly insulated. If it is to fulfill its role, the evaluator must be the unjudged judge, the unruled legislator, the premise maker who rests on no premises, the uncreated creator of values. Now, what would you call such a thing if it existed? You would call it Him.

There is then, this one longstanding, widely accepted ethical and legal system that is based upon the edicts of an unchallengeable creator of the right and the good, in which the only job of the person who would do right is to *find* what the evaluator said. Assuming that I know

1. But see text accompanying notes 3-4 *infra*.

2. My colleague, Leon Lipson, once described a certain species of legal writing as, “Anything you can do, I can do meta.” What follows is a pure instantiation of his category.

what the command "Thou shalt not commit adultery" means, then if (and only if) the speaker is God, I ought not commit adultery. I ought not because He said I ought not, and why He said that is none of my business. And it is none of *my* business because it is a premise of *His* system that what He says I ought not to do, I ought not to do.

It is of the utmost importance to see why a God-grounded system has no analogues. Either God exists or He does not, but if He does not, nothing and no one else can take His place. Anything that took His place would also be Him. For in a God-based system, we do not define God's utterances as unquestionable, the way we might state that a triangle has three sides and go on from there and only from there. *We* are not doing the defining. Our relationship to God's moral order is the triangle's relationship to the order of Euclidean plane geometry, not the mathematician's. We are defined, constituted, as beings whose adultery is wrong, bad, unlawful. Thus, committing adultery in such a system is "naturally" bad only because the system is supernaturally constituted.

Put another way, God, for philosophical purposes, is uniquely in the universe that being whose every pronouncement, including evaluative ones, is a "performative utterance." A "performative" is a statement that does not describe facts or conform to them but instead constitutes them, creates them, "performs" them. When I say, "I am taking a walk," I am describing what I am doing. When I say, "I apologize," or "I swear," I am *doing* it. There is no question whether I am accurately reporting on the world, because I am in the process of constituting it.³

Especially for lawyers, the realm of the performative utterance is not arcane. It is one of the things we deeply understand, often without knowing it. Important performatives, after all, include "I promise," "I now pronounce you man and wife," and "This watch that I now give you, my son, is yours."

We also understand that what a performative performs is not some mysterious emanation of magic words, but the product of certain rules and laws. Therefore, a performative utterance may not have, under all circumstances, the effect it has under some. "I promise" is a promise, but it may not result in a contract unless the promisor has capacity, there is no fraud in the inducement, consideration is present, and so on. "I now pronounce you man and wife" will not necessarily create the status of marriage if, for instance, the speaker is an imposter cleric, and

3. See Hartnack, *Performative Utterances*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 90-91 (P. Edwards ed. 1972), for a brief introduction to some of the nuances of the concept.

at least one of the putative spouses knows it at the time.

This is why there can ordinarily or "naturally" be no such thing as a normative performative utterance. A statement in the form "you ought to do *X*," "it is right to do *X*," or "*X* is good" will establish oughtness, rightness, or goodness only if there is a set of rules that gives the speaker the power totally to determine the question. But it is precisely the question of who has the power to set such rules for validating evaluations that is the central problem of ethics and, as we shall see, of legal theory. There is no one who can be said a priori to have that power unless the question being posed is also being begged.

Except, as noted, God. It *necessarily* follows that the pronouncements of an omniscient, omnipotent, and infinitely good being are always true and effectual. When God says, "Let there be light," there is light. And when He sees that it is good, good is what it is.

Now I certainly have not gone on at such a length to clarify the special status of God as the foundation of an ethical or legal system because I intend to discuss whether or not He exists and can ground such a system for us. That, obviously, is not something that can be decided here. I have pursued this discussion for so long because it will make it much easier to understand why there is discontent verging on despair whenever some theorist tries to develop a system in which "found" ethical or legal propositions are to be treated as binding, but for which there is no supernatural grounding. God's will is binding because it is His will that it be. Under what other circumstances can the unexamined will of anyone else withstand the cosmic "says who" and come out similarly dispositive?

There are no such circumstances. We are never going to get anywhere (assuming for the moment that there is somewhere to get) in ethical or legal theory unless we finally face the fact that, in the Psalmist's words, there is no one like unto the Lord. If He does not exist, there is no metaphoric equivalent. No person, no combination of people, no document however hallowed by time, no process, no premise, nothing is equivalent to an actual God in this central function as the unexaminable examiner of good and evil. The so-called death of God turns out not to have been just *His* funeral; it also seems to have effected the total elimination of any coherent, or even more-than-momentarily convincing, ethical or legal system dependent upon finally authoritative extrasystemic premises. What Kurt Gödel did for systems of logic,⁴ deicide has done for normative systems, including legal sys-

4. See Leff, *Law and Technology: On Shoring Up a Void*, 8 OTTAWA L. REV. 536, 538-39 (1976); Leff, Book Review, 29 STAN. L. REV. 879, 887-88 (1977).

tems.

Put briefly, if the law is “not a brooding omnipresence in the sky,”⁵ then it can be only one place: in us. If we are trying to find a substitute final evaluator, it must be one of us, some of us, all of us—but it cannot be anything else. The result of that realization is what might be called an exhilarated vertigo, a simultaneous combination of an exultant “We’re free of God” and a despairing “Oh God, we’re free.”

Thus, once it is accepted that (a) all normative statements are evaluations of actions and other states of the world; (b) an evaluation entails an evaluator; and (c) in the presumed absence of God, the only available evaluators are people, then only a determinate, and reasonably small, number of kinds of ethical and legal systems can be generated. Each such system will be strongly differentiated by the axiomatic answer it chooses to give to one key question: *who* ultimately gets to play the role of ultimately unquestionable evaluator, a role played in supernaturally based systems by God? Who among us, that is, *ought* to be able to declare “law” that *ought* to be obeyed?

Stated that baldly, the question is so intellectually unsettling that one would expect to find a noticeable number of legal and ethical thinkers trying not to come to grips with it, if its avoidance were at all possible. And of course it turns out that it is possible, at least as a desperate temporary matter, and that the impulse has been actualized in an enormous body of modern writing.

The most popular of those moves may be called “Descriptivism.”⁶ It goes like this: it is not at all necessary to specify *who* is generating the legal system, much less to describe how that generation is being effected. A legal system is a fact. It is something (including processes) that exists. The way to identify its existence is to discover what rules are in fact obeyed. Once you have made that identification, it is possible, at least in theory, to describe how the rules originated, and accurately to describe them as the product of certain people using certain

5. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting). The sky to which Holmes was referring was a heaven in which federal judges might find common law not generated by state legal systems. See also *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (“The fallacy and illusion that I think exist consist in supposing that there is this outside thing [a ‘transcendental body of law’] to be found”).

6. “Descriptivism” bears a strong family resemblance to what is often called “Positivism,” a term I carefully avoid lest I seem to be tendentiously presenting and trivializing any real person’s particular body of work. In fact, however, that is exactly what I am doing, though for a whole school of thought. I present what I take to be the heart of a complicated body of hard thinking in simplified, almost parodic, form so as to heighten the power of my own critical stance. This process is known in the trade as being heuristic.

processes.

That is, you can say if you wish that the law is "the command of the sovereign," but that is only to say that law is the result of that of which it is the result. If law is defined as the command of the sovereign, then the sovereign is defined as whatever it is the commands of which are obeyed. Any sovereign is "as good as," that is, validates the law to the same degree as, any other. The term "the law" describes not *good* behavior or *right* behavior, but behavior. It is not that whatever is is right, but that whatever is is *as* right as anything else that might be.

I find it enormously interesting that this approach to finding a replacement for a transcendent source of values involves, in effect, a redirection of metaphorical energy: to find a human equivalent for God, there is a focus not on God's goodness, but on His power. It makes sense. For this too may be predicated of God: whether or not it is ever coherent to question if His will ought to be done, one way or another His will *is* done. All of His "statements," evaluative and other, are performatives: when God says, "Let there be light," light there is. It may, of course, be His will that *your* will is free to do or not to do one thing or another, but His response is inexorable—not to mention infinite and eternal.

The central difficulty with the Descriptivist position, then, for all the subtlety and intelligence with which various adherents have elaborated it,⁷ is that it "validates" every legal system equally. If a valid system is one that is in fact in place, then anything that is in fact in place is the legal system. No particular characteristic of or procedure employed by the "sovereign" is necessary to validate the system except its power to generate something that is in fact obeyed. The basic engine of law is nowhere—or, rather, it is anywhere at any moment it happens to be—and that robs Descriptivism of any *critical* capacity. Under Descriptivism, it is impossible to say that anything ought or ought not to be.

A critical jurisprudence is impossible when one gives God's place to anyone who happens to be conventionally obeyed, with nothing turning on who that is. If that seems unsatisfactory, then one must finally face the question of who *ought* to have God's validating power. That is, one will have to seek out some way to validate a particular legal system without thereby necessarily validating *every* legal system.

Since we are talking about people, the question really is whether

7. See, e.g., H. KELSEN, PURE THEORY OF LAW (M. Knight trans. 1967). K. OLIVECRONA, LAW AS FACT (1939), is notable for a presentation of positivism so icy that Kelsen himself begins to seem by comparison some kind of hot-blooded Latin.

there is any person or set of persons whose generation of law is entitled to final respect. The obvious first move is to decide whether one can found a system on the premise that each person is his *own* ultimate evaluative authority. In this approach, God is not only dead, but He has been ingested seriatim at a universal feast. Everyone can declare what ought to be for himself, and no one can legitimately criticize anyone else's values—what they are or how they came to be—because everyone has equal ethical dignity. In this approach everything that was true of God's evaluations is true of each person's evaluations. Each individual's normative statements are, for him, performative utterances: what is said to be bad or good, wrong or right, is just that for each person, solely by reason of its having been uttered.

In the absence of a supernatural validator, what could be more "natural" than that? Alas, there *is* a problem: who validates the rules *for interactions* when there is a multiplicity of Gods, all of identical "rank"? The whole point of God, after all, is that there is none like unto Him. But the whole point of turning people into Gods is to make every one like every other one. It is totally impermissible under such a conception for there to be, so to speak, interpersonal comparisons of normativity: there is literally no one in a position to evaluate them against each other.

I have been told that the ancient Babylonians, possessed of (or by) a multiplicity of Gods and therefore faced with similar problems, concluded that in cases of conflict the big Gods ate the little ones. That sort of move here, however, would serve only to collapse this "God-is-me" solution into the "whoever-wins-is-God" approach of Descriptivism. If the difficulty with Descriptivism is that it validates any normative system, the problem with the "God-is-me" approach—call it "Personalism"—is that it validates everyone's individual normative system, while giving no instruction in, or warrant for, choosing among them.

This feature of the Personalist ethical system is something of a hindrance if one wants to found a legal system on it, that is, a system designed to govern interactions among people. It constitutes humanity as a series of autonomous monads, each of identical "dignity," each entitled to exactly the same respect. As long as they remain the ethical equivalent of the atoms of Lucretius,⁸ raining down from some indescribable noplacé, running immovably parallel, eternally untouching and untouchable, there is, of course, no problem. A universe of ethical solipsism is perfectly adequate. But what happens if, again like Lucre-

8. See T. LUCRETIUS CARUS, *THE WAY THINGS ARE* (R. Humphries trans. 1968).

tius' atoms, they enter a world where they cannot continue on their hermetic courses, but have to bang into each other? If they in fact clash, that is, if people actually do affect each other when their autonomous, equally valid value sets are translated into actions, what happens? When these individual moral monads leave the world of definition and entailment for the world of existence and causality, the world in which legal systems operate, the Personalist has one hell of a problem: who *ought* to give way?

Note that this is not the same question as who *will* give way. Picture two of these monstrous monads simultaneously coming upon something that they both want (and that, by the way, they are by definition equally "right" to want). One of them shoulders the other aside and appropriates the object, or maybe he just gets there first. One could say it "ought" to be his because he got it: a single-instance equivalent of Descriptivism. The key question, however, is whether, using the assumptions of Personalism, one can say anything else. If the impulses to possess are, by definition, equally "valid," is not the result equally acceptable whichever way it comes out? Is there any ground from which to criticize the *method* by which a monad fulfills its unchallengeable desires?

The answer is no, not at least within the confines of Personalism. If some methods of actualizing desires in contest with other desires are to be forbidden, the forbidding will have to be done on some basis not entailed by the tenets of the Personalist ethic. By definition, one who considers force an appropriate way to deal with conflicting desires is just as justified as one who feels otherwise, for the propriety of activities in the world is no different from any other subject of evaluation.

That does not mean that one cannot generate and seek to defend a system that provides, for instance, that the little Gods may not use force or fraud on each other when they fall into conflict over aims.⁹ One could indeed defend a system that says that all conflicts have to be settled somehow to the satisfaction of both contending parties.¹⁰ One could say that such a rule for interdivinity transactions will produce more health or wealth or wisdom, and that health, wealth, and wisdom are good.¹¹ What one cannot do is defend it on the basis of Godlet preference.¹²

9. See, e.g., R. NOZICK, in which an intelligent and very enthusiastic Personalist shows his recognition of the impossibility of generating out of mere autonomy rules for interautonomous conflicts by insisting on what he calls "side constraints" on people's actions vis-a-vis each other. See especially *id.* 26-53.

10. See note 31 *infra* and accompanying text.

11. See, e.g., Posner.

12. One could not, that is, unless it somehow turned out that all the individuals were not only

Hence it should come as no surprise that a system of “each-God-for-himself” is not, by itself, much of a solution to any basic problem of human *society*. Nor is there any way out for a Personalist via “agreement,” real or hypothetical. Absolutely nothing is gained by hypothesizing or even bringing about some “contract” or treaty among the monads about what they are permitted to do with or to each other.¹³ Under the Personalist view, a promise ought to be kept only if each promisor thinks it ought to be kept; the value of promise-keeping is no different from any other.

What then is left? Pure Descriptivism is exactly what it purports to be: a description of a state of affairs with no normative content at all. The Personalist, internalizing God on a one-man-one-God basis, leaves evaluations of interactions between the Godlets formally impossible. If the receptacle for God’s evaluative role cannot therefore be either “wherever it is” or “equally in everyone,” then where *can* it be?

The next move, one would guess, would be to find some way to distinguish among the individuals either quantitatively through some aggregation principle, or qualitatively. One might choose to stand, that is, on the most evaluations or the best ones.

Over the first alternative, counting noses, we need not linger long. If we assume that it is impermissible to distinguish qualitatively among the entities being counted—if by stipulation we are not allowed to look inside the heads from which the noses protrude, and if each individual is by definition as “right” and “good” as every other—then all our count tells us is that a multiplicity of perfectly virtuous monads are not necessarily also identical. If we are to cope with the matter through a vote, it must be because of some *rule* that itself cannot be derived from any monad or combination thereof. All one has is the assumed conclusion that in cases of conflicting perfections, the largest number wins.

Can we then get out of our bind by deciding after all to pay attention to the quality of the ethical boxes? No, we cannot. The shortest way to put the reason is this: a fundamental *assumption* of the perfect-monad Personalist view is that no inquiry can be made of the quality of any ethical position held by a monad. Each one is his own God. That is the whole purpose of the Personalist view, to insulate fundamental

of equal ethical dignity, but, at least on this matter, held substantively identical normative positions. See text accompanying notes 24-25 *infra*. Even then one would have at the base of one’s ethical system nothing more than a Descriptivist fact, albeit an interesting anthropological one. See Leff, Book Review, *supra* note 4, at 882-84.

13. See J. RAWLS, A THEORY OF JUSTICE (1971), for the most magisterial modern example of this hypothetical-contract move (not, however, tied to Personalism in the sense of the term used here).

ethical conclusions from any further examination. If monad *A* believes *X*, and monad *B* believes *Y*, it is central to the system that there is *no* criterion for choosing between *X* and *Y*. The moment one suggests a criterion, then individual men have ceased to be the measure of all things, and something else—and that necessarily means someone else—has been promoted to the (formally impossible) position of evaluator-in-chief.

Nonetheless, this impulse to give different weights to different positions based on their “quality” is so common in modern ethical discourse that it deserves further consideration. After all, very rarely do modern moralists actually give the ethical positions of the people on the Clapham Omnibus equal weight. Notably preferred to them are the people in the professorial Volvo, ostensibly because they do not have just any old view of an ethical question, but a “considered” view, or a “serious and reflective” view, or may even have reached the enviable state of being in “reflective equilibrium.”¹⁴

I am making fun of all this, but I should not. Underlying this impulse to rate certain positions over others is the understandable and perhaps unavoidable human desire to give human reason some role in ethical theory. One would think that a fully considered moral position, the product of deep and thorough intellectual activity, one that fits together into a fairly consistent whole, would deserve more respect than shallow, expletive, internally inconsistent ethical decisions. Alas, to think that would be to think wrong: labor and logic have no *necessary* connection to ethical truth.

Let us say that person *A* decides that one ought to do *X* under particular circumstances. Person *B* believes that under those circumstances one ought to do *Y*. Person *A*'s conclusion is based upon deep and mature thought and comes out of an intellectual structure such that doing *X* will work no discernible contradiction with anything else he might think one ought to do. Not so Person *B*. He thinks one ought to do *Y*, but he has not thought about it, and if he did think about it he would recognize that doing *Y* is totally, flagrantly inconsistent with a host of other things he thinks one ought to do. Should one not in such a situation give more weight to *A*'s position than to *B*'s? Only if *someone* has the power to declare careful, consistent, coherent ethical propositions “better” than the sloppier, more impulsive kinds. Who has that power and how did he get it?

Of course, *B* himself might concur. If *A* shows *B* that *B*'s decision grows out of or into a logical muddle, *B* may decide to go along with *A*.

14. See *id.* 20-22, 48-51.

Monads are not *necessarily* sealed off from each other. But what if *B* does not care, that is, what if his own evaluation system does not require logical consistency, let alone elegance? Can *A* (or we) say that *B* is *ethically* mistaken? If *B* will not be persuaded, can he be threatened into changing his views, or physically forced? *Where* do we get that power? Bluntly, intellectual beauty is not a necessary prerequisite to ethical adequacy unless someone declares it to be.¹⁵

Of course, if ethical propositions are made subject to intellectual criteria, ethical discourse is made more interesting, not to mention possible. Once certain intellectual canons are accepted, one can criticize another's conclusion with respect to those canons. The argument

- (1) $p = q$;
- (2) if p , then x ;
- (3) if q , then not x

doubtless can be described as lousy argument, whether the letters p , q , and x stand for propositions of mathematics or of ethics. But so what? The aim of ethical discourse is ethics, not discourse, and a piece of lousy thinking is not necessarily "immoral."

And with the elimination of any requirement that ethical statements be coherent goes any requirement for any particular process leading to more intelligent and intelligible decisions.¹⁶ It would be surprising, after all, if a system based upon the existence of ethical monads whose normative premises are by definition beyond inquiry were also to incorporate some *necessary*, and necessarily normative, rule about communicating them, for instance, that they explain themselves to each other. Gods have their own individual rules for chatting, even with each other. No one else can say that a certain process—free speech, for instance, or equal access to each other—is required, unless there is a super-God who can insist.

There remains, then, only one considerable approach to the validation of ethical systems. Under it no search is made for any evaluator, but rather some state of the world is declared to be good, and acts which effect that state are ethical acts. Merely to express this approach is, of course, to refute it, for a good state of the world must be good *to someone*. One cannot escape from the fact that a normative statement is an evaluation merely by dispensing with any mention of who is making it. Hence the description of a particular end-state—human happi-

15. See *id.* 49 ("It is simply good fortune that the principles of celestial mechanics have their intellectual beauty").

16. The apotheosis in modern jurisprudence of this idea that intelligibility is a normative category is most likely L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969), especially in the chapter, *The Minimum Content of a Substantive Natural Law* at 184-86.

ness¹⁷ or wealth¹⁸—as a validator of a system, is just another evaluator-centered approach, but with blinkers added. Wealth is good, and makes our acts good, if someone, or some collection of someones, says so. But *which* someone or someones count still has to be accounted for.

I have gone through the preceding elaborate discussion because it leads to an important assertion about legal systems in general and ours in particular. *There is no such thing as an unchallengeable evaluative system.* There is no way to prove one ethical or legal system superior to any other, unless at some point an evaluator is asserted to have the final, uncontradictable, unexaminable word. That choice of unjudged judge, whoever is given the role, is itself, strictly speaking, arbitrary.

But if the system in addition presumes to coherence, then once the final-evaluator role is distributed, almost all questions must be answered determinatively in a manner characteristic of, and in all important ways predictable from, the original assignment of final evaluative power. It is thus the first assumption, combined with simple canons of intellectual coherence (the need for which is itself an undefendable assumption),¹⁹ that determines the legal result in any particular instance.

One methodological consequence of the unprovability of the bases of any legal or ethical system is that it makes one particular kind of scholarly work attractively easy to write. If a series of values is set forth to be justified—"proved" in the strong sense used here—all attempts will necessarily fail. On the other hand, if the set includes a value that is to prevail *unless* some other contradictory value is "proved," then the value not requiring proof will always win. That is, an argument in the form "*X*, unless *p*, *q*, or *r*" will always generate "therefore *X*," if the system makes it impossible to establish *p*, *q*, or *r*.

A splendid example of that scholarly move is Robert Nozick's book, *Anarchy, State, and Utopia*, which opens: "Individuals have rights, and there are things no person or group may do to them (without violating their rights)."²⁰ Nozick devotes much of the rest of the book to showing how no contrary position—for instance, that the poor, as a class, have rights against the rich or that the sick have rights against the well—can be established.²¹ But obviously each of those positions (and alas, an infinity of others too) could be established the

17. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), may be taken as a locus classicus for this view. Also see J. RAWLS, *supra* note 13, at 22 n.9, for other works in the tradition.

18. *See, e.g.*, Posner.

19. *See id.* 110.

20. R. NOZICK ix.

21. *See, e.g., id.* 167-74 (*Redistribution and Property Rights*).

same way "Individuals have rights . . ." was established, by simple declarative assertion.²²

I certainly do not want to suggest that Nozick is unique in this mode of argument. It is hard to know, in fact, how else one could proceed, given the proven unprovability of normative propositions. At some point in every sustained argument about what is right or wrong, or what ought or ought not to be done, some normative proposition about who has the final power over normative propositions will have to be asserted. It may be veiled or open, but it will have to be there. And once it is there, whatever it is, it will determine the form of the system that emerges.

That is why works that seem so different in surface detail turn out to have so surprisingly much in common. For example, any system the central premise of which is that individuals may not morally be dominated by other individuals, no matter how many of them there are, will encounter identical problems and not surprisingly will tend to come up with similar "solutions." As we have seen, the problem with turning each person into an evaluative Godlet is that it is then impossible to ground rules for how the individuals ought to deal with each other. To put it another way, if the individuals are assumed to be simultaneously equal and nonidentical, there must be conflict, and that conflict cannot be adjudicated by any extra-individual evaluation system.

As suggested earlier,²³ however, that fatal weakness in the radical individualist position would melt away if, in some mysterious way, equal dignity could be joined to identical evaluation; if everyone believed the same thing were right, there would be no conflict. But there is a strong empirical implausibility to the existence of identical evaluative criteria, at any level above triviality, for any collection of real individuals. Thus, we find two scholars as different in approach as Nozick²⁴ and Roberto Unger,²⁵ both committed to a no-domination constraint on interpersonal behavior, making almost identical moves. What they both do is hypothesize some process that would lead to geographic concentrations of the like-minded, which grouplets would then coexist, but at a spatial remove, with other concentrations of other-minded individuals. The processes leading to the creation of these mini-societies, insofar as they are described at all, are vastly different in

22. Consider, for instance, what would happen if the Nozick book had begun "Individuals have duties, and there are things persons may not fail to do (without violating their duties)." Nozick himself is fully aware of the nakedness of his opening assertion. *See id.* xiv ("This book does not present a precise theory of the moral basis of individual rights"). *See also id.* 9.

23. *See note 12 supra.*

24. *See R. NOZICK.*

25. *See R. UNGER, KNOWLEDGE AND POLITICS (1975).*

the two works, but the result is the same: conflict among the individuals within the subgroups, while not treated as technically impossible, is treated, implicitly, as vastly less important once the individual members have found each other. Individuality, that is, is seen as being retained at relatively low individual cost.

The conceptual difficulty with this solution (leaving totally aside the practical implausibilities of the processes envisioned) is that conflict necessitated by a system of equally "right" monads is merely transferred to the level, so to speak, of international law. Each little cluster of individuals may have become normatively homogeneous, but the world now consists of heterogeneous clusters, and by hypothesis the beliefs of no one of them are entitled to more respect than those of any other. All that has been achieved is the creation of corporative, agglutinative, nonbiological "individuals" whose evaluations are to remain unquestionable. But which rules ought to govern *their* interactions is a question that, necessarily, still has no answer.²⁶

Interestingly enough, the same basic move—generating a process that will produce identical biological individuals so as to eliminate conflict over values—is typical of some forms of neo-Marxism, which is moderately resurgent of late in (of all places) legal scholarship.²⁷ This "Marxist" move²⁸ is to make the winnowing and duplicating process temporal rather than, like Unger's and Nozick's, spatial. The Marxist utopia is located in a blessed future when there will be only one class that, at least impliedly, will have no evaluative conflict.²⁹ The vision is a powerful one because it does not leave the landscape dotted with presumably antagonistic agglutinations of the militantly like-minded. There will be no need for any "international law" governing interclass conflicts of morality because all the other "classes" will be gone.³⁰

Still another ethical system, Richard Posner's, reaches a similar result, albeit from a different direction.³¹ Nonetheless, it ends up for Posner too that, with trivial exceptions, no person may dominate any

26. Both Unger and Nozick are ostentatiously unconvincing in dealing with this "international law" problem. See R. NOZICK 329-30; R. UNGER, *supra* note 25, at 284-89.

27. The "Conference on Critical Legal Studies," a loosely knit group made up mostly of law teachers from around the country, appears to be flourishing and also to be "Marxist," at least in the sense that the things one is supposed to be critical about are bourgeois law and legal categories. The Conference, for example, took part in cosponsoring a panel at the 1979 Annual Meeting of the Law and Society Association on "Marxist Approaches to Law." See Conference on Critical Legal Studies, Newsletter (Mar. 1979).

28. As usual, that is not necessarily to be taken as equivalent to "Marx's move."

29. See, e.g., H. MARCUSE, *EROS AND CIVILIZATION* 134-39 (1955).

30. It is not clear how much active, albeit temporary, nastiness will have been necessarily implicated in the way the other classes "went."

31. See Posner. It must be pointed out that my discussion of this piece focuses on a narrow,

other. Desires are taken as given, beyond external criticism, and no one may be forced, either individually or socially, to do anything for or to oneself or anyone else. Only force and fraud are side-constrained in the operation of the system; any desire for them is illicit.

In this construct, anything two individuals agree to with respect to each other is fine. When there is interaction between monads that is not conflictive, then that interaction is obviously good. When there is an interaction that does not lead to an agreement, then there is nothing. Just as for Nozick any individual can choose not to agglutinate, for Posner every individual can choose not to deal. If he does choose not to deal, the only result is no deal.

Moreover, as one can be neither praised nor blamed for dealing or not dealing, what Posner brings off, in effect, is a rather interesting merger of Descriptivism and Personalism. This time, it is not societies that are what they are and uncriticizably so, but individuals. They just make ad hoc social relationships that become, like the legal order of the Descriptivist, immune to ethical criticism.

There are, of course, small problems with Posner's system, and more important, within Posner's system.³² One of the criteria he lists that can be used to reject an ethical theory is that it "yields precepts sharply contrary to widely shared ethical intuitions."³³ But, as he recognizes, there is

[a] less welcome implication of [this] . . . approach . . . that people who are very poor—not those who merely lack ready cash, but those who have insufficient earning power to be able to cover the expenses of a minimum decent standard of living—count only if they are part of the utility function of someone who has wealth. In a rigorous application of the wealth-maximization criterion, there is (with limited exceptions discussed later) no *public* duty to support the indi-

albeit necessary, part of it, and leaves out most of what Professor Posner would undoubtedly consider the genuine contributions of his essay.

32. That is, there are problems in addition to the nongroundability that afflicts all ethical systems. See notes 1-18 *supra* and accompanying text.

33. Posner 110. The entire passage reads:

I shall proceed on the basis that an ethical theory cannot really be validated but that it can be rejected on one of three grounds: first, that the theory fails to meet certain basic formal criteria of adequacy, such as logical consistency, completeness, definiteness, and the like; second, that the theory yields precepts sharply contrary to widely shared ethical intuitions—precepts such as that murder is in general a good thing or that a sheep is normally entitled to as much consideration as a man; or third, that a society which adopted the theory would not survive in competition with societies following competing theories. The third is a very controversial criterion, and one that I shall not pursue in this paper as it does not afford a basis for drawing sharp distinctions between the economic and the utilitarian approaches. I shall, however, argue that judged either by the formal criteria or by conformity with our moral intuitions, the economic approach is less "rejectable" than utilitarianism or Kantianism.

Id. 110-11.

gent. This conclusion may seem to ascribe excessive significance to an individual's particular endowment of capacities. If he happens to be born feeble-minded and his net social product is negative, he would have no right to the means of support though there was nothing blameworthy in his inability to support himself. This result grates on modern sensibilities yet I see no escape from it that is consistent with *any* of the major ethical systems. The view Rawls and others have promoted that the individual's genetic endowment is a kind of accident devoid of moral significance is inconsistent with the Kantian notions of individuality from which the view is purportedly deduced. To treat the inventor and the idiot equally so far as their moral claim to command over valuable resources is concerned does not take the differences between persons seriously. . . . A related point is that any policy of redistribution impairs the autonomy of those from whom the redistribution is made.³⁴

This translates as follows: "If, quite innocently, you turn out not to be the kind of person found usable by someone else, you die."³⁵ Just as "the optimal population of sheep is determined not by speculation on their capacity for contentment relative to that of people but by the intersection of the marginal product and marginal cost of keeping sheep,"³⁶ so the value of a poor man, one with nothing anyone wants to buy, not even with an attractive enough helplessness to attract altruism, is zero.

This is not an accidental effect of Posner's system. As his regretful tone makes clear, it is a necessary result. The premises of the Posnerian ethical system are as follows: (a) whatever anyone wants is fine; each of the Seven Deadly Sins is as licit as each of the others, and as any of the Cardinal Virtues; (b) no value that involves another person can be realized without that other person's free consent; (c) no aggregation of people can force that consent on any person. There is, by stipulation, nothing licit that can be collectively done, for all morality is contained in individual values—subject to a side-constraint against individually applied force and fraud. Hence, it *necessarily* follows that if no one will freely consent to deal with Person *X*, Person *X* has had it. And this follows naturally and unavoidably from one's laudable desire to "take the differences between persons seriously."³⁷ The nonculpably

34. *Id.* 128 (footnote omitted).

35. "Usable" includes, of course, being used to create the utility another might derive from raining alms on you. Also see Posner 131, for a reasonably calm contemplation of modest amounts of coerced redistribution to the poor to buy them off from a life of crime, or to deal with a small market imperfection, "the public-good aspects of charitable giving."

36. *Id.*; *cf.* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1856) ("[Slaves] had no rights or privileges but such as those who held the power and the Government might choose to grant them").

37. *See* Posner 128.

poor must be allowed to become autonomously deceased.

This is the kind of thing that gives intuitionism a bad name,³⁸ I suppose, but intuitionism has not had an especially good name anyway. The more important observation is that the Posnerian ethical move, as with all ethical systems based upon unexaminable individual preferences, necessarily fails to build any political structure. All it can achieve, even with its side-constraints against force and fraud—themselves arbitrary, in the sense that they do not necessarily follow from individualistic ethics—is an ad hoc, deal-by-deal “community.” Whereas the Marxists place their “community” in the foggy sea of the future, and Nozick and Unger place theirs like dots of butter in a buttermilk of potential strife, Posner leaves his version of sanctified human interaction to moments of firefly-like flash. When the flashes go out, or fail to go on, then there is nothing at all but the dark.

I have told these too-brief-for-fairness tales about various currently popular ethical approaches concretely to illustrate what is, I think, already obvious: not only will the choice of any nonsupernatural source of ethical premises be arbitrary, but choosing either “natural” alternative locus—the individual or society—will lead to either individual or social implausibilities. If each person is a Godlet, there is no room for a valid society; if each society is God, there is no space for individual freedom. And if the two approaches are mixed—society can insist on *X*, but the individual has a right to *Y*—there is no way, except by deception or bluster, to ground all the divers *X*'s and *Y*'s.

Which brings me, at last, to the lawyer's dog to be wagged by the enormous preceding tail of this Article. I would suggest that the United States Constitution, and many of our legal problems with it, can be illuminated by the foregoing analysis. None of the problems can, as you might have guessed, be solved that way, but that is the whole point: all of our problems of constitutional interpretation arise because it is most likely impossible to write a constitution, or create one by interpretation, that does not simultaneously invoke more than one theory as to where ultimate, unchallengeable normative power is to be placed. Or, at any rate, that seems to be the case with respect to the real Constitution we have.

Assume for the moment that the Constitution can be treated as God, and that it is not only transcendent but immanent, that there is a way in which, when it speaks to us, we can hear it.³⁹ If one looks at it

38. One of Posner's tests for an adequate ethical theory, remember, is that it not yield “precepts sharply contrary to widely shared ethical intuitions.” *Id.* 110.

39. Whether we can really “hear” the Constitution on any important question has frequently been questioned and, seemingly, more frequently of late. See, e.g., Ely, *Constitutional Interpretiv-*

for its message about who has final evaluative power under its aegis, it becomes plain that its most important element is a structurally basic equivocation. "The people" have the ultimate normative word, of course, but it is ostentatiously unclear whether that God-like role is lodged in "the people" as a category, or in each constituent person of "the people." Or, in the language of traditional constitutional analysis, along with a structure setting up checks and balances between state and national power, and among executive, legislative, and judicial powers, and between "the people" and each foregoing instantiation of "government," ultimate normative power is divided between two fundamentally different conceptions of personhood: person as fundamental moral building block of "people," and person as mere constituent cell of the fundamental moral entity known as "the people." In short, the Constitution simultaneously establishes rights and democracy.

It may by now be obvious why it could not be otherwise. As we have seen, if total, final normative authority were assigned to each biological individual, and he were made morally autonomous, no rules to govern the interaction between those individuals—the Godlets, as I have called them—could be justified under the assumption of moral autonomy. There would be *nothing but* rights. If, on the other extreme, moral finality were lodged in "the people" as a class, then no claim for moral breathing space could be upheld for any atom out of which the class was constituted. If "the people" decided, by whatever process it validated, what was right, it would be unchallengeably right for each person: there could be *no* rights.

Thus, under the second, collectivist, conception, individual evaluations would be morally meaningless. Under the first, individualist, concept, judgments of collective interactions would be morally impossible. But if I am correct that people rightly see themselves simultaneously as part of "the people" and as autonomous persons, neither of these results is attractive. Nor was it attractive to the drafters of the Constitution, nor is it to many subsequent interpreters. It is thus with respect to this dual self-image that the Constitution really plays God. It commands that *both* of these conceptions of the final lodging place of evaluative power be simultaneously reflected in the operation of the American polity; that is, it attempts to do something that can be done by *neither* an individually nor a collectively grounded system.

Since the Constitution is not God, its case-by-case allocations of Godship are, in the sense I have used the term, "arbitrary." But that

ism: Its Allure and Impossibility, 53 IND. L.J. 399 (1978); Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

does not mean that those allocations do not exist: that clipping should nullify a touchdown pass is also arbitrary in that sense, but that does not mean there is no such rule or result. With respect to the collectivist aspects of the Constitution, there are side-bar restrictions on how the collectivity can make its decisions (notably various aggregation rules, like majoritarianism), rules on who counts as part of the group, and most important, restrictions upon the way in which collective determinations can be enforced against individuals in the collective (notably the detailed regulations constituting due process, and, indeed, the institution of the judicial branch itself). Moreover, certain areas of individual activity are withdrawn from collective interference—religious beliefs, for example.

At the same time, however, the very existence of these collective powers acts as a restriction upon individual evaluative autonomy. To put it very briefly, if you do not want to be taxed for the common good as the common good is defined by the group, tough.

As long as the Constitution is accepted, or at least not overthrown, it successfully functions as a God would in a valid ethical system: *its* restrictions and accommodations govern. They could be other than they are, but they are what they are, and that is that. There will be, as with all divine pronouncements, a continuous controversy over what God says, but whatever the practical importance of the power to determine those questions, they are theoretically unthreatening. It is only when the Constitution ceases to be seen as fulfilling God's normative role, ceases, that is, to be outside the normative system it totally constitutes, or when, as is impossible with a real God, it is seen to have "gaps," that a crisis comes to exist. What "wins" when the Constitution will not say, or says two things at the same time?

At that point, you see, we are really forced to see ourselves as lawmakers rather than law finders, and we are immediately led into a regress that is, fatally, not infinite. We can *say* that a valid legal system must have some minimum process for rational determination and operation. We can *say* that the majority cannot consistently disadvantage any minority. We can *say* that, whatever else a majority can do, it cannot systematically prevent a minority from seeking to become a majority. We can *say* all sorts of things, but what we cannot say is why one say is better than any other, unless we state some standard by which it definedly is. To put it as bluntly as possible, if we go to find what law ought to govern us, and if what we find is not an authoritative Holy Writ but just ourselves, just people, making that law, how can we be governed by what we have found?

Naturally, one need not be on crisis alert all the time. Even if it is

hard to come up with any convincing reason why a two-hundred-year-old document ought to be given final respect, indeed to be given any respect, on some current question about the allocation of power and freedom in America, it is awfully hard to be a credible constitutional thinker by treating the Constitution as irrelevant. It is, therefore, a convention of constitutional law, and may be of American society, that (a) the Constitution does speak to our problems; (b) it can, much of the time, be heard and understood; and (c) when you do hear and understand it, that's it. That is, much of the time one can act as if there is, for constitutional determinations, a God, though He may occasionally mumble.

Hence it is possible to "handle" any number of questions by trying to *understand* what the Constitution says. It is possible to say that such-and-such is a problem of equal protection, *i.e.*, that "the God" accords all people equal dignity and will not allow mere people to do otherwise. It is possible to say that such-and-other is a question of due process, *i.e.*, that "the God" treats all people as rational, and communication channels for the determination of truth must be kept open. It is not possible, however, forever to avoid having to ask whether, in a particular instance, the individual with a "right" or the collectivity with its "power" is to govern. For the Constitution clearly says that there are circumstances in which the collective may override the normative beliefs of a bare numerical minority, and other circumstances in which one biological individual is entitled to withstand everyone else, but the Constitution does not exhaustively specify which circumstances are which. The Constitution as God says, in effect, that one wins out over the other when it, the Constitution, says so, and not when the individual or the group says so. But what then can one do when the Constitution, quite obviously, says nothing at all?

Along with John Ely, one can say that in those cases the collective wins, but only if it sticks to certain processes for its own activities, notably those designed to keep the political process open.⁴⁰ Or, like Michael Perry, one can try, whenever the crunch comes, to discover some deep beliefs of "the people" that are not, for some reason, accurately reflected in the political process.⁴¹ With Alexander Bickel one can look to stable traditions,⁴² or with Laurence Tribe to substantive

40. See Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

41. See, e.g., Perry, *Abortion, The Public Morals, and The Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976).

42. See A. BICKEL, *THE MORALITY OF CONSENT* (1975).

intuitions.⁴³ The point is, one must be arbitrary in locating the ultimately, unchallengeable arbiter of evaluations, if the two specified by the applicable God, in this instance the Constitution, do not in fact agree. To put it concisely, if the applicable God is going to insist upon being incoherent, we really have no choice but to be arbitrary.

All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us “good,” and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs.

Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.

43. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 450-55 (1978).

