Law, Morality and the Decline of the Family

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Morality, rights and justice are not determined by the will of a majority. The majority, properly, enforces policy for the common good with minority participation, or alternately, consents to use of sovereignty over the land, the power found in escheat. The social contract allows citizens to call upon the State to assist in the pursuit of justice and right, but it does not define that which is good, or just and right. Right and wrongs are universal concepts that demand assent from all rational beings. They are logical in nature, necessitating a cohesive framework of rational coherence. The social contract, or its legislature, legitimately implements policy matters such as taxation and general welfare. Policy often reflects descriptive judgements of good, values or ideals, which its sovereign, to various degrees of social toleration, regulates, such as smoking, drinking, or taking drugs. Very often, however, the social contract intrudes into core principles of the structure built upon primordial concepts of right.

We will not distinguish rights from interests in our analysis of morality and the law. We have both rights in our personal interests and interests in our ideals. Rights do not exclusively protect interests, but often promote ideals. For example, free speech promotes a value unrelated to the personal interest of a speaker, giving a “clearer perception and livelier impression of truth, produced by its collision with error,” and “that the best test of truth is the power of the thought

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1 see Johnson and Graham’s Lessee v. William M’Intosh, 8 Wheaton 543, (1815), invalidating land title originating through sale from native American tribe rather than colonial government. Do we consent to government through the theoretical social contract? Or does the citizen submit to the de facto sovereign over the land, to the extent defined by history and laws, as the real source of government power?

to get itself accepted in the competition of the market.”³ Nay, free speech is most valued when a speaker takes a principled position against his own interests to stand for justice and right.

Laws certainly protect the right of an individual from harm or direct offense. Feinberg speaks of the “liberal offense principle,” that the offense-causing action must be more than a wrong, it must be a wrong to the offended party, in short a violation of his rights.⁴ Under this thesis, cruelty to animals in private violates the rights of no member of the social contract. This conclusion is incorrect. Laws cannot be reduced to protecting rights, but are descriptive judgements reflecting values. “Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence . . . .”⁵

There are different schools concerning the extent to which the law and morality interact. R. M. Hare explains the liberal position. It is wrong to interfere with someone’s “interests merely because his own ideal forbids their pursuit, if their ideals permit the pursuit of these interests.”⁶ The liberal “will be in favor of allowing anybody to pursue his own ideals and interests except in so far as their pursuit interferes with other people’s pursuit of theirs.”⁷ The

³ Abrams v. United States, 250 US 616 (1919, Holmes J. dissenting). Devlin considered some opinions so contrary to morality that their legitimacy “would be useless for him to stage a debate designed to prove.” Devlin, P., The Enforcement of Morals, Oxford University Press (1965). But majority reaction cannot determine the validity of an opinion. Consider Tocqueville. “[In] the United States, there is but one authority, one element of strength and success, with nothing beyond it. In America the majority raises formidable barriers around the liberty of opinion; within these barriers an author may write what he pleases, but woe to him if he goes beyond them. . . . His political career is closed forever, since he has offended the only authority that is able to open it. Every sort of compensation, even that of celebrity, is refused to him.” de Tocqueville, A., Democracy in America, Volume II, Ch. 15. Query—“That at any rate is the theory of our Constitution.” Did not Holmes admit this shortcoming in his Abrams dissent?
⁴ Feinberg, J, Offense to Others, 68
⁵ Regina v. Dudley and Stephens, 14 Q. B. D. 273 (Queen’s Bench Division 1884)
⁶ Hare, R.M., Freedom and Reason 178 (Clarendon Press 1963)
⁷ Id.
irrationality of racial discrimination is easily demonstrated by asking the racist to imagine that “you are not the son of your supposed parents. . . and come from parents of his supposed enemy race." Equality before the law is forcefully admitted, as “it is a characteristic of moral thought in general to accord equal with to the interests of all persons; that is to say, it makes no difference whether it is you or I that has the interest." However, what if the racist admits to allowing his own harm, even if he were a member of his enemy race, to further the interest of his racist ideal? Hare answers with that which distinguishes the liberal. Everyone admits “it makes no difference whether it is you or I that has the interest. The liberal does something of this sort with ideals as well as interests.”

Burke understood the polity as "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society." The law binds our generation with generations of the past and makes us a nation. The people do not make the law, but follow the law. To Burke, independence followed the American Conservation rather than Revolution, because the colonists asserted historic rights. By contrast, the French Revolution created rights from theory rather than finding them in tradition. Constitutions do not gain their authority from abstract thought, but from actual past achievement. The position of the conservative points not to the social contract or a general will, upon which desired reform finds no ground, but to precedent and the power of the purse, sovereignty over the land, and the checks and balances on both.

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8 Hare at 174
9 Id. at 177
10 Burke, E., Reflections on the Revolution in France, 110 (Dolphin ed. 1961)
The conservative grounds rights in history and law, upon which Hare’s racist is in contempt. There is no need to equate all ideals, as the liberal does, with tradition, or those values fought for in the past. We distinguish the conservative, and the liberal, from the same-name colloquialisms, both of whom have used substantive due process, the doctrine invented by Calhoun to deny Congressional regulation of slavery in the territories, to deny regulation of privacy, in both property and morality, ironically to the detriment of the states, without foundation in Common Law or the Constitution, but resting upon abstractions, without “any limit but the sky.”

Somewhere between the position of conservative and liberal is that of John Rawls. “In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract.” Rawls proposes that the ideal social contract is one which “no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and liabilities, his intelligence, strength . . .

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11 Baldwin v. Missouri, 281 U.S. 586 (1930, Holmes, J., dissenting). Holmes consistently dissented to the doctrine of substantive due process. Comparing state proscription of teaching in the German language to Plato’s Guardians, the Court created the substantive liberty “to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience . . .” Meyer v. Neb., 262 U.S. 390, 399 (1923). Holmes dissented, consistent with his substantive property dissents. Compulsory instruction in English is well within the competency of the State. “The test is ‘whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.’” Bartels v. Iowa, 262 U.S. 404, 412 (1923, Holmes, J. dissenting, citations omitted). However, Holmes admitted, that the First Amendment right of “free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word ‘liberty’ as there used . . . .” Gitlow v. New York, 268 U.S. 652, 672 (1925, Holmes, J. dissenting). The Court combined the First Amendment with a substantive right of parenting, “when the interests of parenthood are combined with a free exercise claim . . . more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required.” Wisconsin v Yoder, 406 U.S. 205 (1972). Query- Would Holmes agree to Yoder?

12 Rawls, J., A Theory of Justice, 12 (Belknap Press 1971)
Additionally “the parties do not know their conceptions of the good or the special psychological propensities. The principles of justice are chosen behind a veil of ignorance.”

Would we chose a society with religion and tradition behind the “veil of ignorance?” Surely, Rawls would not have each generation to begin anew, for that would leave society without traditions, make the study of history meaningless and destroy cultural identity. We might assume, that under the veil of ignorance, rational persons consent to the value of the teachings of their parents, regulated by conceptions of fairness. The liberal, Feinberg admits, agrees with this. “It gives one pause to think of what life would be like if no one ever held anything to be precious or dear or worthy of profound respect and veneration.”

Logically, “there is a simple, indefinable, unanalyzable object of thought by reference to which it must be defined. . . . to enumerate all true universal judgements, asserting that such and such a thing was good, whenever it occurred.” Yet, good is an elusive concept. G.E. Moore reminds us of the mistake of defining good. It cannot be defined as happiness, ethical conduct, metaphysics, or anything else. “If someone ‘confuses ‘good,’ which is not in the same sense a natural object, with any natural object whatever, then there is a reason for calling that a naturalistic fallacy; its being made with regard to ‘good’ marks it as something quite specific, and this specific mistake deserves a name because it is so common.”

R. George Wright endorses using the law to promote the moral principal of human dignity. He offers an “example [to] suggest that considerations of dignity limit the proper scope

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13 Id.
14 Id.
15 Feinberg, J. at 72
16 Hare at 21
17 Moore, G.E., Principia Ethica 12-13 (Prometheus Books, 1988)
and value of free and knowledgable consent.”\textsuperscript{18} He argues that when one knows about an illusion in his life and consents to it, reason cannot “make the the illusion dignified,” and if one “were finally capable of abandoning his illusion, we would certainly encourage him to do so.”\textsuperscript{19} This proves no more than G.E. Moore, in his third principle of good, when he asked “What things are good or ends in themselves? . . . 1) personal affection and aesthetic enjoyments, 2) cognition of beautiful qualities 3) and a true belief in the object of the cognition.”\textsuperscript{20}

But what about freedom and autonomy that is so important in legal discourse, the exercise of which certainly is a highly valued \textit{good}? Hume famously quipped “It is not contrary to reason for me to prefer the destruction of the whole world to the scratching of my finger.”\textsuperscript{21} As an object of reason, or the hypothetical imperative, Hume is correct. This is not what we mean by freedom and autonomy. After shattering all possible metaphysical claims based on theoretic reason in the First Critique, Kant grounded freedom and autonomy in the Second Critique on practical “reason [which] is concerned with the grounds of determination of the will.”\textsuperscript{22} Notions of right and wrong are determined by the will. “Practical principals . . . are [merely] subjective or \textit{maxims}, when the condition is regarded by the subject as valid only for his own will, but are objective, or practical \textit{laws}, when the condition is recognized as objective, that is,\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Moore
\item Hume, D., \textit{A Treatise of Human Nature} 416 (Clarendon Press 1888) found at: http://books.google.com/books. The greatest discovery of modern philosophy is the distinction drawn by Kant between prudence, reason directed toward attaining an object, and morality, reason having no object as its end other than law for its own sake.
\item Kant, E, \textit{The Critique of Practical Reason}, Great Books of the Western World, Encyclopedia Britannica, Inc., 296 (1952)
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valid for the will of every rational being.” The moral law is not synthetic but *a priori*. Pure reason “must be able to determine the will by the mere form of the practical rule without supposing any feeling, and consequently without any idea of the pleasant or unpleasant.” The exercise of the moral law is a *good*, with “an attendant claim to the agreement of every one else.”

Hare points out that we use language to describe moral conduct. He explains that it “is impossible consistently to maintain that moral judgements are descriptive, and that they are not universalizable. To put the matter even more starkly: a philosopher who rejects universalizability is committed to the view that moral judgements have no descriptive meaning at all.” Logically, a moral statement has to assert to be valid for everyone. Although people may differ in moral principle, it is a fallacy to dismiss moral discussion altogether because “once the logical character of the moral concept is understood, there can be useful and compelling moral arguments between people who do not share a substantive moral outlook.” Reasonable persons will withdraw from positions that are not valid for all. Although a descriptive judgement is *a priory*, Hare calls it synthetic in the sense that it prescribes conduct. “[If] in saying that it is proper to call a certain kind of man good . . . our hearer will be learning something synthetic . . . because of the added prescriptiveness of the word “good”; in learning it, not merely to use a word in a certain way, but to commend, or prescribe for imitation, a certain kind of man.”

Concepts of good often have intergenerational roots and are engrained in the legal structure. Failure to recognize this and to properly frame judgements within the legal paradigm is

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23 Id. at 297. The scratching of Hume’s finger is a hypothetical object of desire, unlike the unconditioned law, which is valid for all possible rational beings as a law, having no object other than the law itself.
24 Id. at 299.
25 Hare at 16.
26 Id.
27 Hare at 23
the greatest source of confusion in our legal culture. This confusion has lead to a decline in the legal status of the family. As will be shown, the family is the source of compassion and the recognition of being, the foundation of our moral values.

The California criminal code defines homicide to include feticide. Murder, traditionally, was defined as killing a human in being. Did California intend to equate the unborn with the human in being? Those who argue that modern medical technology makes a fetus viable, miss the point that at all times in the past a child was viable some brief time before he was born, yet he was not yet a human in being. California is now logically committed to the principle that permits C to kill A to save the life of B, when A is thrown into B through no fault of A, just as certainly, California allows C to kill a fetus to save the mother, since the State changed the definition of personhood. This, no doubt, was not contemplated by the legislature. Two separate descriptive judgements are passed by he killed a child, girl, boy, man or woman, and he killed a fetus. Both are criminal, the former judgement an absolute prohibition, the later, balanced against the interests of the mother, while life in being, is never subject to balancing of interests.

There is confusion over the moral difference between acting to kill and failing to save a life. Killing is a positive act. Killing is a categorically forbidden act blind to utilitarian considerations. Consent cannot change its nature. An omission differs from a criminal act, in a way that allows consideration of circumstance or consequences, consent or imputed consent. The descriptive judgement A killed B says more than that B has a right, but A did the positive act to kill. By contrast, A did not save the life of B, speaks only of the right of B and the failure of A to act upon it. Duty is a term that measures the failure to act limited at the very worse to the positive A killed B. Omission in general differs from a positive act. A does not constantly act to save B, but B needs to be in the circumstance of needing to be saved, and A has to have the
ability to save $B$. Thus, the requirement $A$ save $B$ is a consequent of priority. $A$ in particular has to save $B$. $A$ killed $B$ does not measure priority. It is meaningless to say $A$ has the duty to not kill $B$ as if someone else might not have the duty.

The right to die is relevant only to the judgement $A$ did not save the life of $B$, involving omission or withdrawal of treatment. Once a competent patient desires his doctor to stop treatment, under certain circumstance, the priority to save, is lowered. Euthanasia, or aiding a patient in committing suicide, is a positive act of killing. When the patient acts, one who dispenses aids in the act, even if the law exonerates the patient who attempts, it still holds accountable one who aids in suicide, no different than the liability of one who aids a principal who is not liable due to duress. The accomplice is held liable while the principal is not.

A most polarizing issue facing the nation is the definition of marriage. What is meant by the descriptive judgement $A$ married $B$? It is quite certain that we make an evaluative judgement, perhaps that it is good that $A$ married $B$, or if $A$ and $B$ are not fit to be married to one another, it is not good that $A$ married $B$. If we do not know the character or history of $A$ or $B$, we assume that it is good that $A$ married $B$, since marriage, without individual consideration of condition, is that which is categorically esteemed. $A$ married $B$ also describes a relationship or duty between $A$ and $B$, not just for financial support, but for relinquishment of their sexual autonomy. $C$, a member of society at large who is not married to $B$, now has a duty arising out of the public act in which $A$ married $B$.\(^{28}\) $C$ is proscribed to abstain from sexuality with $B$, even if he has the consent of $B$, or the consent of $A$. The descriptive judgement, $B$ is living with $C$, or $C$ had sexual relations with $B$, both judgements made while $B$ is married to $A$, are categorically met with

\(^{28}\) Marriage requires witnesses and is thus a public ceremony as a private agreement cannot bind members of society at large under pain of adultery.
disapproval.\textsuperscript{29} Thus, \textit{A married B} describes not a private relationship, only of concern to \textit{A} and \textit{B}, but also of concern to \textit{C}. It is a proscription on all people from having relations with \textit{A} or \textit{B}.

Say, \textit{A} and \textit{B} were both women, acting as married, and \textit{C} was a man. The descriptive judgement \textit{B is living with C, or B had sexual relations with C, both while B is in a same gender marriage to A}, would initially confuse us, but the cohabitation of \textit{B} and \textit{C} is not met with categic disapproval.\textsuperscript{30} We cannot universally proscribe, \textit{C}, or any man, from consenting with \textit{B}, who is a woman living without man. \textit{C} logically need not assent to this proscription. The moral proscription upon the world at large arising out of marriage is a matter well beyond the competence of the judiciary, and at the very least, falls within the power reserved to the legislature to sanction conduct.

When \textit{B} does not consent, there is a difference between \textit{A}, to whom \textit{B} is married, and \textit{C}, to whom she is not married. This refutes those who advocate “\textit{not his wife}” be taken out of rape statutes indiscriminately. Their argument does not distinguish between the man whom a woman has chosen, and who remains her chosen, and a man who has intruded into her life to defile her. Can legislators eliminate the term “\textit{not his wife}” from rape statutes and eliminate the force requirement for both \textit{A} and \textit{C}, equating the husband and stranger?

What rights are fundamental under the law? Mr. Justice Holmes assented to the religion right in \textit{Pierce}.\textsuperscript{31} Outside of the First Amendment, they are the “fundamental principals as they have been understood by the traditional of our people and our law.”\textsuperscript{32} These rights, no doubt, are

\textsuperscript{29} We make a judgement of \textit{C}, that \textit{C committed adultery}.
\textsuperscript{30} We do not make a judgement of \textit{C}, that \textit{C committed adultery}.
\textsuperscript{31} \textit{Pierce v. Society of Sisters}, 268 US 510, (1925)
\textsuperscript{32} \textit{Lochner v. New York}, 198 U.S. 45 (1905, Holmes, J. dissenting). See ft. nt. 10. Mr. Justice Cardozo limited which of the Bill of Rights are fundamental. It is “unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress; or the like freedom of the press, or the free exercise of religion;
the “privileges and immunities which are, in their nature, fundamental; which belong, of right, [1] to the citizens of all free governments; and [2] which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” The Fourteenth Amendment Court recognized this and rejected substantive due process.

The fundamental worth of the individual is derivative of his fundamental right to exist. The social contract cannot adopt the descriptive judgement A ought to not live. Morally, it is a particular statement and false, because it is negated by A ought to live, a right to claim belonging to A, and secondly, a right to claim belonging to his or her parents until competency. The

or the right of peaceable assembly, without which speech would be unduly trammeled, or the [additional] right of one accused of crime to the benefit of counsel. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states. Polko v. Connecticut, 302 U.S. 319, 324 (1937, citations omitted). The rule in Heydon’s Case, 78 ER 637, (1587), proves the remaining enumerated rights are specifically directed against a national government resulting from historic events before the Revolution.

Corfield v. Coryell, 6 F. Cas. 546, 551 (Cir. Ct, E.D. Pa. 1823). Note well that there are two elements to privileges and immunities. If one free state can reasonably prohibit act A upon the citizen, then the right to do A does not belong to citizens of all free governments. Secondly, the right has to be historically enjoyed in our States. The Laisez Faire Court and the modern Court had to look to Calhoun’s corrupted due process to restrain the state from interfering with slavery, contract and morality.

Slaughter-House Cases, 83 U.S. 36, 73 (1872). A property “restraint imposed by the State . . . [cannot] be held to be a deprivation of property within the meaning of that provision.” Id. at 82. This overturned Dred Scott v. Sandford, 60 U.S. 393; 450 (1857), in which the Missouri Compromise, “an Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void.”

see ft. 47. Author’s notes of director of neonatology at Jersey Shore University Medical Center, Neptune, N.J., June 2004. Dr. Graf claimed that putting in a feeding tube and tracheostomy so that author’s Trisomy 13 baby could breath without obstruction and so that he could eat, was a violation of the Hypocratic Oath. In general, doctors often claim that life saving procedures are not in the interest of incompetent patients. The right of the parent to keep the child alive is fundamental. Parents ought never be forced to assent to the universality of the statement concerning A, their child, A ought not to live.
classification of parents for the destruction of their offspring has been exercised by tyrants since Pharaoh, king of Egypt. Any branch of government deciding in favor of neonatologists to terminate a newborn against the wishes of the parents violates this most basic right, the parental right to keep a child alive. This is the most basic right, the one right recognized by Hobbes, certainly of Locke. The republican right of exposure reserved the right to the crime with the father. The right is, to keep the child alive, not to kill, harm, or abuse.

One English court denied this right to parents who wanted to keep their congenitally adjoined twins alive long as possible, by ordering the termination one so the other could lead a normal life. A *ought to die so that B will live* was decided over the judgement *A and B will live adjoined*, apparently because *will live* in later was determined to be a substantially shorter duration than the former. Most often however, doctors make the descriptive judgement *A ought to be terminated* because “he will have no quality of life,” and “he is not compatible with life.” This judgement is a fallacy, as explained above, because it cannot logically command universal assent. *A* could assert *he was wronged*. *A* could further claim *A ought to live* and logically command assent of all. In the case of child, replace *A* with *my child*. The state is forbidden from the determination, *A ought not to live* in the interest of the child, *A*, when opposed by parents who assert *my child ought to live*.

The value of the person does not lend itself to quantification. Numbers cannot logically determine the choice of saving two and leaving one, or saving one and leaving two. However, the trolley scenario fails for another reason. It fails because “harm that concern the criminal law

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36 Note that the social contract is theoretic, so the right of life retained by Hobbs, life, liberty and property retained by Locke, are liberal positions. At the same time, both positions correlate to concrete events, are founded in history and law, and are therefore conservative.
38 Author’s notes, June, 2004, Jersey Shore University Medical Center, Neptune, N.J.
depends on moral judgements of the wrongfulness of the actions that do the harm. . . . We cannot first identify harms in morally neutral terms, and then make a moral determination of which subclass of harms are also [wrongful] harms. . . . "39 We first identify the wrongful acts causing harm rather than harm alone. Thus, it is not “better that two lives be saved and one lost than that two be lost and one saved.”40 The harm of two people dying, or not being saved, is qualitatively different than the wrongful act of intentionally killing one person. The killing of the one involves the wrongfull act of killing. “The harm suffered by the victim of a murderous attack is not the same as that suffered by someone who dies from natural causes.”41

Some accuse the law as paternalistic when outlawing consensual crimes.42 But what is consent? The sovereign taxes with the consent of the governed, acquiring part of our property and income. Consent lends descriptive meaning to something that is transacted. We expect all people to transact property. “Privileges and immunities of citizens in the several states . . [include] the right to take, hold and dispose of property, either real or personal . . . .”43 We expect all people to transact marriage. Under due process, “the Court recognizes the [substantive] right to marry . . . .”44 Property and sexuality are necessarily transacted, and they are transacted universally. Consent categorically redefines the otherwise criminal act of theft and

40 LaFave W. R. &  Scott, A.W., Substantive Criminal Law, Section 5.4 at 629 (1986 & 2002 supp.)
41 Duff at 25
43 Corfield at 552.
rape, even when the parameters of a transaction are not universal, such consent to destruction of property or to non-marital sexuality, including some “Scalia parade horrors.”

We expect all people to make some minor modification of their bodies for general appearance, including cutting nails and hair or piercing the ears. Although this universal act can be performed by oneself, its universality is sufficient to warrant recognizing transactions contracting their performance. Therefore, consent categorically redefine an otherwise criminal act, battery, even when the parameters of the transaction are not universal, such as cosmetic surgery or “body art.”

We do not expect all people maim limbs and or to end their lives. This act is not universally expected is not a fundamental right. Although maiming and suicide can be performed by oneself, this is insufficient reason to warrant transaction contracting the performance of maiming limbs or ending life. The is no per se right to transact life and limb, as its category of transactions is cannot be universal.

Consent to medical treatment is not proof that we transact limb. In the case of medical necessity, the law empowers the subject of the necessity to act, and to transact, giving meaning to consent or imputed consent. By nature, a person has to chose the kind of treatment and must transact for a particular actor, a particular act, or refuse all acts. This is universal. “Every human being of adult years and sound mind has a right to determine what shall be done to his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery. or

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45 Bergelson, V., The Right to Be Hurt, Testing the Boundaries of Consent 44 (Rutgers Law School-Newark Faculty Papers, 2006). These sexual “horrors” are “wrongs against all humanity in the person, they cannot be saved, by any limitation or exception whatever, from entire reprobation.” E. Kant, The Science of Right 419 (Great Books of the Western World Encyclopedia Britannica, Inc. 1952)
other medical treatment.” 47 Refusing medical treatment is a mere omission and the common law duty of the doctor not to omit treatment is eliminated with the termination of the consent for medical treatment, so there is no act to be charged as criminal.

If someone were to wrong me, barring error, I comprehend the wrong and demand recognition of it from all rational beings. Wrong is a logical concept, as stated, not a feeling like pleasure, subject to relation. Thus, my faculty of reason entitles me to human dignity, but what about child born with trisomy 13, or anacephaly, who will never comprehend right or wrong? It is not clear that we can rely upon the categorical imperative, or a prescriptive rule.

We ground our assertions upon *compassion or moral love*, which is the principal of recognition. This principal is the substantiation of another, the recognition of his or her personal existence as an end in itself. It is affirmation of the fellow, *to will that the other ought to be*. It begins with the family, as compassion between parent and child correlates to the compassion between God and man. It extends to community, seeking to include under the ideal, all of mankind. One is worthy of love when one is a member of a family, group, nation, and humankind in general, *all of which is derivative of the love in the family*. No doubt, this is the source of the first principle of democracy often given in political science textbooks, the fundamental worth of the individual.48

The external other, the moral being, is not determined by the *will*, yet worthy of willing. Moral love, or compassion, makes possible the fellow, someone that ought to be, someone more than a particular instance of universal humanity, but a *thou*. This is the principle of moral

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relation, the foundation for moral community, the recognition of the fellow as one recognizes the self. Beyond innate sociality, the institutions of family and community are firmly established.

Follow this thought experiment. If one were physically informed of a momentary risk of conceiving a trisomy 13 or anacephalic child, and nevertheless did so, his action might be called morally negligent. Yet, if that information was communicated to him in a prophetic vision, if he could see the future being, then on the contrary, he would be praiseworthy in willing the existence of that conceived being. The instance of a child born with severe anomalies is proof that love for the moral being takes precedent over all moral law, for none ought to will such an existence, yet all ought to will him.49

We grieve over the instance of such a child. But what is the meaning of our grievance? Should we anguish over the nature of the child and ask why he didn’t come into the world differently? But then he would be someone else. The present child would not exist. We might want the child to have been something else, but that something else would not be he. Better for him to be than not to be. The instance of a better existence, the possibility of others who are better, does not deem the less perfect less worthy of existence.50

The principal of recognition requires that a crime against the individual cannot be forgiven by the collective or someone other than the victim. Societal forgiveness of crimes

49 The same reasoning argues against abortion.
50 This argument answers the theodicy. Shall we deduce, from God’s Being, perfection in all possible existence? If we envision a happy world, must there be no world unhappy? How presumptuous are we to demand that happy universe to be ours, for whom do we wish to cast into this less happy one? The world is only an instance of existence; it is an existence as such. As long as there is possibility in the multiverse of possibility, why should not our existence be an instance of that possibility? Imperfection is insufficient reason to conclude that such an instance ought not to be. To question why a human being was not created differently questions his or her right to exist. Similarly, to ask why this world was not created differently questions the right of the world to exist. Compassion, the recognition of being, or the affirmation of existence, compels the instance of this individual and the instance of this world.
against individuals show compassion for the wicked, but deny affirmation to their victims. Whose existence is more worthy of recognition, that of the evildoer or that of the innocent? Even an animal, which is not culpable in the legal sense, must be destroyed if it kills. People should not say “this is the animal that killed so and so.” The affirmation of a murdered victim requires resetting the scale of justice, mandating punishment of the murderer. “But what is the mode and measure of punishment which public justice takes as its principle and standard?” Kant answers, “It is just the principle of equality, by which the pointer of the scale of justice is make to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another is to be regarded as perpetrated on himself.” This explains the moral and legal distinction between an attempted murder and actual murder.

Hare’s prescriptiveness is limited to the abstraction of personal benefit to universalize particular situations, and may be ultimately consequential, whereas Kant’s moral law is the universal, categorical maxim. Some even contend that under the context of consent, euthanasia is moral. It is hard to understand how consent can make an act moral, as if a patient has a universal obligation to die, or that consent give someone a right to do a wrong. Nonetheless, how can Kantians account for lawful exceptions to the categorical imperative? For example, the validity of the universal proscription against lying has been questioned in the context of aiding a criminal intent on murder. Hare would answer that in such context, we can universally prescribe the lie. But, our descriptive judgements evaluate a lie as not good. If a lie is not good, how in this context, we ought to lie? Our solution follows the principal of recognition, that human dignity is

51 Kant, E., The Science of Right at 446.
52 Id.
the recognition of the existence of the other. The categorical imperative defers toward compassion, in favor of life.

On the contrary, the regret and complaint against totalitarianism or a criminal for forcing one to lie derives from the absolute nature of the categorical imperative, even though it is permissible in cases such as saving a life. If morality were merely contextual, then there is no real violation of right because, under the circumstances of force, there is no contextual proscription. One who lied to save a life acted in a universally prescribed manner. In another context, suppose we all can agree on the inappropriateness of a personal question concerning a private matter that can cause great shame, in such a context that without contradiction it can be acknowledged as universally permissible to deny or at least refuse to answer, since the question itself has no legitimacy or consequences other than to shame the one being asked. In either case, the interrogator ought not to expect the truth, yet needs to ask for forgiveness for forcing the victim to lie and violate his right. It is proved that telling the truth is a categorical good regardless of context.

Social toleration often draws the uninitiated into a false distinction between personal and public morality. The moral law is not imposed by society; it is commanded by conscience, to respect the dignity of the human person in ourselves as well as in others. Eudemonism, the ethics of happiness, and hedonism, the ethics of pleasure, have set desire as the motive to both virtue and vice, replacing the categorical imperative with the hypothetical imperative.

The fundamental worth of the individual gives rise to the concept of the inalienable rights of life and liberty, claimable at any time regardless of any previous contract or hypothetical waiver to government. Simply understood, Hobbes is wrong; life is not the only right citizens do retain when they enter into the social contract. Historically, and hence constitutionally, no person
can be denied life, liberty, or property without due process of the law. Theoretically, inalienable rights are those that are retained even when they are actually waived or contracted to others.

To use a statutory example, unwillingness to participate in health insurance does not relinquish the right to emergency room care. Certainly, financial imprudence itself does not imply renunciation of a right, but what if an uninsured were required by the State to offer community service in return for future lifesaving care? Would society then deny it to the individual who, under informed consent, opts out of the system? Can the uninsured or anyone else sign a contract to exempt hospitals and permanently lose the ability to change his mind when medical care is needed? Certainly not! The right to life is inalienable because individuals have a duty to live, a duty that they cannot relinquish. Others have a duty to save them. This is a rebuttal against those who propose allowing lifesaving organ transplants only to those willing to have become donors.\(^{54}\)

The source of all inalienable rights, even the right to liberty, is not individual happiness per se, but the fundamental worth of the individual as a moral being. A citizen who enters into a polity denying freedom of speech is still not absolved from the duty of speaking out against injustice. A civilization that regularly practices heathen sacrifice of anyone, including its own members, is evil, even if all, including the victim, consent and waive the right to life. Cannibalism is wrong even if the victim consents.\(^{55}\) Rights are inalienable because they correlate to virtues that individuals cannot abandon. Our government cannot deprive a citizen of the right to own property, which is the capacity to acquire and hold property under the protection of law. This too, arises from obligations of family, sustenance, and procreation. The right to marry is


\(^{55}\) see Finn, P., *Cannibal Case Grips Germany-Suspect Says Internet Correspondent Volunteered to Die*, Washington Post, December 4, 2003 at A26
also a fundamental substantive right, as *every man ought to marry a woman* (apply the categorical imperative). Individuals can never be released from the responsibilities that accompany moral existence, from moral existence, or from their own existence.

Thus, there cannot be a right to die. The moral law yields to compassion, that the other person *ought to exist*, and favors the autonomy of the other as a being with ends. But how can an end be non-existence, as with euthanasia, that one ought not to exist, the antithesis of compassion? Indeed, to die is not an end but a cessation of ends.

The legal culture has glorified sexual heteronomy and called it autonomy. It has blurred the moral distinction between a married woman consenting to have relations with her husband while married and consensual relations with a stranger while married. The categorical imperative disregards feeling and desire, and compels us to act on that rule which we willfully identify as the universal law for all rational beings. No one can formulate a universal law that every married woman *ought to commit adultery*. The descriptive judgement *A committed adultery* implies disapproval.

The diminution of family *size* that occurred in early industrial society was followed by the attrition of family *existence* in late industrial society. The patterns of marriage and divorce,

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56 What is referred to as sexual autonomy logically is not autonomy. The “natural union of the sexes proceeds according to the mere animal nature, or according to the law. The latter is marriage, which is the union of two persons of different sex for lifelong reciprocal possession of their sexual faculties. . . . an enjoyment for which the one person is given up to the other. In this relation the human individual makes himself a *res*, which is contrary to the right of humanity in his own person. This, however, is only possible under the one condition, that as the one person is acquired by the other as a *res*, that same person also equally acquires the other reciprocally, and thus regains and reestablishes the rational personality. . . . [This] is not only permissible under the condition of marriage, but is further only really possible under that condition. But the personal right thus acquired is, at the same time, real in kind; . . . if one of the married persons run away or enter into the possession of another, the other is entitled, at any time, and incontestably, to bring such a one back to the former relation, as if that person were a thing.” Kant, E., *The Science of Right*, at 419-420 (1952, Latin terminology omitted).
and even the number of nontraditional households have changed. Sociologists note an accompanying trend toward complete equality between men and women in the home and workplace. This is occurring in all post-industrial societies, but are the two necessarily connected? It was the pagan, who based his ethics on the accident of what is deemed human perfection, who justified inequality between the genders and between master and slave.

Equality is so extrinsic to the natural order it was incomprehensible to the Greeks and Romans. They could not deduce the fundamental dignity of each individual, as our moral ends have no place in nature. Indeed, women should equal men in humanity, not in profanity, promiscuity, and brutality; of which in the want, men should equal women. On the contrary, the degeneration of the family is not the result of a desired rise in self-expression and individualism. Have not those two values, on the contrary, been replaced by the herd of homogeneity and massification.

Yet the decline of faith in post-industrial societies is not just confined to the replacement of religious belief and authority with a more rational and secular orientation; instead, it is associated with a supposed change in moral values as well. In the more developed nations and in post-modern philosophy, they note a greater acceptance of abortion, gays, prostitution, euthanasia, divorce, and suicide.

A century and a half ago, American writers criticized the influence of industrialism for material things in life and big government’s glorification of power. Industry and government were feared to ignore and alienate the individual. Why do we now find that the historic

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58 see Aristotle, Politics, Bk. I, chs 3-7
59 Frankfurt school of German American pre-war refugees criticized the “mass-produced culture . . . in which the commodities of the culture industries exhibited the same features as other products of mass production: commodification, standardization, and massification.” Found at: http://gseis.ucla.edu/faculty/kellner/papers/fs.htm
constraints on industrialism and big government, traditional authority and communal obligations, are thought to be antithetical to self-expression and individualism? Are not the latter securer in the former? Have we have lost our revolutionary vigor, the republican virtue of duty, and the true meaning of freedom of expression, which is the expression of right and wrong and our sense of justice?

In fact, the decline of faith in late capitalistic societies is characterized by the replacement of religious belief and authority with an *irrational* orientation. The massive subjective turn of modern culture away from *life as*, life defined in terms of duties and roles, toward *subjective life*, life lived by reference to one’s own experience, has served to fuel the growth of *subjective life* spirituality and to undermine *life as religion*. The decline of religion based on authority is accompanied by a dramatic increase in holistic spirituality that cultivates the dynamic whole of mind, body and spirit, and the uniqueness of the individual as the sum of experiences, in the channeling of mystical forces and life energies. Although the majority of people in the post-industrial world still believe that “there’s something out there,” that something out there is the god of the pagan. It does not command the moral law.

Beyond the Realism of Aristotle, the compassion of parent and child is the ideal between individual persons, the love of the Thou, the analog to our relation with God. How did this insight of faith and family get past Plato? Is it also getting past my fellow Americans, who have witnessed the attrition of the American family during the last century, from being very large to being very small, from being permanent to being temporary, and from having children to having a dog?

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61 Heelas, P. & Woodhead, L. *The spiritual revolution: Why religion is giving way to spirituality* 149 (Blackwell Publishing, 2005).