Sacrifice and Sacred Honor: Why the Constitution Is a Suicide Pact

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SACRIFICE AND SACRED HONOR: WHY THE CONSTITUTION IS A “SUICIDE PACT”

by,

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Abstract

Most legal scholars and elected officials embrace the popular cliché that “the Constitution is not a suicide pact.” Typically, those commentators extol the “Constitution of necessity,” the supposition that Government, essentially the Executive, may take any action -- may abridge or deny any fundamental right -- to alleviate a serious national security threat. The Constitution of necessity is wrong. This article explains that strict devotion to the “fundamental fairness” principles of the Constitution’s Due Process Clauses is America’s utmost legal and moral duty, surpassing all other considerations, even safety, security and survival.

Analysis begins with the most basic premises: the definition of morality and why nations must be moral. This article defends Deontology, the philosophy that because they are a priori, moral principles must be obeyed regardless of terrible outcomes. Such is the sacrifice demanded by morality. As most theorists and politicians favor some form of Consequentialism (the theory that the moral answer is the one that produces the most happiness), the defense of pure Deontology is thorough. Next, this work links Deontology directly with the American Revolution by demonstrating that the Founders were deontologists who asserted in the Declaration of Independence that government is legitimate only if it governs according to eternal moral precepts. They pledged the new Nation’s “sacred honor” to uphold steadfastly the principles of moral government.

Aware of their imperfectness, the Founders instructed their successors to improve the moral philosophy underlying the Declaration. The deontology of Immanuel Kant expresses the best general paradigm of morality. Kant famously explained that all persons and societies share an overarching moral duty to respect the innate dignity of every human being no matter what sacrifice that may entail. Kantian ethics clarifies why moral abidance is more important than life itself. Because it is the superior moral theory that the Founders sought, Kant’s “dignity principle” must delimit the Constitution which, as explicated herein, is the legal iteration of the Declaration. This article’s concluding discussion of the Constitution, particularly due process precedents, explains why the Kantian approach -- sacrifice and honor -- debunks the Constitution of necessity, proving that the Constitution is a suicide pact.

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To be a true constitution, that which a society calls its constitution must enforce values so imperative, so fundamental, that the constitution comprises not only a way to live but more profoundly, a reason to die. Customarily, individual citizens or groups of citizens may be required to risk their lives to preserve their constitution and the nation over which it presides. However, a true constitution rightfully demands that the entire constitutional order – the whole society regulated by that constitution – risk its own demise rather than betray the essential precepts that the constitution embodies. Only principles of such magnitude warrant inclusion in the supreme document of a particular people.¹

¹ Cf., Marbury v. Madison, 1 Cranch. 137, 176-179 (1803)(U.S. Constitution is the supreme law of the United States). Certainly, it may please drafters to include some particulars not essential to the very definition of their given society. But, a constitution by its “nature … requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the
Simply believing that a particular constitution is worth dying for, however, is not enough. To be a legitimate constitution – to actually be worthy of such communal sacrifice -- the given constitution must be moral, that is, both designed to enforce and actually enforcing the abiding moral duties that demarcate legitimate from illegitimate governments.

Pursuant to the character of true and legitimate constitutions, the Constitution of the United States defines who we are, what we are and, most importantly, why we are. Our Constitution purports to set the governing minima without which no society may be legitimate. Accordingly, and quite deliberately, while a legal document, the Constitution as well is a profoundly moral thesis. It could not be otherwise because the Constitution’s overarching endeavor is enforced morality, specifically “fundamental fairness” via due process of law\(^2\) which, as Justice Felix Frankfurter aptly enthused, is “ultimate decency in a civilized society.”\(^3\) America’s validation stems from the morality of the Constitution and how steadfastly we maintain it.\(^4\)

In contravention of our constitutional duty is the long-standing chestnut: the Constitution is not a suicide pact.\(^5\) Of course, no one would argue that literally the Constitution is a “suicide

\(^{1}\)nature of the objects themselves.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); see also, e.g., County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).
\(^{2}\)See infra notes 406-11, and accompanying text.
\(^{4}\)Of course, within a domain of moral society administered by moral government, individuals may indulge their selfish interests and personal preferences, an idea which, as accented shortly, was immortalized in the Declaration of Independence as “the pursuit of Happiness.” E.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 (1972); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). However, specific pursuits of happiness do not legitimize a Government. Instead, legitimacy stems from the moral framework in which persons pursue their selected happiness.
\(^{5}\)E.g., Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949)(Jackson, J., dissenting)(“there is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”); See also, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).
pact,” meaning the Constitution requires those governed thereunder to kill themselves. Nor would reasonable theorists claim it to be a suicide pact “in the sense that the Constitution was meant to fail.” Rather, commentators apply the not a suicide pact metaphor to support the “Constitution of necessity,” the premise that if circumstances raise significant jeopardy and lesser measures appear unavailing, Government may do virtually anything -- abridge or suspend any liberty – both to preserve the nation and to ensure the wellbeing of its institutions.

Several critics challenge that theory’s empirical bases arguing, for example, that the definition of “necessity” is over-inclusive. Critics argue as well that the Constitution of necessity betrays pivotal American principles of law, rights, dignity and separation of powers. However, criticism usually stops well short of accepting the Constitution as a metaphorical “suicide pact,” averring instead that necessity is the ultimate “compelling state interest,” overpowering liberty if the exigency is dire enough.

I join the very few who respond that, even if limited to situations of actual imminent danger to the very continuation of American society, necessity as the Constitution’s “first principle” defies the Constitution’s true nucleus that explains and justifies our nation: due process. While many articles challenge the Constitution of necessity as anathema to the inherent

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8 See infra, notes 412-18, and accompanying text.
9 See infra, notes 442-48, and accompanying text.
11 “Few constitutional rights are absolute, and civil libertarians widely accept that as the government’s interests grow more compelling, it has broader leeway to infringe on liberties.” David Cole, No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint, 75 U. CHI. L. REV. 1329, 1333-34 (2008).
12 E.g., Brooks, supra note 10, at 128 ( “[I]f that phrase is used to suggest that we should jettison the idea of the rule of law in exchange for a possibly illusory security, then I would suggest that perhaps the Constitution was in fact a ‘suicide pact’ of sorts -- and so it should be.”); Prakash, supra n. 7, at 1319.
nature of American government, such arguments alone cannot explain why, under sufficiently urgent circumstances, we ought not abandon all constitutional liberty, if that is what it takes, for however long it takes, with the earnest intent to restore liberty the very moment the danger has passed.

Accordingly, this work proposes a deeper grounding to explain why the Constitution is a suicide pact. Specifically, morality, the very fabric of the Constitution, forbids us from abandoning our basic moral-societal precept of due process even when faithful abidance is extraordinarily dangerous. We must understand more than simply liberty by definition is essential to our constitutional government. Rather, we must appreciate that government ensures liberty as integral to its unalterable duty to be moral. Thus, in a unique figurative sense the Constitution is a suicide pact for as Immanuel Kant nobly concluded, “Do what is right though it results in the demise of the world.”

The proof takes several steps. Part II undertakes a thorough review of Deontology, the philosophy arguing, correctly I believe, that morality is transcendent, a set of a priori principles discernable through reason. Morality, then, does not care what the possible outcomes of a

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13 E.g., Brooks, supra note 10, at 128.
14 Thomas Jefferson, for instance, opined, “To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.” Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES (Paul Leicester Ford ed., Fed. ed. 1904).
particular moral problem may be.\textsuperscript{16} Pursuant to deontological philosophy, the “sacrifice” to which the title of this article refers, is the duty to abide by morality no matter what the cost.\textsuperscript{17}

Thereafter, Part III\textsuperscript{18} argues that this Nation’s founders were deontologists who believed that government is legitimate only insofar as it safeguards morality derived from “the Law of Nature and Nature’s God,” manifested as “unalienable Rights among which are Life, Liberty and the pursuit of Happiness.”\textsuperscript{19} For the preservation of those moral principles, the Founders pledged their “Lives,” “Property,” and “sacred Honor,”\textsuperscript{20} meaning that it is the duty of all Americans – their “sacred Honor” – to sacrifice if necessary their lives and property to defend legitimate government. We thus discover an interesting, informative and useful provenance linking the sacrifices attendant to deontological morality with the birth of United States.\textsuperscript{21}

The Founders understood that their appreciation of and dedication to morality was incomplete as evinced by many political and pragmatic compromises surrounding both the Declaration and its later legal iteration, the Constitution. Indeed, the Founders expected future generations to enrich the moral bases of America, including repudiating ideas and practices that the Founders themselves accepted. Part IV asserts that the ethical theory of Immanuel Kant, as contemporarily understood, presents the improved moral philosophy hoped for by the Founders.\textsuperscript{22} Written shortly after the American Revolution, Kant’s theory of dignity explains why obeying morality is more important than life itself; a principle applicable not only to

\textsuperscript{16} See infra Part II, notes 24-176, and accompanying text.
\textsuperscript{17} Because most ostensible deontologists believe in a Constitution of necessity if the emergency is sufficiently grave and because arguing that outcomes ultimately are irrelevant sounds peculiar at the very least, the Deontology section is methodical and detailed.
\textsuperscript{18} See infra notes 177-267, and accompanying text.
\textsuperscript{19} THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)
\textsuperscript{20} THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776)
\textsuperscript{21} Additionally, for fuller understanding, Part III opens with the abstract idea of honor to preface the meaning of “sacred Honor” under the Declaration. See infra notes 177-248 and accompanying text.
\textsuperscript{22} See infra Part IV, notes 268-405 and accompanying text.
persons and groups, but also to nations and societies. Kantian ethics, therefore, explicate that the highest principle is not survival but, rather, moral rectitude.

Kant’s ideas should control the understanding of the Constitution, most particularly the commands of due process of law, as Part V explains. 23 Although never explicitly cited, Kant’s dignity principle informs modern due process jurisprudence which is sensible because the Constitution was drafted to enforce the moral quest commemorated in the Declaration. The comfortable application of Kantian ethics to constitutional due process demonstrates that, in the singular sense above described, the Constitution should be, must be and is a suicide pact.

-- Part II --

The Dispute between Deontology and Consequentialism –

It may seem counterintuitive, indeed strange, to argue that abstract principles matter but, ultimately, consequences do not. Yet, as explained next, Deontology is the correct approach to understanding both the nature and the functions of morals. Therefore, Consequentialism, the philosophy that morality and its applications depend on and may be comprehended entirely by the consequences they produce, is incorrect. In fact, as I attempt to show, the initial oddness and discomfort with discarding consequences as the paradigm for moral decision-making becomes pleasing, even liberating. 24

Doubtless, AThe referents to both labels [Deontology and Consequentialism] ... are usually caricatures, used to oversimplify philosophical positions for the sake of convenience and less innocently to provide people with a plausible pretext for rejecting ideas they do not

23 See infra Part V, notes 406-514 and accompanying text.
24 For simplicity’s sake I use as synonymous ethics and morals, and ethical and moral.
understand. Nonetheless, the fundamental dispute whether principles must dominate or are dominated by consequences continues to fume among professed deontologists, avowed consequentialists and those who espouse hybrid approaches. To prove that the Constitution is a suicide pact, I must begin by verifying the jarring proposition that ultimately consequences do not matter.

The pivotal disagreement between Deontology and Consequentialism concerns whether morality comprises the right — transcendent, compulsory principles applicable come what may — or the good — the result that produces the most pleasing outcome. Deontologists believe “The right remains prior to the good,” while consequentialists urge that the good is the right. Consequentialism, therefore, avers moral norms are knowable only by assessing and contrasting the consequences — the effects — of possible actions in a given situation. As Prof. Blum summarized, “Consequentialists maintain that choices are not morally ‘good’ or ‘bad’ in themselves, but should instead be assessed solely by virtue of the outcomes they bring about, that is, by their consequences. …” Accordingly, consequentialists aver that the proper consequence — outcome — of any morally uncertain instance is the one that promotes the greatest good, meaning the greatest happiness. “[O]f all the acts that a person can perform, the [morally] right act is the one that produces the greatest amount of happiness among human beings, counting

26 Id. at 259.
27 In particular, consequentialists generally believe, as do many deontologists, that “purposiveness, the setting of ends to be produced, is the most fundamental feature of all action, but [consequentialists] differ ... in taking this feature also to determine the nature of the values grounding ethical theory.” Id. (emphasis added).
everyone equally, and taking into account long-range as well as short-range consequences of actions.”

Certainly, the quest for happiness animates Utilitarianism, “The paradigmatic strand of consequentialism …” The renowned utilitarian John Stuart Mill notably avowed that the “fundamental value is the general happiness, pleasure, and the absence of pain, or what Mill also calls the ‘theory of life’ on which the ‘utilitarian theory of morality’ rests.” Consequentialism, as exemplified by classic Utilitarianism, then, “view[s] people as subjects of desires and inclinations and assign[s] value to their satisfaction as such …” It follows that, pursuant to Consequentialism, identifying moral duties empirical, determined by some measurement of individual or aggregate happiness.

Not without aptness, critics aver that rebukes are almost a waste of ink because Consequentialism is facially implausible. Nonetheless, many profound theorists earnestly tether their deeply held conceptions of what Society should be and how people should interact to the precept that promoting the “good” engenders not only in what is best, but also what is moral. In fact, the current theory of a “Constitution of necessity,” criticized in closing portions of this

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30 Blum, supra note 28, at 38 n.166. Indeed, commentators usually identify Utilitarianism as the most prevalent type of Consequentialism. E.g., Bailey Kuklin, The Morality of Evolutionarily Self-Interested Rescues, 40 ARIZ. ST. L.J. 453, 477 (2008); Powers, supra note 29, at 1570; Jeffrie G. Murphy, Kant: The Philosophy of Right 23 (1994)[hereinafter Murphy Book].

31 Wood, supra note 25, at 55 (quoting John S. Mill, Utilitarianism 7 (George Sher ed., Hackett 2001)).


33 “The task of philosophical ethics then becomes the quasi-scientific examinations of effective techniques for maximizing this value.” Murphy Book, supra note 30, at 24.

34 Deontologists “cannot demonstrate the priority of right simply by debunking a notion of the good based on sheer preference or inclination, a conception so shallow, arbitrary, heteronymous, and mired in contingency that no one could defend it in the first place.” Mark Sagoff, The Limits of Justice, 92 YALE L.J. 1065, 1079 (1983)(reviewing Michael J. Sandel, Liberalism and the Limits of Justice (1982)).
article, espouses the claimed *obligation* of America to take any measures to prevent not only annihilation, but also significant harm such as terrorist attacks. Citing revered sources such as Thomas Jefferson and Abraham Lincoln, these proponents argue either that “necessity” renders actions moral, or that morality is superfluous during periods of necessity.\(^{35}\) When minds as profound as Jefferson’s and Lincoln’s counsel violating due process of law in the face of arguably grave emergencies, and when contemporary American leaders and commentators brashly rebuff constitutional morality in favor of security, a thorough repudiation of Consequentialism is necessary.\(^{36}\)

Deontology avows what Consequentialism denies: that morality exists outside of a humanly created social context of adopted preferred outcomes. “Accordingly, from a deontological perspective, certain choices are inherently evil and can never be justified, even if they would bring about a good outcome.”\(^{37}\) Indeed, Deontology’s remarkably terse yet seemingly unassailable rejoinder is that Consequentialism, in whatever form it takes, strips morality of its moral force because no matter how outwardly sensible they seem, personal preferences, predilections and desires cannot prove anything except such are what the actor believes will bring her happiness, or at least more pleasure than pain. Human desire alone may demonstrate *the good* but is insufficient to prove *the right* unless one simply wishes to define morality as pursuing whatever one wants by whatever means one wishes. Thus, a consequentialist definition of morality is both unremittingly circular and distressingly self-indulgent.

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\(^{35}\) See *infra* notes 144-57, 417-36 and accompanying text.  
\(^{36}\) True, most modern theorists eschew pure Utilitarianism for more nuanced, refined concepts of the good predicated on societal rather than personal predilection purportedly constrained by some communal acknowledgement of obligatory moral directives, a diluted deontology if you will. *See infra* notes 160-76 and accompanying text. But whatever its form, Consequentialism’s paradigmatic insistence that the good dominates the right remains significantly seductive, certainly timely and fundamentally mistaken.  
\(^{37}\) Blum, *supra* note 28, at 38 n. 165.
If it is not a creature of human partiality, then morality must be transcendent, that is, based on immutable, timeless, universally applicable principles, *derivable through impartial reason*, greater than the wants and desires of any given persons, groups, organizations, or social orders. A moral code and attendant applications to particular situations can be proved or disproved only by unfastening them from the societal forces of preferences and predilections that might distort the very reasoning process needed to discern and verify moral norms. Deontology, therefore, is liberating in two vital ways. First, it frees us from the methodological distortions socialization may instill. Second, even if socialization fortuitously inculcates proper moral principles, Deontology provides an impartial process through which adherents can strive to prove that their morality is true and not wholly the product of even profound and momentous happenstance. Deontology frees us from the enslavement of our life experience.

Consequentialists are correct that Deontology’s *damn the consequences* approach sometimes requires persons to do things that can cause tremendous harm, particularly to innocents. Perhaps sadly or perhaps not, keeping faith with morality does not promise freedom from sorrow. Indeed, only the mentally infirm, incorrigibly villainous and woefully uninformed would act immorally if morality engendered no serious costs. *Morality’s sole promise is that the moral are upright and steadfast, fulfilling faithfully morality’s imperatives while resisting consequentialist temptations even when the morality of the moral enables the immorality of the immoral.* Accordingly, the only acceptable reason to be moral is to promote morality itself.\(^3^9\)

Consequentialism’s alternative is an often understandable, but nonetheless outright defiance of

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morality by either shunning morality in favor of a popular albeit immoral outcome or speciously conflating morality with whatever promotes self-interest labeled as the greater good.40

*Deontology, the Individual, the Group and the Society --*

Because this article avers that constitutional due process is deontological, those principles must pertain not only to individual human actors, but also to humanly created entities such as groups, organizations, corporations and, in the case of due process, governments. At first, this proposition seems uncontroversial as we customarily attribute the moral standards of personhood to official and private associations *via* concepts such as *professional ethics, national honor* or a *state’s moral duty*.41

Yet, as Prof. Blum observed,

Deontology is premised on the notion of individuals as rational actors. But the degree to which a state can be personified is questionable, and so is the degree

40 This is an apt point to note a companion denunciation that deontologists are unyielding, obstinately imposing *their* moral values on others while consequentialists are reasonable. This assertion may flow from the mistaken belief that consequentialists are more apt than are deontologists to compromise. Actually, if the consequences are crucial, substantially affecting thousands of lives and millions of dollars, consequentialists are as likely to cling tenaciously to their chosen outcomes as deontologists are to clutch their chosen moral precepts. Correspondingly, no less than deontologists, consequentialists are happy to compel certain outcomes, in effect imposing their moral principles onto unwilling others.

to which we can or should assign to a state moral prescriptions. If this is so, one could hold that even though deontology is a sound moral theory for individuals, government morality should be nonetheless outcome-based."42

The supposition that one cannot properly attribute morally relevant qualities of personhood to complex associations surely is flawed.43 Furthermore, even if attributing personhood to organizations is problematic, the improbably short rejoinder is: if human societies are exempt from equivalent deontological restraints, then individuals can escape their moral duties simply by forming groups authorized to execute on their constituents’ behalf the unethical acts that the constituents as individuals may not perform. That simply cannot be right.44

Designating human organizations unaffected by deontological mandates renders morality essentially empty -- a nullity. Especially in our industrialized, mass communications, high-

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42 Blum, supra note 28 at 40-41, 41 n. 176. Along these lines, Prof. Elster opined that although torn by conflicting motivations, it is possible to understand how a given individual accommodated or harmonized those conflicts in a particular situation. By contrast, “The reason why societies are non-unitary is very different. They are made up of many individuals, none of whom or no subject of whom is ‘in charged.’ … Society has neither an ego nor an id.” Jon Elster, Ulysses Unbound 92, 168 (2000).

43 Scholars lucidly explain how, “Groups … have all of the mental capacities needed to have attitudes toward people.” Anderson & Pildes, supra note 41, at 1519. “Margaret Gilbert provides a key insight … by arguing that certain collectives should be viewed as “plural subjects.” A group is a plural subject if its members (1) can properly refer to themselves as >we,= and (2) make normative claims upon one another in virtue of their belonging to that ‘we.’” Id. at 1515 (quoting MARGARET GILBERT, ON SOCIAL FACTS 204-05, 380-81 (1989)). It is not enough that persons happen to be doing something alike or even that they have agreed to work together, in concert, on one or more given projects to achieve one or more shared goals. ATo count as a >we,= … each member of the group must further acknowledge a commitment or obligation to the others to act in concert with them to achieve that goal.@ Id. at 1516. Therefore, all participants must adopt a generally shared group identity which might place the legitimate aims and means of the group ahead of any given constituent’s preferences. Id. at 1517-18.

This is not to discount the difficulties of identifying the mix of motives, internal and external influences and political compromises underlying why a group took some action in lieu of alternatives. Still, the given action itself, and the accounts of relevant actors and witnesses can provide sufficiently reliable explanations. A popular example is legislation. While their perceptions and intent may differ somewhat, each legislator shares with her colleagues at least a general understanding of what proposed legislation means, what it is intended to do. Accordingly, we understand the meaning and purposes of enacted law by reviewing the legislation’s plain language, legislative history and other sources generally accepted as at least somewhat authoritatively informative. Id. at 1520-23. See also, e.g., Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2805 (2008).

44 E.g., Fernando R. Teson, The Kantian Theory of International Law, 92 COLUM. L. REV. 53, 64 (1992)(“…the constitution of the state, as an artificial creation to serve human needs, must embody and incorporate [human morality] …”); Anderson & Pildes, supra note 41, at 1519. (“There is no reason to think that, in acting together, we become subject to a fundamentally different kind of moral or rational demand than applies to us when we act independently.”)
technology world, few individual acts occur without the assistance of numerous human associations, particularly corporate and governmental. These indispensable associations have become essential to enforcing moral norms which means the associations themselves must derive from moral norms. If human associations are not constrained by moral norms, there is no meaningful role for morality in human society.

The same, then, must be true for that grandest of associations, the State. As Fernando Prof. Teson summarized, “The contingent division of the world into discrete nation-states does not transform political freedom from an ethical imperative into a mere accident of history.” Of course, in certain ways the State necessarily is greater than the sum of its members, particularly given only the State may construct law and enforce that law through reasonable coercive violence. But, that singular authority must be subject to the same a priori principles of morality that constrain human beings if we wish to legitimize the State. If the only basis to judge government and corporate actions is consequentialist, then individuals can construct a social order as they would a nightclub, for their revelry and entertainment; and, as they would

45 As philosopher David Hume noted “with his characteristic verve, ‘We can form no wish, which has not a reference to society.’” Peter Brandon Bayer, Not Interaction but Melding – The “Russian Dressing” Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers, 52 MERCER L. REV. 1033, 1053 (2001)(quoting DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK II 112 (Pell S. Ardal ed., 1972)).
46 LESLIE A. MULHOLLAND, KANT’S SYSTEM OF RIGHTS 304-05 (1990). See also, e.g., Teson, supra note 44, at 64.
47 As Jefferson aptly summarized, “What is true of every member of society individually, is true of all of them collectively, since the rights of the whole can be no more than the sum of the rights of the individual.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in FROM REVOLUTION TO RECONSTRUCTION AND WHAT HAPPENED AFTERWARDS, http://www.let.rug.nl/usa/P/jt3/writings/brf/jefl81.htm. See also, 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826 631-36 (James M. Smith ed., 1995).
48 Teson, supra note 44, at 83.
49 See infra notes368-77 and accompanying text.
50 Teson, supra note 44 at 70 (discussing that Immanuel Kant did not “conceive of the state in a holistic way as a moral person, with rights and duties above and beyond the individuals who make up the state.”) See also, e.g., DAVID RODIN, WAR AND SELF DEFENSE (2002). In his fascinating, intricate book, Prof. Rodin argues that nations are constrained by Kantian morality which includes the right of national self-defense that substantially mirrors individual self-defense. Id. at 107-118, 118 n. 43, 179-197.
their coats, check at the front door their moral duties as unnecessary in that context and circumstance. Thus, the State’s “moral standing” must be that of a social actor, not a “community ... hold[ing] a preeminent position at the expense of the individual.”  

Consequently, no government is legitimate that fails to conform to the moral imperatives required of persons when interacting with others.  

*Morality’s Nature and Purpose Is To Oppose Evil* --

Understanding that it is both *a priori* and applicable to all endeavors pursued by individuals and the groups of which they are a part, we next must discern: what *is* morality? As often occurs, defining primary concepts is as hard, or harder, than explaining how those basic ideas apply in complex situations. Indeed, the noted moral theorist Prof. Bernard Gert lamented, “What is morality? This question seems as if it could be answered by any intelligent person until he actually tries to answer it. Then a funny thing happens. If you start by saying, >Morality is ...= nothing you say afterwards seems quite right. @  

But in summary: *purposeful human action promotes either evil or morality, the former being inherently wicked and unjust, the latter being inherently decent and right.* Evil is the concept of all things that are wrongful to inflict on others, no matter who, no matter where, no matter why we wish to do so. Morality is the set of principles that alert us to what acts are or are not wicked, that is, evil either immutably or, to borrow a legal term, “as applied” in given circumstances.  

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55 Morality’s singular role in human existence is to ∧… prohibit acting in those ways that cause or increase the likelihood of someone suffering an evil. … Morality has the goal of lessening the amount of evil or harm suffered.” GERT, *supra* note 53, at 6,13; See generally, id. at 8-14.
Morality, therefore, is exemplified by an anti-consequentialist imperative. As Kant stated bluntly, “The concept of an external right is derived from the concept of freedom in the external relation of human beings to each other. This concept has nothing at all to do with ... a desire for happiness, nor has it anything to do with the means of achieving such happiness.”

Rather, morality is the claim one person may demand of others based not on that person’s actual goodness, but solely on her status as a human being regardless whether her behavior makes her worthy or unworthy of admiration. Prof. Korsgaard astutely expressed morality’s anti-consequentialist confrontation of evil in terms of the subject, “Deontology reasons are reasons for an agent to do or avoid certain actions. They do not spring from the consequences of those actions, but rather from the claims of those with whom we interact to be treated by us in a certain way.”

Therefore, as the category of principles understood to identify and, we hope, to prevent morality does not maximize or even per se promote the good in the sense that good means what people want, what makes them happy, what makes them comfortable or even what precludes their pain. Rather, at its core, morality claims that in their many and varied social interactions, persons may expect and, correspondingly, must behave in ways that minimize the risk that others will suffer evil. Morality, then, does not promise freedom from harm, but pursues freedom from evil.

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56 Id. at 9 (criticizing the “widespread but mistaken philosophical view that morality is primarily about what is the best state of affairs. See also id. at 17; Blum, supra note 28, at 38 n. 165.
57 Murphy Book, supra note 30, at 106. (quoting IMMANUEL KANT, CONCERNING THE SAYING: THAT MAY BE TRUE IN THEORY BUT NOT IN PRACTICE 289 (Berlin, The Royal Prussian Academy 1793)).
58 Brad Hooker, Griffin on Human Rights, 30 OXFORD J. LEGAL STUD. 193, 194 (2010)(reviewing JAMES GRIFFIN, ON HUMAN RIGHTS (2008)).
60 The reader understandably may now be wondering is there a definition of, or some explicating act, which encapsulates or frames the concept evil so that we might know what specific acts are or are not evil? As earlier noted, at this juncture I seek to explain the concept of Deontology in the hope that the reader will accept that
The foregoing definition is deontological in its basic idea that morality must exist transcending the beliefs or preferences that one or another individual or group would pronounce as its particular ethics. 61 Rather, there is an inevitable eternality attributable to correct moral norms: 62 “Since moral judgments can be made about all rational persons, it follows that morality is universal and that what seem to be different moral systems are simply specifications or variations of a universal morality or moral system.” 63 As Kant similarly explained, there is, “... truth in all possible worlds. ... [The knowledge of this truth] does not come solely from experience. We do not discover what is true for all possible worlds merely by observing what is true in one actual world.” 64

Because transcendent ethical precepts cannot be gleaned solely through experience, morality is comprehensible only through reason, specifically, sensible persons employing a reasoning process to discern applicable moral norms. 65 Furthermore, because reason demands that individual preferences ultimately be disentangled from the reasoning process, impartiality – the absence of personal prejudice supporting or opposing particular outcomes -- is essential for approach as correct over Consequentialism. Nonetheless, as a very brief preface, I join many others who accept as the primary moral command, Emmanuel Kant’s “dignity theory” which requires always respecting the inherent dignity of human beings, whatever the costs. See infra notes 281-308 and accompanying text.

61 E.g., WOOD, supra note 25, at 5 (discussing Kant).
62 Prof. Powers expressed the indispensability of immutability for any theory: “Every theory must presuppose something to get off the ground; no convention or practice can justify itself. ... All practices, conventions, and theories require grounding on a distinct, external convention or practice, which in turn requires its own justification or presupposition. Moral discourse is not unique here; all intellectual disciplines are ungrounded in this sense.” Powers, supra note 29, at 1583.
63 GERT, supra note 53, at 4.
64 Murphy Book, supra note 30, at 14 (quoting IMMANUEL KANT, CRITIQUE OF PURE REASON 1 (Berlin, Royal Prussian Academy 1793)).
65 E.g., GERT, supra note 53, at 3-17, 344. See also, e.g., infra notes 279-85 and accompanying text. That is the reason why morality is not religion; every feature of morality must be known to, or could be chosen by, all rational persons. No religion is known to all rational persons, and all religions have some feature that could not be chosen by all rational persons. GERT, supra note 53, at 6.
resolving moral issues.\textsuperscript{66} If the moral outcome coincidentally comports with the actor’s accumulated prejudices and preferences, so much the better; but, the actor cannot allow her biases to skew the analysis thereby attaining her preferred result. \textit{Thus, the core of Consequentialism, choosing among outcomes based on whatever makes us happiest, cannot validate a purported moral code because the appeal to “happiness” implies that self-interest, not neutrality dominates the analytical process.}

The foregoing analysis confirms our earlier assertion: while socialization fortuitously may indoctrinate pristine morality, proof that such espoused morality is correct requires eschewing the goals, purposes, and preferences of the individuals, groups, and organizations that collectively supply the bits and pieces from which consequentialists select and apply their moral norms.\textsuperscript{67} Consequentialist explanations are not justifiable on any bases other than preference and convenience.\textsuperscript{68} In fact, Consequentialism condones, indeed arguably requires malevolent behavior if evil best fosters happiness.\textsuperscript{69}

\textsuperscript{66} \textit{Id.} at 3-17, 130-36. Although partiality – bias – will taint analysis whether given acts are moral, the morality appropriately answer to a particular problem may permit the actor to act partiality. For instance, we generally agree that, when grading papers, teachers ought not to favor or disfavor individual students based attractiveness or other matters that are extraneous to the quality of the graded papers. But, we generally approve if teachers spend more of their limited time counseling weaker rather than stronger students. That form of arguable partiality is consistent with morally acceptable although not morally obligatory pedagogy that the weaker students are in greater need of the teacher’s professional help. \textit{Id.} at 131.

\textsuperscript{67} \textit{E.g.}, \textit{WOOD, supra} note 25, at 48-49. Certainly, the case for Deontology does not imply that any given individual is preordained to embrace certain teachings based on that person’s unique confluence of social interactions. Certainly, socialization is neither a unilateral, nor a uniform, nor a harmonious process. Faced with incomplete and contradictory information from different individuals, groups and organizations, persons weigh and sift, consider and analyze, to discern for themselves which meanings and teachings they wish to accept. \textit{See, e.g.}, Bayer, \textit{supra} note 25, at 1053-57.

\textsuperscript{68} Of course and of great consequence, preferences and biases are perfectly legitimate considerations in societal projects and pursuits so long as they raise no moral predicaments. Societal accommodation of conflicting but morally acceptable proclivities is one useful understanding of the rightly cherished concept “pursuit of happiness,” which is part of the definition of Americanism. \textit{E.g.}, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 (1972). Indeed, a common deontological tenet is “an individual is free, within the constraints of justice, to determine for himself what is good and to act in what he perceives to be his own self-interest.” Powers, \textit{supra} note 29, at 1570. \textit{See generally, infra} notes 374-76 and accompanying text.

\textsuperscript{69} \textit{E.g.}, \textit{GERT, supra} note 53, at 9-10; \textit{WOOD, supra} note 25, at 5, 48-49.
To offer perhaps too easy examples, if killing Jews because they are Jews is immoral, such killing is not evil exclusively within liberal cultures accepting that moral precept. It simply is evil. If husbands act immorally by violently forcing sex on unwilling spouses, such rape is not wicked only for societies that recognize the personhood of wives. Rather, spousal sexual assault is morally wrong even if a particular society believes that a husband has a societal or religious right to ravage his wife. And, if torturing a terrorist suspect is immoral then no noble motive, such as saving thousands of lives, renders torture ethical.\textsuperscript{70} In sum, if X is immoral, it is always immoral, no matter how much a given person or group believes, teaches and wants it to be otherwise. For the foregoing reasons, Consequentialism is incorrect; morality is deontological.

*Maxims and Morality’s “Value Monism” --*

Of utmost importance, within any deontological system are discrete maxims, principles, standards, or edicts that form a harmonious interrelationship. “Qualified moral maxims … must satisfy the coherence requirement. That is, the set of adopted moral maxims must be consistent with one another, so that a person is able to satisfy them all simultaneously.”\textsuperscript{71} Thus, morality is a schema or system comprised substantially of distinct yet interrelated and congruous precepts appropriate alone or in combination to discrete situations.

That morality entails interplay among distinct, specific moral precepts is hardly contentious. The pragmatic task of ethical norms is to guide personal conduct – to instruct not whether possible actions in a given situation are particularly wise, clever, helpful, or efficient, but, rather, whether they are right, that is moral. As Kant prudently explained, the moral world

\textsuperscript{70} E.g., Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, in *MORAL PHILOSOPHY* 420-40 (George Sher ed., 1996).

\textsuperscript{71} Kuklin, *supra* note 30, at 501-02. See also, *WOOD* *supra* note 25, at 162-65 (certain moral duties are conditional and may be trumped by other moral duties depending on the situation).
"is a mere idea, though at the same time a practical idea, which really can have, as it also ought to have, an influence upon the sensible world, to bring that world, so far as may be possible, into conformity with the idea. The idea of a moral world has, therefore, objective reality...."  

That morality as “a mere idea” the precepts and duties of which are conditional -- depending on given facts one precept may supersede another – neither evinces intrinsic indeterminacy, nor undermines morality’s transcendence, nor invites consequentialist solutions. It is perfectly plain that different situations support different moral conclusions. Indeed, as little as one altered fact can change a possible action from moral to immoral or vice-versa. Morality nicely understands the difference between homicide and self-defense, the difference between denying full contract rights to minors and denying full contract rights to African-American adults, the difference between X and Y. That the moral resolution of a particular dilemma depends on unique facts accords with rather than negates the reality that for every moral inquiry there is a correct answer which must be based on eternal principles of right and wrong.

Crucially, any “correct answer” depends on the “harmony” that must exist among moral maxims. Accordingly, there must be some source of harmony; that is, all separate ethical norms must cohere through one overarching, unifying concept that serves as the pivot for resolving any moral quandary. Absent such unification, we have no basis to know whether and how moral precepts apply in any given situation. Thus, managing discrete moral rules and their functions

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73 E.g., WOOD, supra note 25 at 67-68, 162-65. Kant illustrated by identifying “[w]ide or imperfect duties [that] succumb to strict or perfect duties; for example, the wide duty to aid a stranger is overridden by the duty not to let my parents starve ... and you must testify truthfully in court even if a lie would help your benefactor (and thus fulfill a wide duty of gratitude).” Id. at 67-68 (discussing Kantian morality). See also, e.g., Kuklin, supra note 30, at 501-502.
74 For example, understanding why murder but not self-defense is immoral requires some paradigmatic idea explaining when taking a life is not evil. See generally, RODIN, supra note 50, at 65-99. That same
requires a foundational conception – a paradigmatic idea – morality’s elementary particle that enables, delineates, invigorates and clarifies the entire moral philosophy. Prof. Wood calls this “value monism,” the proposition that morality ultimately is premised on a single basic value:

... An ultimate plurality of values leaves us not only with incommensurable values but also with a plurality of values between which there is in principle no way of establishing any priorities ... Value monism is necessary to provide even a context for making comparisons between different values, however the comparisons may come out.76

The Indisputable Value of Experience and of Evaluating Anticipated Consequences --

Contrary to a frequent criticism by consequentialists, deontologists fully appreciate that contemplating the experience of one’s life is a formative step in the process of discovering and applying moral precepts. The pursuit of timeless morality does not require Deontology to ignore “all empirical facts about the world, including all facts about human beings, as irrelevant to explaining the nature of morality.”77 Certainly, deontologists can and often do allow that reflecting on experiences – pondering the lessons taught through socializations – arouses the search for understanding.78 Kant likewise recognized that, “Though all of our knowledge begins with experience, it does not follow that it all arises out of experience.”79 Kant knew that moral imperatives may be pointless absent choosing goals and means that require moral validation but

overarching concept would elucidate as well, for example, why abridging contract rights on the basis of race but not on the basis of childhood is unethical.

75 Exactly what is the primary moral principle – the elementary particle – from which other moral precepts spring is discussed at Part IV, infra, regarding Kantian honor safeguarding innate human dignity. Furthermore, we shall see at Part V, infra, that due process is the Constitution’s primary particle which is becoming and should be understood in terms of Kantian morality.

76 Id. at 59 (discussing that Kant and Hume agreed that moral theory requires value monism). Wood explicated, “A moral rule or principle may very well be conditional in other ways without affecting its categorical status. The supreme principle of morality admits of no conditions or exceptions, of course, because there is nothing higher by reference to which conditions or exceptions could be justified.” Id. at 67-68.

77 GERT, supra note 53, at 241.

78 E.g., WOOD, supra note 25, at 261.

79 Murphy Book, supra note 30, at 14 (quoting IMMANUEL KANT, CRITIQUE OF PURE REASON 1 (Berlin, Royal Prussian Academy 1797)). See also, e.g., WOOD, supra note 25, at 58 (discussing Kant).
are influenced by socialization.\textsuperscript{80} Prof. Murphy put it drolly, “Kant sees that both rationalism and empiricism have an important story to tell, but that each exaggerates.”\textsuperscript{81}

Accordingly, we may challenge the common critique directed especially at Kant that \textit{a priori} morality “speaks only abstractly about human conduct. It fails to lay down determinate principles of moral behavior.”\textsuperscript{82} Certainly overarching deontological principles are abstract and necessarily so; otherwise they would supply no basis upon which to discern specific applications. That one may espouse a paradigm that is both conceptual and indecipherable is not a condemnation of Deontology, but an indictment of the philosopher. We seek, therefore, common, \textit{comprehensible} principles to provide the structure of moral meaning while understanding that only though the intercession of personal experiences and human conditions can we discern the application of distinct, abstract moral norms and duties.\textsuperscript{83}

\textit{Can We Reason and If So, Can We Reason Impartially?}

\textsuperscript{80} \textit{Id}. at 68. “Kant sensibly recognizes that the duty of [morality] … cannot be determined by a precise universal rule, because context and circumstance play important roles. The exercise of judgment is necessary to decide particular cases.” Wright, \textit{supra} note 32, at 278 (discussing \textsc{Immanuel Kant, The Metaphysics of Morals} 156 (Mary Gregor ed. & trans., 1996)(1797)).

\textsuperscript{81} Murphy Book, \textit{supra} note 30, at 9.

\textsuperscript{82} Powers, \textit{supra} note 29, at 1573. \textit{See also}, \textit{e.g.}, \textsc{Richard A. Posner, The Problematics of Moral and Legal Theory} 7, 19 (1999)(discussed in Jason Brennan, \textit{Beyond the Bottom Line: the Theoretical Aims of Moral Theorizing}, 28 \textsc{Oxford J. Legal Stud.} 277, 278 (2008)). Deontologists do not dispute that our chosen preferences and beliefs “give individuals identity and character; \textit{they reflect what they are, not just what they want}.” Sagoff, \textit{supra} note 34, at 1070 (questioning the humanity of Deontology, emphasis added). Kant and other deontologists understand, indeed celebrate that selecting “personal ends,” is integral to attaining personal identity, uniqueness and satisfaction. \textit{E.g.}, Hill, \textit{supra} note 52, at 47-48; Wright, \textit{supra} note 32, at 280-81. Indeed, Kant never denied that “purposiveness, the setting of ends to be produced, is the most fundamental feature of all action…” \textsc{Wood, supra} note 25, at 259. But, goals and means must be moral; and, morality is prior to the good.

\textsuperscript{83} Any conceptual system is necessarily indeterminate. A concept is a universal, that is, something general that applies to the many particular instances falling under it. One invokes a concept not to produce a full enumeration of its instances but to clarify them by reference to the common category to which they belong. Particulars are what they are because they present themselves to our understanding in a variety of forms; they always contain something contingent with respect to their universal. Weinrib, \textit{supra} note 72, at 505-06.

In these regards, Prof. Carlson précis is exactly right: if the universal is only realized in discrete acts, “The particular is never actualized separate and apart from the universal.” Carlson, \textit{supra} note 39, at 40.
We now understand that morality must be discerned, if at all, by a reasoning process that eschews personal biases and prejudices. Such reasoning requires self-consciousness coupled with the facility for critical analysis of oneself, of others and of ideas. Accordingly, at this juncture we should confront the apparent limited capacity of human beings both to reason and to act impartially. Of course, deontologists are not blind to human reality. Immanuel Kant, perhaps the most celebrated of the deontological rationalists, understood that “human beings are not fully rational beings; they are, rather, creatures of limited knowledge and self-restraint.”

Therefore, while morality exists a priori, many philosophers accept that individuals’ perceptions and understanding of a priori subjects tend to be distorted by the physical and interpretive facets of human understanding. The potential for mishap always exists when, “[t]he subject adds time and space to ... [that] which itself is neither temporal nor spatial.”

In particular, inclinations are the culprits regarding one of the most notorious claims asserted by many philosophers, a position firmly associated with Kant: human emotions impede reason. The argument goes that regarding things transcendent, emotions threaten disorder

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84 One author succinctly defined that essential capacity as, “having the ability and unremitting drive to reflect upon one's own existence and place in the world.” Daniel R. Williams, After the Gold Rush Part II: Hamdi, the Jury Trial and Our Degraded Public Sphere, 113 PENN. ST. L. REV. 55, 57 n. 7 (2008)(citing ROBERTO UNGER, KNOWLEDGE AND POLITICS 200 (Free Press 1984) (1975)). See also, e.g., Thomas P. Crocker, Overcoming Necessity: Torture and the State of Constitutional Culture, 61 SMU L. REV. 221, 269 (2008).

85 E.g., GERT, supra note 53, at 136-37. I address these concerns as part of the overall discussion of Deontology; however, they are applicable equally to this work’s specific review of Immanuel Kant’s moral theories. See infra Part IV, notes 268-404 and accompanying text. Therefore, the resolutions offered here likewise pertain to the upcoming discussion of Kantian ethics and will not be repeated therein.

86 Murphy Book, supra note 30, at 104. See also, e.g., Carlson, supra note 39, at 36 n.64 (quoting George P. Fletcher, Law and Morality: A Kantian Perspective, 87 COLUM. L. REV. 533, 538 (1987) (“Kant concedes that neither the actor nor an observer can ever be sure if the action proceeds out of [rational, unbiased] duty alone”).

87 “There is always the danger that some natural defect in the perspectival mechanism – eyes, ears, etc. – have presented a distorted view of the thing.” Carlson, supra note 39, at 35.

88 Id. at 36 n.64 (citing George P. Fletcher, Law and Morality: A Kantian Perspective, 87 COLUM. L. REV. 533, 538 (1987)).

89 E.g., id. at 38-39 (emphasis added). See also, e.g., John L. Hill, Exploitation, 79 CORNELL L. REV. 631, 674-75 (1994). In this regard no person can ever truly know whether she acted from pure moral duty or whether
because they stimulate personal inclinations, enticing individuals to satisfy their purely internal, selfish desires regardless whether doing so promotes or confounds their moral duties to others. 90

Worse yet, emotions can make us delusional, mistakenly believing that our choices were grounded in rational morality rather than sentiment. 91 As Prof. Carlson summarized, “The problem is that I never know whether my acts are from the moral law or from some pathological inclination.” 92

The issue whether emotions distort the reasoning process is quite academic, however, because understanding ideas and ascribing meaning or value to any object, concept or event is impossible outside of a realm of emotions. That is how human beings operate. Science and much philosophy establish that persons understand the worth of things – assign meaning – not by emotions alone, not by reason alone, but by an immutable interplay of emotions and reason -- what we might call an emotional-rational process. 93 Only the tweak of emotions can inform us whether we properly have employed our rational capacities. Conversely, only reason allows us to construe our emotions, that is, appreciate why we feel what we are feeling. 94 Accordingly, perhaps most famously among others, the philosopher David Hume essentially was right that

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90 Kant argued that, “an action from [moral] duty is to put aside entirely the influence of inclination and with it every object of the will; hence there is left from the will nothing that could determine it except objectively the law . . . ” Carlson, supra note 39, at 38 (quoting IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 13-14 (Mary Gregor trans., 1998)(1797)).

91 E.g., id. at 35-39.

92 Id. at 81-82.

93 See generally, Bayer, supra note 45.

94 Id. at 1046, 1058-76.
absent the interplay of an emotional-rational process human beings cannot attain understanding. Therefore, persons are incapable of pure rationality and remain human.

Indeed, although he rebuffed Hume’s delight over the indispensability of human emotion, Kant acknowledged that people are not capable of strict rationality. Deontologists understand that passions – emotions – are both essential and inevitable for the generation of conscious human action. This leads some theorists mordantly to deduce, “we can only hope and flatter ourselves that our narrative about following rules is true.”

One may respond forcefully that such theory simply presumes that emotions are hostile to reason. We might as well similarly argue that the respiratory system is infirm because breathing

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95 Id. at 1046, 1058-59 (discussing DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK II 155-56 (Pall S. Ardal, ed., 1972)). See also, e.g., MARTHA C. NUSSBAUM, POETIC JUSTICE 68 (1995)(“Intellect without emotion is, we might say, value-blind: …”). For example, Hume argued that although a problem in mathematics may be solvable purely through mathematical reason, neither “the act of solving [nor] the solution itself could be meaningful to the actor without appeal to passion.” Bayer, supra note 45, at 1059 (citing DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK II 155 (Pall S. Ardal, ed., 1972)). A merchant might balance accurately her financial books, but the meaning of such an act requires the interplay of reason and emotion. She may feel numerous emotions which she understands by reasoning and then tests the validity of her reasoning by her emotional responses and the meaning she derives therefrom.

96 For a discussion of how emotions are necessary physiologically to the thinking process of the human brain, see, e.g., ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTIONS IN THE MAKING OF CONSCIOUSNESS (1999); ANTONIO R. DAMASIO, DESCARTES’ ERROR (1994).


98 E.g., Carlson, supra note 39, at 39-40; Bayer, supra note 45, at 1058-76.

99 E.g., Carlson, supra note 39, at 61-62. Prof. Carlson continued his lamentation, “reason cannot logically rule out freedom from reason. Accordingly, the rationality of our acts is ultimately a fantasy, a story we tell ourselves that can never be verified empirically.” Id.
properly relies on other bodily functions such as blood circulation. Breathing does not exist only as an abstract idea; people breathe because of, not despite the reality that breathing requires other physiological systems (as those other functions depend upon breathing). Similarly, if as part of the emotional-rational process, emotions can sway us to eschew morality, so too can they press us to spurn impure desires that otherwise would influence our judgment. The same domain of emotions telling us that we want something can as well stoutly alert us not to pursue that particular thing should either the thing itself or the means to attain that thing be immoral. The trick is using our emotional-rational process to recognize and to suppress our prejudices – our hope for the particular outcome we favor – and to compel us, rather, to seek only the moral course no matter how unpleasant we deem that course to be.

Furthermore, even if emotions to some extent always initially skews reasoning, a plausible interpretation holds that persons nonetheless retain a significant and sufficient “capacity” to reason — a familiar, comfortable idea that experience teaches rings true. The celebrated theorist Ernest J. Weinrib explained, “the purposive being — although affected by inclination ... is not determined by inclination and is therefore not in the coercive grip of any particular representation or object of desire. ... [Persons can] determine choice by virtue of the ability to universalize and not by virtue of the particular content of choice.”

If so stirred, we attain our chosen goals through such means as are permissible within the bounds of morality. This “characteristically Enlightenment … conception of human nature and

100 For example, emotions such as anger, unhappiness and desperation might be part of the reasoning sequence leading a person to consider crime. Yet those or other emotions – possibly shame and guilt -- as part of the same internal emotional-reasoning course might sound a sharp alarm to warn against trading moral uprightness for some immoral immediate gratification.

101 Weinrib, supra note 72, at 483 (emphasis added).
human psychology, ...” explains why Deontology is both workable and, contrary to some criticism, highly reverential towards human beings by embracing fully Liberalism’s prime directives that one must think for oneself, one is responsible for one’s “actions and convictions” and that while one must consider advice and counsel, one cannot place the fault of one’s own action on others. By demanding and expecting integrity, Deontology accords human beings considerably more respect than does Consequentialism which in the last analysis encourages persons simply to do as they like, no matter how ostensibly cloaked in ethics particular Consequentialism may be.

Liberal Deontology’s view of human capacity is completely satisfactory, conventional and roundly accepted, as it should be. Prof. Carlson condensed the practical competence of Deontology – Deontology’s constructive applicability to our daily lives -- with fitting humor: “Every human act is smeared with [emotion induced] pathology ... [but] it is likewise true that every human act is smeared with morality.”

Of equal importance, whether or not emotions prevent us from reasoning perfectly is completely irrelevant to whether transcendent morality exists because, our inability to find something does not mean that thing is nonexistent. Prof. Waldron offered as a “plausible interpretation” that, “The trouble with the application of ... principles is not that, in theory, no right answers exist, but that there [may be] no basis common to the parties for determining

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103 Id. at 3.
104 This article addresses various types of Consequentialism. See infra notes 158-76 and accompanying text.
105 Carlson, supra note 39, at 40 (footnote omitted).
106 See generally, Michael S. Moore, A Natural Law Theory of Interpretation, 85 S. CAL. L. REV. 279, 312 (1985); Michael S. Moore, Moral Reality, 1982 WISC. L. REV. 1061, 1109 (1982). Discussing the possible legitimacy of torture, Prof. Moore noted by analogy “the medieval worry of how many stones make a heap. Our uncertainty whether it takes three, or four, or five, etc., does not justify us in thinking that there are no such things as heaps.” Larry Alexander, Deontology at the Threshold, 37 SAN DIEGO L. REV. 893, 896 (2000)(quoting Michael S. Moore, Placing Blame: A General Theory of the Criminal Law, 724 (1997)).
which answers are right.”

Even accepting that the human enterprise to understand enduring morality inevitably is flawed, the alternative of denying morality’s transcendence panders to pure self-indulgence, very possibly well intended, but informed solely by the happenstance of one’s socialization and genetic tendencies. Human imperfection neither disproves the everlastiness of morality nor absolves us from understanding as fully as possible what morality requires.

The foregoing rejoinder to the contention that our limited rational capacities makes moral analysis fatally flawed applies nicely regarding our capacity to reason impartially. Society and its system of justice accept that persons bring to their social roles accumulated prejudices which, with human effort, they can appreciate and place in proper perspective. To cite a familiar example, during the course of any judicial business, we expect judges to apprehend and to ameliorate adequately any improper influence caused by their respective accumulated predispositions.

107 Waldron, supra note 15, at 1550. As Cassius explained to his brother, “The fault, dear Brutus, is not in our stars, but in ourselves …” William Shakespeare, JULIUS CAESAR, Act I, scene 2, line 139.

108 E.g., Teson, supra note 44, at 75-76; HILL, supra note 52, at 40-41, 207-08; WOOD, supra note 25, at 67.

It is worth adding briefly that inevitable imperfection haunts Consequentialism as well as Deontology. Consequentialist conclusions must be based on conjecture – quite possibly sincere, informed, thoughtful conjecture, but estimation nonetheless; and, the given conjecture may be wrong. “Utilitarianism, which was supposed to be the most precise and hard-headed of moral arguments, turns out to be the most speculative and arbitrary. For we have to assign values where there is no agreed valuation, no recognized hierarchy of value, no market mechanism for determining the positive or negative worth of different acts and outcomes.” Blum, supra note 28, at 44 n. 194 (quoting MICHAEL WALZER, ARGUING ABOUT WAR 38 (2004)). See also, e.g., Cass Sunstein, If People Would Be Outraged by Their Rulings, Should Judges Care? 60 STAN. L. REV. 155, 181-82 (2007).

Similarly, empirical errors can corrupt a consequentialist resolution. To list just a few: an investigator may have misperceived what would make any given subject truly happy or sad. Or, the subject may have misstated her preferences to the investigator. Or, the subject may be unaware that her own unconscious drives have distorted her conscious understanding of what truly would make her happy. Similarly, the investigator may be unaware that her own unconscious drives have distorted her conscious understanding of what truly would make the subject happy.

109 Indeed, the Supreme Court repeatedly admonishes that a judge or jury must “judge a case, as due process requires, impartially, unswayed by outside influences.” Skilling v. United States, 130 S. Ct. 2896, 2913 (2010)(emphasis added). See also, e.g., 28 U.S.C. § 455(a)(2010)(judge must disqualify him/herself “in any proceeding in which his impartiality might reasonable be questioned.”); Caperton v. A.T. Massey Coal Co.
True, human imperfection almost certainly precludes absolute confidence; but, experience and reason show that we can perceive one-another’s meanings with sufficient accuracy. Despite infirm or incomplete comprehension, we successfully can fulfill tasks and projects while trying to avoid past errors. With proper effort, we do well enough.

Why Must We Be Moral?

Understanding that morality is deontological and that morality combats evil answers the related vital question: “why must we be moral?” To ask why be moral is reasonable because, as consequentialists correctly stress, moral systems forbid some acts that persons, groups, even societies otherwise might want to perform to make them happy, to promote their immediate benefit or to avert severe sorrow.

Selfishness is an inadequate explanation for moral behavior, especially when acting morally contradicts self-interest (aside from some too generalized argument that, in comparison with other self-interests that may be in play, it always is one=s overarching self-interest to be moral. That only begs, not answers the question.) Similarly, guilt, or the avoidance of guilt,

Inc., 129 S. Ct. 2252, 2267 (2009)(“All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”); Bridges v. Cal., 314 U.S. 252, 273 (1941); Cohens v. State of Va., 19 U.S. 264, 380 (1821)(Marshall, C.J.).

Of course, the moral judgments that come packaged as immediately-felt solutions to particular problems are not per se incorrect. A “jumped-to” conclusion may be the right one; thus, our responsibility is to scrutinize such conclusions with particular skepticism, worrying that they may be more convenient and comfortable than correct. As the Supreme Court explained in a capital case, “It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences.” Barclay v. Fla., 463 U.S. 939, 950 (1983).

10 E.g., FREDERICK L. BATES, SOCIOPOLITICAL ECOLOGY–HUMAN SYSTEMS AND ECOLOGICAL FIELDS 6-8 (1997); Bayer, supra note 45, at 1053-56 (discussing scholarship on the process of learning in various societal contexts).

11 In this regard, one is reminded of the Baptist minister who, when asked, “Do you believe in full immersion baptism?” replied, “Believe in it? I’ve seen it!”

12 GERT, supra note 53, at 338.

13 Id. at 339.

14 Id. at 341.
cannot explain morality’s imperative. Not all wicked persons feel guilt; and, even if they did, guilt feelings would not be sufficient to prompt morality, especially if the actor calculates that her remorse is outbalanced by the benefits of her immoral behavior.\textsuperscript{115}

Rather, the reason morality is essential stems, as it must, from its very nature.\textsuperscript{116}

\textit{\textit{\&} Moral rules prohibit acting in those ways that cause or increase the likelihood of someone suffering an evil.} This provides a ready-made answer to the question why a person should be moral, specifically that he will cause or increase the likelihood of someone suffering harm or evil if he is not. ... [T]his is a moral answer to the question ... As such, it should apply in all cases rather than merely generally.\textsuperscript{117} Concurrently, not doing evil “is [the] reason for \textit{actually} being moral rather than only seeming to be.\textsuperscript{118} Based on understanding morality, rather than on, say, faith or hope, we accept that we may not cause inappropriate injury nor, even risk placing others in wrongful harm’s way.\textsuperscript{119}

\textit{The Essential Aspect of Sacrifice --}

I now raise a very disconcerting point. Our definition of morality entails, as it must, minimizing harm through shunning immoral, meaning \textit{evil} acts. However, as we now must accept, one may not employ evil to avoid harm either to oneself or to others because acting evilly is immoral. Therefore, consequentialists are correct that deontological morality may extract greater human suffering than would immoral, but less destructive alternatives.

\textsuperscript{115} \textit{Id.} at 344.
\textsuperscript{116} \textit{E.g.}, Carlson, \textit{supra} note 39, at 40-41.
\textsuperscript{117} GERT, \textit{supra} note 53, at 344. (emphasis added).
\textsuperscript{118} \textit{Id.} at 345 (emphasis added). \textit{See also}, \textit{e.g.}, Carlson, \textit{supra} note 39, at 40-41.
\textsuperscript{119} Again, the specific meaning of wrongfully subjecting an innocent person to the risk of unmerited damage comes \textit{infra} in the discussion of Kantian ethics. \textit{See infra} notes 268-96 and accompanying text.
Many times we feel an outcome – a consequence – should be considered immoral because innocent persons (sometimes even the culpable) suffer in ways seemingly disproportionate to the good engendered by the outcome. The innocent may include those who willingly eschewed a favorable consequence by choosing the right course thereby suffering due to their devotion to morality. Perhaps even more alarmingly, some of the innocent sufferers may have had no direct choice or even notice that they would endure anguish in the name of morality. To cite a very popular example, many consequentialists argue that torturing a suspected terrorist to locate a “ticking time bomb” is preferable to the probable consequences of not doing so: death, pain, injury, panic and destruction of property should the bomb detonate. These consequentialists aver that avoiding undeniably terrible consequences endured by presumptively innocent people justifies torture even if torture is immoral.120

I could, but will not respond that the inherent indeterminacy of Consequentialism means that adopting an outcome such as torture is good if it prevents a bomb from detonating is not empirical proof of the “good,” but pure supposition.121 Nor will I attempt to argue that under extraordinarily rarified circumstances, torturing a suspect could be moral in a deontological sense fortuitously engendering the outcome consequentialists want. Rather, I accept *arguendo* that doing what is right may cause considerably more pain than doing what is good. Accordingly, I employ terms such as “untoward,” “inappropriate” and “wrongful” rather than

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121 See generally, e.g., Hooker, *supra* note 58. I mention only in passing that one can envision how successful torture might cause more harm than it prevented. Suppose that because the authorities declined to torture, a bomb exploded causing death, injury and substantial property damage. Yet, there was another consequence: the tragedy stirred the society from its complacency. As a result, the society improved counter-espionage techniques thereby averting five other planned terrorist attacks that would have caused much greater loss of life, injury and destruction. Had the original disaster been forestalled by torturing the original suspect, then, believing incorrectly that its intelligence gathering methods were adequate, the society would not have implemented improved vigilance. Absent such enhanced police methods, the terrorists would successfully complete their five other, more devastating attacks.
“undeserved” to demarcate the harm resulting from evil. *I do so because the difficult and heartbreaking yet ennobling mandate of morality is sacrifice even if, no other moral alternative being available, the innocent suffer.* Sacrifice is the price of Deontology’s great but necessary irony: while opposing evil may be a good and right goal, because one always must be moral, one cannot exploit immorality – evil – to destroy evil even if the quantity of evil destroyed is greater than the amount of evil employed.

Specifically, being moral -- abidance with morality’s *a priori* principles -- is the highest endeavor of human beings. Accordingly, being moral is a purpose, a reason, indeed a duty in and of itself, not a means to some other goals such as minimizing injuries of various kinds.¹²² The impetus to be ethical is essential to the special quality that distinguishes humanity. The “rational motive” for moral obedience is attaining that which is *a priori* an “end in itself” rather than a human preference or immediate inclination that may offend the intrinsic and the inviolate.¹²³ Deontologists tell us we cannot simply live in the Now.

In that regard, Prof. Thomas Pangle identified the basis of deontological sacrifice in his criticism of John Locke’s liberal theory that survival is paramount among the rights which social orders exist to protect. Invoking an apt religious analogy, Pangle explained that the dilemma of Locke’s account is, “the Bible calls us to a life of devotion and sacrifice that lifts us beyond our petty obsession with personal security – and thus exalts us even or precisely through our self-abnegation. *It would seem that any rationalist account of life that is to rival the Bible, ... must do*

¹²² E.g., Carlson, *supra* note 39, at 40–41. It is the understanding, “of an objective end in itself, which is not an end to be produced but something existing that has a value giving us an unconditional ground for acting in accordance with it.” *Wood, supra* note 25, at 55. *See also,* e.g., Christopher Kunz, *Torture, Necessity and Existential Politics,* 95 Cal. L. Rev. 235, 256 (2007)(criticizing Deontology).

justice to that self-transcending dimension of our humanity.”

Surely, Prof. Pangle’s quote does not aver that we must act morally to meet an obligation to a Creator, although many persons may so believe. Rather, like a Devine command, deontological morality, based on reason free from personal prejudices and predilections, requires adherence if one is to be moral, that is, to be righteous in a secular sense. If Consequentialism is the Serpent, Morality is the path by which individuals, and the societies to which they belong, bring to human existence a divine-like devotion to what is right, what is just and what truly should be honorable.

Indeed, it is doubtful whether civilized society can exist at all absent the willingness to sacrifice – to die if necessary – for causes greater than Society’s own comfort. “[C]ulture and values are only plausible when there is a possibility of dying for them. Although convictions arouse our deepest suspicions and represent a great danger to the human race, we cannot construct worlds of meaning without them.”

The Weiners explicating their profound observation, “without convictions we cannot live a life of meaning. Without a dedication to values neither culture nor religion is plausible, and our doubts about the purpose of life go unanswered. Without our convictions we are less than human.”

Accordingly, if we are permitted to respond to immorality with immorality – to respond to evil with evil – we would have no occasion to care, much less to inquire, what morality is and why morality matters. Thus Consequentialism’s irony is that consequentialists need not bother

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125 Indeed, it is worth recalling Prof. Gert’s clarification that morality is not religion because every feature of morality must be known to, or could be chosen by, all rational persons. No religion is known to all rational persons, and all religions have some feature that could not be chosen by all rational persons. GERT, supra note 53, at 6.
126 See infra text accompanying notes 195-225.
128 Id. at 134 (emphasis added).
themselves with morality at all; and, in so doing deny their own humanity.129 After all, Consequentialism tells us that regarding morality and evil there is no need to consider transcendence; rather, the solution is: what will make us happiest? If we conveniently conflate evil with what will make us unhappy and if it makes us happiest to do “whatever it takes” to avoid such evil, then “whatever it takes” is moral by fiat because not doing “whatever it takes” makes us unhappy which, according to Consequentialism, is evil. That the morally correct response happens to defeat the particular evil would be a fortuity, not a requirement, because the goal has become eradicating the evil, not being moral.130 Conversely, if it does not defeat evil, then under a “whatever it takes” regime, the morally correct response is inappropriate.

Thus, if fighting evil is the controlling societal goal, morality vel non becomes a senseless inquiry for once we decide transcendent morality does not matter and embrace exclusively the realm of preferences and predilections, we really have no reason to make moral judgments. Indeed, the danger of compromising morality in favor of outcomes “… is not merely a question of consistency; rather, it is a deeper metaphysical question about what remains if you sacrifice

129 This brings to mind an apt historical illustration. “The Romans, like the Greeks, believed that a man possessed only what he gave away. Life was a treasure that gained value or power only when expended. The person who preserved his life at any cost was a miser ... He was a thing of dirt, his spirit caged and contracted.” Carlin Barton, Honor and Sacredness in the Roman and Christian Worlds, in SACRIFICING THE SELF – PERSPECTIVES OF MARTYRDOM AND RELIGION 26 (Margaret Cormack ed., 2002) (endnote omitted).
130 The additional ironic aspect of Consequentialism’s irony is the “endless loop” that employing evil to fight evil perpetuates evil which may be confronted by more evil and so on. The consequentialist might respond that she will employ less evil to eradicate more evil, then she will use even less evil to eradicate the originally utilized evil until eventually evil is gone entirely. However, she cannot know what new evil, and of what quantity, might spawn simply because she uses evil as an acceptable method to fight evil. In fact, her very use of evil may inspire others to greater evil. Some might engage in unsuccessful attempts to fight evil with evil. Others might erroneously conclude that the relevant evil behavior is moral per se, not solely when it is used to fight evil. Either way, the seemingly logical effort to eradicate evil by using less evil could create more evil than it cures.
“everything,” which underscores that Consequentialism’s concern is not morality but comfort.

In sum, we are not Morality’s master, but its servants; and, beyond question Morality is harsh and unsympathetic, demanding that we do what is right whatever the consequence because, by definition, acting immorally is wickedness. As proposed in the introductory portion of this discussion, Morality’s sole promise is that the moral are upright and honest, fulfilling faithfully their duty to humanity even if others do not – even when the morality of the moral enables the immorality of the immoral. If the perhaps sad result of adherence to morality is harm to those who through no fault of their own become embroiled in a moral confrontation, then suffering becomes the test of commitment to leading an upright existence. It is not difficult, after all, to follow the moral path when doing so renders only pleasure or at least, accords the least anguish. While utilitarian rewards often flow from moral acts, morality itself must be its own reward. These are the duties of a noble life.

The idea of noble sacrifice in the name of fostering a moral social order is neither novel nor subversive. Indeed regarding the founding of our Nation, we instruct our children to believe in the transcendence of morality and the value of suffering when morality so requires. American students, and likely many others, are taught to revere the following homily attributed to Patrick Henry, “Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery?

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132 Even in the case, if such exists, where the violation of the moral rule almost certainly will neither cause nor increase the probability of harm, one still must act morally to maintain the moral virtues, those attributes which are necessary to make moral behavior immutable. Gert, supra note 53, at 346-48. These virtues, according to Prof. Gert include honesty, truthfulness, fairness, dependability and conscientiousness. Id. at 346. See generally, id. at 187-220, 275-309.  
133 E.g., Carlson, supra note 39, at 40-41; Kuklin, supra note 30, at 476-77 (using the example of criminal sentencing to explain that choosing to do the right – the moral – outcome may cause great distress, such as enforcing a term of imprisonment more lenient than the victim and her supporters would like).
... I know not what course others may take; but as for me, give me liberty or give me death."¹³⁴ One might construe Henry’s celebrated avowal to infer personal choice, that is, he would choose death over tyranny, but would leave others to make their own decisions. A better understanding is that his preface, framed both ironically and rhetorically, declares as a factual matter that life and peace are not sufficiently sweet to justify oppression; and, those who believe otherwise are wrong. Patrick Henry urges the immutable immorality of literal and, presumably, figurative enslavement as the price of life and security.¹³⁵

The equally respected patriot Thomas Paine expressed similar views championing death before immorality. Alarmed at the growing despondency after the Continental Army’s terrible loss in New York, Paine drafted an essay of such force that General Washington ordered it read to the troops on Christmas Eve, 1776, just prior to the celebrated crossing of the Delaware River and surprise offensive against the Hessian troops at Trenton, New Jersey.¹³⁶ Speaking to the immediate peril with inspiration pertinent to any moral challenge, Paine wrote,

These are the times that try men’s souls. ... I call not upon few, but upon all: ... Let it be told to the future world, that in the depth of winter, when nothing but hope and virtue could survive, the city and the country, alarmed at one common danger, came forth to meet and repulse it. ... ‘Tis the business of little minds to shrink; but whose heart is firm, and whose conscience approves his conduct, will pursue his principles unto death.¹³⁷

Turning to jurisprudential sentiment, although explicating the deontological morality that roots constitutional due process fairness awaits at Part V, it is appropriate to recognize the

¹³⁴ William J. Bennett, Our Sacred Honor 35 (1997)(quoting William Wirt, Sketches of the Life and Character of Patrick Henry (1818)).
¹³⁵ “The refrain of Patrick Henry was not ‘Give me liberty only if it means I'm secure!’ He said: ‘Give me liberty, or give me death!’ Americans who risked or gave their lives in the Revolutionary War fought for civil liberties, and they knew that those liberties could never be sacrificed in the name of war.” Jennifer Van Bergen, In the Absence of Democracy: the Designation and Material Support Provisions of the Anti-terrorism Laws, 2 Cardozo Pub. L. Pol’y & Ethics J. 107, 109 (2003)(emphasis added).
¹³⁶ Bennett, supra note 134, at 36. Conservative commentator William Bennett noted Paine’s reference to “winter,” as quoted in the text below, has double texture.
¹³⁷ Id. at 36-38 (quoting Thomas Paine, 1 The American Crisis (1777))(emphasis added).
Supreme Court’s understanding in principle, if not always in practice, that sacrifice is the price of national integrity. Responding to the undeniable threat of terrorism which so greatly has shaped the “Constitution of necessity” arguments of the George W. Bush and, perhaps, the Barak Obama presidencies, the Supreme Court fittingly recognized, “It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.” In support, *Hamdi* quoted the Federal judiciary’s unequivocal stance issued four decades earlier,

> The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.

These powerful admonitions underscore in constitutional terms the more general irrationality that, in the name of preserving morality, it is moral to destroy morality. As the Court concisely put it, “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile.” We may better appreciate such judicial sentiment by closing this part of the

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138 *See infra* notes 439-41 and accompanying text.
139 *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004)(U.S. citizen held by the United States as an “enemy combatant” must have a reasonable opportunity meaningfully to challenge her detention).
140 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-165 (1963)(invalidating under due process provisions of the Nationality Act of 1940 that automatically depriving Americans who departed the United States for the purpose of evading military service of their citizenship without a judicial or administrative hearing; quoted in *Hamdi*, 542 U.S. at 532).
141 As Prof. Prakash asked in the context of American constitutional law, how does one know when, figuratively speaking, one is sacrificing a legal limb to save the Constitution’s life rather than slaying the Constitution itself. “Surely self-preservation of the nation at all costs is not the Constitution’s end. Nor is Lincolnesque preservation of the Constitution at all costs a worthy end, for that would suggest that we may suspend or discard every constitutional provision to ‘save’ the Constitution.” Prakash, *supra* note 7, at 1305.
discussion with Prof. Bowman’s dynamic summary of morality’s imperative, “Who we are ... still depends crucially on what we are prepared to stand up for – and our willingness to stand up for it.”

Our morality or lack truly is our definition of ourselves.

The Inadequacy of “Threshold Deontology” --

Not surprisingly, many purported deontologists balk at Deontology’s strict mandates. Of course, that some reject orthodoxy is no disproof of that theory’s soundness. Rather, recalcitrance evinces that well-intentioned persons, usually under great stress, are tempted to shun morality when the moral route requires particularly severe sacrifices.

As Prof. Sunstein observed “even Kantians typically believe that moral rules can be subject to consequentialist override if the consequences are sufficiently serious. If total catastrophe really would ensue, judges should not rule as they believe that principle requires.”

This is known as Threshold Deontology, the assertion that

at some extreme points, one cannot avoid some consequentialist analysis that would require a departure from the absolute prescription. Threshold deontology responds to the accusation that pure deontology would allow catastrophic outcomes for the sake of moral narcissism. For this school, the debate is no longer about the permissibility of lesser-evil calculations, only about the terms and conditions for its application...

Threshold Deontology, according to Prof. Michael Moore, is like a dam “and the consequentialist considerations [is like] water building up behind it. Eventually, if enough water

requires acknowledging, however, that the courts certainly have not sung only one refrain on this matter. See infra notes 412-16 and accompanying text (security may dominate liberty interests).

143 JAMES BOWMAN, HONOR A HISTORY 295 (2006).
144 Prof. Brooks, for instance, argued that torture is not rendered morally right simply because many of its opponents, if confronted with an actual crisis, would use torture to save one or more lives. Rather, the recourse to torture evinces that human psychology can trump moral judgment in instances involving “pressures too terrible for most humans to withstand.” Rosa Ehrenreich Brooks, Review: Ticking Bombs & Catastrophes: Sanford Levinson, Ed.: Torture: a Collection: Oxford 2004, 8 Greenberg 2d 3 (Spring 2005).
145 Sunstein, supra note 108, at 165.
146 Blum, supra note 28, at 43 (emphasis added).
builds up, it will reach and exceed the dam's height--which is analogous to the threshold of threshold deontology." 147 Arguably, the metaphor of a dam is odd because once the dam breaks the unstoppable torrent of water devastates virtually everything in its way, leaving ruins behind. In that regard, I agree that the flow of ceaseless Consequentialism will devastate morality; but, that is not what threshold deontologists seem to mean. Rather, the predictable justification for Threshold Deontology is consequentialist practicality. Indeed, expressing a commonly held view that this article contests, 148 Prof. Levinson wondered, “What if it is a specific limit on government that is itself viewed as a danger to maintaining the overarching society? Why in the world would we consider ourselves bound by such a limit, ‘whatever the consequences’?” 149 Or, as Prof. Bickel famously opined, "[n]o good society can be unprincipled; and no viable society can be principle-ridden." 150

True, Threshold Deontology solves to a degree Consequentialism’s irony that morality is meaningless when the goal is combating evil rather than being moral. 151 By accepting the moral route until doing so causes unquestionably disastrous outcomes, threshold deontologists render morality important in most instances, although not under the most trying circumstances where morality matters most and moral commitment is most tested. However, Threshold Deontology satisfies only if one is content with a partial solution to Consequentialism’s dilemma. What is

148 See infra notes 442-86 and accompanying text.
150 Sunstein, supra note 108, at 168 (quoting Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (1962)).
151 See supra text accompanying notes 128-31.
left is embracing evil, or at least discarding as inconvenient any inquiry into morality, when the incentive seems strong enough.152

Some threshold deontologists sneeringly posit that unmixed Deontology requires “moral narcissism,” apparently a senseless, fetishistic adherence to morality.153 But, what is “moral narcissism?” It cannot mean acting morally for narcissistic goals, that is, to promote one’s selfishness or vanity because motive does not demonstrate whether the proposed moral resolution is either right or good.154 Thus, threshold deontologists surely are not concerned with moral behavior motivated by untoward goals unless such behavior produces “catastrophic” results in which case, according to threshold deontology, the actor’s motives simply are irrelevant because only the consequences matter.

Similarly, “moral narcissism” cannot mean that due to selfish blindness or smug egotism an actor mistakenly concludes that some sort of behavior is morally required despite its calamitous results. In that instance the actor is wrong because the chosen behavior inherently is immoral (regardless of the intensity of resulting consequences). In such cases, Deontology instructs the actor both to recognize her mistake and to refrain from the actually immoral behavior which by fortuity reaches the very result Threshold Deontology supports.

152 My quarrel with Threshold Deontology, therefore, is not that we can never truly know exactly when the invitation to evil is strong enough to permit Consequentialism to overtake Deontology. As mentioned supra, most useful philosophies, especially involving morality and justice, are based on principles capable of being deeply but not completely understood. They are abstract in both meaning and application. If adequacy mandated that reasonable people could not disagree about their exact substance and boundaries, then most ethical and legal principles, including the ones advanced in this article, would be unenforceable. E.g., Alexander, supra note 106, at 895-96 (discussing Moore). See also, e.g., Wood, supra note 25, at 268; Weinrib, supra note 72, at 505-06; supra, notes 84-111, and accompany text (we are able to analyze sufficiently if imperfectly).
153 Blum, supra note 28, at 43 (discussing the theory).
154 See supra notes 26-70, and accompanying text.
Therefore, the actor must be a moral narcissist when threshold deontologists do not like the outcome of the actor’s forthright, steadfast dedication to a correctly discerned moral duty. Threshold Deontology is essentially *ad hominem* disguised as philosophy. Unable to demonstrate that the actor’s chosen behavior is immoral, and equally unable to justify their preferred outcomes on an objective moral basis, threshold deontologists castigate the actor for daring to be moral. Such always has been the cry of the “pragmatist” who prefaces her argument with “How would *you* feel if …,” but is unable to proceed beyond such consequentialist preferences to employ compelling moral reasoning.

Even less convincing is an alternate explanation of Threshold Deontology: “if the positive balance of consequences becomes sufficiently great -- especially if it does so by averting horrible consequences as opposed to merely making people quite well off -- then one is morally permitted, and perhaps required, to engage in those acts that are otherwise morally prohibited.”\footnote{155} That argument is breathtakingly circular because, as we now understand, the transformation of immorality into morality due to consequences would be magic, not philosophy.

However one parses it, Threshold Deontology extols evil when morality tests us most and, as such, is not a theory of morality but an apology for immorality.\footnote{156} Therefore, despite Prof. Moore’s protests, Threshold Deontology “collapse[s] deontology into consequentialism.”\footnote{157}

\footnote{155 Alexander, *supra* note 106, at 894.}
\footnote{156 Prof. Blum evinced Threshold Deontology’s common misapprehension of Deontology by asserting that the only appropriate deontological response to war is pacifism:}

War is about committing evils and choosing between evils. No war can be fought without causing death, long-term injury, suffering, degradation, and despair. Any war is a violation of numerous human rights, … [I]f deontologists are willing to endorse any practical system of laws of war other than pacifism, they must resign to some degree of evil, even if they would be loath to accept it in any other setting. Blum, *supra* note 28, at 39.
Refined Consequentialism Is Consequentialism --

One might charge that any criticism of Consequentialism is wasteful because, as earlier quoted, deontologists “cannot demonstrate the priority of right simply by debunking a notion of the good based on sheer preference or inclination, a conception so shallow, arbitrary, heteronomous, and mired in contingency that no one could defend it in the first place.”\(^{158}\) For instance, if slavery made a majority of the people in a given society happy, slavery becomes moral under raw Consequentialism.\(^{159}\) Consequentialists who believe there must be moral requisites greater than some aggregation of happiness crave Deontology to establish that overriding morality; which surely reaffirms Deontology’s verity.

Granted, Consequentialism has enlarge into a number of competing, refined theories that purport to account for emergent societal moral certainty such as condemning inhumane treatment, proscribing slavery and denouncing race and similar arbitrary discrimination.\(^{160}\) Indisputably, “The wiser and more circumspect versions of utilitarianism, for example, ask not merely which actions (considered singly or severally) produce the most pleasure and the least pain but instead about which set of moral rules, which moral code, would (if generally taught and

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\(^{157}\) Alexander, supra note 106, at 894.

\(^{158}\) Sagoff, supra note 34, at 1079.

\(^{159}\) Murphy Book, supra note 30, at 91 n.1 (Utilitarian arguments that freedom is a good consequence may be challenged by envision systems of limited liberty but great personal comfort where most people are contented).

\(^{160}\) Powers, supra note 29, at 1569.
practiced) be most conductive to the general happiness.” Yet, without Deontology these theories, sophisticated as they are, remain mired in the Consequentialism’s irony, ultimately basing claims of morality on someone’s or some group’s or some society’s preferences that alone provide no verification that the selected moral precepts are true for all persons and all societies.

A short review of modified Consequentialism tells the tale. One common nuance is differentiating act-consequentialism from rule-consequentialism. “The former assesses the outcomes of every particular act; ... The latter weighs the effects of having a particular rule in place (and therefore the average outcome of acts that follow the rule).” Concerned that straight rule-consequentialism is too bold, some analysts argue for, “incrementalist rule-consequentialism,” which requires “abiding by the policies in the currently accepted morality unless and until we can calculate to a reliable degree of probability which changes to this morality would result in a net increase in value in the long run.” Others embrace “indirect

161 WOOD, supra note 25, at 260 (discussing Mill’s use of general moral rules, subject to reform based on utilitarian values).
162 Accordingly, the argument that assigning “large enough” values to abstract moral ideas will harmonize Deontology and Consequentialism must fail because such conflating eschews exactly “what deontology expressly requires: not simply setting and prioritizing the value of ‘states of affairs,’ but conceiving ‘why we assign those values.’” WOOD, supra note 25, at 265 (emphasis supplied). See also, e.g., KORSGAARD, supra note 59, at 82; id. at 309 n. 46 (some consequentialists argue “If justice matters, we can include it among the results.” But, this would allow persons, “to commit injustice if it will bring about more justice.”).
163 Blum, supra note 28, at 45. That is:

Rule-consequentialism counsels that ethical agents follow that set of rules whose observance will produce the best consequences over an array of decisions. Act-consequentialism, on the other hand, counsels ethical agents directly to choose whichever action produces the best consequences. The rule-consequentialist acknowledges that the relevant rules may sometimes call for actions that, when viewed in isolation, are locally suboptimal from the consequentialist point of view. The rule-consequentialist, then, will sometimes be placed in the awkward position of defending acts whose immediate effect is, when viewed in isolation, socially detrimental. Id. (quoting Adrian Vermeule, Three Strategies of Interpretation, 42 SAN DIEGO L. REV. 607, 627 (2005)).
164 Hooker, supra note 58, at 203 (emphasis added).
consequentialism” inquiring, “... which rules and rights are the ones whose establishment would have the best consequences in the long run, impartially considered?”

Proposing a delicate crossbreed, Prof. Hooker argued,

The best forms of indirect consequentialism focus neither on the consequences of one individual’s accepting and following policies nor on the consequences of one society’s accepting and following policies. The best forms of indirect consequentialism are more ‘cosmopolitan’. What we might call incrementalist cosmopolitan rule-consequentialism assesses possible moral rules and policies in terms of the expected value of their acceptance (not just by one individual or by one society but) by all societies simultaneously.

Among many examples, Hooker offered the following:

“do not deliberately kill the innocent, period” has much greater expected value than “do not deliberately kill the innocent except … to redistribute body parts from this one person in a way that would save the lives of other innocent people”. … [P]eople will be much more reluctant to put themselves in the hands of surgeons if they know that surgeons might redistribute their vital organs to others. A rule that results in widespread surgeon-phobia would not have good consequences on the whole and in the long run.

Doubtless, Prof. Hooker’s concern about “widespread surgeon-phobia” is appealing -- it sounds right -- but it hardly is self-proving. What if fear of surgeons prompts people to take especially good care of both themselves and their dependents, thereby actually increasing the aggregate good health of their society, even accounting for lives lost due to refusing surgery? Or, what if more bad people than good people die from avoiding surgery? As improbable as these consequences appear, if they occurred it seems unlikely reasonable people would bestow a surgeons’ prerogative to distribute patients’ organs. We understand that, generally at least, it is

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165 Id. (emphasis added). Indirect consequentialism is purely consequentialist if, as it seems, “impartially considered” means the evaluator determines what would make the relevant person or group happiest regardless of the evaluator’s personal opinion or bias. If, however, “impartially considered” in any regard means assessing morality pursuant to impartial reason, indirect consequentialism is deontological.

166 Id. at 204 (citing BRAD HOOKER, IDEAL CODE, REAL WORD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY (2000))(emphasis added).

167 Id.
immoral to force an unwilling person to donate body parts even renewable components such as blood or skin.\textsuperscript{168} Otherwise, because the bodily components of one healthy person could drastically improve the lives of many others, society would butcher unwilling healthy persons for the sake of such others.

Perhaps Prof. Hooker truly means that if “all societies simultaneously” so preferred, a surgeons’ prerogative would be moral. However, one must suspect that Hooker’s modifying instruction to “assess[] possible moral rules and policies in terms of the expected value of their acceptance,” is deontologically grounded. Specifically, if empirically the “expected value” turns out not to be what he expected – for some reason most persons in all combined societies support surgeons’ discretion to harvest organs – Hooker would think those persons are so ridiculous that their opinions are worthless.

Similarly, Professors Anderson and Pildes contrast so-called “vulgar deontology”\textsuperscript{169} with their paradigm of “expressive theories.” They argue any philosophy of morality that:

somewhow requires us to ignore the consequences of action [is] an absurd position. ... We cannot adequately express the right attitudes toward people while ignoring the consequences of our actions. We express our respect, love, concern, and other favorable attitudes toward people largely through the pursuit of consequences that are good for them. To disregard the consequences of one’s actions is one way to fail to care about people in the ways we ought to care about them. … Expressive theories, therefore, do not deny that the consequences matter.\textsuperscript{170}

\textsuperscript{168} E.g., “Parents cannot be forced to donate organs to their children, even if the child’s life is at stake and the parent is the only appropriate donor. One may not be forced to donate bone marrow to a cousin who is dying of bone cancer.” Julie B. Ehrlich, \textit{Breaking The Law By Giving Birth: The War On Drugs, The War On Reproductive Rights, And The War On Women}, 32 N.Y.U. REV. OF LAW AND SOC. CHANGE, 381 395 (2008) (quoting, Cynthia R. Daniels, At Women’s Expense: State Power and Politics of Fetal Rights 33 (1993)).

\textsuperscript{169} Anderson & Pildes, \textit{supra} note 41, at 1511.

\textsuperscript{170} Anderson & Pildes, \textit{supra} note 41, at 1513-14. The authors’ deontological desire rises again in their explication that, “Expressive theories of action evaluate given actions according to how well they express attitudes \textit{that we ought to have} toward people.” \textit{Id.} at 1513 (emphasis added).
However, in the same portion of their article, Anderson and Pildes appropriately explain, “Expressive theories, therefore, tell us to pursue consequences that are good for people, provided that pursuing those consequences by the means selected is compatible with caring about people in the right ways. ...”\(^{171}\) This is because, “[W]e are morally required to express the right attitudes toward people, ...”\(^{172}\) Anderson’s and Pildes’ unspoken deontological hope is revealed by their perfectly reasonable claim that there are “right ways” to “care about people” which “we are morally required to express ...”. That some observers might find vulgar Anderson’s and Pildes’ “right ways” to “care about people” does not seem to trouble those authors.

Let me indulge one more example. In his article as critical of Deontology as it is of Consequentialism, Prof. Mark Sagoff embraces the appealing theory of Idealism. In brief, “Idealists believe ... that a person identifies and realizes himself not by satisfying every passing desire or by acting from a universal, abstract moral law, but by forming and pursuing long-term plans that have meaning and value within a cultural community and can therefore be viewed as achievements.”\(^{173}\) Immediately Prof. Sagoff assures us, the Idealism is not “committed to relativism. ... [Rather,] a person ‘cannot take his morality simply from the moral world he is in ... [but] must thus stand before and above [societal] inconsistencies, and reflect upon them.”\(^{174}\) Accordingly, individuals “must be self-critical and must maintain what [Prof. F.] Bradley calls a

\(^{171}\) Id. at 1514 (emphasis added).

\(^{172}\) Id. (emphasis added).

\(^{173}\) Sagoff, supra note 34, at 1067 (citing T.H. Green, Lectures on the Philosophy of Kant: The Metaphysic of Ethics-The Good Will, in 2 Works of Thomas Hill Green § 119, at 139 (1886)).

\(^{174}\) Id. at 1067-68 (quoting F. Bradley, Ethical Studies 204 (2d ed. 1927)).
‘cosmopolitan morality’ in his or her loyalties, projects, and plans.”

This requires defining “cosmopolitan morality:”

A cosmopolitan moral perspective ... depends upon critical judgment, ethical intuition, and human sympathy, rather than upon a system of philosophical abstractions, such as the one deontological liberalism provides.  We can rely to some extent on a general sense of moral progress ... [revealing] a notion of goodness not of any particular time and country.  Grounding the good in a historical and cultural perspective can save us from both [deontological] over-abstraction and utilitarian reductionism. ...

The self has a moral identity only within the political and social world it inhabits. ... We develop our identities in communities ... within which we share aspirations and a sense of the meaning or the fitness of things.

Despite his elegant expression of what societies and their constituent factions can teach us, Idealism is Consequentialism -- profound, nuanced Consequentialism, but still fated to the “utilitarian reductionism” Sagoff aptly denounces.  As with Prof. Hooker’s “incrementalist cosmopolitan rule-consequentialism” and Professors Anderson’s and Pildes’ “expressive theories,” Prof. Sagoff’s “critical judgment, ethical intuition, and human sympathy,” albeit sound, informed and likely humane, crumble into an apology for sincere but nonetheless selfish predilections and preferences.  Unless one is content to base morality on a tautology, Sagoff’s “critical judgment, ethical intuition and human sympathy” are not self-confirming even if based on “grounding the good in a historical and cultural perspective,” combined with some coherent “sense of the meaning or the fitness of things,” and confirmed by “a general sense of moral progress.”  One must assert an independent source to show that the particular “historical and cultural perspective” one “senses” based on judgment, intuition and sympathy in fact evince not simply the “fitness of things,” but the correct “fitness of things.”

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175 *Id.*  As we now see, both Profs. Hooker and Sagoff accent cosmopolitanism to premise Consequentialism on a firmer ethical basis than pure individual or group happiness.  Apparently, higher Consequentialism cannot be rustic.

176 *Id.* at 1068 (emphasis added).
For instance, a growing tolerance, indeed empathy, for the sensibilities of homosexual individuals surely reflects a changing “historical and cultural perspective,” resulting in “a general sense of moral progress” established on an emerging new “fitness of things.” Yet, unless we unfasten the moral arguments from both the rejected and preferred consequences, we cannot know the “new fitness of things” manifests the right change, deserving permanence, rather than possibly being exclusively the momentary triumph of political and social pressure. While socialization may have inspired the moral inquiry, we must disentangle the argument from our socially learned preferences and find timeless principles the application of which confirms the arguments Consequentialism can only hope are valid.

-- Part III --

Honor, Deontology and Due Process --

Having established that morality – whatever its specifics may be – is deontological, the next step is an explanation of honor because the mandates of honor and sacrifice enunciated in the Declaration of Independence is the prime American articulation of deontological morality.

As detailed below, the Founders inspired and justified both the Revolution and ensuing fundamental principles of American law, especially due process, on the best applicable precepts of enduring morality they knew. Specifically, to assure the new nation’s commitment to “unalienable Rights,” particularly “Life, Liberty and the pursuit of Happiness,” the Founders concluded their Declaration by “pledg[ing] … our Lives, our Fortunes and our sacred Honor,”177 a vow they intended to obligate not just themselves, but every generation of Americans then and thereafter. For the Founders, the legitimacy of government is not simply positivistic, that is, whatever societal

177 The Declaration of Independence para. 6 (U.S. 1776)(emphasis added). See infra notes 239-67 and accompanying text.
entity is authorized to make and to enforce legal laws is that society’s government. Rather, legitimacy is substantive, measured by government’s honor -- faithful fulfillment of its affirmative duty to vouchsafe “unalienable Rights.” It is not hyperbole, therefore, to insist that the Founders birthed the United States in deontological theory.

In the closing sections of this article, I hope to show that, while not denying its Magna Carta antecedents, American due process of law is a deliberate and inextricable derivative of the national deontology the Declaration implored. More than that, acutely aware of their own imperfectness, the Founders expected that America’s commitment to moral government would be inspired by, but not shackled to their particular moral perceptions. Therefore, although informed by standards embraced in the late Eighteenth and mid-Nineteenth Centuries, the principles of the Declaration and the Constitution it inspired are intended to be governed by the best understanding of morality currently available.

180 Certainly, one may argue that the Founders’ imperfections were glaring and atrocious. The Declaration and the original Constitution (drafted, as we shall see, to enforce the Declaration, See infra notes 244-52 and accompanying text) permitted slavery, allowed gender, religious and myriad other invidious discriminations and failed to guarantee “unalienable Rights” at the State and local levels. Amending and multiple judicial reinterpretations, often prompted by dramatic social upheavals including the Civil War, have rendered substantial transformations to better approach the truly just America we have yet to attain.

No reasonable critic, however, believes that the value of abstract ideas is merely as good as the espouser’s actual ability or willingness to abide by those concepts. Otherwise, only the words of bona fide saints would have any weight. Ideas carry their own verification or refutation which may be explicated by, but are not dependent on the behavior of their originators and subsequent advocates. Therefore, their imperfection, politicking and pretenses do not negate that the Founders correctly elevated honor as a national mandate and opened a viable path for their successors to better promote honor. See, e.g., David F. Epstein, The Political Theory of the Constitution, in Confronting the Constitution 77 (Allan Bloom Ed., The AEI Press 1990). The Founders’ undeniable failure, whatever the reasons, to prohibit behavior they knew or should have known to be immoral may render their words arguable accomplices to hypocrisy, but hardly devoid of meaning.

181 Cf. Casey, 505 U.S. at 847-49 (the meaning of “liberty” is not limited to perceptions of the Framers of the Fourteenth Amendment nor to the enumeration of specific protections under the Bill of Rights).
Because the provenance of constitutional due process derives from the Declaration’s elegant bonding of “unalienable Rights” with “sacred Honor,” we should grasp the meaning of honor both abstractly and as used by the Founders. In that way, we ultimately will understand why due process in a Kantian sense is not only the right approach, but indeed best fulfills the very mandate of America’s founding.182

Honor’s Worth --

Some may contend that an appeal to honor is like grabbing at the wind for, as Bertram Wyatt-Brown succinctly observed, “[e]ver since man first picked up a stone to fling at an enemy, he has justified his thirst for revenge and for popular approval on the grounds of honor.”183 True, at a semantic level anyone can rationalize any act by claiming it was required by, or at least comported with some theory of honor. Indeed, generic honor often is associated with its most notorious manifestations, specific honor principles now widely and properly held in disrepute.184 Honor has become synonymous with conservative elitism, encouraging combative and selfish behavior for the aggrandizement of a select, undeserving few.185 One resulting sentiment is, “The ethos of honor is fundamentally opposed to a universal and formal morality … the dictates of honour, directly applied to the individual case and varying according to the situation, are in no way capable of being

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182 This portion of the article relies on several recent, exciting analyses of honor’s meaning and function. It is appropriate to study the Founders’ perceptions in light of modern honor theory because current understanding does not distort but rather, explicates exactly their attitudes.


184 A particularly prevalent example is antebellum Southern “honor” purporting to justify slavery, racism and sexism as natural, genteel and noble. E.g., generally, Wyatt-Brown, supra note 183; Richard E. Nisbett & Dov Cohen, Culture of Honor: The Psychology of Violence in the South (1996); Frank Henderson Stewart, Honor 79 (1994)(noting that Southern honor codes were not so much codified as enforced informally by culture and tradition).

185 Douglas Adair, Fame and the Founding Fathers, in Fame and the Founding Fathers 10 (1974); see also, e.g., Sharon R. Krause, Liberalism with Honor xi (2002)(“The language of honor smacks of privilege and exclusion, fixed social roles and frivolous duels.”); Bowman, supra note 143, at 28, 39.
made universal.” Sympathetic to the assertion that, “We have come to think of honor as a largely obsolete virtue,” some social theorists employ terms such as “respect,” “dignity,” “prestige,” and “credibility,” – anything to avoid using the word honor when describing precisely what honor signifies.

Although tarnished by admittedly extensive misuse, it seems peculiar and imprudent to discard such an evocative and useful descriptor, one that nobly inspired the Declaration of Independence. Surely the Continental Congress would not have closed the Declaration by pledging America’s “sacred Honor” if honor itself is unworthy and disreputable. Indeed, exploitation is a hazard to which any valuable idea or wide-ranging concept is vulnerable, particularly those that define Americanism such as rights, liberty, freedom, justice, fairness and, yes, honor. One might just as well say morality is passé because so many persons and groups have invoked specious moral defenses for their plainly immoral acts. Indeed, as centuries of philosophy and history remind us, “‘Honor and dishonor are the matters with which the high-minded man is especially concerned,’ ...” Accordingly, pivotal honor concepts such as honesty, integrity, decency, and “fair play” continue to inform modern political and legal morality. Indeed, those who would expunge the term “honor” as too closely associated with religious fanaticism, racism and sexism, self-aggrandizement and self-indulgence (often demanding drastic penalties for trivial,

187 Paul Horwitz, Honor’s Constitutional Moment: the Oath and Presidential Transitions, 103 NW. U. L. REV. COLLOQUIY 259, 260 (2008); see also, e.g., Krause, supra note 185, at 1; Hunt, supra note 183, at 83.
188 E.g., Bowman, supra note 143, at 28; Kamir, supra note 186, at 202-03.
189 See infra notes 239-67 and accompanying text.
190 E.g., Krause, supra note 185, at 104 (noting, The Founders’ invocation of “sacred honor,” “in defense of American independence ... reveals that honor need not be ‘inevitably conservative,’ ‘reactionary,’ or linked to the status quo, as often is thought.”)
191 Adair, supra note 185, at 12 n. 8 (quoting Aristotle, Ethics iv (c. 340 B.C.), and Cicero, De Officiis, Book II, 30).
192 E.g., Bowman, supra note 143, at 102 (discussing the modern laws and conventions of warfare).
personal affronts), habitually invoke honor-like attributes to explain why some act, particularly some communal behavior, is rightful or wrongful.\textsuperscript{193}

As the Founders realized, we need the idea of “honor” which encompasses the blend of noble impulses and moral precepts about which other terms-of-art fail to suffice. If we did not have the watchword “honor,” we would need to invent a new term as no other existing noun quite fits.

\textit{How Honor Works –}

A brief description explaining the \textit{mechanics} of honor provides a useful framework into which we may thereafter understand honor itself and the inextricable connection among honor, legitimate revolution and the basic precepts of Americanism. At one level, honor is a social process – a social dynamic.\textsuperscript{194} Therefore, its prominence in the realm of psychological, sociological and historical theory is appropriate because properly understood, honor “control[s] and animate[s] virtually every aspect of [the adherent’s] public life and his private concerns.”\textsuperscript{195} In fact, honor is the “centerpiece of societies that evaluate their members and rank them according to adherence to

\begin{footnotesize}
\begin{enumerate}
\item They will appeal to “national honor” or the “honorable” acts of keeping promises, respecting individual rights and safeguarding personal liberty. “A nation, the United States in particular, also possessed honor and its actions needed to be shaped so as to protect and enhance that honor. … It was, after all, for the United States that the founders pledged ‘our Lives, our Fortunes and our sacred Honor.’” Detlev F. Vagts, \textit{The United States and its Treaties: Observance and Breach}, 95 Am. J. INT’L L. 313, 325 (2001)(citing Anne-Marie [Slaughter] Burley, \textit{The Alien Tort Statute and the Judiciary Act of 1789: a Badge of Honor}, 83 Am. J. INT’L L. 461 (1989)).
\item E.g., Kamir, \textit{supra} note 186, at 196-98; CAROLINE COX, \textit{A PROPER SENSE OF HONOR: SERVICE AND SACRIFICE IN GEORGE WASHINGTON’S ARMY} 38 (2004) (honor as an inducement to serve the cause of the American Revolution).
\item Hunt, \textit{supra} note 183, at 91; \textit{see also}, e.g., \textit{id.} at 85-86 (every group has some sort of honor system, even if not codified, nor well articulated, nor detailed); STEWART, \textit{supra} note 184, at 55, 124.
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rigid conduct codes, ...”196 Understanding the relevant conception of honor then is essential to understanding a particular person, group or society.197

Not surprisingly, honor theorists accept the classically liberal concept of the person198 as “having the ability and unremitting drive to reflect upon one's own existence and place in the world.”199 Consistent with the liberal thesis of socialization, within the relevant society, individuals of varying degrees of susceptibility encounter one or more “honor cultures” each hoping to indoctrinate those individuals into loyal allegiance to the “honor group.”200 Significantly, the given honor culture desires devotees loyal not only to the honor group as a community but, more specifically, to the discrete elucidation of its “honor code,” selected moral norms denoting that culture from all others201 by setting specific standards of conduct.202 In other words, the honor culture seeks to instill in each adherent a “sense of honor,” which unites the foregoing “two closely related elements: an understanding of what constitutes honorable behavior, and an attachment to

196 Kamir, supra note 186, at 196. Along these lines, Prof. Hunt daringly asserted that honor “is not a social extravaganse or personal indulgence, but rather can be accurately characterized as a fundamental human need and therefore a basic human right.” Hunt, supra note 183, at 86.
197 E.g., Bowman, supra note 143, at 21. Prof. Bowman noted, for instance, that contemporary America’s view of radical Muslim jihadists in terms of psychology, poverty, evil inclinations or post-colonialism, renders incomplete any understanding until and unless we comprehend their culture’s honor principles. Id. at 22, 297-303. “[I]f you look very closely into what the jihadists, or various radical groups who support them, have to say about what they do, you will rarely see any reference to poverty. Even religion as such seems of less interest to them as the idea of Arab or Islamic ‘honor’ and ‘manhood,’ with which honor is always intimately related.” Id. at 22.
198 Crocker, supra note 84, at 269.
199 Williams, supra note 84, at 57 n. 7 (citing Roberto Unger, KNOWLEDGE AND POLITICS 200 (Free Press 1984) (1975)); see also, e.g., supra notes 65-66 and accompanying text.
200 The “honor group” is the amalgam of persons within an honor culture “who follow the same code of honor and who recognize each other as doing so.” Stewart, supra note 184, at 54.
201 E.g., Kamir, supra note 186, at 198 (the particular honor code may be broad and general while “demanding mastery of the most nuanced norms and expectations.” (footnote omitted)); Krause, supra note 185, at 2-3; Hunt, supra note 183, at 84; Stewart, supra note 184, at 24.
202 Krause, supra note 185, at 4, 28.
such behavior.”203 In this way, “Honor cultures develop specific cultural norms ... [to the degree that] ‘the entire moral order is subsumed under the larger goal of honor.’”204

Not surprisingly, understanding honor and honor cultures requires appreciating the systemic interplay205 of the culture with its constituents.206 Honor groups enforce the honor culture’s honor code through a host of formal and informal rewards and punishments including, regarding the former, prestige, respect, acclaim, influence, power and wealth, and for the latter, shame, shunning, derision, loss of influence, loss of power and ostracism.207 Honor, approval of the honor group and, often, admiration of observers outside the honor group motivate each individual within the given honor group.208

Moreover, because honor cultures exist to indoctrinate obedience through instilling specific morality, the interesting study becomes not only the members of that culture, but how the culture itself affects and is affected by the greater society’s other honor cultures.209

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203 STEWART, supra note 184, at 47.
204 Hunt, supra note 183, at 93 (quoting WILLIAM IAN MILLER, MYSTERY OF COURAGE 179 (2000)).
205 A “system” that promotes interplay or interaction is always ongoing and active, never static or inert. A system is a dynamic, continuous process of actions and reflection based on inputs, reactions and feedback to assess the inputs and reactions which, in turn, inspire successive sets of inputs, reactions and feedback. Under systems theory, unlike pure structural analysis, things and events move in time. E.g., FREDERICK L. BATES, SOCIOPOLITICAL ECOLOGY – HUMAN SYSTEMS AND ECOLOGICAL FIELDS 80 (1997); Bayer, supra note 45, at 1063.
206 KAMIR, supra note 186, at 198.
207 STEWART, supra note 184, at 54, 111; Hunt, supra note 183, at 88-89.
208 E.g., KRAUSE, supra note 185, at xi (“[H]onor rests on the sense of duty to oneself”); also, id. at 106. As Frederick the Great caustically observed, “The one thing that can make men march into the muzzles of the cannon which are trained on them is honor.” BOWMAN, supra note 143, at 37. Indeed, “A man’s sense of honor was something that patriot and military leaders exploited to enjoin all men to serve the cause of the American Revolution.” COX, supra note 194, at 38. However, Prof. David Hackett Fischer aptly cautioned along with honor, soldiers of the Revolution were moved by shared a deep belief in general principles of liberty, fighting for their property and families and an abiding sense of moral rightness. David Hackett Fischer, WASHINGTON’S CROSSING 364, 368 (2004).
209 Indeed, most persons belong to various interrelated and disparate honor groups. Frequently, the loyalties and demands of one honor group conflicts with another, or conflict with “absolute principles.” The individual may have to choose which group will predominate, at least in a given situation. BOWMAN, supra note 143, at 4. As a consequence, “The dictates of honor can so exhaust the social landscape that they have the power to go beyond mere elements of a culture, and instead dominate and constitute the essential building blocks of an
Now familiar with the mechanics of honor, we may proceed first to defining that concept and then to exploring how honor influenced the Founders.

Honor: Morality’s Elegant Vessel –

Like morality, a clear and universally accepted definition of honor eludes.\textsuperscript{210} Some view it as an amalgam of roughly related personal characteristics and social interactions.\textsuperscript{211} To try and tame the definition, honor could be described, and usually is understood at least in part as the quest for both self-respect\textsuperscript{212} and the respect of others.\textsuperscript{213} Acting dishonorably, then, amounts to failing both oneself and others.\textsuperscript{214} Certainly, honor provides an instrumental, utilitarian inducement to certain behavior which may spawn unselfish integrity or enhance already existing selflessness.\textsuperscript{215} But, at its worst, persons and groups employ the trappings of honor cynically to inculcate obedience and allegiance, mystifying the susceptible into submission based on honor’s form rather than honor’s meaning.\textsuperscript{216} Prof. Wendel undoubtedly is correct that in a rudimentary, unsophisticated entire culture. When this happens, the analysis shifts from a consideration of the behavior of individuals within a culture who seek simply honor, to what are generally described as entirely ‘honor-based cultures.’” Hunt, supra note 183, at 93 (quoting WILLIAM IAN MILLER, MYSTERY OF COURAGE 168, 179 (2000)).

\textsuperscript{210} “It may seem even that the search for a theory of honor is misguided – that word covers a wide variety of concepts, none of which fit together in a clear way.” STEWART, supra note 184 at 21.

\textsuperscript{211} Kamir, supra note 186, at 200.

\textsuperscript{212} See, e.g., Adair, supra note 185. The Noblest Minds, (Peter McNamara ed. Rowman & Littlefield Pubs., Inc. 1999); Kamir, supra note 186, at 197 (discussing Julian Pitt-Rivers, HONOR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY 21-22 (J. G. Peristiany ed., 1966). \textsuperscript{213} “At its simplest, honor is the good opinion of the people who matter us, and who matter because we regard them as a society of equals who have the power to judge our behavior.” BOWMAN, supra note 143, at 4; see also, e.g., Pangle II, supra note 124, at 211; Hunt, supra note 183, at 84-85, 90 (noting, \textit{inter alia}, that soldiers often fight “not for some great cause, but for the sake of their reputations in the eyes of their comrades and families.”); Horwitz, supra note 187, at 263.

\textsuperscript{214} See, e.g., KRAUSE, supra note 185, at 4; STEWART, supra note 184, at 54, 111.

\textsuperscript{215} See, e.g., infra notes 245-52 and accompanying text.

\textsuperscript{216} For instance, the noted philosopher Arthur Schopenhaur believed that honor, “is nothing but a crude instrument of social control …” BOWMAN, supra note 143, at 88 (quoting Arthur Schopenhauer, The Wisdom of Life, in ESSAYS FROM THE PARERGA AND PARALIPOMENA 63 (T. Baley Saunders trans., 1951)).
sense, “[T]here is nothing intrinsic in the concept of honor that makes it likely that it will be connected with virtue or justice.”

Utilitarian reality notwithstanding, honor can and should be appreciated as something more and better than either mere reputation or a device predominately intended for the disdainful manipulation of other persons. Rather, “to pledge one’s sacred honor is to affirm, in a most emphatic way, allegiance to one's publicly proclaimed moral principles.” Therefore, at its best, honor is deontological, the framework encompassing correct moral commands that must be obeyed whatever the costs. Specifically, honor is the conceptual vessel containing those ethical principles and personal characteristics a particular person or group considers of the utmost consequence. Although some included principles may be important but not essential, the honor vessel invariably contains those values believed to be indispensible to life properly lived.

Because it comprises the morality that the respective person or group likely deems worth dying for, honor is not simply a motivating contrivance. Rather, more intrinsically and consistent with its deontological aspects, honor is an end in itself. As one noted author expressed honor’s intrinsic anti-Consequentialism, “The sense of honor is in certain respects categorical, rather than merely instrumental. There are some things the honorable person simply will not do – or must do –

217 W. Bradley Wendel, Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?, 71 FORDHAM L. REV. 1567, 1585 (2003).
219 See, e.g., STEWART, supra note 184, at 50-51; KRAUSE, supra note 185, at 7; Hunt, supra note 183, at 92-94 (describing the honor culture of the ante-bellum South).
221 See, e.g., KRAUSE, supra note 185, at 82; Pangle II, supra note 124, at 210 (arguably, honor is “above all for itself, [] exhibiting and enacting the fulfillment, the sublime beauty, of the souls of the men of honor, who as such stand out as the most important part of the common good, as the truest or greatest goal of a well-ordered human society”).
as a matter of principle whatever the consequences may be.”222 Therefore, in harmony with the very deontology it embraces, honor mandates the willingness to sacrifice both oneself and, when necessary, others.

Prof. Stewart recognized the sensible linking of honor and Deontology by explaining why honor is not simply integrity, that is, “to thine own self be true,” even when one abides by personal beliefs for seemingly unselfish reasons.223 To use an obvious example, if honor is no more than integrity, a Nazi who fights to support his Fatherland would be honorable, as would a Nazi who genuinely believes in Hitler. Both instances evince honor as integrity. But, “[T]he integrity position … has little social significance. In substance, the integrity position reduces honor to a virtue, and there is no obvious reason why one would wish to pick out this particular virtue from among various others.”224 Absent Deontology, each actor may form her own idiosyncratic rules and is only to be judged according to her integrity, that is, the actor’s strict adherence to her chosen rules. In that case, only the actor is able to judge the merits of her own honor.225

*The Declaration of Independence Embraces Deontological Morality as the Essential Duty of Legitimate Government* --

The significance of the Declaration of Independence regarding history, theory of government and political morality are so well known that citation seems almost superfluous.226 For

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222 KRAUSE, supra note 185, at 29. “While one always has a certain interest in acting honorably, insofar as doing so brings about the desired ends of self-respect and public recognition, ... [h]onor is categorical in the sense that it imposes obligations that are not subject to the contingencies of a utilitarian calculus.” Id. at 82.

223 STEWART, supra note 184, at 50-51.

224 Id. at 51.

225 Id. Hence the famous claim purportedly from Bismark, “I can do without anyone’s respect – except my own.” Id. at 52 n. 69.

226 See, e.g., PAULINE MAIER, AMERICAN SCRIPTURE – MAKING THE DECLARATION OF INDEPENDENCE 189-208 (1997) (discussing the reinterpretation of the document during the early to mid-1800s from blueprint for legitimate revolution to a basic description of fundamental human rights). Therefore, Prof. Larson rightly bemoaned the fact that, “For most legal academics, the Declaration is little more than a political puff piece, or
example, although perhaps not regarded as an epitome of either eloquence or profundity, Dwight D. Eisenhower expressed movingly and appropriately the Declaration’s enormity:

Fellow Americans, we venerate more widely than any other document, except only the Bible, the American Declaration of Independence. That declaration was more than a call to national action. *It is a voice of conscience* establishing clear, enduring values applicable to the lives of all [persons.] *It stands enshrined today as a charter of human liberty and dignity.*

The foregoing describes the Declaration not only in the familiar term “liberty,” but of equal importance and greater insight, as “a voice of conscience” that designed a “charter of human liberty and dignity.” President Eisenhower thereby fittingly linked the American Revolution to safeguarding innate human worth, a principle that, as we will see, perseveres as the defining concept of this Nation’s greatest legal paradigm, due process of law.

Moreover, Eisenhower’s rather spiritual perception, urging that the Declaration “stands enshrined” in American hearts second only to the Bible, is perfectly fitting because the Founders understood that document’s indispensable principles to be enduring, immutable and emanating from more than human making. Evoking a birthright derived not from humankind but from eternity, and certainly among the most famous enunciations of the inherent human condition, the Founders asserted as “self-evident that all [persons] are created equal, that they are endowed by their Creator

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227 Dwight D. Eisenhower, Report by the President to the American People on his European trip (September 10, 1959), in WILLIAM J. FEDERER, TREASURY OF PRESIDENTIAL QUOTATIONS 322 (2004)(emphasis added).

228 See infra notes 461-65 and accompanying text.

229 “[T]he fundamental premise of the American Revolution [was] that there are, in fact, things in the temporal or political realm worth dying for, that political life as such is not altogether inferior to the spiritual life.” Zentner, supra note 220, at 35. In that regard, evoking a nonsectarian spiritualism from the Declaration comports nicely with deontological morality’s similar transcendence. See supra notes 122-27 and accompanying text.
with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

In ringing, celebrated prose, the Founders identified the legitimate function of public authority:

“That to secure these rights, Governments are instituted … deriving their just powers from the consent of the governed.” Accordingly, the people enjoy an inherent prerogative to revolt for “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, …”

All this the Founders summarized in the Declaration’s renowned introduction proclaiming that given “the Course of human events,” the Colonies, as a matter of abiding, eternal right, were free to “dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them …” In that regard, the Founders legitimized the declaring of independence because England’s unremitting maltreatment of the Colonies repudiated that empire’s claim to be a legitimate sovereign.

Although the initial goal of the Continental Congress might have been to expound a formal argument for America’s legitimate revolution, the earlier quoted commentary of President Eisenhower evinces an apt larger meaning. The rights that the Founders identified as emanating from “the Laws of Nature and of Nature’s God” are so rudimentary and essential that the moral

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230 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Regarding punctuation that is unfamiliar to modern English, Carl Becker proposed that Thomas Jefferson’s use of capitalization and italicization in the Declaration was designed to emphasize words he considered to be the most important. CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 221-22 (Knopf 1951)(1922).

231 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see, e.g., Epstein, supra note 180, at 79 (The Framers of the Constitution as well as the Declaration’s drafters believed any government failing properly to promote life, liberty and pursuit of happiness should be abolished).

232 Later in the text, Founders delineated the particular “Course of human events” as unremitting, significant and destructive abuses under the rule of Great Britain.

233 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)(emphasis added). As the Founders correspondingly accented later therein, when shackled by, “absolute Despotism, it is their right, it is their duty, to throw off such Government, …” Id.

authority, thus the legitimacy, of any government depends entirely on that government’s devotion
to those indispensable but still, nearly two-and-a-half centuries later, incompletely comprehended
rights.235 As such, the Founders necessarily relied on deontological principles greater than the
exigency of the American Revolution.236

One of the most expressive and stirring explanations of the Declaration’s deontological
premises came, not surprisingly, from Abraham Lincoln whose reverence for that document is well
documented.237 During his celebrated August 21, 1858, debate with Stephen Douglas in Ottowa,
Illinois, referencing an 1854 speech he had made in Peoria, Lincoln explained his opposition to
repealing the Missouri Compromise which would allow slavery into Kansas and Nebraska.
Therein, the future President presented the necessary connection between transcendent morality,
American society and the Declaration: “This … covert real zeal for the spread of slavery, I cannot
but hate … especially because it forces … an open war with the very fundamental principles of civil

235 The Founders’ strict standards for legitimacy sprang in part from their legendary mistrust of the very
government they knew was necessary. Paul A. Rahe, Fame, Founders, and the Idea of Founding in the
is produced by our wants and government by our wickedness; the former promotes our happiness positively by
uniting our affections, the latter negatively by restraining our vices ... Society in every state is a blessing, but
government, even in its best state, is but a necessary evil.” Id. at 29 (quoting Thomas Paine, Common Sense
(January 1776), 1 THE WRITINGS OF THOMAS PAINE 4).
236 Jefferson, for example, urged “that between society and society, or generation and generation there is no
municipal obligation, no umpire but the law of nature.” Letter from Thomas Jefferson to James Madison
(Sept. 6, 1789), in FROM REVOLUTION TO RECONSTRUCTION AND WHAT HAPPENED AFTERWARDS, supra note
47. See also, 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES
MADISON 1776-1826, 631-36 (James M. Smith ed., 1995); e.g., John D. Bessler, Revisiting Beccaria’s Vision:
The Enlightenment, America’s Death Penalty, and the Abolition Movement, 4 N.W. J. L. & SOC. POL’Y. 1, 194
(2009)(discussing Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)). James Wilson similarly
believed in the application of eternal principles: “we may infer, that the law of nature, though immutable in its
principles, will be progressive in its operations and effects.” ld. at 194 n. 907 (quoting 1 COLLECTED WORKS
OF JAMES WILSON ch. III (“Of the Law of Nature”)(Kermit L. Hall & Mark David Hall eds., 2007)).

Accordingly, scholarship confirms that the Founders’ phrase “the Laws of Nature and of Nature’s
God” refers to the Liberal concept of rights emanating from human beings’ natural state. See, e.g., ACLU of
Ky. v. McCreary County, Ky., 354 F.3d 453 & n. 7 (6th Cir. 2006)(citations omitted); also, e.g., Newdow v.
Rio Linda Sch. Dist., 597 F.3d 1007, 1030 & n. 23 (9th Cir. 2010)(Declaration embraces natural law theory).
237 See, e.g., MAIER, supra note 226, at 205-06.
liberty, criticizing the Declaration of Independence, and insisting that there is no right principle of action but self-interest.”

Lincoln’s splendid sentiments require little explication, particularly considering the proof in Part II of this article that Deontology, not Consequentialism, is correct. Lincoln properly united the Declaration with both “the very fundamental principles of civil liberty” and the fallacy of the utilitarian assertion “that there is no right principle of action but self-interest.” In this way, Lincoln explained with apt fervor the duty – the sacrifice – attendant to the eternal morality that underlies the Declaration, thereby premising this Nation. It is a duty that, as next we will learn, the Founders enunciated through the “pledge” of American “Lives, Property and sacred Honor.”

To Secure Government’s Intrinsic Duty to Protect Transcendent “Life, Liberty and the Pursuit of Happiness,” the Declaration Pledges Every American’s “Sacred Honor” --

With so much at stake, it is hardly surprising that in concluding words as authoritative as any within that document, to achieve and to uphold virtuous independence the Founders promised humankind’s most precious possessions as their collateral: “for the support of this Declaration, … we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.” While a narrower reading of the literal words is possible, the better interpretation is that the Founders meant the Declaration’s concluding line to apply generally, not simply to them. That is, the Declaration is more than a mutual pledge exclusively among the members of the Continental Congress or even among the “people of the individual states as political entities. … [Rather, “we mutually pledge”

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239 THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776).
comprises] the American people acting as a whole.”

Similarly, conservative social critic William Bennett aptly observed, “few Americans pay enough attention to the last line of the Declaration of Independence. … These are not empty words; they are as important as the opening paragraphs of the Declaration. Rights are important. But just as we have a fair claim on our rights, so America’s honor – our sacred honor – has a fair claim on us.”

Thus, in response to illicit government and consistent with the responsibility of timeless morality, all are obliged, if so required, to sacrifice, specifically, to secure liberty with their lives, property and honor.

There is, however, a crucial contrast between “sacred Honor” on the one hand and “Lives” and “Fortunes” on the other. Regarding those three possessions of surely inestimable worth, two are transitory – lives and fortunes – while only “sacred Honor,” imbued with deontological morality, endures beyond time and space. Indeed, although indisputably valued, the Founders did not express as sacrosanct life and property; but, they designated honor to be “sacred.” That disjuncture leads to the interesting fact that the preservation of Liberty demands the populace’s willingness to sacrifice earthly treasures – life and property – while the enduring treasure honor effectively safeguards Liberty only if it is not sacrificed. One must be and remain honorable by devotion to the honor culture of legitimate government through preserving those honor codes that vouchsafe such government. Therefore, because honor is deontological, upholding the moral

\[\text{240} \text{ Larson, supra note 226, at 728-29.}\]
\[\text{241} \text{ BENNETT, supra note 134, at 25 (emphasis added); see also, e.g., MAIER, supra note 226, at 189-208. As Historian Pauline Maier explained, even if not so intended by the Founders, the Declaration has become a pivotal American exemplar of the innate rights of persons qua persons. She quoted as emblematic the sentiments of Peleg Sprague expressed in Hallowell, Maine in 1826, the Declaration’s fiftieth anniversary. Sprage extolled that text as a, “Declaration, by a whole people, of what before existed, and will always exist, the native equality of the human race, as the true foundation of all politics, of all human institutions.”} \text{ Id. at 191 (footnote omitted). Such opinion, according to Prof. Maier, “contributed to a modern reading of the document that had begun to develop among Jeffersonian Republicans in the 1790s but became increasingly common after the 1820s, and gradually eclipsed altogether the document’s assertion of the right of revolution.”}\]
\[\text{Id.}\]
\[\text{242} \text{ See, e.g., Hunt, supra note 183, at 90 (“In this construction, the Founders made it clear that an honor culture’s honor was more important than either his life or his fortune.”).}\]
requisites of “sacred Honor” may engender attendant sacrifices -- pain, loss, distress -- that affect oneself, others or both.243 Thus, for the Founders, sacrifice is integral to the letter and spirit of the Declaration, sacrifice measured as the loss of property, the loss of life and the price of honor.

It is no surprise, therefore, that modern analysts posit the pursuit of honor as a prime, if not the prime incentive for the founding of the United States, meaning The Declaration, the Revolution and the Constitution considered together. Indeed, the concept of honor has remained a dominant impetus throughout America’s history. “[H]onor has been a guardian of American democracy from its inception, … Perhaps honor’s most distinctive contribution has been to set in motion great acts of courage in defense of liberty at defining moments in American history.”244

Perhaps more than any other historian, Prof. Douglas Adair is credited with recognizing the huge influence of honor and the pursuit thereof over the Founders.245 Recognizing them as complex personalities, susceptible, as are we all, to various complementary and conflicting inducements, Prof. Adair explained that the Founders embraced honor substantially, but hardly entirely to pursue noble altruism. Rather, the Founders candidly admitted their quite human longing for “fame, honor, glory”246 and Posterity’s favor which, along with patriotism and a calling

243 Supra notes 218-23 and accompanying text.
244 Hunt, supra note 183, at 97; see also, e.g., Horwitz, supra note 187, at 263 (the president’s oath of office set forth in the Constitution in effect requires the office holder to pledge his personal honor to protect, as president, the nation’s honor); Burley, supra note 48, at 484-87.
245 Adair, supra note 185. Indeed, Adair’s argument “constituted a challenge to the reigning interpretation of the founding period, which stressed the role of economic forces. The economic interpretation of the founding is now widely regarded as inadequate.” THE NOBLEST MINDS, supra note 124, at vii-viii. See also, e.g., KRAUSE, supra note 185, at 101-103 (Adair tried to reconcile the conflicting theories of Charles Beard’s An Economic Interpretation of the Constitution, (The Free Press 1986)(1913)(economic motivations explain the Revolution) and responses to Beard that the Founders were motivated by grand ideas, inspired visions and self-sacrifice).
246 The Founders frankly acknowledged that, in the words of Gouverneur Morris, “the love of fame” is “the great spring to noble & illustrious action.” In The Federalist No. 72, Hamilton notably observed that the quest for fame is “the ruling passion of the noblest minds.” Rahe, supra note 235, at 5.
to serve the best interests of their community, “urged some of them to act with a nobleness and
greatness that their earlier careers had hardly hinted at.”247 Impelled by their passion for honor, the
Founders matured to respect public service inherently, not solely for its utilitarian recompense.

Moreover, the Founders relied on honor to motivate honest, conscientious, able individuals
to accept not very lucrative public service.248 Despairing that disinterested virtue and selflessness
could not sufficiently motivate public service, John Adams reluctantly joined Hamilton’s, Morris’
and Madison’s opinion that “pride and vanity of America’s leading [citizens] could be deployed in
defense of justice and good government.”249 Specifically, constitutional checks and balances,
designed to prevent usurpation, despotism and the collapse of nation into loose confederation of
states, would succeed by attracting persons of “pride and vanity” who sought power, prestige, and
self-aggrandizement.250 Yet, by virtue of the offices and the public trust they engender, selfish
motives would be if not replaced, at least calmed by honor.251 Thus, the Constitution and the
Declaration were not “miracles,” as sometimes claimed, nor dei ex machinae, but the extraordinary
creations of leaders spurred to greatness largely by the quest to be well and fondly remembered as

247 Adair, supra note 185, at 8. As Adair gracefully summarized regarding the drafting of the Constitution,

The greatest and most effective leaders of 1787 – no angels they, but passionately selfish and
self-interested men – were giants in part because the Revolution had led them to redefine
their notions of interest and had given them, through the concept of fame, a personal stake in
creating a national system dedicated to liberty, to justice, and to the general welfare. Id. at
24.

248 For instance, “Washington saw clearly that honor alone could not be counted on to make Americans serve
the republic against their interests, but he saw equally clearly that without it the cause was lost.” Id. at 210.
249 Rahe, supra note 235, at 5-6.
250 Id. Therefore, as Vice-President, John Adams campaigned unsuccessfully, “to have grand titles conferred
on the leading magistrates and legislators of the new republic. … Even when that campaign failed and he
found himself dubbed ‘His Rotundity’ and treated with mockery in circles which had once inspired affection,
consideration and respect, Adams persisted in making the case for pomp and circumstance.” Id.
251 As Madison explained, “because this office holder and his colleagues represented ‘the dignity of their
country in the eyes of other nations,’ they would ‘be particularly sensible to every prospect of public danger,
and of a dishonorable stagnation in public affairs.’” Id. (quoting THE FEDERALIST Nos. 57, 58, at 386, 395
(James Madison)(Jacob E. Cooke ed., 1961)).
the creators of a great society. And, the spur for fame helped them to cherish much more fully the intrinsic rewards of public service in particular and honor in general.252

*The Declaration Did Not Conclude, But Rather Began the New Nation’s Mission To Understand and To Attain “Sacred Honor” --*

As the Declaration’s plain text accents, honor, the morality honor denotes, and the legitimacy of government predicated on honor, were deeply rooted in the hearts of those who envisioned and created the United States.253 Indeed, as Prof. Krause stressed, “The connection between honor and natural rights in the founding generation marks an important departure from traditional forms of honor. *Democratic honor frequently (although not always) is tied to universal principles of right rather than to concrete codes of conduct applicable to only one group.*”254

It is here that we move to a most important realization emanating from the Declaration as an expression of the Founders’ shared concept of “sacred Honor,” broadly defined. The Founders knew that their noble motives were entwined with their “love of fame,” personal ambitions and vanity. They recognized as well that due to their frailty and imperfect wisdom their political-moral philosophy was neither complete nor correct in all regards. Consequently, as with understanding the Constitution, we must take the Founders’ expression of “sacred Honor” not to be the last word, but instead part of ongoing deliberation of that subject. Like the Constitution,255 we may appreciate

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254 Krause, *supra* note 185, at 107 (emphasis added, endnote omitted).

the Declaration not only in its own context, but as the wellspring of principles, understood profundly yet only partially by the Founders who hoped that subsequent generations would attain ever fuller understanding even if elucidation invalidated customs and beliefs that they either did not recognize as immoral or so recognized but nonetheless, for political, pragmatic or other purportedly appropriate reasons, refused to abandon.

Addressing the question “Whether one generation of men has the right to bind another … [which is] among the fundamental principles of every government,”256 Thomas Jefferson, the Declaration’s primary author, cited the deontology of morality, “but that between society and society, or generation and generation there is no municipal obligation, no umpire but the law of nature.”257 Similarly and of extraordinary significance, James Madison unequivocally emphasized in The Federalist No. 14, “the leaders of the revolution ... pursued a new and ... noble course. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, which it is incumbent on their successors to improve and perpetuate.”258 The “Father of the Bill of Rights” supported his assertion with a rhetorical question he had raised earlier in that essay:

… [is not] the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions

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256 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in FROM REVOLUTION TO RECONSTRUCTION AND WHAT HAPPENED AFTERWARDS, supra note 47; see also, 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, supra note 236, at 631-36.
257 Id. As one commentator concluded, Jefferson believed that “to lock … future generations to the eighteenth-century mores and ethics would be absurd.” Bessler, supra note 236, at 194 (discussing Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)).
of their own good sense, the knowledge of their own situation, and the lessons of their own experience?\textsuperscript{259}

Reiterating that sentiment shortly before the fiftieth anniversary of the Declaration, Madison wrote to Jefferson, “And I indulge a confidence that sufficient evidence will find its way to another generation, to ensure, after we are gone, whatever of justice may be withheld whilst we are here.”\textsuperscript{260} Madison certainly implored that future Americans find inspiration and guidance from, but not be enslaved by the words, acts and beliefs of the Founders.\textsuperscript{261}

James Wilson, another renowned signer, similarly linked the moral foundations expressed in the Declaration to future, better comprehension beyond that of the Founders themselves:

Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. ... In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.\textsuperscript{262}

The crucial tenet that the Founders themselves directed their successors to continue the quest for moral perfection has not been lost on subsequent American leaders. Abraham Lincoln, for instance, rejected as unsound the argument that we can only understand and advance the general principles of the Founders by accepting without question their every precept, nuance and discrete belief. As noted scholars have urged, Lincoln offered that the Founders were not ready actually to accord the universal principle of equality they venerated in the document. Therefore, “The

\textsuperscript{259} Id.
\textsuperscript{260} Bessler, \textit{supra} note 236, at 194, n. 906 (quoting Letter from James Madison to Thomas Jefferson (Feb. 24, 1826)).
\textsuperscript{261} See, e.g., Sanford Levinson, \textit{Our Schizoid Approach To the U.S. Constitution: Competing Narratives of Constitutional Dynamism and Stasis}, 84 IND. L. J. 1337, 1355 (2009). Prof. Levinson argued that Madison’s “eloquent” words reflect the “central question” confronting both the Founders and arguably successive generations of Americans, “Are we capable of exercising our own reflection and to make our own well-reasoned choices about how we wish to govern ourselves, or are we, on the contrary trapped within a static constitutional structure ...?” \textit{Id.}
\textsuperscript{262} Bessler, \textit{supra} note 236, at 194, n. 907 (quoting 1 COLLECTED WORKS OF JAMES WILSON ch. III (“Of the Law of Nature”)(Kermit L. Hall & Mark David Hall eds., 2007)).
Declaration was intrinsically reformist insofar as it would push the nation forward and upward by promising universal liberty and equality for all, thereby inviting the reforms required to fulfill its promise.\textsuperscript{263}

Not a decade ago, discussing the Constitution’s due process clauses, the Supreme Court expressed the principle in persuasive words fully applicable to the authors of the Declaration:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.\textsuperscript{264}

Conservative analyst William Bennett expressed concisely and unromantically why the creators of the Revolution cannot have the last word, “The Founders certainly were no angels – often they did not live by their own advice.”\textsuperscript{265}

\textsuperscript{263} KRAUSE, supra note 185, at 138-39 (citing Harry V. Jaffa, Crisis of the House Divided 315-21 (Doubleday, 1959)). See also, e.g., MAIER, supra note 226, at 205-06 (Lincoln “saw the Declaration of Independence’s statements on equality and rights as setting a standard for the future, one that demanded the gradual extinction of conflicting practices [particularly slavery] as that became possible, …” Id. at 205).

\textsuperscript{264} Lawrence v. Texas, 539 U.S. 558, 578-79 (2003). See generally, United States v. Comstock, 130 S. Ct. 1949, 1965 (2010)(“The Federal Government undertakes activities today that would have been unimaginable to the Framers … Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.”; quoting New York v. United States, 505 U.S. 144, 157 (1992)); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847-49 (1992)(the meaning of “liberty” is not limited to perceptions of the framers of the Fourteenth Amendment nor to the enumeration of specific protections under the Bill of Rights); Tashjian v. Republican Party of Conn., 479 U.S. 208, 226 (1986); United States v. Classic, 313 U.S. 299, 316 (1941)(Stone, C.J.)(“[I]n setting up an enduring framework of government [the Framers] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.”).

Speaking for the Court seventy years before \textit{Lawrence}, Chief Justice Hughes expressed the concept as virtually self-evident: “It is no answer . . . to insist that what the provision of the Constitution meant to the vision of [the Framers'] day it must mean to the vision of our time … that what the Constitution meant at the time of its adoption it means to-day, … its own refutation.” Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934)(Hughes, C.J.)

\textsuperscript{265} BENNETT, supra note 134, at 18.
Accordingly, in faith with the Declaration, we must understand even better than did the Founders the contours of transcendent morality -- “the Laws of Nature and of Nature’s God,” if you will – that keeps in check legitimate government. Surely, as would any good parents, the Founders expected from us sufficient fortitude -- “sacred Honor” – to discover the depths of morality they did not know, to vouchsafe through government the moral duties they could not or would not endure and to accept the sacrifices our greater appreciation of morality requires.

While it is doubtful that the Founders would have accepted that the “Constitution is a suicide pact,”266 their basic expression of “unalienable Rights” incited and continues to elucidate our increasing understanding of honor’s bequest, particularly due process of law.267 Consistent with our duty to learn more about the profundity and meaning of their principles than did the Founders themselves, we turn to arguably the greatest expression of morality’s value monism, Kantian honor.

-- Part IV --

The Kantian Overview --

I turn to the profound ideas inspired by the writings of Immanuel Kant to elucidate the value monism evoked by the Founders. I agree with the many theorists arguing that Kant’s moral philosophy best captures the spirit if not the letter of pledging one’s honor to foster the fundamental task of good government, securing “Life, Liberty and the pursuit of Happiness.”

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266 See, e.g., infra notes 422-25 and accompanying text.
267 See infra notes 466-86 and accompanying text.
Few philosophers have provoked the imagination and engendered the respect of modern legal theorists as has Immanuel Kant. Perhaps more than any other post-Hellenistic thinker before him, Kant provided a workable articulation of the abstract moral base below which human behavior and the laws regulating behavior cannot go. In particular, Kant’s ideas premise much contemporary Deontology, especially for theorists who espouse the inevitable intersection of law and morality to defend the robust assertion of justice as “fairness.” Accordingly, my argument is that Kantian Ethics – appropriately also known as Kantian Honor -- best expresses the flowering of the elementary precepts the Founders urged in the Declaration as “sacred Honor.” Because “sacred Honor” is elaborated, explicated and enforced via the Constitution’s due process clauses, due process should be understood as the American idiom of Kantian Honor.

Any writer must approach Kantian analysis with great caution and modesty. Commentators often disagree about particular meanings of Kantian theory or whether he had a fully coherent theory at all. Of course, such debates do not limit commentators’ prerogative to find inspiration from ambiguous or incomplete philosophies. Consequently, even if one can “make[] no claim to have arrived at the understanding that Kant intended ... [a justifiable] goal is to construct a useful understanding of Kant's formula .... rather than

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268 “Kant's project was to render morality undogmatic to ground it in the fact of reason.” Carlson, supra note 39, at 33.
269 If Kant is right, “the condition for the existence of a legal system is morality as such.” Thus Positivism is wrong to conclude that there is no inevitable connection between law and morals. Id.
270 See, e.g., Murphy Book, supra note 30, at 106 (to speak of “rights” requires a context of “justice or fairness,” which, in turn, “can be operative only in a context of institutionalized procedures guaranteeing due process ...” (citing, Immanuel Kant, Concerning the Common Saying: This May Be True in Theory but does not Apply in Practice, in THE PHILOSOPHY OF KANT 289 (Carl J. Friedrich trans., 1949)(1793)); see also John Rawls, Justice as Fairness, 67 PHIL. REV. 164 (1958).
271 See infra notes 306-86 and accompanying text.
272 See infra notes 461-86 and accompanying text.
273 E.g., WOOD, supra note 25, at 206.
one that would have met with Kant's approval."

Nonetheless, there appears sufficient agreement that Kant’s philosophy, especially his moral theory, provides a profound grounding to assess individual and societal behavior in general and legal principles in particular. Intellects such as the properly celebrated John Rawls have restored Kant’s proper place at the heart of the debate on both theoretical and functional morality, especially the morals of law.

A final preliminary merits brief mention: the emphatic distinction between “Kantian ethics” and “Kant’s ethics,” with most commentators accepting the former and rebuking the latter (in a manner similar to embracing the paradigms of the Founders but not necessarily their actual applications of their own moral theory). Kant’s ethics are that philosopher’s specific moral applications and discrete moral conclusions. “Kantian ethics, on the other hand, is an ethical theory formulated in the basic spirit of Kant, ...”

A proponent of Kantian ethics enthusiastically adapts Kant’s broad principles to form what she believes is either a more accurate, pertinent meta-theory or a better application of such to discrete circumstances. By contrast, most modern critics find Kant’s ethics steeped in untoward prejudices and senseless fanaticism.

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274 Wright, supra note 32, at 274.

275 Until the mid-Twentieth Century, the idea that ethics could be subject to rational discourse was in some disrepute, with critics arguing morality was, at best, a set of abstract principles not readily applicable to discrete social and personal dilemmas. Many of those who still pursued a reasoned analysis of morality, “took it for granted that utilitarianism was the only possible basis for rational discussion, ...” This changed with Rawls and his commentators who, “showed not only that ethical theory could be treated with analytical sophistication and applied to issue of vital social concern, but also that Kantian ideas were indispensable to doing this in the right way.” Id. at x (emphasis added); see also, e.g., Powers, supra note 29, at 1575-88 (discussing Rawls’ adaptation of Kantian morality).

276 Wood, supra note 25, at 1 (emphasis supplied).

277 Some scholars maintain that modern “fashionable assumptions” misconceive much of Kant’s ethics. See, e.g., id.at 2. Still, the prevailing sentiment castigates Kant for believing, to cite three examples, (1) that one must keep a trivial promise, such as guaranteeing to be somewhere by noon, even when breaking that promise might save a life, (2) that one may never take an innocent life regardless of the consequences and (3) that lying is immoral under any circumstance even if speaking truthfully reveals to a potential murderer the location of
scorns, “the stiff, inhuman, moralistic Prussian ogre everyone knows by the name Immanuel Kant.”

Yet, Kant espoused profound respect for the individual, particularly that each of us may be self-motivating, self-reflecting, cognizant of moral duties and willing to accept responsibility for our actions. Correspondingly, Kant’s argument that morality is more precious than life evinces faith in the nobility of humankind that many arguably non-bigoted consequentialists lack.

Kant’s Dignity Principle –

The renowned Kantian philosophy of moral honor might be encapsulated within the proposition that, “Because the worth of every human being is absolute, the worth of all persons is fundamentally equal.” This parity of worth stems from the unique rational capacity inherent in each human being. Accepting the Liberal premise that persons are educable in reason, Kant argued that the compelling attribute of humankind is the “… rational capacities [of individuals], including their ability to make rational choices regarding her intended victim. E.g., Kuklin, supra note 30, at 449; Waldron, supra note 15, at 1536. Of course, one could imagine and defend a moral system that absolutely forbade breaking promises, telling lies and killing the innocent. Conceivably if everyone actually abided by such principles, the world would be better, even happier, as war would be unpalatable, homicide would be unknown, and honesty in interpersonal relations would prevail over rationalizations, obsequiousness and duplicity.

Regarding prejudice, Kant considered non-Caucasians intellectually limited, which he attributed in large measure to those races having developed in unsuitable climates and environments. In later writings, Kant appeared to have modified but not fully repudiated his racial theories which may have had a substantial influence on racist models of the 18th and 19th Centuries. Wood, supra note 25, at 8-10. Similarly, Kant thought women inferior to men both intellectually and physically. Id. at 7.

Wood, supra note 25, at xii.

278 Id. at 3. Indeed, Kant argued that respecting others may require not simply refraining from acting immorally, but also taking affirmative steps to render assistance. E.g., Hitl., supra note 52, at 277; Wright, supra note 32, at 36. Going further, Prof. Wood explained that according to Kantian philosophy, we all have a duty of “sympathetic participation,” that is to develop an understanding and appreciation of that which may foster the happiness of others. Wood, supra note 25, at 177. Thus, contrary to some cursory critiques, Kantian ethics requires persons to be compassionate and humane. See, e.g., id. at 171.

279 See infra notes 297-305 and accompanying text.

280 See infra notes 297-305 and accompanying text.

281 Wood, supra note 25, at 3 (emphasis supplied).
what is deeply valuable or worthy.”

Rational capacity is special because it allows persons to be more than the effects of their environments. Rather, consistent with our general perception of Deontology, persons rationally may discern deontological morality, or at least make serious, arguably useful attempts to do so. To that effect, Kant proposed the idea of “practical freedom,”

The origins of Kant’s philosophy stretch back over two millennia, particularly to Cicero who argued that “the ability to reason turned man into an autonomous being, able to choose his fate and act upon that choice. This conception of dignity, as being based in man's ability to reason, has been described as ‘the central claim of modernity -- man's autonomy, his capacity to be lord of his fate and the shaper of his future.’” John D. Castiglione, Human Dignity under the Fourth Amendment, 2008 Wis. L. Rev. 655, 676-79 (2008)(quoting, Yehoshua Arieli, On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights, in The Concept of Human Dignity in Human Rights Discourse 1, 12 (David Kretzmer & Eckart Klein eds., 2002)).

See supra notes 101-04 and accompanying text. This article already has addressed under Deontology, and need not repeat, the well known objections that persons are capable neither of making rational decisions nor of understanding a priori principles. See supra notes 84-104 and accompanying text.

Given its crucial importance, a very brief explication of Kant’s “idea of reason” is apt. Kant, “formulated reason as the ability of humans to appreciate the implications or ‘universality’ of their actions.” Id. at 678 (citing Immanuel Kant, Foundations of the Metaphysics of Morals 54 (Lewis White Beck trans., 1983)). See also, e.g., Teson, supra note 44, at 75-76; Hill, supra note 52, at 40-41, 207-08. Reason enables universality by “order[ing] concepts so as to give them the greatest possible unity combined with the widest possible application.” Weinrib, supra note 72, at 479 (citing Immanuel Kant, Critique of Pure Reason *A644/B672 (N. Smith trans., 1965)). Thus, reason performs the “systematizing function” by which we both understand discrete concepts and form ever larger amalgams of ideas culminating in an “articulated unity … upon which all the conceptual lines converge,” id. at 480-81, (which certainly accords with our earlier discussion of value monism in morality).

Within the realm of reason, Kant emphasized “practical reason” which is, “A will which can be determined independently of sensuous impulses [passion and emotion], and therefore through motives which are represented only by reason, …” Id. at 481(citing Immanuel Kant, Critique of Pure Reason A800/B828-A802/B830 (N. Smith trans., 1965)). The facility for practical reason is essential because people must think as deontologists, not as consequentialists, so that they may embrace standards applicable to all and not simply to the self to promote the self's own well being. Id. at 483.

The capacity for practical reason allows for “practical judgment,” meaning “the capacity to descend correctly from a universal principle to particular instances that conform to it.” Pangle II, supra note 124, at 152; see also, e.g., Wright, supra note 32, at 278 (discussing Immanuel Kant, The Metaphysics of Morals 156 (Mary Gregor ed. & trans., 1996) (1797)). Through “practical judgment” individuals can both derive lower level moral precepts from morality’s value monism – the dignity principle – and discern how to apply such precepts to discrete scenarios. Such is not, however, merely “a rigorous deductive procedure. Instead, we should think of the [process] … as more interpretive or hermeneutical in character. Rules or duties [and proper
namely, a capacity to follow determinate laws given by the faculty of reason, ... the capacity to recognize rational nature as an end in itself as a reason for acting in certain ways, and to act in those ways on the basis of reason ... the capacity to act for reasons, rather than only on the basis of feelings, impulses, or desires that might occur independently of reasons.\(^ {284}\)

The extraordinary potential human competence inherent in *practical freedom* -- the aptitude to discern meaningfully if not perfectly *a priori* rules and to understand that the moral duty of obedience stems from those rules’ *a priori* nature -- comprises nothing less than “the fundamental condition of being a *person* -- in the sense of a being that can be held morally and legally responsible for his actions, ...”\(^ {285}\)

Persons’ capacity for rational thought allowing intentionally moral behavior, in turn, accords every person an intrinsic or inborn dignity that every other person must respect. Indeed, these unique and sublime attributes signify that “to the extent that they are capable of free and autonomous thinking and of genuine moral deliberation, people possess dignity, or worth, *as ends in themselves.*”\(^ {286}\) Certainly, Kant did not assert that the capacity to reason assures the correct solution to every controversy, ...”\(^ {287}\) The very indeterminacy of

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\(^ {284}\) Wood, *supra* note 25, at 60; *see also*, e.g., Carlson, *supra* note 39, at 37-38. Thus judgment may be learned but cannot be appreciated merely by understanding rules uninformed by experience. Wood, *supra* note 25, at 64. That would be like trying to understand Chess simply by reading a rulebook without ever paying the game.

Practical judgment can but certainly does not inevitably render *wisdom*, “a comprehensive knowledge of which ends to pursue, how to combine them, and how to pursue them under contingent conditions.” *Id.* at 153. *See also*, e.g., Carlson, *supra* note 39, at 37-38

\(^ {285}\) *Id.* at 129.


\(^ {287}\) Weinrib, *supra* note 72, at 506. “[T]he inability of the concept of right to predetermine hard cases is merely the unavoidable concomitant of ... being an idea of reason.” *Id.* at 507.
concepts precludes complete certainty. Nonetheless, the potential to contemplate by escaping environmental influences in the conscientious quest for truth allows persons not only to expect, but to demand that their dignity be respected.

As important as the right to demand dignity is the concomitant duty to respect dignity. Because all persons are “ends in themselves,” each person enjoys the primary right that his or her dignity be respected by all others as he or she must respect the dignity of all others. Accordingly, innate dignity allows individuals to demand moral treatment from others while simultaneously requiring those individuals to treat others morally. This is the core of Kantian morality -- and in legal realms of Kantian justice -- for to act in ways that offend this right is to be immoral.

Because the capacity for rational thought is presumed among all persons, the dignity owed to each person is not a function of whether she actually has acted in a dignified manner -- rationally, humanely and morally. That someone acts immorally does not free others from their moral duties, even if they are victimized by those immoral acts. The core of Kantian Honor, then, is an individual’s, a group’s or a society’s faithful respect for the dignity of all other persons, groups and societies.

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288 A concept is a universal, that is, something general that applies to the many particular instances falling under it. One invokes a concept not to produce a full enumeration of its instances but to clarify them by reference to the common category to which they belong. Particulars … always contain something contingent with respect to their universal. Because of this contingency, they cannot be derived from any definition of the concept. Id. at 505-06.

289 Wright, supra note 32, at 274-75.

290 WOOD, supra note 25, at 215 (citing IMMANUEL KANT, METAPHYSICS OF MORALS, 6:237 (1797)).

291 Id.

292 E.g., id. at 55; Wright, supra note 32, at 275; MULHOLLAND, supra note 46, at 314.

293 See supra notes 286-91 and accompanying text (explaining that moral duties inure to and are born by human associations as well as individual persons.) Accordingly, dignity is not a comparable entity. That Jones’ behavior respects the dignity of fellow individuals while Smith’s conduct does not, neither lessens Smith’s innate dignity nor enhances Jones’ although we may pronounce Jones more praiseworthy than Smith (and Smith may warrant societal chastisement including, if her disregard other others’ dignity constitutes a crime, criminal penalties).
Deontology, the immoral conduct of others cannot justify responding in kind; we may not use immorality to fight immorality. 294 Nor is destroying dignity justified on Utilitarian theory, that is, doing so preserves more dignity than was destroyed. 295 One human being is never inherently more valuable than another human being; therefore, and most profoundly, human beings are not fungible. 296

Each Person’s Innate Dignity Is More Precious than Life --

Given its singular importance, Kant posited logically but notoriously that the value of humankind’s innate dignity is priceless, indeed greater than life itself because “[t]he value of the end ... must have existed already prior to [one’s] rational choice.” 297 That is, both the moral law and individuals’ abilities rationally to discern morality exist before one actually makes any moral choices, which underscores why, as noted, rational “capacity ... is not represented merely as the object of a contingent inclination, ... It must be esteemed as unconditionally good, as an end in itself.” 298 Because morality and dignity are interrelated ends in themselves, human beings – the repositories of morality and dignity -- likewise must be regarded and treated as ends in themselves. 299

“The duty to respect others is grounded in the value of their humanity, not in their achievements or their moral conduct, ... To preserve human life per se is not among the

294 See supra notes 129-133 and accompanying text.
296 “The assignment of dignity to each rational agent [even those who choose not to act rationally], then, functions not to introduce a new kind of value calculation, but rather to block our tendency to treat rational agents as interchangeable commodities.” HILL, supra note 52 at 205; see also, e.g., KORSGAARD, supra note 59, at 309 n. 46; Wright, supra note 32, at 276.
297 WOOD, supra note 25, at 92 (emphasis added).
298 Id. at 259 (emphasis supplied); see also, e.g., HILL, supra note 52, at 202. Such, of course, is consistent with the earlier explained obligation that obeying deontological morality is an end in itself.
299 See supra note 289 and accompanying text.
principles.”

It could not be otherwise because the compulsory duty to regard each person’s innate dignity as more important than the preservation of anything else, even life and security is deontological, that is, according to Kant the essence of immorality, thus the essence of evil. As we know, deontological morality, which precedes any actual moral decision, prohibits us from doing evil regardless of outcome. If it is evil to defy other persons’ dignity, we must suffer the consequences of refraining from our evil preferences no matter how terrible those consequences may be.

The dignity principle, then, is Kantian ethics’ value monism, that is, morality’s elementary requirement -- its foundational command, a central corollary to, “Do what is right though it results in the demise of the world.”

We now may appreciate as well that Kant’s philosophy valuing the innate potential for nobility above human life is not premised on an unthinkingly literal, fetishistic ardor for human beings’ rational abilities. Rather, Kant argued that only the value monism of respecting each person’s rational capacity enables us to discern the fabric of ethics that clothes us against the allure of doing evil that is endemic to social order itself. Kant’s theories are informed by Rousseau’s lament “of the way our natural desires have been influenced by the loss of innocence – the restless competitiveness – characteristic of human

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300 Hill, supra note 52, at 204.
301 See supra notes 120-43 and accompanying text.
302 This is Kant’s “radical,” “defiant and paradoxical” egalitarianism. This is the “most fundamental idea in Kantian ethics.” Wood, supra note 25, at 94
303 Immanuel Kant, Perpetual Peace: A Philosophical Sketch App. 1 (1795).
beings in the social condition, ... [Kant believed that] the only resource in combating the radical evil of our social condition is the faculty of reason, …”

Accordingly, as we will soon confirm but may intuit now, Kant’s “dignity principle” forms the core of his theory of legal justice pursuant to which, consistent with morality’s and dignity’s worth above even life, Kant urged “if justice goes, there is no longer any value in men's living on the earth.”

In light of the foregoing, Prof. Pangle appropriately offered that the dignity principle -- the bedrock of Kantian justice -- is best understood as a form of honor. Pangle’s logic certainly supports this article’s attempt to link to the Founders’ quest for a better conception of “sacred Honor” to Kant. In response to Locke’s arguments that persons should pursue utilitarian happiness with security and property interests as paramount goals, Kant proposed, “a new and nobler account of liberalism and the liberal meaning of honor.” The dignity principle requires us to “discover in ourselves a higher call – the reverence for life of principle ... a life lived according to a moral code or law, for its own sake, as the supreme end in itself to which all other ends or interests must be subordinated and if necessary sacrificed.” Such is honor – the principled life.

Kant’s Categorical Imperative – Formulation One, Universal Maxims --

\[304\] WOOD, supra note 25, at 4-5. Prof. Wood explicated that even when moral commands are relatively clear, their “flagrant violation is extremely common, even built systematically into the basic familial, economic, criminal justice, military, political and other institutions of many societies.” Id. at 57.

\[305\] Waldron, supra note 15, at 1540 n.14 (quoting Immanuel Kant, Metaphysical First Principles of the Doctrine of Right, in THE METAPHYSICS OF MORALS 33, supra note 15, at 141. Prof. Sunstein likewise observed in the American context, Kantian adjudication means, “even if the heavens will fall, the Constitution must be interpreted properly.” Sunstein, supra note 108, at 164.

\[306\] Pangle II, supra note 124, at 213.

\[307\] Id. at 214.

\[308\] Id. at 215.
As explained above, Kant embraced Liberalism’s conception of actors in society: people and groups act purposefully to maximize their individual happiness. To attain their personal goals, individuals must interact in a social milieu unavoidably contacting, involving and affecting others often against their inclinations or preferences.\footnote{Wright, supra note 32, at 277.} The fundamental question of individual personhood \textit{vis-a-vis} social interaction is: how are actors to know whether their choice of both goals and the means to attain their goals comport with the innate dignity of those who, wittingly or unwittingly, are thereby affected? Put a bit differently, how do actors know that they are abiding by the \textit{dignity principle}?\footnote{\textquotedblleft[T]he importance of Kant's “formula of ends” in modern moral philosophy is impossible to deny.	extquotedblright Id. at 271 (citing, \textit{inter alia}, David Morris Phillips, \textit{The Commercial Culpability Scale}, 92 \textit{YALE L.J.} 228, 254 n.110 (1982) (describing the Categorical Imperative as “the fundamental principle of common morality”)).}

For Kant, the expedient to abide by the dignity principle is the hugely important Categorical Imperative (“CI”),\footnote{Teson, supra note 44, at 63; see also, e.g., Wood, supra note 25, at 67-68 (“The supreme principle of morality admits of no conditions or exceptions, of course, because there is nothing higher by reference to which conditions or exceptions could be justified.”)}\footnote{Teson, supra note 44 at 63 n. 49.} Kant’s “supreme principle of morality”\footnote{Id. at 63 (discussing \textit{IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS} 98-103 (Harper Torchbook ed., H.P. Paton trans., 1964)).} deduced from “pure practical reason”\footnote{“Honor [is] the principled life guided by the categorical imperative …” Pangle II, supra note 124, at 215.} and expressed as “a universal law that all rational beings can make and act upon for themselves as free, self-determining agents whose actions are morally good.”\footnote{Id. at 63 (discussing \textit{IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS} 98-103 (Harper Torchbook ed., H.P. Paton trans., 1964)).} Kant’s CI is his understanding of honor, meaning how people should live in a world of others.\footnote{“Honor [is] the principled life guided by the categorical imperative …” Pangle II, supra note 124, at 215.}

Kant formulated three related variants of the CI, the first of which expresses: “Act only on that maxim through which you can at the same time will that it should become a universal law.” Put perhaps too easily, formulation one appears to be Kant’s restatement of the Golden Rule, do unto others as you would have them do unto you. “[T]he test is
whether you could will it to be permissible (under the moral law) for everyone to act on the
maxim.\textsuperscript{315} Thus, one ought not do X unless one believes that all other person under like
circumstances morally may do X.\textsuperscript{316}

Prof. Weinrib offered that the first formulation explains how one may act freely and
purposefully but without illicit reliance on consequentialist justifications. If the moral
sufficiency of behavior cannot be gleaned by inclinations – that which will maximize
happiness or minimize unhappiness – then one must act on principles, “valid for all
purposive beings whatever their particular inclinations. Such a principle would determine
choice by virtue of the ability to universalize and not by virtue of the particular content of
choice.”\textsuperscript{317}

\textit{Kant’s Categorical Imperative – Formulation Two, Treating Persons as Ends in
Themselves --}

Although essential, formulation one is insufficient to fulfill the dignity principle.
That persons might in perfect conscience will some behavior as a “universal maxim,” and be
prepared not only to apply that maxim to others but also to themselves does not necessarily
prevent individuals from mistaking their personal preferences for moral principles.
Formulation one certainly constrains hypocrites who would allow themselves benefits or
advantages they would deny to similarly situated others. But in genuine sincerity under

\textsuperscript{315} \textsc{Wood, supra} note 25, at 70 (emphasis supplied).
\textsuperscript{316} For example, Jones might punch Smith in the mouth because Smith made insulting, inappropriate and
untrue remarks about Jones’ spouse. Faithful fulfillment of CI Formulation One requires Jones’ justification to
be more than hitting Smith made Jones happy, a purely consequentialist thus inadequate moral justification.
Instead, Jones must explain why under like circumstances, any offended spouse justifiably may punch the
offender (therefore, Jones must acknowledge that Smith could hit Jones if Jones insulted Smith’s spouse).
\textsuperscript{317} Weinrib, \textit{supra} note 72, at 483 (emphasis added). This is the “positive aspect of freedom,” or what could
be called the “practical idea of reason,” that is, free choice guided by practical reason. \textit{Id.} at 484 (citing
\textsc{Immanuel Kant, The Metaphysical Elements of Justice} 213, 236 (J. Ladd trans., 1965)); \textit{see supra} note
283 defining “practical reason.”
formulation one, some might be willing both to espouse and to abide by a certain universal principle, such as violent retaliation for perceived insults, but which, in fact, immorally intrudes upon the dignity of others.

The first formulation lacks a common neutral basis to judge whether the proposed universal maxim is moral. To resolve that problem Kant gave us perhaps his most celebrated precept, the CI’s Second Formulation which states, “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”

Commentators agree that pursuant to Kant’s somewhat esoteric expression, actors meet their moral obligation under the dignity principle by obeying universal maxims that, as we now know dignity requires, treat persons as “ends in themselves.” As his formulation makes clear, Kant certainly did not assert that one may not use others as means to obtain one’s chosen goals. Such a proposition would be patently ridiculous because attaining virtually all goals from babyhood to our dying breath typically requires the assistance of others. Rather, Kant’s Second Formulation sensibly admonishes that one cannot treat others solely or merely as means. Instead, one must use other persons in ways that respect

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318 Teson, supra note 44, at 64 (quoting Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 96 (Harper Torchbook ed., H.P. Paton trans., 1964)). See also, e.g., Castaglione, supra note 282, at 678.

319 Teson, supra note 44, at 64.

320 “Kant has no general objection to using people, or to using them as a means. Life could hardly be possible otherwise. The Kant scholar H. J. Paton points out that ‘[e]very time we post a letter, we use post-office officials as a means, but we do not use them simply as a means.’” Wright, supra note 32, at 277 (quoting H. J. Paton, THE CATEGORICAL IMPERATIVE: A STUDY IN KANT’S MORAL PHILOSOPHY 165 (4th ed. 1963)).
their individual dignity – their rational capacities, indeed in ways that treat those whom one uses with honor.

To do so Prof. Korsgaard explained, “According to Kant, you treat someone as a mere means whenever you treat him in a way to which he could not possibly [rationally] consent.” Perhaps most fundamentally, actors always must remember that persons are not inanimate objects, meaning things that may be used purely at the whim of and for the benefit of the user. Because things have neither consciousness nor soul, no one need obtain their leave nor worry that they might rationally complain about their misuse or abuse.

“Things are instrumental and have only extrinsic value. Human beings, on the other hand, have intrinsic value.” As Prof. Kunz compellingly invoked, using “a person [solely for another’s gain] does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.”

Logically, violations of the CI consist of more than the complete objectification of a human being at all times, in all situations. Rather, and much more likely, a violation of the CI, particularly the second formulation, arises by objectifying a person in a particular setting, under specific circumstances, in a singular manner.

321 “[I]t is possible to treat persons as ends in themselves and also as means, as long as you respect their rights and dignity.” WOOD, supra note 25 at 87; see also, e.g., Wright, supra note 32, at 277.
322 As earlier noted but worth again quoting, “Honor [is] the principled life guided by the categorical imperative …” Pangle II, supra note 124, at 215.
323 KORSGAARD, supra note 59, at 295 (citation and footnote omitted). As Prof. Hill similarly expressed, “the test of whether we are treating someone as an end in himself is whether that person does, or can, ‘share the end,’ of our action.” HILL, supra note 52, at 73 (footnote omitted).
324 Teson, supra note 44, at 64.
325 Kunz, supra note 132, at 256 (discussing ROBERT NOZICK, ANARCHY, STATE & UTOPIA 33 (1977)).
326 For example, anticipating our later discussion (infra notes 406-11 and accompanying text), a criminal trial absolutely devoid of due process offends the Second Formulation because the defendant is denied any meaningful opportunity to affect the process by which the Government seeks to take her life, liberty or property. Less quantitatively wrongful but no less qualitatively immoral and dishonorable is one non-harmless due process violation in an otherwise scrupulously constitutionally fair trial. A single violation, such as not
Granted, one might complain that the premises for the CI are problematic because Kant never fully proves that, “rational beings are ends in themselves but only [explains] that in setting ends according to reason, we must presuppose that they are.”\textsuperscript{327} Even if so, Kant presented a remarkably elegant, indeed beautiful theoretical depiction of humanness through which to attain a workable deontology for the everyday world. To coerce, deceive, intimidate, confound, abuse or otherwise objectify a person seems the very definition of degradation. It is hardly surprising, therefore, that analysts understand the CI, particularly its second formulation as the cornerstone, in Kant’s chosen term the “groundwork,” that “is unconditionally binding on all human beings, whatever their circumstances and regardless of what (contingent) ends, must be sacrificed to satisfy it.”\textsuperscript{328}

We now can understand why, contrary to some commentary,\textsuperscript{329} but fully consistent with deontological theory,\textsuperscript{330} Kantian ethics can explain regimes of self-defense and sacrificing the innocent in the defense of others.\textsuperscript{331} For instance, if a parent of three children could save one from drowning or save two, but not all three, “Surely she is justified in saving the two, but it is hard to conceive that she would accept that the rationale was that two are worth twice as much as one.”\textsuperscript{332} Rather, given the inevitability of three deaths

\begin{footnotesize}
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\item \textsuperscript{327} WOOD, supra note 25, at 93 (emphasis supplied).
\item \textsuperscript{328} HILL, supra note 52, at 201. See also, e.g., WOOD, supra note 25, at 163.
\item \textsuperscript{330} See supra notes 120-26 and accompanying text.
\item \textsuperscript{331} E.g., Stacy, supra note 295.
\item \textsuperscript{332} HILL, supra note 52, at 206.
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absent intervention but the impossibility of saving three lives even with intervention, Kantian dignity theory can justify saving as many lives as possible.\textsuperscript{333}

The moral principle, of course, is not based on a consequentialist maxim, but rather that the number of lives at stake may be “pertinent information” for the implementation of the general moral-legal standard in a discrete situation.\textsuperscript{334} Two theories support that conclusion. First, because surely it is moral to rescue rational beings, then, one could will as a moral maxim saving as many equally priceless lives as possible in a given crisis. Alternatively, if saving either one child or two children are equally moral outcomes, then the parent has two moral options but is physically able only to exercise one. At that point, the parent’s decision is no longer deontological but consequentialist because, as we learned, within the realm of moral choices, individuals may choose the options that maximize their respective pursuits of happiness. Therefore, the parent may choose to save two children rather than one.\textsuperscript{335}

As the drowning children example shows, arguing that “numbers count” does not \textit{per se} transform a precept from deontological to consequentialist because, “It matters how, for what reasons, and under what constraints a theory allows the numbers to count.”\textsuperscript{336}

When every available moral solution to a particular problem engenders loss of innocent

\textsuperscript{333} \textit{Id.} at 215.
\textsuperscript{334} \textit{Id.} As Prof. Stacy aptly concluded, “The overriding value Kantian moral philosophy places on the rational autonomy of individuals does not support indifference to how many individuals survive. That would not be in harmony with the value of the individual human beings whose personhood rational autonomy defines.” Stacy, \textit{supra} note 295, at 508.
\textsuperscript{335} The foregoing posits the \textit{possibility} that that the parent morally might choose to save one rather than two children. Of course, the reasons why a parent might so choose could invalidate the decision. For instance, choosing to save the handsomest or nicest child arguably would offend the dignity of the two other children unless one could will a universal maxim that attractiveness or pleasantness dominates other characteristics (a doubtful proposition indeed). Accordingly, possibly there are no qualities or characteristics that morally could justify saving one rather than two children.
\textsuperscript{336} \textit{Id.} at 215 n.12.
lives, opting for the moral resolution that sacrifices the least number comports with respecting the dignity of others.337

The CI and the State --

Experience, if not logic, tells us that violations of the CI’s second formulation commonly involve coercive force and deception because under the former, “I have no choice to consent” and under the latter, “I don’t know what I am consenting to.”338 Immediately, one might respond: although we know that groups and governments must obey moral duties,339 it is not the very definition of Society via its governmental offices to coerce certain behaviors and to forbid other behaviors, all under penalty of law regardless of the willingness of those who do not wish to be so controlled? If coercion is suspect under the CI’s second formulation, we must understand how and why governments may operate without violating the dignity of those who would not comply voluntarily.

Aware of this issue, Kant argued that although the moral duties required of human beings inure to the social structures they create, especially government, properly designed governmental compulsion is not only apt, but is essential.340 His resolution is typically Liberal and compellingly consistent with the legal-governmental framework created by the Founders. First, we must recall a key concept quoted just a few paragraphs above:

“According to Kant, you treat someone as a mere means whenever you treat him in a way to

337 Id. at 510-11; see also, e.g., WOOD, supra note 25, at 331 n. 1. Similar arguments explain a Kantian justification for self-defense. See generally, e.g., RODIN, supra note 50; Murphy Book, supra note 30, at 108-09.
338 KORSGAARD, supra note 59, at 295.
339 See infra text accompanying notes 349-65; see also supra notes 309-22 and accompanying text.
340 E.g., MULHOLLAND, supra note 46, at 291; Teson, supra note 44, at 64-66; HILL, supra note 52, at 208-209.
which he could not possibly consent.”

Similarly, Prof. Hill explained that Kant certainly does not mean that per se one cannot do to another something that other would not want. Rather, “insofar as [others] are used as means, they must be able to adopt the agent’s end, under some appropriate description, without irrational conflict of will.”

Therefore, even if personal preferences and inclinations impel otherwise, a person must be guided instead by her unbiased rationality. If her rational capacity understands that a particular action or standard rightfully may be willed as a universal maxim and does not objectify persons but instead treats persons as ends in themselves, then she must accept the action or standard as moral no matter how much she might like it to be otherwise. Such moral behavior, then, may become a rational imposition, that is, imposed against all unwilling others. So long as the actor’s challenged behavior or standard does not offend dignity, then unwilling others must accept the impositions imposed by that moral albeit disliked conduct, even if they have been used for the advantage of the actor.

To understand how the two formulations must operate, Kant proposed his third formulation of the CI: “Not to choose otherwise than so that the maxims of one’s choice are at the same time comprehended with it in the same volition as universal law.”

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341 KORSGAARD, supra note 59, at 295 (emphasis added).
342 HILL, supra note 52, at 45 (emphasis supplied).
343 The hundreds of impositions, minor and occasionally major, with which we deal daily illustrate Kant’s theory. Obeying traffic signals when we are in a hurry, keeping our voices politely low in restaurants and being silent in theaters even if we wish to make witty comments about the show evince lesser but understandable examples of respecting the dignity of those around us, including strangers, for the sake of universal maxims of decent social behavior. We forego behavior that we would prefer because we recognize how such behavior would be inappropriately intrusive into the lives and comfort of others who would wrongfully be obstructed from pursuing lawful, moral projects.
344 WOOD, supra note 25, at 67 (quoting Immanuel Kant, Groundwork of the Metaphysics of Morals, in CAMBRIDGE EDITION OF THE WRITINGS OF IMMANUEL KANT 4:400 (1992)). Alternatively, the third formulation holds that one must accept, “… the idea of the will of every rational being as a will giving universal law.” Id. at 66-67 (quoting Immanuel Kant, Groundwork of the Metaphysics of Morals, in CAMBRIDGE EDITION OF THE WRITINGS OF IMMANUEL KANT 4:431 (1992)).
formulation unites the first two formulations to buttress how a law or maxim can be “valid universally for all rational beings … with the conception of every rational nature as having absolute worth as an end in itself, to get the idea of the will of every rational being as the source of a universally valid legislation.”345 Kant sought to explain by this third formulation how any given person might consider herself subject to universal laws and simultaneously consider herself to have willed those laws, meaning, “… every rational will, equally our own and that of other rational beings, … in obeying the objectively valid moral law, [may] regard[] itself as at the same time giving that law.”346 Formulation three assures that any maxim that might fulfill the first two formulations belongs in a “system of moral laws.”347

This leads to the next logical, indeed obvious stage: how to protect the pursuit of happiness, that is, freedom to seek one’s chosen goals. In Kant’s words the essence of freedom is,

No one can compel me (in accordance with his belief about the welfare of others) to be happy after his fashion; instead, every person may seek happiness in the way that seems best to him, if only he does not violate the freedom of others to strive toward such similar ends as are compatible with everyone's freedom under a possible universal law ...348

345 Id. at 75 (emphasis added).
346 Id. at 76 (citing Immanuel Kant, Groundwork of the Metaphysics of Morals, in CAMBRIDGE EDITION OF THE WRITINGS OF IMMANUEL KANT 4:435, 435 (1992)).
347 Id. at 77. Prof. Wood attempted an easily accessible explanation of formulation three, “to think of ourselves as members of an ideal community of rational beings, in which each of us should strive to obey the moral principles by which we would choose that members of the community should ideally govern their conduct.” Id. Similarly, effectuating the third formulation is part of the famous project of John Rawls’ “original position” by which he posited disembodied spirits panning a new social order, but unaware of what their respective statuses will be once they inhabit the society they created. Rawls argued that through a bargaining process based on reason, the spirits would agree to maximize the opportunities of all and, correspondingly, minimize restrictions on legitimate pursuits of happiness due to irrelevant prejudices. The spirits would devise a system steeped in fundamental rights and certain shared economic opportunities. JOHN RAWLS, A THEORY OF JUSTICE; accord, e.g., HILL, supra note 52, at 208 n. 7 (discussing Rawls).
348 Teson, supra note 44, at 62 (quoting Immanuel Kant, On the Proverb: That May be True in Theory, But Is of No Practical Use, in PERPETUAL PEACE AND OTHER ESSAYS 72 (Ted Humphrey trans., 1983)).
To reconcile the impositions that various persons’ morally legitimate projects might impose against unwilling others, that is, to establish a process by which all persons peacefully can pursue happiness by using others as means consistent with the dignity principle, all must form societies that include government, the entity authorized to make and to enforce law by coercive means. For Kant, society cohered through governmental authority is more than a convenience. In fact, people do not form societies out of mutual consent – Kant was not a consent theorist. Rather Kant was a natural rights theorist believing the “natural will” compels forming and perpetuating society as the basis to discern whether proposed standards may be willed as universal maxims. A coercive government arises “not to maximize welfare or to give the morally vicious their just deserts but rather to create the conditions in which each has, as far as possible, a fair chance to live out a life as a rational autonomous agent.”

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349 In fact, Kant’s entire project in his The Metaphysical Elements of Justice is explaining “the nature and justice of coercion.” Murphy Book, supra note 30, at 91 (emphasis supplied). Freedom is an inherent “good” which needs no justifying while coercion is inherently opposed to freedom and, therefore, warrants justification. Accordingly, “[C]oercion is justified only in so far as it is used to prevent invasions against freedom. … So Kant has to establish the paradoxical claim that some forms of coercion (as opposed to violence) are morally permissible because, contrary to appearance, they really expand rational freedom.” Id. at 91-92 (emphasis supplied). This is, according to Kant, the “best justification for civil government.” Id. at 104 (emphasis supplied).

350 MULHOLLAND, supra note 46, at 278-82 (discussing specifically Kant’s view of property); see also, id. at 289-290.

351 True, Kant described the transfer from the state of nature as “an original contract, in which people give up their inborn external freedom in order immediately to receive it back secure and undiminished as members of a lawful commonwealth.” Weinrib, supra note 72, at 478-79 (citing IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 315-16 (J. Ladd trans., 1965)). This contract arises because in a world of limited resources, “all persons are in practical relation to one another,” a condition Kant believed is “constituted by nature itself.” Therefore, “consent is irrelevant to the justification of political obligation and the condition for the acquisition of rights.” MULHOLLAND, supra note 46, at 280. For example, while the particular details may vary from society to society, all persons must will rational restrictions on the use of land, including their own realty, if they are peaceably and effectively to use land at all. Such restrictions via titles and other guarantees are part of the function of states. Id. at 280-81. Accordingly, rather than an actual or figurative arm’s length agreement, “the original contract ‘is in fact merely an idea of reason…”’ Weinrib, supra note 72, at 479 (quoting Immanuel Kant, On the Common Saying: “This May be True in Theory, but it does not Apply in Practice,” in KANT’S POLITICAL WRITINGS 79 (H. Reiss ed., 1979)).

352 HILL, supra note 52, at 209.
Kant’s pivotal enrichment of the prevailing metaphor is that the “social contract” does not symbolize a discretionary arrangement of expediency, but rather a moral requisite without which the dignity principle cannot be achieved. Suggesting the title “kingdom of ends,” Kant asserted that governmental society is indispensible because, when properly formed and operated, it assures maximum protection and enjoyment of the dignity principle, while absent a legitimate state there is no formal and proper enforcement of the CI.

Kant’s overarching emphasis on the pursuit of moral decency accords the social contract nobility and virtue exceeding Lockean concepts of pure security and the protection of possessions (although those latter considerations surely are relevant to liberty). Kant accepted that persons must leave the state of nature where generally behavior is unconstrained to form societies “that assign to each rights and responsibilities … [thereby] secur[ing] to each person a reasonable opportunity for life and liberty as rational autonomous agents.” Indeed, “in the absence of legal authority, … individuals will disagree about right and justice … [which likely] will lead to violent conflict. The task of the [legitimate government] is to put an end to this conflict by replacing individual judgments with the authoritative determinations of positive law.”

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353 E.g., *Hill, supra* note 52, at 58; or “realm of ends,” e.g., *Wood, supra* note 25, at 78.
354 “The idea of a state” is “derived” from “the universal principle of right.” *Wood, supra* note 25, at 215; see also, e.g., *Mulholland, supra* note 46, at 285; *Waldron, supra* note 15, at 1546.
355 In the state of nature, where there is no controlling, official governmental authority, persons may pursue their happiness by any means. “[I]ndividuals fight in the state of nature, and the consequent war of all against all can only cease when people submit to a unitary sovereign.” *Waldron, supra* note 15, at 1545 (discussing *Thomas Hobbes, Leviathan* 86-90, 117-21 (Richard Tuck ed., 1991) (1651)); see generally, *Hamburger, supra* note 234, at 1835-36 (2009).
356 *Hill, supra* note 52, at 208.
357 *Waldron, supra* note 15, at 1545; see also, e.g., *Murphy Book, supra* note 30, at 104. True, the obligations of the dignity principle precede the formation of governments, thus absent government, persons are morally obliged not to act in ways that offends the innate humanity of others. In fact, unlike Hobbes and in agreement with Locke, Kant did not envision the state of nature as per se uncivilized. “But though it may be sociable, the state of nature … is a situation in which people have a ‘tendency to attack one another’ and to do so in the name of justice.” *Waldron, supra* note 15, at 1546 (quoting Immanuel Kant, *Metaphysical First Principles of*
rational edicts of the officers of the State that individuals know the reciprocal laws that bind and govern interpersonal relations.  

The State, then, is essential to legitimize rights and accord duties derived from moral laws gleaned through the freedom innate in human beings. The State is the requisite key to implement the moral law – the moral imperative. Accordingly, a state “has a moral standing qua the creature of a social contract.” It is not a “community ... hold[ing] a preeminent position at the expense of the individual.” Rather, the “fundamental unit” and “fundamental end” of society under government both domestic and international is the “individual human being.” That is why Kant believed that remaining in the state of nature under any conditions is wrongful as, by definition, there is no external, coercive state to assure protection of “rightful freedom” even if people happen voluntarily to employ their “lawless freedom” to “limit their actions to what is right.” After all, the very concept of the state of nature allows each person to exercise her predilections without concern about other persons.

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358 Murphy Book, supra note 30, at 104; see also, e.g., MULHOLLAND, supra note 46, at 285. Therefore, accusations made in texts such as in M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 172-73 (1973), that Kant rejects socialization as essential to the self arguably are misplaced. Indeed, Kant accepted that it is predominately through social contexts that a person chooses among competing preferences, predilections and desires – the pursuit of happiness -- which, of course, must conform to the dignity principle. E.g., Weinrib, supra note 72, at 503. Certainly, society, the state and government are instrumental, but essential instruments for both personal fulfillment through the pursuit of happiness and obedience of the dignity principle.

359 E.g., WOOD, supra note 25, at 213-15 (discussing Immanuel Kant, Groundwork of the Metaphysics of Morals, in CAMBRIDGE EDITION OF THE WRITINGS OF IMMANUEL KANT 6:313 (1992)).

360 Id.

361 Id.

362 Id.

363 Id.

364 WOOD, supra note 25, at 215.

365 Waldron, supra note 15, at 1546 (discussing Immanuel Kant, Metaphysical First Principles of the Doctrine of Right, in THE METAPHYSICS OF MORALS 33, 123-24 (Mary Gregor trans., 1991)(1797)). Apparently, Kant did not accept Rousseau’s view of “the nobility of natural man.” “Even if men are angels, they are opinionated
In this way, Kant challenged Lockean utilitarian social contract theory by emphasizing a higher calling – a “reverence for a life of principle” that alone validates and legitimizes Society and the government that enforces Society’s edicts. Thus, forming a governmental social order is “obligatory” because the dignity principle is obligatory.

Of course, the core concept of the State and the government that governs the State is the authority to employ coercion. That is, individuals relinquish their complete freedom of action in the state of nature in exchange for the security of a formal State that alone is empowered both to establish legal laws and to enforce those laws through violence – coercive means – if necessary. The security engendered is the opportunity to pursue one’s happiness within the confines of the CI while employing the offices of the State to constrain others who would limit one’s legitimate pursuit of happiness by violating the CI. Thus, to express the obvious, coercion is required so that recalcitrant persons will obey the rational laws.
Consistent with the foregoing, Kant identified **juridical duties**, also called “duties of right,” that may be enforced by the legitimate coercion of the State against those who will not obey by self-constraint. Ethical duties, by contrast, “are to be fulfilled through inner rational constraint.” Ethical duties or “duties of virtue” encourage us to maximize “our own perfection and the happiness of others;” but, doing so is not compulsory under Kantian theory.

In light of these definitions, obeying the law such as refraining from committing murder is a juridical duty the violation of which may be punishable by lawful authority. Ethical duties, however, arguably concern what the Founders regarded as the “pursuit of Happiness,” that is, all projects within the expansive boundaries of moral behavior.

Certainly, we may pursue happiness by leading selfless lives, giving all our spare time and resources to charities and similar worthy pursuits. But, there is no moral duty to be selfless because preserving each person’s innate dignity does not require a universal maxim that members of society must suffer excessive deprivations for the sake of other members.

Accordingly, we may live selfish lives, acquiring for ourselves as much as we can with no

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373 WOOD, *supra* note 25, at 167. See also, e.g., KORSGAARD, *supra* note 59, at 20.

374 This explains Kant’s “universal principle of justice” elucidating the pursuit of happiness which “allow[s] individuals freedom to form and pursue their own life plans subject only to the constraint that others be allowed similar freedom.” HILL, *supra* note 52, at 54; see also, e.g., Grey, *supra* note 365, at 182; Pangle II, *supra* note 124, at 213-15, 219 n. 10.

375 Doubtless, along with refraining from intruding illegitimately into the dignity of others, one might recognize universal maxims imposing positive duties -- mandatory affirmative obligations -- incumbent upon Society’s membership to help those in need. “If, as seems obvious, too much inequality between people … is incompatible with their pursuit of common ends, then Kantian ethics implies that that limiting human inequality should always take precedence over maximizing human welfare” HILL, *supra* note 52, at 79; see also, e.g., Wright, *supra* note 32, at 277. In such cases, the citizenry in some fashion must dedicate resources to fulfill those affirmative duties. For instance, as a matter of fundamental decency not discretionary largesse, the Constitution’s Sixth Amendment requires American society to provide competent attorneys to criminal defendants who cannot afford legal representation. Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963); Beard v. Banks, 452 U.S. 406, 417-18 (2004). Necessarily, supplying lawyers costs tax dollars which taxpayers must pay regardless whether they otherwise voluntarily would do.
thought of sharing so long as doing so is not immoral; that is, the pursuit of happiness as selfishness must not denigrate anyone’s innate dignity.\textsuperscript{376}

In sum, comparable with the Founders’ precepts in the Declaration, government is legitimate if it “maintain[s] a system of peace wherein each citizen will enjoy the most extensive liberty compatible with like liberty for others. This is the only reason why rational autonomous persons would contract to give up liberty; and only in terms of this end is state coercion justified.”\textsuperscript{377}

\textit{How Government Is Constrained Lest Coercive Authority Be Used Illicitly --}

Along with other theorists, including the Founders, Kantian philosophy understands a correlated core principle: almost certainly government will fail its moral duties absent constraints limiting how government itself employs its singular, breathtaking authority coercively to enforce the laws it creates. Therefore, Kant embraced the fruits of the

\textsuperscript{376} E.g., \textsc{Wood, supra} note 25, at 167. That is why, for example, Kantian ethics permits Jones to use clever but honest advertising and creative marketing to drive her competitor Smith out of business but does not allow Jones to succeed by vandalizing Smith’s store.

Of course, legitimate government may regulate to promote policies consistent with, but exceeding the minima necessitated by the dignity principle. For example, assuming \textit{arguendo} that under the dignity principle society has an affirmative duty to provide minimum nutrition, clothing and shelter for the needy, legitimate law may surpass that least amount so long as the excess does not unreasonably intrude into the liberty of others.

Although at least one commentator laments the following is weak, \textsc{Murphy Book, supra} note 30, at 112 n. 16, Kant provides a plausible explanation why law that exceeds the arguable minimum social obligation may be legitimate even if those opposed are compelled to support such policies with taxes or other personal resources. Kant argued that while individuals form societies to pursue morally their private goals, the State may assume an “external aspect,” whereby law “becomes the general or universal will...” \textsc{Weinrib, supra} note 72, at 490. Therefore, the State may subvert individual preferences in favor of a general will if doing so is consistent with the dignity principle. \textit{Id}. In other words, to pursue their respective goals, persons rationally accept a realm of competitive politics wherein individuals and groups attempt to influence government to adopt policies that other individuals and groups may oppose. The winners in each discrete instance impose their will on the losers, the unwilling others. The imposition placed on such unwilling others to obey laws with which they do not agree is moral so long as governmental process is legitimate. If such is not what the governed want and expect, they may either reform the structure of government or move to someplace where government exists only to realize the CI’s minima.

\textsuperscript{377} \textsc{Murphy Article, supra} note 370, at 516; \textit{see also}, \textit{e.g.}, \textsc{Hill, supra} note 52, at 209.
Framers, “[a] republican state as one defined by a constitution based upon three principles: freedom, due process, and equality.”

In particular, Kant believed that to be a legitimate source of rights, policies and correlative obligations, civil society must be governed by impartial persons with “supreme title to give, apply and execute laws determining rights ...” Because to promote the CI law must be the product of detached rationality, each legislator must view herself and all members of her “kingdom” as “ends in themselves.” This requires, inter alia, that, “the legislators regard the rationality of each member as unconditionally and incomparably worth preserving, developing, and honoring.”

Second, to maximize the probability that government will be legitimate and remain so, Kant embraced separation of powers – legislative bodies to make law, a judiciary or similar system to resolve public and private disputes, an executive to enforce law and such other mechanisms as are appropriate to establish and to enforce the rational rule of law. Such dispersed authority helps assure that the Government will not collapse into either despotism or anarchy. In this regard, which has become accepted elementary American constitutional law, Kant warned that repression can arise not only from dictatorial leaders

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378 Teson, supra note 44, at 62 (citing Immanuel Kant, To Perpetual Peace: A Philosophical Sketch, in PERPETUAL PEACE AND OTHER ESSAYS 114 (Ted Humphrey trans., 1983)(1795)); see also, Immanuel Kant, On the Proverb: That May be True in Theory, But Is of No Practical Use [1793], in PERPETUAL PEACE AND OTHER ESSAYS, supra at 71-84.
379 MULHOLLAND, supra note 46, at 284-86 (quote at 284).
380 E.g., Hill, supra note 52, at 60-61.
381 E.g., MULHOLLAND, supra note 46, at 283-85; WOOD, supra note 25, at 213.
382 As Madison earlier had famously stated, “The accumulation of all powers legislative, executive and judiciary in the same hands, ... may justly be pronounced the very definition of tyranny.” THE FEDERALIST No. 47, at 244 (James Madison)(Gary Wills ed., 1982).
383 The Supreme Court “consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” Mistretta v. United States, 488 U.S. 361, 380 (1989); accord, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004); Loving v. United States, 517 U.S. 748, 756 (1996).
but also from the “tyranny of the majority,” meaning “a system of pure democracy … unrestrained by rights …”\textsuperscript{384} Such may occur because “the [tyrannical] majority legislates for everyone, while regarding itself as not subject to any higher universal laws and while it, itself, does not constitute everyone.”\textsuperscript{385}

Accordingly, as a third principle of tremendous significance, Kant recognized that government must be restrained by relatively explicit overarching injunctions predicated, of course, on the dignity principle:

If in our everyday behavior we should never consider fellows human beings merely as means, it follows \textit{a fortiori} that the constitution of the state, an artificial creation to serve human needs, must embody and incorporate a formula of respect for persons -- \textit{a bill of human rights}. … [Such] mechanisms for guaranteeing traditional civil and political rights, which act as barriers against the abuse of state power, form the basis of a republican constitution because such mechanisms implement the respect for autonomy and dignity of persons.”\textsuperscript{386}

Thus, completely consistent with both America’s founding and American constitutional theory, Kant appreciated that government is indispensable to protect each person’s right to liberty – to pursue happiness in moral ways – but, as well, government must be controlled lest, as any powerful entity is apt to do, it abuses its authority in violation of the very principles it was created to safeguard.\textsuperscript{387}


\textsuperscript{385} MULHOLLAND, \textit{supra} note 46, at 325.

\textsuperscript{386} Teson, \textit{supra} note 44, at 64 (citing, \textit{inter alia}, Immanuel Kant, \textit{Theory and Practice} 72; emphasis added).

\textsuperscript{387} On this point, many commentators misinterpret Kant’s theory, arguing that he opposed all revolutions against established government. Granted, Kant averred that, aside from enacting reforms, almost always the proper means to oppose unjust laws are protest and passive resistance. Accordingly, he disagreed with Locke that revolution is justified in a merely imperfect state. MULHOLLAND, \textit{supra} note 46, at 337-46; see also, \textit{e.g.}, Waldron, \textit{supra} note 15, at 1544-45 (“The moral requirement of obedience to actually existing law, Kant concluded, is ‘absolute.’”) (quoting Immanuel Kant, \textit{On the Common Saying: “This May Be True in Theory,}
In this regard, as earlier accented, arguably Kant’s most significant contribution is linking Liberal political theory not to utilitarian principles of property, contract and mutual security, but to the incontrovertible moral duties emanating from the dignity principle, incumbent on all persons, mandatory regardless of the consequences and achieved, if at all, through society, the State and government. Consistent with his deontology, Kant identified justice as the principle indispensible to government’s obligation under the CI. He invoked the proposition in terms that we now understand are not hyperbolic, but morally correct: “if justice goes, there is no longer any value in men's living on the earth.”

The core of Kantian justice is due process of law which is unsurprising because, Legality that offers only prudential reasons for compliance with law -- follow the law or the state will impose unpleasant consequences upon you -- [defies] Enlightenment notions of autonomy and respect. In fact, a state that secures compliance with law purely through threats of sanction -- indeed, a state that roots its existence through the power to enforce law -- is by definition illegitimate.

The archetypal example, of course, is criminal law and procedure. Due to her innate rational capacity, the criminal can and should accept the principles of reasonable

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Nonetheless, a plausible Kantian analysis asserts that any government acting as an irredeemable “despot” may be deposed by revolution, should lesser measures fail. Some right to revolution as a last resort makes seamless Kantian sense as there is no reason to exist under a formal system that ceaselessly is worse than the state of nature from which the government should afford liberation. MULHOLLAND, supra note 46, at 342; see also, e.g., Teson, supra note 44, at 68. Such, of course, is precisely the theory of “sacred Honor” the Founders expressed in their Declaration of Independence. See supra Part III.

88 E.g., Pangle II, supra note 124, at 213-18.
389 Waldron, supra note 15, at 1540, n.14 (quoting Immanuel Kant, Metaphysical First Principles of the Doctrine of Right, in THE METAPHYSICS OF MORALS 33, 141 (Mary Gregor trans., 1991)(1797)).

390 Murphy Book, supra note 30, at 106 (citing IMMANUEL KANT, CONCERNING THE SAYING: THAT MAY BE TRUE IN THEORY BUT NOT IN PRACTICE, 289 (The Royal Prussian Academy, Berlin, 1793)).

391 Williams, supra note 84, at 86.

392 “[T]he greatest expression of the Enlightenment ideal within the Kantian tradition is the criminal trial. It is where the ideal is most fully vitalized and where it is most forcefully put to the test.” Id. at 83 (citing JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 144 (Harvard Univ. Press, 2d ed. 1984)(1964)).
criminal justice even if the criminal is not inclined to obey criminal law.\textsuperscript{393} Although the
criminal would have preferred to succeed in her crime, her innate rationality informs her that
what Society imposed against her could be willed as universal rules for peaceful civil
dealings and relations within a social order, so long as such due process never failed to treat
her as an end in herself.\textsuperscript{394} Due process succeeds by assuring that the suspect or defendant
meaningfully may participate in the process that seeks to penalize her, thereby treating her
as a subject, not an object – as an end in herself, and not merely a means to foster some
public or private interest.\textsuperscript{395} Therefore, a criminal cannot properly object to the search of
her home pursuant to a properly issued warrant, or to her arrest based on probable cause or
to a trial, conviction and sentence all consistent with due process including affording her the
meaningful opportunity to contest the legality of the governmental actions taken against
her.\textsuperscript{396}

As Prof. Williams persuasively explicated,

The real power of [due process] is not, as is often assumed, that [one] is
entitled to … due process … because we ought to be risk averse in our
diagnosis of who are [criminals] … No, the real power lies in the fact that
criminal adjudication … is the only way to legitimize the exercise of state
power against a [criminal defendant]. The function of the criminal trial, on

\textsuperscript{393} E.g., HILL, supra note 52, at 45, 73.
\textsuperscript{394} E.g., Murphy Book, supra note 30, at 108; HILL, supra note 52, at 160-84 (discussing punishment for
criminal acts).
\textsuperscript{395} HILL, supra note 52, at 210; accord, e.g., Teson, supra note 44, at 67 (the laws of any state must conform to
the CI); Murphy Book, supra note 30, at 106. Indeed while certainly distressing but perfectly correct, a
convicted yet innocent person has no moral objections so long as the investigation, arrest, trial and sentencing
comport with true due process. As perfection is not possible in human endeavors, we can hope for no better
treatment than the best humanly possible. Accordingly, the courts have adopted an accurate if curt shorthand,
“A person is entitled to a fair trial but not a perfect one.” E.g., McDonough Power Equip., Inc. v. Greenwood,
F.3d 48, 54 (1st Cir. 2007); United States v. Ramirez, 426 F.3d 1344, 1353 (11th Cir. 2005).
\textsuperscript{396} As the Supreme Court prudently underscored, “The fundamental requirement of due process is the
opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Matthews v. Eldridge, 424 U.S.
319, 333 (1976)(quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); see also, e.g., City of Los Angeles
v. David, 538 U.S. 715, 717 (2003)(per curiam; quoting Eldridge); Tate v. District of Columbia, 627 F.3d 904,
908 (D.C. Cir. 2010)(quoting Eldridge).
this account, is to vindicate what the Enlightenment demands of the state: a justification for its own existence.397

Why Law and Morals Functionally Are Inseparable --

Pursuant to the foregoing Kantian exposition, law is paramount in Kantian society as the device through which the State exercises its rightful coercion and by which government’s coercive power rightfully is limited, all for the sake of the Categorical Imperative.398 Accordingly, in a most fundamental sense, Kant teaches us that while law may be identifiable in positive terms – recognizable via processes of enactment and enforcement that we understand apply only to law399 -- Positivism mistakenly asserts that process is enough for law to be law.400 “In Kant’s view, all moral laws, even all legitimate laws of the state, must be conceived as (or as falling under) natural laws. In fact, Kant believed that merely statutory or positive legislation does not, properly speaking, give ‘laws’ at all, but only ‘commands.’”401 Rather, “the condition for the existence of a legal system is morality as such.”402 While Kant did not aver a corresponding legal duty for every ethical duty, “law sets … the minimal … moral conditions for the interaction of purposive

398 E.g., Murphy Book, supra note 30, at 94; Pangle II, supra note 124, at 213-18. Notably, “Kant almost never gives us the content of this law – only its form.” That form, of course, is the CI. Carlson, supra note 39, at 39.
399 For a general explanation of Positivism, see e.g., H.L.A. Hart, THE CONCEPT OF LAW 185-212 (2d ed. 1994) (conceptualizing the relationship between law and morals and explaining natural law and legal positivism).
400 The separation of law and morals is the pivotal idea of Positivism; that is, there is no inevitable connection between law and morals. “Morality, for [Positivists such as H.L.A.] Hart, is content. Law is form. The form of the law is sufficiently flexible to encompass any content, moral or not.” Carlson, supra note 39, at 28-29.
402 Carlson, supra note 39, at 23. “Both law and ethics are for Kant branches of moral philosophy; ... They differ in the incentive that each holds out: in law the actor responds to the prospect of external coercion, whereas in ethics the idea of duty itself motivates the action.” Weinrib, supra note 72, at 501; see also, e.g., Grey, supra note 365, at 581. Prof. Grey offered an alternative understanding: “Kant treats Law not as part of morality but rather as a precondition for its realization.” Grey, supra note 365, at 586 (quoting Immanuel Kant, Idea for a Universal History from a Cosmopolitan Point of View, in KANT ON HISTORY 22 (L. Beck ed., 1975)). Yet, under this idea as well, the function of law must be the vindication of the dignity principle if law is to be legitimate.
beings.” As such, there must be some unity – some value monism – to law. Like morality, concepts of law “cannot be understood in isolation from one another [although they can be described discretely].” The unity for law, as accented above, is the dignity principle particularly as advanced by due process. As we will next see, deontological dignity is precisely the grounding of due process under American constitutional law and, thus, should be subject to the Kantian admonition that faithful fulfillment of due process – of justice – is more important than life itself.

-- Part V --

Due Process – America’s Highest Duty – America’s Value Monism --

We have discerned that morality is deontological, engendering as humanity’s greatest responsibility refraining from evil. All persons and the societies to which they belong must endure any sacrifice rather than betray Humanity though immorality. As Kant intrepidly if audaciously stated the duty of morality, “Do what is right though it results in the demise of the world.”

Next, as a principle means to vouchsafe morality, we reviewed honor, particularly “sacred Honor” as it relates to that “charter of human liberty and dignity,” the Declaration of Independence. The Founders declared that government is legitimate only when it obeys the moral imperative to safeguard indispensable, deontological “unalienable Rights” that derive not from the will of human beings but, as the Declaration states, from the “Law of Nature and of Nature’s

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403 Weinrib, supra note 72, at 503.
404 Id. at 480 n. 26 (discussing contract legal concepts such as acceptance and consideration).
405 “[E]very aspect of law must bear the traces of [some focusing] idea and ... these traces are decisive for the systemic connections within law. ... The idea of reason runs through the whole length of law as a single fiber that connects each part with every other part ...” Id. at 481.
406 IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH App. 1 (1795).
God." As such, the Declaration set the fundamental rules for, was the precursor of, and profoundly inspired the document that constructs American government, the Constitution. The Founders solemnized their moral-political theory two ways: by pledging to sacrifice if necessary the lives and property of persons under the jurisdiction of America, and by dedicating the young Nation’s “sacred Honor” to the overarching principle of preserving legitimate government. As progeny of the Founders -- as inheritors of the Declaration -- we adopt those pledges as well if we are to be Americans. Such is the sacrifice pledged by America’s “sacred Honor.”

To realize the ever emerging arc of our duty to the Founders -- to develop a firmer, fuller concept of “sacred Honor” faithful to their philosophy of “unalienable Rights” -- we identified Kantian honor as a commanding expression of deontological values. Kant’s *dignity principle* explicated by his three formulations of the Categorical Imperative provides the most compelling description of basic morality this author knows. Kant anticipated where American morality should and, in large measure, has progressed: that constitutional due process forbids government from violating the dignity principle no matter what consequences stem from such faithfulness.

Accordingly, as this portion of the article avers, Kantian morality under the Constitution’s due process clauses is the quintessence of constitutional honor, America’s paradigmatic non-delegable, non-volitional governmental duty. One must reject, therefore, the so-called “Constitution of necessity” -- the proposition that security, particularly as defined by the Executive, is the predominant constitutional duty -- because that theory permits *any* governmental conduct no

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408 “The connection between honor and natural rights in the founding generation marks an important departure from traditional forms of honor. *Democratic honor frequently (although not always) is tied to universal principles of right rather than to concrete codes of conduct applicable to only one group.*” KRAUSE, *supra* note 185, at 107 (emphasis added, endnote omitted); *see also*, e.g., Burley, *supra* note 48, at 484.
409 See *infra* notes 466-86 and accompanying text.
410 E.g., *THE FEDERALIST* No. 14 (James Madison) stated “the leaders of the revolution ... pursued a new and ... noble course. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate.” *See also*, e.g., *supra* notes 256-65 and accompanying text.
matter how dehumanizing, no matter how degenerate, no matter how atrocious. Therefore, in faith
with the Founders’ plan under the Declaration, constitutional law should be understood pursuant to
the ennobling principles of Kantian honor, not Consequentialism. Because governmental failure to
act morally regardless of even the direst consequences is evil per se, the sacrifice and “sacred
Honor” of due process surpass any purported duty of “necessity.”

In that basic sense, the
Constitution is, must be and should be a “suicide pact.”

The “Not a Suicide Pact” Metaphor and the Constitution of Necessity –

Although entirely sensible, the link between Kantian honor and the Constitution butts
against much scholarly sentiment as well as the arguable letter of prevailing jurisprudence. A
quarter of a century ago, the United State Supreme Court stated tersely, “We do not think the [Due
Process] Clause lays down any such categorical imperative. We have repeatedly held that the
Government’s regulatory interest in community safety can, in appropriate circumstances, outweigh
an individual’s liberty interest.”

As the highlighted portion emphasizes, the Court allows itself a
bit of maneuvering leeway, acknowledging the possibility that in “appropriate circumstances”
safety and security will not overwhelm liberty. Even so, the best understanding is that in response
to security threats, liberty interests must fall.

411 In this regard, we should reject the assertion of constitutional meaning noted by Prof. Waldron:

[T]o discover the Constitution, we must approach it without the assistance of guides imported from
another time and place. … We ask not whether … the ethics of Kant or Rawls or Bentham or Mill or
Hayek or Nozick … is adequately grounded -- but whether it is the best approach for the
contemporary American legal system to follow, given what we know about markets, ... about
American legislatures, about American judges, and about the values of the American people.
Waldron, supra note 15, at 1537 n. 12 (citations omitted).

412 United States v. Salerno, 481 U.S. 739, 748 (1987)(emphasis added; 18 U.S.C. § 3142(e) of The Bail Reform Act of
1984 permitting certain pretrial detentions without bail is not per se unconstitutional); see also, e.g., Comm. for Pub.
Ed. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980)(Establishment Clause case)(“[O]ur decisions have tended
to avoid categorical imperatives and absolutist approaches …”); Hamdi v. Rumsfeld, 542 U.S. 507, 591
(2004)(Thomas, J., dissenting); Mora v. Gaithersburg, Md., 519 F.3d 216, 222 (4th Cir. 2008).
Ironically perhaps, courts so rule pursuant to their own long-standing dogmatic categorical imperative: “It is ‘obvious and unarguable’ that no government interest is more compelling than the security of the Nation.”\(^{413}\) That proposition unearths the crucial companion judicial categorical dogma: “The Constitution is not a suicide pact.”\(^{414}\) Despite the fervent invocation of the “security of the Nation,” precedent reveals that much less than a national calamity will elicit the “not a suicide pact” argument.\(^{415}\) Some courts assert that failing to enforce any compelling state interest in any situation could render the Constitution a “suicide pact,” perhaps on the logic that while one instance is not likely to jeopardize America’s survival, habitual failure to enforce compelling state interests in the aggregate threatens the continued security of the Nation. Whatever the prevailing rationale, the “not a suicide pact” doctrine envelops preserving safety in general, not solely avoiding utter catastrophes.\(^{416}\)


\(^{414}\) E.g., *Terminiello v. Chicago.*, 337 U.S. 1, 37 (1949)(Jackson, J., dissenting)(“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)(“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).

\(^{415}\) E.g., David J. Barron & Martin S. Lederman, *The Commander In Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 746 (2008).

\(^{416}\) New Jersey, for example, argued that not being a suicide pact, the Constitution “permits courts to consider exigency and public safety when evaluating the reasonableness of police conduct.” *State v. Golotta*, 837 A.2d 359, 368 (N.J. 2003)(anonymous “911” caller claiming vehicle driven erratically reasonably supported stopping vehicle); see also, e.g., *Haig*, 453 U.S. at 307 (no pre-revocation hearing required to revoke passport due to holder’s activities purportedly threatening to national security while in foreign countries); *Ctr. for Nat’l Sec. Study v. U.S. Dep’t of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003)(First Amendment does not require release of information regarding post-9/11 detainees such as names, location and reasons for detention); *Indomenico v. Brewster*, 848 F. Supp. 1136, 1139 (S.D.N.Y. 1994) (“Were the stop here to be held violative of the Constitution, virtually no arrest for speeding would be permissible, with the result that carnage on the highways might well escalate with few limits”); *Palestine Info. Office v. Schultz*, 674 F. Supp. 918, 918-19 (D. D.C. 1987)(Secretary of State’s decision to close Palestine Information Office of the Palestine Liberation Organization in Washington, D.C. to “further the foreign policy interests of the United States” is a constitutional “compelling governmental interest” because “[t]he Constitution is not a suicide pact as the able
The “not a suicide pact” metaphor (or anti-metaphor) underlies what popularly is known as the “Constitution of necessity.” Prof. Paulsen offered a tight summary of the concept:

The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document’s specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements. The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one, where an alternative construction is fairly possible.\(^417\)

Clearly, the Constitution of necessity is steeped in the pragmatism of survival, safety and security.\(^418\)

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\(^418\) E.g., id. at 1257; Posner, supra note 82, at 46; David E. Pozen, *Deep Secrecy*, 62 Stan. L. Rev. 257, 302 (2010); Kunz, supra note 132, at 245. Because this article emphasizes that the Constitution must be both appreciated and confronted on its own terms, it is necessary to mention that some theorists eschew the Constitution of necessity in favor of either extra-constitutionality or unconstitutionality. E.g., Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1383, 1428 (1989) (Executive should openly state it is acting extra-constitutionally); Posner, supra note 82, at 12 (advocates a moral and political but not legal justification for dealing with emergencies); Robert J. Pushaw, Jr., *Justifying Wartime Limits on Civil Rights and Liberties*, 12 Chap. L. Rev. 675, 696 (2009).

Prof. Crocker explicated, “Because a Constitution of necessity provides no clear guidance as to when the principle of necessity trumps normal principles, we at least maintain greater conceptual clarity by placing necessity outside the bounds of the Constitution.” Id. at 246 (emphasis added). Despite Prof. Crocker’s assurance of “greater conceptual clarity,” one must wonder how banishing the Constitution in lieu of enforcing a Constitution of necessity in any manner elucidates “necessity.” Deciding that due to necessity a particular emergency is “outside the bounds of the Constitution” does not explicate either the nature or extent of necessity any better than urging that pursuant to the Constitution’s own implied necessity principles, the given emergency negates the application of one or more constitutional liberties. Neither approach inherently defines when a dangerous situation crosses the threshold into applicable, liberty-nullifying necessity.

Nor is there any reason to suppose that the definition of necessity actually would differ between the two approaches if one believes that the Constitution truly includes an implied necessity doctrine. Because negating liberty pursuant to the Constitution of necessity is functionally equivalent to declaring that due to necessity the Constitution is inapplicable, identical exigencies would justify either approach, unless by fiat one simply declared that a certain level of emergency invokes the Constitution of necessity while a different level of emergency obviates the Constitution altogether.

Whatever their form, extra-constitutional arguments necessarily discredits the Constitution’s essential character as the supreme expression of law, a tenet core to the very identity and meaning of the United States as a nation comprised of, confined by and devoted to law rather than anarchy or tyranny. U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, … shall be the Supreme law of the Land; …”); Ex parte Quirin, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution”)(cited in Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006)); Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 425 (1934) (*per* Hughes, C.J.) (“Emergency does not create power. Emergency
Correspondingly, supporters of the Constitution of Necessity are acutely exasperated by those who will not accept the supposedly unassailable logic that the promises of liberty and justice are worthless if the liberty-based system is threatened by enemies who almost certainly do not value and would not implement a similar system. Judge Posner, for instance, derided with both palpable irritation and incensed disrespect civil libertarians who:

deny that civil liberties should wax and wane with changes in the danger level. They believe that the Constitution is about protecting rights rather than about promoting community interests, a belief some civil libertarians ground on a quasi-religious veneration of civil liberties coupled with a profound suspicion of the coercive side of government ...

It appears inconceivable to these purported realists that morality’s dominion exerts the highest duty, the noblest calling, the ascendency of humanity, which explains the otherwise anomalous requisite that doing the right thing transcends doing the good thing. They deride the courageous idea that the true victory, indeed the definitive conquest comes from defying iniquity when immorality is most seductive and seemingly sensible. They deny that understanding and undertaking the responsibility of morality defines the singular decency, nobility and worth of humanity. Such is, of course, the courage to accept the sacrifice and sacred honor of morality when every arguably reasonable impulse urges otherwise.

does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.”). Thus, the answer to difficult issues must be found in the letter and spirit of the document that defines the Nation, not by deceptively asserting that the Constitution is honorable but charmingly naïve, therefore necessity requires ignoring that document until it is convenient to respect it again. If the Constitution’s purported naiveté is perilous, then either forthrightly amend the document or rename it as it is no longer a constitution, but rather, a statutory scheme arguably of penultimate rank. If, alternatively, the alleged constitutional naiveté is no such thing, but rather the sacrifice and sacred honor of morality, then we must have the courage to obey it.

419 E.g., Paulsen, supra note 417, at 1282-83. “The alternative is near-absurdity: … that adherence to the Constitution might require destruction of the Constitution.” Id. at 1258-59.

420 POSNER, supra note 82, at 41-42. In stark contrast, Judge Posner seems to harbor little if any suspicion “of the coercive side of government.” His discussion of police powers does not seriously consider the possibility that law enforcement might make willful or inadvertent mistakes in the course of national security investigations.
True, these consequentialists find more than a modicum of backing not only in the aforementioned judicial precedents but also in the words and deeds of some of America’s greatest patriots. Candor requires citation to illustrative instances. Despite the previously quoted arguably deontological positions of Revolutionary War patriots Patrick Henry and Thomas Paine, in an 1810 letter Thomas Jefferson offered:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

Consequentialists appeal as well to The Federalist, in particular Hamilton’s Federalist No. 23 which addresses the President’s “war powers” noting, “circumstances which may affect the public safety are [not] reducible within certain determinate limits,... there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency.” In Federalist No. 41 Madison arguably accepted Hamilton’s sentiment by posing an eloquent but doctrinaire rhetorical question, “With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense?” Yet therein, Madison expressed as well deliberate ambivalence, noting with deep caution that,

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421 Supra notes 134-37 and accompanying text.
423 In this regard, many scholars argue that, as had the drafters of the Declaration, the Framers of the Constitution embraced the Lockean idea, likewise espoused by Montesquieu, that individuals relinquish the freedom but danger of “the state of nature and the consequent identification of the end of government as individual liberty, understood as individual security.” Pangle I, supra note 38, at 35.
424 THE FEDERALIST No. 23, at 147 (Alexander Hamilton)(Jacob E. Cooke ed., 1961)(original emphasis omitted). Federalist No. 23 stated further, “[War] power ought to exist without limitation ... The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”
425 THE FEDERALIST No. 41, at 270 (James Madison) (Jacob E. Cooke ed., 1961). Indeed, the proposition that “safety” should know no “constitutional shackles ... is one of those truths which, to a correct and unprejudiced
Not the less true is … that the [civil] liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal.\footnote{Id. No. 41 (James Madison)(emphasis added).}

Furthermore, Madison proclaimed in Federalist No. 51, “Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.”\footnote{Id. No. 51 (James Madison).} Thus, even if he believed that necessity might trump liberty,\footnote{“A wise nation will … not rashly preclude itself from any resource which may become essential it its safety …” \textit{Id.}} Madison emphasized as strongly that “justice” is the paradigmatic reason for government, therefore “extensive” loss of liberty – of justice -- for the sake of safety is “fatal.”

His embrace of essential justice demonstrates Madison’s crucial agreement with the Founders that a nation lacking liberty is no legitimate governor. We must remember that it was Madison who unequivocally instructed future Americans to improve and better the Founders’ precepts of government: “[T]he leaders of the revolution … pursued a new and … noble course. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate.”\footnote{The Federalist No. 14 (James Madison).} Perhaps for that reason, Madison ended Federalist No. 41 with a detailed expression of confidence that the proposed Constitution coupled with America’s dynamic spirit would accommodate both military necessity and liberty.\footnote{Possibly the greatest irony is that arguably the Constitution is the product of necessity theory. The Framers’ mandate from Congress was to repair the Articles of Confederation, not to annul that document with mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reason.” The Federalist No. 23 (Alexander Hamilton). Hamilton’s and Madison’s unacceptable, off-putting, anti-intellectual dogmatism that only fools, dupes, and contrarians would demand an actual justification for necessity’s primacy stands in sharp contrast with the detailed logical and historical explanations they offered when addressing myriad other topics in The Federalist.}

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Proponents of the Constitution of necessity fondly invoke Abraham Lincoln who temporarily but likely unlawfully suspended *habeas corpus* during the Civil War. Additionally, in violation of acts of Congress, Lincoln subjected civilians far from actual combat to military trials and punishments for violating military orders. For what it is worth, Lincoln viewed his constitutional trespass as very limited in both duration and reach, unlike the present “war on terror” which is worldwide in scope and of unlimited duration, potentially limiting, if not undoing perpetually constitutional liberties. That being said, doubtless the proponents of the Constitution of necessity enjoy not insignificant support from a range of respected sources.

*The Constitution of Necessity’s Methodology* --

A word or two is appropriate regarding how this purported Constitution of necessity actually works. Although proponents do not agree on every aspect of its application and may differ on the precise philosophical-jurisprudential roots of its justification, usually the argument is expressed an entirely new framework for American government. Furthermore, the Framers “ignored … the requirements of Article XIII of the Articles of Confederation that any amendments be approved by the state legislature of every one of the thirteen states within the Confederation.” Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. Pa. L. Rev. 707, 729 (2009).

431 E.g., Michael Kent Curtis, *Lincoln, The Constitution of Necessity, and the Necessity of Constitutions: A Reply to Professor Paulsen*, 59 Me. L. Rev. 1, 11-16 (2007). In his July 4, 1861 Special Address to Congress, Lincoln stated that the President would violate his oath, “if the government should be overthrown, when it was believed that disregarding the single [instance of constitutional] law, would tend to preserve it.” Paulsen, *supra* note 417, at 1263; *see also*, e.g., Levinson & Balkin, *supra* note 430, at 724; Crocker, *supra* note 84, at 234.

432 E.g., Curtis, *supra* note 431, at 11. Interestingly, in one highly debatable but fascinating regard some argue that President Lincoln treated the Constitution as a suicide pact (although for purposes starkly different than assuring due process). He could have sacrificed the extant Union – let the South secede – rather than risk the Constitution by fighting a war which the North might well have lost. After all, the presidential Oath requires the Executive to preserve the Constitution, not preserve the Union. Prakash, *supra* note 7, at 1305-06. Therefore, one could argue that although he did not believe liberty is a great enough value, Lincoln accepted that some ideas – specifically, to borrow *post-bellum* phrasing, “one nation indivisible” – are so intrinsic to the Constitution that their preservation is worth risking the Nation itself.

433 Scholars have noted four paradigmatic theories regarding constitutional emergency powers of which aspects one, three and four could support a Constitution of necessity:

(1) “Constitutional relativists,” … believe that executive discretion during emergencies is largely unbounded; … (although some proponents] concede that the appropriations power and other legislative powers can be used to check executive abuse. ... )
somewhat disingenuously as balancing costs and values when security purportedly conflicts with liberty. Understandably, proponents of the Constitution of necessity insist that striking the proper balance is not based on empowering government for its own sake.\textsuperscript{434} Rather, the ostensible balance is a means to protect the safety of the greater society (not necessarily the safety of Society’s citizenry as individuals)\textsuperscript{435} even if the price is allowing the Government to abate or abolish liberty interests, possibly for an indeterminate duration.\textsuperscript{436}

While its proponents employ soothingly reasonable rhetoric, balancing is not truly the method. Rather, the imagery of balancing helps distract and distort the reality that in the last analysis, as it must be, the Constitution of necessity is uncompromising. Although coming to an the opposite resolution, no less than Kantian honor, the Constitution of necessity seeks the elementary unit, the value monism, the bedrock premising the Constitution that answers to the ultimate

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(2) Theorists of “extralegal emergency powers,” … believe that … [i]f executives or other officials desire to take extraordinary measures, they must deliberately step outside the legal system to do so, hoping for some sort of ex post political ratification. …

(3) Theorists who praise “common law emergency oversight” hold that ex post judicial review, under constitutions or statutes, can provide government with needed flexibility during emergencies while ensuring that expanded powers are contracted again once the emergency has passed. ...

(4) Finally, “emergency legal formalists,” … propose ex ante statutory and constitutional regulation of emergencies, rather than ex post judicial regulation in the common law mode. Their main mechanisms involve constitutional provisions and framework statutes that are supposed to provide clear and specific limitations on governmental powers before an emergency event occurs. Vermule, \textit{supra} note 413, at 195-96 (quoting William Scheuerman, \textit{Emergency Powers}, 2 \textsc{Ann. Rev. L. & Soc. Sci.} 257 (2006)(footnotes omitted)).

434 “When it is said that liberty must be traded off for the sake of security, what is meant by ‘security’ is people being more secure rather than governmental institutions being more powerful.” Jeremy Waldron, \textit{Safety and Security}, 85 \textsc{Neb. L. Rev.} 454, 460 (2006).

435 “As Hobbes reminded us, governments have to design their security strategies in broad terms, taking account of the overall impact of what they do. They cannot be expected to undertake the detailed evaluations that this account requires, when they are addressing the safety of a quarter billion people.” \textit{Id.} at 492.

436 It is no answer to bootstrap by arguing that security is not an end in itself, but rather a means to attain diverse goals such as both liberty and safety from terrorism. \textit{Id.} at 462-63, 471-72. Of course, a society that holds liberty as the ultimate trump over life, bodily safety and property does not advocate a Constitution of necessity in terms criticized in this article. By contrast, if we confess that are not secure without liberty, \textit{e.g.}, Brooks, \textit{supra} note 10, at 128, yet are willing to render liberty subject to necessity’s domination, we live under a Constitution of necessity.
question: which takes precedence if you can have only one, safety or liberty. The Constitution of necessity puts security above all.

To this end, most proponents predictably allow the Executive substantially unreviewable if not absolute authority to curtail or to eliminate liberties during those emergencies deemed sufficient to trigger the Constitution of necessity. Typical is the proposition of Profs. Vermeule and Eric Posner that:

executive officials [should take] aggressive action in response to perceived security threats, and courts and Congress [should defer] to or approved of the executive's initiatives. ... [I]t is therefore desirable and indeed inevitable that liberties will be sacrificed when security threats arise. ... Because those of us outside the executive branch are unqualified to assess the balance struck, our position must be one of outright deference.

Similarly, an untouchable Executive is the pivot of the notorious memoranda published by high ranking officers of the Department of Justice's Office of Legal Counsel during the presidency of George W. Bush. Advocates urge that there is no reason to doubt the Executive's pragmatic

437 E.g., Paulsen, supra note 417, at 159-63.
438 Cole, supra note 11, at 1330 (discussing ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 12, 16 (2007)). Indeed, according to Posner and Vermeule, the Executive may respond to security threats by imposing torture, suppression of dissent, and other curtailments of due process. Id. at 1330-31; see also, e.g., Crocker, supra note 84, at 238-40 (discussing the theory of the unreviewable Executive).

assessment of danger, or to suspect its good faith or to presume that it will overreach. Moreover, according to the argument, not entrusted with the daily operation of the Nation’s foreign affairs, the other branches of government are prone to more and greater mistakes regarding the rarified realm of international relations and national security than is America’s constitutionally designated expert, the Presidency.

The Constitution of Necessity – Consequentialist Rejoinders --

Not surprisingly, opponents of the Constitution of necessity challenge that theory’s empirical premises. For instance, Judge Posner expressed the typical consequentialist rationalization for torture-like interrogation, if not actual torture: if the situation “is dire enough and the value of the information great enough, only a diehard civil libertarian will deny the propriety of using a high degree of coercion to elicit the information.” The problem with the Posnerian approach is not that we can never know when the situation “is dire enough.” Rather, the problem is we cannot always know when it “is dire enough.” One empirical deficiency of the Constitution of necessity, then, stems from “slippage,” that is, “the [necessity] defense must apply to conduct undertaken before the threat materializes. It is nearly always impossible to know whether the threat really would have been realized ...”

440 E.g., Cole, supra note 11, at 1333. While some proponents would not fully exclude legislative or judicial review, such oversight would be extraordinarily deferential and, thus, prone to uphold executive prerogative except in the unlikely event that the Executive acted wholly irrationally.
441 Id.
442 POSNER, supra note 82, at 81.
443 Reasonable people could agree that certain situations unreservedly are “dire enough” even if out of caution, the chosen demarcation excludes less egregious circumstances that almost certainly are sufficiently “dire.” For instance, from a reasonable consequentialist perspective, surely the situation “is sufficiently dire” if beyond reasonable doubt a captured suspect knows but will not reveal the location of five “ticking” nuclear bombs, scattered among ten different major American cities. The carnage wrought by fewer, even one ignited nuclear weapon may be calamitous enough, but surely the detonation of five nuclear bombs in five key cities would decimate American society.
444 Kunz, supra note 132, at 244; see also, e.g., Henry Shue, Torture, in TORTURE: A COLLECTION 56-57 (Sanford Levinson ed., 2004); Crocker, supra note 84, at 255.
Thus, while supporters of the Constitution of necessity earnestly contend that the Executive would employ extreme measures rarely and prudently to avoid a public backlash (if governmental efforts at maintaining secrecy fail), theory and experience evince that relativism, fear and poor judgment encourage officials to err on the side of necessity, rather than liberty. Given the political realities of a society esteeming justice but nonetheless inclined to anxiety, edginess and bigotry, any official investigating a credible suspect will be tempted to take extreme steps lest some terrible event occur and an angered public demands to know why the suspect who might have had crucial information was not subjected to every form of intensive interrogation. Torture, torture-like conduct and similar immoderate measures likely would not be limited to the most certain instances of the “ticking time bomb” scenario. Instead, Society could learn to tolerate, even become comfortable with excessive measures in response to less than highly credible threats of significant danger. Thus, arguments “that there is no reason to fear executive overreaching … during emergencies and no reason to worry that emergency measures will outlast the emergency … are blind to history, the social psychology of fear, and the extraordinary pressures to safeguard security at all costs that executives inevitably experience during emergency periods.”

Another consequentialist critique warns that if security is the core principle overwhelming all others then the most depraved, horrific practices may be inflicted on unlimited numbers of

445 E.g., POSNER, supra note 82, at 83-84.
446 “Indeed, most of human history teaches us that reliance on executive good intentions is an insufficient safeguard against abuse of power.” Brooks, supra note 10, at 128.
447 Crocker, supra note 84, at 260. This is not to say that investigators always will succumb to such temptations. Rather, the argument is that they will do so with sufficient regularity until that regularity becomes customary at which point investigators might attempt increased incursions into liberty to revise norms yet again. Each time, the chance of returning to pre-exigency normalcy becomes less probable. E.g., Cole, supra note 11, at 1334.
448 In fact, even if less oppressive interrogation yields reliable information, investigators might indulge in torturous interrogation both to test whether the suspect still has any guilty knowledge and to assure the public that nothing was left untried to safeguard lives, health and property. Thus, the prospect of torture becomes not a theory, but “an omnipresent, pressing question.” Crocker, supra note 84, at 260.
449 Cole, supra note 11, at 1334.
suspects – indeed upon unlimited numbers of entirely innocent others -- if that is what it will take to restore national safety. Prof. Crocker expressed that potential through horrific logic: “Then the loathsome idea arises -- after failing to respond to the usual methods, would the suspect respond to the threatened or actual torture of one or both of his daughters? Would officials be justified in perpetrating such harm? Under the standard justification relying on necessity arguments, the answer must be ‘yes.’” For similar reasons, Society will become more tolerant of less extreme but nonetheless inappropriate liberty incursions for situations of ever decreasing exigency. Thus deprivations “quickly become routinized.” Rosa Brooks’ warning, therefore, carries the ring of likelihood, “Without a clear and consistently reaffirmed prohibition on torture, we will quickly become a society that accepts far worse.”

Correspondingly, in theory at least, the Constitution of necessity could justify invalidating every liberty express or implied in that document. The appeal to Lincoln avers that sometimes one must “cut of a limb to save the tree;” but, of course, there comes a point where so many parts are removed or suspended that the tree dies. “Nor is Lincolnesque preservation of the Constitution at all costs a worthy end, for that would suggest that we may suspend or discard every constitutional provision to ‘save’ the Constitution.”

One other general retort merits very brief reference. Many commentators vigorously dispute not only the legality, but the wisdom of President Lincoln’s extra-constitutional tactics.

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450 Crocker, supra note 84, at 256-57 (citing, inter alia, John Conroy, UNSPEAKABLE ACTS, ORDINARY PEOPLE 92 (2000)); see also, e.g., Kunz, supra note 132, at 244.
451 E.g., Schultz, supra note 439, at 206-208 (discussing detention of suspects, warrantless review of bank records and similar procedures).
453 Id.; see also, e.g., Crocker, supra note 84, at 255.
454 Prakash, supra note 7, at 1305; see also, e.g., Brooks, supra note 10, at 128 (“Our security depends on our liberty. In an open society we can separate good policies from bad, and correct our errors; ...”).
455 E.g., Curtis, supra note 431, at 18-28.
Should those analysts be correct, one well might conclude: if America’s most revered president mistakenly presumed executive license to contravene the Constitution, we cannot concede comparable authority to others who, even if admirable, almost certainly will lack the sagacity of a Lincoln. If Lincoln was wrong, others using the same power likely will be worse.\textsuperscript{456}

\textit{The Constitution Must Be a Suicide Pact --}

The foregoing reveals that the Constitution of necessity is vulnerable to many pragmatic criticisms.\textsuperscript{457} Nonetheless, let us assume that every practical critique fails. Let us assume that under the Constitution of necessity, all officials act with perfect judgment and never make errors. Such results assuage only outcome-based challenges. The foundational argument against the Constitution of necessity is that it is consequentialist, not deontological; or, if it elevates survival as a moral apex, the Constitution of necessity does so erroneously.

The Constitution is the flowering of the Declaration of Independence’s pronouncement that legitimate government must “secure” deontological principles the Founders entitled “unalienable Rights;”\textsuperscript{458} thus, government exists to fulfill Humanity’s prime responsibility: always to be moral in the pursuit of happiness. Pursuant to the unparalleled magnitude of that moral imperative, the Founders pledged their “Lives, [] Fortunes and [] sacred Honor,” and expected all Americans then and thereafter to do likewise for the sake of attaining and maintaining legitimate government under law.\textsuperscript{459} As such, the Constitution is the legal component of our responsibility as a nation and as

\textsuperscript{456} \textit{Id.} at 28.
\textsuperscript{457} Arguably such pragmatic objections address only the matter of policy, that is, whether the Constitution of necessity is a good idea, not whether it is an infirm legal theory. That is because potential or actual misuse neither negates constitutional authority nor proves that such authority does not exist (although the potential that abuses will overwhelm legitimate implementations may provide vital clues that the constitutional theory itself is fatally flawed). \textit{E.g.}, Paulsen, \textit{supra} note 417, at 1259. Disproving the \textit{bona fides} of the Constitution of necessity thus requires disproving its premises, not anticipating its possible abuse.
\textsuperscript{458} \textit{See infra} notes 466-86 and accompanying text.
\textsuperscript{459} \textit{See supra} notes 226-36 and accompanying text.
individuals to hone the Founders’ deep but imperfect understanding of those moral principles that, borrowing a term from the presidential oath, government must “preserve, protect and defend.”\footnote{U.S. CONST. art. II, § 1, “Before he enters on the execution of his office, he shall take the following oath or affirmation: -- ‘I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.’”} \footnote{See supra notes 256-65 and accompanying text.} Indeed, that is precisely what the Founders hoped and expected.\footnote{See supra notes 71-76 and accompanying text.}

This leads us back to the core of Deontology. As earlier noted, within any system of morality must be a singular, controlling precept, the value monism that defines the moral paradigm, providing the point of departure from which all other ethical maxims and applications are understood.\footnote{See supra notes 353-73 and accompanying text.} Writing shortly after the Revolution, Immanuel Kant explained why Lockeian survival theory cannot be human society’s highest moral value. Rather, dignity comprehended by the Categorical Imperative is the value monism of any moral system and regime of rights enforced by law.\footnote{See supra notes 373-97 and accompanying text.} Therefore, despite its pre-Kantian origin, the Constitution must advance Kantian ethics to be true to “sacred Honor’s” task that successive generations improve the Founders’ principles through a deepening appreciation of what morality is. Anything less fosters governmental immorality which, as explained above, is exactly contrary to the Declaration of Independence’s justification for the American Revolution. \textit{If morality requires the Government to risk even the greatest sacrifice, to jeopardize its own existence rather than betray what is right, then Government must do so. In that essential regard, the Constitution is a suicide pact.}

The concluding discussion of this section shows that, exactly as Kant recognized it should be,\footnote{See supra notes 256-65 and accompanying text.} constitutional due process has become -- and arguably always was -- the moral core, soul and
psyche of American law the Founders rightly demanded, for as Felix Frankfurter exclaimed over sixty years ago, due process is “ultimate decency in a civilized society.”

465

Consistent with Its Roots in the Declaration of Independence, the Constitution Embraces the Transcendence of Rights --

It is long and well established that the Constitution’s concept of legitimate government is derived from and loyal to the Declaration of Independence.466 The Framers of the Constitution asked the fundamental question addressed by the very text of the Declaration: what is good and proper government? They based their answer in significant part on “self-evident truths concerning man’s natural rights and the origins and purposes of government.”467 It is no surprise, therefore, that the Judiciary steadfastly has emphasized the logical, inextricable connection between the Declaration and the Constitution.468 Nearly 140 years ago the Supreme Court wrote, “But the fundamental rights of life, liberty, and the pursuit of happiness considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress … in securing … the blessings of civilization under the reign of just and


467 Epstein, supra note 180, at 78.

468 Recently the Ninth Circuit noted, “The Declaration of Independence was the promise; the Constitution was the fulfillment.” Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1031 (2010) (quoting Chief Justice Warren Burger as quoted by Charles Alan Wright, Warren Burger: A Young Friend Remembers, 74 TEX. L. REV. 213, 219 (1995)).
equal laws, …” Identically, Louis Brandeis famously summarized four decades after Yick Wo, “The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.”

Justice Brandeis’ conclusion, adopted by subsequent decisions, verifies the Court’s turn-of-the-Twentieth-Century observation that, “The first official action of this nation declared the foundation of government” as the Declaration’s enumeration of “unalienable rights.” Indeed, the Court frequently has reminded us of the Constitution’s linkage with the Declaration. Cotting explicated elegantly:

While [the Declaration’s] … principles may not have the force of organic law, or be made the basis of judicial decisions as to the limits of rights and duties, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.

Contemporary justices as diverse as John Paul Stevens and Clarence Thomas embrace the longstanding judicial recognition that the Declaration substantially informs the meaning and scope

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470 Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting, discussing the right of individual privacy).
474 Cotting, 183 U.S. at 107 (emphasis added, quoting Yick Wo, 118 U.S. at 369).
of the Constitution, a perspective steadfast with the understanding of America’s earliest patriots and leaders. For instance, The Federalist No. 39 explained:

The first question [regarding the proposed Constitution] … is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.

John Quincy Adams likewise noted, “The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, founded upon one and the same theory of government.” Samuel Adams agreed writing after the ratification of both the Constitution and the Bill of Rights, “This Declaration of Independence was received and ratified by all the States in the Union and has never been disannulled.”

Surely, for all the reale politik and compromises of principle confirm by historians that explain the final document, the Constitutional Convention nonetheless hoped to create the foundation that could not immediately, but ultimately would kindle full faith with the Declaration’s philosophy. In light of these precedents, Prof. Larson correctly concluded, “the Declaration was … the declaration of one American people declaring the existence of one American nation. It is

477 THE FEDERALIST No. 39 (James Madison)(emphasis added).
480 “The variety of opinions and disagreements of 1787-1788 did not call into question the fundamental political principles asserted in the Declaration of Independence.” Epstein, supra note 180, at 78.
therefore entirely appropriate to date the legal existence of the American nation from July 4, 1776, … The American nation preceded … the Constitution, which “perfected” that nation. 481

Accordingly, the Framers intended the Constitution to form not simply a positive governmental system, but a moral basis for governing American society as directed by the Declaration’s deontology that legitimate government must preserve and protect the “unalienable Rights” derived from “Nature and Nature’s God.” They fostered a political philosophy imbued deeply with “moral goals.” 482 The Framers believed the very nature of their Constitution would establish “... a profound and lucid consensus on the nature of ‘justice,’ the ‘general welfare,’ and, preeminently, the ‘blessings of liberty.’” 483 Indeed, urging the ratification of the Constitution, Federalist No. 43 applied the very reasoning of the Declaration, underscoring “the transcendent law of nature and of nature’s God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed.” 484

In sum, while one may find some support for the Constitution of necessity in their writings, the early Patriots embraced the Declaration’s affirmation of both the transcendence of morality and the moral duty of government to be just above all else. The earlier quoted Federalist No. 51 encapsulated the precept boldly, “Justice is the end of government. It is the end of civil society. It

481 Larson, supra note 226, at 702; see also, id. at 737.
482 Thomas Paine succinctly, for example, stated that the Revolution instituted “Government founded on a moral theory …”. Pangle I, supra note 38, at 9 (discussing THOMAS PAINE, Rights of Man, THE BASIC WRITINGS OF THOMAS PAINE 148 (Willey Book Co. 1942)).
483 Pangle I, supra note 30, at 9
484 THE FEDERALIST No. 43 (James Madison). Referring as well to transcendent principles, John Jay reminded that although government is necessary to protect liberty, “the people must cede to it some of their natural rights in order to vest it with requisite powers.” THE FEDERALIST No. 2 (John Jay). James Wilson, signer of both the Declaration and the Constitution, likewise believed in the application of eternal principles: “we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects.” John D. Bessler, Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement, 4 N.W. J. L. & Soc. Pol’y. 1, 194 n. 907 (2009) (quoting 1 Collected Works of James Wilson ch. III (“Of the Law of Nature”)(Kermit L. Hall & Mark David Hall eds., 2007)).
ever has been and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.”

Indeed, the District of Columbia Circuit verified that Madison’s philosophy expresses “truths [that] are immutable – they live – they govern us – and they compel our course of action …”

As the foregoing discussion shows, the quest for governance secured in deontological morality is a crucial, if not the fundamental basis for the Revolution and the Constitution. Nonetheless, “the twentieth century has seen a decline in the faith in natural justice that sparked the Declaration,” in favor of law unapologetically based on the partiality of American lawmakers arguably without regard to whether such laws conform with deontological moral principles. This new judicial trend opines that to be “fundamental,” a right must be “fundamental to our scheme of ordered liberty … or as we have said in a related context, whether ‘this right is deeply rooted in this Nation’s history and tradition.’”

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485 The Federalist No. 51 (James Madison).
486 Nat’l Treasury Employees Union v. Nixon, 492 F. 2d 587, 616 (D.C. Cir. 1974) (quoting The Federalist No. 51); see also, e.g., Missouri v. Jenkins, 495 U.S. 33, 81 (1990) (Kennedy, J., with Rehnquist, C.J., and O’Connor and Scalia, JJ., concurring in part and concurring in the judgment; quoting The Federalist No. 51); Haney v. County Bd. of Ed. of Sevier County, Ark., 410 F. 2d 920, 926 and n. 3 (8th Cir. 1969) (quoting The Federalist No. 51); United States v. Hamilton, 428 F. Supp. 2d 1253, 1259 and n. 20 (M.D. Fla. 2006) (quoting The Federalist No. 51, to support the proposition that, “It is the Court that is called upon to make the hard decisions necessary to integrate Congressional mandates with the requirements of justice, …”).
488 Id. (“In Duncan v. Louisiana, [391 U.S. 145, 149 n. 14 (1968),] the Court recognized that its incorporation of Bill of Rights provisions had reflected the partial abandonment of an earlier search for transcendent principles of ordered liberty.”) The Duncan Court offered that the concept of “fundamental fairness” animating due process relates to American values, conceptions and principles. Id. The Supreme Court recently stated that Duncan’s approach is preferable to imagining whether particular procedure is essential to the very definition of civilized society. McDonald v. City of Chicago, Ill., 130 S. Ct. 3020, 3034 (2010).
489 McDonald, 130 S. Ct. at 3036 (The Fourteenth Amendment’s Due Process Clause requires the States to abide by the Second Amendment; quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

Granted, some esteemed jurists have suggested that constitutional principles are informed by extant American tradition rather than immutable values. E.g., Rochin v. California, 342 U.S. 165, 169 (1952) (per Frankfurter, J.); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Nonetheless, Frankfurter’s and Harlan’s writings evince at least cautious appreciation of Deontology. E.g., Solesbee v. Balkom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (“the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.”) (Emphasis added). Justice Harlan alluded to understanding liberty as a “rational process.” Id. Similarly, although offering that “Due process of law … is
Regardless of some judicial timorousness to evoke eternal principles, modern “substantive due process” decisions have not forsaken natural law, such as extolling the enduring institution of marriage.\footnote{\textit{Alshlure, supra} note 487, at 523-34 (discussing, \textit{inter alia}, Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating as applied to married couples laws prohibiting the dissemination of and information regarding contraceptives)). As Prof. Alshlure aptly concluded, “Old due process standards never die.” \textit{Id.} at 529.} Indeed, not ten years ago, the Supreme Court reiterated that moral transcendence premises the Constitution. Invalidating state laws criminalizing privately performed homosexual conduct between consenting adults, \textit{Lawrence v. Texas} identified the constitutional issue as “involve[ing] liberty of the person both in its spatial \textit{and in its more transcendent sense}.”\footnote{\textit{Alshlure, supra} note 487, at 523-34 (discussing, \textit{inter alia}, Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating as applied to married couples laws prohibiting the dissemination of and information regarding contraceptives)). As Prof. Alshlure aptly concluded, “Old due process standards never die.” \textit{Id.} at 529.} The Court properly accepted that more is at play regarding liberty interests than simple judicial Consequentialism, albeit consequentialism based on American tradition rather than unexpurgated fiat. Abiding by its roots in the Declaration, \textit{Lawrence} correctly identified the constitutional principle “liberty” as “transcendent,” that is, beyond human preferences.

To the extent that it is incompatible with a deontological theory of the Constitution, the \textit{Duncan-McDonald} line of precedent is incorrect, as everything heretofore in this article attempts to prove. Accepting American traditions and applying concepts of “ordered liberty” with no consideration of whether such inherently are decent in a non-Utilitarian sense betrays the sound and worthy principles of both the Revolution and the Constitution. Whatever politically motivated
unfaithfulness mars the birth of this Nation, the Founders’ invocation of deontological morality was
neither a gloss, nor hyperbole, nor a frivolous, cynical distraction. Rather, by pledging life,
property and “sacred Honor,” they established what later would be incorporated into the
Constitution, a “precommitment” to moral rectitude as a substantive command of the law, the very
formality of which would better induce compliance.492

Consequently, the Duncan-McDonald rationale either wrongly denies that Deontological
morality must premise legitimate governmental action or espouses the uncomfortable proposition
that morality be damned, due process is no more than a political device to serve consequentialist
ends.493 It simply makes neither logical nor jurisprudential sense to envision a liberty interest that
is fundamental to the United States but nonetheless is immoral in either form or application.

Due Process Is the Constitution’s Value Monism, Thus Due Process Is the Controlling Concept that
Should Afford No Exceptions.

It comes as no surprise that, although often expressed in terms of mores and beliefs, due
process is the abiding morality of our society and, accordingly, the bedrock of American law:

It is now the settled doctrine of this Court that the Due Process Clause embodies a
system of rights based on moral principles so deeply embedded in the traditions and
feelings of our people as to be deemed fundamental to a civilized society as

492 Under the theory of “precommitments,” the Constitution vouchsafes the non-delegable duty to protect
“unalienable Rights” as the dominant responsibility of Government. By so doing, the Nation accepts as
incontrovertible its precommitment so that it will not forsake its duty in situations where faithful abidance is
particularly painful – when “we will be tempted, especially in times of stress, to fall short of those ideals.”
Cole, supra note 11, at 1332 (discussing precommitment theory). See also, e.g., David Cole, The Poverty of
493 Of course, there may be many ethical but different ways to enforce substantive and procedural due process.
For example, perhaps a trial by a jury of one’s peers is not indispensible to due process in civil cases, or, in
certain instances might actually be counter-productive. Trial-like administrative hearings with simple
evidence rules may promote the dignity of claimants who would otherwise be unable to afford costly, formal
(2005).
conceived by our whole history. *Due Process is that which comports with the deepest notions of what is fair and right and just.*

Three years earlier, Justice Frankfurter stated the idea in one earlier quoted powerful line worth repeating: the due process clause evinces “ultimate decency in a civilized society.”

Frankfurter’s references to *fundamentals* of “a civilized society,” reflecting “ultimate decency” and “the deepest notions of what is fair and right and just” stem from the Supreme Court’s perspective that, consistent with its origins form the Declaration, constitutional law, particularly *liberty*, is “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice.”

Therefore, as the judiciary tells us, the due process clauses of the Fifth and Fourteenth Amendments are the repository of America’s “deepest notions of what is fair and right and just.” Indeed, although the Constitution, particularly its Bill of Rights, contains many “enumerated rights” of somewhat greater specificity than the due process clauses themselves, constitutional law properly and wisely informs: (1) such explicit rights emanate from the overarching idea of due process and (2) absent their explicit enumeration within the Constitution, due process alone would be sufficient.

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495 Adamson, 332 U.S. at 61 (Frankfurter, J., concurring in part).
497 The Fifth Amendment applies only to the Federal government while the Fourteenth Amendment applies to State government and localities. E.g., S.F. Arts & Athletics, Inc. v. U.S. Olympics Comm., 483 U.S. 522, 543 n. 21 (1987); Wayte v. United States, 470 U.S. 598, 608 n. 9 (1985). Understandably however, the definition of due process is the same for both amendments. E.g., Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975)(implied equal protection component of due process under the Fifth Amendment is identical to express equal protection and due process components under the Fourteenth Amendment); United States v. Martinez, 621 F.3d 101, 108 n. 3 (2d Cir. 2010)(same); United States v. Nagel, 559 F.3d 756, 760 (7th Cir. 2009)(same).
to derive those rights as integral to that document. Due process is America’s value monism from which free speech, freedom from unreasonable police conduct, the right to defense counsel in a criminal prosecution, equal protection and every other fundamental specific constitution right derives.\textsuperscript{498}

The value monism of due process is proved by Bolling v. Sharpe.\textsuperscript{499} Although the Fourteenth Amendment contains both a due process and an equal protection clause, the Fifth Amendment enumerates only the former. Nonetheless, the Supreme Court ruled in Bolling, a companion case to Brown v. Board of Education of Topeka,\textsuperscript{500} that mandatory racial segregation of public school students in the District of Columbia – a federal jurisdiction -- violates the Fifth Amendment’s due process clause which subsumes an implied guarantee of equal protection under law. Within a remarkably short three page opinion, the Court pithily stated its rationale in terms of overarching morality, “[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not morally exclusive.”\textsuperscript{501} Understandably, the Court has not deviated from Bolling’s holding and rationale.\textsuperscript{502} Nor is Bolling to only instance of “substantive

\textsuperscript{498} In that regard, we again see that in the realm of moral precepts, the metaphor of balancing is inapt. It is not that any given right is more important than any other. Rather, depending on the particular situation under review, one or more rights might apply while others do not. Recently, regarding free speech, the Supreme Court reaffirmed that very idea. Rulings segregating certain utterances, writings and portrayals from the First Amendment’s ambit because of their purported lack of speech value, are not based on simple cost-benefits analysis. Rather such determinations reflect that a different right better applied to the particular case. United States v. Stevens, 130 S. Ct. 1577, 1585-86 (2010)(statute criminalizing creation, sale or possession of materials depicting animal cruelty is facially overbroad under the First Amendment). For example, access to and possession of child pornography is outside the First Amendment because the pornographic materials themselves are “an integral part” of the crime of producing child pornography. New York v. Ferber, 458 U.S. 747, 761-62 (1982)(discussed in Stevens, 130 S. Ct. at 1586).

\textsuperscript{499} 347 U.S. 497 (1954).

\textsuperscript{500} 347 U.S. 483 (1954)(mandatory racial segregation of public school students violates the Equal Protection Clause of the Fourteenth Amendment).

\textsuperscript{501} Bolling, 347 U.S. at 499.

due process,” involving rights not expressly found in the constitutional text, yet derivative of the “ordered liberty” encompassed within both due process clauses.\footnote{503}

Similarly, it is axiomatic constitutional law that the Due Process Clause of the Fourteenth Amendment does not fully “incorporate,” that is does not \emph{per se} mandate onto the States the rights set forth in the Bill of Rights.\footnote{504} Rather, through a right-by-right review, the judiciary has applied to the States pursuant to the Fourteenth Amendment those provisions of the Bill of Rights that derive from the American “scheme of ordered liberty and system of justice.”\footnote{506} In other words, due process requires States and localities to respect those rights essential to the very legitimacy of government. As a result of this right-by-right evaluation known as “selective incorporation,”\footnote{507} every discrete liberty under the Bill of Rights has been applied to the States through the Fourteenth Amendment’s Due Process Clause except the Sixth Amendment’s right to a unanimous jury verdict, the Fifth Amendment’s requirement of indictment by a grand jury and the right to a jury trial under the Seventh Amendment.\footnote{508}

\footnote{503} “It has been ‘settled’ for well over a century that the Due Process Clause[s] `appl[y] to matters of substantive law as well as matters of procedure.” \textit{McDonald}, 130 S. Ct. at 3091 (Stevens, J., dissenting; quoting, Whitney v. California, 274 U.S. 357, 373 (1927)(Brandeis, J., concurring)).

\footnote{504} Such rights, often understood in terms of a general right to privacy, include: sexual conduct privately performed between consenting adults, Lawrence v. Texas, 539 U.S. 558 (2003)(government may not criminalize homosexual sodomy \textit{per se}); access to contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972); the right to choose abortion subject to appropriate restrictions, Gonzales v. Carhart, 550 U.S. 124, 146 (2007); right of otherwise single adults to marry regardless of race, Loving v. Virginia, 388 U.S. 1 (1967); and the general right of parents to raise and educate their children, Pierce v. Society of Sisters, 268 U.S. 510 (1925).

\footnote{505} Justice Black is perhaps the most renown proponent of the judicially discredited theory that the due process clause of the Fourteenth Amendment incorporates every enumerated right in the Bill of Rights, but has no other meaning – covers not other conceivable rights – other than those enumerated rights. Adamson v. California, 332 U.S. 46, 71-72 (1947)(Black, J. dissenting)(Fourth Amendment’s privilege against self-incrimination not applicable \textit{via} the Fourteenth Amendment to state prosecutions), \textit{overruled}, Malloy v. Hogan,378 U.S. 1 (1964); \textit{see also}, Duncan v. Louisiana, 391 U.S. 145, 166 (1968)(Black, J., concurring).

\footnote{506} McDonald v. City of Chicago., Ill., 130 S. Ct. 3020, 3034 (2010)(citations omitted).

\footnote{507} \textit{Id}.

\footnote{508} \textit{Id.} at 3034-35 nn. 12 & 13. In addition, the Supreme Court has yet to adjudicate whether due process includes the Third Amendment (prohibiting mandatory quartering of soldiers in peacetime) and the Eighth Amendment’s provision banning excessive fines. \textit{Id.} at n. 13.
The implied equal protection aspect of the Fifth Amendment’s Due Process Clause, due process engendered rights unwritten in the Constitution’s text, and the “selective incorporation” doctrine evince the singular quality of due process among all rights: fundamental constitutional rights need not be itemized within the constitutional text because due process is applicable to American government on any governmental level. Consequently, adept jurists and other officials would have discerned as specific constituents of due process discrete rights such as equal protection, free speech, religious liberty, criminal defense counsel and freedom from unreasonable police conduct even if such rights were not set forth explicitly in our Constitution. If the sole expression of fundamental rights was simply a due process clause, study and reflection would generate a rich due process jurisprudence spawning the very rights actually extant in the text of the Constitution’s first eight and fourteenth amendments, and many others besides.\textsuperscript{509}

Indeed, when originally interpreted under the Fourteenth Amendment’s liberty clause, principles such as free speech were applied to restrict state action not through an incorporation doctrine, but as derivations of the very notion of liberty itself.\textsuperscript{510} Due process stands on its own as sufficient to reveal those fundamental principles.\textsuperscript{511} As the Court unequivocally concluded, “Due process of law is the primary and indispensible foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the

\textsuperscript{509} One might additionally argue that, even absent a due process clause, the understanding that the Constitution is the legal enforcement of the Declaration of Independence should be sufficient to imply that due process is the Constitution’s pivotal function.

\textsuperscript{510} McDonald, 130 U.S. at 3092 and n. 9 (2010)(Stevens, J., dissenting, citing \textit{inter alia}, Gitlow v. New York, 268 U.S. 652, 666 (1925) and \textit{id.} at 672 (Holmes, J., dissenting)); \textit{see also}, Malloy v. Hogan, 378 U.S. 1, 24 (1964)(Harlan, J., dissenting).

\textsuperscript{511} The presence of an enumerated right may itself be a strong indicator of that right’s fundamental nature. However, as just noted, enumeration is not \textit{per se} proof of fundamentalism, nor does a theory of enumeration limit the meaning of due process solely to those specific rights that are set forth expressly in the Constitution. Rather, full due process analysis is required.
powers which the states may exercise.”\textsuperscript{512} Thus, due process manifests what Justice Frankfurter called an “independent function”\textsuperscript{513} that encompasses every enumerated and unenumerated fundamental right. As such, due process is the Constitution’s elementary particle, the value monism from which all other constitutional rights flow. Thus, a century ago the Court correctly understood the categorical imperative of due process, “The fundamental guaranty of due process is absolute, not merely relative. … [T]he constitutional safeguard as to due process [is] at all times dominant and controlling where the Constitution is applicable.”\textsuperscript{514}

\textit{The Controlling Principle of Due Process is a Kantian-like Perception of Individual Dignity.}

Because it is America’s essential tenet of unalienable rights, it is neither a shock nor a mystery that the courts understand due process to protect the inherent dignity of individuals against even well intentioned governmental excess. Certainly, there is no doubt that, “The Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression.”\textsuperscript{515} Such protection from “oppression,” of course, is the very definition of \textit{liberty} memorialized in the Declaration and put into legal effect by the Constitution. Chief Justice Harlan Fiske Stone was correct, therefore, when he wrote for the Court in remarkably prescient prose, “...
the duty which rests on the courts, in time of war as well as in time of peace, [is] to preserve unimpaired the constitutional safeguards of civil liberty, ...

Given that due process is not only Government’s legal duty, but also its moral duty, we appreciate why when determining whether officials have abused their authority, the courts’ analytical framework emphasizes due process’ ethical breadth. The judiciary has identified that ethical breadth as “fundamental fairness” with which any challenged governmental conduct must comport. Official acts failing to meet fundamental fairness’ minimum are beyond Government’s constitutional competence. The earlier discussed pivotal Bolling v. Sharpe confirmed that fairness is due process’ integral quality: “[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not morally exclusive.” Accordingly, while the courts insist that due process and equal protection challenges must fail if the reviewing court discerns any rational basis to support the specific governmental action, in fact the contested action is unconstitutional only if it offends integral perceptions of fairness, that it, if it is immoral. It could not be

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516 In re Quirin, 317 U.S. 1, 6 (1942)(Stone, C.J.); see also, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 588 (2006)(quoting In re Quirin).
517 Supra note 481-86 and accompanying text.
521 That is why, although purporting to apply “levels of scrutiny” to judge the constitutional merits of different types of governmental actions, ultimately the courts engage in a general “rationality” analysis informed by concepts of fairness. E.g., id. at 336-39. As Justice John Paul Stevens aptly observed, “There is only one Equal Protection Clause. It requires every [official office] to govern impartially. It does not direct the courts.
otherwise because every official act no matter how offensive promotes some reasonable goal or may be shown to serve some rationale purpose albeit a goal or purpose minor in nature and overwhelmed by its resulting unfairness.\textsuperscript{522}

The only remaining matter for resolution is identifying the moral element or elements that inform due process “fundamental fairness.” Even a cursory survey of due process decisions confirms that the crucial moral constituent – the pivotal ethical consideration – to determine constitutional sufficiency is whether the disputed official conduct unduly offends the dignity of an individual, a group of individuals or an entity to

\textsuperscript{522}E.g., Cleburne Living Ctr., 473 U.S. at 446-47 (any legitimate governmental interests that are too “attenuated” from the means and impact of the challenged conduct cannot render the conduct constitutional); see also, e.g., Bayer, supra note 45, at 340-41.
which we ascribe the respect accorded to persons. As Justice Stevens correctly summarized, referring to the Court’s majority opinion in *Casey*, “It is the liberty clause that enacts the Constitution’s ‘promise’ that a measure of dignity and self-rule will be afforded to all persons.”

Reviewing precedents from the late Nineteenth and early to middle Twentieth centuries, Prof. Alschuler explained, “The Court's view was tolerant of diversity and experimentation but insisted that law must adhere at its core to immutable principles of human dignity.” Similarly, in her thoughtful review of decisions involving fundamental constitutional rights, Prof. Maxine Goodman demonstrated that especially in contemporary constitutional jurisprudence, the Supreme Court appropriately “has repeatedly treated

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Indeed, in one of the most significant dissents in Supreme Court annals, the first Justice John Marshall Harlan enthused that the Fourteenth Amendment “added greatly to the dignity and the glory of American citizenship, and to the security of personal liberty.” *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896)(Harlan, J., dissenting); see also, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002)(Thomas, J., concurring, quoting Justice Harlan’s *Plessy* dissent). Of course we now understand that the Fourteenth Amendment could not add dignity, but rather, memorialized and vouchsafed Government’s duty to protect the inherent dignity of persons under the jurisdiction and control of the United States. Nonetheless, Justice Harlan was correct to link fundamental constitutional rights with the dignity of both America and those under its jurisdiction.


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human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees.”

As with its recognition of the deontological moral basis of due process, we cannot be surprised that an astute, forthright judiciary realizes that dignity explains when governmental conduct crosses an admittedly often indistinct boundary from rightful to wrongful imposition upon one or more persons. Prof. Castiglione correctly noticed, “Indeed, of all core constitutional values, dignity is perhaps the only one that cannot be legitimately stripped entirely by the state under any circumstance.”

With thorough analytical surveys such as Prof. Goodman’s readily available for perusal, just a very few examples are required to illustrate herein that the dignity which rightfully dominates constitutional rights jurisprudence is Kantian dignity – Kantian honor. As earlier noted, Lawrence v. Texas ruled that government may not criminalize per se homosexual sodomy performed in private between consenting adults. The Court carefully stressed that Lawrence’s due process issue concerned consenting adults’ common right to enjoy non-injurious private relations in which sexual acts may be an important part. “It suffices for us to acknowledge that adults may choose to enter upon [an intimate personal] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” To be sure the point was not missed, the Court reiterated, “The

527 Castiglione, supra note 282, at 703.
petitioners are entitled to respect for their private lives. *The State cannot demean their existence or control their destiny* by making their private sexual conduct a crime.”\(^{529}\)

A decade earlier, explaining the constitutional basis for the general right of women to choose to terminate pregnancies, the Supreme Court clarified,

> These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment*. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.\(^{530}\)

Let me draw from one additional line of due process/equal protection cases. As the Court vehemently admonishes, constitutional principles such as due process and equal protection, “must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”\(^{531}\) Applying equal protection implied from the Fifth Amendment’s Due Process Clause, *Department of Agriculture v. Moreno* struck 1971 amendments to the Food Stamp Act of 1964 that limited eligibility to “households” consisting only of members of the same family. The Court concluded that Congress adopted the amendments to prohibit “hippy communes” from receiving food stamps,\(^{532}\) a vindictive, callous enactment to disadvantage a lawful group that Congress happened to find repugnant but which posed no true danger to society.

*Cleburne Living Center* invalidated the City of Cleburne, Texas’ uniquely burdensome zoning requisites regarding group homes for non-violent mentally retarded

\(^{529}\) *Id.* at 578.


\(^{531}\) Romer v. Evans, 517 U.S. 620, 634 (1996)(quoting Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

\(^{532}\) *Moreno*, 413 U.S. at 534.

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individuals. Despite the arguable rational basis that such group homes might depress the property values of the relevant neighborhood, the Court held constitutionally irrational the ordinance’s overriding basis: “the negative attitude of the majority of property owners located within 200 feet of the Featherston facilities, as well as the fears of elderly residents of the neighborhood.”

*Romer v. Evans* struck a provision of the Colorado Constitution adopted by popular referendum that (1) required any law specifically protecting homosexuals to be adopted solely through state constitutional amendment and (2) repealed all statutes, ordinances and state precedents specifically prohibiting discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.” The Court discerned that homosexuals and bisexuels were singled out for such adverse status not due to any threat they posed to others but to the “animosity” of a significant portion of the citizenry who find homosexuality distasteful, unnatural or decadent.

Perhaps the most popularly known example of the judiciary’s ban of “a bare … desire to harm a politically unpopular group” is *Brown v. Board of Education* ruling unconstitutional mandatory racial segregation of public school students. Recognizing that children of minority races cause no inherent harm, the *Brown* Court famously stated, “To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

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534 *Romer*, 517 U.S. at 624.
535 Id. at 633-35.
of the Court’s sociology nearly a quarter century later, Justice Arthur Goldberg observed, “The racial stigma which prevents segregated schools from offering equal educational opportunities is not felt exclusively by children, nor is it felt exclusively in the educational context.”

Some may argue that the courts mention dignity a bit offhandedly, rather than developing a vivid exposition of that concept and its inextricable link to the Constitution. Yet, even if it never provides a thoroughgoing abstract definition, one need not have the passion a Thomas Jefferson, or the sagacity of a James Madison, or the learned inspiration of an Immanuel Kant to realize how in each instance the judiciary applied Kantian honor – Kantian dignity theory – although nowhere is that philosopher cited (not would one expect to find such citations in future judicial opinions).

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537 EEOC v. Int’l Longshoremen’s Ass’n, 511 F.2d 273, 278 (5th Cir. 1975) (opinion of Goldberg, J.) (citing as well cases desegregating public parks, public buses and public benches). Indeed, the courts have recognized that imposition of undue stigma is a violation of due process because it is an offense to personal dignity. E.g., Vitek v. Jones, 445 U.S. 480, 494 (1980) (stigma of involuntary confinements for psychiatric treatment may “constitute the kinds of deprivations of liberty that requires procedural protections.”). See also, e.g., Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (law allowing a governmental entity to forbid the sale or gifting of alcoholic beverages to particular persons due to purported alcoholism must provide “notice and an opportunity to be heard” because of the resultant “stigma or badge of disgrace”); Coleman v. Dretke, 409 F.3d 665, 668 (5th Cir. 2005) (requiring defendant convicted of a misdemeanor to attend “sex offender therapy” violates due process by stigmatizing the defendant with the apparent legal “status” of a felonious sex offender).

Of course, stigma per se does not violate due process because the results of procedures that comport fully with due process might result in legitimate stigma (“stigma plus”) such as proving the defendant is a criminal. E.g., Wenger v. Moore, 282 F.3d 1068, 1094 (9th Cir. 2002).

It is worth noting as well that the preeminence of dignity understandably applies as well to express fundamental rights in the Bill of Rights applied to the States pursuant to the liberty provision of the Fourteenth Amendment’s Due Process Clause. For example, regarding unreasonable searches and seizures, the Court accented, “The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.” Schmerber v. California, 384 U.S. 757, 767 (1966); see also, e.g., U.S. v. Flores-Montano, 541 U.S. 149, 152 (2004) (threats to dignity not as acute in searches of automobiles). Similarly, explicating the right against cruel and unusual punishments, the Court stated, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man …” Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

538 E.g., Castiglione, supra note 282, at 660-61.
The core due process deficiency in each of the discussed cases is evident despite the many and varied fact scenarios. Each time to promote its own discriminatory purposes, some organ of government unfairly – immorally -- infringed liberty, disregarding the adversely acted persons as ends in themselves -- as individual human beings worthy of respect and dignity. Government treated these individuals merely as means for some goal, usually illegitimate such as promoting untoward discrimination or undeserved domination. Each time, Government effectively objectified the disadvantaged individuals, nullifying to some meaningful extent their humanity and depriving them in some meaningful degree of their rightful pursuit of happiness.

In Brown, the racially segregated students were told they are inferior, that they lack dignity, not because somehow that is true, but to convert them from persons into objects to promote a racist social order. No rational person would will as a general maxim that her value be assessed not on her actual abilities and behavior, but on race, a factor that carries no inherent index of what one can do, what one will do and what one is worth. One’s race is not an immorality and to regard it as such violates dignity.

In Lawrence and Romer, Government criminalized the sexual behavior of homosexuals and denied them the full opportunity to protect their dignity through civil rights laws not because gays, lesbians and bisexuels truly threaten the health and safety of others, but, because they are disliked by persons powerful enough to turn their disdain into purported law. Distaste for the so-called homosexual lifestyle is not proof that homosexual conduct is immoral. Indeed, one would not will a general maxim to lessen one’s social status based on one’s sexual practices so long as such behavior does not offend the dignity of others as would, for example, rape. Absent such proof, Government cannot limit that
pursuit of happiness, nor reduce homosexual individuals into nothing more than means to achieve the discriminatory predilections of others.

The City of Cleburne imposed special, difficult zoning criteria on group homes for mentally retarded persons not because the occupants were a danger to themselves and others, but because neighborhood residents found them unsightly and distressing. The mentally disabled were objectified and discarded because they were ugly, not because they were immoral. The same is true for the “hippies” in Moreno whom Congress attempted to disadvantage by rescinding their eligibility for food stamps. That persons might disapprove of the hippy lifestyle cannot be a basis to demean their humanity, for the hippy pursuit of happiness is neither criminal nor otherwise dangerous simply because people do not like it. Thus, legislators used hippies purely as means either for political gain, or to indulge their misplaced sanctimony, or likely both.

Granted, in each instance Government might respond that minority children, gays and lesbians, the mentally impaired and hippies each offended the sensibilities of some powerful segment of society. Offended sensibilities, however, cannot be a legitimate basis to exercise governmental authority lest Consequentialism prevail, for hurt feelings are subjective responses. The issue cannot be was some powerful group’s sensibilities hurt, for such simply justifies the raw consequentialist exercise of power, of coercion for the sake of pleasing the powerful. Rather, the question must be whether the hurt sensibilities in question are responses to objectively immoral conduct and, if so, whether Government’s remedial actions stay within the bounds of ethics.539

539 E.g., Wright, supra note 32, at 280-81.
This review demonstrates that due process is deontological and, thus, must be enforced according to the best available moral understanding: Kantian honor. Indeed, Kantian dignity principles guide actual constitutional litigation, although the Courts are unwilling to accord Kant his due. Consistent with the deontological imperatives attendant to Kantian ethics, the United States cannot abandon the immutable duty of due process even to forestall cataclysmic results. Because Deontology cannot tolerate consequentialist application, justice must be done under the Constitution even if the heavens fall.

-- Part IV – Conclusion –

A compelling summation of this article’s proposition comes from Abraham Lincoln; not Lincoln the pragmatist, rather the Lincoln we most admire -- the theorist, the visionary, the idealist. During one of his debates with Stephen Douglas, addressing the extraordinarily contentious issue of slavery, Lincoln announced with characteristic intensity and passion:

[Z]eal for the spread of slavery, I cannot but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world; enables the enemies of free institutions, with plausibility, to taunt us as hypocrites; causes the real friends of freedom to doubt our sincerity, and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty, criticizing the Declaration of Independence, and insisting that there is no right principle of action but self-interest.\footnote{\textsuperscript{540} Abraham Lincoln - Stephen Douglas Debates, First Joint Debate at Ottawa, Illinois. Lincoln’s reply to Douglas (August 21, 1858; emphasis added), \textit{available as of March 4, 2011 at http://lincoln.lib.niu.edu/cgi-bin/philologic/getobject.pl?c.2239:2.lincoln}}

Lincoln was impeccably correct. The core iniquity of slavery and indeed any other practice “in an open war with the very fundamental principles of civil liberty” is not its consequences such as “enable[ing] the enemies of free institutions, with plausibility, to taunt us as hypocrites,” as momentous as those consequences doubtless are. Nor is it even the undeniably “monstrous
injustice of slavery itself.” Rather the fundamental treachery is “insisting that there is no right principle of action but self-interest,” which betrays the principles of legitimate society set forth in the Declaration, enforced through the Constitution. For, it is though the negation of a priori morality that every unjust and wrongful act flows.

William Bennett poignantly encapsulate “in America, what brings forth our patriotism – our greatest sacrifices – is our steadfast devotion to the ideals of freedom and equality. American patriotism … is not based on tribe or family, but on principle, law, and liberty. … [the Founders] had a new idea – a country tied together in loyalty to a principle.”\(^{541}\) Bennett’s words aptly recognize the vital American linkage of morality, honor and sacrifice.

However much some may fear it, resent it, lament it or wish it were otherwise, the Constitution is a suicide pact.

\(^{541}\) BENNETT, supra note 134, at 26 (emphasis added).