The Utilitarian Foundations of Natural Law

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SYMPOSIUM ON THE COMPATIBILITY OF RIGHTS AND CONSEQUENTIALIST ANALYSES
Contemporary thinking about rights draws a sharp line between deontological and consequentialist ethical theories. Deontological theories are associated with the natural law tradition as it has developed in this century, while consequentialist theories may be conveniently, if inexactely, grouped as utilitarian. The points of opposition between these approaches have been so often rehearsed that it is only necessary to summarize them briefly here. Natural rights theories regard themselves as theories of individual entitlement, not as theories of social good. Their emphasis on the justice of the individual case, the intimate connection between the doer and the sufferer of harm, makes them overtly anti-instrumental in orientation. They disavow the idea that the consequences of any legal rule could justify its adoption or rejection. Taken to its logical extreme, these natural law theories have—or at least ought to have—as their central maxim, fiat justitia ruat coelum, let justice be done though the heavens may fall: if consequences never count, then disastrous consequences cannot count either.

Natural rights theories employ a terminology that often borders upon the obscure. Some special thing, property, quality or attribute is all too often "immanent" or "inherent" in something else. While natural lawyers recognize the difference between analytical and empirical truths, they often strive to identify a grand set of necessary empirical truths about human nature that are not made, but rather are discovered through some combination of introspection, observation, and rational

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1. "In the common-law world generally, tort law treats the two litigants as connected one with the other through an immediate personal interaction as doer and sufferer of the same harm." Weinrib, The Insurance Justification and Private Law, 14 J. LEGAL STUD. 681, 683 (1985); see also Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 YALE L.J. 949 (1988).

2. "From the first, the idea of a normative order immanent in nature was a fundamental element of classical Greek speculation." L. WEINREB, NATURAL LAW AND JUSTICE 15 (1987); see also sources cited supra note 1.
discourse. The synthetic a priori of Kant is not, or at least not obviously, an empty category for thinkers in the natural rights tradition. The contingent and variegated elements of human life and experience are subordinated to those elements that are perceived as permanent, general, and inescapable, if not divinely revealed. The study of differences in culture and laws, first made popular by Montesquieu in his *Spirit of the Laws*, is viewed by them with suspicion because of its implicit attack on the universality of the legal order whose basic intellectual substrate spans the generations and crosses the seas. A couple of sentences of Leo Strauss sum up the position:

By natural law is meant a law which determines what is right and wrong and which has power or is valid by nature, inherently, hence everywhere and always. . . . Natural right is that right which has everywhere the same power and does not owe its validity to human enactment. . . . Natural right thus understood delineates the minimum conditions of political life. . . .

No modesty here.

Notwithstanding the breadth of their claims, natural lawyers today are often quite defensive about what they do. While they pride themselves in a program that is abstract, ambitious, austere, and rigorous, they recognize that they are the devoted champions of a minority outlook. To them, modern legal and ethical thinking is dominated by a dreaded reliance upon cost-benefit calculations, realism, pragmatism, instrumentalism and social planning. Nonetheless they persevere, stoically confident

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3. See, for example, J. Finnis, *Natural Law and Natural Rights* 283-84 (1980), which heavily emphasizes the importance of "practical reasonableness." Finnis's position is criticized for its incompleteness in L. Weinreb, *supra* note 2, at 112-15.

4. 


6. L. Strauss, *On Natural Law*, in *Studies in Platonic Political Philosophy* 137, 140 (1983). Although Strauss is a unique philosopher, his position is widespread in the natural law tradition. Thus Blackstone writes:

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over the globe in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

1 W. Blackstone, *Commentaries* *41. See also* the passage from Gaius, at *infra* note 41.

7. See, e.g., J. Finnis, *supra* note 3, at 120.
that with suitable explication their necessary truths about human and legal relations may perhaps in time become our conventional truths as well.

Utilitarianism for its part makes light of what it regards as the exaggerated pretensions of natural law theories. Jeremy Bentham, for example, regarded himself as the mortal adversary of the lawyer Blackstone, so much so that natural law was in his view not only "nonsense, but nonsense on stilts"—so as to capture the ungainliness of natural law in a derisive phrase. The hostility towards natural law begins with the obvious point that it is odd to "find" law "out there" like a rock or a stone, or even as a necessary constituent of a human relationship. Laws are something made by men for the governance of mankind. There is a need to escape what Laurence Becker has aptly called "the rigidity and ultimate mystery of seventeenth-century natural rights theory." While all utilitarians may not agree with John Austin that law is the command of the sovereign, they do regard the dominant mark of law as power, not reason. Be that as it may, there is a second truth as well. The survival of past societies has depended heavily upon their choice of laws, just as our survival and prosperity is heavily dependent upon the choices, often conscious and deliberate, that are made today. Utilitarianism is thus concerned not only with general principles of right and wrong, but also with historical context and institutional arrangements. Law is more than what is written on the statute books.

Utilitarianism also rejects the intuitionism to which natural lawyers gravitate. In examining this complex of legal and social institutions that surrounds the law as such, modern consequentialist theories place heavy emphasis upon the maximization of some social good. The choice of happiness, utility, or wealth raise important controversies within the consequentialist school, but these divisions pale in comparison to the starker opposition with classical theories of natural law and natural right. If the classical philosophy of Plato, Aristotle, Aquinas and Locke lies at the root of natural law, then utilitarianism de-

8. On the rivalry, see Posner, Blackstone and Bentham, 19 J.L. & Econ. 569 (1976).
9. L. Becker, Property Rights: Philosophical Foundations 4 (1977). Becker is willing to spread the criticism around, for the sentence continues, "as well as of the ruthlessly forward-looking concerns of utilitarian and socialist theories." Id. Most socialist theories do invoke some utilitarian standard, and fail because the set of institutions that they envision fares poorly by any utilitarian criterion.
pends upon the skepticism of David Hume, the economics of Adam Smith, the indefatigable curiosity of Bentham, and the social cost calculations of Ronald Coase.

This brief thumbnail sketch deliberately ignores or downplays important differences within both the natural law and utilitarian camps. Although for some purposes those tensions might be important, in this context they are not. Enough has been said to indicate that apparently there is fundamental conflict between these two schools of Western thought that cannot be ignored or papered over. Nonetheless I think that these conflicts, although often celebrated today, miss some larger truths about the relationship between natural rights and utilitarian tradition in Western and certainly Anglo-American thought. Thus it is commonplace to observe that although the two schools may differ radically on methodology and theoretical structure, they often agree upon results. Both theories find a large place for private property; both are concerned with aggression and with the importance of keeping promises. Whatever one can say about the differences between Locke and Hume, or between Blackstone and Bentham, they are very much peas from the same pod in comparison to the Marxists, socialists, communitarians, republicans and feminists of our day.

I believe that the correspondence in outcomes between the classical utilitarians and their natural law rivals is not simply a matter of coincidence, but rests upon a deep convergence between these two theories. The sense of convergence was, I think, fairly evident in the works of the earlier natural law writers, many of whom were quite happy to make reference to general utility in the course of their deliberations. Indeed in the earlier writings, the utility of the rules were not the reasons for their binding force, but were evidence of the goodness of the divine will that made them obligatory on mankind. Often the

10. On the relationship between Blackstone and Bentham:
   In short, Bentham's hostility to Blackstone seems to have been rooted less in disagreements over substantive policies than in Blackstone's forensically effective defense of a gradualist approach to legal reform that preferred common law interstitial lawmaking to sweeping statutory change and that emphasized both the capacity of the common law to reform and the high incidence of legislative miscarriage.
   Posner, supra note 8, at 596.

11. The point is stressed in N. Simmonds, supra note 4, at 54. He quotes Pufendorf as follows:
demonstrations of the utilitarian advantages received a subordinate place in the argument, but they are evident on even a casual inspection of the text. Blackstone, for example, could refer to private property as "[t]he immediate gift of the creator,"\textsuperscript{12} in one place, but then give the standard modern justification for private property—the internalization of gains from private effort maximizes social output—with a clarity and precision modern analysts would do well to emulate.\textsuperscript{13} The simplest way to view the connection between the two traditions is to understand that the utilitarian considerations have come to dominate the analysis given the loss of faith in divine providence.

Again, although those precepts have manifest utility, still, if they are to have the force of law, it is necessary to presuppose that God exists, and by His providence rules all things; also that He has enjoined upon the human race that they observe those dictates of the reason, as laws promulgated by Himself by means of our natural light.

\textit{Id.} (quoting S. Pufendorf, \textit{De Officio Hominis et Civis} 19 (F. Moore trans. 1927) (1682)).

Blackstone also sounds this same consequentialist theme:

For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be obtained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter,... [God] has graciously reduced the rule of obedience to one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law.

\textit{1 W. Blackstone, Commentaries \#40-41.} Blackstone of course did not reckon on the complications of collective choice.

\textit{12.} See \textit{2 W. Blackstone, supra note 11, at \#3 ("The earth therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator.").} Note that Blackstone reaches this conclusion because he is aware that the customary justifications for property—receipt by grant, gift or bequest—fall unless the title of the grantor, donor or testator can be established. He has no strong justification for the common law rule of occupancy, so he avoids the problem by converting all property into a gift from the creator to all mankind. But he does not explain how this title is "jointly" held, how severance takes place, and why the title vests in mankind "exclusive of other beings."

\textit{13.} But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving to get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other.

\textit{Id. at \#4 (emphasis in original).}
Despite the possibility of this easy transition from classical natural law to modern utilitarianism, the convergence between the two traditions has disappeared in our own time. But when understood correctly, the two traditions are very closely allied. This essay is devoted to exploring those common elements in order to effectuate a reconciliation of sorts between these two dominant traditions. That reconciliation cannot be achieved without some cost. Here both sides have to pay part of the price. My sense is that the natural law thinkers had a very acute and sound sense of the basic rights that any utilitarian would want to adopt in his society, but that their methodology, with its heavy appeals to intuition and revelation, cannot withstand the battering that it has received from thinkers schooled in the utilitarian tradition.\textsuperscript{14}

What I shall try to do, therefore, is to indicate how a proper application of utilitarian principles generates many of the categorical conclusions that natural rights thinkers first articulated and defended. In order to do this, one has to look more closely at the various points of difference that separate the natural law thinkers from their utilitarian rivals. The first section therefore examines the question of whether the social and legal relations between persons depend on the common features of all mankind or the differences that arise between different cultures. The second section then examines the dominant legal and social institutions that arise in response to the similarities and differences within the human condition. The third section then looks at the way in which the categorical rules that often emerge in private law are in fact the proper utilitarian response when the costs of enforcement are allowed to temper the demand for justice in the individual case. The fourth section then briefly discusses the congruence between general utilitarian principles and the state's power to take private property for public use. A brief conclusion follows.

I.

One critical element of the natural law program is that certain conditions remain constant across apparently disparate civilizations and cultures. The motivation for this tenet seems

\textsuperscript{14} I addressed some of these themes in Epstein, The Classical Legal Tradition, 73 \textsc{Cornell L. Rev.} 292 (1988); Discussion: The Classical Theory of Law, 73 \textsc{Cornell L. Rev.} 310 (1988).
clear enough. If every culture stood on its own bottom, then it
would be impossible to generate a set of universal norms suita-
ble for all cultures. The obvious differences in social circum-
stances and local conventions would defeat the natural lawyer's
claim for universality.

The use of the word "nature" itself suggests the dominant
strategy that allows—or at least should allow—natural lawyers
to counter the threat of particularization. The obvious source
of human needs and desires is not culture, but human nature.
What is distinctively human does not depend on how persons
are socialized in this or that particular environment. It rests in
the common set of biological necessities that have shaped the
way all individuals, and indeed entire populations, have
evolved over time. It is possible to identify these natural needs,
desires, and inclinations, without retreating to a very high level
of abstraction, or to any artificial linguistic convention. There
are needs for essential amino acids to construct the proteins
necessary for life. There is need for caloric intake above certain
minimum levels to sustain basic life functions. There is need
for pregnant women to carry their infants to term, and for par-
ents to raise them to a level of reproductive maturity. There is
need for protection against cold and heat, and against disease
and predation. Any social order that ignores these imperatives
pays a very high price, perhaps the ultimate price, of extinction.
The biological anchor weighs heavily on the types of feasible
social organizations.

Back of the battle for survival is the looming threat of scar-
city. There is never enough to go round, so that conflict within
groups and across groups is an inescapable part of human
existence. It is, moreover, a condition that calls forth its own
type of human personality. Hume talked about a human condi-
tion in which there was individual self-interest and confined
generosity. 15 Hume treated this generalization more as a wise
observation, and less as the consequence of any general theory.
But the logic of evolution suggests otherwise. Where resources
are scarce, disinterested generosity is not a viable strategy for
survival. The organism that unilaterally divides its possessions
with others cannot thereby force others to divide their posses-

(1739) ("'tis only from the selfishness and confin'd generosity of men, along with the scanty provi-
sion nature has made for his wants, that justice derives its origin") (emphasis in original).
sions with him. Over time greedy organisms that have all of what they produce, and some of what others have produced, will tend to fare better in competition with more generous organisms who retain only a fraction of what they produce. As the process continues, the pure altruist keeps a smaller and smaller share of the world's stock, until the retained share is insufficient to allow survival or the reproduction of its own kind.

These evolutionary pressures did not surface first in human beings. They are the driving force behind the evolution for all forms of life. Whatever the manifest difference in structure, tastes and appearances, self-interest deserves its special status as a constant in nature. It is hardly possible that forces that operate on all living creatures from single-cell organisms to primates cease to be relevant in human beings. Traits that natural selection has molded for eons do not just disappear without a trace. Quite the opposite holds true. Self-interest looks to be a well-nigh universal imperative that instructs all individuals how to manage their initial endowments, given variations in their external environment. Self-interest is not the reason for the Darwinian theory of natural selection. Rather, it is the necessary behavioral consequence of the prolonged and remorseless operation of that principle. Darwin's choice of the word "natural" is no verbal happenstance. Not only does it hint at some tight connection between natural selection and natural law, but it also calls to the fore the proposition that there is no central purpose that directs or informs the process. The whole picture is a composite mosaic in which each organism has control over only a very small piece. There is no master or central plan. There is only the conflict, coordination and overlap of small and separate plans, each held by individual organisms. What happens to the whole is a complex aggregation of the constituent parts.

This argument is perfectly general in form, and in no way depends upon the particular manifestations of human conduct in any specific culture. It is not bound to time or to place. It satisfies the stringent conditions of universalization that natural lawyers set for their own task. But what utilitarian could reject it as the basis of his own calculations? At a descriptive level, these theories explain how individuals maximize their welfare under conditions of scarcity and uncertainty. The biology to which the natural lawyer so frequently resorts thus throws him
into the deadly brace of the maximization theories that are the hallmark of utilitarian thought.

This theory of individual self-interest is not only a theory of conflict and competition, it is a theory of cooperation as well. The organism that goes it alone has no insurance to fall back upon when things go bad, and is unable to engage in any projects that require the coordination of two or more actors. The logic of self-interest does not ignore the gains from cooperation in order to maximize only those gains from competition and aggression. It encourages voluntary arrangements with some, and recognizes that although conflict may promise great gains, it also holds out the possibility of devastating losses. Voluntary arrangements sidestep these perils, and therefore can be stable over the long run without external enforcement if each party to them knows (in that peculiar biological sense of "as if") that the gains from a short-term defection are smaller than the gains from a continued long-term relationship. Given this pattern of long term relationship, many instances of "altruism" are "reciprocal altruism"—which, notwithstanding the phrase, are not forms of altruism at all. An isolated act of generosity is sometimes better understood as self-interested behavior embedded in a large network of reciprocal interactions. We have here the basis of tort (preventing aggression) and contract (enforcing voluntary agreements) that both coincide very well with the theory of individual self-interest.

At this point a note of caution must be injected. The counterexamples to the theory of individual self-interest must be taken into account, each in their very different ways. There are countless instances of parents who sacrifice themselves for their children, and, even of individuals who act to their own detriment in order to advance the interests of strangers. Hume recognized that point when he spoke of the confined generosity that softened the hard edges of a utilitarian theory based on scarcity and self-interest. It is useful to see how a natural law theory should deal with these two cases: benevolence to strangers, and ties within the family.

16. For a general discussion, see D. Barash, Sociobiology and Behavior 104-36 (1977).
A. Benevolence Toward Strangers

Cases of genuine heroism toward strangers cannot be accounted for by the self-interest model, save by elaborate and contrived extensions as to what self-interest means. In part these behaviors seem to be attributable to the capacity for conscious reflection that people have, at least in far greater abundance than other organisms. Whether in the form of risky undertakings or charitable contributions, the willingness to forego benefits to one's own self serves as the foundation for much good that comes in society. The legal system, however, does not have to trouble itself unduly with actions of benevolence. If it does not prohibit them, then they will continue to occur, and thus mediate the conflicts of interest that otherwise arise among people.

The great mistake, however, would be to overestimate the frequency and importance of these events relative to the risks that self-interest poses to social order. The easy solution of praising benevolence has no costless mirror image when it comes to controlling against harms inflicted on strangers. Quite the opposite, public and private resources do have to be committed to this enterprise, and it is important to structure social obligations in ways that limit the risks that unbridled self-interest can have on the welfare of all individuals. It would be a mistake, for example, to organize a tax system around a norm of voluntary compliance simply because many people make extensive charitable contributions. The natural lawyer therefore need not trouble himself unduly with these counter-examples to unremitting individual self-interest. So long as they occur with modest frequency in different societies, rules can be fashioned to allow the behavior to go forward, and these will tend to serve desirable utilitarian ends. If the very worst we think about all people is not always true, then there is a cushion of safety from which we all benefit.


18. Indeed most of the difficulties with gifts lie in the fact that transfers that appear to be voluntary may well be subject to subtle forms of pressure or undue influence. Unwillingness to enforce bare promises to make a gift, which is characteristic of virtually all legal systems, rests on the recognition that these pressures cannot simply be ignored. For a discussion of the complications, see Eisenberg, Donative Promises, 47 U. Chi. L. Rev. 1 (1979).
B. Altruism Within the Family

The postulate of individual self-interest is also unsuccessful in dealing with the complex transactions within the family. Parents routinely make enormous investments in their children in the present, and their willingness to do this is not easily explained by treating that investment as though it were the front end of a voluntary exchange, with return performance due from the child at some later date. Any such return care (by implicit agreement, if and when I reach an old age) can usually be provided only in the distant future, if at all. The risk of non-performance, given imperfect enforcement, is very high, and the present discounted value of any return performance is trivial, especially with small children born of older parents. Investment in children is a poor form of old age insurance. The perfect egotist is well-advised to avoid children and to set up an annuity from earnings to provide health care on a contract basis for his old age. Yet parents continue to make enormous sacrifices to have and to raise children. To make matters worse parents often face anguish choices of allocating special care to children with severe handicap, sickness, disability, and retardation, both during life and after their death. In these cases, any effort to conjure up some implicit contract of exchange across the generations rests on the thin veneer of fiction. One can find signs of business transactions within the family, especially after the children come of age and become partners in the family firm. But the full range of familial behaviors offers a deadly challenge to the uncompromising theory of individual self-interest.

These interfamilial objections do not undermine natural law theory by showing that there are no constants in human nature. Quite the opposite, they reinforce the model by requiring us to recognize the interdependent utility functions that are themselves the result of constant biological interactions. Through-

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19. For a summary of the relevant economic literature, see Cox, *Motives for Private Income Transfers*, 95 J. Pol. Econ. 508 (1987). Cox allies himself with those who think that the exchange model dominates the altruism model, and offers in support of that proposition that bequests are larger to offspring with high incomes, which is consistent with the idea that these persons have rendered services for which the bequest is in payment. The altruist hypothesis would suggest that greater gifts would go to offspring with lower incomes, in order to equalize wealth within the family, here on the assumption of diminishing returns to additional units of wealth. His data does not include the care and support that are given by parents prior to the maturity of their children, but concentrates only on support that adult children give their parents.
out nature the care that primates, and other animals as well, give to their youngsters cannot be explained by any theory of individual self-interest. But the behavior can be explained by invoking the idea of inclusive fitness, whereby what is maximized is the welfare of genes, not individuals as such. By virtue of this theory, each person takes into account the welfare of others, discounted to reflect their fraction of common genes. In the normal situation each parent treats the welfare of the child as though it were one half of its own, that of a grandchild as though it were one-fourth and so on. Under this theory what is maximized is the expected value of the total genotype, so that each parent will trade off one unit of cost to himself for two units of benefit to the offspring—even if there is no prospect of return benefit under some implicit contract. In the early stages of child rearing, small inputs from the parent generate large benefits to the child, so that the amount of caring behavior is great.

The same marginal tradeoffs, moreover, are applicable to both fathers and mothers, but that does not imply that parents of both sexes invest the same amount in parental care. Breast feeding is but the most conspicuous illustration of an asymmetry in cost between mother and father. The mother is often in a better position to provide effective, low-cost care for an infant, so the theory suggests that she will provide more care than the father even though their theory of genetic relatedness is the same. Given the difference in initial endowments, the unified theory of inclusive fitness predicts differential involvement for males and females. Similarly the theory also explains why the level of parental care for both mothers and fathers diminish as a child gets older. The benefits of parental care are reduced as the child can do more for himself, but the costs of care to the parents are constant or increasing if only because continued attention to living children reduces their opportunities to have further children.

The existence of children, moreover, increases the gains

21. The feminist proposition that women are different from men because they are "connected" to other persons while men are not represents an oversimplification of the basic biological theory. See, e.g., West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 2-3 (1988). So long as inclusive fitness applies to both men and women, both have "connectedness" with other members of their family. Men cannot be regarded as so distinct, separate and autonomous in ways that women are not. The differences be-
from cooperation between parents, who after all are unrelated. The children in effect serve as "hostages" to guard against any intrigue between the parents, because any harm that one parent inflicts upon another, necessarily reduces the prospects that the offspring will flourish in their maturity.\textsuperscript{22} Emotions are not outside the realm of biological influence, but are heavily dependent on them. The sentiment of love and affection that binds parents together improves the long-term fitness of both parents, given their common stake in the future. Played out in nature, one finds that genetic egotism, coupled with reciprocal altruism, translates itself into a form of ongoing generosity that typically characterizes relations within the family.

There are of course variations within the overall pattern. As external environments change, the return on parental investment in children changes as well, so that we should not expect the same level of family intimacy across cultures and generations. But these variations should all conform to a system in which at the margin one unit of parental expenditure yields two units of benefit to the child. This relationship is determined not solely by the basic interdependent utility function, but also by other natural individual endowments and by external factors. Whatever these differences in intensities, it is highly unlikely that even today parents regard other people's children just like their own—hence the enormous pains that people are prepared to take in order to use surrogate mothers instead of ordinary adoption.\textsuperscript{23}

\textsuperscript{22} The model here is different from that presented in Becker, \textit{A Theory of Social Interactions}, 82 J. Pol. Econ. 1063, 1076 (1974). In the Becker model, children are constrained to act altruistically towards each other only because of parental threats to withhold benefits from them if they do not. These constraints will break down if the gains from misbehavior toward a sibling exceed the benefits that the parents are able to withhold. The biological models predict stronger loyalty between siblings because each has a stake in the welfare of the other, which will influence conduct, even in the absence of any parental enforcement. There is of course a conflict of interest between the siblings when the cost to the one sibling is greater than half the benefits conferred on the other side. But that conflict is in principle no different between parent and child. Under the Becker model, killing a sibling is far more likely to produce a private gain than it is under the biological models. With Becker, the death of the sibling could increase the welfare of the survivor, but it will generally decrease it under the biological models.

Certain biological constants thus lie at the root of family behavior, and these demarcate the zone of voluntary market exchanges from that of the nonprice, nonexchange economy of the family. Every legal system must draw some distinction between those within the family and those outsiders who deal with the family at “arm’s length.” The strongest counterexample to individual self-interest only confirms the importance of common practices, albeit with different intensities across times and across cultures.

The wise utilitarian will not ignore these facts. Instead he will try to minimize the pressures on legal enforcement in setting the rules of social organization. His rules will therefore follow the basic pattern of natural obligation as it is perceived to arise within families. To transform inclination into duty is to derive an “is” from an “ought.” There is no Humean gap,\(^2\) only some good common sense of the sort congenial to Hume’s own utilitarian biases. The utilitarian’s major premise is that one tries to organize social arrangements to best serve the individuals that compose them. The system of parental obligations reduces the costs of external enforcement because it takes advantage of natural inclination to provide the assistance that the law would otherwise have to compel by force. Taken in the aggregate, the system thus generates high levels of care at relatively low costs. Could one imagine the costs of any system that systematically incurred the costs to strip children from their parents at birth and assigned their upbringing to a stranger? It is no accident that the attack on the family takes place in authoritarian systems that can brook no counterweight to the greater central power of the state, and to the conception of the common good that all its citizens must accept. On matters of the family, the natural law theorist then fares quite well by utilitarian standards. There is good empirical reason to believe in the set of external constants that generate the need for some constant social response.

II.

The congruence between natural law rules and their utilitarian justifications can be found not only with the family but also in other critical areas. In this section I first examine the as-

\(^2\) See D. Hume, supra note 15, § 1, at 469-70.
sumption of individual autonomy—that all individuals are free, equal and independent in the state of nature. Next I address the rules for the acquisition of property by first possession. Third I look to the importance of custom as a source of rights in both property and contract. Fourth I examine the question of what counts as an "externality" sufficient to call forth legal remedies under either the tort or the criminal law. Fifth I examine the "natural law" framework as it applies to the "just compensation" requirement when the government takes property for public use. In all cases my strategy is the same. I first attack the ostensible natural law justifications for these critical legal rules. Thereafter I develop alternative utilitarian accounts, ones that revolve around the minimization of the transactions costs, a theme that has achieved great prominence from the work of Ronald Coase.\textsuperscript{25}

\section{A. Individual Autonomy}

Within the family context, individual autonomy is not a dominant theme, given the extensive network of status obligations, enforced either by law or by an elaborate set of informal social norms and sanctions. Nonetheless as the focus moves from the family to the "public" realm, the assumption of individual autonomy gains importance until it lies at the root of huge portions of legal and political theory. Stated in its most naive form, the claim for autonomy is a claim for self-ownership and self-governance that each person has for his own body or person and the labor it generates. The standard natural law argument for autonomy is intuitive in form. People who are in possession of themselves have a right to be in possession of themselves. The counter-argument is that the possession of natural talents is in some measure a question of individual luck, which cannot serve as the principled basis of entitlements across individuals.\textsuperscript{26} Given this program, proposals are often made that natural talents should be socialized for the benefit of all, as all persons have an equal claim to these endowments by virtue of their common humanity. The argument itself can be given not only an egalitarian, but a utilitarian twist by the observation


\textsuperscript{26} The theme is most heavily associated with J. Rawls, \textit{A Theory of Justice} (1971). I discuss some of the counterarguments in greater depth in Epstein, \textit{Luck}, 6 Soc. Pol. \& Phil. 17 (1988).
that two common features of all human beings (the natural law style of argument again) are, first, a diminishing marginal utility of wealth and, second, a general tendency toward risk aversion. Taken together, these imply that the shift of any unit of resources from rich to poor satisfies some utilitarian mandate.

The utilitarian argument, however, is incomplete if it only looks at the state of affairs desired in the end, independent of the costs that are necessary to obtain it. These costs are very high indeed, considering what is given up. When each individual is regarded (subject to the family obligations discussed above) as the owner of his own labor, there is no need for any routine coerced transaction to remove natural talents from the person who is in possession of them to the person who is, by some undisclosed standard, now entitled to their use or benefits. Instead there is a single owner of each bit of human talent, who is then in a position to transact in ways that benefit not only himself, but all others with whom he does business. The system operates in a decentralized fashion because the cost for acquiring property rights in human labor is essentially zero. In addition, there is no need to enter into any complex system of recordation (such as that used for real estate) to explain who it is that X must deal with in order to obtain the benefits of Y’s talents. That answer is always Y, subject to Y’s own prior inconsistent contracts of which X has notice.27

The great advantage of the rule of self-ownership is that it tends to preserve the total stock of natural talents that will otherwise be dissipated by competition between rival persons (who, perhaps, should not really be allowed to compete because they do not own themselves). Slavery is the most obvious situation in which we are most uneasy about the ownership of one person by another: conquest is surely in the interest of the victor, but it does not register the preferences of the losers or the total costs of the struggle—even if the owner is free to (re)sell the slave his freedom. Conquest aside, there is no system of governance known that allows some collective decision to identify those persons who are superior to others, and to pair each superior with the correctly identified inferior. Individ-

27. When there is notice of those contracts with third parties, there is an inducement of breach of contract, which I have sought to explain on the same principles of notice that are used to resolve inconsistent claims in the same chattel. See Epstein, Inducement of Breach of Contract as a Problem of Ostensible Ownership, 16 J. Legal Stud. 1, 9 (1987).
ual self-ownership, subject only to the status of obligations within the family, is surely a better mode of social organization, for now connections between private persons can be made by contract, which work to mutual benefit, rather than coercion, which does not.

Once various institutions of slavery are rejected, a rule of self-ownership has to prevail unless there is some superior system that confers on each person, as it were, a partial interest in all other persons. That complex network of human cross-ownership cannot be achieved without resorting to some very extensive system of redistributive taxation and regulation (that is, coercion that applies the fruit of A’s talents to the benefit of B through Z, and so on for each person). Yet here too there are allocative losses associated with some uncertain pursuit of distributational equity. The use of this framework does not abolish the fact of individual self-interest, suitably qualified by the principle of inclusive fitness. So this new framework of interlacing rights gives each (self-interested) person an incentive to impose a greater share of obligations upon his rivals than he bears for himself. The process generates some net resource losses that must be borne in pursuit of this ostensible utilitarian ideal.

It is risky to oversell the virtues of autonomy, for in the end it turns out that self-ownership is not inviolate save by voluntary consent. Nonetheless for these involuntary exchanges, self-ownership serves as an indispensable baseline to measure which exchanges are in the common good (that is, those for which all persons gain) and those that are not. The standard criticisms of the self-ownership theory observe that the argument is philosophically naive and incomplete and therefore wrong. That line of argument is only good against a traditional natural lawyer’s philosophical defense that argues that self-ownership and individual autonomy are “necessary” truths, like those of logic or at least those of physics. That refutation will have no power against the more modest functional defense, which relies only on the most general features of human conduct. So long as there are motivational and transactional barriers to an ideal world, we must learn to live in the world of

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28. For a discussion of the importance of these baselines, see generally Wittman, Liability for Harm or Restitution for Benefit, 13 J. LEGAL STUD. 57 (1984). For a discussion of the takings question implicit here, see infra note 64.
the second-best. Accordingly, we should tolerate the so-called moral weaknesses of this rule, given the inability of anyone to formulate a workable alternative system of property rights in persons. When suitably fleshed out, utilitarian arguments better explain this portion of natural rights than does natural rights theory itself.

B. First Possession

Similar arguments carry over to the theory of first possession, which represents the dominant rule for the acquisition of property adopted by both Locke and Blackstone in the natural law tradition, and by Hume and Bentham in the utilitarian tradition. Here too the natural law influence is powerful, as the rule of first possession is often described as one that gives title by way of "natural occupation." The standard natural law accounts seek to justify this principle of natural occupation by reference to an idea of individual desert, or perhaps by the labor theory of value. For Locke the theory reads, at least at first blush, as though it were one of desert because he constantly insists that the great part of the value of any land taken from the commons by first occupancy is attributable to the labor invested in it. One key passage reads as follows:

He that is nourished by the Acorns he pickt up under an Oak, or the Apples he gathered from the Trees in the wood, has certainly appropriated them to himself. No Body can deny but the nourishment is his. I ask then, When did they begin to be his? When he digested? Or when he ate? Or when he boiled? Or when he brought them home? Or when he pickt them up? And 'tis plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common. That added something to them more than Nature, the common mother of all, had done; and so they became his private right. And will anyone say he had no right to those Acorns or Apples he thus appropriated, because he had not the consent of all Mankind to make them his? Was it a Robbery thus to assume to himself what belonged to all in Common? If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him.

29. See, e.g., 2 GAIUS, INSTITUTES 66 (de Zelueta trans. 1946); D. HUME, supra note 15, § 3, at 505-07.

There are a number of objectives to the labor theory that are commonly made when it is cast as a theory of desert. Initially we have to reject ownership by first possession if we reject the prior Lockean argument that all people own their labor and natural talents. If these are not owned by each individual, then he has no right to take an asset held in common—his labor—and turn it to an end from which he derives some exclusive benefit. The first-possession rule is dependent upon the self-ownership rule; if that rule falls, then first possession falls as well.

In addition, the labor theory of ownership runs into difficulties even if a person does own his own labor. Thus one recurrent criticism of Locke is that his theory at best accounts for why the first possessor or occupier should have a lien for labor instead of outright ownership of the land or thing in question. Locke tried to duck this difficulty by choosing an example that almost made it disappear: He asked about the ownership to the uncleared and rocky lands of his day, but not to the discovery of vast quantities of cheap oil located beneath the lands of some lucky sheik or cattle rancher. With the fields, his answer was that ninety-nine percent of the value in the land was attributable to the labor that was added. It is in essence a de minimis answer designed to silence anyone who would dispute the title of the laborer. But his response does not deal with the case of the lucky owner of oil-bearing lands. Even in his own case it does not allow him to bridge rigorously the small, but theoretically significant gap that remains. Ninety-nine percent is not a hundred percent, so what should be done with the unearned increment, however small, that nature has supplied? The gap here is as important between 1 and 0.99 percent, which separates the universe of determinate solutions from that of the probabilistic calculation.

Lodged against an intuitive natural rights theory, these objections have conclusive force. But there are utilitarian rejoin-

31. See L. BECKER, supra note 9, at 34; Epstein, Possession as the Root of Title, 13 GA. L. REV. 1221, 1228 (1979).
32. I think it will be but a very modest Computation to say, that of the Products of the Earth useful to the life of man [nine-tenths] are the effects of labour: Nay, if we will rightly estimate things as they come to our use, and cast up the several Expenses bout them, what in them is purely owing to Nature, and what to labour, we shall find, that in most of them [ninety-nine hundredths] are wholly to be put on the account of labour.
J. LOCKE, supra note 30, at 314 (§ 40, Second Treatise).
ders that these objections do not meet. Initially there are strong utilitarian justifications for individual self-ownership in the original position. So the Lockean solution cannot be attacked on the ground that the first possessor has no valid claim to his own labor or talents. Similarly, there are functional explanations to justify giving the first possessor outright ownership of the thing. To hold that the labor theory of value accounts only for a lien, but not full ownership, gives rise to the identical problem faced with respect to individual self-ownership: who gets the difference between the total value of the thing, and that portion of value attributable to the labor of the first possessor? To treat that increment as a common pool asset necessarily requires extensive administrative costs, first to measure the size of the increment in each case, and then to assign its value to all other persons, none of whom have any specific claim to the thing in question. (Locke is right that the first possessor is different from the others.) In some cases that equity may be large, but at the margin it will tend toward zero. Taken over the full range of cases, the assessments and reassignments necessarily reduce the total value of the stock in question, and undermine the willingness of individuals to incur the costs of discovery and appropriation in the first instance. It is also quite possible that the costs of finding the line between total value and the lien for labor exceeds the total value of the “equity” in the thing that the public is said to hold as of right.

In the end, therefore, the strongest justification for the strict rule that first possession yields complete ownership, not the lien for labor, is not one of individual desert. It is one of modest prudence. It is therefore more congenial to Hume, who saw in the rule the virtues that it gave to the “stability of possession.” In the long run we are all better off if the surplus in things remains well defined with a single owner, than if each and every owner surrenders some of what he has acquired in exchange for the right to some portion of the surplus of lands acquired by others. The first-possession rule leaves each thing with a determinate owner, who is then capable of entering into voluntary transactions over the thing with other persons. These transactions are facilitated, as Locke rightly notes, by the existence of both money and durable goods, which render inappo-

site any limitations on how much one person can acquire on his own account. A simple functionalism thus explains the appeal of the rule.

It might be suggested that the best way to avoid the apportionment problems is simply to reject flatly the proposition that any person should have the right to mix his individual labor with external things that are held in common. No person can add his labor to things that are in common ownership. At this point the rebuttal again takes on a utilitarian cast. Locke himself was aware of the enormous bargaining problems that exist if unanimous consent should be required to determine what particular things should be used by what persons. The last sentence in the quotation above from section 28 of the *Second Treatise*, with its pointed reference to starvation, makes the point. There will be bargaining breakdown if the consent of all individuals is necessary for the consumption of any portion of the whole. A system of first possession allows all to survive, and hence (to use modern terminology) has to be Pareto superior to this alternative of mutually assured destruction. Now the ultimate justification for Locke is no longer desert theory, but simple necessity. Blackstone himself takes exactly the same line. Consent is not required to establish property rights because the number of parties is too great for it to work. When

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34. See J. Locke, supra note 30, at 312-13 (§ 37, *Second Treatise*). Prior to this passage, Locke has tried to write as though the unilateral appropriation by one individual is acceptable because there is always as much and as good left for others. See id. at 307 (§ 29, *Second Treatise*). In section 37, however, he shifts gears and notes that although individuals may have lost from what another has appropriated from the common, they gain because of their opportunity to share in the greater production of land under cultivation:

he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind. For the provisions serving to the support of humane life, produced by one acre of inclosed and cultivated land, are (to speak much within compass) ten times more, than those, which are yielded by an acre of Land, of an equal richness, lying waste in common. *Id.* at 312 (§ 97, *Second Treatise*); see also id. at 317-18 (§ 46, Section Treatise) (arguing that the ability to convert plums into nuts, and perishables into durables, removes the limitations based upon waste in the original position).

Passages of this sort have led others to defend Locke on efficiency grounds. See Miller, *Economic Efficiency and the Lockean Proviso*, 10 Harv. J.L. & Pub. Pol’y, 491, 410 (1987) (“The Lockean Proviso . . . has a function not unlike the role of certain efficiency criteria in modern economic thought.”).

35. See 2 W. Blackstone, supra note 11, at *8 (“Necessity begat property, and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, governments, laws, punishments, and the public exercise of religious duties.”).
necessity, not consent, becomes the origin of property, then we have a utilitarian system, not a social contract theory.

The next question that one has to face is what is acquired by first possession. Here in a matter congenial with the general feature, all systems of private law have roughly the same contours. Many standard modern accounts talk about possession, use and disposition of the fee, and it is possible to compile somewhat longer lists of incidents as well. One standard objection to the Lockean theory is that it may explain why the first possessor has some special interest in the thing, but it does not explain why he is entitled to the robust form of absolute ownership that is routinely conferred upon him by well-developed legal systems (at least in their private law guise). Yet the functional explanation for the robust bundle of rights follows in utilitarian terms from the considerations above. It is very costly for a social system to have partial bundles of rights in discrete things, for then some additional way must be found to assign those rights that did not pass into private hands with the original appropriation. Suppose that taking possession of a thing gave right to possession only so long as actual possession of the thing were maintained. It would then follow that no farmer could leave his fields untended and go to market. Blackstone saw the point clearly, as did Bentham. The purpose of a legal rule is to allow the right to possession to continue even


37. For the standard account of the incidents of ownership, see Honoré, Ownership, in Oxford Essays in Jurisprudence 107 (A.G. Guest ed. 1961). His account of "liberal" ownership stresses the right to possess, to use, to manage, to enjoy income, to preserve capital, to have security against expropriation, to dispose, and to be liable for execution for debts. It is said to apply to all "mature" legal systems and to many primitive ones besides, thus confirming the natural lawyer's belief in the universality of legal systems. The key tension between primitive and modern systems of ownership relates to "who" owns the property. With extended clan and tribal relationships, it is much harder to draw the line between family and stranger within civil society. Family rules tend to be indefinite and emphasize common control, while rules between strangers emphasize the importance of separation and boundaries. The rules, as it were, follow the interdependence of utility functions.

38. See supra note 13.

39. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable.
when the fact of possession is no longer indubitable, unless and until the owner has decided to abandon the thing. Legal protection is thus a cheap substitute for the active defense and patrol of property, which is why theories of possession from Roman law to the present have always stressed the acquisition and loss of possession, and presumed that until possession is abandoned it is retained without any independent showing of the kind of mental or physical facts needed to establish the original acquisition.

Similarly, the standard rule—that possession generates ownership of an indefinite duration—eliminates the awkward problem of deciding who owns the land in question after the death of the original possessor. Instead of having to open anew the prospects of possession after the death of the possessor or, even his descendants, the property can be developed in full, secure in the knowledge that the gains from improvement can be captured either by sale, or by consuming the proceeds thereof, if desired, during life.

The first possession rule has powerful functional justifications that cut across societies. The basic problems of incentives, allocation and administrative costs that it addresses are more or less constants across different cultures, so that we should expect the rule to be relatively robust, which it has been. Nonetheless there are certain variations that have to be taken into account as well. Thus once first possession becomes the rule of acquisition, it is important to know when each claim of possession is perfected. There is a powerful need to develop subordinate rules to implement the central rule of acquisition. At this level we should expect a certain degree of diversity in the customary or statutory practices. In a rocky New England

and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases.

J. BENTHAM, A THEORY OF LEGISLATION 112-13 (1931 ed.) (1864).

The last sentence is said to expose a strong anti-natural law bias. In one sense it does because it excludes the possibility that law precedes the state. But his position is an explicit "natural law-type" position because of the sense in which the legal rules strengthen the expectations that people have in the natural state. Again, the reference to "the least agreement" echoes social contract theory of the Lockean stripe. But the more forceful argument is that the forced surrender of the mutual rights of aggression leaves everyone better off—itself a takings-type argument.

40. "The Romans offer no definition of possession. They take it for granted that the lessee, the borrower, &c., do not possess. What they are interested in is not the abstract question of the meaning of possession, but the practical question of how it is acquired and lost." B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 112 (1962).
soil, it may be sensible to mark the boundary lines of one’s property by stones collected from the soil, while in heavy forests the edge of territories could be marked by niches in trees. In other cases, claims offices and recordation systems may be used to establish both the scope and priority of claims, whether to land or minerals. But notwithstanding this apparent diversity, the same principle appears to govern. That system of identification will be used that gives the largest net gain in clarity, given the costs of implementation. These subordinate conventions do not undermine the universality of a first-possession rule. They only illustrate the myriad of ways in which it can be implemented.

The first-possession rule has yet another desirable feature, given that it may be merged with the status obligations associated with families. If A obtains possession of an unowned tract of land, he may not do so solely on his own account, but rather as head of his family, clan or tribe. If several persons combine to take possession of some unowned property, it will be divided in accordance with the terms of their partnership joint venture. Once it has excluded outsiders, the rule of first possession therefore dovetails neatly into the more complex rules of family and business associations. It is therefore widely adaptable to different social organizations. First possession works as well for larger groups as it does for atomistic individuals.

The origin of property, then, is rooted in practical necessity, given the inability to reach any broad compact over the distribution of natural things. But the internal operation of the system need not operate by necessity as well. The transactional difficulties are radically reduced once individual titles are established by first possession. Within this changed environment, consent now becomes the appropriate method for exchange. Only two parties need be involved in order to transfer property rights, so the bargaining range will be relatively small given the large number of potential suppliers of standard commodities like acorns and apples. The general rules of transfer should have a consensual basis even though the rules of acquisition do not. The natural lawyers understood this point as well, for they included in their basic rules the principles for contract, especially as a mode for transferring ownership of things already reduced to ownership by first possession. Their rules were not couched in terms of market efficiency, but they surely facili-
tated and fostered market institutions, as opposed to any protective, mercantilist or guild mentality.

C. Custom

The use of custom is yet another point where there is a powerful, if unappreciated convergence between natural law theories and utilitarianism. Within the natural law tradition, custom has long played a powerful role. Operationally, it was not possible to observe the divine hand at work. Historically, there was little understanding of the biological imperatives that work in a cross-cultural setting. Even so, it was always possible to observe that certain legal rules or conventions were in fact followed in large numbers of different societies, from which it could be easily—too easily inferred—that what was common to all “civilized” people—the *ius commune* or *ius gentium*—necessarily had the force of law. The chain of inference is faulty if custom is treated as a universal imperative, without further qualification or caution. Slavery was a common practice in many ancient cultures that regarded themselves as civilized, and conquest was generally regarded as an appropriate way to acquire slaves—as an act of mercy towards those whom the conqueror could otherwise kill with impunity. It is hard to offer any normative defenses of those practices today, and we should all be better off if we did not try.

A single counterexample to a general rule, however, does not necessarily lead to its abandonment. Qualification may well turn out to be the better alternative. Custom should not be regarded as dispositive with respect to those persons who are strangers to the culture that has generated the custom in ques-

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41. Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. The law which a people established for itself is peculiar to it, and is called *ius civile* (civil law) as being the special law of that ciuitas (State), which the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind.

1 GAIUS, supra note 29, at 1.

In practice the *ius civile* was devoted to special forms or ceremonies needed to make a will or to convey real property. The *ius gentium* dominated issues of substance, but the civil law was important for certain methods of transfer. See, e.g., id. at 16-28. The passage of property by ordinary delivery is part of the general law, but the unique forms of Roman conveyance—in *ius cessio* and *mancipatio*—are part of the general law. See id. at 65. Acquisition by original occupation or possession is also a part of the *ius gentium* as a natural mode of acquisition. See id. at 66.

42. See id. at 129.
tion. Conquest is a norm that may appear in all cultures at the same time, but in each instance it is a rule that prefers the inside members to the rest of the world. It is never the case that the right of conquest has been agreed across different cultures before the onset of conflict. Quite the opposite, international treaties on the question of prisoners have generally moved toward the amelioration of the position of the captives in question. The independent rules generated in each culture with respect to the status of outsiders thus represents a classical (and literal) prisoner's dilemma game in which there is (in utilitarian terms) every reason to believe that the local custom will systematically deviate from the social optimum.

Nonetheless a different class of customs is entitled to far greater respect—those that operate internal to a given group or society. Here one speaks about the rules that bind all for the benefit of all. At any given time the gaming dynamics are totally different from what they would be in the case in which the losses are external, for now each person (or subgroup) knows as a general matter that he (or it) is equally likely to assume either of two future roles: the owner whose land is trespassed, or the owner of the animals who do the trespassing. If forced to choose a general rule of conduct to govern both the bitter and the sweet, no one can do better for himself than by choosing the social optimum. The point is of course one that is constantly stressed by references to John Rawls’s veil of ignorance, and Friedrich Hayek’s spontaneous order, but in truth its origins date back further. It is the idea behind Hegel’s reference to “die List der Vernunft,” or the cunning of reason. It also lies at the root of Maitland’s classic discussion of the question of tenure: here individual nobles occupied many rungs in the feudal ladder, and never knew in advance of dispute whether they would be lord or tenant. Hence there was the pressure to

45. Lastly, though pure feudal theory can draw no distinction between the king and the other lords, still we have already seen that the English king has very exceptional rights within the feudal sphere. Even if no exceptional rules were applied to him, still his position would be unique. Too often in discussions of questions about feudal law we are wont to speak of lords and tenants as though they were two different classes of persons with conflicting interests. Therefore it is necessary to remember that the king was the only person who was always lord and never tenant; that his greatest feudatories had one interest as lords, another as tenants; that the baron, who did not like to see his
adopt those customary rules efficient for the relationship as a whole.

Therefore, when there are large numbers of repetitive and similar transactions, there is a powerful set of incentives at work to fasten upon the optimal set of rules, not by conscious design, but by incremental development. There is accordingly a good utilitarian explanation as to why we should place great confidence in the slow form of evolutionary growth that natural lawyers have generally praised. The evolution is reliable because all participants have powerful incentives to articulate and support general norms that work toward the long term advantage of all members of the community.

Robert Ellickson has pointed out the development of these powerful customary norms of "neighborliness" that govern disputes over cattle trespass among the ranchers in Shasta County, California, but in truth the practices go back far earlier in Anglo-American Law. Take one example. The law of cattle trespass illustrates the convergence between customary practices and the efficient utilitarian outcome. The customary rule allowed each party to hold the trespassing cattle of his neighbor until amends were paid for the damage so caused, with an allowance for the cost of interim keep. The underlying rules of cattle trespass were strict, so that the simple fact that the animals strayed made it clear to both parties that the amends were indeed owing. The choice of amends had the effect of avoiding any complex bargaining problems that might otherwise exist if one farmer were allowed to keep another's animals until their possession had been repurchased by its true owner.

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vassals creating new sub-tenancies, could not forget that he himself had a lord. The conflict of interests takes place within the mind of every magnate of the realm, and the result is that the development of definite law is slow.

1 F. Pollock & F. Maitland, A History of English Law 331-32 (1968 ed.). Prior to this discussion, Maitland sets out the ways in which tenants can seek to undercut the interest of their lords with substitution or subinfeudation—what we would call today opportunistic or strategic behavior. See id. at 330-31. Elsewhere Pollock and Maitland observe that "[i]n England tenure is no mark of a class, and we may say the same of 'feudal' tenure." Id. at 234.


47. See, e.g., Tithe Case, Y.B. Trin. 21 Hen. 7, f. 27, pl. 5 (1506), translated in C. Fifoot, History and Sources of the Common Law: Tort and Contract 197 (1949) ("[T]hus if I have beasts damage feasant, I shall not justify my entry to chase them out unless I first tender all amends.")
The problem is the familiar one of bilateral monopoly. Under that rights structure, the cattle owner should in principle be willing to pay an amount up to the full value of the animal to recover it, while the landowner should be satisfied with any amount greater than the damage done plus the interim costs of keeping the animal. The amends formula cut down the size of the bargaining range, while the requirement to pay for the animal’s keep encouraged the cattle owner to put in a prompt appearance so that amends could be assessed on the strength of accurate information. As most individuals owned both land and cattle in roughly equal proportions, the rule worked an overall allocative improvement without any systematic redistributive effects. The desirable features of the system were not lost on any of the participants to it, even if the utilitarian arguments were not formally understood. Indeed when a legal commission proposed changing the ancient rules on the ground that they did not conform to the ethical principles behind a negligence system, the farmers rose up to defeat the system.48 Other customs, whether as part of the trade or of the region, typically had the same desirable features—so long as the risks of external harms—are safely put to one side. The approach of Hume and Hayek—observe in order that you may understand—will usually do more to advance the welfare of the community than any conscious effort to rejigger rules with an overt, interventionist utilitarian calculus. The small government, reactive sense of the natural lawyer again makes good sense from a sound and complete utilitarian perspective—one that takes account of the political pressures that can lead to systematic distortions in legislation.

48. See Report of the Committee on the Law of Civil Liability for Damage Done by Animals, Cmnd. 8746, at 4, para. 3 (1953) ("This class of liability is of interest only to farmers and landowners[,] and the general public are not affected thereby."). The law of cattle trespass was therefore left alone, although the academic position was squarely for negligence:

On the historical side the topic is, I think, a fascinating one. It throws a vivid light on primitive modes of thought, and on the stages by which they were outgrown. It marks a comparatively early departure from the archaic rule that liability was confined to personal acts. Yet the very precocity of this kind of liability gave it a character of its own; it has not been properly absorbed into the law of negligence.

G. Williams, Liability for Animals v (1939).
D. External Harms

The prior discussion of custom indicated that external harms always cause a special problem for any legal system, and natural law is no exception. Typically these harms were governed by the principle *non sic utere tuo ut alienum laedes*: do not use your own things in order to harm another person. This legal principle is reflected in the famous passage from Mill's *On Liberty*:

[T]he only purpose for which power can rightfully be exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right.  

As stated, however, the legal maxim and the Millian postulate only postpone the central inquiry: what should be counted as an external harm? As a first approximation, the thoroughgoing utilitarian answer is *anything* that serves to diminish the subjective values held by another individual, whether neighbor, competitor or stranger. Thus it becomes impossible to rule out any type of subjective loss on the ground that the losses are causally remote, at least as a matter of ordinary language or everyday intuitions. The connection between conduct and consequence is made plain by the complaint of the victim. Indeed when there are express contracts, say, as part of a common unit development, it is quite clear that the parties (working through the common owner) take into account far more than those obvious harms that are caused by the physical invasion from the property of one person to another. The aim of the parties in an ordinary contract is to maximize their joint utility, subject to whatever external and practical constraints under which they labor. There is no reason at all to think that they will adopt a categorical rule that only takes into account the overt types of physical harm, while ignoring more subtle effects of greater practical significance. If aesthetics mean more to the members of a common unit development,

then they may impose strict controls on set-backs and exterior design while tolerating relatively relaxed restrictions on music and noise. It hardly matters that the aesthetics ordinarily lie outside the law of nuisance while noise is the paradigmatic wrong. What the parties think, not what the law holds, is decisive. Any harm that the parties perceive should be taken into account, just like any benefit.

Does this broad definition of harm mark the end of any system of personal liberty, so that libertarian and utilitarian theory are unreconcilable after all? Just this point has been made forcefully by H.L.A. Hart in *Law, Liberty, and Morality*:

It may be said that the distress occasioned by the bare thought that others are offending in private against morality cannot constitute "harm," except in a few neurotic or hypersensitive persons who are literally "made ill" by this thought . . . . The fundamental objection surely is that a right to be protected from the distress which is inseparable from the bare knowledge that others are acting in ways you think wrong, cannot be acknowledged by anyone who recognises individual liberty as a value. For the extension of the utilitarian principle that coercion may be used to protect men from harm, so as to include their protection from this form of distress, cannot stop there. If distress incident to the belief that others are doing wrong is harm, so also is the distress incident to the belief that others are doing what you do not want them to do. To punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do; and the only liberty that could coexist with this extension of the utilitarian principle is liberty to do those things to which no one seriously objects. Such liberty is plainly quite nugatory. 52

Hart's objection contains much good common sense, but its attack on utilitarianism misses the analytical point. In order to see the error, it is necessary to draw a distinction between two different kinds of legal worlds. The first is a world of perfect decisionmaking, where virtuous and incorruptible public officials can acquire perfect information and enforce the law perfectly, both at zero cost. The normal passions and temptations of interest-group politics are nowhere to be found. The second is our world, where information is costly to acquire, enforce-

52. H.L.A. HART, LAW, LIBERTY, AND MORALITY 46-47 (1963). Hart is speaking directly of the criminalization of homosexual conduct, but his point goes more strongly. There is a definition of externality so broad as to consume the idea of liberty.
ment is error-prone, and some public officials are likely to abuse whatever discretion the law confers upon them. The proper definitions of external harm differ in these two worlds. So too does the proper social response.

In a world of perfect public enforcement, we should opt for the broadest possible definition of externality. There is no reason not to take into account every disutility that every individual suffers from the action of every other individual. In effect we should be able to calculate the net benefits and the net losses of all persons, and then adopt that course of action that will maximize the total net value of the whole, taking subjective utilities (which we can now costlessly measure) into account. We could satisfy any distributional concerns with (costless) transfer payments that make everyone better off in consequence of our public intervention. As the social marginal cost of preventing harm is always equal to zero, we should strive to capture every possible social benefit imaginable.

Now let us suppose, however, that we have a system in which the costs of public administration are very high indeed. The good utilitarian still believes that marginal considerations are decisive, so now the inquiry is to identify those externalities that can be redressed for a sum that is smaller than the externality itself. But the greater the refinement in the legal rule, the greater the costs of information and enforcement, and the greater the risk of public abuse. One therefore has to target those externalities that on net produce the most serious negative results. Other externalities have to be disregarded. The problem here is of course compounded because actions that harm strangers often confer gains upon the actors who commit them. Ceteris paribus, when enforcement is costly, the proper strategy is to go after situations that seem to generate losses on net.

Once these conditions are taken into account, then the traditional libertarian concerns with force (including the threat of force) and fraud (including concealment, and perhaps some forms of nondisclosure) suddenly become a good proxy for those kinds of harms that are worth preventing in a friction-filled world and those that are not. Force involves the infliction of relatively visible harms for which restraint ex ante and dam-

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53. See infra note 60.
ages ex post seem imperative. It is usually possible to tell who hit whom in any given context. Even if one takes the Coasean position that all matters of causation are perfectly reciprocal in a zero-transaction-cost world, that position does not carry over to our high-transaction-cost world, where the prohibition against the use of force (including physical invasion in the land use cases) becomes the best first approximation of how to draw boundaries between different people.\(^5\) The level of public discretion needed to enforce these rules against force and fraud (especially the former) is relatively small, while the net gains from enforcement seem to be large. It is very unlikely that the party who commits an assault values the right to kill another as much as that other person values his right to self-preservation. (The tragedy is that he may value the death of another person more than his cost of killing him, which is why we face the problem of aggression in the first place.) The more diffuse harms from competitive injury, disappointed expectations, hurt feelings and ordinary business competition are of such frequent occurrence, and (at least with competition) produce such general social benefits, that public officials should ignore the costs of these activities instead of undertaking in countless transactions the unhappy task of identifying all winners and taxing them to pay some sum to all losers.\(^5\)

There are some important exceptions to this general rule. The protection of intangible property rights such as patents and trademarks are all done by analogizing the actions for infringement to the ordinary common-law remedies for trespass to land and chattels. Similarly, the willingness to attack horizontal cartels and price-fixing arrangements rests on the formal proof that monopoly practices result in net social harm that might justify the very high positive costs of public enforcement. The various approaches—nonenforcement of contracts, private actions by third party consumers, or regulatory clearances—all have their relative advantages and disadvantages.\(^6\) Yet however these remedial questions are resolved, any consideration

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55. For a forceful demonstration of the point, see Demsetz, Some Aspects of Property Rights, 9 J.L. & ECON. 61 (1966).

56. Epstein, Private Property and the Public Domain: The Case of Antitrust, in Ethics, Economics and the Law, 24 NOMOS 49 (1982). On balance, my favorite position is still one that refuses to enforce horizontal price-fixing arrangements, but does not allow any
of the costs of enforcement tends to drive the philosophical utilitarian back to the libertarian rules with their relatively fixed prohibitions against force and misrepresentation. The good utilitarian with even a modest dose of public choice theory quickly narrows the account of external harm that is made operative within the legal system.

E. Forced Exchanges

The attitude toward external harms also shapes the legal response to the problem of forced exchanges. Here it is possible to think of very strong systems of autonomy that preclude all such exchanges whatsoever—one, for example, that excludes all antitrust laws. A strong position of that sort has been suggested by Ronald Dworkin, but ultimately his arguments rest on the same kinds of misconceptions that undermine Hart's argument that utilitarianism is necessarily inconsistent with a system of individual liberty.

Dworkin's precise argument is that the search for wealth maximization—he could have said as well utility maximization—necessarily leads to a disregard of distributional concerns, so that it is possible that the total gains will be larger while the share of some individuals under this regime will be smaller. To make his point, Dworkin resorts to the example of Derek and Amartya. The omniscient government official knows that Amartya values the book at $3, while Derek, its present owner, values it at $2. Nonetheless for some reason there are inpenetrable barriers to private exchange (in this case a transaction cost of $1 or more will do). The public official therefore takes the book from her and gives it to him. The question that Dworkin puts is why should anyone think this a better world after the forced exchange with the book lodged in Amartya's hand than it was before, especially given that Derek has received no compensation for his loss?

Stated more generally, this example is an objection to the Kaldor-Hicks, or potential compensation, standard of efficiency, which allows changes in property rights so long as it is clear that the winners from the exchange would be willing to

actions by third parties. The administrative costs of the system are lower than the alternative, and there is little chance of the rules misfiring.


58. See id. at 197.
pay a sum of money in compensation that would satisfy the losers for their losses.\(^5\) What if $2.50 in compensation is paid, so that both sides are left better off than before, as the Pareto standard of social welfare requires? But insisting on this more exacting standard is hardly an objection to the wealth (or utility) maximization position as stated. If government officials can make perfect assessments of utilities and costless transfers of assets between parties, then we are now in a world where maximum government intervention is desirable. Public officials can therefore at zero cost dole out perfect compensation as well. If Amartya has $2.50 in cash, it can be plucked from his hands and deposited in Derek's account. If she does not, then we can finance the exchange by a costless loan agreement in a perfect capital market that allows her to pay at some future time. Under the assumptions as stated, every Kaldor-Hicks improvement can be costlessly converted into a more demanding Pareto improvement. At this point the question becomes, why should anyone want to remain a pure libertarian when both sides can be made better off by the beneficient use of public coercion, given that voluntary exchanges are by hypothesis totally impossible?

One can take the point further. We should not know what sense to make of the compensation requirement at all in a world in which officials acted with such disinterested, costless precision. Presumably there would be lots of individual occasions for intervention when public officials have perfect knowledge and private parties have none. We should therefore want the government simply to move all assets to the higher value use. If there were enough utility increasing transactions, then the odds are extremely small that at the end of the period any single person would be left worse off than before.\(^6\) Surely ex

\(^5\) See generally Coleman, Efficiency, Utility, and Wealth Maximization, 8 Hofstra L. Rev. 509 (1980) (examining the various measures of social welfare employed in political and economic theory).

\(^6\) To give some sense of the magnitude, assume that there were 100 people, each of whom were made to participate in 10 forced exchanges each year. Assume further that for each exchange, the winner got 5 more units of satisfaction than the loser sacrificed, because the loss equalled 10 and the gain was 15. The total gain from operating this system is 5,000 (100 persons x 10 transactions x 5 units of gain). Any person who received 5 times and surrendered 5 times would have a net positive return of 25 units ((15 x 5) - (10 x 5)). If he received 4 times, and paid 6, he would still come out even. ((4 x 15) = (6 x 10)). Only if he received 3 times, and paid out 7 would he be a net loser, by 5 units. The odds of that happening on ten transactions are equal to 176/1024 or about 17 percent. If there are 1,000 transactions, then the total gain equals 500,000 units on the above assumptions (100 x 1,000 x 5). The chance of coming out a net loser (for example, winning on 399 or fewer transactions) shrinks to less than one percent.
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ante, everyone would consent to allow takings without compensation if the twin conditions of public beneficience and omniscience held, at least if the alternative were no transactions at all. What lingering dissatisfaction remains could be removed by a costless annual accounting that eliminated all net losers ex post. Transactional accounting becomes quite irrelevant. If desired, the payments could be more substantial so that everyone received exactly the same gains as the median person. Note that both Derek and Amartya each obtained $.50 of gain if $2.50 were paid in the above example. The case is exactly parallel to that of external harms. Given these radical assumptions, who could care about preserving competition, markets or compensation? State regulation would trump any conceivable form or organization. Constitutional protection against taking property without just compensation would properly be regarded, not as a fundamental safeguard of individual liberty, but as a redundant curiosity.

The situation instantly changes, however, once we relax the strong assumption of Dworkin’s model and make assumptions that better fit the real world. Here it seems likely that, with respect to two-party transactions of standard commodities—for example, that of Derek and Amartya—the parties will have better information about their own utilities than would the government, and that their transaction costs of implementing deals would be lower. Voluntary markets should certainly be allowed to develop, and there is little cause to think that forced government transfers play even a support role in this system. However, there are many situations in which forced exchanges could well be useful. Most concretely there are often situations—for example, with common pool assets, such as the fishery or the oil field—in which large numbers of separate claimants will find it very difficult to reach voluntary agreement because of the wide bargaining range and the large number of participants. These are exactly the cases that Dworkin suppresses with his simple two-person example. Yet they are exactly the cases in which the autonomy principle is at its weakest. If the choice is between bargaining impasse and no gains, and forced exchanges at some positive cost, but with real net gains, then the utilitarian case for forced takings is strengthened.

As the number of transactions expand, the aggregate gains swamp the distributional consequences.
In this new environment of government action, the requirement of compensation has an important functional justification. It is often very difficult for public officials to make the right comparisons between the losses to individual property owners and the gains to society at large. A rule that forces compensation to the losers makes it far easier for courts to monitor the legislature and the executive for potential misconduct. In essence one quickly gets to the principle that is embodied in the Takings Clause of the Constitution: "nor shall private property be taken for public use, without just compensation." The detailed explication of the clause, and its application to various forms of taxes, regulation and changes in liability rules is quite beyond the scope of this article, and I shall not attempt to repeat here what I have argued elsewhere. Nonetheless, the congruence between utilitarian and natural law principles here is again complete. Blackstone endorsed it in the most forceful terms possible, and in language that makes it clear that the property owner is to be left at least as well off after the condem-

61. U.S. Const. amend. V.
62. See R. Epstein, supra note 36.
63. So great moreover is the regard for the law of private property, that it will not authorize the least violation of it: no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of the common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

1 W. Blackstone, supra note 11, at *139.

Note that Blackstone essentially adopts the view that there is no public interest separate and apart from the interests of the individuals in society: that is why the public good is interested essentially in the protection of all private rights. His analysis therefore invites the construction of the social interest by Paretian-type rules that compare social states by showing that all persons are at least as well off in the second state (for example, after the eminent domain power) than they were in the first state (for example, before the power was exercised). Both natural law and utilitarian theories are set in opposition to collectivist theories of the good that presuppose some objective moral or political truth.
nation as before, given that the compensation required is not for the property taken, but "for the injury thereby sustained."64 Other natural law writers of all stripes have also accepted this principle as one of the foundations of ordinary justice.65 The compensation requirement turns out to have very powerful functional roots in a world in which official misconduct or want of information is the order of the day. The natural lawyers again had the right principle, for which they did not offer sufficient justification.

CONCLUSION

I have attempted in this paper to give reasons why the battles between the utilitarian and natural law traditions have been overstated. In essence the point is that the types of rights protected by the natural lawyers did have powerful functional explanations, many of which were perceived by the writers who endorsed the rules in question. This connection between utilitarian concerns and natural rights theory was stronger in earlier writers than it is in much modern thinking in this branch of the law, and the divergence of the two traditions is an unfortunate rupture in what should be a powerful intellectual alliance. Start with the assumption that scarcity in nature breeds self-interest (with due allowance for the complexities of the family), and the progression from facts of nature to the laws that govern human action is not so long or perilous as has sometimes

64. Id. at *139.

The modern caselaw speaks only of the compensation for the property taken, see, e.g., Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the result of which is that all consequential damages, loss of good will, and appraisal fees are today routinely left uncompensated, see, e.g., United States v. Bodcaw Co., 440 U.S. 202 (1979); Community Redevelopment Agency v. Abrams, 15 Cal. 3d 813, 543 P.2d, 905, 126 Cal. Rptr. 475 (1975). I criticize these cases in R. Epstein, supra note 36, at 51-56. Note that the failure to follow Blackstone's rule has the following allocative distortion. When the plaintiff's direct loss of property is less than the social gain, which is in turn less than plaintiff's direct loss plus consequential damages, then the state will take even though its action will lead to an overall social loss.

65. A passage from Grotius is suggestive:

[T]hrough the agency of the king even a right gained by subjects can be taken from them in two ways, either as a penalty, or by the force of eminent domain. But in order that this may be done by the power of eminent domain the first requisite is public advantage; then, that compensation from the public funds be made, if possible, to the one who has lost his right.

2 H. Grotius, De Jure Belli ac Pacis Libri Tres ch. XIV, § VII (F. Kelsey trans. 1925) (1646); see also Gardner v. City of Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816); Grant, The Higher Law Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67, 71 (1931) (noting appeals to Grotius, Pufendorf, and Bynkershoek).
been supposed. The natural law tradition does not have to depend upon bare assertion, intuition or pure reason. It does not have to insist that rights and duties could be determined by simple inspection of the external world; it does not have to assume that rights are pre-political in any sense of that term. What the tradition does try to do is to develop a set of rules, capable of enforcement at reasonable cost, that allow resources to be used in ways that hold the greatest promise to advance the general good, given what we know about human desires and behavior. In the end the natural law tradition generates rules of individual autonomy, the family, property, contract, tort and constitutional governance. We could do far worse.

There are of course hard and doubtful cases within the general framework, and I have not pursued those in any depth here. Nonetheless it is now possible to offer an explanation as to why these hard cases emerge. The basic rules of natural law operate as a first round of presumptions. They capture much of what makes sense in a sound legal order. But they do not exhaust all the possibilities for gain in the structuring of social institutions. Further refinement is always possible. Within the framework of the common law, these corrections were typically achieved by recognizing "excuses" and "justifications" to qualify the basic presumptions of the legal system. The presumption of promise keeping does not rule out the defense of duress. The prohibition against the use of force does not rule out force in self-defense.

In principle the process of refinement can continue indefinitely until the presumptions converge on the ideal set of utilitarian rules. But the further the process, the less important the issues, and the greater the scope for honest disagreements over substantive rules. The strong consensus that people should keep their promises does not explain what remedy should be afforded the promisee in an anticipatory breach case, or what defenses should be given the promisor when the promisee is also in breach. Typically the debate is over repudiation of the contract, damages, contract reformation and specific performance — important issues all, but of a second order nonetheless. Nor does the social consensus against inflicting harm on stran-

66. See, e.g., L. WEINREB, supra note 2, at 114-15 (pointedly criticizing Finnis).
gers say what mix of damages and injunctions are appropriate to counteract an ordinary nuisance.

There is little reason to be dismayed by the differences that emerge as the inquiry is pursued. The cases in which the natural lawyer's intuitions are most in conflict are those in which the utilitarian calculations are also the most difficult to make. The market will survive if plaintiffs in anticipatory breach cases must wait until the day of performance to sue. Property will not perish if the courts reserve some discretion to delay issuing injunctions to minimize minor dislocation of defendants. As the capacity for formal and empirical analysis increases, we should expect to see a decline in natural law methodology and rise in systematic economic thought. As that inquiry unfolds, we can now be confident of our central conclusion: The natural lawyers built better than they knew.