The Spirit of Legal History

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In 1748, Charles de Montesquieu published a scientific study of comparative law. A short time later, De l'esprit des lois appeared among the banned books of the papal index. Rarely has a treatise on law provoked such a sharp response from ecclesiastical authorities. Montesquieu's purpose was to dissect and lay bare law's origins, presumptions, and soul. His work reflected the certainty of the Enlightenment that reason should permeate all human institutions and that by skillfully using reason one could penetrate the complexity of a system of thought and reveal its clean, rational, sturdy structure. Montesquieu believed that positive, man-made law should be delicately balanced by transcendental norms, which he called natural law, and that the power and authority of human legislative and judicial institutions should also be carefully balanced. Most importantly, he thought that one could discover the "spirit" of the law by studying the "esprit général" of the people, the climate in which they lived, and their customs, religion, and political institutions.

Distinguished legal historians no longer provoke the same kind of censorious reaction, but they are still interested in capturing the essence of the law's soul. The newest successor to

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Montesquieu's project is a series entitled *The Spirit of the Laws*, edited by the distinguished legal historian Alan Watson, who also wrote Volume One, *The Spirit of Roman Law*. Richard Helmholz penned the second volume of the series, *The Spirit of Classical Canon Law*. Further volumes are promised on Chinese, Biblical, Talmudic, Common, Hindu, Customary, Japanese, and International law. An editor's note in the front of Helmholz's book states that the series will be "concerned less with the rules of the law and more with the relationships of the laws in each system with religion and moral perspectives; the degree of complexity and abstraction; classifications; attitudes to possible sources of law; authority; and values enshrined in law" (p iii). Montesquieu would be, I think, satisfied with that goal.

Montesquieu studied Roman law and wrote a book on the fall of the Roman Empire, a theme that Edward Gibbon would immortalize later in the eighteenth century. Watson carries Montesquieu's fascination with Roman jurisprudence into the twentieth century for good reasons. The Romans' contribution to jurisprudence remains pervasive in the European civil law tradition and significant in the Anglo-American common law. Its influence is not limited to the West. European colonialism transplanted not only the West's economic and political institutions but also its law into other cultures. Today, there is almost no legal system on the face of the earth that has not accrued debts to Roman jurisprudence.

Alan Watson, however, had to decide which Roman law he would write about. Ancient Roman law began with the Twelve Tables (circa 450 B.C.E.) and ended shortly after the massive codification of Justinian, the *Corpus iuris civilis* (528-534 C.E.). Within that millennium of jurisprudence, Watson might have chosen to write about the law of the Roman Republic, the Principate, or the late Imperial period. Or he might have written about medieval and early modern Roman law. This Roman law was studied in every law school in Europe from the twelfth century to the seventeenth, became an integral part of the medieval and early modern *ius commune* (about which more below), and directly shaped the structure and content of all modern legal sys-

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1 Charles de Montesquieu, *Considérations sur les causes de la grandeur des Romains et de leur décadence* (Garnier 1954); Edward Gibbon, *The History of the Decline and Fall of the Roman Empire* (Strahan 1797).

tems. I would argue that medieval and early modern Roman law deserves more attention than it has customarily received, because we have borrowed directly from it, not from its ancient predecessors.

In fact, Watson chose the period from the Twelve Tables to the end of the "classical period" of Roman law, traditionally dated to circa 235 C.E. Consequently, he set himself the task of extracting the "spirit" of Roman law from a period in which we do not have a single complete text of Roman law. The only exception is the almost complete *Institutes* of Gaius, who lived in the middle of the second century C.E. For Watson, as we shall see, Gaius's work does not "correspond to the spirit of Roman law," even though Justinian's jurists modeled their introductory textbook on Roman law upon the *Institutes* centuries later (p 201).

Watson finds the true spirit of Roman law in the "values, express and implicit, of those who made the law," that is, the jurists (p xi). He is right to do so. Very few legal systems have been driven by doctrinal scholars as Roman law was. These jurists were more important as a source of law than court decisions, statutes, or the rulings of magistrates. Yet Watson's depiction of the jurists is open to question. He characterizes them as "first and foremost politicians or bureaucrats" (p 206), who approached their legal writings as a recreational activity similar to "pheasant shooting as it is practiced in the United Kingdom" (p 206). The hunters have as their goal not only the "killing of pheasants" but also "winning the respect of one's fellows" (p 206). They are not interested in the birds themselves, but the exercise is for "the kindly, gentle but watchful, unorganized training of the next generation" (p 206). Just as the hunters are not concerned with the birds, Watson believes that these "powerful figures [the jurists] . . . were not really interested in law," but only in winning "the approbation of their fellows (and others) by proffering an ingenious opinion based on an accepted style of reasoning" (pp 205-06).

Repeating themes that he has developed in earlier studies, Watson argues that the spirit of Roman law embodies "isolationism" in three different senses: the jurists rejected or ignored other legal systems, most obviously Greek law (pp 111-16, 158-67); they concentrated on the law of Rome and paid little attention to the law of the imperial provinces (pp 167-71); and they

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were not interested in legal practices or norms of Roman society (pp 64-73). Many legal historians would agree with parts of these generalizations, but Watson pushes them further than most would dare: “Roman jurists argue as if they lived in a vacuum, remote from economic, social, religious, and political considerations” (p 66). We are told repeatedly that a certain legal development must be ascribed to “the internal logic of the legal tradition, and not at all to economic, social, or political pressures” (p 137). It has been estimated that the cadre of jurists was small, perhaps no more than ten or twenty men during the first century of this era. If Watson is correct, the spirit of Roman law resided in an extraordinarily minuscule number of souls.

These generalizations about Roman law are particularly hard-won because all the texts upon which they are based are small fragments of the writings of the jurists, selected by the compilers of Justinian’s Digest, the most important part of the Corpus iuris civilis, and almost our only source for their thought. Watson believes that these fragments contain the spirit that he seeks, not the entire Digest, which was, “of course, unknown to the Romans,” having been compiled after the fall of the Western provinces of the empire, in a Greek-speaking city, Constantinople (p xi). It would be impossible in the space of even a very long review to demonstrate how Watson teases his conclusions out of this fragmentary material.

A couple of examples will illustrate how Watson reaches his conclusions and how ambiguous the evidence is. He discusses a law promulgated by the Roman Senate in 10 C.E. (Senatus consultum Silanianum) that decreed if an owner of slaves (dominus) was murdered in his home, his slaves should be tortured and executed. The purpose of the law, says the jurist Ulpian (d. 223 C.E.), was to make “slaves . . . guard their masters.” Watson then turns to subsequent juristic interpretation of who could be called an owner under the law. His source for much of the evidence is a passage in Justinian’s Digest by Ulpian, who, following the lead of a number of his predecessors, restricted the term dominus considerably. The slaves of masters who held them through usufruct or in good faith, for example, did not fall under the law’s harsh dictates. If a son or a daughter were killed, the slaves of their mother were not tortured, even if the children had been living in the same house with her. Since the law remained

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4 See p 165, discussing Theodor Mommsen, Paul Krueger, and Alan Watson, eds, 2 The Digest of Justinian 29.5.1 at 896-98 (Pennsylvania 1985).
in force until the time of Justinian, Watson concludes that this is an example of "Roman legal rules . . . develop[ing] a life of their own . . . [with] little regard . . . to their purpose" (p 165). The original intent of the statute was to protect slave owners, and the jurists lost sight of this purpose in a web of elegant argument. He considers this an aspect of the "isolationism" of the Roman jurists, who never explained in these fragmented texts why they restricted the term "master."

Yet in this case, one could put a different, and to me a more convincing, spin on the evidence. Instead of being isolated from society and immersed in the intricacies of their arguments, the jurists may have been trying to protect slaves from a draconian piece of legislation. Over the centuries, most legal systems have rejected reprisals against undoubtedly innocent people whose only guilt was geographical proximity to a crime. Was this an example of Roman jurists following the inexorable logic of their arguments, or were the jurists restricting the reach of the statute for other reasons? I would find other reasons more compelling. It was, after all, a general tendency in Roman law beginning in the Principate to ameliorate the treatment of slaves.

To take another example: The lex Aquilia was promulgated in the third century B.C.E. and dealt with damage to property—what the Romans called delicts, and what we call torts. This statute has been a favorite teaching tool in European law schools for illustrating the evolution of Roman legal thought and the role of the jurists in bringing about change in the legal system. Few European law students leave school without the “cases” of the javelin throwers, or the barber in the baths, having become part of their intellectual baggage on the development of contributory negligence. Watson argues that the statute is an example of the inherent conservatism of Roman law. In spite of the defects of

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6 Aside from notorious modern-day instances of reprisal against innocent populations, there are earlier examples. In 1231, Emperor Frederick II promulgated a law for the Kingdom of Sicily stipulating that the inhabitants of a place where a secret murder had been committed should be fined if the perpetrator were not found; later jurists rejected the law’s validity. James M. Powell, trans, The Liber Augustalis or Constitutions of Melfi Promulgated by the Emperor Frederick II for the Kingdom of Sicily in 1231 1.28(32) at 29-30 (Syracuse 1971).

7 Watson is well aware of these tendencies. See generally Alan Watson, Roman Slave Law (Johns Hopkins 1987).

8 One might conclude that some American students have also learned these Roman law lessons and anecdotes from the superb textbook written by Bruce W. Frier, A Casebook on the Roman Law of Delict 91-94 (Scholars 1989). A standard European textbook is Herbert Hausmaninger, Das Schadenersatzrecht der lex Aquilia (Manzsche Studienbücher 2d ed 1980).
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the statute and the lacunae in the jurists' commentaries on it, the lex Aquilia "was never replaced by better legislation or re-script" (p 145). Yet this conclusion could be stood on its head using the same evidence. Rather than a mark of conservatism, the lex Aquilia could be seen as a tribute to the status, ingenuity, and importance of the jurists, whose analysis of the statute over roughly six centuries made replacement unnecessary. One could conclude that they paid enough attention to the needs of Roman society and provided sufficient remedies in cases of property damage that, in spite of the lacunae, two chapters of the original statute were included in Justinian's Digest eight hundred years after their promulgation.⁸

Watson's interpretations are subtle, nuanced, and clever, but not always completely convincing. However, the point of these illustrations is not to niggle about Watson's arguments but to illustrate the difficulty of reaching firm conclusions from the evidence.

Gaius (d. after 178 C.E.) challenges every facet of Watson's conception of Roman law's spirit. Although none of his writings was cited by jurists before about 250 C.E., jurists of the fourth century embraced him. In the next century, Theodosius and Valentinianus elevated him to the level of Ulpian and other important jurists in their Law of Citations (426 C.E.). Justinian's jurists used Gaius's Institutes as the model for a new introductory textbook for Roman law and included fragments from his other works. The outsider triumphed in the end.

Gaius was everything that Watson's pheasant hunters were not. Having taught, perhaps, at Berytus (the modern Beirut), he wrote for students; his book reeks of the classroom. He posed "Socratic" questions, often giving the contradictory opinions of his predecessors, and then offering his own resolution. Gaius tested his conclusions by looking at legal practice in contemporary Roman society. To give one example, he rejected the pretense that women of full age should still be governed by the rules of Roman tutorship (tutela). Women are not, he argued, deceived by poor judgment, as earlier jurists presumed to believe. In fact, according to Gaius, mature Roman women had the right to conduct their own legal affairs. Although the fiction of a tutor remained in second-century Roman society, Gaius pointed out that the praetor could force a tutor to accede to a woman's wishes,

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⁸ One should always remember that the lacunae may be a result of Justinian's jurists' selection of sources, not the jurists' lack of attention to certain points.
even against his will. Again unlike the jurists, Gaius knew Greek law and used its terms. He quoted Homer's *Iliad* to demonstrate that sale and barter were equivalent legal transactions. He was the only Roman jurist to write a book on the Provincial Edict, the vehicle through which Roman law operated outside Rome. The jurists did not create a system of law (pp 117-23); Gaius attempted to do so, laying out categories and treating subjects like contracts and delicts as separate fields of law. In Watson's view, Gaius was unique. No Roman jurist of the classical period followed in his footsteps (p 201).

After reading Watson's book, I was left to wonder how jurists whose intellectual horizons were so limited, whose curiosity about other sources of law was so stunted, could have created the extraordinary legal system that they bestowed on subsequent generations. It is either a magnificent paradox or a splendid irony that Roman jurists, who had no passion for the law itself, who did not view law as a vehicle of social justice, who exiled themselves to the city, and who strove only to outmatch the elegantly delivered, neatly put arguments of their peers, could have exercised such great influence on the world's jurisprudence.

Watson has created a riddle to which there can be no definitive answers. Our sources of Roman law are problematic. Although one-third of Justinian's *Digest* is taken from the writings of Ulpian, the most important of all Roman jurists, we must understand Ulpian's thought, methodology, and purpose from non-contiguous fragments. Imagine trying to understand and measure the thought of a modern scholar by reading scattered paragraphs taken from many different works. Would we think that Ulpian and the other jurists were more concerned with systematizing Roman law if we had complete texts, as we do for Gaius?

Watson has provided a challenging picture of Roman jurists, at odds with how most historians have evaluated them until now, and quite unattractive in a number of ways—unless, of course, you prefer the company of English pheasant hunters. Aside from whether a fictive, elite English upper class is the correct analog for Roman jurists, there remains the question whether any other

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legal elite in any other society ever had a relationship to law like the one Watson attributes to the Romans. If they were unique, and assuming that his picture of them is true, of what interest could they possibly be for understanding the proper role of a jurist in the legal system and in society? What lessons could these jurists teach the student of legal history today? I shall return to that question below.

Watson's Roman jurists are the product of his historical imagination and, I suspect, what he thinks the role of a jurist in society should be. Richard Helmholz imagines that medieval jurists had broad horizons, with a learned and engaged relationship to society. Their world was not one in which law floated serenely overhead as a disembodied set of arguments and principles, but one in which they participated as writers, practitioners, teachers, and officeholders. Their main business was canon law—the law of the church. They relished the order, rules, principles, and system of canon law. Today canon law may seem an arcane branch of irrelevant learning on the tree of jurisprudence. However, throughout Europe between 1150 and the time of the Protestant Reformation in 1520, canon law governed the law of marriage, divorce, wills, and all cases in which the clergy were litigants. It was the last universal system of jurisprudence in the European tradition.

A great virtue of Helmholz's book is its vast scope. He analyzes a wide array of topics in the writings of the major jurists beginning with Gratian in the mid-twelfth century and ending in the late fifteenth or early sixteenth century. He lays bare 350 years of developing juristic thought and gives the jurists' consensus, their communis opinio, in each area. The result of this approach, never before done on this scale or with this breadth, is to give us a broad and nuanced appreciation for their ability as jurists. Helmholz's book is a splendid example of what legal history should be, demonstrating how these jurists reasoned, what options earlier doctrine gave them, and how they shaped Western jurisprudence. It must be said that no scholar of ancient Roman law could write a similar book—not because of a lack of talent or learning, but because Roman law scholars are limited to what Justinian's jurists decided to put in the Digest. For most subjects, that reality precludes a detailed analysis of how a particular doctrine evolved from the Republican to the classical period.

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10 For a very good history of canon law for this period, see James A. Brundage, Medieval Canon Law (Longman 1995).
Gratian of Bologna established canon law as a coherent field of study. A figure as shadowy as Gaius, Gratian composed an introduction to the systematic study of canon law between circa 1130 and 1140 and revised it a short time later. He called his work a *Concordia discordantium canonum*, a *Concord of Discordant Canons*.

The jurists sensibly shortened his cumbersome title to *Decretum*. The second recension was immediately adopted by the teachers in all the law schools of Europe as the standard introductory text for the study of canon law. Jurists wrote extensive commentaries on it. As we have seen, Gaius's *Institutes* lasted four centuries before Justinian gave them a thorough rewriting. Remarkably, Gratian's *Decretum* lasted almost twice as long; it was not officially replaced until 1917.

Although both Gaius and Gratian systematized law, their methodologies were very different. Gaius wrote a coherent description of Roman law, divided into four books. He cited the opinions of his predecessors, but not their texts. Gratian collected the texts of the previous millennium, gathering together canons from ecumenical and provincial councils, papal letters (*decretals*), the writings of the Church Fathers, biblical texts, and those of later writers like Bede, Alcuin, and Peter Damian. He even included passages taken from Roman and Germanic law. Gratian drew upon a wealth of sources whose breadth and scope may be unequaled in legal history. Whereas Gaius only occasionally mentioned the conflicting opinions of earlier jurists, readers of Gratian were pummeled with the contradictions of the sources. They were constantly aware that law in the primitive church had been different and that doctrine had often evolved in several directions over the centuries. Most importantly, the texts permitted them to judge Gratian's conclusions as he picked and chose from different alternatives in the canonical tradition.

In contrast, Gaius's exposition is a seamless garment, summing up whole areas of jurisprudence and concealing the rough and tum-

11 Historians have long known from textual anomalies that Gratian must have compiled an earlier version of his work. Anders Winroth recently discovered a copy of the first recension in a Florentine manuscript and will publish his findings in the 1997 volume of the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Kanonistische Abteilung* (forthcoming) (text available at <http://www.newcastle.ac.uk/∼nhawl/paper.html>).

ble of his sources from his readers. Unlike Gratian, Gaius did not incorporate excerpts from earlier jurists in his work. The canonical tradition had to wait another fifty years for a work that was similar to Gaius's.13

As my listing of Gratian's sources suggests, the twelfth-century canonists found law in many cupboards. It must be emphasized that Gratian did not create this catholic panoply of sources; instead, he inherited it from his predecessors. The canonists also depended on the whole body of Roman law in its medieval guise for principles and doctrine, not just on those texts that Gratian included. By the end of the twelfth century, a "canonist" had to be trained in both Roman and canon law, and these two laws comprised the curriculum of the medieval law schools. The jurists called the jurisprudence created by this conflation of two systems of law the *ius commune*, which became the "common law" of Europe. Every student of law between 1200 and 1525 studied both Roman and canon law and became a practitioner of law in the region where he lived (all law students were male). His practice was informed by the principles and doctrines of the *ius commune*.14

For each topic he discusses, Helmholtz begins with Gratian. This starting point permits him to illustrate the "state of the question" and then to use Gratian as a foil for exploring later developments. A few examples demonstrate the effectiveness of Helmholtz's approach.

*Election law.* Helmholtz devotes Chapter Two to the jurisprudential foundations of ecclesiastical governance and the canonists' contributions (pp 33-60). Election was the most important vehicle for establishing legitimacy in the medieval church. Roman law had no defined rules for elections. Consequently, Gratian and his successors wrestled with electoral theory. Since an officeholder's right to office depended on the legitimacy of his election, the canonists had practical reasons for working out a set of rules. What constituted the electoral body? Did a candidate

13 The first canonistic Gaius was Bernardus Papiensis, who wrote a *Summa titulorum decretalium* circa 1191-1198. His *Summa* became the model for all subsequent general treatises on canon law, such as those of Goffredus Tranensis and Hostiensis.

14 The best survey of the *ius commune* is Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* (Catholic 1995). Scholars have often underestimated the importance of the *ius commune* by considering it merely academic law, having little influence on contemporary society—reversing Watson's argument that the Roman jurists created norms and rules for society but were untouched by it. I have discussed this tendency in Kenneth Pennington, *Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept*, 20 Syracuse J Intl L & Comm 205, 205-15 (1994).
need a majority (maior pars) or just the support of the most important electors (sanior pars)? What should the qualifications of officeholders be? These were not matters of abstract legal principle but real institutional problems that were of crucial significance for ecclesiastical and secular institutions. Although Roman law did not contain much electoral theory, the canonists did mine the work of the Roman jurists for norms that would regulate elections. When a canonical rule was violated in an election for a good reason, the canonists justified the breaking of the norm by the rule of law: "Cessante causa cessare debet et effectus" ("When reason fails, the effect should fail") (p 57).

This maxim is an illustration of the intricate interplay between Roman law and the ius commune, and it has found a place in the jurisprudence and decisions of modern legal systems and in law dictionaries. Roman law contained a number of texts in which the idea and language of this rule was adumbrated. Gratian included two texts from Pope Innocent I written in 414 C.E. in which the pope, undoubtedly borrowing from contemporary law, stated, "Quod pro necessitate temporis statutum est, cessante necessitate debet cessare pariter quod urgebat." ("What is established because of necessity, should cease when what dictates necessity ceases.") By the early thirteenth century, the canonists were using this rule of law to analyze many different legal situations. Johannes Teutonicus applied it to judges who temporarily could not exercise their office, and to curators of the insane. Helmholtz has demonstrated the rule’s importance for
electoral doctrine, and it became, in many different areas of law, a vehicle for understanding legal problems.\textsuperscript{20} The jurists of the \textit{ius commune} searched for principles that unified law in much the same way that modern physicists search for a unifying link between energy and matter that will explain the universe.

\textit{Criminal procedure}. Helmholz gives another example of canon law's search for principles and coherence in a chapter on criminal procedure that focuses on the maxim “Non bis in idem” (“Not twice in the same”), modern civil law's counterpart to our constitutional prohibition against double jeopardy. He points out that the principle can be found in an ancient Roman statute of the Emperor Honorius and in a passage from Ulpian (pp 287-90). The Bible also rendered support. Saint Jerome interpreted an opaque passage in the \textit{Prophecy of Nahum} that God would not judge a defendant twice (p 287).\textsuperscript{21} While Jerome's interpretation is strained, it is yet another example of the importance of biblical and theological texts in the jurisprudence of the \textit{ius commune}. Roman law offered further support for the principle. A text of the \textit{Digest} forbade that a defendant be sued twice for violating a grave.\textsuperscript{22} By the end of the thirteenth century, canonists had firmly established the principle of double jeopardy as a fundamental rule.

Just as in modern law, there were exceptions. The most striking similarity to American law is that the canonists permitted a cleric who wished to procure an ecclesiastical office to be examined for crimes even though he had already been tried for them in criminal proceedings. In spite of the biblical, Roman, and canonical prohibitions against double jeopardy, the jurists held that “[t]he principal end of the civil proceeding was to secure the removal of an unworthy person from ecclesiastical office . . . not to punish him for his crime” (p 293).

\textsuperscript{20} This text has never been printed and is taken from a manuscript in the Benedictine monastery at Admont, Austria, with the signature, Stiftsbibl.\textsuperscript{22}. It can be found on fol. 208v. The text can also be found on the Web at: http://www.maxwell.syr.edu/maxpages/faculty/penningk.

\textsuperscript{21} Helmholz illustrates its use for limiting the longevity of papal privileges at p 321.

\textsuperscript{22} The biblical passage, \textit{Nahum} 1:9, reads: “Quid cogitatis contra Dominum? Consummationem ipse faciet: Non consurget duplex tribulatio.” It might be translated: “Do you plot against the Lord? He will make a complete end. No tribulation will trouble him twice.” A certain amount of ingenuity is necessary to find support for double jeopardy in this text.

\textsuperscript{22} Mommsen, Krueger, and Watson, eds, \textit{4 The Digest of Justinian} 47.12.6 at 787 (cited in note 4).
Medieval jurists did not formulate the problem the same way a modern jurist would. They did not argue that a defendant had a right not to be tried twice for the same crime, and Helmholz explores some of the reasons why they did not. He argues that they viewed the “right” not to be prosecuted twice for the same crime as not “emanating from the individual but rather from an objective order of justice” (p 307). In this case, the spirit of canon law recognized that the individual possessed a right, but the right was protected by the legal order. In the twentieth century, the legal order of nation-states has proven a frail bulwark for resisting the state’s violation of the rights of citizens and non-citizens. In medieval jurisprudence, a rich brew of legal authorities external to the state—biblical, Roman, theological, and canonical—gave the legal order permanence and stability.

The jurists of the ius commune were also capable of expressing their conceptions of procedural rights in ways that seem to anticipate modern conceptions and language. Gratian did not recognize a defendant’s right to a trial. Following earlier traditions, he acknowledged that when a person committed a notorious crime, he sometimes forfeited his right. Again the Bible played an important role in shaping legal thought. From the middle of the twelfth century, the canonists noticed that God had summoned Adam and Eve to answer for their sins. If an omniscient God must summon defendants, the jurists concluded that human judges must do so as well. Guilielmus Durantis, who wrote a great procedural treatise, Speculum iuris, at the end of the thirteenth century (1271-1291), declared that even the devil must be given his day in court if accused of a crime! As is the case in their discussion of double jeopardy, they did not formulate their arguments in terms of “a defendant’s right to a trial.” They stated that a summons was embodied in natural law, and one could argue that they believed that the right was embedded in the natural order of things. Nevertheless, the right was absolute. Even the pope or the emperor was bound to give a defendant a trial. In part, it was a matter of vocabulary and usage.

Within two decades, Johannes Andreae wrote about a person’s right to make a will in terms that resonate with today’s language of “human rights,” inherent in each human being: “Although the form of making a will is a matter of public or civil law, the authority and power of making a will are derived from

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natural law or the law of nations... and natural rights are immutable." Johannes's language has a surprising modern resonance. It is, as Helmholz observes (pp 306-08), open to debate exactly what kind of rights these jurists conceived, but the spirit of canon law fostered rights that have played a crucial role in the development of modern rights theory.

The rights of those who are subject to the authority and power of a state have always been defined and protected by norms that transcend positive law (the law of the human legislator). Following a pattern that would repeat itself in every other European legal system, the jurists of the canon law gradually restricted its scope and sources, eventually limiting it to the judicial decisions and legislation of the papal curia. A subtext of each of Helmholz's chapters is the growing importance of papal law and the consequent narrowing of sources of law from the broad fields that Gratian cultivated. As the papacy became the bureaucratic and legal center of the church, papal law weeded out its rivals in the same way that the legal systems of the modern nation-states have isolated themselves into balkanized and self-referencing systems. This process of creating legal systems that recognize only their own positive law was just beginning in the period that Helmholz examines. During the course of the next three centuries, papal law did make great strides in obliterating other sources of law, but the jurists still had many tools with which to limit papal legislative and judicial authority, particularly the norms of the ius commune.

The law of privileges. In another chapter, Helmholz discusses the system through which the papacy granted rights in the church, the law of privileges (pp 311-38). Papal privileges may seem a long way from modern law but, as Helmholz points out, present-day governments give special rights to individuals, groups, and institutions that exempt them from the normal provisions of the law. In the Middle Ages, these privileges were most often granted to institutions or groups like religious orders. Privileges presented Gratian with a problem. He included sixteen early papal letters in the Decretum stating that the pope could not grant exceptions to the ancient canons of the church. To counter the force of these letters, Gratian used six Biblical examples to demonstrate that exceptions to the law were not unlawful.

Johannes Andreae, Novella in Sextum 302A (modern pagination) at VI 5.11.7 § Et sciendum (Academische Druck 1963): "Licet forma testandi sit de iure publico vel civili voluntas et potestas testandi sunt de iure nature vel gentium... set iura naturalia sunt immutabilia."
Even Jesus, for example, had cleansed a leper against "the letter of the law," and by doing so proved that "he who bestows his authority on the law is not subject to it" (pp 314-15). After a string of biblical justifications, Gratian turned to a text of Roman law taken from the *Theodosian Code* (438 C.E.) that introduced an idea that would remain a cornerstone of the jurisprudence of privileges: "We command that rescripts contrary to law be rejected . . . unless they do not harm another." From the Bible Gratian took authority and power to change law; from Roman law he adopted the concept that a privilege should not injure the rights of another. There is a certain delicious irony in the fact that he cited a secular text to establish an ethical norm and turned to a religious text to confirm a jurisprudential principle. As Helmholz demonstrates, the canonical jurisprudence of privileges is a gloss on these two principles: "The principal goals [of later canonists] . . . boiled down to two. The first was establishing the authority and the inviolability of papal privileges. The second was restricting an injury to the rights of others" (p 323).

With each of Helmholz's richly researched chapters, a new aspect of the "spirit of canon law" emerges. The process tends to unfold as follows: The canonists confront a problem of jurisdiction, rights, or institutional structure. They build a jurisprudence to describe contemporary practice, using Roman law, custom, theological thought, biblical and canonical examples, and the canons of early church councils to refine their thought. Out of this wide and deep lode of sources, they created doctrines, definitions, rules, and procedures that are still embedded in contemporary law.

The enormous range of subjects treated by canon law will surprise the modern jurist accustomed to thinking of ecclesiastical law as an obscure sideshow of legal history. Helmholz discusses the rights of the poor, the jurisprudence of the oath, property rights, canonistic contributions to criminal procedure, and the rights of ecclesiastical magistrates to exercise secular jurisdiction. Other chapters are devoted to topics that one might expect in a book on canonical jurisprudence: baptism, marriage,


13 Later incorporated into Justinian's *Code*, Cod. 1.19(22).7: "Rescripta contra ius elicitab omnibus iudicibus praecipimus refutari, nisi forte alienum est, quod non laedat alium." This text became the most important text for the jurists of the *ius commune* in discussing the issue of when a ruler could or should derogate the provisions of natural law. See Pennington, *The Prince and the Law* at 130-32 (cited in note 23).
blasphemy, and excommunication. Helmholz has written one of those rare books that both students and scholars will find useful and thought-provoking.

For those readers who have stayed with me to this point I would like to raise one last issue. Of what use are these books and, indeed, legal history, to the modern lawyer? Is the “spirit” of these laws of any practical interest or importance? If one bases the answer on the number of law students who take courses in European legal history or the number of law schools that require a course in legal history of their graduates, the answer is little or none. If, however, one grapples with the issues that both these books raise in different ways—the role of a jurist in society and the range of sources that jurists might recognize as being relevant to their work—the answer might be more positive.

Watson argues in his book that jurists can create a sophisticated legal system without looking beyond their own law. Law, he seems to argue, can be created by generations of subtle minds working out legal problems by using logic and elegant arguments that convince the profession. I do not believe that Roman jurists resembled Watson’s, although I would concede that brilliant law can sometimes evolve in splendid isolation, cut off from outside influences and even separated from the needs and norms of society. But only occasionally. Most often law evolves under the sway of a myriad of influences. This truth is the best argument for studying legal history.

The most important conclusion to draw from the study of the Roman jurists is that they were essential sources of law and vehicles of legal change in Roman society. I use these jurists in my legal history classes to demonstrate how fruitful the interplay between the “intellectuals” of the legal system and legal institutions was in ancient Rome, and, by analogy, how jurists and the courts could create a fruitful dialectic in today’s legal systems. Watson has acknowledged this function of the Roman jurists in earlier books, but in this book he has downplayed this aspect of their importance by highlighting their isolation from society. His thesis diminishes their importance for Roman law and makes it harder to understand how Roman law became the bedrock upon which modern jurisprudence rests.

Watson would readily grant, I think, that the jurists were a source of law in the ancient world. Some of the jurists, but not

See, for example, Alan Watson, Sources of Law, Legal Change, and Ambiguity 1-24 (Pennsylvania 1984).
all, had the *ius respondendi ex auctoritate principis* (right of responding on the authority of the prince) during the classical period. This right granted by the emperor gave their opinions legal force. Early in the second century, the Emperor Hadrian ruled that when privileged jurists agreed on a particular point, judges were bound to follow their opinion. Hadrian's elevation of juristic opinion led, by the time of the Emperors Theodosius and Valentinianus, to the Law of Citations in which the jurists' general writings, not just individual opinions on a certain issue, obtained the force of law by imperial decree. We have no way of knowing how this transition took place or when it began to influence the practice of Roman courts. But we do know that the jurists retained their status for centuries, altering their opinions on the basis of justice (*equitas*) and utility (*utilitas*), not just elegant argument. I think it is inconceivable that Watson's jurists could have retained their privileged position without there having been much more interplay between them and society. Whether my doubts have any merit or not, his pheasant hunters provide much food for thought about what the proper role of a jurist should be in a legal system. Should judges recognize the scribblings of law professors (not just American, but also French, German, Italian, and Japanese) as authoritative in deciding cases? Should jurisprudence be a closed intellectual system that operates without an eye to society, social problems, or the outside world?

If Watson raises the issue of the proper role of a jurist, Helmholtz encourages us to think about how broad the spectrum of sources should be in a legal system. Here too legal history offers thought-provoking perspectives. Helmholtz's jurists drew upon a wide range of sources that they comfortably labeled "law." Between about 1320 and 1600, a new genre of jurisprudence arose called *consilia*. These were legal briefs that litigants would request from famous jurists and submit for the consideration of the court. A confluence of juristic opinions (and the money to pay for them) could affect the decisions of judges. Until the seventeenth century, jurists of the *ius commune* drew upon sources of law that transcended the law of the locality in which they worked. Dutch jurists in the seventeenth and eighteenth centuries cited decisions and legal literature from Portugal, Italy, France, Germany, Scotland, and Spain in their *consilia*. This "pan-geographical jurisprudence" died slowly. Statutes forbidding the use of court decisions from other legal systems began
appearing only in the eighteenth century. American Supreme Court justices still cited Roman and canon law commonly in the late nineteenth century. In the twentieth century, legislatures, courts, and legal education have focused on the supreme sovereignty of national positive law to the exclusion of most other norms. Quite understandably, this narrowing of the sources of law diminished the importance of comparative and historical law in legal education. The culmination of these developments came in the nineteenth century with the triumph of John Austin’s legal positivism, which has provided the theoretical foundations for the sovereignty of the modern nation-state. The result of this “strict construction” of legal sources has made it difficult for jurists to break out of the presuppositions of each legal tradition. I have argued that human rights have been especially limited by the narrow horizons of “balkanized” legal systems.

The distinguished Italian legal historian, Paolo Grossi, recently published a book in which he lamented the reduction of law to those norms that the state itself creates. Grossi argues that when the state is the only producer of law, it loses its natural connection to the needs and just rights of the people. He dates the first stages of this development in European law to the late Middle Ages. Before then, legal norms could also be found outside the legislative, judicial, and executive organs of political authority. Helmholz illustrates with much learning and skill the kind of legal system that Grossi idealizes.

If jurists today could cite the arguments and norms of ancient Roman law, of the ius commune, and of other legal systems, they could not only expand the definition of what law is but also radically alter legal education. I am convinced, for example, that the American system of justice would not be able to take the due process rights of illegal aliens and other rights of non-citizens away quite so easily if American lawyers could argue that the right to due process is not only based on American constitutional and positive law but on the subjective right of human beings to

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29 See, for example, the remarkable array of sources used to establish the validity of the principle that a person is innocent until proven guilty in Coffin v United States, 156 US 432, 455 (1894) (citing both Gratian’s Decretum and canon law).
have their cases heard in court. Moreover, they could argue that this idea is not a recent creation but has roots deep in the sources of Western law. The concept of transcendent rights, norms, and principles is not alien to American law and society. Thomas Jefferson would have been perplexed by the idea that only "citizens" were entitled to his "inalienable rights."

This expansion of law's sources is not utopian. The jurists of the European Union must delicately draw upon comparative law and look far beyond individual legal systems if they are to recreate successfully a new European ius commune as agreed upon in the Treaty of Maastricht. International lawyers have struggled for some time with the problem of finding sources of law that would counterbalance and pierce the protective shield of the law erected by the sovereign nation-state. Theodor Meron has advocated that jurists should look to international norms and customs, a source of law that cannot be suffocated by the positive law of the nation-state, as a new source of international law. Gaius, Gratian, and the jurists of the ius commune would not view his suggestion as a radical departure but as an accepted practice. In a world where the sources of law became catholic, legal education would have to change. Comparative law and legal history would have to have a much larger place in the curriculum than these subjects have today.

If legal history deserves such a place in the curriculum of today's law schools, it must earn it by producing books that not only restore memories of forgotten jurists, doctrines, and practices, but that also provide different ways of thinking about law. It must produce more than "textbooks"; it must produce books like Helmholz's that instruct with the lessons of the past and inspire ideas about the future. Law is, I think, quite different from the physical sciences in its relationship to the past. The "experimentalism" of Roger Bacon (circa 1213-1291) is only of antiquarian interest to a modern researcher of optics and light, but the jurisprudence of the past can be of real relevance to the present. If judged by the criteria of stimulating thought about the proper role of jurists and of encouraging perspectives that would transcend the paradigms, boundaries, and definitions of modern law, Helmholz's book is a brilliant success. Watson's book is more problematic as a heuristic tool for the classroom. His central the-

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22 I discuss the roots of our conception of due process in Pennington, The Prince and the Law at ch 4-7 (cited in note 23).
sis does encourage us to think about the relationship of jurists to the law. If one were to construct an ideal world, would its jurists be concerned only with the inexorable logic of the law, isolated from practice and the society in which they live? Since I know of no legal system, past or present, in which jurists resemble Watson's pheasant hunters, I have my doubts about whether the question has much relevance for thinking about the sociology of law. Law and the civil polity cannot and should not be separated. The essence of legal thought is the elegant and intricate dialectic between the world of the mind and the world of men and women. Taking one or the other away would leave jurisprudence impoverished.
The Right to Community?

Jacqueline Bhabha†


Does the modern state have a duty to implement basic economic and social rights for its population? If so, what program of action should the state adopt to realize this obligation?

At the dawn of a new American presidential term, as affirmative action programs come under severe threat and welfare entitlements are abolished, the answer to the first is increasingly negative (and the second therefore irrelevant). Conversely, in the realm of public international law, the human rights regime established after World War II answered the first question with a qualified affirmative. States have an obligation to promote the economic and social rights of their citizens insofar as they have the available resources to do so. Unlike the absolute and immediately binding standard imposed with respect to such rights as freedom of thought, and protection from torture or arbitrary deprivation of life,¹ the requirements on states to provide food, housing, medical care, and basic education were formulated in terms of contingency and progressive realization.² As to the second question, it was left up to states to decide what steps their resources permitted them to take to realize economic and social rights. The international monitoring and enforcement machinery established to ensure states’ compliance with their obligations with respect to civil and political rights³ was not paralleled in the economic and social fields.

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¹ The so-called non-derogable civil and political rights are set out in the International Covenant on Civil and Political Rights, Arts 4-8, 11, 15, 16, 18, UNGA Res 2200(XXI), 999 UNTS 171, 174-78 (Dec 19, 1966, entered into force Mar 23, 1976) (“ICCPR”).

² “Each State Party to the Covenant [on Economic, Social and Cultural Rights] undertakes to take steps, individually and through international assistance and cooperation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.” International Covenant on Economic, Social and Cultural Rights, Art 2(1), UNGA Res 2200(XXI), 993 UNTS 3, 5, (Dec 19, 1966, entered into force Jan 3, 1976).

³ The most significant is the right of individuals, under the Optional Protocol to the
At first glance, this dichotomous approach appears perverse. Civil and political rights are considered “first generation” rights, while economic and social rights constitute a “second generation,” even though the former presuppose a certain attainment of the latter—if indeed the two types of rights can be disentangled in the first place. Access to food, shelter, and basic education is a necessary precondition for the exercise of freedom of thought; indeed, the failure to provide a minimal, life-sustaining standard of living in the modern world of plenty arguably represents an arbitrary deprivation of life. The constitutions of the Soviet Union and most of the old-regime East European states reflected this thinking by enumerating a wide range of social and economic rights.

In the West, however, a distinction between the two sets of rights has been justified by pointing to differences in the feasibility of their implementation. States can establish structures that protect their citizens’ civil and political liberties, but they cannot create natural or social resources by fiat. Rights to social and economic goods, while worthy aspirations, are unenforceable. Enshrining such rights, the argument goes, is therefore pointless at best, and moreover runs the risk of dangerously discrediting the worth of other constitutional obligations. While this may well be true for impoverished states, it hardly reflects the situation of many affluent states where unequal distribution, not scarcity, is the principal source of deprivation.

In The Community of Rights, Alan Gewirth boldly takes on these questions. First, he proposes and substantiates a powerful philosophical argument in favor of the state’s duty to provide basic economic and social rights for its citizens. Second, and perhaps surprisingly for a philosopher, he cogently elaborates a detailed account of the socioeconomic and political strategies necessary to turn his theory into practice. The book starts with a philosophical account of the relationship between human action and rights. It details the nature of positive rights and argues for the centrality of a principle of mutuality, which links individuals to the establishment of a just community based on human rights. The second half of the book then describes, in illuminating and

ICCPR, to present claims of human rights violations to the Human Rights Committee.


convincing detail, how the philosophical argument translates into concrete policies regarding welfare, education, property rights, employment, and industrial and political democracy.

Building on his earlier book *Reason and Morality* and drawing together a substantial corpus of writing by others, Gewirth traces the guiding socioeconomic principles—that he calls "the economic biography"—that would govern a society concerned with the protection of individual human rights (pp 99-100). He argues, in opposition to an adversarial conception of the relationship between community and individual rights, that the two have a relation of mutual support. Thus, it is a duty of the wider community (which he identifies with the state rather than the market, charitable organizations, or other institutions of civil society) to promote individuals' ability to achieve a life of freedom and well-being. At the same time, it is an obligation of individuals, once they have the capacity to do so, to exert effort to realize such a life and to aid others in the same pursuit.

*The Community of Rights* focuses its argument particularly on those worst off and best off. According to Gewirth, the most vulnerable members of society—victims of the devastating material and psychic effects of prolonged poverty and deprivation, who are unable by their own efforts to achieve a minimal dignified standard of living—are entitled to particular kinds of assistance, such as welfare support, intensive pre-schooling on the model of Head Start, and public works jobs with child care provided. The most affluent—beneficiaries of positive socialization and heredity, and consumers of a disproportionate share of societal resources—have an obligation to support such programs, if only through progressive taxation schemes. For their tax dollars, affluent citizens receive dividends in the form of reduced social divisiveness. By eclectically combining a focus on the state's obligations with an emphasis on individual effort and responsibility, Gewirth distinguishes his robust social democratic position from the approach of communitarians, socialists, and liberal theorists.

What sets *The Community of Rights* apart from other works defending social and economic rights is its dialectical underpinning. The starting point of the book is that all human action is necessarily connected with the concept of rights (p 18). Gewirth advances a deductive argument (elaborated in earlier work) to establish this. He begins from two assumptions: first, that human beings can act freely, and second, that they act purposively to attain "well-being." Gewirth then moves from the human

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rights of the individual to the necessity of rights for all human beings.

This argument concludes where modern international human rights law commences, with the proposition that all human beings (as rational and volitional agents) have inherent dignity and equal and inalienable rights. Despite its formal deductive nature, Gewirth's reasoning is of considerable interest for human rights lawyers precisely because it does not simply assert the "inherent dignity" of human beings as an a priori assumption, as does the Universal Declaration of Human Rights, or as a culturally specific construct. It is because human beings have the capacity to act purposively that they have the "inherent dignity" that distinguishes them from animals, plants or other forms of life, and require, as a matter of rational necessity, the fulfillment of basic economic and social rights. In the absence of the basic necessities of life, human beings lose some or all of their purposive ability to act and are therefore deprived of the possibility of realizing their inherent dignity.

This argument presents a difficulty with Gewirth's thesis. If being an agent requires having freedom and well-being, then either there is no point in claiming a right to these goods because all human agents already have them, or, given the massive extent of human deprivation and oppression for many millions around the world, they cannot be necessary conditions of action. In response, Gewirth invokes a notion of potentially different levels of human agency: agents may have freedom and well-being insofar as they are capable of purposive and rational activity, but their circumstances may change so that they lose these conditions of action. In other words, it is not inevitable that they will have these goods prospectively and indefinitely. Hence the necessity of human rights as a social safety net.

Alternatively, the deprivation of the world's poorest people may be taken to indicate not an inability to act or to achieve any purposive goals, but a mismatch between capacities and social conditions; they may well have the capacities but lack an adequate set of social conditions. Typically such populations have only a limited capacity for purposive activity because they only

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9 According to Gewirth, the mentally and physically disabled have rights "to the degree to which they approach being normal agents" (p 24). More on this below.
have access to a basic, minimal level of well-being. But well-being comprises more than the bare minimum of subsistence; it includes the ability to have control over one's own life, and to achieve basic self-respect by virtue of education and the ability to earn. Without these, human endeavor is inevitably doomed to bare animal existence. So there are levels of well-being and correlative levels of purposive action (p 14).

It is the failure of states to ensure access to this more comprehensive well-being for the deprived masses that underlies the apathy, destructiveness, and low level of productive activity characteristic of many poor countries. Though The Community of Rights does not focus on questions of international distribution of resources, by linking human action to access to basic rights Gewirth's theory avoids the myopic culturalism of some recent accounts of global inequalities. Far from cultural anarchy or civilizational clash being at the root of human misery in the non-western world, as suggested by writers such as Robert Kaplan and Samuel Huntington, it is the failure of governments to institute effective socioeconomic reforms and redistributive programs that raises the most critical questions facing the international community today.

Gewirth's position also contrasts in two key areas with that of John Rawls, despite their common focus on the situation and needs of the most deprived members of society. As we have seen, Gewirth constructs his argument for a community of rights on the basis of the rational necessity of rights, proceeding by way of logical deduction. By contrast, the Rawlsian theory of justice stipulates, as is well known, that any actor must make his moral choices from an "original position," behind a "veil of ignorance." Gewirth notes critically that there is an element of contingency here, because no argument establishes why, as a matter of neces-
sity, a human agent must accept Rawls's two principles of justice (p 27).

But surely it is precisely this element of choice that is crucial in the implementation of human rights. Herein lies a possible weakness of *The Community of Rights*. Freedom and well-being turn from normative abstractions to practical actuality only when individual citizens, politicians, and governments decide it is in their interest to move forward and implement them. In most cases, given the imbalances of power and other resources, redistribution is not mandated by mutuality or any other abstract principle. Revolutionary disruption and massive social upheaval do not threaten ruling elites within most countries. Nor does the position of the wealthy nations in the present geopolitical climate require them to attend to the well-being of the most needy nations and their citizens. Indeed, Gewirth distances himself from what he considers an excessively adversarial account of the power of the disenfranchised to effectively threaten the powerful (p 122). Instead, he sets out his position in more sanguine terms:

The state, as the community of rights, imposes taxes in order to secure the economic rights of those who are more deprived and thereby to narrow the inequalities that subject them to unwarranted superiorities of power. In this way rights and community reinforce one another, because these economic rights are fulfilled through the mutualist provisions of the community (p 179).

But he provides no account of how this extensive economic redistribution—involving progressive taxation and means-tested benefits, for example—is to be accepted as desirable (let alone necessary) by those burdened. Without being unduly pessimistic about human altruism, it is clear from the present distribution of resources, both within and between states, that the necessity for mutuality and redistribution has been singularly neglected in the interests of self-advancement.

A second difference between Gewirth and Rawls points in the opposite direction. It goes to the question of human achievement and effort. Rawls emphasizes the need for equal opportunity to access society's basic institutions, but he does recognize that effort (stimulated by economic incentives) and individual merit have a proper role to play in determining access to resources, jobs, and other social goods in that society. Gewirth, for
his part, stresses the element of individual effort and responsibility as an essential basis for the principle of mutuality underlying the community of rights. Once individuals are in a position to be productive agents—either unaided if they are sufficiently well-endowed or as a result of the community’s implementation of social and economic rights—they have an obligation to contribute to the community. Only an absence of productive potential, not a lack of personal effort, can justify welfare dependence.

But while Gewirth characterizes Rawls’s position as being determinist (p 190), he does not adequately explain the genesis of the individual “effort” on which he relies. Consider Gewirth’s treatment of two key areas where individual motivation relates to socioeconomic provision: entitlement to welfare and participation in worker cooperatives. In the first, Gewirth correctly highlights the fact that “[m]any welfare recipients come from a background in which the debilitating effects of poverty have already left a heavy mark” (p 128). They therefore frequently lack the psychological attributes necessary to seek work or even participate effectively in “workfare” and other social programs. The book sets out a persuasive account of the conceptual and practical limitations of these programs, a critique that could, mutatis mutandis, apply to a wide array of state welfare strategies (pp 128-31). Gewirth’s solution is a form of social engineering designed precisely to change these individuals’ motivational structure:

It is hence naive to expect that these persons directly have the emotional and intellectual abilities, including relevant skills and an effective sense of personal responsibility, needed to take adequate advantage of the opportunities they may be offered. In this regard, it is vitally important to seek out their children at a very early age and to put them into educational programs in which these debilitating effects can be strongly countered (pp 128-29, emphasis added).

Given this acknowledged association between institutional factors and individual motivation, it is not clear what place there is in Gewirth’s account for individual effort as an independent variable.

Similar questions arise from the analysis of individual participation in forms of workplace democracy. In the optimal worker cooperative employment situation, for example, where
industries are run and owned by the workers and exhibit a “flourishing kind of socialized entrepreneurship” (p 300), the solidarity essential to the system has to be developed and built in by institutional means so that each individual actor becomes, if he or she is not already, “a reasonable self” (p 304). The inherent rationality of the principle of human rights is thus a socially produced realization, which has to be consistently and constantly taught. Again, this seems to suggest that the motivational structure required to act in a mutualist manner is irreducibly a product of external factors rather than of any inherent individual ability to exert “effort.”

But if the givenness of the individual bearer of rights is problematic in Gewirth’s theory, so too, arguably, is the entity standing at the opposite end of his analytic stage, the community. The problems can be posed in terms of two questions. First, who is the community of rights to be composed of? Second, given that our current world includes multiple communities, what is the relationship of each community to the others?

According to Gewirth, all human agents are bearers of rights; however, he qualifies this general point in two ways. The first qualification is a contrast between “normal” agents and other humans who lack the ability or right to be purposive prospective agents. Mentally and physically disabled humans fit within this category (p 65) and at various points in the book, so do “criminals” (p 315). Gewirth argues that the less ability humans have for productive agency, the “less they are able to fulfill their purposes without endangering themselves and others, and this is why their generic rights must be [ ] reduced” (p 65).

This association of rights to agentive capabilities is questionable, as is the unqualified connection between disability and danger. True, the freedom (though not the material well-being) of severely mentally subnormal individuals may properly be curtailed for their own safety. Yet it is not clear that this utilitarian argument is sustainable for the overwhelming majority of affected individuals. Difference is not the same as danger, though some may perceive it that way. As Martha Minow has emphasized, this sort of vocabulary, “that distinguish[es] the self from others, the normal group from the abnormal, and autonomous individuals from those in relationships of dependency . . . ends up contributing to rather than challenging assigned categories of difference that manifest social prejudice and misunderstanding.”

Moreover, Gewirth is silent on the question of how to resolve conflicts between the interests of the "normal" majority and of the "subnormal" minority. For example, he does not address the questions of integrating mentally and physically disabled children into normal classrooms, resolving disputes over the siting of residential facilities for the disabled, and the like. In the case of "criminals" (presented here as a strangely essentialized category), the conflicts with the interests of the majoritarian sections of the community are even clearer, yet Gewirth leaves the area completely unexplored.

Gewirth's second qualification concerns the broader question of who should be part of the "us" of community. Given that the state has a duty to meet individuals' needs for freedom and well-being, what criteria should determine the community of beneficiaries? Who is and who is not included within the polity? During an era of massive migratory flows, refugee displacements, and supra-national unions such as the European Union, NAFTA, and Mercosul, this is an increasingly urgent question. Yet Gewirth fails to discuss the rights of non-citizens to inclusion in polities, particularly affluent polities (p 289). He does allude to the critical issues at stake, for example, in restricting universal social and political rights to "members [does he mean citizens, legal residents, physically present individuals?] of societies geographically demarcated as countries or nation-states" (p 86), but he does not clarify whether this is a purely pragmatic or a normative restriction. Though he asks, "[H]ow can the resident of Chicago help to fulfill the pressing agency needs that the residents of Bosnia or Afghanistan or Somalia or Ecuador cannot fulfill for themselves by their own efforts?" (p 55), he seems to accept as inevitable restrictive or exclusionary state immigration and citizenship laws (p 294). This omission is significant. The stakes in having access to freedom and well-being—and the problem of mutuality—are raised sharply when destitute non-citizens, par-

15 See, for example, Will Kymlicka's recent discussion of multicultural citizenship, and particularly his useful distinction between three forms of group-differentiated rights, in his Multicultural Citizenship: A Liberal Theory of Minority Rights 26-33 (Clarendon 1995).

16 The full passage runs as follows:

The universality here envisaged may be restricted, for reasons of practical convenience of effectuation, to members of societies geographically demarcated as countries or nation-states; but in principle it applies internationally as well. At the same time, this universality does not militate against the particularism whereby persons give special consideration to the members of their own families and other partial groups of friends or colleagues. Such particularism not only is consistent with but is justified by the universal principle of human rights (p 86).
particularly those fleeing persecution, are denied access to more affluent countries.

In a larger sense, the question of ethnic or cultural coherence or diversity of the polity goes to the heart of one's understanding of what "community" is. One of Gewirth's models of economic democracy is the worker cooperative experiment at Mondragon in the Basque region of Northern Spain. It is clear that the ethnic coherence and cultural solidarity of the Basque work force, and the correlative absence of the "vast labor mobility and heterogeneity" that characterizes "existing capitalist industrial societies," (p 308) were critical components of the project's success (p 302). Indeed, Gewirth goes on to argue that a reduction in labor mobility is critical to the viability of such projects. But he does not explore the exclusionary consequences of this model for immigrants, migrant workers, and others.7

This problem raises the broader question of the relationship between nation-states. While The Community of Rights focuses unapologetically18 on the United States, Gewirth refers to the need for international cooperation and a universalist approach to the enforcement of the community of rights. He rightly acknowledges the primacy of the individual state as a vehicle for the translation of moral rights into human entitlements. Other theorists may argue that the nation-state is in terminal decline,19 but in the absence of effective international enforcement mechanisms, the state remains the appropriate custodian of the duties generated by a theory of human rights. Gewirth, however, neglects the complex nature of interstate relations and the critical effect of these relations on access to human rights.

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7 He cites Switzerland as an example of an existing industrial society where "community attachments [have] markedly . . . decrease[d] labor mobility" (p 308). But Switzerland has one of the largest foreign labor forces, and its denial of citizenship rights to long-established migrant workers—particularly Italians—is notorious.

18 Gewirth defends his focus on the United States as follows:

Although the problems, histories and traditions of each country are to some extent unique, the American experience can be taken to be broadly representative of many other Western countries . . . insofar as other countries have been developing economically according to Western patterns, the American problems can be taken at least in part to apply to them as well, either in the present or in the not too indefinite future (p 111).

19 "[W]e are in the process of moving to a global order in which the nation-state has become obsolete and other formations for allegiance and identity have taken its place." Arjun Appadurai, Patriotism and Its Futures, 5 Pub Culture 411, 421 (1993). See also Mike Featherstone and Scott Lash, Globalization, Modernity and the Spatialization of Social Theory: An Introduction, in Mike Featherstone, Scott Lash and Roland Robertson, eds, Global Modernities 1, 1-2 (Sage 1995); Arjun Appadurai, Modernity at Large: Cultural Dimensions of Globalization 22 (Minnesota 1996).
Interstate relations affect rights in two ways. First, affluent states' policies are frequently a reflection of, or work in tandem with, massive transnational corporate interests. These interests operate to the detriment of the majority of residents of underdeveloped countries, through structural adjustment policies and other forms of economic and political domination. Therefore, much interstate cooperation is principally characterized by a negative effect on the productive abilities of those worst off. This reality makes Gewirth's account of possible interstate intervention seem dangerously wishful:

Where governments do not have the will or the resources to fulfill the rights, they must be helped by other governments, especially through facilitating processes of democratization and developing in their own members the abilities of productive agency whereby they can provide the needed resources for themselves, and also by making international trade less subject to domination by richer nations (pp 353-54, emphasis added).

Such a consensual process is hard to conceive, and still harder to achieve.

Second, the post-war period has witnessed an increasing polarization between affluent and non-affluent states concerning access to human rights protection. This disjunction has become more marked since the end of the Cold War removed some of the equalizing checks and balances in the world system. At the same time that collaboration between states within regional blocs or economic networks is picking up steam, the processes of exclusion that have long operated between individual states are now being transferred to larger interstate groupings. Mutualy of a sort is at work, but only within circumscribed geographically or economically defined interest groups. Affluent states have made concerted moves to fortify their common borders against asylum seekers and to regionalize the responsibility for exilic relocation within refugees' region of origin. Gewirth does not provide an

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13 These policies are routinely demanded of third world governments by international organizations such as the World Bank and International Monetary Fund, in return for loans and debt forgiveness. The pursuit of free market policies, the reduction of state subsidies, and the economic liberalization associated with structural adjustment all impact most onerously on societies' most deprived members.

21 For a justification of this position by a prominent refugee advocate and scholar, see James C. Hathaway, Can International Refugee Law Be Made Relevant Again?, in U.S. Committee for Refugees, World Refugee Survey 1996 14, 14-19 (Immigration and Refugee Services of America 1996).
account of how the principle of mutuality would work in the context of this sort of regionally configured community of rights.

These omissions do not detract from the importance of this erudite and lucid work. In elaborating his vision of the community of rights, Gewirth succeeds in drawing together a huge literature on the social and economic policies that could improve the functioning of social democracies. He establishes persuasively, with great scholarly mastery of the field, just how crucial these "second generation" rights are for modern democratic society. This book draws together much of the material on which the critical debates of our times over social and economic policy must depend. Most usefully, *The Community of Rights* articulates a tension between normative and pragmatic considerations, raising fundamental questions about human rights enforceability, questions that are as difficult to resolve as they are urgent.