FOREWORD: CAN JUSTICE AND THE RULE OF LAW BE RECONCILED?

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I. THE CONFLICT BETWEEN JUSTICE AND THE RULE OF LAW

Much of the current debate between activists on "the left" and "the right" concerning the legal system can be conceived in purely jurisprudential, as opposed to political, terms. Today, many on the left insist that the decisions made by the legal system conform as closely as possible to some substantive conception of "justice" that is independent of the legal system itself. They call those who disagree "formalists." Many on the right insist that the procedural values of the "rule of law"—general rule-making, impartially administered among persons and over time—preempt concern for correct outcomes. They call those who disagree "result-oriented."

In pursuit of their preferred values, many of these conservatives and liberals are willing to allow a degree of slippage in the other less favored value. Jerome Frank, for example, rejected the rule of law values of generality and uniformity in legal precepts in favor of justice:

> Once trapped by the belief that the announced rules are the paramount thing in the law, and that uniformity and certainty are of major importance, and are to be procured by uniformity and certainty in the phrasing of rules, a judge is likely to be affected, in determining what is fair to the parties in the unique situation before him, by consideration of the possible, yet scarcely imaginable, bad effect of a just opinion in the instant case on possible unlike cases which may later be brought into court. He then refuses to do justice in the case on trial because he fears that "hard cases make bad laws." And thus arises what may aptly be called "injustice according to law."
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> Such injustice is particularly tragic because it is based on a hope doomed to futility, a hope of controlling the future. . . . For it is the nature of the future that it never arrives. . . .
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> *The judge, at his best, is an arbitrator*, a "sound man" who

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> strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. He does not merely "find" or invent some generalized rule which he "applies" to the facts presented to him. He does "equity" in the sense in which Aristotle—when thinking most clearly—described it.[1]

According to this view, the formal requirements of the rule of law are either redundant or pernicious. Where justice in the particular case and the tenets of the rule of law correspond, the rule of law is redundant. Where justice in the particular case and the rule of law diverge, the rule of law is pernicious to the extent that it detracts from achieving justice.

On the other side we have scholars such as Robert Bork who favor the rule of law over justice because:

> There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. . . . There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. . . . The issue of the community's moral and ethical values, the issue of degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.[2]

According to this view, there is no "objective" category of justice to which judges may appeal. Because justice is not neutral, there are no "neutral principles" by which judges may conclude that one result is more just than another. Lacking the authority of neutral principles, judges must defer to the legislative will, and conform to the procedural constraints of the rule of law.

The tension between justice and the rule of law should come as no surprise. Conceived substantively, justice speaks to the "correctness" of the outcome of individual cases. Conceived procedurally, the rule of law speaks to the form of a "fair" legal process. Conflict between these two values arises when the outcome of a "fair" legal system is deemed to be unjust; or when the effort by the legal system to be "just" is deemed by critics

1. J. FRANK, LAW AND THE MODERN MIND 165-66, 168 (1963) (italics in original). Frank describes Aristotle's separation of law and equity as "unfortunate." *Id.* at 169 n.

2. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 10 (1971).

to be unfair. Such a conflict is inevitable because these concepts are not identical. When applied to particular cases or controversies, concepts that are different must sometimes point in different directions.

Notwithstanding the unavoidable tension between these concepts, the interminable nature of the debate stems from the tendency of each side to see its favored value as (in some sense) an "end" to which the other value must remain subservient. Both sides fail to see that, although both justice and the rule of law are "ends" for certain analytic purposes, both are also "means" of dealing with a set of fundamental and pervasive social problems. Today's activists on the left fail to see the essential role that the rule of law plays in solving these problems, while today's activists on the right do not recognize why these problems make certain principles of justice necessary.

Although I shall not accomplish a final reconciliation of these two values in this essay,[3] I will explain how, in practice, the conflict between justice and the rule of law may be resolved by determining a specific content of each value that addresses these more fundamental social problems.

II. The Social Problems of Knowledge, Interest, and Power

The concepts of justice and the rule of law presuppose a social context.[4] Unless and until persons interact with each other, such ideas or practices are inapplicable. A human being may be a "social animal" who needs the company of others to be truly happy, but when such company is sought certain social problems invariably arise. Justice and the rule of law may be conceived as solutions to particular fundamental social problems that are unavoidable features of human social life.

It is almost a truism that the possibility of social conflict between persons gives rise to a need for justice and the rule of law. It is less commonly acknowledged that certain identifiable features of social life in our world shape the nature of this con-

3. The thesis presented in this Foreword is part of a larger research project in progress and should be considered as tentative.

4. *See* Barnett, *A Consent Theory of Contract*, 86 Colum. L. Rev. 269, 294-95 (1986) (discussing allocative and distributional functions of individual entitlements) [hereinafter *Consent Theory*]; Barnett, *Pursuing Justice in a Free Society: Part One—Power vs. Liberty*, Crim. Just. Ethics, Summer/Fall 1985, at 50 (discussing sources and proper content of entitlements theory) [hereinafter *Pursuing Justice*].

flict and limit the range of possible solutions to it. Any effort to resolve or reduce social conflict and to promote social harmony must confront the social problems of knowledge, interest, and power.

A. *The Problem of Knowledge*

Let us begin by assuming what we know is untrue: that all persons sincerely desire to be good to one another. (Pessimists fear not, for we shall relax this assumption in the next section.) Even if all persons were "good" in this way, there would still be an important social role for both justice and the rule of law. In a world of scarce resources,[5] even persons with benign intentions may inadvertently harm another or interfere with another's plans. The intention that one's actions be good for others is insufficient to achieve this end. One must somehow know what actions are truly good for others.

Suppose, for example, that Ann cultivates some land for crops. While Ann is away foraging for food, Ben comes along and discovers the clearing that Ann has made. Seeing no one around, Ben begins to build a shelter in the clearing. Ann returns, informs Ben of her prior activities, and asks him to leave. Ben refuses. In the absence of a voluntary compromise, how is this conflict to be resolved? Does Ann or Ben have the superior claim to the clearing, or is the correct outcome that they must somehow share? Whatever the proper resolution of this dispute may be, unless Ben and Ann have some way of knowing whose claim is stronger, or that they must share, Ben and Ann do not know which of them must yield to the other.

Nor is this situation limited to "state of nature" scenarios. Precisely the same problem arises if, while Ann is away working, Ben enters the apartment in which Ann has been living and begins to fix himself some dinner with the food he finds in the refrigerator. Who has the stronger claim to this apartment or must they share? Or suppose that Ben wishes to have sexual relations with Ann, but Ann refuses. Who has the stronger claim to Ann's body or must they "share" (whatever this may

5. "Scarce resources" here refers only to the possibility that two persons may wish to use the same resource at the same time. According to this definition, no amount of material abundance can eliminate the scarcity of resources, so long as one person may wish, for example, to have sexual relations with another who does not share the desire. In this sense, "scarcity" arises because human desires for resource use are not naturally coordinated, and not solely from the physical limits of resources.

mean)? So strong are our moral intuitions about this last situation that it is difficult even to state the problem in ways that do not presuppose the validity of Ann's claim to her body.

Remember we are assuming that Ann and Ben have only the best of intentions; neither wants to harm the other. The problem is that neither knows what constitutes harm to one rather than harm to the other unless there is some baseline allocation of resources from which they may make such an assessment. Without this baseline, Ann and Ben cannot know that it is Ben and not Ann who must vacate the clearing or the apartment. Put another way, assuming that both Ann and Ben desire only to pursue their goals without harming anyone else, both need somehow to know the domain in which they may act. There is a "knowledge problem."

The knowledge problem in this context concerns two types of subsidiary questions. The first is substantive: What is the proper allocation of resources that are subject to potentially conflicting use and what are the appropriate uses to which allotted resources may be put? The second is methodological: How should the decision be made and who should make it? My purpose is not to answer these questions here, but only to suggest that justice and the rule of law have evolved as answers to these questions. Justice concerns the "proper" allocation of resources. The rule of law concerns the "method" by which this allocation is made and the decision conveyed. Justice addresses the substantively correct answer to the question of allocation. The rule of law addresses the proper manner by which such an answer is determined, promulgated, and enforced.[6]

One may argue that there is no substantively correct or "just" outcome that is independent of a legal decision; that prior to an official determination there are only different preferences for allocation. Ann prefers to have the clearing or apartment; so does Ben. Ann does not wish to have sexual relations with Ben; Ben desires such relations. There is, the argument goes, no principled way to prefer one of these claims to the other in the absence of an official ruling.

Alternatively, one may argue that while there may be a correct or just outcome in principle, there is no way to know what it is independent of an authoritative decision of a fair legal pro-

6. This corresponds to Lon Fuller's distinction between the "external" and "internal" moralities of law. *See* L. FULLER, THE MORALITY OF LAW 96-97 (1969).

cess. Whether or not Ann has an antecedent "right" to the clearing, the apartment, or her body, it is not a "real" right until a legal system acknowledges it. According to either argument, then, the "just" outcome would be whatever outcome is reached by a "fair" process; there is no independent basis for challenging the validity of whatever decision a "fair" procedure reaches.

How plausible are such arguments? Are we really unable to give any reasons why certain allocations are not truly better or more just than others? Suppose a seemingly fair process determined that Ben should get the clearing simply because he was a male and Ann a female. Are there any compelling reasons that support the justice of such a decision? Are there no compelling reasons to be given against the justice of such a decision? On the contrary, such a proposition may so lack for rational support, or some objections to it that are rooted in justice may be so compelling, that we would question the fairness of any system that disagreed.

Suppose that a "fair" coin flip is used to decide the issue—so that despite Ann's previous work to clear the field, Ben may get rightful possession by winning the flip. Suppose that Ann may refuse Ben's sexual advances only if she wins a "fair" flip. It can only be a substantive judgment of the injustice of the results that would undermine the fairness of this procedure. What is fair, then, may very well depend in part on what we have reason to think is just. Determining fair procedures may sometimes be impossible without a peek at what is just.

1. *The Epistemic Function of the Rule of Law*

Does this mean that a decision is "fair" solely because it conforms to what we believe to be just? No, for there is an important sense in which the rule of law is operationally independent of a substantively "correct" outcome.

We have already assumed that Ann and Ben desire to know what they may rightly do and they will do it. Deprived of such knowledge each may act in good faith and still "unjustly" harm the other. Now let us assume that a perfect theory of just allocation is already in existence but it is entirely unknown to both Ann and Ben. Lacking knowledge of this perfect theory of justice, they are still likely to harm one another inadvertently.

There are two promising ways of responding to this instance

of the knowledge problem. First, suppose that the theory of justice is based on some natural feature or features of the situation—first possession, for example. Based on our common knowledge of what motivates possession, the mere fact of first possession may be presumed to be for the purpose of beneficial use by the possessor who is first. Moreover, investment in life-enhancing improvements requires reliance on continued beneficial use over time. In this situation, beneficial use and expectations based on prior investment may best be protected by applying a precept of "first in time, first in right."

If such is the case and the natural feature on which the precept rests is "prominent"[7] enough, both Ann and Ben may be able to reach the correct result simply by reflecting upon the situation. This does not necessarily mean, however, that Ann and Ben will explicitly formulate the precept itself.

> Man certainly does not know all the rules which guide his actions in the sense that he is able to state them in words. . . . Although man never existed without laws that he obeyed, he did, of course, exist for hundreds of thousands of years without laws he "knew" in the sense that he was able to articulate them.[8]

Perhaps if our intuitions favor Ann's claim over Ben's, it is because our intuitions reflect this "common sense" of the situation. When a dispute arises and a third party is called in to judge the merits of the claim, the precept that is articulated may simply render explicit this tacit or inchoate knowledge. Once articulated, others may be able to reach the correct decision more reliably and quickly if they (or their advisors) are aware of the precept that best captures the common sense of this situation.

If the first method of deciding disputes corresponds to what Aquinas called rational "conclusion" from principle, other conflicts require what he called a "determination"[9] consistent with

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7. The important role that natural prominence or obviousness plays in the formation of legal norms is discussed in R. SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE 44-52 (1986) [hereinafter ECONOMICS OF RIGHTS]. Professor Sugden discusses a very similar example in Sugden, *Labour, Property and the Morality of Markets*, in THE MARKET IN HISTORY 23-28 (B. Anderson & A. Latham eds. 1986).

8. 1 F. HAYEK, LAW, LEGISLATION AND LIBERTY 43 (1973).

9. As Aquinas explains:

> Some things are . . . derived from the common principles of the natural law by way of conclusions: for instance, that one must not kill may be derived as a conclusion from the principle that one should do harm to no man. But some

principle, or what we may today call convention.[10] For example, although there may be no reason whatsoever to prefer that traffic flow on one side of the road rather than the other, there is good reason to "determine" that traffic shall flow on one of the two sides. It matters not which of two alternatives is chosen, so long as one is chosen. Once chosen, such a convention will decide a dispute. If such is the case, Ann and Ben need some way to learn the relevant convention.

Whether derived from rational principle or convention or some combination of the two, then, both Ann and Ben still need some way of knowing what the just outcome is in a particular dispute. Assuming good intentions, they may sometimes learn the just outcome on their own by reflecting on the situation and responding to some prominent feature of it. When they cannot generate their own solution, conflict can be avoided only if others somehow inform them of the just outcome. Moreover, when one of them relies on a social convention, the other must already know of it or be able to substantiate its existence. In short, justice is not purely instinctive. Even a perfect theory of justice will sometimes require an effective mechanism of *communication*.

Furthermore, the timing of this communication is crucial. Communication can take place either before a conflict arises (*ex ante*) or after a conflict arises (*ex post*). There are advantages to each approach. Only *ex post* may we learn the actual facts of a particular dispute and base our judgment upon them. *Ex ante* we are able only to know in general terms the kinds of disputes that may arise. Presumably, an *ex post* decision can be much more exactly tailored to fit what actually occurred than an *ex ante* decision. Only *ex post*, arguably, can we know exactly why and how much Ann and Ben desire to control the clearing, the apartment, or Ann's body.

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are derived from these principles by way of determination: for instance, the law of nature has it that the evil-doer should be punished, but that he be punished in this or that way is a determination of the law of nature.

Accordingly, both modes of derivation are found in human law. But those things which are derived in the first way are contained in human law not as emanating from it exclusively, but have some force from the natural law also. But those things which are derived in the second way have no other force than that of human law.

Aquinas, *Summa Theologica*, in 20 GREAT BOOKS OF THE WESTERN WORLD 228 (1980).

10. For a discussion of the spontaneous development and stability of certain conventions, see ECONOMICS OF RIGHTS, *supra* note 7.

There is however a serious drawback to particularistic *ex post* decisionmaking. A purely *ex post* system unavoidably requires that a dispute first occur. This means that *ex post* decisionmaking actually requires the disruption of social life and that scarce resources be spent on an *ex post* adjudicative process. Without a real dispute, one cannot know the particular facts on which to base an *ex post* judgment. Without an *ex post* adjudicative process, no authoritative judgments are possible. In principle, then, an *ex post* approach is incapable of avoiding or preventing costly social disruption. While some may argue that parties could learn future decisions from very detailed accounts of the factual bases of past *ex post* judgments, such an argument concedes the desireability of *ex ante* judgment and rejects a pure *ex post* approach.

Despite the social disruption it causes, an *ex post* approach might be acceptable if a legal system were ever completely able to undo costlessly the wrong *ex post*—to turn back the clock and adjust the situation. In our world, however, this is quite impossible. When a dispute takes place costs that can never be fully compensated, such as the costs of adjudication itself, must be born by both disputing parties. The subjective costs of any action are borne by the actor in the form of opportunities for alternative conduct that can never be recaptured.[11] Whoever loses this or any dispute *ex post* can never arrange his or her affairs so as to avoid the conflict. If Ann loses, she can never use her expended time and energies to clear a different piece of land. If Ben loses, he can never use his expended time and energies to build another shelter on land that is truly his. Once her body is violated, Ann can never be returned to an *ex ante* position. She can never be "unraped."

Moreover, even an *ex post* analysis is not infallible. A legal system faces its own knowledge problem. For many reasons, it is extremely difficult for *ex post* fact-finders to put themselves in the shoes of the parties to a dispute. Adjudicative errors are inevitable. The costs of such errors are magnified when they occur after it is too late to avoid the conflict. Perhaps a decision that the clearing belongs to Ann is unjust. The injustice is magnified, however, if the decision comes after rather than before Ben has built a shelter on the land. Even if Ann keeps the shel-

11. *See* J. BUCHANAN, COST AND CHOICE 1-26 (1969) (distinguishing objective and subjective concepts of cost).

ter and compensates Ben for his loss *ex post*, it means that the time it takes her to produce the compensation may not be used in the manner she would have preferred had Ben not built the shelter in the first place. Do we really want to wait until after the fact to adjudicate the justice of Ben's claim to Ann's body? If not, then perhaps this is due to our *ex ante* convictions concerning the justice of Ben's claim, the costs to Ann of waiting, and, to a much lesser extent, the risk of an adjudicative error in Ben's favor.

In sum, whatever an *ex post* system may gain by its ability to render more particularistic judgments is jeopardized by its inability to avoid losses being inflicted on the guilty and innocent alike. Therefore it would be preferable that such information be communicated *ex ante*. For, assuming that *ex ante* knowledge of justice is possible, it is clearly preferable that a conflict be avoided altogether, so neither Ann's nor Ben's life is disrupted at all. When the full costs to the parties of *ex post* adjudication is taken into account, the application of an *ex ante* precept need not be perfect to be preferable.

It is no accident, then, that a standard feature of the rule of law is communication before the fact. Without advance communication, vital information about justice is not conveyed to persons who may inadvertently come into conflict with one another. Prospective communication is not merely a part of a formal definition of law. Nor is it solely a product of the belief that it is "unfair" to hold persons to a rule of conduct that was unknown to them. Prospective communication is a practical necessity if costly disputes—and resultant injustices—are to be avoided by those who wish only to know how.

To effectively achieve prospective communication, law must take a certain form. Lon Fuller listed eight requirements of legality[12]: generality, promulgation, prospectivity, clarity, consistency, requirements that are possible to obey, constancy through time, and congruence between official action and declared rule. These features serve "the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort."[13]

12. L. FULLER, *supra* note 6, at 33-94.
13. *Id.* at 106.

The purpose or function[14] of this lawmaking effort is the conveyance of vital information to members of a society. Each of these features of the "rule of law" can be understood as enabling the communication of useful information about "justice" in advance of conflicts and thereby making possible the avoidance of interpersonal conflict. The absence of any of these features impedes, sometimes completely, the ability to convey the relevant information.

> A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract.[15]

This claim is not a matter of semantics,[16] but of function.

The analysis thus far may be summarized as follows: Without *ex ante* knowledge of substantive justice, even good people will inadvertently harm one another unjustly. Knowledge of justice that cannot be obtained by personal intuition and reason must be obtained from communication with others. To be understandable *ex ante* this communication must take certain recognizable forms that are associated with the rule of law. Without the formal characteristics of the rule of law, justice will be unknowable in advance of personal decisions to act and, consequently, avoidable injustices will unavoidably occur.

Some have questioned whether it really is possible to convey such *ex ante* knowledge. Some legal realists argued that it is simply impossible to convey sufficiently accurate knowledge about just conduct in advance of a dispute. They alleged that any effort to convey information by general rules and principles[17] is

14. F.A. Hayek argues that using the term "purpose" to describe a spontaneously evolved order is potentially misleading. It suggests that a human maker had a particular purpose in mind in creating and maintaining the order, whereas a spontaneous order is not deliberately made or preserved and therefore "cannot legitimately be said to have a particular purpose, although our awareness of its existence may be extremely important for our successful pursuit of a great variety of different purposes." F. HAYEK, *supra* note 8, at 38 (emphasis in original). For this reason he suggests that "it is preferable to avoid in this connection the term 'purpose' and to speak instead of 'function.' " *Id.* at 39. Law can be said to have an essential social function even if no one is aware of it.

15. L. FULLER, *supra* note 6, at 39.

16. For a criticism of "semantic" legal philosophies, see R. DWORKIN, LAW'S EMPIRE 31-46 (1986).

17. I have described law as "three-dimensional," embracing the dimensions of theory (rationale), doctrine (rules and principles), and practice (application of doctrine to facts). *See* Barnett, *Foreword: Why We Need Legal Philosophy*, 8 HARV. J.L. & PUB. POL'Y 1, 9-10 (1985). Rather than continually repeat the phrase "legal rules and principles," in

futile, either because abstract precepts would fail to reflect the justice of particular situations, or because these precepts are too indeterminate for judges, much less individual citizens, to follow. Moreover, they argue, citizens—even commercial actors—are pervasively ignorant of what legal precepts have to say.

In recent years there have been potent responses to the last two of these accusations. I shall only list a few. First, the fact that legal precepts are sometimes indeterminate does not mean that they are always or even mostly indeterminate.[18] For every hard case there are a vast multitude of easy cases.[19] For every easy case there are a vast multitude of transactions that never become cases at all. The indeterminacy thesis is based on a misleading sample of disputes. Second, even hard cases may have right answers and, as we saw with the example of Ann and Ben, such answers may be present and available at the time of the dispute.[20] Third, while many persons may be ignorant of the law, this may not matter if there is a common sense of the matter and the law accurately reflects it.[21] Fourth, ignorance of the law does not provide an *ex post* excuse provided knowledge of the law is possible *ex ante*.[22] Finally, repeat players in the legal sytem usually know the rules and usually deal with other repeat players. Novices may obtain such knowledge from lawyers. Indeed this analysis explains the vital role that lawyers play as private disseminators of information. When the risk of a dispute is too small to make this investment likely and when the rules do not conform to common sense, repeat players should be compelled to make the operative rule explicit in their

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this Foreword, I am employing the term "legal precepts" to embrace both kinds of doctrine.

18. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 121-50 (1961) (criticizing "rule-skepticism" of the legal realists); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) (criticizing the "indeterminacy thesis as it has been developed in critical legal scholarship").

19. *See* Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985) (describing the prevalence of "easy cases").

20. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977) (defending the thesis that even "hard cases" have right answers); R. DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985) (same).

21. *See, e.g.*, F. HAYEK, *supra* note 8, at 43: "[T]he rules which govern the actions of elements of such spontaneous orders need not be rules which are "known" to these elements; it is sufficient that the elements actually behave in a manner which can be described by such rules."

22. *See Consent Theory*, *supra* note 4, at 300-09 (justifying the "objective" interpretation of rights).

agreements.[23]

What about the claim that *ex ante* rules and principles are inherently unjust because they cannot capture all the details of actual disputes? Part of the answer to this objection has already been suggested. Although *ex ante* precepts may be far from perfect in avoiding and resolving conflicts, *ex post* justice actually requires that conflicts occur—conflicts that will be incurably unjust to at least one and possibly both of the parties. Because only some effort at *ex ante* justice stands even a chance of avoiding this injustice, the injustice avoided by *ex post* adjudication is likely to be dwarfed by the injustice avoided by good *ex ante* precepts.[24]

Another part of the response to this claim rests on the epistemic function of justice itself.

2. *The Epistemic Function of Justice*

To this point we have assumed that a perfect theory of substantive justice existed, and this theory needed to be communicated for it to be known and observed. Even if a perfect theory were possible, however, we do not possess it. How, then, do we go about determining what is a "just" allocation of resources? Not surprisingly, perhaps, it turns out that the knowledge problem plays an important role here as well.

Ann and Ben need to know how to resolve their conflict, preferably before they invest time and energy improving resources that they must later divest. This is why waiting for a conflict to develop and then taking it before an adjudicator would be wasteful. Precepts by which the "just" outcome may be determined should be promulgated in advance.

Not all precepts are equally informative, however.[25] Sup-

23. *See, e.g.*, Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179, 200-01 (1986) (firms who wish to avoid specific relief should have to make this an explicit term of any contract with a consumer).

24. Of course, where an *ex ante* formulation of a precept proves to be unsatisfactory, it can be modified *ex post* provided we are willing to apply the modified rule in the future. The effort to reform *ex ante* precepts in particular cases creates an engine of change that accounts for the knowledge embedded in an evolved tradition. *See infra* text accompanying notes 42-43. Moreover, the traditional separation of law and equity permitted *ex post* adjustments in certain cases where an *ex ante* precept was generally satisfactory, but its failure in a particular dispute was extreme. This approach was practical so long as the division of law and equity was maintained and equitable "exceptions" could be distinguished from "the rule." Finally, even a completely satisfactory legal precept is only presumptively binding. *See infra* note 31.

25. *Cf.* F. HAYEK, *supra* note 8, at 43-44:

pose, for example, that the promulgated precept is: "The one who needs the land the most gets it." Assume that both Ann and Ben are aware of this precept in advance of any dispute between them. Ben comes across the clearing. Can he know that it is safe to erect a shelter upon it? How can he know that he needs it more than Ann? When Ann returns, how can she know whether to vacate or remain? The problem of knowledge created by this precept is compounded when third parties such as judges attempt to answer such a question. The same difficulties exist with a precept that: "The person who places the highest value on the land gets it." How is any potential claimant to know who values the land the most?[26] With either proposition, the knowledge problem stems not from the form of the relevant precept but from its substance.

Suppose instead that the rule is simply, "first in time, first in right."[27] Both Ann and Ben are aware of this precept when Ben happens across the clearing. Can he know that it is safe to erect a shelter upon it? How is he to know whether he is the first one to the clearing? When Ann returns, how does Ben know that Ann is not the second in time? The rule is inadequate because it does not specify some mode of communicating "first in time." It would be improved if it required that a cleared area be fenced, or that its boundaries be artificially marked or "staked" by Ann, the first possessor, to establish the timing of her claim. So the better precept would be "first to stake a recognizable claim, first in right."[28]

> [N]ot every regularity in the behaviour of the elements does secure an overall order. Some rules governing individual behavior might clearly make altogether impossible the formation of an overall order. Our problem is what kind of rules of conduct will produce an order of society and what kind of order particular rules will produce.

26. *Cf. Consent Theory*, *supra* note 4, at 277-83 (criticizing efficiency theories of contract for failing to address the knowledge problem).

27. *See* Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U.L.Q. 667, 669-74 (1986) (discussing the rule that "Prior in Time is Higher in Right").

28. *Time, Property Rights, and the Common Law: Round Table Discussion*, 64 WASH. U.L.Q. 793, 801 (1986) (statement of Richard Epstein):

> The usual way in which people handled the problem of demarcation is that, instead of having a rule of naked first possession, they had a rule in which they put out claim stakes at the edges that formed a visible and known barrier. Everybody else then had notice and was able to alter his conduct accordingly.

See also Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 77 (1985) ("The clear-act principle suggests that the common law defines acts of possession as some kind of *statement*. As Blackstone said, the acts must be a *declaration* of one's intent to appropriate.") (citation omitted; emphasis in original); *id.* at 78-79 ("Possession now begins to look even more like something that requires a kind of communication, and

This precept offers some significant epistemic advantages over other alternatives. It enables well-meaning claimants to determine for themselves the comparative merits of their claims, and it makes it easier for third parties to assess the merits of claims.[29] This suggests that both the form and the substance of justice are influenced by the problem of knowledge in society.

This or any other isolated precept is undoubtedly incomplete. For example, in a particular case the knowledge problem would be solved (both *ex ante* and *ex post*) if it could be shown that Ben had actually observed Ann clearing the field, even though she had failed to stake her claim.[30] In a well-conceived system of law, there is no legal precept that does not potentially admit of certain exceptions. More accurately, all precepts are only presumptively binding.[31] Still, if it can be justified as presumptively binding, the precept, "first to stake a recognizable claim, first in right," does not require that every adjudicator consider *ex post* the substantive justice of first possession in particular cases. By informing potential claimants and adjudicators alike of the relative merits of claims *ex ante*, the precept helps to avoid disputes and permits justice to be done in most cases.

Notice, however, that the justice of this suggested precept or even a complete set of such presumptively binding precepts is

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the original claim to the property looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question.").

29. This example is replicated in every department of private law theory. In contract law, for example, we require a manifestation or communication of assent. *See Consent Theory*, *supra* note 4, at 300-07 (describing and defending the objective approach to contractual interpretation). In agency law we have a doctrine of "apparent" agency. *See* Barnett, *Squaring Undisclosed Agency With Contract Theory*, 75 CALIF. L. REV. 1969, 1944-97 (1987).

30. So too in contract law, we protect a party's reliance upon the objective appearances. When the parties shared a common subjective understanding of a term, however, it will generally be enforced even when it differs from the objective meaning. *Id.* at 307-09.

31. A precept is presumptively or *prima facie* binding because it captures the right outcome for the majority of cases within its reach, but it may be rebutted by showing additional and exceptional facts that normally undermine the correctness of the *prima facie* case. This response or "defense" to the *prima facie* case is itself only presumptively or *prima facie* compelling and may be rebutted by other still more exceptional facts. The law governing a particular dispute consists of a series of such presumptions at a succession of stages, each of which captures the majority of cases at a particular stage of analysis. As the analysis progresses the number of unresolved cases is steadily reduced. *See, e.g.*, Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556 (1973) (discussing the appropriate role of presumptions and staged pleadings in legal analysis); *Consent Theory*, *supra* note 4, at 309-10 (discussing the presumptive nature of consent in contract theory).

not self-evident or self-explanatory. Such precepts may strike some as an arbitrary or purely "formal" way of assigning of rights adopted strictly for administrative convenience, rather than from a concern for justice. To fully appreciate the justice of the precept, "first to stake a recognizable claim, first in right," requires an examination of the reasons why anyone appropriates resources to their own use, the reasons why reliance on such claims is beneficial to the claimant and to the common good, the reasons why the claims of first possessors as a rule are superior to those who come later. In short, such a precept requires moral justification.

This suggests that the justice of a particular precept or set of precepts depends on more than the fact that a particular precept or set of precepts may be applied and known in advance of a dispute. It requires as well a consideration of what Lon Fuller called the "external" morality of law.[32] Although justice extends beyond the concern for formal legality, this enhanced moral analysis also has an important epistemic dimension. For the justification of the substance of certain legal rules also depends on the type of "local" knowledge about personal and group plans and goals that only individuals and groups possess. Once initially allocated, the discretion of individuals to reallocate resources stems, at least in part, from where the knowledge of how resources may best be used resides.[33]

Individuals and their close associates are generally in the best position to know what they need and desire and what is required to achieve it. For example, should Ann and Ben both decide to have sexual relations with each other, they are in a far better position than a third party to know that this will make them happy. They may err, of course, but given that they are the most likely to know what makes them happy and that they bear the subjective costs of choice, it is their mistake to make. The practical alternative to individual discretion is not a correct choice made by third parties, but a different and far more egregious set of mistakes.

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32. L. FULLER, supra note 6, at 96.

33. The seminal modern work on this aspect of the knowledge problem is F. HAYEK, *The Use of Knowledge in Society*, in INDIVIDUALISM AND ECONOMIC ORDER 137-42 (1951). Professor Hayek's role in explaining the epistemological functions of market institutions and processes is described in J. GRAY, HAYEK ON LIBERTY 40 (1984), and D. LAVOIE, RIVALRY AND CENTRAL PLANNING 106-66, 171-73 (1985). For a concise description of the "knowledge problem," see D. LAVOIE, NATIONAL ECONOMIC PLANNING: WHAT IS LEFT? 51-92 (1985).

Even if Ann and Ben are mistaken about their own best interests, the simple fact that they subjectively prefer a course of conduct that may be "bad" for them affects the propriety (and the efficacy) of a third party's forcible intervention to correct their mistake. Successful persuasion that changes their subjective preferences yields significantly different results than successful coercion to change their objective conduct.

Moreover, individual discretion is especially important if one accepts Aristotle's view that happiness is not a state of being, but an activity[34] or, in the words of Henry Veatch, a "do-it-yourself job."[35] That is, the activity of choice is an indispensable element of a good life, rather than an incidental or ancillary feature.

Of course, contemporary intuitions largely support a deferential respect for the consensual choices of Ann and Ben in this area. Had I chosen a consensual commercial exchange or the injection of an intoxicating substance into one's body,[36] the analysis would be much the same, but the intuitions of many would differ. The issue there is not whether the same analysis extends to these other domains,[37] but whether, at a minimum, the problem of knowledge plausibly pertains, albeit along with other concerns, to this domain. Regardless of what other justifications exist for repecting Ann and Ben's exercise of consent, most would admit that epistemic concerns can be seen to operate here.

The substance of justice, therefore, must also take into account the consensual action that is required for the pursuit of survival and happiness in society with others. This consensual activity may be in pursuit of ends that are common to the consenting parties or may be based on a reciprocal exchange of

34. *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS 20-21 (M. Ostwald trans. 1962) (distinguishing between "the possession" and "the practice of virtue, *viz.*, as being a characteristic or an activity" and favoring the latter).

35. H. VEATCH, HUMAN RIGHTS: FACT OR FANCY? 114 (1985).

36. This is an issue I discuss elsewhere. *See* Barnett, *Curing the Drug Law Addiction: The Harmful Side Effects of Legal Prohibition*, in DEALING WITH DRUGS 73 (R. Hamowy ed. 1987).

37. Elsewhere, for example, I distinguish between the inalienable rights one has in one's body and the alienable rights one has in external resources. *See* Barnett, *supra* note 23. As I explain there, the consent of a rights-holder normally passes title to external resources to another but does not convey the ownership one has in one's own body. Whether there are other differences between the ownership of one's body and the ownership of external resources is a worthwhile inquiry. The value of the principle of "self-ownership" to the discussion here is that it establishes for most the acceptability of some domain of private ownership. The rest is line-drawing.

resources.[38] In addition to avoiding disputes by conveying knowledge of what belongs to whom in advance, the substance of legal precepts should harnesses the local knowledge that resides in all of us by acknowledging a right to use and dispose of what is otherwise determined to be "ours."[39]

Showing how the knowledge problem is better solved by one particular set of allocative precepts than another is not my purpose here. My thesis is that while the rule of law and justice may sometimes conflict, they are both different means of solving the vital social problem of knowledge. Their respective contents should be significantly influenced by this function. Conflicts that may arise between justice and the rule of law may be fruitfully addressed by considering which of the two competing concerns best ameliorates the knowledge problem.

For example, the fact that the rule of law requires prospective lawmaking sometimes clashes with justice when a particular lawsuit reveals a prior formulation of a rule to be deficient. Which gives way, the rule of law or justice? The fact that both address the knowledge problem helps us to choose. Suppose a good faith dispute exists about the justice of applying an unquestionably relevant precept to an unanticipated set of facts. In such a case, at least, the precept has failed to avoid a dispute among two persons acting in good faith. At this point the requirements of both justice between the parties and *ex ante* communication to future actors may justify a new explicit exception to the rule.[40] As F.A. Hayek, an ardent proponent of the rule of law, explains:

> What has been promulgated or announced beforehand will often be only a very imperfect formulation of principles which people can better honour in action than express in words. Only if one believes that all law is an expression of the will of a legislator and has been invented by him, rather than an expression of the principles required by the exigencies of a going order, does it seem that previous announce-

38. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978) ("It is submitted that there are two basic forms of social ordering: organization by common aims and organization by reciprocity.").

39. The quotation marks reflect the fact that what belongs to us cannot be based solely on the existence of local knowledge. For example, two persons may both know (far better than outsiders) how each would use a particular item that only one of them may possess. Although local knowledge is not irrelevant to specifying the domain of private ownership—it strongly supports respect for consensual exchanges, for example—other factors must also be considered.

40. *See* F. HAYEK, *supra* note 8, at 115-18.

> ment is an indispensible condition of knowledge of the law. Indeed it is likely that few endeavours by judges to improve the law have come to be accepted by others unless they found expressed in them what in a sense they "knew" already.[41]

While of great importance, however, the problem of knowledge is not the whole story.

B. *The Problem of Interest*

To this point we have assumed that Ann and Ben wanted to act justly towards one another, provided that they knew what was just. Of course, some people wish only to benefit themselves and are indifferent to whether their actions may harm another. Some even gain pleasure from the very act of harming others. This suggests that solving the knowledge problem is not enough. Even in a world of "perfect information" about the just allocation of resources, some would attempt to serve their own interests by taking what they knew did not belong to them. Some argue that legal sanctions are needed to influence the decisions of such persons. This concern appears to animate Holmes' "bad man" theory of law.[42]

H.L.A. Hart, describing this as the "external point of view,"[43] rejected the idea that either a good man or a bad man theory explained the whole of law.

> At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence.[44]

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41. *Id.* at 118.

42. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897):

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

43. H.L.A. HART, *supra* note 18, at 86-87. Professor Hart's distinction between the "external" and "internal" points of view does not correspond to Fuller's distinction between the "external" and "internal" moralities of law discussed *supra* note 6.

44. H.L.A. Hart, *supra* note 18, at 88.

My thesis is that each of these "points of view" reflect distinguishable social problems. Properly conceived, justice and the rule of law are based on neither undue optimism, nor undue pessimism about human nature and the human condition, but a proper mixture of the two. Adopting Hart's distinction, the "internal" view of law should realistically address the *problem of knowledge* (while "optimistically" assuming good intentions); the "external" view of law should realistically address the *problem of interest* (while "optimistically" assuming knowledge of required behavior).

What is the effect of the problem of interest on a proper conception of justice and the rule of law? As with the problem of knowledge, there are many more aspects of the interest problem than can be discussed here. Still, let me suggest a few ways that the problem of interest may supplement or alter an approach to justice and the rule of law that might otherwise satisfactorily address the knowledge problem.

Let us return to Ann and Ben. Ann comes back to the clearing and finds Ben erecting a shelter. Both know that the rule is "first to stake a recognizable claim, first in right." Ann clearly has staked a claim. Ben refuses to vacate because he calculates that he will be better off taking Ann's clearing from her than respecting her claim. How may Ann respond to Ben's unjust act? Or suppose that, knowing full well that Ann has a right to refuse his advances, Ben tries to force her to have sexual relations with him. How may Ann respond to Ben's attack?

A common view is that, in one or both of these situations, Ann may use force against Ben or at least that she may prevail upon someone else (perhaps the state) to use force on her behalf. One reason this is a common view, I think, is because common notions of justice attempt to address the problem of interest. We know all too well that some will disregard what they know to be just when it suits their interests. Some right to use force in defense of one's rightful domain that would be unnecessary if all people acted in good faith is quite necessary for a system of rights to effectively maintain the individual discretion these domains are supposed to provide.

To effectively address the problem of interest, however, it is not enough that Ann is accorded a right to drive Ben off the land or repel his advances by self-help or other means. It is necessary that Ben know *ex ante* of Ann's right of self-defense

and her ability to exercise that right. If Ben is willing to violate the rights of others when he perceives that it is in his interest, he must be aware of Ann's right of self-defense and her ability to enforce this right before his calculation of self-interest is affected and the conflict successfully avoided. Only if this knowledge is successfully conveyed to Ben will he incorporate into his analysis of his interest the costs he is likely to sustain as a result of his acting unjustly. Only then will he perceive *ex ante* that the costs to him exceed the benefits to be gained and refrain from his unjust conduct.

In a just society, Ann's rights and her enforcement ability are related to the extent that the help of others is more likely to be forthcoming if others are persuaded that Ann's legitimate rights are indeed threatened. This gives rise to a further problem of knowledge. It is not enough that Ann and Ben know who must vacate the clearing; others must know as well. Happily, the same substantive principles and formal requirements that address the first problem of knowledge help solve this knowledge problem as well. For example, a principle that required a manifested claim of ownership makes the claim demonstrable to third parties as well as to Ben.

Still, requiring that one prove the merits of one's claim to others may require further modifications of substantive and formal dimensions of justice and the rule of law. When the return of property is sought, for example, it would seem to give rise to the need for some form of fact-finding procedure and a body of evidence law to ensure that parties may effectively present "proofs and reasoned arguments"[45] in support of their claims of right. Only when third parties have reliable means of knowing whose claim of right is just may they confidently take the side of the victim or refrain from defending those in the wrong. If it is well-known that such claims are accurately decided and effective assistance provided, then the *ex ante* interest of potential rights violators is altered and rights violations are thereby prevented.

Even with an effective means of assisting those whose rights are threatened, however, it seems that it would not be enough that *ex post* Ben will be effectively ousted from Ann's clearing. Ben may be willing to run the risk that he will be ousted on the

45. Professor Fuller viewed "true" adjudication as providing this mode of participation to parties to a dispute. *See* Fuller, *supra* note 38, at 363-72.

chance that his effort will succeed. Some additional sanction for his conduct would be needed to cause him to sufficiently discount the probability that his aggression will succeed. In short, the problem of interest explains not only the forcible defense of self and others, but also the forcible exaction of sanctions for successfully breaching a legal precept.

At least part of this requirement may already be implicitly addressed by the precepts that address the knowledge problem. If one has a "property interest" in certain resources, for example, one may reclaim them if they are wrongfully taken. When reclaiming the resources is not feasible or desirable, monetary compensation is a very short step from the right to the resources themselves.[46]

It is commonly thought that the problem of interest must be addressed by the imposition of legal penalties over and above those that would serve to compensate the victim of injustice completely. Just as a legal sanction may be needed to affect the interests of those who would take a chance on overcoming self-defense, many would argue that enhanced sanctions are needed to compensate for the chance that a rights-violator will not be caught or successfully prosecuted. Without enhanced penalties, the "bad man's" calculation of interest will inadequately deter him from unjust conduct even if he has to make complete restitution.[47]

It is here, however, that we begin to glimpse the limits of the ability of law to successfully address the problem of interest. While the rule of law employs general rules and principles and other formal requirements to address the problem of knowledge, law must employ force or power to address the problem of interest. Yet the strategy of using force or power gives rise to its own distinct set of problems that at some point produce diminishing returns. This problem of power in turn accounts for a proper conception of justice and the rule of law that limits in some manner the availability of force to punish unjust conduct.

46. I discuss a "restitutive theory of justice" in Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977); Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117 (1980); and *Pursuing Justice*, *supra* note 4, at 63-67.

47. It should be noted that even if enhanced sanctions to compensate for the probability of a rights-violator escaping any sanction is desirable, this does not necessarily entail a shift in the form of relief away from compensation to victims.

C. *The Problem of Power*

1. *Power and the Knowledge Problem*

Any attempt to solve the problem of interest by increasing the severity of forcible sanctions gives rise to its own knowledge problems.[48] The problem of interest presupposes that *ex ante* knowledge of the rules is not enough to deter the "bad man." The *ex ante* threat of *ex post* penalties must be such as to deprive the "bad man" of any potential subjective gains from violating rights. The intractable problems facing such an effort are commonly overlooked.

First, there is no reliable way to know how to tailor an *ex post* sanction so that no one will perceive a potential gain from aggression. Different persons will subjectively discount their future costs and benefits at radically different rates and those who are most likely to commit unjust acts are precisely those whose internal rates of discount are the highest.[49] Because we lack knowledge of individual subjective discount rates, we are unable to tailor penalties that effectively take account of the varying weight different persons place on future consequences in deciding on present conduct.

Second, at some point pursuing justice by a strategy of increasing all legal sanctions to address the problem of interest will be self-defeating. The justice of any legal sanction depends upon the existence of certain facts that show the commission of an unjust act, but no fact-finding mechanism is error free. As the costs of sanctions are raised, the costs of erroneously imposing sanctions is raised as well. Beyond a certain level of sanctions we will be doing more injustice than justice.

2. *Power and the Problem of Interest*

A strategy of increasing the severity of forcible sanctions to

48. While this section describes problems of power that would exist regardless of the structure of law enforcement, where law enforcement is entrusted to monopoly institutions, special problems arise that I describe elsewhere. *See Pursuing Justice*, *supra* note 4, at 50-56 (describing the practical and moral problems with the "power principle"); Barnett, *Pursuing Justice in a Free Society: Part Two—Crime Prevention and the Legal Order*, 5 CRIM. JUST. ETHICS 30 (1986) (comparing monopolistic with competitive legal institutions) [hereinafter *Crime Prevention*].

49. *See* Banfield, *Present-Orientedness and Crime*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS 133 (R. Barnett & J. Hagel III eds. 1977). *See also* O'Driscoll, *Professor Banfield on Time Horizon: What has He Taught Us About Crime?*, *id.* at 143; Rizzo, *Time Preference, Situational Determinism, and Crime*, *id.* at 163.

address the problem of interest also creates two potent problems of interest of its own. First, the object of increasing the severity of sanctions is to raise the *ex ante* costs of engaging in unjust conduct. But the *ex ante* costs of unjust consequences depends not only on the severity of *ex post* sanctions, but also on the *ex ante* probability or *certainty* of their *ex post* imposition. Consequently, declining to act unjustly is not the only rational response to a threatened increase in severity. One may also reduce one's *ex ante* costs by reducing the likelihood of receiving a legal sanction.

For example, one may increase resistance to the imposition of sanctions *ex post*. We can expect that as the level of threatened sanctions increases, the willingness of those who are the object of sanctions to invest resources to resist the imposition of sanctions can be expected to rise as well. As investment in resistance increases, the rate of successful sanctioning will decline, adversely affecting the *ex ante* probability of receiving a sanction.

Contrary to the implicit assumptions of much academic discussion of this topic, whatever the theoretical relationship is between severity and certainty of sanctions, in practice they are not entirely independent variables.[50] As the severity of sanctions increases, the certainty of imposition declines to some extent. At some point (that will vary widely depending on the circumstances) the effect of the decline in certainty on the calculation of *ex ante* interest will exceed the effect of the increase in severity, in which case increasing severity actually reduces effective deterrence.[51] This problem together with the costs of overenforcement give rise to the need to place some general limit on the use of legal sanctions to solve the interest problem.

There is a second important problem of interest that is also generally ignored in academic discussions. Just as we cannot assume that Ann and Ben want only to be good, it is naive and

50. *See Pursuing Justice*, *supra* note 4, at 63-64.

51. This analysis suggests that the problem of interest may best be approached by efforts to increase the efficiency of law enforcement techniques so as to increase the certainty of sanctions. A substantial improvement in this area may require fundamental rethinking of how we provide law enforcement. In particular it may require a shift away from "public" or monopoly provision to "private" or competitive provision. *See Crime Prevention*, *supra* note 48. The constant agitation to increase deterrence by increasing the severity of sanctions may best be viewed as an easy way to evade the real institutional responsibility for the inefficient monopoly law enforcement mechanisms that undermine the certainty of imposing sanctions—both civil and criminal.

dangerous to assume that third parties empowered to adjudicate and intervene in disputes want only to do good. Third parties are subject not only to the problem of knowledge, but also to the problem of interest. They may see it in their interest at times to help the rights violator against a genuine victim. Once empowered to help victims, they are also able to use these same powers to help themselves. Thus arises the age-old problem of "who guards the guardians?"

Placing in the hands of some the power to impose sanctions on others creates a potent problem of interest that becomes a cause of rather than a cure for injustice. Making the powers to impose sanctions unlimited by any publicly known precepts greatly exacerbates this serious problem. Consequently, it becomes necessary to subject the imposition of sanctions to principles of justice and to the rule of law. This most serious problem of third party interest may make the *ex post* adjustment of legal sanctions to deal with the problem of the interest of potential rights violators quite impractical. In criminal law addressing this problem of interest may take the form of determinate as opposed to indeterminate sentencing. In civil law it may take the form of proportional caps on monetary awards for intangible harms and for punitive damages.

Finally, it is commonly accepted that the power to impose legal sanctions should be placed in the care of a legal system that is a legal monopoly. Such a strategy— whether or not it includes enhanced sanctions—further exacerbates the problem of interest by eliminating or greatly weakening any effective institutional constraints on the exercise of such power.[52]

3. *Power and the Requirement of Moral Justification*

There is another dimension to using legal means in pursuit of social ends including solving the social problems of knowledge and interest. This dimension is a moral one. Law necessarily involves the use of force or power against an individual or group.[53] For this reason the use of legal means requires a different order of justification than purely social mechanisms.[54]

52. *See Pursuing Justice*, *supra* note 4, at 50-56.

53. *See* Nance, *Legal Theory and the Pivotal Role of the Concept of Coercion*, 57 U. COLO. L. REV. 1 (1985) (coercion is an essential aspect of legal mechanisms that jurisprudential theories must take into account).

54. *Cf.* R. DWORKIN, *supra* note 16, at 108-09 ("legal argument takes place on a pla-

Much of what we think of as a moral justification of coercion may simply be a tacit cultural distillation of something like the above analysis of knowledge, interest, and power. Even were this true, however, the moral sentiment underlying a requirement of justification would still be significant. For this sentiment ever reminds us that only certain means are permissible in solving even the most basic of social problems. The preservation of the individual's pursuit of happiness in a social context is the problem that justice and the rule of law have evolved to solve. In this light, respect for individual liberty secured by individual rights—the source of the presumption against physical coercion and fraud—is to be viewed, not as a bothersome obstacle to some higher social good, but rather as essential to achieving in practice a truly *common* good.

III. Conclusion: The Fusion of Justice and the Rule of Law

Justice and the rule of law doubtlessly perform many important social functions. In this Foreword, I have offered the thesis that these ideas can be understood as the means of coping with, if not solving, the pervasive social problems of knowledge, interest, and power. Individual "entitlements"—substantively justified rights claims having the appropriate form—provide cognizable areas where individual discretion can be exercised free of outside interference. Entitlements also provide boundaries beyond which individual discretion cannot be permitted. Liberty is not license; it is defined by entitlements that are based on the fusion of justice and the rule of law.

Apart from permitting discretion in the pursuit of happiness, the clear entitlements that result from the fusion of justice and the rule of law serve a number of important functions. They give rise to expectations that may be relied upon, permitting productive investment. They provide third parties a way of avoiding needless and destructive conflict and a means of distinguishing victims from aggressors. In this way they serve to increase the costs of aggression and so diminish its likelihood. So conceived, entitlements also serve as a benchmark by which to assess whether law enforcement agencies are staying within

teau of rough consensus that if law exists it provides a justification for the use of collective power against individual citizens or groups").

their bounds. They provides formal safeguards against the undue influence of interest and against abuses of power.

The rule of law is neither form for form's sake, nor a second-best approximation of true justice. Rather, the rule of law is what makes possible the knowledge and enforcement of justice in a social setting. Of course, as with any evolving concept or institution, both justice and the rule of law have evolved imperfectly. By understanding the social functions these institutions perform, we may better understand and reform both ideas. As important as reform, however, is the preservation of sufficient respect for both of these institutions to avoid unnecessary and potentially disastrous experimentation. Understanding the social problems addressed by justice and the rule of law helps us resist extremists of both the left and right who would deprecate one value in pursuit of the other. According to the thesis presented here, we need not try a society based upon justice without the rule of law or upon the rule of law without justice to know that either would be a nightmare—and why.

IV. The IHS Symposium on Law and Philosophy

This is the fourth annual Symposium on Law and Philosophy sponsored by the Institute for Humane Studies at George Mason University. This symposium issue features two engaging papers awarded IHS Lon L. Fuller Prizes in Jurisprudence: Jeremy Waldron's "When Justice Replaces Affection: The Need for Rights," and Peter Aranson's "Bruno Leoni in Retrospect." Gary Lawson's "The Ethics of Insider Trading" was supported by an IHS Law and Philosophy Fellowship. We are very fortunate as well to have insightful commentary on these papers by Jules Coleman, by Leonard Liggio and Tom Palmer, and by Jonathan Macey. Finally, David Thomasson's "Rights, Justice and Discrimination" was a product of an IHS Leonard P. Cassidy Summer Research Fellowship in Law and Philosophy.

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