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HUMAN DIGNITY AND THE LAW

Tibor R. Machan*

In this article, Professor Machan offers the view that a good legal system is based on a philosophy of individualism or ethical egoism, and concludes that a legal system best promotes a citizen's human dignity by protecting that citizen's individual identity and right of free choice. He argues that certain political and social programs do not in fact benefit the citizen, but rather are flawed because they erode respect for human dignity.

Ordinarily, members of the legal profession attend only to the details and technicalities of their craft. It is rare for lawyers to scrutinize the broader foundations of their profession. In this respect they are similar to most other professionals. Yet, in all professions, certain basic problems may arise to create difficulties. Even when a profession faces no traumatic crises, it is useful to keep an eye on fundamental principles in order to prepare for possible impending difficulties. The concept of human dignity should be one of the cornerstones of our legal system. This article will outline a theory of human nature and society based on natural law in which recognition of human dignity is crucial.

Human dignity is the capacity of individuals to be morally responsible. Moral responsibility, in turn, arises because human beings are capable of free choice and rational thought. Rational consciousness and the ability to make choices make an individual a moral agent, since his decisions can be made in accordance with a rational standard in which some actions are right while

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1. The concept "moral" refers to the uniquely human task of choosing between right and wrong conduct in accordance with a standard appropriate to a free and rational agent. Thus, moral issues require making decisions with reference to such a standard. "Moral" does not mean ethically good or right. The concept "nature" here means "essential" or "relating to by definition." So having a moral nature involves essentially being required to make choices in accordance with a standard.
others are wrong. Of course, people can adopt improper standards of judgment—a putative moral position which has no rational foundation. Still, anyone who can identify or accept and guide himself by a rational ethic possesses human dignity because of his ability to execute significant choices in the performance of human tasks.\(^2\) It is when he is blocked in this ability that a person’s human dignity has been denied.

The basic institutions of the community should support human dignity. The law which governs community life should recognize and uphold the individual’s dignity. This can be achieved through legal policies such as due process and equal protection under the law.

However, the concept of human dignity has come under serious attack by some segments of the social sciences, particularly behaviorist psychology. Behaviorists have expounded the view that human action is determined by influences beyond the control of the individual. Behaviorism denies a person’s capacity to choose his conduct and thus this human dignity—his capacity to be morally responsible. Professor B. F. Skinner’s book *Beyond Freedom and Dignity*\(^3\) is perhaps the most popularly known work espousing the behaviorist view.\(^4\)

2. One need not be a worthy or morally good person to possess human dignity. Merely the capacity to exercise morally significant choice in the performance of human tasks requires the acknowledgment of one’s dignity.


A very good discussion of the mutual benefit to be gained from work in humanistic and experimental psychology is offered by I. Child, *Humanistic Psychology and the Research Tradition: Their Several Virtues* (1973). Most emphatic about psychology’s rejection of human freedom of choice is L. Immergluck, *Determinism—Freedom in Contemporary Psychology*, 19 American Psychologist 270-81 (1964). Such concepts as “purpose” and “intention” sometimes trouble determinist psychologists, but more often than not they simply translate these ideas into forms that accommodate their determinism. See G. Miller, E. Galanter & K. Pribram, *Plans and the Structure of Behavior* (1960). Outside of psychology proper, we also encounter widespread adherence to the
Behaviorism is beginning to have a serious impact on our legal system, surfacing in the positive law of legislation, verdicts, and judicial policy. Encouraged by this view, legal institutions frequently treat people as if they were helpless and lacking free will and the capacity for purposeful action. This treatment is most obvious in policies such as involuntary mental hospitalization and psychosurgery. It is accomplished far less obviously through preventive laws of various types, such as legislation forcing motorcyclists to wear helmets and the requirement that drug manufacturers prove that their drug is harmless even if no evidence of

behaviorist/determinist/reductionist approach, exhibited, e.g., in the works of R. Ardrey, The Territorial Imperative (1966); K. Lorenz, Evolution and the Modification of Behavior (1965), On Aggression (1966). It is difficult to find explicit discussions of the issue in the prominent literature because most scholars simply presuppose Skinner's view that science and freedom of choice are inherently in conflict. It is usually philosophers who discuss the topic explicitly. See Dimensions of Mind (S. Hook ed. 1960); Freedom and Responsibility (H. Morris ed. 1961).

A crucial point to keep in mind is that in the social sciences there are two major aims: explanation and prediction. Explanation is generally taken to involve the showing of what factors preceded an event and made it occur. Prediction is the stating of what the future will be, based on knowledge or estimates of present or past events. The very possibility of free choice is by many people either denied outright or regarded as a mysterious—or divinely endowed—feature of the universe. The factors considered relevant to explanations and predictions are usually restricted to the observable material aspects of the world. They therefore exclude choices, decisions, or intentions. Such mental activities have no place in a view of science that excludes from legitimacy any judgment not strictly reducible to sensory observations.

Needless to say, this is the extreme version of the position at issue, and many mitigated versions exist. It is fair to hold, nevertheless, that this version is the ideal being aimed at and wished for, even though it is sometimes regarded as an impossible ideal. For a clear discussion of this view, see R. Rudner, Philosophy of Social Science (1966). Contra, R. Harre & P. Secord, The Explanation of Social Behavior (1972); S. Toulmin, The Uses of Argument (1964).

5. Positive law here refers to what the general public in any modern society regards as the law: the recorded and enforceable edicts, prohibitions, statutes, regulations, proscriptions, and prescriptions issued by various branches of the government. This can be contrasted with proper law, which includes any edict that is within the proper authority of a government to enact and enforce. Overlaps between these two sets can and arguably should be considerable.

6. See, e.g., ILL. REV. STAT. ch. 91 1/2, §§8-12 (1975); MASS. GEN. LAWS ch. 123, §6 (1976); MICH. COMP. LAWS ANNO. §300.1468 (1975).


8. See, e.g., ALA. CODE Title 36 §138 (1973); DEL. CODE Title 21 §4185 (1974); FLA. STAT. ANN. §316.288 (1969).
harm is present.⁹ Some argue that such preventive legislation is implemented for the good of the citizen. Nevertheless, such legislation undermines continued respect for human dignity. When the basic responsibility of an individual to make his own decisions is rejected in favor of governmental paternalism, the legal system stands in opposition to human nature itself. The impact of a denial of human dignity may perhaps be resisted by private citizens in such areas as education, the arts, and personal relationships. Much of what ensues in these realms enjoys a degree of independence from legal interference. However, the detrimental impact of the denial of dignity through positive law is inevitable.

As an example, when poetry is under government control in the Soviet Union, the essential human dignity of artists is under a near fatal assault. In our own history, when members of different racial groups were legally forbidden to marry, the same attack on human dignity was evident.

In order for the legal system to reaffirm the support of human dignity instead of state paternalism, the philosophical foundations for proper law must be uncovered. Lawyers are not always best situated to make this examination. The legal community must be persuaded as to what values should be protected and what is wrong with the status quo. It should then develop a consistent legal system based on these values.¹⁰ This article will outline the view that the legal system promotes human dignity most successfully when it supports individuals’ natural human rights.¹¹


¹⁰. Any investigation of this sort requires full reliance on logic. There are, of course, those who hold that the fundamental propositions of logic are arbitrary. See A. Ayer, LANGUAGE TRUTH AND LOGIC (2d ed. 1946); H. Hahn, LOGIK, MATHEMATIK UND NATURERKENNEN (1933); C. Lewis, MIND AND THE WORLD ORDER (1929); E. Nagel, LOGIC WITHOUT METAPHYSICS (1956). Contrary to this view is the proposition that logic acts as an indispensable tool of inquiry because nature is itself governed by basic principles which are expressed in thought and language through logic. See B. Blanshard, REASON AND ANALYSIS (1962); M. Cohen, A PREFACE TO LOGIC (1944); M. Swar, LOGIC AND NATURE (1955); T. Machan, C. S. Peirce and Absolute Truth, PROCEEDINGS OF THE C. S. PEIRCE BICENTENNIAL INTERNATIONAL CONGRESS (1977); Hollinger, A Defense of Essentialism, 57 THE PERSONALIST 327-44 (1976); Rasmussen, ARISTOTLE AND THE DEFENSE OF THE LAW OF CONTRADICTION, 54 THE PERSONALIST 149-62 (1973).

¹¹. Opponents will claim that dignity is a myth and merely excuses possessive individualism. See C. B. MacPherson, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS
The author will argue that while certain political programs superficially appear to benefit the citizen, they in fact are crucially flawed because they erode respect for human dignity. Additionally, suggestions will be made as to how certain features of a legal system can best protect an individual's freedom of choice and why other factors now in force are damaging to it.

THE RELATIONSHIP BETWEEN HUMAN NATURE AND THE LEGAL SYSTEM

A basic element of the present thesis is Aristotle's observation that human beings are rational animals capable of choosing their actions with some end in mind.\textsuperscript{12} As Ayn Rand, a contemporary Aristotelian, has stated, we are beings of volitional consciousness.\textsuperscript{13} Each individual's crucial and distinctive capacity of rationality consists of having the ability to think and to distinguish between truth and falsehood and between right and wrong.\textsuperscript{14} The very possibility of being wrong and of failing to make the right judgment indicates that we are able to exercise choices in some matters.\textsuperscript{15} Our freedom of choice cannot be denied without leading to fundamental paradoxes in human life and thought. The infinite variety of possible human activities cannot be understood without accepting the proposition that individuals possess freedom of choice.\textsuperscript{16} In fact, the denial of free choice is self-refuting:

\textsuperscript{12} See \textit{Aristotle, Nicomachean Ethics}. \textit{See also H. Veatch, Rational Man: A Modern Interpretation of Aristotelian Ethics} (1962).

\textsuperscript{13} See \textit{A. Rand, The Virtue of Selfishness} 20-24 (1964).


\textsuperscript{15} Contrary to Skinner and many other social scientists, this is emphatically not in conflict with the requirements of science. See N. Branden, \textit{The Psychology of Self-Esteem} (1968); R. Harre & P. Secord, \textit{The Explanation of Social Behavior} (1973); Sperry, \textit{Mind, Brain and Humanistic Values}, \textit{New Views of the Nature of Man} (1965).

\textsuperscript{16} Only after introducing the fact that human beings are "essentially rational beings capable of choosing to think" can we make clear sense of various facets of human existence such as scientific progress, artistic creativity, and all types of novelty.

It has been suggested that this definition of "human being" is arbitrary. "Human being" could be defined as "an animal with a thumb" or "a biological entity that uses a comb," but these and similar "definitions" consider only partial distinctiveness and fail to satisfy comprehensiveness in identifying human nature absolutely. For a discussion and
by denying it, we imply that those who do not deny it are wrong and should deny it, yet it makes no sense to claim that we should do something if we have no choice in the matter.17

Aside from the strictly philosophical argument in support of the existence of human choice, there is scientific evidence that people can choose. Professor Roger W. Sperry, a psychophysicist, argues that human action is not merely a conditioned reflex.18 Rather, the human brain is a complicated biological organ enabling each person to produce original ideas which can guide him to act in novel ways. Dr. Sperry argues that subjective awareness and conscious experience can be tied to neural activity and physical brain processes. Thus, an individual's decision-making process does not consist of mechanistic, stimulus-response activity.

If the capacity to choose is essential to human beings, a proper political and legal system should function so as not to impair that choice. Laws have emerged throughout history20 because an or-

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full defense of the definition used in this article, see T. Machan, HUMAN RIGHTS AND HUMAN LIBERTIES 241-45 (1975). For the underlying theory of definitions, see A. Rand, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (1970).


19. In our current interpretation of consciousness, subjective awareness is conceived to be an emergent property of neural events generated at top levels in the brain hierarchy. . . . [While] conscious experience [is] a systematic property of and functionally tied to the physical brain processes. . . . [it] must also be taken into account and included among the controlling causal determinants. This introduces new degrees and qualities of freedom into the brain's decision-making process, lifting it above mechanistic, physicalistic kind of determinism envisaged in classical behaviorist, stimulus-response, or materialist doctrine.

Id. at 13.

20. In trying to explain the reason for the emergence and existence of law, numerous writers have introduced state of nature arguments, postulating conditions of natural anarchy and determining that by some quasi-causal process organized community life will emerge. See T. Hobbes, De Cive (The Citizen) in THE ENGLISH WORKS OF THOMAS HOBSES, vol. II, ch. 12 (1839-45); J. Locke, SECOND TREATISE OF CIVIL GOVERNMENT, ch. II, #15 (1689); R. Nozick, ANARCHY, STATE, AND UTOPIA (1974). However, this approach tends to omit the concept of choice. Another prominent approach speculates about a social contract where law is the outcome of what people would have done had they united in seeking their own social survival. See J. Rawls, A THEORY OF JUSTICE (1971). This article will consider the reasons or purposes, not the causes, for organized human community life and arrive thereby at the function law should play in such an evidently valuable endeavor.
derly and well-governed political society is valuable to human beings. Individuals actualize their full potential through virtually unlimited enhancements that community life offers.

They can develop more successfully by drawing on the talents and accomplishments of others. Thus, commerce, education, entertainment, science, sports, and law are all potential contributors to the enhancement of each person's life. Whatever values social life enhances, people must still choose to better themselves, and they often refrain from doing so when in each other's company.

Aside from private failings, people can fail in ways which injure others. For example, when someone interjects physical violence or force into human relationships, there is a great potential of danger. A primary purpose of the legal system is to prevent all unjustified violence or coercion in human relationships. By acting as keeper of the peace, the legal system serves to prevent persons from interfering with another's independence of judgment. The law helps protect human liberty within the community and enables the individual to develop to his or her full capacity as a rational and creative being within his or her own unique situation.

Laws must be developed to meet the challenges of change and thereby help to provide a detailed framework for continued freedom of action. In order for our legal system to acknowledge this

21. For purposes of this article, political society refers to groups of individuals who need not be related by blood and who accede to a basic code concerning how members of the group must never be treated (i.e., forcibly, negligently, unhelpfully, or however they see it).

22. "Value" for people exists, ultimately, in living their lives in accordance with their rational, free, purposive and moral nature as effectively and fully as possible, given their individual circumstances. See A. RAND, THE OBJECTIVIST ETHICS (1961); E. Mack, How To Derive Ethical Egoism, 52 THE PERSONALIST 736-43 (1971).

23. HUMAN RIGHTS AND HUMAN LIBERTIES, supra note 14, at 74-77.

24. This ancient explanation for the existence of law is hardly more than a matter of common sense. However, determinists such as Skinner and relativists would have to deny that society and law emerged because of their discovered value.

25. The conception of law developed in this article is normative, and more in the tradition of natural law than positivist conceptions of legality. See A. P. d'ENTREVES, NATURAL LAW (1951); P. Sigmund, NATURAL LAW AND POLITICAL THOUGHT (1971). Although the overall influence of positivism and realism has outweighed the natural law tradition in the last century, many writers argue that the U.S. political tradition is related to the natural law stance. See C. LEBOUTILLIER, AMERICAN DEMOCRACY AND NATURAL LAW (1950);
goal, the underlying interpersonal moral principles on which law should be based must be identified. These principles provide a


The concept of human dignity is individualist rather than collectivist. Within this framework, the individual human being—not the interests of states, nations, or even humanity in general—is of primary concern. Contra, G. Hegel, REASON AND HISTORY (1837); K. Marx, CRITIQUE OF POLITICAL ECONOMY (1859); B. F. Skinner, BEYOND FREEDOM AND DIGNITY (1971). These diverse thinkers concentrate on the well-being interest or emancipation of a group rather than of an individual. Hegel focused on the perfection of the abstract whole of humanity at some point in the development of history. For Marx, humanity's material emancipation was the highest historical goal to be reached. He viewed contemporary individuals as inadequate or immature versions of the final human community, the communist state. Skinner is concerned with the survival of culture and regards an individual as "merely a stage in a process which began long before he came into existence and will long outlast him." *Id.* at 200.

American culture tends to balance the individualist and collectivist aspects of the numerous political theories that have emerged. In other parts of the world, only a few elements of the individualist theory are given prominence. In general, however, nothing of individualism receives the slightest respect, let alone legal support. For example, Marx's view is summarized as follows:

The right of man to freedom is not based on the union of man with man, but on the separation of man from man . . . ; the right of man to property is the right to enjoy his possessions and dispose of the same arbitrarily, without regard for other men, independently from society, the right of selfishness.

K. Marx, EARLY TEXTS at 103 (1971).

"Rights" in this context are, according to Locke, grounded on the fact that we all possess moral autonomy, and proper law enjoins or forbids others' usurpation of this autonomy. Therefore, Marx is correct in observing that the individualist tradition rejects the political ideal that individuals must be united coercively by law. However, the individualist viewpoint does not deny that we have some moral responsibilities to certain members of a community, such as family and friends.

The dignity of man is protected by acknowledging, protecting and preserving his rights through positive law. These rights must be denigrated in order to undermine the individual's dignity. Accordingly, Skinner can say: "Life, liberty, and the pursuit of happiness are basic rights. But they are the rights of the individual and were listed as such at a time when the literatures of freedom and dignity were concerned with the aggrandizement of the individual. They have only a minor bearing on the survival of a culture." B. F. Skinner, BEYOND FREEDOM AND DIGNITY at 172 (1971).

26. Different candidates for the correct (rationally warranted) moral position will yield different conceptions of the proper content and scope of law. When those active in political affairs have particular ethical views, they usually attempt to shape the law to further the purposes they believe to be morally proper. Thus, in predominant religious eras the law tended to serve goals fostered by the dominating religious creeds. See O. Gierke, POLITICAL THEORIES OF THE MIDDLE AGES (1900). In times which emphasized utilitarian goals such as economic prosperity or the equal distribution of wealth, the laws were directed toward these goals. See E. Browning, REDISTRIBUTION AND THE WELFARE SYSTEM (1975); R. Posner, ECONOMIC ANALYSIS OF LAW (1973); Baker, THE IDEOLOGY OF THE ECONOMIC ANALYSIS OF LAW,
social condition in which the individual can benefit from living in a community while preserving his moral independence and his freedom to choose between living as a good or an evil person.  

Because human beings are essentially animals with the capacity to live by the use of reason, they live properly when their actions are directed by the use of their minds.  

A good legal system provides an individual with the opportunity to exercise his choice-making capacity and leaves the responsibility for achieving success to that person.  

Each individual's moral responsibil-

3 PHILOSOPHY AND PUBLIC AFFAIRS 43 (1975).

Even in criminal law, which in most eras focuses on the protection of people from *malum in se* acts, judicial decisions sometimes are governed by considerations of prevailing morality. See T. Szasz, Law, Liberty, and Psychiatry 218-21 (1963). Although *malum in se* statutes usually survive major ideological changes, so that murder, robbery, and assault remain crimes in socialist, communist, monarchical, democratic, or fascist countries, the exact treatment of those found guilty of such crimes changes considerably. Today, the influence of recent theories in psychology and psychiatry on punishment, rehabilitation, and guilt has been evident. See H. Fingarette, The Meaning of Criminal Insanity (1972); H. Hart, Punishment and Responsibility (1968); K. Menninger, The Crime of Punishment (1968); J. Murphy, Punishment and Rehabilitation (1973).

Depending on the values which one considers central, one will advocate legal concepts, institutions, and systems of adjudication which give instrumental support to defending these values. See H. Arendt, The Origins of Totalitarianism (1958); B. Bailyn, The Ideological Origins of the American Revolution (1967); R. Crossman, The God That Failed (1950); C. Delsell, Mediterranean Fascism (1969); H. Harris, The Social Philosophy of Giovanni Gentile (1960); L. Levy, Origins of the Fifth Amendment (1968); B. Zylstra, From Pluralism to Collectivism: The Development of Laski's Political Thought (1968); R. Dworkin, Taking Rights Seriously (1977). All these show the relationship of the values people hold to the legal systems they support.

27. A morality or an ethical theory aims to identify how human beings can live an excellent and proper human life. There are numerous proposed ethics or moralities, and a most difficult task is to identify the best. The correct moral position is one that most successfully serves as a general system of principles to guide conduct for human beings. It must be very general in scope to reach all areas of human existence. The idea of human dignity and the corresponding framework of proper law given support in this article are based on a detailed ethical theory we may best call individualism or ethical egoism. The idea is that each person's central task in life is to become an excellent human being within the context of his or her own individual situation. The fullest realization of one's own unique human self or ego is the good life for each individual.

28. This conception of moral goodness has its philosophical background in the entire Aristotelian tradition of ethics. See notes 12, 13 and 22 supra. See also D. Norton, Personal Destinies: A Philosophy of Ethical Individualism (1976); T. Machan, Selfishness and Capitalism, 17 Inquiry 338 (Fall 1974).

29. For a person to flourish he would have to make the most of what he is—a human individual with the capacity to make choices. Ayn Rand makes a crucial point about this ethical framework:

'Happiness' can properly be the *purpose* of ethics, but not the *standard*. The
ity is to excel as the human being that he is. This ethical system, namely, individualism or ethical egoism, is the basis of a good legal system.

A. RAND, THE VIRTUE OF SELFISHNESS, 29 (1964). Many professional economists sanction psychological hedonism in their support of a free society. See, e.g., L. VON MISES, HUMAN ACTION (1949). Critics of this conception of human community life have charged its advocates with inviting "all men to play it deuces wild." See D. BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM (1975); H. Kristol, When Virtue Has Lost All Her Loveliness, CAPITALISM TODAY (1971); Schmitt, The Desire for Private Gain, INQUIRY 149-67 (Summer 1973). But economists are not professional students of ethics. Unfortunately, philosophers have not combined a clear understanding of ethics with a diligent study of the findings of economics. Therefore, while economists have defended liberty with little thought of virtue, philosophers have defended virtue with little regard for liberty. Yet virtue and liberty, as Skinner keenly perceives, are interdependent: "Goodness, like other aspects of dignity or worth, waxes as invisible control wanes, and so, of course, does freedom. Hence goodness and freedom tend to be associated." B. F. SKINNER, BEYOND FREEDOM AND DIGNITY at 66 (1971).

Egoism and individualism are usually viewed as amoral and antithetical to morality. This viewpoint may be traced to Plato's conception of the individual as a low-level metaphysical component, something that is inferior to the universal or ideal. See PLATO, THE REPUBLIC. Another reason for this view is the general tendency to consider Thomas Hobbes as the advocate of egoistic ethics, even though the Hobbesian conception of human life clearly leaves no room for morality. See S. R. Letwin, MODERN PHILOSOPHIES OF LAW, THE GREAT IDEAS TODAY (1972); Hobbes and Christianity, DAEDALUS (Winter 1976). Subsequent views of ethics, such as Locke's mitigated hedonism and Bentham's full-blown version, along with John Stuart Mill's utilitarianism, fail to qualify as bona fide ethical theories, mainly because they tend to deny freedom of human choice. They have a theory of value, however, which accounts for their frequent use in economics.

Egoism or individualism has fallen into disrepute as a moral system because of the view that individuals are either inferior beings or ones only inclined to conduct themselves in an anti-social way. As an example of this, consider the following remark: "What is most important is that motives of this sort be distinguished from the typical criminal motive: self-interest. . . . " J. MURPHY, CIVIL DISOBEDIENCE AND VIOLENCE (1971). For the numerous efforts to defeat Hobbesian egoism, see D. GAUTHIER, THE IMPOSSIBILITY OF RATIONAL EGOISM, 71 THE JOURNAL OF PHILOSOPHY 439-56 (1974); K. NIELSEN, ON THE RATIONALITY OF 'RATIONAL EGOISM,' 55 THE PERSONALIST 398-400 (1974); J. RACHELS, TWO ARGUMENTS AGAINST ETHICAL EGOISM, PHILOSOPHIA 297-314 (April-July 1974). In all of these discussions egoism is generally construed as the doctrine where each person does what he desires, wishes, or wants. Such hedonistic and/or psychological egoism is indeed deficient, as it provides the acting individual with no standard for determining what is in fact in his or her own best interest. Conflicting alternatives and desires often face us, and we frequently require a standard for deciding what course of conduct to pursue. Eudaimonistic individu-
DIGNITY VERSUS WELFARE

The major objection to the individualistic viewpoint comes from those who consider economic welfare or spiritual perfection the primary goal of political life. The widespread acceptance of either economic or spiritual welfarisms, and the forceful intellectual support behind it, have produced certain trends. Current political issues have focused on economic welfare and the quality of life, but only rarely address the issue of the usurpation of human dignity through the loss of liberty. The case for dignity is admitted only in the abstract discussions of political theory, where the dominant idea is that liberty and welfare must be balanced.31

While individualism was once hailed in the United States, it is criticized today as being amoral and heartless. But the proposed alternatives are utopian ideals. The individualist viewpoint is unable to promise honestly that everyone will eventually be completely well off. Since the utopian promises are unattainable, however, the individualist ideal of a free society, in which each person can aspire to human excellence, is clearly superior.

Most intellectuals still want to push society toward utopian perfection. This is because they develop their political principles by consulting common moral intuitions, which are based on certain well-entrenched, personal, non-political, altruistic principles, such as equality, self-sacrifice, and sharing of one's wealth. They give support mainly to welfare-oriented public policy, so as to effectuate these ideals in the political sphere, disregarding that this would make personal moral choices a matter of coercive public policy.

Thus, our culturally prominent ideas of morality often directly conflict with political implications of the theory of ethical individualism or egoism. These ideas support the belief that egoalism, or classical egoism, offers such a standard in its reference to human nature. See A. RAND, THE OBJECTIVIST ETHICS (1961); D. NORTON, PERSONAL DESTINIES: A PHILOSOPHY OF ETHICAL INDIVIDUALISM (1976); Machan, Selfishness and Capitalism, INQUIRY 338-44 (Fall 1974).

nomic or spiritual *equality*, not liberty, should be the supreme political goal.\(^\text{32}\) The prevailing view is that a good society must insure equal economic or spiritual welfare. This is accomplished not only by providing equal opportunity to all citizens, but by effectuating the equal distribution of material goods and paternalistic care. It logically follows that if the law is to serve justice, it must sacrifice individual liberty when the exercise of that liberty leads to inequality.

If the proper political goal is the equal progress of all individuals, then obviously the proper function of law is to achieve this goal. Clearly, bringing about full equality among citizens will require the widespread enforcement of economic and related changes required to eradicate the natural and inevitable differences among individuals. The totalitarian and dictatorial consequences are easy to infer. Voluntary cooperation and generosity are certainly encouraged by those who oppose governmental welfarism. Within the welfarist system, however, that is not regarded as enough. Individuals are not trusted to live peacefully and to be responsible for reaching their full potential. The entire concern with equality of welfare, even in the framework of "upgrading the poor" and "upholding society's moral fiber," is inconsistent with the ideal that each person must make his or her own way in life.

This trend toward economic and spiritual equalization is so strong that when institutions do not meet the established norm, the government forces progress by utilizing its retaliatory powers for redistributional and paternalistic purposes. This can be seen in the use of forced busing to meet integration standards.\(^\text{33}\) The government can also indirectly force institutions to meet various standards by conditioning financial assistance on meeting certain requirements.\(^\text{34}\) Such requirements treat members of society as


\(^{34}\) For example, the National Endowment for the Arts, created at 20 U.S.C. §951 *et seq.* (1971) bases the award of grants on regulations and criteria set by the Chairman of the Endowment.
tools for other people's programs. This personal responsibility for others which underlies well-intentioned programs also underlies the more radical techniques of behavior modification and psychosurgery.

All nonretaliatory governmental coercion, because it treats people as tools, is antithetical to any respect for human dignity. While it is true that some people should give to others to assist them in reaching their goals, forcing those individuals to do so plainly robs them of their dignity. There is nothing morally worthwhile in forced giving. Generally, for a society to respect human dignity, the special moral relations between people should be left undisturbed. Government should confine itself to making sure that this voluntarism is not abridged, no matter how tempting it might be to use its coercive powers to attain some worthy goal. Obviously, this idea is neither accepted nor widely promulgated in our times. Most institutions are oriented in the opposite direction, where the state acts as the tool to foster a variety of special goals and produce desired ends for millions of disparate individuals and groups.

The popular conception of governmental responsibility for economic or spiritual welfare is rejected in this present essay. Economic, spiritual, or psychological welfare should not be a primary political goal, although in different situations such equality may indeed be valuable and well fostered by competent protection of human liberty. If welfare and equality are to be primary aims of law, some people must necessarily possess a greater power of coercion in order to force redistribution of material goods. Political power alone should be equal among human beings; yet, striving for other kinds of equality absolutely requires political inequality.35 The institution of law itself is utterly subverted when

35. See Machan, A Note on Socialism and Elitism, INTERCOLLEGIATE REVIEW 33-34 (1975). Marx recognized this temporary inequality and allowed for it in his theory as merely a temporary political condition. Prior to the emergence of ideal communism a period of dictatorship would be required, one which would take on the form of socialism. Some analysts, such as Michael Harrington, insist this could be done in a democratic manner. However, the asserted possibility of democratic socialism can be contested. See Interview with L. Kolakowski, ENCOUNTER (June 1977). The liberty to make an independent political judgment and to engage in political advocacy without the prior security of one's livelihood is considerably diminished when the state owns all the factories, offices, schools, and whatever else may constitute a place of employment. Although capitalism
law is made the tool for the achievement of various special goals by using it to secure nonvoluntary support for those goals.\textsuperscript{36} In plainest terms, coercion is justified only as a defense against actual or threatened physical violence, which is a violation of basic human rights. The use of coercion to provide welfare or achieve equality is not justified.

Current belief that such coercion is justified is supported by the view that individuals are passive entities driven by circumstances and possessing no free will. Those believing that welfare or equality is a primary political goal do not accept the premise that each person is able to be responsible for governing his or her own conduct.\textsuperscript{37} They believe that progress is blocked by economic or spiritual factors. This was a central element of Marx’s concept of human liberty. They also believe that government must eliminate these outside barriers, even if some people’s liberty must be infringed.\textsuperscript{38}

There is no question that the state must protect the freedom of its citizens. However, if the concept of “freedom” is used to mean freedom from lack of wealth, ignorance, moral grace, and hardship, the state becomes not only the peace keeper, but the welfare provider. Of course, not all aspects of the paternalistic conception of the state emerge from the view that human beings involves economic risks, socialism appears to involve the risk of being legally disenfranchised and forcibly excluded from participation in community life.

\textsuperscript{36} Alcibiades said to Pericles, as reported in Xenophone’s \textit{Memorabilia}, i, 2, 40-46, that law that is not confined to defensive force is not a valid and morally justified law. Attempts to force equality upon a people result in placing some in the position of requiring others to yield services. These are not cases of punishment given for initiating force against people, as it would be where coercion is used to retaliate defensively against murder, theft, fraud, or extortion.

\textsuperscript{37} More precisely, those who construe economic, psychological, or related types of well-being tend to view people as (a) moved by forces they do not control, and (b) fully emancipated only when they reach some (unspecified) stage of economic, psychological, or related level of well-being. Karl Marx is the most radical example of those persons adhering to this view. In less radical and more inconsistent fashion, political thinkers such as J. Rawls, M. Harrington, and the majority of social scientists making recommendations for social policy agree with this view. In political philosophy, however, the prominent idea today is that the requirement for liberty must be balanced with the requirement for welfare. See Machan, \textit{Prima Facie versus Natural (Human) Rights}, The Journal of Value Inquiry 119-31 (1976).

\textsuperscript{38} This position was presented in an untitled paper by Professor Alan Gewirth at Marquette University, October 16, 1974.
are passive entities.\(^{39}\) Even when the passive view is partially rejected, the perception of a basic deficiency in individual capacity to progress is used to justify the perpetuation of paternalistic elements in the legal system.\(^{40}\)

These developments in America's political institutions are difficult to explain. Perhaps the paternalistic role of government resulted from the neglect or deliberate debasement of a system that began with the highest though not fully consistent regard for the capacities of the individual. Of course, a more complex explanation may be involved.

The American political tradition is correctly regarded as essentially individualistic. But the philosophical background of this individualism is confused. In American culture, persons were generally regarded as moral agents with the responsibility to make their own way in life. Nevertheless, within the same tradition, people were often seen to be motivated exclusively by the desire for material gain. This view has been widely promulgated in economics, for example. These traditions are contradictory, as the existence of moral self-responsibility implies that humans can be motivated by factors other than a desire for material possessions.

The conflict in these views has had an impact on the legal developments of our culture. As an obvious example, restrictions on civil liberties are being lifted, but the demise of substantive economic due process fosters the idea that individuals are incapable of improving their lives from any point on the economic continuum.\(^{41}\) Recent judicial decisions and legislation empower the state's regulation of the voluntary creative and productive activi-

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39. For example, some ancient Greek political philosophers envisioned the state as the spiritual father of a community. There is, however, debate about whether Aristotle believed that the state or the civil community should fill the leadership role. If the latter, there is no negation of the dignity of individuals, because the kind of leadership a civil community could offer need not be compulsory, coercive, or otherwise disrespectful of a person's choice and self-responsibility. See F. D. Miller, The State and the Community in Aristotle's Politics, REASON PAPERS (1974).

40. The idea is resurfacing today that government should support the religions of a community, but not the arts, sciences, education, commerce, sports, or secular inspirational organizations. This seems to be in response to the perception throughout the culture that there has been a decline in the quality of life. See W. Berns, The First Amendment and the Future of American Democracy (1976).

41. Several recent commentators have pointed to this paradox in the cultural traditions and elements of American society. See, e.g., D. Bell, The Cultural Contradictions of Capitalism (1975).
ties of individuals. Indirect control is slowly beginning to be exercised over certain specially guarded areas of human endeavor, such as political and artistic activities, by conditioning financial assistance on various governmentally-ordained requirements. These controls clearly foster greater governmental paternalism and authoritarianism throughout. First, help is offered to "clean up" elections or to "support" the arts; compliance with provisions aimed at achieving various social goals then determines the help contingency.

It may be maintained, of course, that governmental assistance in the form of supervision and endowments provides additional opportunities for personal progress. Yet the price is morally unacceptable. The aid is provided at other people's expense, so some will urge restrictions on those groups who will be able to obtain it. Instead of the admittedly diverse system of private assistance with diverse private "strings attached," assistance today is largely centralized and administered politically, requiring full submission to various federal regulatory provisions.

Some effort has recently been made to allow direct public support of the arts, but still with government help. For example, the recently formed arts lobby headed by actor Henry Fonda42 will urge Congress to make possible direct funding for the arts. If enacted, HR 1042 would enable taxpayers to check off some of their tax dollars for specified artistic endeavors. Yet, those who would want to support different activities will have to fend for themselves and would be put at a disadvantage by such proposals. Next, all other preferred endeavors could warrant such state measures. Regardless of how urgently economic support is desired or needed by some persons, there is no justification for any person to use the state for his or her special purposes, even if only by making it a collection and dispersal agent. That just is not the government's proper vocation.

Admittedly, not all people have an equal opportunity to accomplish their various goals. This is especially true in cases where a person is saddled with genetic defects or is born into negligent or

42. HR 1042, 94th Congress, 1st Sess. (1977), which provides that persons be allowed to make financial contributions to the arts and humanities in connection with the payment of their income taxes. The legislation is sponsored by Rep. Fred Richmond (D-NY).
unfortunate family situations. But, even under those circumstances, persons can conduct their lives for better or for worse. In any case, the proper function of law is to make it possible for all individuals to govern their own lives within the broad or narrow limitations afforded by the particular conditions of their individual existence. Anything should be pursued freely, voluntarily, lest it involve coercive interference with an individual’s life and place some people in the position of managers of others’ personal and social affairs. This point can be made more directly by discussing the situation of the economically poor. Certain goals in life are unreachable for such people. For example, they are less able to obtain proper education than others coming from more favorable economic circumstances. This is often considered as a reason to justify coercive redistribution of wealth.

The present approach rejects this redistributionist view. Being rich or poor, for a start, is not central to human achievement. A poor plumber can have a far more successful life than a rich movie star. While the news media and our culture in general do not promulgate this point, our personal relationships and private experiences often demonstrate the view’s validity. More importantly, welfare legislation and governmental regulation do not provide people with, and indeed obstruct, what is crucial for leading a successful human life, namely, doing one’s very best in his or her own particular circumstances. The law should enhance this only by protecting each individual from those who would interfere with his effort or lack of effort to achieve his individual potential.

Many individuals allege that minimal economic survival requirements, surely crucial for a dignified human life, could not be met by some people if the state did not intercede and provide assistance. This charge ignores economic history. The United States Government has exercised relatively less state control over the lives of individuals than any other government in recent world history. This has helped to produce a better general economic life than that which other societies have, particularly those with extensive government welfare programs and regulation.

What is most important in terms of human dignity is that a system of governmental paternalism, welfarism, and protectionism necessarily regards the essential dignity of individuals as being of less than primary significance. In contrast, a society with freedom as the primary goal, while it—as others, despite their
claims—cannot guarantee against poverty, has repeatedly proven to be more productive. This is because free citizens are generally willing to be more productive than slaves or semi-slaves. When relationships between individuals in society are non-coercive, except in retaliation to initiated force, the prospect for all members developing their own innate individual economic, educational, professional, and other potential is enhanced.

Freedom as the legal respect for individual dignity can only provide the necessary optimum social conditions for the flourishing of individuals. It is the individuals themselves who are ultimately responsible for their success under such circumstances.

**THE RIGHT TO PROPERTY AND THE LEGAL SYSTEM**

If law should serve to establish a framework within which individuals can develop successfully, the citizenry, government’s various branches, and the legal profession must determine what conditions provide individuals the optimum freedom of action. One way to establish a workable framework is to reaffirm our political and legal commitment to the right to property. Upholding property rights facilitates and encourages individual liberty.

Liberty cannot be realized in a vacuum. People are conscious as well as physical entities whose liberty must involve action in the material world. For example, writers need pencil and paper to exercise their freedom of expression. Unless individuals are free to produce, obtain, keep, and trade their tools, they cannot be free of others’ interference. If the government has legal title to the tools needed by a writer, architect, teacher, or plumber to accomplish his or her chosen goals, such a person is dependent on and must seek permission to act from the government. For example, in the Soviet Union, where the government controls the printing presses and publishing organizations, anyone wishing to state an opinion must gain official sanction to express his or her views. In countries where broadcasting is government business, there is no widespread competition of views on the airways. In contrast, where the right to property is respected, individuals do not have to seek political permission to act, even if they still must earn the opportunity to do so via the free marketplace.

The right to property is the right to work for, acquire, and hold goods and valuables; it includes the rights of production, trade,
and bequeathal. This is not a right to be provided with goods, but rather an injunction which prohibits others from impeding a person's voluntary attempt to obtain what he wants. The right to pursue individual excellence in life requires full support of the right to property—even aesthetic achievements, for example, require materials.

Unfortunately, property rights are neither favored nor legally protected in our era, as many people associate these rights with a misunderstood economic history. Both cultural and legal developments in the last 100 years have undermined the protection of property rights. Yet, contrary to widespread contentions, the institution of private property does not generate the development of cartels and oligopolies that stifle economic prosperity and yield unfair political advantage. First, an era of laissez-faire never fully existed; and second, there is ample evidence to show that the so-called abuses of the free market were in fact mainly the result of governmental interference. This interference took the

43. For a clear discussion of this concept, see Ayn Rand, *Man's Rights in Capitalism: The Unknown Ideal* (1967). The essential point is that freedom of action involves the freedom to act vis-a-vis the world, including the freedom to attempt to gain, keep, and trade various items. However, the right to property is not the right to be given things, but the right to engage in the actions that can lead to having things. One inherently possesses this right because it is proper for each person to attempt to achieve happiness in life, and to pursue the material goods which will enhance this happiness. As Rand explains: "The right to property means that a man has the right to take the economic actions necessary to earn property, to use it and to dispose of it; it does not mean that others must provide him with property." *Id.*

44. *Id.* See also Sadowsky, *Private Property and Collective Ownership* in *The Libertarian Alternative* (T. Machan ed. 1974).

45. Many people believe that the rise of capitalism and the reduction of state control over economic life produced poverty, alienation and deprivation for millions. At the same time, a class of ruthless capitalists emerged and wielded enormous power over their communities. The stories of child labor, sweat shops, and robber barons are widely believed. For a different view, see *Capitalism and the Historians* (F. A. Hayek ed. 1954); M. Byer, *Health, Welfare and Population in the Early Days of the Industrial Revolution* (1926); W. Neff, *Victorian Working Women* (1920); G. M. Trevelyan, *English Social History* (1942); J. Chamberlain, *The Enterprise Americans* (1961).


form of granting of special privileges, the granting of monopoly status by various state bodies, and the disproportionate wealth distribution by means of state support of national or public interest projects.\textsuperscript{48} Still, the persistent distrust of a free society and free market, with a strict disrespect for property rights, has engendered widespread intrusions into people's economic relations.\textsuperscript{49}

The state often acts in a paternalistic fashion toward the citizen's right to own and manage property. For example, the state is increasingly willing to freely usurp mutually agreed-upon contracts. Under the theory of unconscionability,\textsuperscript{50} the state can re-

\begin{itemize}
\item \textsuperscript{48} R. Childs, Jr., Big Business and the Rise of American Statism and Armentano, Capitalism and the Antitrust Laws, in The Libertarian Alternative (T. Machan ed. 1974).
\item \textsuperscript{49} A recent instance of such influence is the concept of unconscionability in contract law. For example, in Tunkl v. Regents of University of California, 60 Cal.2d 92 (1963), the court held that not only does "the hospital-patient contract clearly fall within the category of agreements affecting the public interest," thus justifying the violation of the rights of contracting parties to specify the terms of their interaction, but "in insisting that the patient accept the provision of waiver in the contract, the hospital certainly exercises a decisive advantage in bargaining." The court held that the problem is that "[t]he would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital."
\item We should admit, however, that most of the problems that fall under both procedural and substantive unconscionability decisions cannot be treated solely by an economic analysis. See Kornhauser, Unconscionability in Standard Forms, 64 Cal. L. Rev. 1151 (1976), for a sharp critique of such efforts. Economics should not be decisive. The current remedies, however, assume that judicial and legislative intervention can produce more just and equitable results than decentralization. In terms of the present non-paternalist analysis, instances of allegedly unconscionable contracts which occur even in open but poor consumer markets do not, in the absence of fraud or duress, justify governmental interference if the conditions of poverty were produced peacefully. See D. Caplovitz, The Poor Pay More (1963). The contrary view assumes that people cannot improve their economic conditions and are owed charity by means of invalidating their contractual responsibilities.
\item \textsuperscript{50} When the law finds a contract is so unreasonable to the interest of a contracting party as to render it unenforceable, such a contract is termed unconscionable. Section 2-302 of the Uniform Commercial Code, which adopts the doctrine of unconscionability, has been codified in all but three of our states (California and North Carolina omit section 2-302, and Louisiana has not enacted the Uniform Commercial Code). Section 2-302 reads:
\begin{enumerate}
\item If the court as a matter of law finds the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
\item When it is claimed or appears to the court that the contract or any clause
fuse to respect contractual agreements when so-called unequal economic parties are involved. For example, the customers of a department store and the corporation that owns it are regarded as unequal bargaining parties. These state policies clearly undermine a crucial function of a good legal system: respect for the individual’s capacity to make proper choices.

It is sometimes argued that the unconscionability rules are directed against those adhesion contracts which do not allow “meaningful” free choice. However, if men and women form a corporation and invest in it their earnings, work, and time, others do not have a right to force such voluntary associations, i.e., the corporation, to write contracts for the convenience of customers who cannot meet the standard form requirements. Of course, if

thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

The term “unconscionability” was defined in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965):

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . . Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered into a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent . . . was ever given to all the terms. In such a case the usual rule that the terms of an agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Excessive price can render a contract unconscionable. See, e.g., American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964) (goods sold and services rendered were worth $959, but the additional charges of $800 for commission and $809 for finance charges resulted in an excessive price); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Dist. Ct. 1966), rev’d on issue of relief, 54 Misc. 2d 119, 281 N.Y.S. 2d 964 (1967) (Spanish-speaking consumer purchased freezer for $1,145.88 when the wholesale cost to the seller had been $348). A creditor-seller’s contractual meddling with his own and his buyer’s rights and remedies upon default can bring about an unconscionable contract. See, e.g., Denkin v. Sterner, 10 Pa. D.&C.2d 203 (C.P. 1956) (striking down a liquidated damage clause on the ground that it was unconscionable); Jefferson Credit Corp. v. Marcano, 60 Misc.2d 138, 302 N.Y.S.2d 390 (Sup. Ct. 1969) (disclaimer ineffective because of the lack of equality between the bargaining parties). On the general issue of unconscionability, see Ellinghaus, In Defense of Unconscionability, 78 YALE L. J. 757 (1969); Leff, Unconscionability and the Crowd-Consumers and the Common Law Tradition, 31 U. Pitt. L. Rev. 349 (1970); Speidel, Unconscionability, Assent and Consumer Protection, 31 U. Pitt. L. Rev. 359 (1970).
the standard form contracts hinder the business, the people who use them will not succeed in their business venture. But the individuals standing behind the mistakenly regarded "faceless" corporation should not be forced to succumb to the demands of those who want what the corporation has to offer. Refusing to recognize the liberty of corporations—i.e., voluntarily formed economic associations—is no less an affront to human dignity than refusing to recognize the liberty of an individual shareholder. This situation can be contrasted with certain elements of legislation such as Truth in Lending, which, by requiring accurate information, facilitates choice by protecting against fraud. Similarly, paternalistic legislation and regulation of commerce and industry are often combined with legitimate provisions that protect a person against fraud, extortion, or misrepresentation. What is unjustifiable is that courts are attempting to remedy the failure of individuals doing business or entering contracts to adequately prepare for their lives. Thus it would be possible to plan for future hospitalization and avoid being made the "victim" of unconscionable hospital rules. The same is possible in one's dealings with corporations and their standard forms. The fact that many individuals refuse to prepare for dealing competently in a complex society is no justification for forcing those who have done so to forego their resulting benefits.

Early in our history, American legal institutions put serious limitations on the right to property, including freedom of contract. In 1876, during a time when laissez-faire was at its peak, the Supreme Court in Munn v. Illinois, ruled that business "affected with a public interest" could not be free of government interference. Ten years later, the Supreme Court transferred the regulation of commerce from state to federal jurisdiction on grounds that "the right of continuous transportation from one end of the country to the other is essential in modern times." Subsequently, in this century, we have witnessed the total demise of substantive economic due process and the expansion of the

52. 69 Ill. 80 (1873), aff'd 94 U.S. 113 (1876).
53. 69 Ill. at 134.
HUMAN DIGNITY

federal and state governments' power to regulate property and business. By now, through judicial interpretation, the Commerce Clause of the federal Constitution sanctions the most extensive and pervasive violations of private property rights. Such judicial interpretations and the rejection of economic due process have rendered the Fifth and Fourth Amendments feeble legal measures against government power to violate private property rights and to regulate commercial endeavors.

HUMAN DIGNITY AND HUMAN RIGHTS

Some may still argue that these developments do not debase human dignity because they evolved through the democratic process. But, use of the democratic process does not justify restrictions on individual rights. Certain decisions may be popular but not morally permissible. The fact that a citizenry does not protest vigorously cannot license government encroachment upon a person's liberty. Similarly, despite the fact that a welfare state can benefit some people economically via the usurpation of human rights and dignity, that benefit does not justify limiting individual liberty. Democracy cannot be unlimited in its scope of concern. As an example, in West Virginia Board of Education v. Barnette, the United States Supreme Court stated:

55. See, e.g., Day Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) wherein the majority of the court stated that a state legislature can control business and labor practices within extremely broad limits. The Court found that issues relating to business, economic, and social affairs should be left to legislative decision free of court interference. Id. at 424-5.

56. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955), wherein the Supreme Court observed that "[t]he day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought...." Id. at 488. Accord, North Dakota Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 164-67 (1973); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).

57. Whether moral judgments can be proven true or false is a controversial issue. For the views of commentators who feel that moral judgments cannot be proven true or false, see note 14 supra. See also Attfield, The Logical Status of Moral Utterances, THE JOURNAL OF CRITICAL ANALYSIS 70-84 (1972); Alan Gewirth, The 'Is-Ought' Problem Resolved, Presidential Address, 72nd Annual Western Meeting of the American Philosophical Association (1974).

58. 319 U.S. 624 (1942).
The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities. One's fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Any democracy requires constant constraints, lest the democratic process be open to elimination via the democratic method.

The theory that law must uphold human dignity is logically tied to the conception of political justice that rests upon natural rights. Natural rights theory, especially the recently advanced version, so formulates principles of law that regard each person as a moral agent whose life, liberty, and property may not be controlled by others. Government control, even of a democratic sort, is justified only if it protects and preserves the rights to life, liberty, and property. Although people sometimes try to vote them away, as if they were granted and revocable by society, government, or the state, these rights are inalienable, even when positive law disregards them. Thus, although slavery was sanctioned by positive law, it was immoral because persons are by nature free agents not slaves.

Now, despite contrary institutional and historical developments, the proper perspective by which to view the bulk of current positive law is a moral theory tied to the nature of man.

This drastic suggestion may be met with the rejoinder that the entire thesis of this article is in error because dignity either does not exist or is not of primary importance. The first point has already been answered. To the second we need to admit that competing moral ideals will yield competing political and legal ideals and a corresponding recasting of the function of law in society. Thus, if stability is the highest political purpose, there would exist justification for taking measures such as behavior modification, which disregards the dignity of individuals but aims to ensure stability. If advancing toward communism is

59. Id. at 638.
60. See T. Machan, Human Rights and Human Liberties at 204-06.
61. Id. at 116.
63. Advocates of behavior modification will not explicitly admit this. Instead, like Skinner himself, they employ an entirely different language so that value-laden concepts
crucial, then the terrorism employed and the so called wars of liberation around the world are of greater significance than efforts aimed at protecting the moral autonomy and dignity of the individual. But, if our society is to give priority to human dignity, legal institutions should support the individualist tradition, which views each person as being individually responsible for leading a successful human life.

CONCLUSION

Dignity is being crushed by the implementation of behavior modification techniques in the penal and educational systems of the country. Wherever paternalism sets in, the capacity of indi-

such as dignity no longer find a place in the discussion. Consider the following statement: "Successful application of these [behavior modification] techniques becomes more probable when the behavior modifier has firm control over the environmental contingencies; thus, mental hospitals, prisons, and schools have served as frequent arenas for their implementation." The phrase "firm control over the environmental contingencies" appears to be a value-free technical phrase, referring perhaps to the physical environment, i.e. the furniture, walls, or structure of a building that surrounds someone whose behavior is being modified. However, these factors appear to be of little significance when the aim of the procedure is to eliminate maladaptive behaviors.

However, environmental contingencies include "items" in the social environment. Moreover, maladaptive behavior modification techniques require a coercing of people to change their preferred peaceful conduct. Yet, explicit reference to what will constitute good or bad conduct needs to be excluded in order to placate moralists and to provide maximum efficiency. Whitman notes that "behavior modifiers in mental hospitals, prisons, and schools hold maximum power over those whose behavior is thought to require modification. Such ideas as consent, agreement, voluntary cooperation, choice, and evaluation of reasons for administering the techniques, have no place in the vocabulary of behaviorism." Whitman, Behavior Modification: Introduction and Implications, 24 DePaul L. Rev. 949, 953 (1975). See also Beyond Freedom and Dignity, supra note 3, at 7, where Skinner criticizes the fact that "[A]lmost everyone who is concerned with human affairs—as political scientists, philosophers, men of letters, economists, psychologists, linguists, sociologists, theologians, anthropologists, educators, or psychotherapists—continues to talk about human behavior in this way (i.e., "in terms of traits of character, capacities, and abilities")." Skinner's list of such terms include pride, sense of responsibility, will to power, self-respect, initiative, frustration, hopelessness, sense of purpose, crisis of belief. Id. -64.

64. See Trotter, Patuxent: "Therapeutic" Prison Faces Toast, A.P.A. MONITOR 6 (May, 1975), where psychologist Arthur Mandel testified that segregation cells (referred to by inmates as "the hole") were really "negative reinforcers... used as positive treatment conditions." Skinner recounted at a public lecture at U.C. Santa Barbara in early 1971 that he used behavioral modification techniques in his own classrooms, when he wanted to condition his students not to prepare to leave class prior to the time class ended. For more systematic designs of behavior modification techniques used for education, see
individuals to be a decisive element in their own lives diminishes. The impact of yielding to vested interest-group pressures has also produced the denigration of individual human dignity and the rapid spread of state paternalism, the consequences of which are extremely regrettable and should immediately be rejected and resisted.

There has been an attempt here to outline and defend a moral case for the existence and value of human dignity and its proper relationship to various features of a legal system. I have proposed that human dignity should be upheld within a good legal system as an essential function of law. Such a function will be fulfilled if the legal system rests on a theory of natural human rights to life, liberty, and property. These rights specify the standards by which each individual’s liberty of moral choice can be protected and preserved, thereby achieving valid, nonutopian social justice. Although the topic of dignity has usually been considered in light of the need to protect civil and political rights, an approach stressing property rights is also needed. When the government has unlimited legal authority to use, dispose of, and expropriate property, the individuals who produce and must depend on property cannot oppose that government’s policies and cannot govern their own lives.

I have not tried to make the case for my thesis with the tools of legal research. Such an approach is inadequate for making basic normative points. Instead, through moral argumentation, one can influence the basic direction of the political and legal community, a task of every citizen.

The technical tools of legal research are powerless without a prior determination of the proper direction in which we should steer our various institutions. The goal should be a consistent and competent affirmation of human dignity—that is, the full respect for each member of society as a free and self-responsible being.

Keller, Engineered Personalized Instruction in the Classroom, Revista Interamericana de Psicologia 189-97 (1967).

65. This point is of interest to our discussion of dignity, because underlying the idea of human dignity is the notion that people can choose to confront issues, follow arguments, and learn by thinking through the points they may encounter. The assumption here is that ideas have consequences, whereas the assumption in Skinnerism and the bulk of less extreme social science is that ideas are mere products of the environment’s action upon the human brain.
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