HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS

Edited by

Tom Campbell and Seumas Miller

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INTRODUCTION

The discourses and institutions of human rights are contemporary devices for bringing morality to bear on the harsh realities of political, economic and social life. These attempts to render the conditions of human existence more tolerable and more dignified tend to focus mainly on the role of domestic and international law and the conduct of states and the international institutions that represent them. This is an entirely proper and necessary part of any serious attempt to promote and protect human rights and one that has the full moral endorsement of those who are committed to the cause of human rights. Indeed, identifying the legitimating goals, proper forms and limiting constraints of state action is a primary role for discourses of human rights.

However, the emphasis on law and state is becoming increasingly insufficient for the task of articulating and implementing human rights. Moral commitments going far beyond the requirements of conformity to law and moral obligations that are binding on organisations other than states, are indispensable for the adequate realisation of human rights objectives. This book concentrates on the distinctively moral obligations generated by human rights as they apply to organisations operating in both private and public spheres. Drawing on expertise in philosophy, sociology, law and politics, argument and evidence is presented to demonstrate how human rights obligations transcend and differ from the more narrowly construed legal responsibilities established by human rights laws. Indications are given as to how these moral obligations may be supported and implemented. All the chapters were written in the light of this brief and were presented and refined at a workshop held in Canberra in late 2000. The editors wish to thank Mrs Barbara Nunn for her superb editorial work in preparing the final manuscript in 2003.

Part One consists of three philosophical examinations of the moral responsibilities arising from human rights which set the parameters for the more concrete studies which follow. Coming from different angles they are contribute to the analysis of the idea of human rights and explore the practicalities of human rights as well as the foundational values they express.

In Chapter One, Tom Campbell starts from a vision of human rights as an attractive and redeeming aspect of globalisation but argues that this endorsement must not be confined to the increasingly pervasive legal uses of human rights both within and between states. Neither should the moral dimension of human rights be confined to grounding and supporting legal instruments. Human rights have moral

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 1–8.

implications that go beyond even enthusiastic conformity to human rights laws. These implications need to be worked out through a critical examination of the goals and culture of different types of organisation.

Articulating the moral aspects of human rights involves broadening the range of human rights discourse and taking it beyond the context of politics in which it arose. When this is done, Campbell argues, human rights can be seen as, to some extent, 'sphere specific', in that the formulation of the obligations that correlate with human rights requires having regard to the characteristic threats to human rights, the resources available to meet those threats, and the sorts of remedies available within the domains of different types of organisation. Although there is a danger that this sphere specific approach diminishes the traditional universality, simplicity and absolute priority of human rights, it is argued that there are concomitant advantages in focussing on bringing about effective changes in both market and public sector organisations, which fits with the strong utilitarian element that features in even the most deontological theories of human rights.

Campbell's chapter serves as a general introduction to themes that are taken up throughout the remainder of the book. The other two chapters in Part One explore in more detail the core of human rights discourse, seeking to establish a distinctive and delimited role which preserves the high moral importance of human rights while making room for the broad scope and positive nature of the obligations and responsibilities that derive from it.

James Griffin deals with the various type of duty that may be said to correlate with human rights by tackling what he sees as the prior issue of the 'existence conditions' of human rights. Concentrating on the tradition, dating back to the 15th century, from which human rights emerged, he emphasises the connection of human rights to rational agency, particularly moral agency and the sense of dignity that attaches to the human personality as a result. Demonstrating the range of rights that are generated by this conception of personhood, Griffin notes that the correlative obligations are indeterminate until we take into account the requirement of practicality, including psychological realism about what can be expected of human beings by way of taking responsibility for others.

Griffin concedes that his conception of human rights is limited – deliberately so – but sees this as a virtue in an era when an ever increasing range of demands are couched in human rights terms. However, it is a sufficiently expansive conception of human rights to take in a measure of well-being rights. For instance, the right to life which a person has as an agent gives rise to correlative positive obligations in the spheres of health and education, albeit only with reference to the protection and enhancement of agency. Bringing this to bear on the moral responsibilities of human rights Griffin emphasises the need to identify those who have the ability to render the appropriate assistance and demonstrates that this criterion justifies historical shifts in the locus of such obligations and points out that these include not only rendering positive assistance to human rights victims but also secondary duties such as the promotion of human rights through publicity, education, active debate, monitoring the observance of human rights and encouraging compliance. He

illustrates these themes with respect to responsibilities relating to the AIDS epidemic in Africa and the role of the pharmaceutical industry in this sphere.

In Chapter Three, David Archard considers the allegedly problematic human rights status of welfare rights and systematically confronts the standard objections to giving social and economic rights the same moral status as civil and political rights. Arguing that, once we make serious attempts to formulate specific human rights and seek to ensure their implementation, all human rights throw up problems of indeterminacy and lack of resources, he then turns the problem of practicality around by adopting a perspective that transcends state responsibilities and national boundaries in the search to find a range of locations for the onerous duties to which all types of human rights give rise.

Archard agrees with Griffin that there are core values underpinning all human rights, but broadens their scope beyond the notion of agency and moral personhood. Elucidating the distinction between core human rights values and the preconditions for realising these core values, he uses this to enhance the importance of welfare rights, all of which he sees as necessary for the realisation of those values that are identified in civil and political rights and some of which, like the right to education, themselves represent core values. Drawing on the notion of practicality discussed by Griffin and Campbell's notion of sphere specificity, Archard articulates and defends the principle that all individuals and organisations have a duty to desist if what they are doing increases the likelihood of human rights violations.

Part Two takes up the philosophical themes introduced in Part One in relation to the special obligations of business corporations and how these might be implemented. In Chapter Four, Doreen McBarnet sets the scene for these discussions by providing a sociologist's overview of the 'new accountability' which epitomises the historical phenomena from which philosophical reflections on the moral duties of organisations arise. McBarnet traces the sources of these demands and the complex ways in which corporations adopt, resist, transform and manipulate the forces of globalisation, the diminution of state capacity, the emergence of a reinvigorated civil society in the shape of NGOs, and technological changes all of which drive the allocation of these new duties.

McBarnet traces the emergence of the idea of a triple bottom line (financial, environmental and social) and the impact of this thinking on corporations, such as Shell International, which are now coming to terms with what is involved in adopting and institutionalising human rights obligations. She explains the threats to human rights which are caused by such factors as out-sourcing and notes the opportunities that emerge for bringing pressure to bear, at least on major corporations, because of the marketing strategy of 'branding' products, a marketing strategy which makes corporations vulnerable to hostile publicity. McBarnet notes the arrival of an 'ethics industry' which may be seen as either as a prop for, or a challenge to, traditional ways of conducting international business. She presents a range of arresting facts and important social trends and offers some sceptical comments both as to the sincerity and the successes of the ethics bandwagon, drawing attention to the oversimplification of complex issues and emphasising and pointing out that the audits which are a necessary feature of accountability can be as

fallible (and sometimes as counter-productive) in the sphere of environmental and social issues as in financial accounting.

In Chapter Five, Peter Muchlinski draws a similar picture from a more legal perspective, focussing on the institutions of international trade and the human rights aspects of their emerging discourse. Like Griffin and Archard, Muchlinski starts from a historical theme, in this case the traditional justifications of property rights which he sees as crucial to the ethical movement in international business regulation. Noting the corporate libertarianism of the World Bank and the World Trade Organisation, Muchlinski contrasts the managerial ad hoc responses to international trade politics with the standard setting or principled approach that involves some articulation of rights in the context of anti-capitalist pressures. He sees the setting of minimum standards as an institutional way of implementing human rights and notes the unattractive moral compromises that arise from adopting a more relativist line, often under the guise of 'Asian values'.

Muchlinksi argues that such standards can be identified as emerging from a process that is capable of being justified in terms of the social contract model. Drawing examples from the UN Global Charter, and UNCTAD 98, he notes the wide acceptance of the idea of sustainable development and the use of this idea to foster the legitimacy and accountability of international organisations in the face of NGO pressure to constitutionalise such rights in the framework of international trade 'proto-legislation'. He offers some hope of transcending oversimplified opposition between the international market and the interests of individual states while repudiating the notion of a human right to trade as a self-serving fiction of dominant economies. Identifying the ethical push behind entrenching the concept of minimum standards for corporate conduct in the sphere of international law Muchlinksi discerns a framework in which the moral obligations of corporations might flourish.

In Chapters Six and Seven, these and other issues relating to the extent and nature of corporate responsibility are taken up in a systematic way by two philosophers highly experienced in this area. Wesley Cragg operates, like Muchlinski, with the concept of a social contract between business and society or the state, a relationship which he sees as ripe for reappraisal. Starting from a broad historical analysis Cragg notes that the original emergence of the joint stock company was legitimated, not in terms of the rights of corporations, but in terms of the promised benefits to the public good that would flow from providing licences to trade, limited liability and an enforced patenting regime. Only later, when there was a demand for fairness in the granting of such privileges was there a shift to the idea that everyone has a right to enter into business under these beneficial conditions, a demand that was further justified by the insights of Smithean economic theory and the expansion of free trade. However, more detailed examination demonstrates that all convincing arguments for the rights of business corporations are couched in terms of the public interest. Indeed, capitalist business is defined by the rules of the market and business organisations depend crucially on the social frameworks that protect the human rights and other interests of those involved in it.

A large part of the public interest that justifies the protected legal status of corporations consists of the protection and furtherance of human rights In recent

history this goal has been served by a social division of labour that gives corporations the right and duty to create wealth, leaving everything else, including the rest of human rights, to governments. However, Cragg argues, there is no reason in principle and many reasons deriving from current social and economic circumstances, why this arrangement should not be varied to give corporations a broader human rights role.

Tom Sorell makes a broadly based case for business corporations having such human rights based moral obligations. Deploying a series of analogies, he makes the case that such obligations are grounded on the basis of the opportunities that corporations have to make a difference in these matters, the urgency of the sufferings and deprivations involved and the human rights risks that are inevitably involved in corporate activities. These obligations go beyond those deriving from the mere fact of incorporation or any contractual commitments into which corporations may have entered, but are firmly based in considerations of social justice and the obligations that every person has with respect to human rights. It is because of the fact that we are specifically dealing with human rights, rather than social injustice in general, that corporations have moral obligations relating to such matters as forced labour, even if they do not have responsibility for other aspects of social justice or any legal obligation to involve themselves in human rights promotion generally. This thesis is illustrated by the Global Compact put forward by the United Nations as its precondition for supporting international free trade.

Sorell then goes on to raise the tricky question of whether these duties of corporations arise simply by way of default, as a result of the failures of governments to take appropriate action, or whether they arise as a result of the immense power and wealth of many multinational corporations. Using the example of Premier Oil and Burma, of which he has significant personal experience, Sorell argues that, even in an ideal world, businesses have a distinctive contribution to make that can enhance, as well as make up for the lack of, government action.

In Chapter Eight, Melissa Lane approaches corporate responsibility from the point of view of a political philosopher. Her particular concern is the need for corporations to negotiate with the appropriate persons and groups over the specifics of their human rights interests as they are affected by corporate activities. She follows through the search for the ethical content of human rights via the concept of autonomy, taking up some of the threads woven by Griffin and Archard. Like them, she has some sympathy with corporations seeking to determine the nature and extent of their human rights obligations beyond mere conformity with the law and the customs that prevail where they operate.

To clarify human rights obligations in this area she deploys a sophisticated typology of correlative obligations which enables her to open up the possibility of corporations, such as multinational mining corporations, having duties to bring pressure to bear on governments which violate human rights and even to set up schools and other services in the deprived contexts in which they conduct their business. She takes a radical view of the implications of the human right to autonomy for the processes of consultation and negotiation For instance, she argues that respect for the autonomy of those affected by mining developments requires

corporations to take into account the views of those in the locality about their own understanding of their core human rights values.

If we are to respect the autonomy of others, especially those living in other cultures, it is not appropriate simply to impose the content of the rights which are given priority in the very different situations and experiences of those in the societies in which the corporations are based. Negotiating with governments may do little to benefit those most at risk from the disruption to their own lives and economies, while doing deals with some locals may be to exclude the interests of other groups, including the national community itself. It is only by working through these problems in good faith and with considerable commitment that corporations making major and long but not necessarily open-ended intrusions into vulnerable societies can begin to discharge their extra-legal human rights obligations.

While Part Two starts with empirical, legal and political analyses which lead into two more theoretical discussions within normative ethical philosophy. Part Three reverses this process by starting with a philosophical chapter by Seumas Miller which, although it deals explicitly with the police, has wide ranging implications for the moral responsibilities of public sector organisations generally. This is followed by two more applied chapters that deal with human rights issues in relation to corrections and the phenomenon of 'evil' within public organisations.

Miller adopts a broad analysis of human rights, going beyond respecting autonomy and its prerequisites, and allowing scope for the possession of rights by those who are not capable of exercising autonomy. He takes a strong line on the objectivity of human rights and by implication our capacity to know what these are. On this basis he develops the thesis that policing is a human rights enterprise in which human rights serve, not just as side-constraints to some other goals such as law-enforcement, but as a direct and core objective which establishes the prime normative goal for the institution of the police, albeit one that must be constrained by the law.

Miller presents this thesis within an account of social norms and a general teleological theory of social organisations. He identifies the benefits of this analysis in providing a relatively narrow priority goal for policing and giving a framework for the exercise of police discretion. Developing his teleological model of what makes for a coherent idea of collective goals and noting that modern criminal law in democratic states is in fact principally concerned with protecting those basic norms which relate directly to human rights, Miller takes up certain sphere specific aspects of policing, particularly the possibly justified use of coercion, undercover surveillance and other methods that would normally be themselves violations of human rights. Justifications for such methods can themselves only be derived from human rights.

This bold and controversial thesis is an appropriate backcloth for the more specific phenomena considered by David Biles, in Chapter Ten. Biles, drawing on his long experience in correctional services, explores empirical questions about the extent to which correctional agencies in Australia and Asia actually respect the human rights of those subject to their regimes. His findings are highly critical with

respect to such matters as overcrowding, while acknowledging that improvements have taken place in training and treatment programs within prisons.

Biles counters such common beliefs as that prison is an unpleasant experience for most prisoners, that order is only maintained through vigilance and coercion, that recidivism is unacceptably high, and that prisons are particularly dangerous places to be. The main human rights deficit in correctional systems is, he argues, unnecessary incarceration of many prisoners and the lack of available remedies for human rights violations within correctional facilities. In fact, he argues that correctional institutions systematically violate the human rights of prisoners because the 'benefits' they enjoy, such as adequate nutrition and access to self-improvement programs are obtained as privileges rather than rights. This is a situation that cannot be turned around until such time as correctional services see themselves as, within their punitive remit, human rights institutions.

Adams and Balfour, in their chapter on modern organisations and administrative evil, cast a wider net in their identification of the specific threats to human rights which derive from the culture of technical rationality in large scale organisations. Technical rationality is a matter of organisation of tasks into smaller units in the interests of efficiency. Analysing this organisational phenomenon is some detail, Adams and Balfour conclude that the modern organisation is unable to effectively confront ethical and moral issues. In a largely pessimistic chapter, 'administrative evil' is identified as the performance of dehumanising actions under the mask of technical efficiency which generates routine indifference to moral outcomes and avoids accountability through the diffusion of responsibility throughout the organisation.

Examples of administrative evil are not difficult to find, ranging from the Holocaust to the Space Shuttle Challenger, and these are given a common analysis in terms of the perspective of the perpetrator rather than that of the victims, the difficulty of perceiving evil in one's own time, the euphemisms of technical language, the dehumanising impact of collective action, and the tacit dimension of social life whereby daily life is simply taken for granted. These features of organisational behaviour present major challenges to the feasibility of locating human rights moral obligations on modern organisations and at the same time reinforce the case for giving all major public organisations explicit human rights goals.

In a trenchant and wide ranging examination of the new role of the military in what are essentially policing functions, Costas Douzinas, in the final chapter, subjects the dominant role of human rights as the new core of international law to sustained critical analysis in the context of military intervention and policing in the name of human rights. Douzinas notes that in the pre-modern world the most barbarous of wars were justified in moral terms, an approach which gave way to a general acceptance of the propriety of war between independent sovereigns in the modern period. With Kosovo this has been replaced by a new type of sovereignty based on intervention in the cause of humanitarian values as a form of police action.

Douzinas points to the evident contradictions in the rationales given for such interventions, involving as they do the demonisation of the enemy, and the morally distorting effect of the use of massive force in a way that avoided casualties amongst the victors while enabling the atrocities to continue in an intensified form and failing to produce a viable settlement after the apparent conclusion of the just war. In so doing he mounts a powerful case as to the dangers of giving violent policing activity the mantle of human rights. This is a sobering line of thought with which to close a volume on the moral obligations arising from human rights. It does not establish, however, that it is not possible to utilise human rights as a source of organisational goals and as a guide to organisational methods. It does remind us, however, of the danger of allowing organisations as well as individuals to occupy the high moral ground and use this to enforce their own, often distorted, view of the world.

The object of this book is to establish the importance of viewing human rights in moral as well as legal terms in a way that provides a framework for establishing what the moral obligations arising from human rights might be and how they could change our perception of the role of human rights in the contemporary world. This takes us deep into some traditional questions about the nature and scope of human rights, and brings fresh insights into possible advantages and disadvantages of assigning human rights obligations to private and public sector organisations.

In so far as this project is successful it opens the way for a continuing examination of the specific threats that organisations pose for human rights and the grounds on which it can be argued that organisations have duties not only to refrain from inflicting human rights injuries but also to take an active part in promoting human rights, even to the point of reconceiving their core objectives in human rights terms.

In emphasising the sphere specificity of such human rights obligations and the shifting boundaries and uses of human rights, this approach may be thought to threaten the underlying objectives of human rights movements by discounting the centrality of legally enforceable universal rights by and against states. On balance, the authors do not take this view. Instead they see the future of human rights as lying, at least partly, in an effort to articulate and institutionalise human rights morality within the confines of the large and powerful private and public organisations that dominate not only domestic politics but also the global realities that shape our contemporary human environment.

PART ONE

RIGHTS AND

RESPONSIBILITIES

TOM CAMPBELL

CHAPTER ONE

Moral Dimensions of Human Rights

Many contemporary social and political theorists are feeling their way towards a moral framework for some amalgamation of liberal capitalism and social democracy suited to our current conditions. These conditions include the comparative success of free market capitalism as opposed to statist socialism, the serious injustices and unacceptable inequalities that liberal capitalism generates along the way, lack of effective accountability for bureaucracies, and the endemic corporate iniquities and regulatory failures that disfigure business practice, on any account of its legitimacy.[1] The evolving context in which these conditions flourish, loosely referred to as globalisation, involves the increasing economic and political dominance of world markets, largely skewed to the benefit of the wealthier states and trading groups, the hesitant emergence of global regulation[2] and the diffuse and limited scope of political power under diminishing democratic effectiveness.[3]

Amidst this morally ambivalent scene, human rights appear as something of a beacon.[4] Human rights have come to represent the moral dimension of globalisation: the affirmation of universal standards to which we can look for guidance for the humanisation of capitalism, the revitalisation of democratic control and the protection of the values that give meaning and importance to human life. More particularly, in their affirmation of the equal worth and supreme value of every human being, human rights set the parameters and goals for any legitimate human organisation. It therefore seems appropriate to see human rights as a source of ideas for determining the normative ordering of global capitalism and its governmental structures.[5]

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[1] Ronald Francis, *Ethics and Corporate Governance* (Sydney: UNSW Press, 2000), Chapter 1.

[2] John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

[3] S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996); Tom Campbell, 'Democracy in a World of Global Markets', in Charles Sampford and Tom Round (eds), *After the Republic* (Sydney: Federation Press, 2001), pp. 78-92.

[4] Justice Michael Kirby, 'Human Rights: an Agenda for the Future', in Brian Galligan and Charles Sampford (eds), *Rethinking Human Rights* (Sydney: Federation Press, 1997).

[5] Thomas Donaldson, 'Moral Minimums for Multinationals' *Ethics and International Affairs*, 3 (1989), pp. 163-82.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 11–30.

In playing this role, human rights have the advantage of universality and hence global applicability.[6] Human rights apply to all societies and to all people. They cannot be excluded from any sphere of human life, including the economic world of production, services and markets. We cannot say, for instance, that human rights have to do with politics, or policing, or administration, but not with economics, or business or religion. Moreover, human rights have, by common acceptance, high if not overriding moral importance, so that, once admitted to these spheres, they cannot be relegated to the status of optional extras, things that it is nice to take into account when and if we have the time and resources to do so.[7] Human rights are not only universal, and therefore intrusive, they are also morally imperious, and therefore unignorable.

Further, human rights now have formal and institutional expression, through the 'international bill of rights', as constituted by the Universal Declaration of Human Rights (1948), The Covenant on Civil and Political Rights (1976) and the Covenant on Economic, Social and Cultural Rights (1976), through domestic legislation (such as anti-discrimination and equal opportunity laws), and increasingly often through constitutional provision for the judicial review of legislation.[8] These positive human rights norms are supported by a host of international agreements and organisations and enjoy broadly based ideological support in most countries. Human rights can now be said to have a tangible, palpable existence, which gives them a social objectivity in an institutional facticity that enhances their de facto credibility. Human rights can no longer be said to represent only the opinions of moral campaigners and utopian academics. They can be seen as embodying the transnational commitments of civilised nations. Human rights have thus acquired a global institutionalised authority on which we can draw to work out the moral obligations of all actors, be they individuals or organisations.

Before we get carried away by this exhilarating scenario, there are several factors that must be borne in mind when we come to examine in detail the applicability of human rights to organisations, factors that count against the easy application of existing human rights discourse to non-state organisational activities. Some of these factors derive from the political contexts from which human rights have emerged and to which they are characteristically applied. The state-centred origins of human rights affects their accepted content (cataloguing the abuses of government power), and their standard forms (individual protection against the intrusive acts of governments). In short, human rights as we know them are largely statist in their focus.

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[6] For theoretical treatments of human rights on which this analysis is based, see Maurice Cranston, W*hat are Human Rights?*, (London: Bodley Head, 1973); Ronald Dworkin, *Taking Rights Seriously*, (London: Dickworth, 1978); Tom Campbell, *The Left and Rights*, (London: Routledge and Kegan Paul, 1983).

[7] 'Overridingness' is variously attributed to justice and to human rights, although the latter are inevitably included in the former: see John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), Chapter 1.

[8] Wojciech Sadurski, 'Rights-Based Constitutional Review in Central and Eastern Europe' in Tom Campbell, Keith Ewing and Adam Tomkins (eds)*, Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001), pp. 315-334.

Other factors that raise doubts about the applicability of human rights to the moral responsibilities of organisations derive from the capture of human rights by legal institutions and ideologies. The progressive legalisation of human rights goes with an assumption that human rights are within the domain of lawyers, law-makers and law-enforcers, so that respecting human rights can be achieved simply by enacting, obeying and enforcing the appropriate laws. This means that, in so far as other organisations have moral obligations arising from human rights, they are mediated by law and may be met by a moral commitment to obey laws. Indeed, some international lawyers regard human rights as their preserve and equate human rights progress with the development of legal institutions. In short, human rights as they are developing are becoming increasingly legalised.

Yet other factors that render problematic the application of human rights to organisations relate to problems concerning the epistemology of human rights, that is the difficulties that arise when deciding how to go about assessing a knowledge claim that something is a genuine human right, a difficulty that is exacerbated when we move away from focussing our discussion of human rights on the existing state-centred, legalistic human rights with which we are familiar. Epistemological problems about human rights can be side-stepped when we equate them with existing and emerging legal provisions but not when we seek to develop novel adaptations of human rights to other types of organisation and institutions. In considering the moral obligations of organisations arising from human rights, we have no ready-made basis in secure knowledge of the content and nature of human rights.

This chapter considers some of these factors – statism, legalism and epistemology – that inhibit the use of human rights discourse in non-state contexts, and asks what sort of human rights and what sort of human rights theory best enables us to work out a reasonable and practical answer to questions about the moral responsibilities of organisations that derive from human rights. Subsequent chapters take up and add to these points and illustrate the many facets of human rights that are exposed by concentrating on the organisational applications of their moral dimensions.

1. HUMAN RIGHTS AND ORGANISATIONS

In considering the extent to which human rights can serve to identify the moral responsibilities of organisations, I have indicated that we must take account of the political contexts in which they originated and were developed. If we trace human rights to the tradition of natural rights as they were fashioned by political philosophers of the seventeenth and eighteenth centuries, the rights from which human rights emerged functioned to define and delimit the role of governments, and set the standards of legitimacy of political life.[9]

[9] This paradigm, evident in Hobbes's *Leviathan* (1651), received its classical formulation in Locke's *2nd Treatise on Government* (1690).

It may be argued that, since the sovereignty of states establishes the primacy of politics, politics is the master discipline and its concerns are in principle applicable to any and all spheres of human existence, so that locating human rights in the political sphere may not be much of a limitation. Yet the statist orientation of human rights discourse means that human rights as we currently know them may not be well adapted to serve the function of defining and limiting the role of non-political organisations. Natural, and hence, human rights were not designed for non-political purposes in non-political contexts. This is very evident with respect to some human rights, such as the right to vote, that have clear political application but are of doubtful relevance in other spheres, such as business and family. To some extent the same is true of all the human rights that we have inherited. In particular, the concrete interpretations of abstract rights has been carried out almost entirely in the context of state-citizen relationships. Indeed statist interpretations are, if anything, becoming more dominant through the increasingly common assumption that the full development of a human rights culture involves the constitutionalising of human rights along the US model in which it is a basic tenet that we are dealing with the rights of the individual against the state.

Human rights, in their contemporary guise, emerged in the aftermath of the government perpetrated atrocities of the Second World War and may be seen as a catalogue of the sins and dangers of state power and the capacity of states to inflict evils on their own citizens and those of other countries. They draw on a tradition that seeks to identify those evil things that governments are prone to do and must be prevented from doing. This is the major reason why we cannot, therefore, just assume that human rights as we know them are well adapted to identifying the sins and dangers of non-governmental bodies.

Even where human rights are given a more positive role in actually furthering the values identifiable as human rights values, such as life, liberty, property, equality and dignity, these goals are formulated in a context where political theorists and political activists have in mind the legitimating goals of governments, the reasons why we must have states and the acceptable, indeed the necessary, goals of political systems, such as the preservation of life, liberty and property. We cannot just assume that human rights, as they have developed, embody the proper or legitimating goals of all other types of organisation, although it is a reasonable assumption that public sector organisations, particularly public administration, police and correctional organisations, ought to share these objectives. In the division of labour between social institutions, human rights belong in the governmental sphere of responsibility. This is less clear in the case of other organisations. In particular, it can be argued that business is not in the business of human rights.

We may react to the statist focus of the human rights tradition in three different ways, which I will call (1) selective application, (2) universal extrapolation and (3) sphere specific articulation. The first way sees some rights as focussed on states and others as having more general application, the second seeks to extend all human rights to all types of organisation and the third takes a more creative approach that looks to the development of distinctive human rights in different spheres so that the

human rights for organisations may differ significantly in form and matter from those that prevail in the domain of the state.

(1) Selective Application. We might seek to identify those human rights that are plainly related solely or primarily to governments and separate them from those that are genuinely universal in their focus, protecting persons against the evils that may be inflicted on them by all other persons, groups, or organisations. In the former category goes the right to vote, in the latter goes the right to life. Here it is natural to think of civil and political rights as of more general application, or even as falling primarily outside the sphere of government. This approach does not meet the problem that existing human rights have been formulated in the context of state politics.

(2) Universal Extrapolation. We might accept that some human rights have been aimed at government in the past, but that they are in fact of universal application, so that they should now all be extended to spheres beyond government, making the right to vote of direct relevance, for instance, to members of organisations as well as to citizens. This would be an acknowledgment that states are not the sole perpetrators of human rights violations. Thus, it can be argued that freedom of speech is not simply a matter of the state not interfering with (principally political) expression, but a right that ought to be recognised and protected in all spheres, including the workplace. This approach begs the question against the significance of the evident differences between state and other organisations.

(3) Sphere specific. We might devise rather different human rights for different types of organisation that are designed to deal with the particular problems and opportunities that arise in these different contexts. Thus, organisations may be said to have characteristic human rights and duties, beyond those that apply to all states and citizens in general, that relate to such factors as (i) the characteristic 'standing threats'[10] to basic human interests that this type of organisation is most likely to harm, (ii) their sphere of activity, that is, the domain in which their activities have impacts, and (iii) their capacities, that is, their ability and opportunity to make a difference to fundamental human interests within and beyond their own core sphere of activity. This approach offers the prospect of developing sphere specific articulations of human rights.

The creative adaptation involved in articulating sphere specific rights could take us in a number of directions. Perhaps the most important of these relates to identifying the distinctive threats to human interests that typify each sphere. In particular we might focus on the impersonality that is such a dehumanising factor in bureaucratic organisations, or the grave consequences that arise from the commodification of human labour in large industrial concerns. The idea that human

[10] The term comes from Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1980), pp. 29-34.

rights are relative to the sphere of operation of an organisation could lead us in the somewhat simplistic direction of saying that educational organisations, for instance, should pursue the right to education and, perhaps, even that they should do this by means of education. Or, we might consider whether economic organisations ought to concentrate on the right to subsistence and should do so by the deployment of their economic resources and expertise to that end. Finally, concentrating on what it is that different sorts of organisation are capable of achieving gives us a fruitful basis for looking not only to where the duties correlative to human rights may fall, but what those duties may actually be, hence changing the contents of the correlative rights.

It is clear that such creative adaptation is not an exhaustive approach and must be combined with a measure of universal extrapolation since organisations evidently do have many human rights duties that are not sphere specific. And the measure of selective application must remain appropriate, since it is evident that governments and their coercive arms have particular responsibilities, often in relation to enforcement of rights, that do not apply to other types of organisation.

Taking up this last point, it may be argued that, because the characteristic and distinctive mode of activity of the state is through law that this locates human rights firmly in the arena of state responsibility. Certainly, rights, particularly human rights, have come to be associated with legal forms. The very idea of rights is closely tied to the concept of rules and entitlements, and human rights, as the most important of rights, are tightly associated with the strongest mode of rules and entitlements, namely law. The assumption is that it is the duty of governments to see that the rights identified as human rights are expressed in and guaranteed by laws and the duty of courts to see that these laws actually do protect human rights. This seems to follow from their fundamental importance.

Moreover, it is arguable that, if we are to give any distinctive meaning to the concept of rights as opposed to the more general idea of right and wrong, it must be by reference to the pre-existence of rules or norms in virtue of which it makes sense to talk of being entitled to the content of the right in question, thus imposing closure on the issue in question. Of course, laws regulate all spheres of human activity so that the legalism of rights does not in itself exclude human rights from non-governmental areas, but, from the point of view of identifying who has the responsibility for articulating and applying human rights discourse, the legalism of rights gives states the lead role, with other organisations being required only to conform to the laws made for them.

However, by pointing out that not all rules are legal rules, we can side step many problems we may have over the legalism of human rights by drawing attention to the function of social rules, and the expectations that go with them in grounding the idea of entitlements that is so vital to the distinctiveness of the discourse of rights. That done, however, there remains a sense that human rights are most at home in the legal or quasi-legal world of rules of societal norms that have some sort of official status, thus making it easier to envisage the application of human rights to governmental bureaucracies than to less formal style organisations and non-organisational forms of social life.

Further, many human rights are specifically designed to indicate what are, or ought to be, the limits of the powers of government, giving rise to the idea that they represent a higher law that ought to be embedded in constitutional rules and entitlements. By a process of extrapolation we may, of course, extend the role of constitutionalised human rights to the private sphere and make them directly applicable to disputes within and between private organisations, as they are through administrative law to some activities of public organisations. Nevertheless, on this model, human rights remain dominantly matters for law, lawyers, legislatures, police and courts.

Both the legalist and the governmental rationales for confining the implications of human rights to state politics have important kernels of truth. Evidently, while human rights, or some of them at any rate, are universal in the sense that they may be violated by any individual or organisation, states, as the monopoly bearers of coercive power, are prime violators of human rights as well as the most obvious source of effective remedies. However, none of this excludes more specific and targeted roles being given to organisations in the protection and furtherance of those basic human interests whose value underpins the significance of human rights of all forms.

Certainly human rights responsibilities are not necessarily confined to respecting and obeying the laws that are established to protect human rights, even when those laws are specifically aimed at the dangers typically manifest by certain types of organisation. The rule of law is itself a human right and requires conformity to all laws, other, perhaps, than those that are themselves contrary to human rights standards. In the case of human rights laws in particular, the moral obligations of non-government agents may be broadly construed as requiring the utilisation of the means at their disposal to further the same objectives: realising human rights. Individuals should not only refrain from violating the human rights of others, but they may be expected to join in persuading others to do likewise, to do what they can to prevent infringements of human rights and to promote human rights objectives. This is equally or even more the case with organisations. Economic organisations may not be able to pass laws prohibiting violations of human rights, but they may still have a role that goes beyond not violating such rights themselves, and that involves using the means at their disposal, including their economic power, to promote human rights objectives and alter the conduct of others in this regard. Indeed, they may have many means at their disposal more effective than coercive law.

Further, while human rights may contain an implicit logic that points to the need for legal protections and government inaction and action, they remain, at base, a moral discourse that provides reasons why states should behave in certain ways, reasons, such as human dignity, equality and justice, that have application far beyond legal and governmental domains. Indeed, one of the prime roles of human rights is to provide a basis for the criticism of positive law and government policies, including human rights law and policy, so that human rights can never be entirely identified with actual laws and policies. There would seem to be no reason why the

principles enunciated in these criticisms do not have application beyond the governmental sphere.

This perspective clears the way for seeing human rights as a basis for some of the moral obligations of organisations, but, at the same time, it points up the need to modify our inherited ideas about the form and content of human rights in order to make them more appropriate for organisational use. The human rights that apply to non-governmental agents may not be quite the same as those that apply to governments.

This project cannot be carried through if we do not address the epistemological issues that bedevil human rights discourse. If human rights are seen as a set of self-evident intuitive truths from which we can deduce applications to different spheres that vary only because of the different factual situations involved, then we can make little progress along the lines of creative adaptation. Progress is possible, however, if we realise that human rights are, to a considerable extent, a human invention that serve particular moral purposes in particular social contexts. Human rights are not metaphysically independent entities that we discover by investigating the moral furniture of the universe detached from the empirical realities of human life. They do not, therefore, have fixed contents that can be identified independently of the purpose and function to which they are put.

On the other hand, there is a danger that the non-governmental human rights that are developed through a process of creative adaptation are seen as weaker, less significant types of rights that fail to instantiate the powerful moral force that state-oriented human rights have acquired. It has to be a mistake to think that the moral dimensions of human rights that are detachable from state duties are therefore morally less important.

Summarising the parameters of the creative adaptation of human rights in a sphere-specific direction with respect to the human rights obligations of organisations, human rights may be characterised as legitimating, important, overriding, institutional and sphere specific.

(1) Legitimating. Human rights deal with the basic values that ultimately legitimate human actions, and in particular the activities of human organisations, of all kinds. We may retain the idea that, for instance, business human rights have a similar legitimating function to governmental human rights in that they establish both their right to exist and the limits of that right, so that no business entity is legitimate if it systematically violates business human rights in the same way as no government is legitimate if it systematically violates governmental human rights. We are not dealing here, therefore, with factors that are peripheral to business corporations, but about their very right to exist. The justification for giving such a powerful role to business human rights is that the power, and therefore the potential for good and evil, of business corporations is so great, that the analogy between the role of governmental and that of corporate human rights has bite.

(2) Important. Human rights pertain to fundamental human interests, needs or capacities. Something should not be identified as a human right merely because it is desirable or good, but only where we can identify a way of achieving such desirable objectives by modifying the patterns of conduct in a society through the imposition or adoption of responsibilities that may be legitimately imposed or adopted because of their high moral importance.[11]

(3) Normatively Overriding. One thing that can be retained as to the universal form of human rights is that, whatever is determined to be a human right, in whatever context-dependent form, it can be assumed that this represents an overriding moral imperative that trumps any other legitimate goal of the organisation and cannot be opted out of, even on the grounds that it is not the purpose of that organisation to pursue such objectives.[12] In this sense, a charter of human rights for business, for instance, differs from the idea of having a code of ethics, an altogether weaker form of normative framework that operates at the interstices of its management, structure and goals. Whatever problems may arise with the practical clash of rights, human rights must always win out in conflict with other considerations.

(4) Institutional. It follows from their existence as a species of rights that human rights must be capable of being institutionalised so that an appeal to human rights can be effectively recognised as a legitimate claim. Values are not rights until they feature in rules or standards that are sufficiently established within a society to protect such values through the creation or sustenance of a system of socially recognised correlative duties. As rights, human rights must be or aspire to be established institutionalised entitlements. However, while it is part of the idea of rights that these duties be identifiable in terms of rules or standards of conduct it is neither necessary nor always desirable that these rules be legal rules adopted and enforced by governments through law.[13]

(5) Sphere specific. There is no uniform answer to questions about the meaning and content of human rights except at a level of abstraction that is unhelpfully vague. At any level of concrete detail that has application to actual situations, human rights mean different things in different contexts. Further, there is no necessary priority that must be given to answers current in one sphere when we come to consider the moral responsibilities in another sphere. No doubt there will be substantial overlap in the sort of considerations that are relevant in every sphere, particularly in relation to what is ultimately valuable and important about human life, but, at any level of specificity that has significant practical implications, we can expect wide divergence in the content, form and scope of human rights

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[11] The classic affirmation of this criterion is to be found in Maurice Cranston, *What are Human Rights*? (London: Bodley Head, 1973), p. 63.

[12] John Rawls, somewhat arbitrarily, attributes overridingness to justice in general, however lexical prority is identified as a feature of basic liberty rights. See John Rawls, op.cit.

[13] See Tom Campbell, *The Left and Rights* (London: Routledge and Kegan Paul, 1983), pp. 35-57.

depending on the type of use to which we are seeking to put the answers to our questions. It therefore makes sense for us to examine the nature and content of business organisations' human rights, or public sector organisations' human rights, without undermining the moral universality of the underlying commitment to the values that give rise to human rights norms.

Sphere-specificity gives rise to three aspects of human rights relativity. In their moral dimensions, human rights are relative to the standing threats, the available remedies and the particular capacities of the candidates for bearers of the moral obligations that correlate with human rights:

(1) Threat-relative. A key role of human rights is to identify the specific type of evil that has to be guarded against. Characteristically these threats vary with the nature of the human activities in question.

(2) Remedy-relative. Both the form and content of human rights must vary with the institutional mechanisms assumed to be appropriate for the implementation of such rights and the objectives of deploying those mechanisms. Thus, if it is assumed that human rights ought to be institutionalised through an entrenched bill of rights administered by courts in order to limit the powers of governments, then this will directly impact on what may reasonably be considered to be a 'human right', for this purpose. The same will apply if we utilise the concept of human rights to justify imposing sanctions on or using armed intervention against a sovereign state. In other words, human rights are purpose-relative or, more precisely perhaps, remedy-relative.

(3) Capacity-relative. The practical dimension of human rights entails that correlative responsibilities partly constitute the right in question, so that it is not possible to determine that a human right exists until appropriate correlative duties have been shown to be feasible. Responsibility for human rights cannot be ascribed without reference to the capacities of those who are to be held responsible.[14]

One advantage of abstract affirmation of generalised human rights is that they bear their morality on their sleeve. No one can doubt that declarations of human rights are declarations of moral commitments. Another advantage of abstract affirmations of human rights is that they can be presented as a unity of values that have universal application. These are valuable features and should not be lost sight of. However, at the level of specificity at which human rights can be brought to bear on concrete situations and therefore be of immediate practical importance, regard must be had to the type of circumstance to which they are being applied and this inevitably leads to more fragmented statements of human rights.

[14] Compare, Thomas Donaldson, op.cit, p. 171. Donaldson commends a 'fairness-affordability' test, but in a footnote identifies this with the capacity to pay rather than something that does not require trading off against other valuable goods.

As it happens, much of this detailed articulation has been done in legislation and, more so, in the interpretation by courts of that legislation and, where they exist, of constitutionalised bills of rights. In this process human rights have become identified with the particular duty of courts to curb and constrain state power. The outcome has been that human rights have now come to be closely identified with court-articulated legal rules that restrict the range of legitimate government activity. While questions may be raised about the democratic legitimacy of the exercise of such powers by unelected judiciaries, there is no doubt that it is an important function to render abstract human rights more detailed and more concrete and thus more useful.

However, when we come to re-examine the original moral sources of human rights discourse, and to do so with the intention of working out their implications for organisations in general, it is necessary to free ourselves from the confines of the legal principles and rules that have been developed with a rather different focus. Not only do we need to consider the underlying moral basis on which we might want to go on and legislate for the control and facilitation of different types of organisations with respect to human rights, something that can never be fully captured in legal statements of rights, we will also want to consider the moral duties of organisations that correlate with human rights objectives that are not appropriately pursued by means of legislation or state activity in general. The moral dimensions of concrete human rights are not exhausted by the moral justification of legislation or bills of rights.

Once this is appreciated, we can proceed to work through to the sphere-specific human rights duties of organisations without the inhibiting assumption that these must inevitable lead to legislation, constitutional amendment, or creative judicial interpretation of existing provisions. No doubt there will always be problems of compliance that follow on the creation of standards, but these need not, indeed often cannot, be met by legal interventions. The moral dimensions of human rights with respect to organisations transcend the legalism that is one, but only one, proper outcome of human rights articulation and protection.

2. MARKETS AND RIGHTS

Once liberated from thinking of organisational human rights and obligations as simply a matter of conformity to human rights law, there are a number of questions that can be addressed with a relatively open mind. One such question is: what are the human rights objectives of organisations, or specific types of organisation?

This may seem to be the wrong sort of question. Surely, it may be argued, it is only human rights organisations and governments that have human rights objectives? What other organisations may have is human rights limitations. Organisations have their own purposes that they must carry out within the confines established by law and in particular by human rights law. Thus business organisations are there to make profits but in the process should not indulge in murder, torture, enslavement or genocide. These constraints on their pursuit of profit do not mean that they have human rights objectives.

However, becoming more sphere specific, we may go on and identify those human rights violations that business organisations are most likely to perpetrate. A list readily comes to mind: health, safety, subsistence, and the environment. This takes us into all the familiar regulatory objectives whereby governments seek to minimise the harm done in the course of economic activity, and business organisations may be expected to cooperate with such endeavours. Whether or not they regard these as human rights matters, in relation to such side-constraints, business organisations may be morally required to conform to their legal obligations and perhaps to aid the objectives of government policy in ways that go beyond conforming with legal requirements by utilising means that could not readily be legally enforced. In this context going the second mile in the implementation of the sort of human rights standards that are imposed on business may be seen as a moral implication of human rights for business organisations.

Thus in the sphere of workplace relationships, thinking through what it is to treat employees as human beings in accordance with their dignity and human rights, involves far more that conforming to human rights laws, such as anti-discrimination law, and health and safety regulations, and suggests that there is a powerful moral imperative to respecting in an informal way, such rights as freedom of speech in the workplace. The moral requirements that are ambiguously enshrined in contemporary human resource management theory, can be given a human rights dimension when such goals as developing the capacities of employees is taken to be an end in itself beyond its advantageous outcomes for the corporation in question.[15]

Of course, there may be a tension, perhaps a major chasm, between what is required by pure business considerations, namely profit maximising, and what these human rights legal and moral obligations require. Much may be made of the extent to which such tensions and chasms are exaggerated and it is often persuasively argued that human rights, like ethics in general, is good business.[16] Respecting human rights makes for a healthy and content workforce, satisfied consumers, a wholesome image and trusting business relationships, all of which may happily be profitable. But what if this is not the case, and there is a choice to be made between respecting these constraining human rights and the economic objectives of the organisation?[17]

On the analysis given so far, the moral answer is that human rights win, hands down. Human rights are, by definition, those things that may not be violated in the pursuit of other objectives. Human rights are important, generally overriding, considerations that trump all other moral and non-moral objectives. Business

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[15] See J. Storey, 'Human Resource Management: Still Marching On, or Marching Out?', in J. Storey, (ed.), *Human Resource Management: A Critical Text*, (London: Routledge, 1995) and Diana Winstanley and Jean Woodall, 'The Ethical Dimension of Human Resource Management', *Human Resource Management Journal*, 10 (2000), pp. 5-20.

[16] Anthony Giddens in Will Hutton and Anthony Giddens (eds), *On the Edge: Living with Global Capitalism* (London: Jonathan Cape, 2000), p. 215: 'multinational companies find that the penalties for trading unethically or irresponsibly are growing, imposed by an increasingly well-organised and powerful international consumer movement'.

[17] Kenneth J. Arrow, 'Social Responsibility and Economic Efficiency' *Public Policy*, 21 (1973), pp. 303-17.

organisations must therefore not only reduce profits, if necessary, they must even go out of business rather than violate such rights. If, in the case of any particular right, we dispute this, then the logic of the argument is to withdraw the claim that the right in question is a human right.

Such a 'side-constraints' scenario, operates on the assumption that business activity, or market activity, or profit making, is not itself an expression of human rights. However, there may be, under different descriptions, a human right to participate in the market place, and, if doing business is itself a human right, then we do not have a tension or a chasm between business and human rights, but a clash of different human rights. And if we have a clash of rights, then there is no a priori reason to believe that what may be called 'market human rights' must always give way to other human rights.

Let's start again, then, with the question: what are the human rights objectives of business organisations? This is certainly a fair question. We have seen that in the governmental sphere human rights serve not only to limit but also to set the objectives of governments. For Locke, it is not simply that governments lose their legitimacy if they take property without consent, one of the very purposes of the trust which is placed in government is the protection of property. Why should something like this not pertain in relation to other organisational types?

The answer may be found in the *raison d'etre* of most business organisations, to make money, perhaps as much of it as possible. This is not an immoral objective in itself, but neither is it necessarily a moral one. Yet if its long-term benefits are considered the moral standing of markets, as A. K. Sen points out, 'has to be high'.[18] There is a parallel here in the way we think of governments. Governments, we say, have primarily utilitarian objectives: to enhance the welfare of their citizens, to seek the greatest happiness of the greatest number. Rights come into the picture in laying down what governments may not do in pursuit of such moral but not rights-respecting objectives, such as increasing the gross national product, or reducing the extent of human misery. Perhaps business organisations, in the same sort of way, have the morally acceptable objective of making money that is circumscribed by rights-based obligations. In both cases we may say: do what you do but whatever you do, do not kill or torture.

Unfortunately for this side-constraints model of human rights, the contrast between two types of moral consideration – maximising utility and respecting rights – is in a state of chronic breakdown. For a start, goals and rights overlap. Preserving human life, preventing serious injury, providing medical treatment, eliminating racial discrimination, facilitating choices: all these and much more are as readily classifiable under the head of increasing utility as they are under the head of respecting rights. If there is a significant distinction between goals and rights, it may be that goals are distant objectives, achieved via a complex and extended causal chain, and rights are more directly related to immediate benefit and avoidance of harms. But both can be seen in instrumental terms, direct or indirect, short-term or long-term.

[18] A. K. Sen, 'The Moral Standing of the Market', *Social Philosophy and Pol*icy, 2 (1985), pp. 1-19 at 1.

This will not seem right to those who have come to believe that there is a moral deficit to utilitarianism, namely its inability to exclude unequal distribution of the maximised benefits or minimised burdens. However, equality can itself be conceived of as an objective that is worth bringing about and this can be articulated without reference to rights, if needs be. Equality is an important moral demand but it is not confined to rights nor need it be expressed as a right rather than a goal. Moreover, equality demands are certainly important in human rights discourse, although mainly in the affirmation that human rights apply equally to all, so that everyone has equal human rights and no one may be excluded from their enjoyment. Demands of equality, although they apply to human rights (all human beings have equal human rights) vastly transcend the spheres of human rights and take in the whole landscape of distributive justice. And while some human rights are focussed on the exclusion of certain types on inequality: racial, gender, age etc, human rights are not coextensive with anti-discrimination considerations of this sort.

Further, it is important to note that there is scarcely a human right that is widely recognised that does not depend on a measure of utilitarian or consequentialist justification. Even the classic civil and political rights, perhaps especially the classic civil and political rights, would not survive on non-consequentialism alone. We may certainly distinguish two sorts of rights with respect to their underlying rationales. One, that may be called intrinsic rights, where the value of the right resides in the activity that the right-holder has a right to perform. The other is instrumental rights, rights whose rationale is to be found in the beneficial effects of having the right recognised, protected and enforced. The whole system of property ownership may, for instance, be justified in this way. Granted the distinction, it is quite implausible to argue that all human rights are purely intrinsic rights, or that a right is a human right only in so far as it is intrinsic. It is certainly possible to attribute some intrinsic significance to all human rights (and many more besides) but these are without exception allied to instrumental rationales. Life is of intrinsic significance, but it has great human rights utility by being the precondition for the enjoyment of all other benefits. Life is supremely valued for its instrumentality as well as its intrinsic worth. Again, the right to vote is justified in part by its function as a mode of self-protection, but it is also an instrument for self-protection and, collectively, for the contribution it makes to improving the quality of government.

But what of the right to make money? Is this a purely instrumental right? Does it have any intrinsic significance? And, in either case, does it have the sort of moral importance that is required to override or compete with other considerations that are uncontroversially described as human rights?

Something depends here on how we individuate and analyse this right. We may be reluctant to speak of a right to make money through wages, profits or interest, because it seems to suggest that some other person(s) have the duty to provide that money or that profit. What is at stake, however, may well be the right to engage in employment, trade, or voluntary exchange in general and to be permitted to keep the proceeds. The correlative duty to such rights need be no more than the duty not to prevent such activities or confiscate the proceeds.

Yet, as such, the right to work for wages or engage in trade may be regarded as a manifestation of a fundamental right, a form of liberty that can be said to have immense intrinsic significance. Trading, for instance, is as instinctive and fulfilling an activity as any within the normal ambit of human behaviour, even if it does have immense practical significance as a requirement for the survival of the human species.

Indeed, one of the most influential, although undoubtedly mistaken, political philosophers of recent times, has persuasively (for many) argued for the existence of a small number of intrinsic basic rights, deriving from the ownership we all have of our own bodies, that establishes our natural entitlement to the products of our own activities and voluntary exchanges as long as these do not violate the same rights in other people. In the logic of Robert Nozick's position,[19] whatever results from the exercise of these basic rights: to life, to ownership of our bodies and to voluntary exchange, is legitimate. No consequential consideration enters into the picture. No resulting inequality can be condemned. No intervention in the outcomes can be easily justified.

The attractive simplicity of Nozick's scheme gives moral priority to business activity as a prime manifestation of basic liberty. The basic human rights may be seen in the Nozickean scheme as the right to do business. This is why it is difficult for Nozick to come up with a justification for the existence of government and all its coercive interventions in the free exchanges of individuals. And, indeed, in the event, only a very limited range of such interventions is acceptable on the extreme libertarian position expounded by Nozick.

However, we need not go anywhere near so far as this in providing a rationale, for markets, that can be expressed in a rights-based form. Instead, we can draw on the capitalist image of a market arising in conjunction with extensive divisions of labour in a situation where individuals are free to join together to make and exchange whatever commodities they have. This, it is claimed, is the most efficient way to produce as much as possible of what people want at the lowest feasible price. This means that the capitalist market is, *inter alia*, the best means of producing and making available that which meets basic human needs. This is sufficient to ground a general right to market transactions. In addition, it is clear that markets cannot operate without an effective practice of contractual relationships that involve mutual trust and obligations. Further what counts as a contract – as an agreement 'freely' entered into – takes us deep into norms of justice that have intrinsic moral connotations with respect to fairness as well as instrumental connections to the goals of sustenance and survival.[20]

This analysis does not give us rights that trump all other considerations, but it does take us to the point of establishing that human rights are implicated in the justification of markets in ways other than side-constraints. For instance, the right of subsistence must be seen in terms of a goal of, rather than can a side-constraint on,

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[19] See Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974). For an exposition and critique, see Tom Campbell, *Justice*, (London: Macmillan Press, 2nd Edition. 2001), Chapter 3.

[20] For one account of the moral basis of contract see Charles Fried, *Contract as Promise*, (Cambridge: Harvard University Press), 1981.

governments or others capable of meeting the subsistence needs of people. This, in turn, can take us in all sort of interesting directions. We may distinguish between those rights that constitute the market and those that are extrinsic to the market. We may distinguish between those market rights that are justified by reference to the interests of the right-holder and those that are justified by reference to the more effective operation of a system that benefits others or everyone. And, when we explore these questions we find that there is no definitive way of defining 'the market' in a way that does not bring in controversial evaluative issues about what we want markets to be like, so that there is always a prior question as to what market rights we ought to have, before we go on and ask how market rights stand up against other rights.[21]

The crucial point here, from the point of view of human rights of and in business, is that we are not dealing with a situation in which the market is justified by a less stringent type of 'ordinary' moral consideration, which then comes up against a more powerful form of extraordinary moral considerations, called human rights. What we have may be described as a clash of rights, between those rights that are construed (always provisionally) as constitutive of our preferred form of market type activity, and rights that may be defined without reference to any market related concepts. This may save us falling into the easy assumption that the morality of markets is of a lower order than the morality of basic rights, and that the issues of the relationship between rights and markets is a matter of determining what falls on the rights side of the equation and imposing this dogmatically on the lesser area of business and economics, so clearing the decks for a more enlightened examination of the human rights obligations of organisations.

3. THE PUBLIC SECTOR AND RIGHTS

Much of the analysis so far has drawn on a fairly crude distinction between the operations of the state and the operations of private organisations, particularly business organisations. It might be thought that public sector organisations, such as government departments, defence and police organisations, and publicly owned utilities, fall clearly on the government side of the dichotomy. Many public sector organisations are in the business of creating and implementing the delegated legislation through which government policies are implemented and are deeply implicated in the issues of legitimation and control with which state-focussed human rights are concerned. Public sector organisations have much the same duties and failings with respect to human rights as other branches of government. On the other hand, bureaucracies, particularly large bureaucracies, have their own distinctive features that give rise to characteristic potentials for good and evil with respect to the moral dimensions of human rights, and these vary significantly according to the public sector function involved, from defence, police, courts and corrective services

[21] See Tom Campbell, 'Liberalism and the Law of Contract' in Alan J. Gamble (ed.), *Obligations in Context*, (Edinburgh: W. Green, 1990), pp. 111-25.

at one end of the scale, through to the regulation and administration of health, welfare and education services at the other end of the coercive spectrum.

It is evident that public sector organisations in general are more cabined by rules and required procedures than their private counterparts, and some of these relate to those human rights values that have to do with procedural fairness and democratic accountability. This derives from the special duty of public organisations to act impartially in the service of the public. They also tend to have greater human rights protections for their employees than private organisations, which reduces dissonance between the principles that govern their external activities and their internal management. However, the contrast between the private and the public sectors in these and other respects has been diminishing in recent times, partly because of more extensive regulation of the private sector with respect to such matters as unfair dismissal and health and safety at work, and partly because of the continuing privatisation of public functions, not only in the transfer of essentially public work to private concerns, but in the expectation that public organisations behave more like private ones in their response to 'market' pressures.

This makes it appropriate to ask rather similar questions about the public sector to those that we have been considering in relation to private organisations. What are their particular threats to human rights values? What bearing has their core 'business' on their human rights obligations and how does this relate to human rights goals? What are their characteristic capacities that might be utilised with respect to fundamental human interests?

All these questions point to the model of rule-governed organisational efficiency that public sector organisations are thought to exemplify. Weberian rationality carries the promise of large-scale organisational efficiency that is able to turn government objectives into real social outcomes, and to do so in a way that is impartial and fair in terms of the laws under which they operate. From the substantive human rights point of view this should make public sector organisations neutral instruments whose moral legitimacy depends on the values that are espoused by their political masters. From the procedural human rights point of views public sector organisations are significant with respect to the administration of policies in a non-discriminatory manner.

This suggests that a distinctive thing about public sector organisations is that they have to develop and faithfully follow rules that do not introduce questionable factors into the implementation of government policies. It follows that the distinctive threats of such organisations arise when they use the power that is given to them with respect to the distribution of benefits and burdens between citizens but they neglect to follow their own rules and procedures to the detriment of those adversely affected.

Moreover, it is a characteristic of such organisations that, where this does happen, those involved in the perpetration of the error have a tendency, indeed often a vested interest, in not admitting the error and failing to take responsibility for what has happened. This is usually not difficult to do in a complex organisation where many different people are involved in a multiplicity of roles in a hierarchy, in which

it is in no one's interest to admit wrongdoing, and there is usually no objective way of identifying and measuring such failures.

The characteristic sins of bureaucracies lie even more, however, in the fact that any large scale administration has to involve a large measure of discretionary power whose exercise is not governed by definitive rules and procedures. This gives rise to particular problems of accountability where there is no measure of success comparable to that of profit maximising in the private sphere. It is agreed that the public sector provide value for money but it is often not clear how that value is to be measured, particularly with respect to public goods that cannot readily be quantified in terms of individual benefits.

In combination, the capacity to depart from rules and procedures and the freedom to exercise unaccountable administrative discretion, gives rise to the constant prospect of individual grievances, to which there are few effective remedies, and the prospect of large scale injustices, that arise from the diffusion of responsibility in large organisations, that are capable of bringing about substantial effects on the lives of many people.

These are familiar and recurring problems that cause concern far beyond the confines of human rights. Many of them are increasingly addressed through administrative law, which has developed judicial review of administrative action to handle individual grievances arising from maladministration, unauthorised activities and indefensible uses of discretionary power. Some of these undoubtedly concern human rights. The very fact of having a judicial remedy for administrative action can itself be regarded as a human right. Where this remedy covers a re-examination of the merits of the decision in question, human rights may be brought it to help assess the reasonableness of what was done. Other aspects, including freedom of information and privacy also involve human rights values.

However, it is clear that the scale and complexity of administrative organisations makes detailed external supervision of their activities very difficult, and there is little prospect of picking up any serious injustices that do not directly impact on individuals who have the opportunity and capacity to discover them and raise a grievance. It is important, therefore, to consider how those moral dimensions of human rights, that cannot be readily and thoroughly supervised through legal mechanisms, may be articulated and developed within these organisations themselves. Indeed, it is easy to see some public sector organisations as prime suspects as violators of human rights. Police and corrective services in general have highly ambivalent records in this respect. This is to be expected, given the historical role of human rights in setting both the goals and the limits of state power. It is an unfortunate political fact that those very bodies that we need most to achieve a civilised way of life are, because of the power that has to be entrusted to them, the very bodies from which citizens have often most to fear. This 'tragic paradox of politics'[22] applies to all state functions and especially to those involving evident

[22] Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth Publishing, 1996), Chapter 2.

coercive power and concerned with the distribution of resources that are vital to the attainment of a tolerable standard of living.

Nevertheless, in the case of mainstream public sector organisations, a human rights approach does not have the same initial disadvantage as private sector market-based organisations in establishing the prima facie moral status of their activities. Especially in democracies, the administration of basic government functions, many of which have been expressed in terms of specific human rights, is not morally suspect in itself. Moreover the liberal assumption, that such administration must be carried out impartially and for the common good, seems to put public sector organisations a moral peg or two above the profit driven private sector, whatever the ultimate moral justification of its competitive operations may be.

However, the scope for falling from grace is considerable, for there is a standing danger that those involved in the public sector use the power that is given to them for their own private ends, or utilise their position for private benefit. Further, the lack of effective accountability can mean that an entire organisation can be led into socially destructive activities that, because they are caused by large scale institutions, no one is able or willing to do anything about.

On the other side of the equation, some public sector organisations are clearly directly involved in activities that make a direct contribution to human rights goals. This is evident in regard to those social and economic rights that governments have positive duties to promote, and is particularly evident with respect to police and courts with their responsibility for the administration of justice. Given these assumptions, the pursuit of efficiency in their operations becomes, in practice, tantamount to the pursuit of human rights and gains high moral significance from this fact. The perennial problem of such organisations is, however, that the organisation gravitates towards serving and protecting the interests of its members to the detriment of their legitimating goals.

Bearing these factors in mind, it is clear that human rights have considerable moral implications for public sector organisations beyond those that are subsumed within administrative and human rights law. Human rights give enhanced moral significance to the pursuit of efficiency in organisations that often lack effective disciplinary frameworks, such as the market. Public sector organisations are prone to abuses that have direct impact on the rights of large numbers of individuals and which are hard to identify and correct, particularly in spheres such as police, and welfare. Much of what has to be done here is to perceive what are often regarded as ‘merely ethical’ or ‘merely administrative’ matters as in fact charged with significance for human rights.

Moreover, it cannot be assumed that the form and content of human rights as they apply to public sector organisations can be captured by the goal of conformity to human rights law, however well formulated this may be. The pursuit and respect for human rights values in large public sector organisations depends mainly on the development of a human rights culture that is well adapted to their particular functions and characteristic failures. Precisely what human rights involve in these contexts is something that has to be looked at afresh in the light of the particular threats and promises connected with such organisations.

4. CONCLUSION

That human rights should have moral implications beyond the need to enact and conform to effective human rights laws is hardly surprising, given that the very concept of human rights is, at base, a moral one. Human rights are primarily a species of moral rights in that they highlight certain priority moral values that cannot be identified with any actual set of institutionalised rights and duties. Human rights can never, for instance, simply be equated with human rights law, either in its domestic or international manifestations. Because human rights derive from important human interests and needs, it is natural to expect legal protection of human rights. Indeed this itself may contribute to their moral influence in a society. Nevertheless, the import of human rights goes far beyond setting up and implementing laws and ought to impact on every aspect of policy and decision-making in private as well as public sector organisations. This gives new force to the significance of developing ethical cultures in organisations, a process that is already emerging in the increasing significance given to internal codes of ethics, ethical audits and open acknowledgment of the corporate social responsibility of management and boards of directors.

In this introductory chapter, I argue that when these distinctively moral dimensions of human rights are taken seriously in the governance and goal-setting of organisations, this does not involve simply taking on board institutionalised human rights in their existing state and legally oriented guise, but can be expected to lead to the articulation and deployment of specific human rights that, in form and content, relate to the particular situations and capacities, for good and evil, of different types of human organisation.

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CHAPTER TWO

Human Rights: Whose Duties?

What human rights do we have? What, when worked out, are they rights to? And upon whom do the related duties fall? My question is the third – whose duties? – but to answer it requires some idea of the answers to the first two questions.

1. WHAT HUMAN RIGHTS DO WE HAVE?

We need to know what must be shown in order to establish the existence of a human right. We need to know, as one might put it, their existence conditions.

A good way into establishing their existence conditions is through the human rights tradition. There are two approaches to human rights that philosophers adopt. There is a top-down approach: one starts with a highly abstract philosophical principle (or principles), such as the principle of utility or the Categorical Imperative or the contractualist test, and then derives an account of human rights from it (or them). Then there is a bottom-up approach: one starts with the tradition, which is a mixture of philosophical, theological, legal, and practical political concerns. The tradition has its own criteria for its claims, to some extent independent of any of these particular highly abstract moral principles.

I prefer the bottom-up approach. It has pressures on it to rise in abstraction – for instance, in order to explain the moral weight of human rights and to resolve conflict between two rights or between a right and the general welfare. But with the bottom-up approach we do not have to make assumptions about the availability of highly abstract and systematic theory in ethics, and we can wait to see how abstract and systematic our account must become.

A term with our modern sense of 'a right' emerged in the late middle ages, probably first in Bologna, in the work of the canonists, experts (mainly clerics) who glossed, commented on, and to some extent brought system to the many, not always consistent, norms of canon and Roman law.[1] In the course of the twelfth and thirteenth centuries the use of the Latin word *ius* expanded from meaning a law stating what is fair to include also our modern sense of 'a right', that is, a power that

[1] See O. F. Robinson, T. D. Fergus, and W. M. Gordon, *European Legal History, Sources and Institution*, (2nd ed., London: Butterworth, 1994).

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 31–43.

a person possesses to control or claim something.[2] For instance, in this period one finds the transition from the assertion that it is a natural law (*ius*) that all things are held in common and thus a person in mortal need who takes from a person in surplus does not steal, to the new form of expression, that a person in need has a right (*ius*) to take from a person in surplus and so does not steal.[3] The prevailing view of the canonists was that this new sort of *ius*, a right that an individual has, derives from the natural law that human beings are, in a very particular sense, equal: namely, that we are all made in God's image, that we are free to act for reasons, especially for reasons of good and evil. We are rational agents; we are, more particularly, moral agents.[4]

This link between freedom and dignity became a central theme in the political thought of all subsequent centuries. Pico della Mirandola, an early Renaissance philosopher who studied canon law in Bologna in 1477, gave an influential account of the link. God fixed the nature of all other things but left man alone to determine his own nature. It is given to man 'to have that which he chooses and be that which he wills'.[5] This freedom constitutes, as it is called in the title of his influential book, 'the dignity of man'.

This same link between freedom and dignity was at the centre of the early sixteenth century debates about the Spanish colonisation of Latin America. Many canonists argued fiercely that the natives were undeniably moral agents and, therefore, should not be deprived of their autonomy and liberty, which the Spanish government was everywhere doing. The same notion of dignity was also central to political thought in the seventeenth and eighteenth centuries, when it received its most powerful development at the hands of Rousseau and Kant. It came to be accepted that this freedom itself confers dignity, whether or not there is a God who also has it. God became superfluous, and natural law, from which these natural rights were derived – a connection on which Locke still relied – also became superfluous. Thus eventually emerged the secularised Enlightenment notion of a 'human right'. And this notion of dignity, or at any rate the word 'dignity', appears in the most authoritative claims to human rights in the twentieth century. The United Nations says little in its declarations, covenants, conventions, and protocols about the grounds of human rights; it says simply that human rights derive from 'the inherent dignity of the human person',[6] but I see no reason to think that their use of 'dignity' differs appreciably from that of the philosophers of the Enlightenment.

Now, the human rights tradition, which I have condensed into very few words, does not lead inescapably to a particular substantive account of human rights. There

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[2] See Brian Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997), passim but e.g. pp. 42-45.

[3] Tierney, op. cit., pp. 72-3.

[4] See Richard Dagger, 'Rights', in Terence Ball, James Farr, and Russell Hanson (eds.), *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989), pp. 298-301.

[5] Giovanni Pico della Mirandola (1463-94), *On the Dignity of Man*, transl. Charles Glenn Wallis, (Indianapolis: Hackett Publishing, 1998), p. 3.

[6] To be found in the Preambles to the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, both adopted by the General Assembly of the United Nations in 1966.

can be reasons to take a tradition in new directions or to break with it altogether. None the less, the best substantive account of the existence conditions for human rights, to my mind, is very much in the spirit of the tradition and goes like this.

Human life is different from the life of other animals. We human beings reflect; we form pictures of what a good life would be and try to realise these pictures. This is what we mean by a characteristically *human* existence. It does not matter if some animals have more of our nature than we used to think, nor that there might be intelligent creatures elsewhere in the universe also capable of deliberation and action. So long as we do not ignore these possibilities, there is no harm in continuing to speak of a characteristically 'human' existence. And we value our status as human beings especially highly, often more highly even than our happiness.

Human rights can then be seen as protections of our human standing, our personhood. And we shall understand personhood better by analysing agency into its components. Being an agent involves, first, choosing one's own course through life (autonomy). One's choice must be real: so, second, one must have at least minimum education and information to know what the possibilities are. Having chosen one's course, one must, third, be able to follow it; one must have at least the minimum resources and capabilities that it takes. And, fourth, others must not stop one from pursuing, within limits, what one sees as a good life (liberty).

It is already clear that the generative capacities of the notion of personhood are great. We have a right to life (without it personhood is impossible), to security of person (for the same reason), to a voice in political decision (a key exercise of autonomy), to free expression, to assembly, and to a free press (without them the exercise of autonomy would be a sham). It also generates, I should say (though this is hotly disputed), a positive freedom, namely to a right to minimum learning and material resources needed for a human existence, that is, for more than mere physical survival.

But personhood cannot be the only ground for human rights. It leaves many rights too indeterminate. For example, we have a right to security of person. But what does that exclude? Would it exclude forcefully taking a few drops of blood from my finger to save the lives of many others? Perhaps not. To up the stakes, would it also not exclude forcefully taking one of my kidneys? After all, the two weeks it would take me to recover from a kidney extraction would not deprive me of my personhood. Where is the line to be drawn? The personhood consideration on its own will not make the line determinate enough for practice. And if a proposed right cannot become a practicable claim that one person can make upon another, then it will not be a right. That degree of determinateness is one of the existence conditions for rights. To fix a sufficiently determinate line we should have to introduce considerations such as these. Given human nature, have we left a big enough safety margin? Is the right too complicated to do the job we want it do? Is the right too demanding? and so on. We must consider how human beings and their societies actually work. So, to make the right to security of person determinate enough we need another ground, call it practicalities.

I propose, therefore, two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these. One

establishes the existence of such a right by showing, first, that it protects an essential feature of human standing and, second, that its determinate content results from the sorts of practical considerations that I have very roughly sketched.

So much for what seems to me the best account of human rights. There are, of course, many other accounts than mine. The best of the alternatives, I should say, is one that accepts my two proposed existence conditions but adds certain others; its advocates doubt that the existence conditions can be reduced just to those two. I think that, for our present purposes, the alternatives to my account may not much matter. I should guess that the most plausible of them will have consequences for our main question, 'Whose duties?' that are roughly like mine. In any case, it is useful to have an example of existence conditions for human rights in front of us to see how they logically connect with answers to the next two questions: What are human rights rights to? and Whose duties?

2. WHAT ARE THEY RIGHTS TO?

The content of a human right is also the content of the corresponding duty, and sometimes we must know *what* duties in order to decide *whose* duties.

Take, for example, the right to life. The case for there being a right to life is widely accepted. On the personhood ground, the intuitive case would go something like this. We attach a high value to our living as agents, that is, our autonomously choosing and freely pursuing our conception of a good life. Then it is not surprising that we should include among human rights, as the tradition for long has done, not only rights to autonomy and liberty (which the tradition has generally lumped together under the word 'freedom' or 'liberty'), but also a right to life. Can we value living in a characteristically human way without valuing the living as well as the autonomy and liberty that make it characteristically human? If human rights are protections of that form of life, they should protect the life as well as that form of it. The case for the existence of a right to life is, as these things go, fairly clear.

One can be confident that a certain human right exists without being at all confident what it is a right to. In the seventeenth century most of the proponents of a right to life seemed to conceive of it entirely negatively – as a right not to be deprived of life without due process. But since then the content of the right has ballooned from a right against the arbitrary termination of life, to a right against the prevention of life (so against abortion, sterilisation, etc. – a use of the right made by many 'pro-life' campaigners), to a right to basic welfare provisions, to a right to a flourishing life.[7]

So, what is its content? To my mind, the personhood ground supports a right to life with positive as well as negative elements. For present purposes I shall give just a quick intuitive case for these positive elements and leave the argument for another time. The rationale for human rights, on the personhood account, is centred on the high value that we attach to certain features that we sum up under the heading

[7] For a history of this pathological growth, see Hugo Bedau, 'The Right to Life', *Monist* 52 (1968) pp. 550-572.

'personhood'. One attacks the value of life if one wantonly discards it. And it would seem to be possible to discard it wantonly by more than just murder – for instance, by my not bothering to throw a life-belt to you when you are drowning, or, in general, by one's failure to save life when one can at little cost to oneself.

If we accept that the right to life implies positive as well as negative duties, then we face a great problem: precisely how far do the positive demands go? Is there any plausible ethical basis for limiting them?

One plausible limit is this. The right is only to life as an agent – that is, to characteristic human existence. It is not a right to that ultimate human goal: a good, fulfilled, successful, flourishing life. The ultimate goal – a flourishing life – would make enormous demands upon others, and it is not the subject of *any* human right. The right to life is merely to survival as an agent.

Still, that leaves the right quite demanding enough. You have a right to rescue and to aid in mortal distress. So does everyone else – the millions starving in the Third World, potential victims of genocide, anyone with a fatal illness that might yield to a crash research program.

These thoughts make my main question, 'Who has the correlative duty?' all the more pressing. But let me, for a while longer, carry on with the question, What is the content of the right, and so of the duty? Is the duty unqualified? Rescue or aid at what cost to oneself? Locke attaches the obvious proviso that one does not have to save another person's life at the cost of one's own. But that is a weak proviso; surely the cost can be somewhat smaller and one still not have to pay it. I have mentioned another proviso: provided that the cost to oneself is slight. But that is doubtless too weak in the opposite sense; surely the cost can be somewhat more than slight and one would still have to pay it. In any case, these provisos need a rationale.

I think that there is a rationale for them – extremely rough and ready, I admit, but a rationale all the same. And it goes a long way towards meeting the objection that many positive duties are too demanding to be plausible. The rationale is this. No ethical norms can be such unless they meet the requirement of psychological realism. The rule *'ought' implies 'can'* comes into play here. One cannot, in the sense relevant to obligation, meet a demand if the demand is beyond the capacity of the sort of people that, on other especially important grounds, we should want there to be. A demand does not have to be entirely beyond the human frame; that is, it does not have to be the sort of demand that no human at all, no matter how it developed or was trained, could meet. The sort of people we want there to be, the sort of people able to meet the demands that are likely to be made upon them in the course of their lives, will be deeply committed to certain other persons by ties of love and affection. They will also be committed to certain goals and institutions and not others; otherwise, society will work badly. But such committed persons will be incapable of complete impartiality, incapable of treating everybody, their own children as well a distant stranger, for one and nobody for more than one. Again, it is not that no humans are capable of this extreme impartiality; some very unusual people have in fact been. But we should not want to be like those people ourselves; there would be costs to a good life, both prudentially and morally, that would be far too great to pay. Nor should we dream of raising our own children to be like that. It

is not that we can weigh all the costs and benefits attached to all possible sets of dispositions available to us and decide, to a degree or probability on which we should be willing to act, which set maximises benefits. None the less, the people we should want there to be, people of deep commitments, cannot enter into and exit from these commitments as the utterly impartial promotion of the good might demand. That, roughly put, is the strength of the 'cannot' that implies 'so it is not the case that one ought'.

There are limits, therefore, to what one may demand of the sort of persons one would want there to be. Such persons will sacrifice themselves and their families, but only up to a point. Those limits will be difficult to place exactly, and anyone who tries to place them will have to put up with roughness and arbitrariness. But these are, or at any rate should be, familiar features of ethical life. This implies that there are limits to what any redistributive welfare program can require. Its demands must stay within the capacities of the sort of people that society would want there to be. We should do what, with present resources, we can to raise the destitute to the minimum acceptable level. But do at what cost to ourselves? The answer to that question is inevitably rough, but it is along these lines: at a cost within the capacities of the sort of persons we should want there to be. There are other restrictions as well, but this is a major one. It still leaves open the possibility of hefty claims on governments and, through taxation and charities, on individual citizens to help the needy.

That, according to the personhood account, is the case for a human right to life. But it is not a case for a right to human life in every form. The high value that human rights protect is the life of an agent. The right to life, it would therefore seem, is only to life *as an agent*. So the right does not apply to foetuses, infants, adults in an irreversible coma, and so on. Can we stomach those consequences?

I cannot see why not. We have constantly to remind ourselves of the destructive modern tendency to turn all important moral matters into issues of rights. Everything important in ethics has to be put into the language of rights, we think, because that is the only language with rhetorical power equal to their ethical importance. But this tendency has brought about the present degradation of the discourse of rights. We have to recover our sense of the power of the rest of our moral vocabulary – for example, the language of justice and fairness. We have to feel again the power of a term like 'murder'. We should reserve talk about 'rights' to something closer to its original, more restricted sense – and in that way give it tolerably clear criteria for correct and incorrect use. It is, or should be, quite enough to say that wantonly to take an infant's life is murder; to deny the infant the chance to reach and exercise and enjoy agency is a most grievous harm – indeed, more grievous than most infringements of human rights. Once we recover a sense of the full range of our moral vocabulary, we shall no longer feel the need to make all important claims into claims of rights.

Let me now make my example more concrete. If the right to life includes the positive elements I have mentioned, then it includes a right to health, at least to the degree of health needed for life as an agent. And, indeed, the United Nations includes on its list of human rights a right to health. How much is that a right to?

A human right to health cannot be a right, literally, to health. We today still have only limited control over health. If I am struck down by an unpreventable and incurable cancer, my rights are not violated. 'Ought' implies 'can': in many cases we cannot do anything to preserve health.

Nor is the right to health, instead, a right just to health care. Health is often best promoted by action well outside the bounds of health care, as normally understood. For example, in many countries the best way to reduce infant morality is to raise female literacy. The right to health is a welfare right. It is a right to the sorts of welfare provision that support health: antibiotics, and other medicines, of course, but also sewers, education of women, or advice to change one's diet.

But a right to how much health support? The *International Covenant on Economic, Social and Cultural Rights* of the United Nations, followed by many other international documents, answers that we have a right to 'the highest attainable standard of physical and mental health'.[8] But that cannot be so. The highest attainable standard of physical and mental health is not even a reasonable social aim. Rich societies could mount crash programs, on the model of the Manhattan Project, in the case of illnesses for which cures are attainable, but they often do not. They regard themselves as free to decide when they have spent enough on health, even if they are short of the highest attainable standards, and may instead devote their inevitably limited resources to education, preservation of the environment, and other major social goods.

The United Nations Committee on Economic, Social and Cultural Rights, in a session in 2000,[9] spelt out what a violation of the right to health would be. The 'highest attainable' level of health, it says, requires each state party merely to attain the level it can 'to the maximum of its available resources'. But no current state, no matter how rich, spends 'the maximum of its available resources' on health. Nor should it.

Of course, the phrase 'available resources' was meant to be concessive: a state need not spend more than is available to it. That concessive spirit suggests a rather different interpretation from the one I have so far assumed. Perhaps when the drafters wrote of 'the highest attainable standard' and 'the maximum of its available resources', they meant to take account of just the realities I have pointed out in criticism. Perhaps they meant 'highest attainable standard, given the other standards that a state should also meet'; and perhaps by 'maximum available resources' they meant 'available after allocation to other important social goals'. If they did mean this, one would be justified to ask why they did not say so. In any case, this interpretation is no better. A right to health must specify, at least roughly, the level of health we have a right to; otherwise the right is too indeterminate to be a useful social claim. To say that one has a right to the level of health support possible given expenditure on other worthy social goals, with no account of which other social goals are worthy, or of their worthiness relative to health, is to say far too little. The

[8] Art. 12.1. See also the *African Charter on Human and People's Rights*, Art. 16; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Art. 10.1.

[9] Twenty-second session, 25 April to 12 May 2000, as reported in Draft General Comment 14.

first interpretation makes the right ridiculously lavish; the second makes it next to empty.

So what is the right to health a right to? On the personhood account, we have a right to life, because life is a necessary condition of agency. And on the personhood account we also have a right to the health support necessary for our functioning as agents. These statements of the right to life and the right to health are still very loose, and much work has to be put into making them determinate enough for political life. But I should say that there is nothing in the personhood account that implies that life must be extended as long as possible or that health must be as rude as possible. And that seems intuitively right.

So, to repeat, what is the right to health a right to? The personhood account says that human rights are protections, not of a fully flourishing, successful, and happy life, but of that somewhat more austere state, the life of an agent. And there are many forms of ill health that do not jeopardise agency. We all get sniffles from time to time. These sniffles are pathological; they are illnesses. But they do not stop us from being agents. According to the United Nations we have a human right to have these sniffles treated; according to the personhood account we do not. All the same, it is compatible with the personhood account that, if there were cheap pills that would cure these sniffles, and if our society were well off, then we should have them. There would he a perfectly good reason for that, only not a human right: namely, that it would increase the quality of our lives. But 'health' is not equivalent to 'well-being', although the World Health Organisation, in the Preamble to its Constitution, in effect declares that it is.

So, on the personhood account, our main project in the case of the right to health is to sketch what is needed – some sort of basic kit of capacities and opportunities – for life as an agent. The sketch would inevitably be very rough and, at points, arbitrary. But roughness and arbitrariness run through nearly all moral principles.

I have not myself carried this sketch of the basic kit far, but here is a start on it. Protecting agency requires protecting certain human capacities, namely, those without which one's options in life shrink so drastically that life as an agent is undermined. Life as an agent requires a reasonable span of life and level of health. Children become agents only with time, and one requires a good run of adult years to form mature aims and to have time to realise some of the most major ones. And many people in old age naturally lose some of the powers of agency, and often the major achievements in their lives are already behind them. This hardly means that there is no longer a moral case for caring for the elderly, but agency may play a smaller part in it. So a right to health requires high priority to a fair span of life, but its demands in old age can decline in strength – for example, in determining allocation of scarce medical resources.

3. WHO HAS THE DUTIES?

With those preliminaries over, we may now turn to our main question: whose duties?

A human right, it is often said, is a claim of all human agents, simply as human agents, against all other human agents.[10] It is thus doubly universal. At least, that is the way that classical liberty rights are widely thought to work. All of us have a right not to be dominated or blocked, and the correlative duty falls on every other individual and group and government – in short, upon all agents. But welfare rights in general and a right to health in particular do not behave like that. We think that only members of a particular group – say, citizens of a certain country – can claim welfare, and can claim it, say, from only their own government. Welfare rights are doubly particular. If human rights have to be doubly universal, then welfare rights are *not* human rights.

But I am just assuming – what I think is correct – that rights to certain forms of welfare are human rights. In any case, classical liberty rights are not entirely negative; they too sometimes give rise to duties of implementation, often costly implementation (think of the cost of an effective system of justice), and there can be the problem with them too of identifying the correlative duty-ower. And I think that there is a solution to the problem of identifying a less than universal duty-ower in the case of welfare rights generally and the right to health in particular, without thereby undermining their status as human rights.

In ethics, we accept a general obligation to help those in distress, at least if the benefit we can confer is great and the cost to us is small. That is almost universally agreed upon. For example, if I see a child fall into a pond, and I can save it just by wading in, and no one else is about, I must do it. But this is a claim that all of us make upon all the rest of us. Why, then, should if fall upon me in particular? Well, obviously because I happen to be the only one on the scene. Accidental facts such as being in a position to help can impose moral responsibilities – and nothing more special to the situation may bring the responsibility than that. Of course, in many cases of need, it is one's own family, or local community, or central government that has the ability to help. At different periods in history, different agencies have had that ability. And, of course, the families of the needy have additional reasons to help them. Central governments may too, but mere ability, apart from any of the reasons arising from special relations, itself remains at least one reason-generating consideration. And ability provides a ground in the world as it is to distribute the burden to help along membership lines: a family to its members, a central government to its citizens.

Ability also explains why, over time, the burden has shifted from one group to another. In the late Middle Ages and early modern period in England the church had the resources and the highly developed organisation, the central government playing a much smaller role in society than it does now, and it fell upon the clergy to provide alms houses and the like. With the dissolution of the monasteries and religious confraternities, a new source of welfare had to be found. The Poor Law of 1572 secularised support for the indigent: the burden shifted from the church to local civil entities ('every city, borough, town, village, hamlet'), and money was raised through

[10] I borrow in this section, with revisions, from my paper 'Welfare Rights', *The Journal of Ethics* 4 (2000), pp. 27-43.

a local tax. By the eighteenth century, after both agricultural and industrial revolutions, it became too restrictive to have welfare obligations tied to local civil entities. The Poor Law assumed a settled workforce, and the new economy needed a mobile one. The shift to a national welfare provision fitfully began. In Britain the Liberal government of 1906 introduced a wide range of centrally funded welfare benefits; the Labour government of 1945 created a 'welfare state'. There are perfectly good reasons for assigning the responsibility for welfare to one agency rather than another.

I said a moment ago that mere ability is one reason-generating consideration in cases of aid. But moral life is more complicated than that. Many other considerations also shape moral norms, for instance, the one I glanced at earlier: that a good life is a life of deep commitments to particular persons, causes, careers, and institutions; that deep commitments limit our wills in major ways; and that our powers of large-scale calculation about what maximises good outcomes are also limited. Unless one stresses these other reason-generating considerations, my proposal that ability can fix who should give aid might look odd. A Gates or a Getty has a great ability to help the needy. That ability, no doubt, means that they have above-average obligations to help. But the obligation upon them does not go on until their marginal loss equals the marginal gain of the needy; nor does it with us. The ethical story is far more complicated than that. That Gateses and the Gettys – and we – are allowed substantially to honour our own commitments and follow our own interests, and these permissions limit our obligations. All that I wish to claim is that mere ability is one consideration in fixing where to place the duty to help.

As with identifying the content of a human right, so also with identifying the related duty-ower: my remarks are only a start on the job. It is characteristic of the work involved in identifying duty-owers that it too can be long, hard, and contentious. I think that sometimes it will prove impossible to make a clearly successful case for holding anyone in particular the appropriate duty-ower. Sometimes the identification will have elements of arbitrariness and convention in it. Sometimes it will be subject to negotiation in a particular place or time. We can know that there is a moral burden, without yet knowing who should shoulder it.

Still, in the case of the human right to welfare it seems to me justified, in these times of concentration of wealth and power in central governments, to place the burden on them. And if poor central governments are unable to shoulder the burden, then perhaps the time has come for us to consider whether the burden should not also be placed on a group of rich nations – although a lot of work would have to go into deciding which nations count as 'rich' for these purposes, how great a demand can be made on them, and what a fair distribution of the burden between them would be.

My proposal about the identification of the duty-owers – that it is often not clear-cut, that it may change from time to time and from place to place, that it may have elements of arbitrariness, that it may be subject to negotiation – is contrary to what many writers about human rights think. Perhaps they are being influenced in this by their choice of paradigm. Take classical liberty rights: we all have a right not to be blocked in our pursuit of the main features of what we regard as a worthwhile life.

The content of that right gives the content of the related duty: not to block us. And the content of the right also identifies the duty-ower: all other agents. The duty-ower can be read off the internal structure of the right itself. Take another paradigm of a claim right, the right created by a promise: here too everything can be read off the internal structures of the promising relation in a straightforward way. But we have to remind such writers: not all human rights are like that.

5. PRIMARY AND SECONDARY DUTIES

So far I have been talking about the primary duties correlative to a human right, that is, the duties with the same content as the related rights. But there are also duties more loosely connected to human rights – call them 'secondary' duties.

For example, who is to *promote* human rights? Rights will be largely ineffectual unless someone declares and publicises them, and educates people in them, and gives them weight in society. One might give them weight by turning them into domestic or international law: one might give them further weight by entrenching a bill of rights into a constitution – though whether bills of rights are, all things considered, good for a society is properly a subject of active debate. All of these promotional attempts are meant to give human rights their proper place in our action. During the twentieth century the duty of promotion was accepted by organisations whose object was to bring about respect for human rights: mainly the United Nations but also non-governmental organisations such as Amnesty International.

Then, who is to *monitor* the observance of human rights? Even when human rights have been incorporated into international law, there has been as yet only limited prosecution and punishment of offending nations. In this situation it is important to monitor compliance. If for whatever reason legal sanction is not available, the sanction of shame should take its place. But who is to provide it?

Most importantly, who is to *ensure* compliance, when that is indeed feasible? For instance, who is to protect our liberty from its enemies, domestic and foreign? Who is to detect, prosecute, and punish violators of human rights? Here we need legislators, judges, lawyers, police, army, and so on – complex and costly institutions. Now, a small group of people on a remote eighteenth century frontier who have to dispense justice to one of their number might do so faultlessly; they might be just by nature, even down to the finest points of procedure. But such a society, while not impossible, is highly unusual. In our actual societies we need institutions to make laws, to keep track of and to publicise them, to lay down procedures for dealing with the accused, to defend participants in these procedures from intimidation, and so on. Although this duty to create and sustain a legal system is not strictly identical to the primary duty, as the frontier example shows, in our actual social conditions the two duties are so close as to be treatable, for all practical purposes, as one.

Some secondary duties are at a considerable remove from their related primary duties. But it would be artificial to regard a right to procedural justice and a right to the social institutions needed for any realistic chance of procedural justice as other

than the same human right. Similarly, the primary duty to respect people's liberty is, in our circumstances, indistinguishable from the secondary duty effectively to protect people's liberty – with institutions such as police or army. Not all secondary duties merge in this way with their primary duty, but some do.

6. AIDS IN AFRICA AND THE PHARMACEUTICAL INDUSTRY

Let me end with an example, if only to acknowledge further how hard it can sometimes be to identify the duty-ower. With the right to health, the duty in our time falls, in the first instance, on the right-holder's government. But the present AIDS epidemic in the developing world is so extensive, and the really effective treatment (the anti-retroviral 'cocktail' of drugs introduced in 1996) so costly, that some governments cannot afford it. For example, the adult rate of infection is 35.8% in Botswana and 19.94% in South Africa, and the annual cost in the West for the anti-retroviral treatment is US $10,000 to 15,000 per person.[11] To use the word I put stress on earlier, these governments lack the *ability*. But other agencies are able: to mention two, some rich countries and some pharmaceutical firms. Should we conclude that the duty now shifts to another agency? And how do we decide which agency? And as there are other fatal diseases than AIDS in countries unable to buy the effective medicines or technology, how far must these other agencies go? Or, to step back for a moment, do these questions show that I must have got it wrong where the duty lies?

One problem is that, on my account, the duties threaten to become exceedingly burdensome. I have already given part of a solution to that threat: there are limits to the will which help fix the limits of moral obligation. The problem of the excessive demandingness of ethics is one that we in the First World already face as individuals, given the present poverty in the Third World. The place where we fix the limits of these demands is not easy either to decide or to defend. But, again, this is not a problem special to human rights.

Now, if in the circumstances I described a moment ago the duty to help many of the AIDS victims in Africa shifts away from their governments, where does it go? To the extent that ability to help is our guide, it is natural to think of rich First World governments. If we were to follow this line of thought, then we should have to put a lot of work into deciding which nations count as 'rich' for these purposes and what a fair distribution of the burden between them would be.

But it has already occurred to some that the demand might most appropriately be addressed to pharmaceutical firms. The anti-retroviral drugs are still under patent, but the firms that produce them have already made huge profits from them. As

[11] UNAIDS, Table of Country-Specific HIV/AIDS Estimates and Data, June 2000; J. T. Gathii, 'Construing Intellectual Property Rights and Competition Policy Consistency with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers', *Florida Law Review* 53 (2001), p. 734; A. Tabor, 'Recent Developments: AIDS Crisis', *Harvard Journal on Legislation* 38 (2001), p. 525. For a good survey, see Sarah Joseph, 'The "Third Wave" of Corporate Human Rights Accountability: Pharmaceuticals and Human Rights', Conference, Castan Centre for Human Rights Law, Monash University, 10-11 December 2001.

pharmaceutical firms can now decide life and death, and as there is a human right to life, these firms are in a special moral position. If the present death-rate from AIDS in southern Africa continues in the most productive age group, then several future generations seem destined for deep poverty. These firms are the ones who have profited greatly from the near monopoly position that patents give them, and it is the international community that has granted them this privileged, sometimes over-privileged, position by establishing the laws of patent. It is true that nations could change the patent laws, say change the present twenty-year duration of patents on the anti-retroviral medicines, but there is a limit to the fine-tuning possible in legislation. And perhaps some crises, such as AIDS in Africa, cannot wait the time that it would take to get new laws of patent in place. The scene is changing: national emergency is now seen as justifying special commercial arrangements, and some governments are now allowed to use cheaper generic versions of the drugs under special license.[12]

If we were to follow this second line of thought, then we should have to decide how much profit from the development of a new drug is 'decent', for present purposes. And we should probably have to develop institutions to decide when First World governments and when pharmaceutical firms had to shoulder the burden. We should have to decide which other businesses might be subject to a similar obligation. And, of course, we should have to decide whether this complicated scheme is feasible. If it is not, that would suggest that we think again about First World governments, or some combination of the two agencies.

I shall have to leave the matter here. If my example of the AIDS crisis has done no more than to acknowledge how hard it can sometimes be to identify the duty-ower, then, in the present state of our understanding of human rights, that is something.

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[12] See Sarah Joseph, *op. cit.*, notes 71, 72.

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CHAPTER THREE

Welfare Rights as Human Rights and the Duties of Organisations

Roughly contemporaneously with the French Declaration of the Rights of Man in 1793 the Prussian Civil Code enacted in 1794 declared that 'it is the duty of the state to provide the sustenance and support of those of its citizens who cannot….procure subsistence themselves'.[1] The idea that citizens have a right against their states to subsistence does not then date only from the period immediately after the Second World War. This was when social and economic rights – henceforward welfare rights – were included in international covenants of human rights alongside the familiar civic and political liberties. Nevertheless, it is these conventions that provide canonical statements of human rights. Moreover their inclusion of welfare rights as universal human rights has provoked familiar lines of criticism. Let me give some examples of the rights in question before outlining the criticism.

Taking the 1948 Universal Declaration of Human Rights as our definitive text we can find in it two very different types of right. In the first category are the central civic and political freedoms. Thus, Article 7 accords to all equally the protection of the law, Article 9 says no one shall be subjected to arbitrary arrest, detention, or exile, Article 18 that everyone has the right to freedom of thought, conscience, and religion, Article 20 that everyone has the right to freedom of peaceful assembly and association, and Article 21 that everyone has the right to take part in the government of his country. In the second category can be found examples of welfare rights. Thus Article 23 accords everyone the right to work, Article 24 says that everyone has the right to rest and leisure, Article 25 that everyone has the right to a standard of living adequate for the health and the well-being of himself and his family, and Article 26 that everyone has the right to education.

A concern for rights has, it is argued, not traditionally been a major one within business ethics, but this has been changing.[2] Rights generally have assumed an ever increasing importance in the way that we understand – morally, politically, and legally – the actions of individuals and organisations. Rights are a key means of monitoring and evaluating these actions. In the sphere of business and organisations

[1] Quoted in Richard L. Siegel, 'Socioeconomic Human Rights: Past and Future', *Human Rights Quarterly*, 7 (1985) p. 262.
[2] Tom L. Beauchamp and Norman E. Bowie, *Ethical Theory and Business*, 4th Edition (Englewood Cliffs, NJ: Prentice Hall, 1993), p. 36.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 45–59.

we are now more ready to talk about the rights of employees, of clients or customers, and of shareholders. Such rights are role-relative rights, that is rights possessed in so far as a role is occupied. Only a shareholder has the rights of a shareholder, just as only a prisoner has the rights of a prisoner. Role-relative rights are thus restricted in their scope and normally also of limited weight.

By contrast, human rights apply to all human beings irrespective of their role, occupation or position in an organisation. They are also taken to have a presumptively absolute weight. One may never violate, alienate or suspend a human right unless some very great good is promoted, or some very great harm is avoided, by doing so. As a result it makes a huge difference what is included on the list of human rights. Moreover rights have correlate duties. The distinction between liberty and welfare rights – sometimes unhelpfully characterised also as one between negative and positive rights – is a well-established and well-known one; as is the criticism of the inclusion of welfare rights within the class of universal human rights. If welfare rights are human rights then there are correlate duties, and it is important to know who must discharge these duties.

Those who write on business and organisational ethics acknowledge the distinction between negative liberty rights and positive welfare rights. They also recognise that it is congenial to business and other organisations to have the state taken as the sole or principal agency charged with discharging the duties that correlate with welfare rights.[3] Yet things are not that simple. One welfare right that is asserted in some charters to be a human right is the right to employment. Recognition of this right has evident application to businesses and organisations.[4] But although this is a welfare right of obvious and central importance for business – and one that is briefly discussed in what follows – the scope of duties incumbent upon businesses and organisations that correlate with welfare rights may be much broader. If, for instance, there is a human welfare right to subsistence – something argued for in what follows – then arguably the duty directly to ensure that a people is fed falls upon the relevant state, or, at one remove, upon some international political body. It does not fall upon those transnational organisations operating in the country in question. Yet these organisations may nevertheless be under an obligation not to act so as to increase the number or probability of violations of the right to subsistence. Thus a company ought not to contribute to the starvation of a people by, for instance, removing arable land from use by the domestic population through converting it to some other economic purpose.[5]

In this chapter I will indicate, and briefly dismiss, several forms the criticism of the view that welfare rights cannot be human rights takes. I will then concentrate on what I take to be the major objections to thinking of welfare rights as human rights. In meeting these objections I shall outline the duties that organisations and business

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[3] Ibid.

[4] Richard T. George, *Business Ethics*, 4th Edition (Englewood Cliffs, NJ: Prentice Hall, 1995), pp. 363-370; George D. Chryssides and John H. Keller, *An Introduction to Business Ethics* (London: Chapman & Hall, 1993), p. 294.

[5] John R. Boatright, *Ethics and the Conduct of Business* (Englewood Cliffs, NJ: Prentice Hall, 1993), pp. 424-5

may plausibly be said to be under in respect of those welfare rights that are human rights. The implications, for businesses and organisations, of this argument are very significant indeed. If businesses and organisations do take their obligation to respect and to protect human rights seriously, as they are being increasingly enjoined to do, then they have very many duties to discharge.

1

Welfare rights are said to fail certain tests that any putative human right must pass. First there is the test of practicability. 'If,' Maurice Cranston has argued, 'it is impossible for a thing to be done, it is absurd to claim it as a right'.[6] It is 'utterly impossible' to provide people in the developing world with paid work and holidays. Thus there can be no such universal human right as one to paid work and holidays. The impossibility in question is physical rather than conceptual. However it is not at all obvious why one cannot think of circumstances in which it would be physically impossible to provide a significant majority of some population with the enjoyment of *any* of the listed rights. Equal protection before the law and the right to a fair and public hearing by an independent and impartial tribunal, by way of a simple example, requires that there be a trained, competent, effectively functioning, and serviced judiciary. One can always surely imagine conditions in which it would be impossible for a country to provide and sustain a judiciary so defined.

The claim of impossibility also derives some of its plausibility from the making of an apparent assumption about who is under the obligation to secure the enjoyment of the right. A developing country and its state may find it impossible, alone and unaided, to provide the means whereby its population can enjoy welfare rights. But if the duty to secure enjoyment of the welfare rights falls on others – let us say the international community – then the claim of impossibility loses some of its immediate bite.

There is a further distinct test for universal human rights. This asserts that they have absolute weight such that they could never be violated. But, runs the criticism, it is fairly easy to conceive of cases in which it would make perfectly good moral sense for a government to make some of its citizens unemployed or to deny some of them education. The rights to work and to be educated cannot thus be universal human rights. Yet *every* human right can, in principle, be suspended by a government. Most conventions of rights accord governments the freedom to derogate from their terms under specified, extreme circumstances. Thus threats to national security, an imminent invasion, or internal terrorist attacks might provide a government with good reasons to limit, for instance, the right to privacy or the freedom from arbitrary detention. This is not to say that the appeals governments make to such considerations in a limitation of human rights always justify the derogations. It is merely to point out that, in principle, they could do so and that this is not ruled out by the bare stipulation that the rights in question are universal human rights.

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[6] Maurice Cranston, *What are Human Rights?* (London: Bodley Head, 1973), p. 66.

A third test of a universal human right is that it should not impose unfeasibly demanding duties. Here the unhelpful nomenclature of positive and negative rights intrudes. Welfare rights, it is said, are positive rights in that the duties they impose require the positive performance of actions or the provision of goods. The liberty rights, by contrast, are negative in that the duties they impose require only the refraining from performance of actions that violate the rights in question. Thus if there is a right to education a person or persons must build, staff, and maintain the appropriate educational establishments. Whereas if there is a right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment then individuals and governments are merely enjoined not to torture or degradingly to punish persons.

The duties that correlate with the welfare rights may not be impossible to discharge. But they may be described as making unreasonable demands. It is one thing to require a government not to subject its citizens to arbitrary arrest or detention, quite another to require it to supply every one of its citizens with an education or with paid employment. However, as many have noted, the contrast is overstated. As was said earlier the right to a fair trial requires that there should be a trained and efficient judiciary. Even the right to life and security of one's person can only be enjoyed within a state that has an effectively run police force, judiciary, and armed services. It is just not true then that in order to protect the liberty rights a government has only to do nothing. What a government has to do – and also what other organisations have to do – is an issue to which I shall return.

Welfare rights are said to be imprecise. Article 25 speaks of a standard of living adequate for the health and well being of the person and his family. A specification of terms is obviously called for. What after all is an 'adequate' standard of living? Nevertheless this charge of imprecision is only well directed if two things can be shown. First any such imprecision of language is constitutive of welfare rights, and, second, liberty rights by contrast are precisely defined. However when we turn our attention to the liberty rights it is just as easy to make the charge of vagueness and indeterminacy. What, after all, is a 'degrading' punishment? When exactly is an arrest or detention 'arbitrary'? Moreover all law is arguably imprecise. Legal statutes are formulated in general terms whose disambiguation and substantive specification is the function of judicial judgements, case law, and statutory implementation. There is no reason, in principle or in practice, why what is meant by an 'adequate' standard of living could not be made very precise.

Certain other criticisms of welfare rights as universal human rights may merely beg the question of their status. For instance it may be charged that it is improper to term welfare rights human rights. They should rather be characterised as expressions of ideals or as aspirations for governments to aim at. This is to assert what needs to be shown. Again welfare rights, it may be alleged, cannot be universal human rights because they do not meet the requirement that they should protect what is of 'paramount importance'.[7] This may be so. Welfare rights may not, unlike liberty

[7] Ibid., p. 67.

rights, protect what is of 'paramount importance'. Asserting they do not is not a demonstration that they do not.

2

I have considered and dismissed several misapplied criticisms of the idea of welfare rights as human rights. Let me now turn to what I take to be the serious charges against this idea. First, denying that welfare rights are human rights does not, as would be the case with the denial of the liberty rights, amount to an injustice. Second, there cannot in the case of welfare rights, as there can be in the case of liberty rights, be a realistic distribution of correlative duties. Let me take each charge in turn. The charge that the denial of welfare rights does not amount to an injustice is a version of the claim that welfare rights do not protect anything of paramount importance. But it will be supported by appeals to some idea of what it is that is of central value in the leading of a human life. Whatever that is – James Griffin's theory of rights as protecting human agency defended in this volume is a persuasive and influential account of what it might be – it will be said that the liberty rights protect whereas the welfare rights do not protect that core value.

The most direct response to this criticism is as follows. The welfare rights protect indispensably necessary but not sufficient conditions for the protection and enjoyment of the liberty rights. The conditions are obviously not sufficient since the liberty rights themselves need to be protected. At its simplest the thought is as follows. One cannot have and enjoy a freedom to associate with others, for instance, if one lacks the means of ensuring one's own continued physical existence. Thus a right to subsistence is presupposed by the liberty right of free association. The argument will generalise to all liberty rights. This is the strategy of Henry Shue who argues that the right of subsistence is a basic right in his sense. A right is basic if its enjoyment is essential to the enjoyment of all other rights. He maintains that the right to physical security of one's person is also basic.[8]

This argument will also go some way to meeting the frequently mentioned worry about what is termed 'rights inflation'. 'Inflation devalues a currency by eroding its purchasing power. The proliferation of rights claims has devalued rights by eroding their argumentative power'.[9] Human rights are very powerful moral restraints – and where they are part of enforceable conventions powerful legal constraints – on the permissibility of actions and states of affairs. Given their power they must be used sparingly. If overextended in their usage they cease to have that power. Extending human rights to encompass welfare rights diminishes the capacity of the original, core human rights – namely liberty rights – to function as powerful constraints on the actions of governments and organisations.

The strategy under consideration meets the worry of rights inflation by denying that more rights are simply being added to the list. Rather welfare rights are

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[8] Henry Shue, *Basic Rights: Subsistence, Affluence, and US foreign policy* (Princeton, NJ: Princeton University Press, 1980), especially Chapter 1.

[9] L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press 1987), p. 15; see also H. Steiner, *An Essay on Rights* (Oxford: Blackwell, 1998), p. 233.

buttressing the core rights. This is because the protection of the welfare rights is a necessary condition of the enjoyment of the liberty rights. It is not so much, then, that one seeks simply to multiply rights by having liberty *and* welfare rights. The thought is rather than one cannot have the first without the second.

What is it to 'have' a right? In the most basic sense a specified right is *possessed* by some person, X, if there is legal or moral recognition that X falls within the scope of those who may legitimately hold and exercise the right in question. A right is *enjoyed* by X if X is able, in the normal course of events, to exercise the right if X so chooses. Imagine then that I, along with my fellow citizens, have a right of free assembly. The laws of my state accord me such a right and other laws protect its exercise. The state does more than just fail to proscribe peaceful assembly. It also criminalises actions seeking to prevent those who wish to do so from peacefully assembling. However the laws are inadequately enforced. There is a high level of civil unrest and criminal activity which the government, through its law enforcement agencies, is incapable of controlling. Whenever I seek with others of a similar disposition to assemble we find ourselves physically attacked and intimidated. Our meetings are obstructed, disrupted and forcibly dissolved. It is reasonable to say that although I have a positive legal right of free assembly I cannot and do not enjoy this right. I want to say further that, in possessing but not enjoying the right to free assembly, I do not *hold* this right. A right is only held if it can be enjoyed to some minimal, threshold degree.

Obviously a right can be enjoyed to varying degrees. Consider only the fact that it is more or less difficult for me to travel to the places where it is possible for groups freely to assemble. We do not need to say that a right is enjoyed only if it can be enjoyed to the maximum possible degree. A person does not enjoy the right of peaceful assembly only if all assemblies are conducted immediately outside his place of residence. We should rather say that a right is only enjoyed, and thus held, if it can normally be exercised to a reasonable extent and without unreasonable costs to the individual.

Let me now term the putative core rights 'C-rights' and the rights that are arguably rights to the preconditions of these rights 'P-rights'. The enjoyment of P-rights is a precondition of the enjoyment of C-rights in at least the following four senses. In the first sense failure to have a P-right would render a person vulnerable to threats and pressures that would lead them to relinquish their C-right or rights. Or inasmuch as rights are inalienable it would lead them not to seek enforcement of the duties correlative to the right. If I lack subsistence goods I might be prepared to give up the exercise of a liberty right in exchange for these goods. The starving man will sell his vote for a crust of bread.[10] Second, the enjoyment of a P-right may be a constitutive element of the enjoyment of a C-right. Not being physically assaulted, that is enjoying the basic right of the security of one's person, is, arguably, a component element of enjoying the freedom of associating with others.

Third the enjoyment of a P-right may be a precondition for the enjoyment of a C-right having any worth or point. In a way that will be further discussed later on,

[10] Shue, op. cit., pp. 178 – 81.

unless one has received an education – secured by enjoyment of a right to education – there is little or no point to the enjoyment of some liberty rights, such as those of thought, conscience, and political participation. In this sense to enjoy a right is not simply to be able to exercise a right to some reasonable degree at no unreasonable cost to oneself. It is also to derive value from, or for there to be a point in, doing so. Fourth – and this is the most straightforward sense appealed to – I simply cannot enjoy a C-right if I do not have enjoyment of the P-rights. I cannot vote or associate with others or express my opinions if my very physical existence is under threat due to a lack of subsistence means.

Liberty rights are rights of agency, rights to do certain things and to engage in certain activities such as voting, associating with others, practising the religion of one's choice, and expressing one's views. Agency presupposes, at a minimum, the existence of an agent and, further, it presupposes certain physical preconditions for the very possibility of there continuing to be an agent. A person debilitated by starvation cannot act. Nor can somebody physically incapacitated by an assault on her physical person. The claim is that if liberty rights are C-rights, core rights, then welfare rights may be P-rights, that is rights that protect the indispensably necessary conditions for the holding of the C-rights. An obvious and immediate thought is, 'Why should one not then think of welfare rights as C-rights?' The response is as follows. C-rights are those rights to what is of central value in the leading of a human life. On the kind of account outlined and defended by James Griffin in this volume what is of central value in the leading of a recognisably human life is being an agent. The C-rights are agency rights, the liberty rights. P-rights are those rights whose holding protects the conditions necessary for the holding of the C-rights, that is for the exercise of agency. Inasmuch as both P- and C-rights are human rights they hold universally and are equally stringent in the terms of their application.

If there is a point to distinguishing C- and P-rights as human rights it is for the following reason. First – to repeat – C-rights protect what is of value in leading a distinctively human life, whereas P-rights protect the preconditions for the possibility of enjoying what is valuable in leading a distinctively human life. Second, the conditional relations between C- and P-rights are different. Holding P-rights is a necessary condition of holding a C-right. But holding a C-right is not, or need not be, a necessary condition of holding a P-right. Whilst it is the case that I can only vote and associate with others if my physical integrity is preserved and sustained, it is not true that I can only subsist if I am able to vote or to associate with others.

Henry Shue disagrees.[11] He thinks that the enjoyment at least of the liberty rights of participation – such as voting and of association – are the only guarantee of the basic rights to subsistence and security of one's person. He does so because he believes that a benevolent dictatorship could ensure enjoyment of security and subsistence but not enjoyment of the *rights* to these things. Yet a benevolent dictator could in principle – even if it is practically unlikely – assure the rights of security and subsistence but deny those of political participation. A state could grant all of its

[11] Ibid. Chapter 3.

members certain basic welfare rights but deny the suffrage to some of them. Those who are not full citizens may nevertheless enjoy the welfare rights to the same degree as those who can vote. Those who cannot politically defend their welfare rights may be at a greater risk of ceasing to enjoy them. But the existence of such risks does not show that the enjoyment of the political liberty rights is an indispensably necessary condition for the enjoyment of the welfare rights.

3

The argument thus far only establishes so much. It shows only that in so far as P-rights are human rights then those welfare rights that are P-rights are human rights. It does not show that *all* welfare rights are P-rights, only that they might be and that *if* they are then they ought to be included as human rights. Moreover it is at least possible that those welfare rights that are *not* P-rights ought still to be counted as human rights. The account thus far takes for granted a view of what shall count as a C-right. This is one in terms of agency. The argument is of the form, 'If liberty rights are human rights then so also must at least some welfare rights be human rights'. However it may be that liberty rights do not exhaust the class of C-rights. Perhaps then there are reasons to think that there are some things of value in the leading of a recognisably human life other than agency. If, for instance, one believes that having an identity is of value in the leading of a recognisably human life then one may think that there are rights – such as, for instance, a right to a nationality – which are human rights but which are not liberty rights.

This piece does not address this possibility. It seeks only to make the case for the inclusion in the class of human rights of those welfare rights which are the P-rights to the C-rights of agency. On this basis what welfare rights shall count as human rights? Article 25 that accords everyone a right to an adequate standard of living is defensible in these terms. A person who does not enjoy an adequate standard of living is, arguably, incapable of enjoying the freedoms of assembly and participation in the government of his country. It is not that it is physically impossible for him to do so, though it may be. It is rather that somebody living below the specified threshold of acceptable existence must give such a high priority to securing the means of his own continued existence that he will not have the opportunity or motivation to exercise these liberties. Although he has these liberty rights, and they are adequately protected by the state, he cannot enjoy them to anything like the degree that would allow us to say that he does, properly, hold the rights in question.

Nevertheless, it is far less clear that a welfare right such as the right to work can be represented as a P-right in the indicated sense. If, of course, paid employment is the only means whereby an individual can obtain the means of subsistence then work is a necessary precondition of enjoying the right to an adequate standard of living. But societies with developed welfare support systems provide a safety net for those unable to work or to find employment. In these circumstances work is not an indispensable necessary condition for the enjoyment of the liberty rights.

Of course working is important for other reasons. It meets the need of human beings to engage in fulfilling, creative, and socially beneficial activity. It is essential

if an individual is to feel self-respect, to realise her talents, and to believe that she is playing her proper part within the wider community. A right to work would protect these important interests of individuals. If these interests are seen as of such importance that leading a recognisably human life is not of value unless they are secured then a case has been made for including the right to work in the class of core human rights. But – to repeat the qualification made earlier – this to make the case for inclusion on grounds other than that the right to work is a P-right whose protected enjoyment is a necessary condition for the enjoyment of the core liberty rights.

Similar remarks can be made in respect of the idea of a right to a nationality. If by being a national of some country is just meant being a citizen then having a nationality is having a civic status as a member of a state. That clearly is very important since 'not to have a nationality – to be a "stateless person" – is an international form of social death'[12]. In order to enjoy the political freedoms of assembly, the vote, and the equal protection of the law, one must be a citizen of some state. It is also true that some states make the possession of a specific national identity a precondition of – as opposed simply to equating it with – citizenship. For those individuals who cannot be citizens of any of the other states national identity is a necessary condition of, a passport to, the enjoyment of civic status. In these limited circumstances one might speak of a right to a national identity. But the basic, core right is one of political membership and the right to nationality is a derivative right to that which alone secures enjoyment of the core right.

Independently of the value of citizenship, having a protected national identity may be very important to some people. Consider those who live in multinational states, enjoying full civic rights, but who value their membership of a national group. Yet the rights of association and assembly assure to those who wish to do so the liberty, with their co-nationals, to express in various ways their shared sense of nationality. Many individuals will nevertheless not think it important or valuable to have a national identity. It thus seems false to assert that no one can lead a valuable human life unless she enjoys a protected national identity.

What of the right to education to a minimum specified degree accorded by Article 26.1? A plausible case can be made for saying that an individual who has not enjoyed an education cannot enjoy his rights to freedom of thought, conscience and religion, to freedom of opinion and expression, and to political participation in the government of his country. Here the claim cannot be that an individual is physically incapable if uneducated of exercising these liberties. Nor that it would be unreasonable for him to give any time to the exercise of these liberties. It is rather that the exercise of the liberties only has a point and a value for somebody who is also educated.

Again the freedom to express one's views is valuable only to those who have views to express, and that presupposes a minimal capacity to acquire information, form opinions, and revise them in the light of new epistemic circumstances. The

[12] Brian Barry, *Culture and Equality, An Egalitarian Critique of Multiculturalism* (Oxford: Polity, 2001), p. 77.

freedom politically to participate in the government of one's country is valuable only to those who have an understanding of the political process, of what is at stake in political decision-making, and an ability to represent their own political views.

Liberal states have recognized that citizens must have these minimal capacities necessary to function as participants in the democratic governance of their own society. The United States Supreme Court has acknowledged as much in a series of influential judgements. In the case of *Wisconsin v. Yoder* [1972] the Court concluded that the state had a legitimate interest in preparing 'citizens to participate effectively and intelligently in our open political system', to be 'self-reliant and self-sufficient participants in society'.[13] In *Pierce v. Society of Sisters* [1925] the Court spoke of the need to teach 'certain skills plainly essential to good citizenship'.[14] Finally, in *Prince v. Commonwealth of Massachusetts* [1944] the Court talked of the dependence of a democratic society 'upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies'.[15]

The above argument shows not that some welfare rights protect interests of paramount importance to human beings. Rather it shows that the enjoyment of some, but certainly not all, welfare rights secure the preconditions for the enjoyment of the liberty rights. Since the latter are certainly universal human rights a case has been made for thinking that not including some welfare rights as human rights would be a serious injustice. For such a denial would mean that humans could not enjoy what are agreed to be human rights.

4

The second major criticism of including welfare rights as human rights is that there cannot be, as there can be with liberty rights, a realistic distribution of the correlative duties. Rights correlate with duties. To say that P has a right to ϕ is just to say that, in the first instance, others – specified or in general – have a duty not to deny ϕ to P or to provide P with ϕ or not to obstruct P in her enjoyment of ϕ. The demands that are made by the attribution to humans of rights are to be found fully specified in these correlate duties. It is at this point, most obviously, that the question of the moral and legal responsibilities of corporate and public sector organisations is raised. The more rights that are counted as human rights the greater the number of correlate duties that these organisations may be under.

Here it is useful to follow Shue and distinguish between three types of correlate duties. These are the duties to avoid depriving, those to protect from deprivation, and those to aid the deprived.[16] Thus if there is a human right to ϕ others are under a duty, first, not to deny ϕ to persons, second to act so as to minimise the denials of ϕ to persons, and, third, to render assistance to those who have been denied ϕ. A government that accords to its citizens the right of free assembly should not, in its laws and policies, prevent citizens from peacefully assembling. But, further, it

[13] *Wisconsin v Yoder* [1972*J* 32 L Ed: 15 – 441 at 29
[14] *Pierce v Society of Sisters* [1925] 69 L Ed: 1070 – 10789 at 1077
[15] *Prince v Commonwealth of Massachusetts* [1944] 88 L Ed: 645 – 659 at 653
[16] Shue, op. cit., p. 52.

should ensure that the number of occasions on which citizens who so wish can not peacefully assemble – by virtue of factors already instanced such as civil unrest – are kept to a minimum. Finally it should provide some form of remedy – compensation, the future provision of reasonable alternative arrangements, or whatever – to those citizens who have not been able to enjoy their right of assembly.

I shall concentrate on the first two kinds of duty since these seem most plausibly to be those that organisations are, in the first instance and at a minimum, under. Clearly organisations can directly violate the human rights of both those within and those outwith the organisation. Thus an organisation can, in the first instance, violate the human rights of its own employees. It could, for instance, arbitrarily interfere with the privacy of an employee by tapping her phone or opening her mail. Or it could deny an employee the freedom to associate with other employees, say in a trade union. Or it could prevent an employee from expressing her views by enforcing an unwarranted confidentiality or loyalty condition on employment. Or it could prevent an employee from practising her religion by forcing her to work on a recognised holy day. Organisations can also be guilty of discriminating in their hiring and promotion practises, and thus of violating the requirement that all shall receive equal protection under the law.

When it is liberty rights that an organisation must respect the duties it is enjoined to discharge are determinate and minimal. Indeed they are largely negative in the sense discussed earlier. An organisation should *not* deny its employees the opportunity to associate, express their views, and enjoy their privacy. It should *not* discriminate between its employees on the basis of their gender or religion. However when the rights an organisation must respect are welfare rights the correlate duties it appears to be enjoined to discharge are neither determinate nor minimal.

Let me initially illustrate this claim by restricting the discharge of duties to individuals. The claim is one, as Wellman says, of asymmetry.[17] The universal right to life imposes on each of us the practicable duty not to take anyone else's life. However the universal right to subsistence, if there is one, imposes on each of us an indeterminate duty. Either each of us, as an individual, is under the impracticable duty of keeping everyone else alive. Or, if some have discharged the duty of keeping others alive, the remainder are under a superfluous duty. Either an individual faces an impossible requirement or an unnecessary, since duplicated, requirement

The case of individuals extends easily and obviously to that of organisations. Now it may be objected that talk of organisations discharging duties is improper since it presumes that organisations are agents who can be put under obligations. I shall assume that even if it is improper to think of collective agents – such as businesses and corporations – as being duty-bound, it is proper to distribute responsibility for the discharge of a duty to those who can discharge it. Thus those who manage collectives may reasonably be thought to have a duty to direct the collective in such a way that the duty in question can be discharged. In short organisations may not be moral or legal 'persons' who can be put under obligations,

[17] Carl Wellman, *Welfare Rights* (Totowa, NJ: Rowman and Littlefield, 1982), pp. 157 – 64.

but there are individuals in these organisations who can be put under obligations that the organisation as a whole would otherwise be under.

Organisations can very simply discharge the duties of not denying individuals their liberty rights but cannot so obviously discharge the duties that correlate with the welfare rights. What are organisations expected to do that ensures that everyone enjoys an adequate standard of living or that everyone receives an education? The criticism under consideration is met by making the following two points. First, once we acknowledge that duties correlate with the liberty, as well as the welfare, rights, and, further, that these duties include those to protect against and minimise rights violations it is not so obvious that even these duties are minimal and determinate. Second, we can envisage a fair division of responsibility for the discharge of duties. Let me take each in turn.

There is a duty, correlative with the right to peaceful assembly, to minimise the occasions on which individuals cannot exercise this right if they so choose. This is not the duty directly to deny the exercise of this right but the duty to protect individuals from that denial. It seems clear that the state, in the first instance, has the authority and is normally empowered to protect individuals in the required way. The state should legislate and enforce the laws that proscribe the activities of those who would prevent others from peacefully assembling. In the imagined example considered earlier individuals might not be able to enjoy, and thus hold, the right to peaceful assembly if the state cannot effectively enforce these laws.

It seems clear that non-state organisations could act directly to deny the exercise of a right of peaceful assembly. They could do so by, for instance, hiring thugs to break up a lawful, non-violent rally. But there are many other things some organisations could do or fail to do that would serve to reduce the opportunities for an exercise of a right such as that of peaceful assembly. Imagine, as a simple example, that a group of individuals have organised a rally to protest some aspect of the government's economic policy. A private transport company, sympathetic to the government's policy and unhappy at the idea of the large-scale protest envisaged, could deliberately fail to meet the demand for extra buses or trains to the rallying point, or simply withdraw its services, or charge prohibitively high prices.

In doing these things the company would not directly be denying the individuals the right to assemble. The government would be doing this if it declared a sudden emergency and the proposed assembly unlawful. A company could act, in the manner of a government, if it too declared a peaceful assembly by its employees to be against company rules and used its security personnel to prevent any such assembly on its premises. However in the envisaged example a company fails to act, as it might normally be expected to act, in such a manner that some individuals cannot enjoy a human right. The company is responsible for the failure of enjoyment in the simple and straightforward sense that had it acted as it normally would have, then the right in question could have been enjoyed.

In ways familiar from other contexts the sense of 'normally' here is ambiguous between 'as might have been predicted or expected' and 'as it should have been'. It is not inappropriate to hold that the company should not have acted as it did. It certainly did not do what it would have been expected or predicted to do. It may not,

however, have acted illegally if, for instance, it was under no contractual duty to provide specified transport services at a certain price. However we can still speak of moral obligations that arise from past actions that give rise to, and are known to give rise to, reasonable expectations in others who will suffer harms if these reasonable expectations are disappointed. A transport company that leads its passengers to believe that it will, except in exceptional circumstances, continue to provide its advertised service is under a moral duty to do so if failure to do so would put these passengers at risk of harm.

Consider now the example of a company that uses child labour.[18] Such employment is perfectly legal in the country in which the company is operating. Children may have a human right not to be employed. In that case the company which employs children directly violates that right and does so even though it acts within the law of the country concerned. Imagine, however, there is no such right and that there is nonetheless a right to education (there is under Article 28 of the United Nations Convention on the Rights of the Child). In employing children the company prevents them from enjoying the opportunity to be educated. Children at work cannot go to school. Interestingly Article 32 of the United Nations Convention on the Rights of the Child does indeed accord children a right 'to be protected from … performing any work that is likely to … interfere with the child's education'. Now arguably it is a state that legally permits children to work that denies them enjoyment of the right to be educated. Yet, at a minimum, the company colludes in this denial. Thus although it may not directly violate a right it does fail, as it could, not to minimise the opportunities for that right to be exercised and enjoyed.

Just as a company or organisation can do or fail to do that which may minimise the opportunities for the exercise of a liberty right it can conversely do or fail to do that which *maximises* these opportunities. In the imagined case the transport company could increase the number of services to the rallying points in order to meet the additional demand raised by the proposed rally. All companies could assist in the exercise by its employees of the freedom to practise one's religion by its policies on timekeeping, holiday, and leave. The examples can be multiplied. What has been shown is that there is no simple set of minimal determinate duties that fall upon organisations and that correlate with the 'negative' liberty rights.

The second response to the criticism that including welfare rights as human rights imposes indeterminate and demanding duties is as follows. Responsibility for the discharge of these duties can be fairly apportioned. What does this mean? In the first place it must be possible for individuals and organisations to discharge their specified duties. One can not morally, and arguably legally, be required to do what one can not do. The appropriate sense of what cannot be done should be extended beyond the merely physically impossible. Clearly there are some things organisations simply cannot do. They may not, for instance, have the resources to undertake certain actions. However there are also things organisations could do but

[18] Thomas Donaldson, 'Fundamental Rights and Multinational Duties', in T.L. Beauchamp and N. Bowie (eds.) *Ethical Theory and Business*, 5th edition (Upper Saddle Rise, NJ: Simon and Schuster, 1997); Richard T. George 'Ethical Universals and International Business', in F. Neil Brady (ed*.) Ethical Universals in International Business*, (Berlin: Springer-Verlah, 1996) pp. 87-8.

only at the price of ceasing to exist as an organisation – those actions that would, for instance, put a corporation out of business. It would be unreasonable to ask an organisation to do those things.

It should be noted that the discussion here is of the duties that correlate with *welfare* rights. Organisations whose *raison d'être* is the violation of liberty rights should not legally be protected. They are constituted as bodies that simply cannot discharge the duties correlate with the liberty rights. A Society for the Suppression of Muslim Practices cannot, consistent with its avowed purposes, discharge the duties correlate with the liberty right of religious worship. Such a Society – in so far as it practises what it preaches – should not itself be protected by the freedom of association.

In the second place we can, and should, distinguish between ability and opportunity. I am able to administer First Aid to the victims of a road traffic accident. I can do so because I have secured the appropriate qualification, have the First Aid kit, know what I am doing, and have past experience of providing such help. However I only have the opportunity to render such aid if I am there when a traffic accident has taken place and there is a victim to whom I can give First Aid.

Similarly an organisation may be able – that is has the resources – to discharge duties that correlate with welfare rights. But it does not follow that it has the appropriate opportunity to do so. An organisation, it might be said, could but need not have the opportunity to assist in the education of children in Third World countries. Of course it will be replied that major organisations command resources that could, in part, be devoted to discharging these duties. They have opportunity to do so simply in virtue of the fact that their resources might be distributed as needed. Consider a major corporation that could, without seriously jeopardising its continuing economic status, devote some of its profits to providing education for children in Third World countries. Yet, even if it could do this, it seems wrong to regard this as an enforceable duty rather than a laudable act of charity.

In the first place an organisation's normal and legitimate sphere of operation will indicate the appropriate set of opportunities to discharge the duties. An organisation works within a particular set of locations and acts upon a specified population in particular ways. It is this context that defines what will count as an opportunity to discharge its duties. A company that works in a certain Third World country, employing that country's inhabitants and contributing to its economy, has an opportunity, as well as an ability, to discharge duties correlate with welfare rights in that country. It does not have the same opportunity in some other country. It has an opportunity that another company that does not work in that country does not have.

In the second place responsibility for the discharge of the duties – even when the opportunity to do so presents itself – must be distributed in an equitable fashion. One can not be required to do what another has a greater claim to be asked to do. Obviously what is crucial is determining who has the greater or lesser claim to discharge a duty. Thus, if we take a putative welfare right such as that to an adequate standard of living how can we fairly distribute the correlative duties among individuals and organisations? Clearly everybody has a duty not directly to violate this right by, for instance, depriving an individual of his subsistence means. But,

further, everybody is under a duty to ensure that as few people as possible are deprived of the enjoyment of this right to an adequate standard of living. The discharge of this duty falls in the first instance and principally upon the state. Or it would be better to speak of states. Talking only of the individual state begs the question against the possibility of the subscription by all states to principles of distributive justice that are global in their scope. Indeed such subscription seems evidently the most effective way to reduce the incidence, worldwide, of violations of human rights. What, however, follows for non-state organisations and individuals?

These should not act, or fail to act, in any way that obstructs the efforts of the state, or states, to discharge their principal duty to protect against rights violations. In the envisaged case organisations should not make it more difficult for a state, or states, to distribute the means of subsistence in a manner that ensures as many as possible enjoy an adequate standard of living. The following is a plausible further principle. Organisations are under a duty to desist from activities that may reasonably be held to cause an increase in the likelihood of rights violations. They are under such a duty even if they are not causally responsible for any direct violations of rights. Thus organisations should not employ people on terms or under conditions that increase the likelihood that their employees cannot enjoy an adequate standard of living. They should not act upon the environment in such a way that some people are less likely to be assured of enjoying an adequate standard of living. And so on. Thus when an organisation operates within a specified sphere of activity it has an opportunity to act in ways that both increase the likelihood of rights of violations and also count as discharging the duties that correlate with the welfare rights.

Let me summarise the arguments of this chapter. Welfare rights, or at least some welfare rights, are not disqualified from being human rights on the grounds that they are constitutively imprecise, impose impossible duties, or do not protect interests of paramount importance. Where their enjoyment is a precondition for the enjoyment of what undoubtedly are human rights, namely liberty rights, they should enjoy the same status as these rights, namely as human rights. Welfare rights as human rights, finally, need not correlate with indeterminate and impossibly demanding duties. Nevertheless welfare rights as human rights do impose duties on organisations which extend beyond the requirement not directly to violate these rights to the requirement that they should not act so as to increase the likelihood of rights violations.

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PART TWO

CORPORATE

RESPONSIBILITIES

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CHAPTER FOUR

Human Rights, Corporate Responsibility and the New Accountability

What is corporate responsibility and to whom is business accountable?[1] These questions used to have easy answers, at least in the Milton Friedman school of thought. 'Responsibility' and 'accountability' were defined by law. 'Accountability' was to shareholders, and management's responsibility was to maximise 'the bottom line'. There is a growing discourse, however, of a much wider concept of corporate responsibility and accountability, not just among philosophers or social critics but in the business community itself. The new image focuses not on the bottom line but on the 'triple bottom line' of economic, social and environmental responsibility, including responsibility in relation to human rights. Accountability is not just to shareholders but to 'stakeholders', often very widely defined. And both responsibility and accountability are defined not by legal obligations but by a much wider remit. This shift in thinking could be significant for human rights since it raises the possibility of international business corporations accepting responsibility for respecting and supporting human rights whether or not they are under any direct legal obligation to do so.[2]

The first section of the paper offers a simple illustration of developments in the concept of corporate responsibility. The second reviews a range of social and economic forces which have been identified as driving the new approach to corporate responsibility. These could be seen as constituting a 'new accountability'. Indeed a whole discourse is developing, with new buzzwords, new gurus, and new clichés. The third section of the paper begins to look behind the discourse, to ask: who is driving? Is the new responsibility more than just discourse? Is the discourse more important than the empirical reality? Is the new accountability, reality or image, desirable?

[1] Doreen McBarnet would like to acknowledge with thanks the support of the ESRC, via a professorial fellowship, for the opportunity to develop her work on corporate responsibility as part of a program of research on 'Regulation, Responsibility and the Rule of Law'.

[2] The Universal Declaration of Human Rights is a matter of international law affecting states rather than directly affecting business corporations, although it is argued, by for example, Amnesty International (in *Human Rights: Is it any of your Business?* Amnesty International / Prince of Wales Business Leaders Forum, 2000) that the language of the Declaration applies as readily to organisations and individuals as to states.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 63–80.

1. CORPORATE RESPONSIBILITY: FROM BOTTOM LINE TO TRIPLE BOTTOM LINE

The classic referent for the narrow concept of corporate responsibility is Milton Friedman, who famously declared

> The social responsibility of business is to increase its profits. [3]

To Friedman, and to others who take this stance[4], accountability is to shareholders; the criterion of stewardship and responsibility is financial, maximising the 'bottom line'; and the only legitimate constraint on the pursuit of profit is the obligation to comply with the law.

The Friedman stance is, however, just one end of the spectrum in the current discourse of corporate responsibility. Compare that position, with, for example, the public stance taken by Royal Dutch/Shell, which is commonly cited as epitomising a very different approach.[5] In its first annual *social* report Shell set out its vision of corporate responsibility in the following terms. First,

> The Royal Dutch/Shell group is commercial in nature and its primary responsibility has to be economic – wealth generation, meeting customer needs, providing an acceptable return to investors, and contributing to overall economic development.[6]

So far this is pure Friedman. But the report goes on:

> But there is also an inseparable responsibility to ensure that our businesses are run in a way that is ethically acceptable to the rest of the world and in line with our own values.[7]

Indeed the report is summarised as describing,

> how we, the people, companies and businesses that make up the Royal Dutch/Shell Group, are striving to live up to our responsibilities – financial, social and environmental.[8]

Note the differences from the Friedman school of thought. First responsibility is defined not in terms of the bottom line but in terms of a *triple* bottom line[9]. Second,

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[3] M. Friedman, 'The Social Responsibility of Business is to Increase its Profits' *New York Times Magazine*, 13 September 1970; and see M. Friedman, *Capitalism and Freedom* (Chicago: Chicago University Press, 1962). This position is also justified in terms of the success of capitalism in increasing wealth which benefits society as a whole, though of course this does not deal with distributive issues.

[4] See E. Sternberg, *Corporate Governance* (Institute of Economic Affairs,1998).

[5] The following analysis is based on Shell documents, case studies on Shell, and discussions with senior Shell executives.

[6] The Shell Report *Profits and Principles – Does There have to be a Choice?* (1998), p. 3.

[7] The Shell Report *Profits and Principles – Does There have to be a Choice?,* p 3

[8] The Shell Report *Profits and Principles – Does There have to be a Choice?,* p 2

accountability is defined as owed not just to shareholders, or even to the wider remit of stakeholders[10] as in, for example, continental European concepts of corporate governance – shareholders *plus* employees, consumers, suppliers. Rather Shell announces itself responsible to all of those categories [11] *and* to 'society at large',[12] indeed to 'the *rest of the world'*.[13] Thirdly Shell holds itself up as accountable not just on *legal* obligations, but according to what is *'ethically acceptable'* [14] to the rest of the world and 'ourselves'. 'This report', states the opening line, 'is about values.'[15] The company has set out a statement of principles[16] and in its social reports it accounts for its performance according to those principles, with 'external verification'.[17]

The Shell Report provides a particularly clear illustration of the other end of the spectrum in the current discourse on corporate responsibility, and it demonstrates the overt introduction of the language of ethics into business's public depiction of its role. But Shell is not so much a special case as the epitome of a trend. All of the US's Fortune 500 corporations have codes of conduct,[18] and as at March 1999, 70% of the UK's FTSE350 were making some disclosure about environmental and social issues[19]. The language of ethics turns up repeatedly in business discourse. In the UK, the FTSE (The Financial Times Stock Exchange Index) has introduced in 2001 the FTSE4Good index for ethically high scorers. And this is just the latest in the line of a burgeoning field of 'ethical investment', reckoned to have grown tenfold over the last 10 years.[20] There are banks expressly describing themselves as 'ethical banks', there are ethical audits and ethics consultancies.

Discussion of the moral responsibilities of business has come out of the classroom and into both the financial press and the boardroom. Why?

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[9] J. Elkington, *Cannibals with Forks: TheTtriple Bottom Line of 21st Century Business* (Capstone, 1997).
[10] See for example R. E. Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984).
[11] Royal Dutch/Shell Group *Statement of General Business Principles* 1997, Principle 2.
[12] The Shell Report *Profits and Principles – Does There have to be a Choice?*, p. 3.
[13] The Shell Report *Profits and Principles – Does There have to be a Choice?*, p. 3.
[14] The Shell Report *Profits and Principles – Does There have to be a Choice?*, p. 3.
[15] The Shell Report *Profits and Principles – Does There have to be a Choice?*, p. 3.
[16] Royal Dutch/Shell Group *Statement of General Business Principles* 1997
[17] External verification by KPMG Price Waterhouse of Shell's assertions on its policies and strategies for implementing them. (The Shell Report *Profits and Principles – Does There have to be a Choice?*, p. 52) In this report however Shell recognised the distinction between external verification of the 'accuracy of the data' and 'the assurance process by which the quality of performance against stated objectives can be judged' (Shell Report *Profits and Principles – Does There have to be a Choice?*, p. 51). In the 1999 report they recognise that new criteria are needed for measuring social performance and commit themselves to working with others to find the best means. (The Shell Report 1999 *People, Planet and Profits* p. 37.)
[18] *Financial Times*, 5 August 1999.
[19] P. Williams, *The Financial Director*, March 1999.
[20] *Guardian*, 3 November 2001.

2. DRIVERS

In academic analysis, in media analysis, and in discussion within business itself, a number of 'drivers'[21] of this new discourse of business ethics and corporate responsibility have been and can be identified. Some drivers are 'old', the need to respond to crises, for example, though the nature of that response could be seen as innovative. Some are new, indexing a changing global context.

2.1 'Old' Drivers: Crisis Management

What Shell itself has described as its 'transformation'[22] did not take place in a vacuum. It was a response to major PR crises resulting from both environmental, and, especially, human rights issues. 'Shell in Nigeria' has become a classic case study for business schools.[23] The company's operation in a state run by a military dictatorship accused of major human rights abuses, the impact of oil extraction on the Ogoni people and the Delta environment, the execution of Ken Saro-Wiwa, the campaigns of human rights organisations pointing the finger not just at the Nigerian dictatorship but at Shell, amounted to a PR disaster, which was only exacerbated when Shell's plan to dump its Brent Spar oil rig at sea was met by much publicised resistance by Greenpeace.[24]

In that context the new philosophy of corporate responsibility adopted by the company can be seen as a response to a very old driver of crisis management. Indeed a study by Arthur Andersen and the London Business School found that the motivation for introducing codes of conduct in 22% of companies surveyed was 'negative publicity'.[25] Other examples come readily to mind, with British Airways introducing a code of conduct after Virgin accused it of 'dirty tactics', or NatWest Bank doing so after the Blue Arrow affair.[26]

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[21] I use the term uncritically for the moment in order to explore contextual issues, but the notion of 'drivers' needs scrutiny too. See below.

[22] The Shell Report *Profits and Principles – Does There have to be a Choice?*, p. 2 and see P. Mirvis, 'Transformation at Shell', *Business and Society Review* 105, (2000), pp. 63-84.

[23] Including my own MBA course on Business Ethics at Oxford's Said Business School, and see Harvard Business School case studies *Royal Dutch/Shell in Nigeria* (Boston: Harvard Business School Publishing 9-399-126, Rev. April 20 2000), and *Royal Dutch/Shell in Transition* (Boston: Harvard Business School Publishing 9-300-039, October 4, 1999) and management texts, for example M. McIntosh, D. Leipziger, K. Jones, G. Coleman, *Corporate Citizenship* (FT/Pitman, 1998). See too P. Mirvis, 'Transformation at Shell', *Business and Society Review* 105, (2000), pp. 63-84, and G. Chandler, 'Oil Companies and Human Rights', *Business Ethics: A European Review* 7, (1998), pp. 69-72.

[24] Even though Greenpeace's claims were in fact based on erroneous assumptions, as was later acknowledged.

[25] Arthur Andersen / London Business School, *Ethical Concerns and Reputation Risk Management*, Arthur Andersen, 1999.

[26] Simon Webley, 'The Nature and Value of Internal Codes of Ethics', paper presented at the conference on *The Importance of Human Rights in International Business,* University of Exeter, 15-17 September 1998.

If the stimulus is not novel, however, the nature of the response is. Shell in particular, instead of sticking to its original response to criticism over its role in Nigeria (a Friedmanesque denial of responsibility – 'Nigeria makes its rules and it is not for private companies such as us to comment on such processes in the country'[27]) switched tack to acknowledge that 'not to take action could itself be a political act',[28] and to commit itself in the future to a wider concept of responsibility. Its new Statement of Principles made an express commitment to 'express support for fundamental human rights',[29] while subsequent reports have documented its attention to human rights issues, including dilemmas faced,[30] and it has produced a 'management primer' on human rights.[31]

2.2 'New' Drivers

More generally the growth in business discourse of a wider concept of corporate responsibility has also been attributed[32] to a range of new socio-political, economic and strategic developments.

2.2.1 Globalisation and Civil Society

One recurrent theme in analyses of drivers of the new corporate responsibility is the ubiquitous if hazy 'globalisation', including the global economy, the role of civil society and the new technology.

Globalisation refers in part to the development of worldwide consumer markets and production. There is nothing new in the use by first world companies of third world labour pools for cheap labour far from the constraints of first world health and safety, minimum wage, environmental or other laws. Nor indeed is organised protest by civil society new. Witness, historically, the critics of slavery. Global non-governmental (NGO) activity has however become a key part of the discussion of globalisation, and identified as one of the drivers of the new corporate responsibility.

NGOs monitor, investigate and campaign against corporate activity. Greenpeace, with its environmental concerns, and Amnesty International and Pax Christi, with their focus on human rights, played major parts in the public attacks on Shell. NGOs such as Earthrights International, Amnesty International and the Centre for

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[27] Eckbert Imomoh, General Manager Eastern Division, Shell Petroleum, on 18 April 1996 on *Africa Express,* Channel 4 TV, UK, cited in M, McIntosh , D. Leipziger, K. Jones, G. Coleman, *Corporate Citizenship,* p 123, fn 73.

[28] Mark Moody Stuart, Chairman of the Committee of Managing Directors, Shell Group, quoted in Harvard Business School case *Royal Dutch/Shell in Transition* (Boston: Harvard Business School Publishing 9-300-039, October 4, 1999) p. 7.

[29] Royal Dutch/Shell Group, *Statement of General Business Principles,* 1997, principle 2. e.

[30] See for example The Shell Report 1999 *People, Planet and Profits*, p. 28 on its approach to child labour in Brazil (not in its own company) and its report on its actions in Nigeria.

[31] Shell International Petroleum Company, *Business and Human Rights: A Management PrimerI,* (1998).

[32] See for example, M. McIntosh, D. Leipziger, K. Jones, G. Coleman, *Corporate Citizenship*; S. Zadek, 'Balancing Performance, Ethics, and Accountability', *Journal of Business Ethics* 17 (1998), pp. 1421-1441; Naomi Klein, *No Logo* (Flamingo, 2000).

Constitutional Rights have been involved in legal action against corporations, as in the pursuit, through the US courts, of Unocal and Shell in relation to human rights issues in Myanmar (Burma) and Nigeria.

Another tactic is to buy shares in order to protest as shareholders at annual general meetings (AGMs). BP, for example, at its 2001 AGM, faced boisterous criticism of the human rights and environmental implications of its exploration strategies.[33] Even where the protestors are very much in the minority, and the vote lost, this strategy ensures the generation of significant publicity.

The broader anti-globalisation and anti-capitalism movements, and what we might think of as 'NGNs' – non-governmental networks – are also identified[34] as highly significant drivers.

Businesses can also face a situation where activists' techniques, for example in the case of animal rights movements, move beyond protest to violence and threats of violence against corporate executives, sometimes to significant effect, as in the Royal Bank of Scotland's decision to withdraw from funding of Huntingdon Life Sciences, a core target of UK animal rights activists.

2.2.2 Globalisation: the New Technology

All of this can be seen as aided by the new technology, expanding easy global communication, and making for instant worldwide publicity. There is now, it is frequently said, 'no hiding place' for corporate activity. The internet not only allows for the organisation of networks of protest on the streets, but provides a ready forum for instant criticism and publicity, with websites on all kinds of issues, pointing the finger at specific companies. The Greenpeace website offers a shoppers' guide on such issues as GM foods, with, for example, Kellogg's self-presentation in the UK as a GM free company, undermined by the website observation that it was still using GM crops in the US. Amnesty International has produced world maps highlighting countries where there is 'corporate risk' with regard to human rights, and naming companies operating there.

All this can be seen as resulting in a new *de facto* accountability, that goes beyond that required by law. Take another classic case, that of Nike. Nike, like many other multinational companies, has its shoes and clothing produced in cheap labour countries by independent suppliers. Some of its Vietnamese, Indonesian and Chinese suppliers have been exposed as using child labour, requiring employees to work long hours (beyond even the high legal minimum of the countries in question), at less than even the low statutory minimum wage, and in some places in conditions where carcinogens in the air were above the permitted level.[35] In short, both Nike's own code of conduct, and in some cases, local law, were being broken, but not by Nike. Under traditional criteria Nike was neither accountable nor responsible.

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[33] London, 19 April 2001.

[34] For example, Klein, *No Logo*

[35] In November 1997 an employee leaked a report by the company's auditors exposing conditions in Vietnamese factories supplying it (*Guardian* 13 June 1998), and the story has featured repeatedly in all forms of media since.

But Nike was *held* responsible and held to account by civil society campaigners. Again the Nike experience has become an icon of what can go wrong if companies stick to too narrow a notion of corporate responsibility – demonstrations, protests, 'shoe-ins' where Nike trainers were publicly thrown away, very public rejection of sponsorship, weeks of Garry Trudeau anti-Nike cartoons, and a fall in profits.[36]

2.2.3 Trends in Business Practice: Outsourcing and Branding

The Nike case demonstrates another contextual factor – trends in business practice such as outsourcing and branding. Nike was particularly vulnerable to such adverse publicity, because of the importance to its business of the Nike brand. Indeed Nike is in a sense only a brand. Production is all subcontracted. The functions of the Nike corporation itself consist of design, marketing, and finance; Nike's role is the creation and management of a brand. In its emphasis on branding, however, it can be seen to have created its own nemesis.[37] The very fact that the name is so well known makes it an easy target for critique.[38] At the same time the trend to outsourcing and subcontracting means companies have less direct control over the conditions under which their products are made. Though this can be seen cynically as an advantage when no responsibility or accountability is attached, it becomes a source of risk when the 'new accountability' is brought into play.

2.2.4 Employees and the New Economy

The trend to outsourcing, incidentally, points to another aspect of what is sometimes presented as 'the new economy', characterised by much less long term job security on the one hand, and employee loyalty, on the other. Business discussion of the drivers of a wider notion of corporate responsibility routinely refers to the importance of corporate values and corporate citizenship in attracting and keeping 'the best and the brightest minds'[39], and countering the 'garage millionaire syndrome'[40].

2.2.5 Market Factors: Consumers and Investors

Market factors can also be seen as key contextual drivers. Traditional legal definitions of responsibility can (theoretically at least)[41] be enforced through legal sanctions, but civil society campaigns to enforce a notion of corporate responsibility that goes *beyond* legal requirements depend for their effectiveness on market reactions.[42] In other words, attacking brands on ethical and social grounds would be

[36] Which Nike itself attributed to its association with child labour.
[37] Klein's *No Logo* is particularly associated with this argument.
[38] What Klein labels the 'brand boomerang', *No Logo*, p. 345.
[39] BP Chief Executive Officer Sir John Browne, 'Large Companies Cannot Afford to Disappoint' in M. MacIntosh, (ed.), *Visions of Ethical Business, (*www. business-minds.com, 2000) at p. 24.
[40] BT spokesman, quoted in *Financial Times*, 31 March 1999.
[41] Socio-legal research demonstrates that in practice this is often harder than might be expected.
[42] Though there are also strategies of challenging narrow definitions in the courts and through lobbying for wider legislative remits.

ineffective if consumers and investors did not care. Further drivers are therefore identified in what is seen as a growing trend to what we might think of as 'concerned consumption' (the so-called 'purse power'),[43] 'ethical banking'[44] and ethical investment, including funds which screen companies by triple bottom line criteria rather than simply on the basis of financial performance or value.

Market forces can also impact on companies via corporate governance channels. The role of NGOs as minority shareholders at AGMs has already been noted, and larger shareholders such as pension funds can play a similar role, via, for example shareholder resolutions. Shell's activities in relation to human rights and environmental issues are now externally audited as a result of pension fund action of just this sort of challenge (by investment adviser PIRC at a Shell Transport and Trading AGM in 1997)[45] and of management taking the point on board. CALPERS (the Californian Public Employees Retirement Scheme Fund with international investment capacity in excess of $74,000 million)[46] announced in February 2002 that it was pulling out of investment in businesses in Thailand, Indonesia, Malaysia, and the Philippines because they did not meet CALPERS' ethical criteria. A key issue, with echoes of the Nike experience, was labour conditions.[47]

2.2.6 Legal and Regulatory Developments

The market also operates in a legal and regulatory context, and though the role of law and regulation has been less marked in discussion of drivers of the new corporate responsibility (perhaps because it is rather more prosaic than globalisation or corporate martyrdom), it should be added to the catalogue. For example, a particular fillip has been given to 'ethical investment' by a recent development in UK law. Pension funds have been required by law since July 2000 to disclose whether and how social, environmental and ethical issues influence their investment policy. Though this of itself does not require pension funds to invest 'ethically', increasing transparency can itself result in a shift of policy to avoid potential criticism.

Likewise the proliferation of codes of conduct in the US may be set in the context of the tougher penalties introduced by the Foreign Corrupt Practices Act, *and* the Sentencing Commission's guidelines that those penalties should be modified

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[43] Evidenced for example in consumer support for the Fair Trade movement. See K. Jones, 'Global Sourcing', in C. Moon, C. Bonny, et al (eds), *A Guide to Business Ethics* (Profile Books, 2001); K. Bird and D. R. Hughes, 'Ethical Consumerism: The Case of "Fairly-Traded" Coffee', *Business Ethics: A European Review* 6 (1997), pp. 159-67.

[44] Examples in the UK are Triodos and the Co-operative Bank.

[45] The motion was defeated but 10% of shareholders supported the resolution, and management introduced independent verification. And see McIntosh et al *Corporate Citizenship*, p. 124.

[46] The value quoted in M. McIntosh, D. Leipziger, K. Jones, G. Coleman, *Corporate Citizenship*, (1998), p. 90.

[47] Business Week Online, 25 February 2002.

if the corporation in question had a code of conduct and an active program for its propagation and enforcement.[48]

The importance of reputation has been implicit in factors already discussed such as PR crisis management and branding. In the Arthur Andersen/LBS survey of UK companies with codes of conduct, 72% gave 'reputation' as the prime motivation, and the authors note that 'heavily branded companies are more likely to manage business ethics.'[49] Indeed 'reputation', 'reputation risk' and reputation management' are key notions that crop up again and again in contemporary UK business discourse.[50] They also crop up in contemporary UK business regulation. The London Stock Exchange's recent Combined Code on Corporate Governance, based on the Turnbull Report of 1999, includes reputation as an asset to be protected by companies, and requires internal reviews and reputational risk management, with, it has been suggested, directors potentially open to attack for breach of fiduciary duties if they do not pay this issue sufficient attention.[51]

These developments can be seen as both a product of the new accountability and a new factor within it.

International initiatives are also relevant. Though the UN's Declaration of Human Rights is strictly speaking a matter for states not corporations, there are a number of ongoing attempts to extend its ambit into business via codes of practice with the backing of the UN, OECD and NGOs like Amnesty International. There have also been national legislative initiatives aimed at requiring multinational corporations to meet internationally agreed human rights, environmental codes, and employee and consumer rights.

2.2.7 The Ethics Industry

There is another factor which should be added to the usual list of 'drivers', one which, again, can be seen as both a product and a constituent part of the 'new accountability'. This is the emergence of a whole new ethics industry. As well as ethical investment funds and banks, there are ethics consultancies, ethics standard setting organisations, ethics certification firms – all with a vested interest in selling 'ethics' to business.

The big accountancy firms now include ethics and reputation risk management services, as well as green and social responsibility audits. The 1999 Arthur Andersen/LBS survey of companies with codes of conduct also, of course, marketed the services of Arthur Andersen's own 'Ethics and Responsible Business Practices consulting group', arguing, (ironically, in the wake of Andersen's own recent

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[48] Simon Webley, 'The Nature and Value of Internal Codes of Ethics', paper presented at the conference on *The Importance of Human Rights in International Business,* University of Exeter, 15-17 September 1998.

[49] Arthur Andersen / London Business School, *Ethical Concerns and Reputation Risk Management*, p. 12.

[50] See for example J. Kay, *Foundations of Corporate Success,* Oxford: Oxford University Press, 1998, and see Charles Forbrun's work on 'reputational capital': Charles Forbrun, *Reputation: Realising Value from the Corporate Image* (Boston: Harvard Business School Press, 1996).

[51] Interview with in-house Head of Legal Department of international corporation; and see Philip Goldenberg, partner Berwin Leyton, quoted in the *Financial Times*, 9 March 2002.

experiences *vis-à-vis* Enron), that with reputation an 'increasingly valuable corporate asset', companies need 'robust programs for guiding employee behaviour' and expressing concern that 'adoption of programs to manage business ethics risk is by no means evident in all large companies'. Significantly, the authors add to their argument on the need for companies to adopt these programs: 'the prize for those which can do so successfully is competitive advantage'.[52]

2.2.8 Ideology: Good Business

The emphasis on competitive advantage takes us to another facet of the context for the new corporate responsibility, the recurrent presentation of the idea that being 'good', or being seen to be 'good' is good business. In other words in the last analysis the triple bottom line is elided with the bottom line. The clear message is that the new corporate responsibility is not in conflict with the old. Businesses benefit financially by adopting a broader ethical approach. Business ethics become good business strategy.[53] Shell poses the question: 'Profits and Principles: Does There have to be a Choice?'[54] Amnesty International in its guide for business, *Human Rights: Is it any of your Business*? reminds companies of 'the business case for human rights':

> companies have a direct self-interest in using their legitimate influence to protect and promote the human rights of their employees and of the communities within which they are investing and/or operating… Corporate reputation, licence to operate, brand image, employee recruitment and retention, share value – all these key commercial concerns are affected by society's perception of a company's behaviour with regard to human rights. [55]

The ideology of good business can be seen as a justification for a change of approach driven by other factors, or as a driver itself, a means of persuading business into a change of approach. It may also be seen as an indication that any assumption of real change needs very careful scrutiny indeed. In the next sections we move from uncritical review of the 'new accountability' to make a start, at least, at unpacking it by asking: who is driving? Is the new corporate responsibility (and accountability) more than just discourse? Is the discourse more important than the empirical reality? Is the new accountability, reality or image, desirable?

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[52] Arthur Andersen / London Business School, *Ethical Concerns and Reputation Risk Management*, p. 7.
[53] For example McIntosh et al, *Corporate Citizenship*.
[54] Royal Dutch/Shell Group Report, *Profits and Principles - Does There have to be a Choice?* (1997).
[55] Amnesty International/Prince of Wales Forum, 2000, p. 24.

3. WHO IS DRIVING?

Though in the previous section the notion of 'drivers' was used uncritically, as the literature uses it, it does in fact need scrutiny. Identifying the 'drivers' of the new ethics has also become part of the discourse of the new ethics, and there is a good deal of assumption mixed in with the facts. There is also a confluence of analysis *of* businesses, and the context in which they are operating, with explanation *by* businesses adopting a new approach – indeed explanation, in part, to shareholders operating under the *old* accountability.

The notion of 'drivers' suggests an image of business as reactive to a changing context, but business can be seen as being both reactive and proactive. Business may lead and create the ethical market, without the prompting of a crisis or other drivers. It may also react to a new context, partly of its own making, but then go on to proactively use and develop the discourse of change. Shell's new image was a response to a tough situation (and arguably also an expression of genuine concern on the part of executives). Nonetheless it now chooses to make its social conscience a key part of its PR and advertising campaigns. Shell no longer advertises its oil or petrochemicals products; it advertises its corporate citizenship.

Consider this newspaper advertisement for Shell – in this case focussed on environmental rather than human rights issues – illustrated with a photograph of piles of barrels of obsolete insecticide.

> Cover up or clean up?
>
> It wasn't our pollution. The insecticide was owned by the government and had been provided by aid organisations to combat locusts. However we had produced it some thirty years before, so we willingly agreed to assist in its safe collection and incineration. It's part of our commitment to sustainable development, balancing economic progress with environmental care and social responsibility. Because do we really profit if the world doesn't?[56]

The answer to that is of course 'yes', as companies have been profiting for generations. But what we see here is a bid to profit from a good deed, or to do a good deed for profit. 'Good business' is not done quietly. Shell's declared commitment to the triple bottom line is not simply a code of conduct; it is a market brand. This is not new. The whole basis of the Bodyshop brand was its ethical stance – an entirely proactive strategy.

The new accountability is also the new market opportunity and the concerned consumer can be seen as a creation of market supply as well as of civil society demand. The new accountability may make companies vulnerable, but that market vulnerability can also be converted to market opportunity. Union Carbide, infamous for the Bhopal tragedy, went on to become a leader in advising companies on using hazardous technologies safely in developing countries.[57]

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[56] Repeated newspaper advertisement. See, for example, *Financial Times*, 12 September 1999. And BP's logo on its petrol pumps is now a stylised flower.

[57] T. Donaldson, 'Values in Tension.' *Harvard Business Review*, (1996) September, pp. 48-62, at p. 53.

The language of *strategic* citizenship,[58] of principles *and* profits,[59] of good business as a source of competitive advantage, the idea that altruism pays, may be a discursive way of bridging the old accountability and the new, denying a conflict of interest between profit maximisation (at least in the long run) and doing the right thing. Companies are after all still *legally* accountable to shareholders. It could, on the other hand, suggest a co-opting of critique – new wine in old bottles. And if the message is that altruism pays is it then altruism? If this is the motivation, are we talking about ethics at all? One might argue that pragmatically the philosophical point is irrelevant if the practical outcome is beneficial. But is it? And if so, how far?

4. JUST DISCOURSE?

Much is made of the proliferation of corporate codes of conduct, but, as is increasingly acknowledged, codes also need to be effectively implemented and monitored. Webley's survey of UK companies in 1995 found that a third of employees in respondent companies were not issued with the company's code, a third provided no mechanism for raising issues, and less than 40% required managers to certify the code was being applied.[60] Companies need to look to their structure of both sanctions and rewards. What happens to whistleblowers? What happens to the employee who loses a contract by refusing to bribe or to work in a context of human rights abuse? There are issues of interpretation. Embedding ethics in the corporate culture is declared as the aim but how is it best accomplished?[61] Where production is via subcontractors or goods bought in from external suppliers how is their practice monitored? Are codes effectively percolated to all parts of an organisation and other relevant sectors? According to Klein, until 1998, Nike and Gap (which has also attracted criticism over child labour in its suppliers' factories) only published their codes of conduct in English and did not distribute them to the (Asian) factory workers producing their brand.[62]

And what *is* the ethical stance? Codes may denigrate child labour, but is simply prohibiting child labour appropriate where children, for example AIDS orphans in Zimbabwe, are the family earners? How far should implementation be tempered by ethical judgement? Companies may deal with unethical practices by their suppliers by imposing ethical codes upon them. But is it ethical to impose ethical codes – and the costs of meeting them – on third world suppliers, without improving the terms of trade?[63]

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[58] McIntosh et al, *Corporate Citizenship*.
[59] The Shell Report *Profits and Principles – Does There have to be a Choice?* (1997).
[60] A. Doig and J. Wilson, 'The Effectiveness of Codes of Conduct', *Business Ethics: A European Review* 7 (1998), pp. 140-49, at p 142, citing Simon Webley's Institute of Business Ethics Survey (1995).
[61] See R. Warren, 'Codes of Ethics: Bricks Without Straw', *Business Ethics: A European Review* 2 (1993) for why codes may not be enough for active business ethics. And see A. Doig and J. Wilson, 'The Effectiveness of Codes of Conduct', *Business Ethics: A European Review* 7 (1998), pp. 140-49.
[62] Klein, *No Logo,* p. 431.
[63] Fiona King, 'Reality Check on Corporate Social Responsibility and Corporate Citizenship', in M. McIntosh et al, *Visions of Ethical Business (*www. business-minds.com, 2000).

Ethical investment needs a closer look too. How ethical is it? What do ethical funds mean by ethics? By what criteria do they measure ethical practice? How and how effectively do they make their assessments? What is the impact of the development of 'light green' as well as 'dark green' environmental measures, with less rigorous standards? What is the impact of the ethical fund policy of 'engagement' – including in the 'investable' categories companies which have poor ethical records but are trying to improve? Or companies that are 'best in class', in a sector which fails on rigorous ethical criteria – arms trading perhaps – but is seen as 'less unethical' than its competitors. Lewis and Mackenzie[64] see engagement as the more active form of ethical investment, since it seeks to alter companies in the direction of a wider concept of corporate responsibility, rather than simply rewarding those taking it on on their own. But these approaches could also be seen as expanding ethical investment only by diluting it. There is also the issue of transparency: are all investors in 'ethical funds' fully aware of these policies?

For its part, ethical and triple bottom line reporting needs to be subjected to the same scrutiny as conventional financial reporting (which has not stood up well in the light of either empirical research or the lessons of practical experience).[65] Likewise ethical audit. How independent are the auditors? What standards do they apply? How adequate are they? How, and how creatively, are those standards interpreted and applied?

These are empirical questions.[66] Only with a solid empirical base can the reality of the new corporate responsibility in practice, or even as potential, be properly assessed. Till then there remains plenty of discourse, on both the practical fulfilment of a new business ethics, and on its inevitability, given the driving forces, the pressures for change, outlined above. But how real are those forces?

5. DRIVERS OR DISCOURSE

The discourse is real enough, and pervasive, not only in corporate reports but in public debate on business by business, in the invocations of NGOs, in the sales pitch of the ethics industry, in management texts and in the books of business gurus. For example:

- At a recent business forum, Jane Nelson, director of the Prince of Wales Business Leaders Forum, listed as drivers the now familiar inventory of:

[64] A. Lewis and C. Mackenzie, 'Support for Investor Activism Among UK Ethical Investors', *Journal of Business Ethics* 24 (2000) pp. 215-217.

[65] See, for example, McBarnet and Whelan ,*Creative Accounting and the Cross-Eyed Javelin Thrower* (John Wiley, 1999) on off-balance sheet financing, and the collapse of Enron which has brought home its implications.

[66] Though a body of academic research is developing, the discourse, or certainly the business discourse, does not tend to be evidence based except in the sense of referring to famous case studies, and that may be misleading as the basis of the kind of general conclusions that are drawn. A lot more research, and particularly qualitative research, is also required. The bulk of research to date is quantitative or at macro level.

consumers, governments, inter-governmental organisations, civil society, brands, reputations, new markets, and stakeholders; as the social issues being raised: human rights, labour rights, anti-corruption, poverty and climate change. She concluded: 'There seems to be only one certainty. These issues are not likely to disappear and they call for some fundamental changes in the way companies are managed and led'.[67]

- In a pull-out poster Amnesty International declares: 'The pressures on transnational companies to avoid doing harm and to exercise their legitimate influence for good are growing'.[68] In its management primer on human rights its list of drivers includes: shareholders, ethical investment, consumers, the internet, social auditing, regulatory and normative pressures.[69]

- In their influential textbook *Corporate Citizenship*, McIntosh et al outline a rapidly changing environment, including, again: a global economy, technological revolution, proliferation of information (which campaigners can use to advantage), wider consumer choice, changing working patterns, and they conclude: in this environment: 'corporate citizenship…is no longer discretionary'.[70]

Over and over again we find similar lists of pressures, drivers, forces, the same conclusion of inevitable change in the direction of a new corporate responsibility. But these are logical hypotheses. They too need empirical testing. Indeed, even at the level of logical hypothesis there are questions to be asked.

Take the issue of branding, the exposure to investigation and adverse publicity that this can produce, and the role of NGOs in doing this. The case studies are graphic enough, but are Nike and Gap the only companies using sweated labour? Branding may make some companies particularly vulnerable to public critique, but what of the many anonymous producers involved in the same practices? Where are the NGO or NGN investigations of and protests against them? One company may suffer but does business in general? People burning their Nike trainers need to replace them. Are the new sources any more ethical than the old? Klein, for all her emphasis on the role of civil society, recognises the limits of the brand boomerang. and is thrown back in her conclusion on calls for international regulation of the old-fashioned variety as a means of controlling corporate practice.[71] There are limits to the range and rigour of the new accountability. NGO legal action too places huge demands on resources and is necessarily targeted.

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[67] J. Nelson, 'Innovations in Executive Development: Building Socially-Aware Business Leaders' in M. MacIntosh (ed.), *Visions of Ethical Business,*

[68] Amnesty International newsletter November 2000.

[69] Amnesty International, *Human Rights: Is it any of your Business?* Amnesty International / Prince of Wales Business Leaders Forum, 2000.

[70] McIntosh et al, *Corporate Citizenship*, pp xxii-xxiii.

[71] Klein, *No Logo*, pp. 422, 424, 437.

That is not of course to deny in any way the role of NGOs in drawing attention to problems, their traditional role indeed of 'constructing a social problem' that then demands attention by other agencies. And they go far beyond that. Even single cases can have huge precedential effect. It nonetheless raises the question of how extensively business as a whole is likely to be 'driven' by these forces into a new corporate responsibility.

There is also a huge resource imbalance between the activists of civil society and the corporations they are confronting, which may well have an effect on legal battles, PR battles, and battles to lobby for governmental and intergovernmental action.

How strong as yet are the new market forces? The question of just how ethical 'ethical investment' is has already been raised, and this has implications for its role as a force for change. Likewise the concerned consumer is as yet only a niche market. All of this may change, take on its own momentum, but we are very far from being in the world of irresistible market forces yet.

And how real is the pressure of the new economy? The management fear of losing bright employees to the garage millionaire syndrome is of little relevance to most employees, who instead see themselves as disempowered rather than empowered by the new economy.

The reality is that the discourse of drivers tends to take the exception and treat it as the rule.

Not all the drivers listed are 'just discourse'. The ethics industry is very real, but any assumption that it will stimulate ethical corporate practice will depend on how it functions in practice. We cannot simply assume the logical consequence of a new ethical world. Law and regulation can be weak or strong. But again one cannot assume logical causal chains. Personal liability for directors, for example, may well focus the management mind, but it can also, counter-intuitively, reduce the likelihood of punitive action.[72]

And then there is the discourse of 'good business' – 'profits and principles: does there have to be a choice?' – with the clear implication that the answer is: no. But the answer is yes; sometimes there does have to be a choice. Though there is sense in the argument that long term sustainability of business requires attention to more than short term profit, how long term are how many shareholders willing to be? The 'good business' approach is in fact a sleight of hand that hides the real conflicts involved in pursuing profits *and* principles. The real test is what happens when there has to be a choice.

For a *sustainable business ethics* to develop there will need to be a move away from a discursive conjoining of profit and principle, which essentially ducks the issue, to an acknowledgment that ethics involves conflict and choice, and that, for the ethical business in a situation of conflict, the exercise of that choice must be in favour of principle at the expense of profit. What we need to know is how much of

[72] See McBarnet and Whelan, *Creative Accounting and the Cross-Eyed Javelin Thrower* on the issue of personal liability in relation to creative accounting.

business is taking, or is willing to take, *that* approach to corporate responsibility, and whether those with an interest in the *old* accountability will let it.

6. A DESIRABLE DEVELOPMENT?

It is worth mentioning briefly that there is also the question of whether a new accountability of the kind outlined above, even if it is realisable, is desirable. For example, some of the forms of protest engaged in, in the new accountability, effective as they may be, raise significant questions for democracy and the rule of law. The idea of a code of conduct for NGOs has already been raised.[73] Vigilante tactics such as those employed by animal rights activists can also produce a backlash of repressive law with wider consequences.

Indeed even the discourse of the new accountability has its dangers. Debora Spar, professor at Harvard Business School, has argued that brand based regulation is so successful that we no longer need regulation. We have, she says, the 'spotlight phenomenon' now:

> Firms will cut off abusive suppliers or make them clean up because it is now in their financial interest to do so.[74]

This is both a huge assumption and a dangerous proposal. Regulation is already of limited effect, and while such developments as the 'spotlight phenomenon' may indeed be valuable supplements, we are a long way from the situation where regulation can be entirely replaced by market forces.

7. DISCOURSE AS DRIVER

This critique is not intended as yet another work of pessimistic sociology, spreading messages of gloom and acting as a damper on all hope of social change. Its goal is merely to urge careful interpretation of the current discourse of both the new corporate responsibility and the new context of accountability, and to press the need for research that probes beneath the surface of that discourse. And a sociological perspective *can* offer positive messages too.

In this essay we have already analysed the notion of drivers as discourse, but by way of conclusion we can close the loop by considering the role of discourse as driver, because discourse, even if it is 'just discourse' can have significant repercussions on social practice.[75]

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[73] *Financial Times*, 11 July 2000.

[74] D. Spar, 'The Spotlight on the Bottom Line' *Foreign Affairs,* 13 March 1998, cited in Klein, *No Logo* p. 434.

[75] E. P. Thompson, *Whigs and Hunters* (Allen Lane, 1975) is the classic citation for the practical impact of the discourse of the rule of law.

A number of leading companies are adopting 'good corporate citizenship' as, in effect, their brand image. We might think of this as 'halo-branding'. If Nike's branding focussed on the cool customer, Shell's focuses on the ethical company, and of course by extension, the ethical customer and investor. Moral is the new cool. But this is a different kind of image, and one that is hard to live up to. Indeed it can be seen as feeding into the 'new accountability'. NGOs are well aware of this potential for shortfall, and the leverage it can provide. Witness Peter Frankental of Amnesty International:

> From an NGO perspective, a company that ties its flag to the mast of human rights is offering a hostage to fortune. If it fails to deliver on its stated commitments, its credibility will be at stake.[76]

While this of itself does nothing to resolve the issue of the limits of NGO action raised earlier, it does suggest that it will be difficult for at least high profile companies to ignore their own declared principles, without an overt change of management style (or management), a reversion to the old accountability with profit as the trump card, or the construction of some new creative response.

All of these scenarios are of course possible. Indeed it is just how the multiplicity of possible scenarios will in fact play out that is the fascination of this area. If philosophers are concerned with how the new business ethics *should* develop, sociologists are concerned with how it *is* developing and how it will. Probing the dynamics of that development will be one of the more interesting research challenges of the immediate future, and one with significant practical implications.

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[76] P. Frankental, 'Can Branding Reinforce Human Rights?' in M, McIntosh et al, *Visions of Ethical Business* (www. business-minds.com, 2000).

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CHAPTER FIVE

International Business Regulation: An Ethical Discourse in the Making?

Is there a need for an 'ethical' approach to international business regulation? It appears that there is, judging by the more recent rise in the incidence of critiques of international business in general, of multinational enterprises (MNEs) in particular and of the failure of the existing regulatory system, epitomised by the World Trade Organisation (WTO) and the G8, to resolve age old conflicts over the equitable distribution of wealth and resources across countries and regions. There has also been anti-capitalist rioting, culminating in injury and, more recently, in Genoa, death.[1] What all this actually means is rather hard to determine. This paper hopes to shed some light on the question, though it will remain uncommitted as to whether an 'ethical' approach to international business regulation must be adopted. It is all too tempting to be seduced by the obviously 'good' intention to infuse a dry technical subject such as international business regulation with 'ethics'. What is more important is to understand where such an idea has come from, why it is apparently gaining ground as an 'agenda item' and what it means in relation to the shape and development of already existing regulatory structures. It would be impossible to cover all such structures adequately in a single paper. Accordingly the emphasis will be on the supranational level of regulation, concentrating, in particular, on developments at the multilateral level. However, a complete study of the issue would need to take account of regional, national, and sub-national developments. Here these will be alluded to only where they help to illuminate developments at the multilateral level.

The starting point for this discussion will be the very notion of 'ethics' and 'ethical regulation'. These are fluid terms. As will be shown, they may well mean many different things. The meaning chosen will profoundly affect the architecture of regulation that these concepts seek to inform. The discourse will itself structure the reality.[2] So a vocabulary for that discourse is required, a vocabulary of alternatives. Once this conceptual ground has been prepared, attention will turn to the existing system of international business regulation, contrasting its avowed aims and

[1] See 'Italy Defends Police Operation in Genoa' *Financial Times*, 24 July 2001, p. 9.

[2] For an example of discourse analysis being used to inform discussion on corporate ethics see Gjalt de Graaf, 'Discourse Theory and Business Ethics. The Case of Bankers' Conceptualisation of Customers' *Journal of Business Ethics,* 31 (2001) p. 299.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 81–104.

objectives with those of what can be termed the 'ethical challenge' – the tempering of purely economic regulatory goals with some concept of ethical judgment which may trump those goals where they prove inimical to the ethical objectives sought to be achieved. This is, of course, an ideological contest, and must be understood as such. Hence the paper will stress the choices of ethical concepts available to take part in the contest. In particular, attention will be paid to the possibility that international human rights standards are coming to be seen as the ethical foundations of an emergent global economy and society, though, as will be more fully considered below, such a claim is far from being uncontroversial. The very question of whether human rights standards provide a universal and generally accepted set of norms by which the ethical acceptability of conduct, both on the part of state and non-state actors, can be judged, lies at the very heart of the debates this paper seeks to discuss. Whatever the outcome of this contest may be in substantive terms, there appears to be developing a new model of international economic regulation, what some have termed the 'consitutionalisation' of that system. This is in itself a highly problematic way of characterising the emergent model, charged as it is with ideological assumptions.

From the preceding discussion the paper will draw certain conclusions about what seems to be happening. The underlying issue is whether we, as an essentially greedy, hierarchical, racist and sexist species can ever achieve anything approaching a global 'state of grace'. This project is being launched in a post-Cold War, Western dominated, mostly secular – though culturally and religiously pluralistic – world economy and society. It is a process that requires close observation as part of the continuing history of the human race. There is no 'End'. Indeed, if anything, it looks rather like a rediscovery of still unresolved issues of just distribution, power and political morality in the international economic and social system. These were talked about rather more openly before the intellectual freeze on this agenda during the Reagan and Thatcher 'revolution', partly because there were points to be scored in the Cold War, but also because of a greater general scepticism about the ability of free markets and unregulated business to deliver what people actually want and need.[3] However, the current state of international economic, political and social integration has raised these issues once again.

1. THE MEANINGS OF 'ETHIC' AND 'ETHICAL REGULATION' IN AN INTERNATIONAL BUSINESS CONTEXT

The term 'ethics' is easy to define – it is the system of morals or values by which a group or community can determine what is right or wrong. All human communities have such a system. The real problems begin with determining the content of that system. Human history is, in part, the story of how human communities, in whatever

[3] See further Mark Mazower, *The Dark Continent: Europe's Twentieth Century* (London: Penguin Books, 1998) especially pp. 206-9 and Chapter 9.

form, have arrived at their view of right and wrong. This gets really interesting, not to say murderous, when different human communities try to convince each other of the superior value of their particular system of ethics. The implications of such historical debates, and their attendant events, influence so much. For example, where would we, in the United Kingdom, be on the issue of a united Europe had there not been a religious schism between European Catholics and Protestants in the early modern era, with Scotland and England ending up in the Protestant, rather than Catholic, camp?[4] What would our global economy and society look like if white people had not been convinced that black people were their moral and existential inferiors? The point is that we cannot ignore these matters in explaining the development of human societies and institutions. Thus, in the debate under discussion, it is not enough to say that the economy is in the process of 'globalisation' due to changes in productive and communications technology coupled with the rise of foreign direct investment by MNEs and developments in international finance. The social dimension is equally important.[5] The question raised at the start of the paper is asking, in effect, whether there is a process of ethical 'globalisation' in the sense of whether we can develop a set of moral values by which we conduct the process of the global economy in order to attain a good global society.

In relation to 'ethical regulation' this raises the further problem of identifying the correct regulatory space for this process to take place: ethical systems are, it is safe to say, the products of rooted cultures which do not necessarily correspond with the boundaries of legal systems (whether sub-national, national, regional or international). Thus, for example, Islamic law may inform the content of various legal systems, but, as a system of ethical rules from which laws may be derived, it transcends their territorial boundaries. Thus, followers of Islam in non-Islamic societies may still follow its rules as members of the wider Islamic faith, whether or not these rules are formally recognised in (if not repressed by) the relevant legal system.[6] Nor, indeed, do ethical systems correspond with corporate boundaries: it is not clear that MNEs display any identifiable ethical culture in their activities. That there is an ethical dimension to the decisions and actions of MNEs and their staff would be hard to deny.[7] However, what is driving such ethical activity? Is it the source culture of the parent company (from where senior management are most likely to originate), the various local cultures in which the MNE operates (and from which it recruits staff) or some new hybrid culture peculiar to the corporation in question and/or to its particular industry? Clearly, the identification of the ethical

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[4] See Hugo Young, *This Blessed Plot* (London, MacMillan, 1998) especially pp 50-1, 150, 310, 379.

[5] See further Anthony Giddens, *The Third Way* (Cambridge, Polity Press, 1998), pp. 28-33.

[6] See generally on such issues William Twining, *Globalisation and Legal Theory* (London, Butterworths, 2000), Chapter 3.

[7] The large and growing literature on the subject alone testifies to this. See, by way of introduction, Thomas Donaldson, *The Ethics of International Business* (Oxford, Oxford University Press, UK Paperback Ed., 1992); Richard T. De George, *Competing with Integrity in International Business* (New York, Oxford University Press, 1993) and articles in the *Journal of Business Ethics, Business Ethics: A European Review, Business Ethics Quarterly.* See too the contributions by Wesley Cragg and Melissa Lane in this volume.

system(s) which may be said to inform the areas of human conduct most directly involved in the practice of international business, and in its regulation, is highly problematic. Not surprisingly this has encouraged extensive debate over the proper basis (or bases) for an ethics of international business, a debate which, potentially, draws in the whole of human ethical theory and ideology, since all humans can be said to be in some way affected by international business activity.[8] To this we now turn.

2. THE ETHICAL CHALLENGE

It is clear that numerous ethical ideas and systems may contest the right to be seen as a formative block for an emergent global system of business ethics on which good business conduct and effective regulation might be based. The starting point for this process is the issue of property rights and the resulting questions of distributive justice raised thereby. It is fair to say that all the various approaches to the question of international business ethics engage with this fundamental matter, albeit with quite distinct results. Equally, it is quite significant how far old ideas can still influence the debate.[9] Thus our starting point will be the historical legitimation of private property rights, the theory of the social contract.

2.1 The Influence of Social Contract Theory

The current literature on business ethics contains extensive references to, and arguments based on, social contract theory.[10] The underlying premise is taken from Thomas Hobbes: it is in the rational self-interest of individuals to come together in a united common power that will ensure their mutual security in the face of the alternative of the state of nature in which only the most forcefully acquisitive will

[8] Whether this is true as a matter of empirical fact cannot be known with certainty. However, it is reasonable to presume that a very large part of humanity is either directly or indirectly affected by such phenomena and that this covers the majority of human cultures and societies. For a useful account of the spatial development of the global economy see Peter Dicken, *Global Shift* (London, Paul Chapman Publishing Ltd, 3rd Ed., 1999).

[9] Here the business ethics literature appears to be doing in relation to ethical and political theory what William Twining hopes will also happen in relation to legal studies, namely, that globalisation will force a rethinking of fundamental legal concepts in the light of the existing theories of general jurisprudence: see Twining, *op.cit.* Note 6.

[10] See Donaldson, *op.cit.* Note 7 Ch.4.; E.Palmer, 'Multinational Corporations and the Social Contract' *Journal of Business Ethics* 31 (2001) p. 245; Wesley Cragg, 'Human Rights and Business Ethics: Fashioning a New Social Contract' *Journal of Business Ethics* 27 (2000), p. 205; Gopalkrishnan R. Iyer, 'International Exchanges as a Basis for Conceptualising Ethics in International Business' *Journal of Business Ethics* 31 (2001), p. 3, 6-12.

survive, and then only for so long as they in turn are not vanquished by another.[11] This idea has been adapted to the operation of MNEs in the international business system. Such firms operate beyond the traditionally national locus of the social contract underlying a liberal society.[12] Although MNEs do not operate in a Hobbesian 'state of nature' beyond national borders, none the less they may operate in host countries whose institutions are not well suited to complex business regulation. In addition, they operate in an international system which lacks developed international regulatory institutions that can act as the sovereign for the purposes of a global social contract, although some degree of regulation is possible, for example, through inter-governmental codes of conduct.[13] Thus there is a regulatory gap in which abuses of corporate rights, and of the rights of others by corporations, might take place to the detriment of the self-interest of all. In this light, it may be rational for corporations and governments to enter into a new 'social contract' whereby, in return for the protection of corporate rights by states and/or inter-governmental regulatory agencies, corporations, in their turn, agree to abide by certain principles of good corporate conduct. The question then becomes that of the substantive content of such rights and responsibilities and of the modalities by which they are enforced.

There is, however, another way in which social contract thinking can be used which leads to a different conception of the contents of this 'new social contract'. If one moves to the principles underlying the social contract as conceived by John Locke, then the main purpose of that contract shifts from personal security to the protection of private property previously appropriated in the state of nature by means of a persons labour.[14] The fundamental effect is to give authoritative recognition to property *rights* though the coming together of people into civil society. So where the government itself interferes with private property rights without the consent of the owner, the social contract comes to an end and a new government, that will respect such rights, can be put into place.[15] Such a reading of the social contract can be used to create a far more limited type of civil society and government. The protection of private property can become an end in itself.[16] Accordingly, government need do little more than put into place a system of

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[11] See Thomas Hobbes, *Leviathan* (1651) (Pelican Classics Ed., 1968) Part I 'Of Man' Chapter XIII, pp. 183-8, Part II 'Of Commonwealth' Chapter XVII, pp. 223-8.

[12] Palmer, *op.cit.* Note 10, p. 246.

[13] De George, *op.cit.* Note 7, pp. 26-33.

[14] John Locke, *Two Treatises on Government* (1690) (London, Dent Dutton, Everyman's Library Ed., 1978) Book II Chapter V 'On Property', p. 129.

[15] *Ibid.* Chapters IX 'The Ends of Political Society and Government' and XI ''Of the Extent of Legislative Power'.

[16] This reading of Locke can be contrasted with the views of Rousseau, who saw property rights as coming into existence only after the foundation of the state, which recognises and places on a legal footing what was previously a 'usurpation'. By contrast, Locke saw the acquisition of property in the state of nature as a source of natural rights. Rousseau asserts that 'the right of any individual over his own estate is always subordinate to the right of the community over everything.' Owners of private property are regarded as 'trustees of the public property'. This approach offers a stronger justification for public intervention in, and control over, property rights than that found in Locke's conception. See Jean-Jacques Rousseau, *The Social Contract* (1762) (Penguin Classics Ed., 1968), Book I, Chapter 9, pp. 65-8.

property law, an impartial judiciary and a system of centralised law enforcement.[17] Property owners in their turn, have no positive duties to act in the public interest, or to protect the needy, only a negative duty to obey the law so far as it protects the property of others. This has been termed the 'hard libertarian' position.[18] Put into terms of corporate ethics, this position leads to the view that corporations have no social responsibilities as such. They need only follow the aim of profit maximisation for the benefit of their shareholders, subject to a duty to obey the law, a law that should have nothing to say about redistribution or equality of outcome, though it may protect corporations against anti-competitive practices and fraud.[19] At the level of global business, such an approach has been held to underlie calls for deregulation, privatisation and liberalisation of global markets, what David Korten has termed 'corporate libertarianism'.[20] It is this approach that is said to inform the policies of inter-governmental organisations, such as the WTO or World Bank, when they call for such policies to be put into place. Their aim is the creation of economically efficient global markets, without much regard (hitherto) to the social and environmental costs that this policy might entail.

Thus a social contract based approach to the development of a model of international business ethics may lead to divergent results. It might support a libertarian, minimalist, system of ethics with the profit motive at its heart and the duty to obey the law – a law unconcerned with re-distributive goals but only with the efficient functioning of markets – as the only positive obligation. Equally it might support a mutual exchange of benefits and burdens between corporations and the societies in which they operate including the development of wider social responsibilities for corporations. This, in turn raises the question of what those responsibilities should be.

2.1.1 The Development of Substantive Ethical Responsibilities

Several approaches can be taken to determine the substantive content of ethics in international business. One approach might be to look at the practical problems faced by MNEs operating in particular places and to decide what might be the right course to take, given all the circumstances of the case. This could be termed a 'managerial' approach. It aims mainly to resolve the ethical problems that arise out of the cross-cultural operations of MNEs by offering guidelines on how managers should make decisions in this area.[21] The underlying issue here is whether or not the

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[17] Locke, *op.cit.* Note 14, Chapter IX.

[18] See Simon A. Hailwood, 'Why 'Business's Nastier Friends Should not be Libertarians' *Journal of Business Ethics* 24 (2000), p. 77.

[19] The classic statement of this position is Milton Friedman's *Capitalism and Freedom* (Chicago, University of Chicago Press, 1962). For a more recent critique of 'corporate social responsibility' along similar lines see D. Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (Wellington, New Zealand Business Roundtable, 2001).

[20] David Korten, *When Corporations Rule the World* (West Hartford, Kumarian Press Inc, 1995) especially Chapter 5.

[21] See further J. Brook Hamilton III and Stephen B. Knouse, 'Multinational Enterprise Decision Principles for Dealing with Cross Cultural Ethical Conflicts' *Journal of Business Ethics* 31 (2001) p. 77 and see Wesley Cragg, this volume.

MNE manager should follow local business customs where these might be regarded as questionable. The response will be conditional upon a number of variables, for example: Is the local practice at variance with the usual ethical standards of the MNE? Does the questionable practice violate the MNE's minimal ethical standards (assuming the corporation has such minima, as for example in a corporate code of conduct)? Does the MNE have enough leverage in the host country to follow its own ethical practices rather than host country practices? Do the host country institutions have prospects for improvement?[22] Such an approach is designed mainly to offer problem-solving paths for managers to apply in practice. As such it may not have very much to say about what outcome *ought* to occur unless it is accepted that the firm cannot in any circumstances violate its own ethical minima. Not all such models accept such an approach.[23]

Another approach might be to focus on an important moral principle and require corporations to adhere to it at all times. Thus, it has been said that among the fundamental ethical obligations of MNEs, wherever they operate, is to, 'do no intentional direct harm' and that MNEs should 'produce more good than harm for the host country'.[24] This approach retains a degree of self-regulation in the observance of what are internally generated ethical norms. A more demanding variant of this approach is to ground the principles that MNEs must follow in their operations on externally generated fundamental international standards, for example, fundamental workers rights as articulated by the ILO or fundamental human rights standards as developed in UN and other regional human rights conventions and instruments.[25] This can be seen as part of the wider movement to subject MNEs to fundamental international norms, by requiring internal decision-makers to take such norms into account when coming to their operational decisions. In this way norms, that have been designed primarily to control the activities of states, might be applied to non-state actors, such as corporations, through the internal managerial network of

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[22] *Ibid.* p. 79.

[23] See eg P.F.Buller and J.J.Kohls, 'A Model for Addressing Cross-Cultural Ethical Conflicts' *Business and Society* 36 (1997), p. 169.

[24] De George, *op.cit.* Note 7, pp. 46-7. De George enumerates five further principles: MNEs should contribute by their activity to the host country's development; they should respect the human rights of their employees; to the extent that local culture does not violate ethical norms, MNEs should respect the local culture and work with and not against it; they should pay their fair share of taxes; and they should cooperate with local government in developing and enforcing just background institutions.

[25] See further Donaldson, *op.cit.* Note 7 Chs 5 & 6. Donaldson does not take existing international fundamental rights codes as his starting point. Rather he concludes, from first principles, that certain fundamental rights must be observed by MNEs in their operations (see pp. 66-80). He is looking for minimal obligations – the levels of behaviour that firms cannot fall below – not maximal obligations. His resulting list coincides closely with what may be found in international codes and includes rights to: free movement, ownership of property, freedom from torture, fair trial, non-discrimination, physical security, freedom of speech and association, minimal education, political participation, subsistence (at p.81). He then shows how these fundamental rights can be worked into a decision-making algorithm for MNE managers (see Ch. 6). However, the algorithm is not intended as a substitute for more specific international codes of conduct (see p. 107). Thus Donaldson's approach can be read as supporting positive international standard setting. For a general discussion of the applicability of human rights standards to MNEs see P.T.Muchlinski, 'Human Rights and Multinationals – Is there a Problem?' *International Affairs* 77 (2001), p. 31.

the enterprise.[26] It is this process for the development of the substantive content of international business ethics that is of most significance to the development of an international regulatory system. It assumes institutional drivers for that system at the international level as well as a degree of policy commitment to the development of universal standards. This will form the substance of discussion in the next section of the paper. However, before that is done it is necessary to examine a third trend in the development of the substantive content of international business ethics: the 'anti-capitalist' movement.

The 'anti-capitalist' critique of global business and its fundamental immorality, as represented in recent books and media accounts, owes seemingly little to the one historically real anti-capitalism – that of Karl Marx and his followers.[27] Indeed, the (arguably) most famous recent work in this genre, Naomi Klein's *No Logo*, does not even contain a reference to Marx's work in either the further reading section or the Index.[28] However, what this book represents is an expression of deep moral indignation at MNEs whose principal business aims appear to be: the maintenance of brand image, the radical cutting of costs through labour relocation from developed countries and labour exploitation in developing country free enterprise zones, and the seizure of regulatory institutions, both at the national and international levels, which help to deregulate, privatise and liberalise the global economy in the interests of MNEs. Klein ends with an exhortation of hope in the creation of a new anti-capitalist movement arising form the various local and transnational protest groups that have emerged in recent years and in the rediscovery of international laws and standards for the regulation of MNEs, including those of the ILO and UN.[29] There is thus little clear water between the pro-market proponents of mandatory international business ethics and the contemporary 'anti-capitalists'. Unlike their revolutionary forebears, today's 'anti-capitalists' have no clear program for dismantling capitalism. Instead there is a reliance that existing inter-governmental institutions, if properly lobbied by the 'anti-capitalist' movement, will create a global 'floor of responsibilities' that MNEs must observe in relation to workers rights, human rights and the environment. Indeed, it seems a misnomer to call the current protest movement 'anti-capitalist' at all. Perhaps the recent lurch to neo-liberalism in economic policy making, even by avowedly left of centre parties, has simply made mainstream social democracy look radical by comparison![30]

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[26] See further Amnesty International United Kingdom Business Group, *Human Rights Guidelines for Companies* (London, Amnesty International, 1998). On labour rights see Bob Hepple, 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct' 20 *Comparative Labour Law and Policy Journal* 20 (1999) p. 347 and Tom Campbell, this volume.

[27] A Marxian approach can be used, with effect, to explain opposition to the policies of bodies such as the WTO see Raj Bhala, 'Marxist Origins of the Anti-Third World Claim' *Fordham International Law Journal* 24 (2000) p. 132.

[28] Naomi Klein, *No Logo* (London, Flamingo Harper-Collins, 2000).

[29] *Ibid*, pp. 435-7.

[30] There exists one further strand of radical thinking that should be mentioned, if only in passing, as this has a distinct policy agenda. According to some, the only solution to the abuses of MNEs in the liberal global economy is to dismantle that economy – including the MNEs that constitute it – and return to a degree of neo-protectionism. This aims to encourage local production of goods and services and restrict

2.1.2 The Universalist-Relativist Problem

Save in the case of managerial approaches which do not recognise the need of ethical minima in MNE operations, a common trend in the majority of the above-mentioned approaches is a belief that certain definite and universal assumptions can be made about the substantive content of international business ethics, and that this might be provided by international instruments. This in turn assumes that social and cultural relativism is unimportant, or conversely, that there is sufficient common ground among the world's major ethical systems that we can agree on a common floor of ethical responsibilities for business. Such a claim is made, for example, by De George who cites injunctions against arbitrary killing and a need for truthfulness as illustrations. He is on shakier ground, however, when he lists respect for property, as this assumes that all ethical systems understand property in the same way.[31] Another justification for a universal approach might be to point to the ethical aspects of exchange as a basic activity in international business that all participants, regardless of their cultural origin, must accept in order for business to function at all.[32] This approach appears to have some commonality with the 'new *lex mercatoria*' argument,[33] where many of the principles of 'fair exchange' will be found. It sees the rules and practices that commonly govern international business transactions as a source of universal values.

It is hard to argue against the adoption of good exchange practices by all parties to international business transactions, and there are certainly cases in which an appeal to concepts of, for instance, fair dealing or respect for a state's sovereignty over natural resources will serve as a good standard by which to evaluate a corporation's behaviour. However, the exchange-based approach appears to cover too narrow a range of situations. It tells us little of how to deal with allegations of complicity with gross violations of human rights. Nor can it deal with the effects of corporate behaviour on individuals or groups with which the firm has no exchange relationships such as, for example, the resolution of claims for compensation arising out of catastrophes such as Bhopal, or mass personal injury claims arising out of alleged environmental degradation. Thus, the exchange based approach, though valuable as a source of ethical standards to be observed in commercial transactions, is inadequate to deal with the wider ethical questions that the operations of international business create.

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international trade only to transactions in goods and services that cannot be produced locally. This approach has little faith in existing multilateral intergovernmental institutions being able to reign in the operations of MNEs. It seeks, in the alternative, to re-empower the nation state and the locality as the basic economic political and social units of human society. See Colin Hines, *Localisation A Global Manifesto* (London, Earthscan, 2000).

[31] De George, *Op.cit.* Note 7, pp. 19-22. Clearly they do not as MNEs operating in Papua New Guinea have recently learnt see 'When contracts fall foul of local culture' *Financial Times* 30 July 2001, p. 10; 'Why Gold Miners Pay a Price for Killing a Pig' *Financial Times Weekend* 4/5 August 200, p. VIII.

[32] Iyer, *op.cit.* Note 10.

[33] On which see Hans-Joachim Mertens, '*Lex Mercatoria*: *A Self-applying System Beyond National Law?*' in Gunther Teubner, ed., *Global Law Without a State* (Aldershot, Dartmouth Publishing, 1997) p. 31; Boaventura De Sousa Santos, *Toward a New Common Sense*, 2nd Ed. (London, Butterworths, 2002) pp. 208-15.

The strongest position in this area is that which places the observance of fundamental human rights at the heart of ethical business practice. As noted above, responsibility for violations of human rights has fallen historically upon the state. However, in relation to business ethics, the use of human rights standards seeks to extend their relevance and applicability to private non-state actors as well. This is replete with conceptual difficulties. Indeed, there are a number of strong arguments against such an extension of human rights responsibilities to MNEs.[34] First, MNEs are in business. Their only social responsibility is to make profits for their shareholders. It is not for them to act as moral arbiters in relation to the wider issues arising in the communities in which they operate. Indeed to do so may be seen as unwarranted interference in the internal affairs of those communities, something that MNEs have, in the past, been urged not to do.[35] Secondly, private non-state actors, such as MNEs, do not have any positive duty to observe human rights. Their only duty is to obey the law. Thus it is for the state to regulate on matters of social importance and for MNEs to observe the law. It follows also that MNEs, as private actors, can only be beneficiaries of human rights protection and not human rights protectors themselves. Thirdly, which human rights are MNEs to observe? They may have some influence over social and economic matters, as for example, by ensuring the proper treatment of their workers, but they can do nothing to protect civil and political rights. Only states have the power and the ability to do that. Fourthly, the extension of human rights obligations to MNEs will create a 'free rider' problem.[36] It is predictable that not all states and not all MNEs will take the same care to observe fundamental human rights. Thus the more conscientious corporations that invest time and money into observing human rights, and making themselves accountable for their record in this field, will be at a competitive disadvantage in relation to more unscrupulous corporations that do not undertake such responsibilities. They may also lose business opportunities in countries with poor human rights records, in that the host government may not wish to do business with ethically driven MNEs and they may not want to do business with it. Fifth, unfairness may be exacerbated by the selective and politically driven activities of NGOs, whose principal concern may be to maintain a high profile for their particular campaigns and not to ensure that all corporations are held equally to account.

Such arguments can, however, be answered. First, as regards the extension of social responsibility standards to corporations, it should be noted that MNEs have been expected to observe socially responsible standards of behaviour for a long time.[37] This expectation has been expressed in national and regional laws and in numerous codes of conduct drawn up by inter-governmental organisations, as will

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[34] This section of the paper draws on Muchlinski, *op.cit.* Note 25, pp. 35-44.

[35] See for example the UN Draft Code of Conduct for Transnational Corporations paragraphs 15-16 in UNCTAD, *International Investment Agreements: A Compendium* (New York and Geneva, United Nations, 1996) Vol. I: 165.

[36] See Ray Vernon in *Business and Human Rights* (Harvard Law School Human Rights Program, 1999), p. 49.

[37] See UNCTAD, *The Social Responsibility of Transnational Corporations* (New York and Geneva, United Nations, 1999) UNCTAD *World Investment Report 1999* (New York and Geneva, United Nations, 1999), Ch. XII.

be discussed more fully below. Indeed, MNEs themselves appear to be rejecting a purely non-social role for themselves through the adoption of corporate and industry based codes of conduct.[38] Secondly, observance of human rights is increasingly being seen by MNEs as 'Good for Business'. It is argued that business cannot flourish in an environment where fundamental human rights are not respected – what firm would be happy with the disappearance or imprisonment without trial of employees for their political opinions? In addition, businesses themselves may justify the adoption of human rights policies by reference to good reputation.[39] The benefit to be reaped from espousing a pro human rights stance is seen as outweighing any 'free rider' problem, which may be in any case exaggerated.[40]

Thirdly, the private legal status of MNEs may be seen as irrelevant to the extension of human rights responsibilities to such entities. As Andrew Clapham has forcefully argued, changes in the nature and location of power in the contemporary international system, including an increase in the power of private non-state actors such as MNEs (which may allow them to bypass traditional state-centred systems of governance) have forced a reconsideration of the boundaries between the private and the public spheres. This, in turn, has brought into question the traditional notion of the corporation as a private entity with no social or public obligations, with the consequence that such actors, including MNEs, may in principle be subjected to human rights obligations.[41] This position coincides with the fear that these powerful entities may disregard human rights and, thereby, violate human dignity. It follows that corporations, including, in particular, MNEs, should be subjected to human rights responsibilities, notwithstanding their status as creatures of private law, because human dignity must be protected in every circumstance.[42] Despite this convincing theoretical and moral case for extending responsibility for human rights violations to MNEs, the legal responsibility of MNEs for such violations remains uncertain. Thus much of the literature on this issue suggests ways to reform and develop the law towards full legal responsibility, rather than documenting actual juridical findings of human rights violations by MNEs, or, indeed, other non-state actors.[43] We are yet to see such an event in the courts of the world, although it

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[38] See for examples UNCTAD *World Investment Report 1994* (New York and Geneva, United Nations, 1994) Ch.VIII; UNCTAD *The Social Responsibility of Transnational Corporations* (New York and Geneva, United Nations, 1999), pp. 31-42.

[39] See for example, Simon Williams, 'How Principles Benefit the Bottom Line: The Experience of the Co-operative Bank' in M.Addo (ed) *Human Rights Standards and the Responsibility of Transnational* Corporations (The Hague, Kluwer Law International, 1999) pp. 63-8. See too Harvard Law School *Human Rights and Business op.cit.* Note 36, pp. 19-22.

[40] See further Muchlinski, *op.cit.* Note 25, pp. 38-9.

[41] See A.Clapham, *Human Rights in the Private Sphere* (Oxford, Clarendon Press, 1993), pp. 137-8. See further the contributions by Tom Campbell and Tom Sorell in this volume.

[42] See *ibid* p. 147.

[43] See for example Sarah Joseph, 'An Overview of the Human Rights Accountability of Multinational Enterprises' in Menno Kamminga and Sam Zia-Zarifi, (eds), *Liability of Multinational Corporations under International Law* (The Hague, Kluwer Law International, 2000), p. 75; Chris Avery, 'Business and Human Rights in a Time of Change' in Kamminga and Zia-Zarifi, (eds), *ibid* , p. 17 and http://www.multinationals.law.eur.nl; Menno Kamminga, 'Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC' in Philip Alston, (ed.), *The EU and*

should be remembered that findings of human rights violations concerning slave labour practices have been made against individual German industrialists at the end of the Second World War.[44]

Furthermore, in response to the view that MNEs cannot be subjected to human rights responsibilities because they are incapable of observing human rights designed to direct state action, it may be said that, to the contrary, MNEs can affect the economic welfare of the communities in which they operate and, given the indivisibility of human rights, this means that they have a direct impact on the extent that economic and social rights, especially labour rights in the workplace, can be enjoyed. Although it is true that MNEs may not have direct control over matters arising outside the workplace they may none the less exercise important influence in this regard. Thus, MNEs may seek to defend the human rights of their employees outside the workplace, to set standards for their sub-contractors and to refuse to accept the benefits of governmental measures that seek to improve the business climate at the expense of fundamental human rights.[45] Equally, where firms operate in unstable environments they should ensure that their security arrangements comply with fundamental human rights standards.[46] Moreover, where companies have no direct means of influence they should avoid, at the very least, making statements or engaging in actions that appear to condone human rights violations. This may include silence in the face of such violations.[47] Finally, all firms should develop an internal human rights policy which ensures that such concerns are taken into account in management decision-making, and which may find expression in a corporate code of conduct.[48]

Finally, the argument that MNEs may be subjected to arbitrary and selective targeting by NGOs should not be overstated. While it is true that such behaviour can arise out of what Upendra Baxi has termed 'the market for human rights',[49] in which NGOs strive for support from a consuming public in a manner not dissimilar to that of a service industry, MNEs are big enough to take care of themselves. In any case the activities of campaigning NGOs depend, in part, for their success on complicity from the mass media, which must be prepared to publicise the unacceptable behaviour of targeted MNEs. Thus the NGOs depend on one set of MNEs – the media corporations – to raise consciousness about the wrongdoing of other MNEs.

Appeals to human rights standards as the basis for determining the ethical dimension of corporate – and, to be sure, host state – conduct in the economic

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Human Rights (Oxford, Oxford University Press, 1999), p. 558; Amnesty International and Pax Christi International Dutch Sections, *Multinational Enterprises and Human Rights* (Utrecht, November 1998); Muchlinski, *op.cit* Note 25, pp. 40-43.

[44] See Andrew Clapham, 'The Question of Jurisdiction Under International Criminal Law Over Legal Persons' in Kamminga and Zia-Zarifi, (eds), *op.cit.* Note 43 especially pp. 166-71.

[45] See Amnesty International Dutch Section and Pax Christi International, *op.cit.* Note 43, pp. 50-1.

[46] See Amnesty International UK Business Group, *Human Rights Guidelines for Companies* (London, Amnesty International, 1998), pp. 8-11.

[47] Amnesty International Dutch Section and Pax Christi International, *op.cit*. Note 43, pp. 52-4.

[48] *Ibid*. Ch.V.

[49] Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' *Transnational Law and Contemporary* Problems 126 (1998), pp. 161-169.

sphere, have come under sustained attack from a relativist perspective.[50] In particular, the last decade has seen the use of arguments, made by leaders from newly industrialising South and East Asian economies, which reject the imposition of 'Western' notions of human rights as a benchmark for assessing the human rights condition of workers and other groups or individuals in these societies. This argument maintains that the newly industrialising societies of South and East Asia, cannot afford the luxury of extensive guarantees of human rights when strong governmental measures might be required to ensure economic development. Furthermore, given the very different philosophical and social traditions of these countries, the Western notion of individualistic human rights does not accord with 'Asian values', which may be characterised as including: respect for authority, deference to societal interests, emphasis on duty, the politics of consensus rather than conflict and the centrality of family in all social relations.[51] This is, of course, not cultural relativism, but good old-fashioned authoritarianism! As the last British Governor of Hong Kong, Chris Patten has put it, 'there are proponents of something very like 'Asian values' in Europe and North America, arguing that, 'Things aren't what they used to be; what we need is a bit more discipline.' He goes on to dismiss 'Asian values' as, 'an invented concept'.[52]

However, the Asian leaders who advocated this position did form a negotiating bloc in the 1993 UN Conference on Human Rights in Vienna. Indeed, the ability of states to weaken developments in international standards, that they see as inimical to their perceived interests, is very real. Relativism is a convenient way of articulating a position in favour of less accountability before international fora. It can also be used to develop an argument (which has also been employed beyond South and East Asia) that using human rights standards in the assessment of working and social conditions is a form of 'cultural imperialism' and 'protectionism' which ignores the very real problems of development in a post-colonial setting.[53] This might lead liberals to baulk at the idea of daring to complain about conditions on the ground, for fear of being a bit too much like their missionary forebears and not showing sufficient multicultural awareness! However, as Pogge has ably demonstrated though his adaptation of Rawls's analysis of the development of a 'law of peoples', it is not obvious why, just because hierarchical societies exist in the world, liberals must accommodate themselves with these societies and their values, simply because showing a committed attitude to liberal values in the face of such realities is not liberal.[54]

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[50] For a useful discussion see de Sousa Santos, *op.cit.* Note 33 pp. 289-301. See too the contributions by James Griffin and David Archard in this volume, which show some of the important conceptual difficulties arising in relation to human rights based arguments for the development of welfare-oriented responsibilities for states and non-state actors alike.

[51] Tony Evans, *The Politics of Human Rights* (London, Pluto Press, 2001) at p. 95. See too for a strong rejection of the 'Asian values' approach Chris Patten, *East and West* (London, MacMillan, 1998,) Chapter 5.

[52] *Ibid.,* p. 149.

[53] See de Sousa Santos, *op. cit.,* Note 33, pp. 289-93 on the development/human rights trade-off.

[54] Thomas W. Pogge, 'An Egalitarian Law of Peoples' *Philosophy and Public Affairs* 23 (1994), p. 195 at 217.

So far the discussion has centred on newly industrialising and developing countries. In developed countries a similar result (the avoidance of human rights or other social responsibility standards as a measure of ethical business behaviour) might be argued for under the banner of 'the need to maintain competitiveness' in the face of the (deliberately MNE created?) challenge posed by newly industrialising countries which can reduce the costs of production through *inter alia* lower wages and poorer working and environmental conditions. More cynically, it may well be that Western industrialised country leaders, who take such a position, also want an end to serious methods of holding business and government accountable for the manner in which people are treated in the course of economic activity. The historical resistance of the former Conservative British Government to social developments in the EU, including greater rights of consultation for workers, or the more recent opposition of the New Labour Government to a European Charter of Fundamental Rights could be read in this way, as could the 'tough love' approach of the former Clinton administration in the US to welfare. What is more worrying is the degree to which the 'competitive threat' is exaggerated, given that it may only affect certain industries with mature technologies and consequently high unit labour costs as, for example, apparel and textiles.[55] Thus the suspicion remains that the real issue concerns the structure and nature of the working and social environment itself. Workers in the West may have it too good and that is bad for shareholder returns. Firms want to reorganise and shed full-time permanent jobs and either outsource those jobs to developing countries or go over to part-time and short-term contracts. They cannot do so easily so long as employees have rights or, worse, belong to trade unions. Hence the need to get government on side and reduce the 'floor of rights'.[56] Again this will have an adverse effect on the agendas of inter-governmental organisations, the very bodies seen to be the source of standards for the development of ethical business practices, as developed countries may not wish to play hostage to fortune and undermine the freedom to reorganise the legal conditions for economic activity within their borders, let alone those of developing foreign host states. As Naomi Klein argues, the only way to avoid this outcome might be to raise popular consciousness and make political demands for the preservation of good ethical regulatory norms in developed countries, and ensure their expansion to developing countries, through international standard setting.

3. THE INSTITUTIONAL CHALLENGE

The foregoing discussion has shown how an apparent consensus is developing among advocates of greater concern for international business ethics that inter-governmental organisations (IGOs) must take an active part in forging a new 'floor' of international ethical standards applicable to business, to governments as regulators of business and as a guide to new supranational institutions charged with monitoring and enforcing such standards. This is in fact a radical constitutional

[55] On which see further Paul Krugman, *Pop Internationalism* (Cambridge Mass, MIT Press, 1996).
[56] See Klein, *op. cit.,* Note 28 Chapters 9-11.

model which goes well beyond the current limits of IGO action, accepts that unilateral national sovereign action in this area cannot deliver the hoped for standards alone (perhaps for the political reasons outlined above) and demands a new global institutional order with social responsibility and welfare at its heart, in preference to the perception that at present this order is no more than an instrument for the furtherance of 'corporate libertarianism'.

This section will now critically examine the institutional implications of the 'new model', starting with a brief overview of what has been achieved to date in the setting of global standards of ethical business behaviour under the catch-all rubric of 'social responsibility standards'. It is, after all, useful to know where we have got to before we know where we want to go. It will then consider the implications of this call for the 'constitutionalisation' of IGOs operating in the socio-economic sphere.

3.1 Social Responsibility Standards: A Stocktaking:

Despite calls for more, there is already a surprising amount of documentation, both legally binding and non-binding, that can offer an insight into the content of global social responsibility standards in business.[57] The sources vary from voluntary codes of conduct developed by individual companies or industry sectors,[58] NGO codes, codes drawn up by governments or IGOs and binding conventions on specific issues, of which the 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions is the most prominent example.[59] However, despite such developments, it is still difficult to ascertain precisely what principles bind all of these disparate developments together, since the phrase 'corporate social responsibility' can mean many different things.

As pointed out in a recent UNCTAD study on *Social Responsibility*, the obligations of firms in this matter can be drawn rather widely. That was the case, for example, in the Draft UN Code of Conduct for Transnational Corporations. The Draft Code contains obligations ranging from respect for the sovereignty and political system of the host state, respect for human rights, abstention from corrupt practices, full disclosure or observance of tax and competition laws, to obligations on transnational corporations (TNCs) not to abuse their economic power in a manner

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[57] See for a recent overview UNCTAD, *Social Responsibility* UNCTAD Series on issues in international investment agreements (New York and Geneva, United Nations, 2001). See too UNCTAD, *Employment* Series on issues in international investment agreements (New York and Geneva, United Nations, 2000); UNCTAD, *Environment* UNCTAD Series on issues in international investment agreements (New York and Geneva, United Nations, 2001); P. T. Muchlinski, 'The Social Dimension of International Investment Agreements' in J. Faundez, M. Footer and J. J. Norton, (eds), *Governance, Development and Globalisation* (London, Blackstone Press, 2000), p. 373.

[58] On which see further Muchlinski, *ibid*., pp. 386-8 and sources cited therein; UNCTAD, *Social Responsibility ibid.*, pp. 37-40. For a full inventory of corporate codes of conduct see OECD Trade Committee, *Codes of Corporate Conduct: An Inventory* (Paris, OECD, 1999) and on http://www.oecd.org/, 4 December 2003. See too Government of Canada, *Voluntary Codes: A Guide for Their Development and Use* (Ottawa, 1998) available on http://strategis.ic.gc.ca/volcodes, 4 December 2003.

[59] This Convention entered into force on 15 February 1999. See OECD Doc DAFFE/IME/BR(97) 20 8 April 1998 or http://www.oecd.org/, 4 December 2003.

damaging to the economic well-being of the countries in which they operate.[60] Equally, the recently revised OECD Guidelines for Multinational Enterprises contain an extensive range of social obligations for MNEs including, *inter alia*, a duty to contribute to the sustainable development of the countries in which they operate, to respect human rights, to encourage local capacity building, or to refrain from seeking or accepting exemptions to local regulatory frameworks in the areas of environment, health and safety, labour, taxation, financial incentives or other issues.[61] By contrast, the UN Global Compact focuses on just three issue areas upon which world business should act by upholding the major international instruments in each field: respect for human rights as defined in the Universal Declaration of Human Rights; the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work, which requires respect for freedom of association, recognition of collective bargaining, elimination of all forms of forced and compulsory labour, the effective abolition of child labour and elimination of discrimination in respect of employment and occupation; and the Rio Declaration of the UN Conference on Environment and Development, which requires support for a precautionary approach to environmental challenges, the undertaking of initiatives to promote greater environmental responsibility and the encouragement of the development and diffusion of environmentally friendly technologies.[62]

The question of what the list of social responsibility standards should contain is, of course, a question of choice bound by ideological considerations.[63] However, it is clear that it can cover potentially all aspects of corporate conduct, and that the matter may assume economic, social, political and ethical dimensions in that, 'TNCs are expected to conduct their economic affairs in good faith and in accordance with proper standards of economic activity, while also observing fundamental principles of good socio-political and ethical conduct.'[64] What this means may be better explained by considering which social and economic interests have generated internationally sanctioned protective standards. This issue has been more fully discussed by the author elsewhere.[65] For now it is enough to note that at least the following interests might be adversely affected by MNE operations, and that these have already elicited the development of, or calls for, new international standards.

First, in line with the 'corporate libertarian' approach outlined above, there may be other economic parties in the global market that might be adversely affected by MNE behaviour which upsets the fair and competitive operation of the market. In such cases, there is a need to promote market fairness. This will involve, in particular, controls over restrictive business practices, fraud and tax abuses. These matters are dealt with to a greater or lesser extent by international rules.[66] It is also at

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[60] *Ibid*., p. 5.
[61] OECD, *Guidelines for Multinational Enterprises* (Paris, OECD, 2000) Chapter II 'General Policies'. The remaining chapters include 'Disclosure', 'Employment and Industrial Relations', 'Environment', 'Combating Bribery', 'Consumer Interests', 'Science and Technology', 'Competition' and 'Taxation'.
[62] See UN Global Compact http://www.unglobalcompact.org, 4 December 2003.
[63] See Muchlinski, 'Social Dimension' *op. cit.*, Note 57, pp. 373-4.
[64] UNCTAD, *Social Responsibility op. cit.*, Note 57, p. 11.
[65] See Muchlinski, 'Social Dimension' *op. cit.*, Note 57.
[66] *Ibid.*, pp. 377-9.

the heart of anti-corruption developments which have, as noted above, already produced a major international convention.

However, this issue is not restricted to a 'corporate libertarian' agenda. The question of market fairness also involves the need to respect the interests of those unable to compete equally in the global economy, as advocated by the more socially oriented approaches discussed above. Thus, there may be weaker parties that encounter MNEs in their every day lives and who require protection through protective rules. In this regard, the protection of the rights of employees has figured highly in the social responsibility agenda, given the weaker position of employees in relation to their employers. Not only has this led to codes of conduct drawn up by the ILO,[67] but also to the inclusion of 'no lowering of standards' clauses in international economic agreements, which ensure that host countries do not lower labour, or other regulatory standards, such as health and safety, as an incentive to attract investment from MNEs.[68] Similarly, the rise of international consumer protection standards can be attributed to the need to ensure adequate minimum protection for consumers dealing with products and services produced by MNEs, and to ensure the proper and ethical conduct of electronic consumer transactions, an area in which there has been considerable international concern in recent years.[69]

Secondly, another significant question of equality in the global economy concerns the special position of developing countries.[70] Such countries may have particular problems that international social responsibility codes must recognise. Of these, perhaps the most important is the need to ensure developing country access to adequate information and resources while dealing with MNEs, so that agreements can be entered into with such firms that are truly beneficial to development. This entails the inclusion, in international regimes governing the conditions of investment into developing countries, provisions that ensure adequacy of information and resources for developing countries. This can be done by way of duties imposed on firms and their home governments to co-operate in the evolution of development policies on the part of developing countries through, for example, duties to transfer technology useful to the developing country's science and technology policy or through co-operation in the control of abusive business or taxation practices, such as transfer pricing.[71]

In addition, the special situation of developing countries raises the question of whether preferential treatment can be justified by reference to the 'right to development'. Such a right was first recognised in the African Charter of Human

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[67] See for example the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1977 (as revised 2000), the ILO Declaration of Fundamental Principles and Rights at Work 1998 discussed in Muchlinski, *ibid.*, pp. 382-3

[68] See for example NAFTA Article 1114.

[69] See, for examples, UNCTAD, *Social Responsibility op. cit.*, Note 57, pp. 25-35.

[70] Thus the UNCTAD study on *Social Responsibility* contains a section on 'Development Obligations' in the international investment agreements it surveys: see *ibid.* , pp. 17-21.

[71] Muchlinski, 'Social Dimension' *op. cit.*, Note 57, pp. 376-7. See for example the WTO TRIPS Agreement Articles 65-66 and the OECD Guidelines for Multinational Enterprises *op. cit.*, Note 49 Chapter on 'Science and Technology'. See too UNCTAD, *Transfer Pricing* UNCTAD Series on issues in international investment agreements (New York and Geneva, United Nations, 1999).

and Peoples Rights and was adopted by the UN General Assembly in its Declaration on the Right to Development.[72] This right, which is not legally binding,[73] asserts that there can be no trade-off between human rights and development – it trumps such hard pragmatism. Equally it is simultaneously an individual and a collective right and it encompasses civil and political and economic, social and cultural rights. It is a so-called third generation 'solidarity right'. Whether this right is a useful building block for justifying social responsibility on the part of states and corporations has been questioned from all sides. Thus, neo-liberals doubt whether civil and political and economic, social and cultural rights can be so conflated, while critics from the left have expressed concern over the state centred nature of the right in that developing states can invoke it as much as communities or individuals.[74] However, while the value of the 'right to development' to the elaboration of ethical international business standards is undoubtedly problematic, the ideal expressed by this right – the ideal of equal development and equitable redistribution – can be used to inform details of specific principles.

Thirdly, there will be interests requiring that MNEs operate in a manner that furthers more general, socially desirable goals. The need to act in a manner that is consistent with the protection of the environment and sustainable development may be seen in this light, as there is a general public interest in ensuring a healthy and safe environment. Hence the emphasis in the UN Global Compact on the principles contained in the Rio Declaration that are of direct application to the activities of MNEs.[75] Similarly, the duty to observe fundamental human rights may be seen as an expression of the need for MNEs to act in a manner that protects wider social goals, in this case the furtherance and protection of human dignity. However, as pointed out earlier, this area is still very much in the realm of evolution, though there exists an increasing number of non-binding declarations and codes outlining MNE responsibilities in this area.[76] Furthermore, there is a continuing debate before the UN Sub-Commission on the Promotion and Protection of Human Rights concerning the set of 'Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights'.[77] Although adopted by the UN Sub-Commission in August 2003, the precise effect of this instrument is as yet uncertain, though, arguably, it represents an emerging 'soft law' of persuasive moral authority.

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[72] UNGA Resolution 41/128 4 December 1986. See de Sousa Santos *op. cit*., Note 33, pp. 357-8. For the authors original position on this issue see P. T. Muchlinski, ''Basic Needs' Theory and 'Development Law'' in Francis Snyder and Peter Slinn, (eds), *International Law of Development* (Abingdon, Professional Books, 1987), p. 237. For a more recent discussion see Koen de Feyter, *World Development Law* (Oxford, Intersentia, 2001), pp. 20-6.

[73] De Feyter, *ibid*., para. 38, p. 22.

[74] See de Sousa Santos, *op. cit*., Note 33 and Muchlinski, *op. cit*., Note 72.

[75] On which see further P. T. Muchlinski, 'Towards a Multilateral Investment Agreement (MAI): The OECD and WTO Models of Sustainable Development' in F. Weiss, E. Denters and P. De Waart, *International Economic Law with a Human Face* (The Hague, Kluwer Law International, 1998), p. 429.

[76] See the UN Global Compact Note 62, the Amnesty International Guidelines *op. cit*., Note 26 and see further UNCTAD, *Social Responsibility op. cit.*, Note 57, pp. 40-44.

[77] See UN Doc E/CN.4/Sub.2/2002/13 available from www.business-humanrights.org, 4 December 2003.

Finally, there is an interest in ensuring proper accountability on the part of MNEs through disclosure rules, and through emergent international standards of good corporate governance. At present both serve to protect mainly shareholder interests, and, in the case of disclosure, governmental interests in obtaining adequate information about the international operations of MNEs for regulatory purposes. Both areas could easily evolve into wider regimes catering for other stakeholder groups.[78]

3.2 The 'Constitutionalisation' of IGOs

From the preceding section, it is clear that some kind of proto-legislative activity is going on at the international level in the field of social responsibility. This appears to be creating an 'ethical floor of responsibilities' that MNEs should observe when operating in home or host countries, though especially in developing host countries. This can be justified, as we have seen, by an appeal to a 'social contract' between MNEs and the countries and communities in which they operate on the ground that such firms should observe certain ethical minima as a condition of benefiting commercially from their presence in these countries. It is then for the international community, as embodied in IGOs, to develop the applicable minima through international rule making. Thus IGOs appear to be given an 'agency' by their member countries – endorsed by NGOs it seems – to fill out the terms of the 'social contract' between such countries, as representatives of the communities found therein, and MNEs.

This emergent phenomenon can be seen as some kind of 'constitutionalisation' of IGOs. It has given rise to a debate as to the proper role of IGOs in the evolution of global economic and social rules and about the proper constitutional form that the development of such rules through IGOs should take. In part, it arises from increasing disquiet as to the role of the nation state as the source of constitutional legitimacy in the emerging global economy and society.[79] The basic question being asked is whether IGOs should take on the standard setting role in social issues hitherto undertaken by the nation state, and, if so, how should they do this?

In answering this question it should be remembered that it contains at least two major dimensions. First there is a procedural dimension. This demands that IGOs conduct themselves in accordance with certain fundamental principles of good constitutional practice. In particular they must observe the 'rule of law' by acting within their powers and by observing standards of due process in the resolution of differences.[80] This issue appears to be relatively settled, in that no one seriously

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[78] Muchlinski, 'Social Dimension' *op. cit*., Note 57, pp. 380-2 and see OECD Guidelines for Multinational Enterprises *op. cit*., Note 61 'Disclosure' and OECD Principles on Corporate Governance 1999 http://www.oecd.org/, 4 December 2003. See too contributions to this volume by Wesley Cragg and Stephen Bottomley.

[79] See further Damian Chalmers, 'Post-nationalism and the Quest for Constitutional Substitutes' 27 *Journal.of Law and Society* 178 (2000); de Sousa Santos, *op. cit*., Note 33 especially Chs 2 & 4.

[80] See further E-U Petersmann, 'Human Rights and International Economic Law in the 21st Century: The Need to Clarify their Inter-relationships' *Jouranl of Internatioal Economic Law* 4 (2001), p. 3 at 24-5;

questions the need for IGOs to act within their procedural laws, though there may be debate about whether, as a constitutional matter based on the interpretation of the organisation's constitutive instrument, the IGO in question *can* adopt standards in the social field.

More fundamentally, notwithstanding the answer to the issue of whether the IGO has subject-matter jurisdiction over social issues, there is the second dimension of whether a particular organisation can *legitimately* take on the task of setting international standards. In undertaking such an activity, the IGO in question is being asked to mediate in numerous cross-cultural dialogues and thereupon to produce global rules not only on specific specialised issues – such as the case of trade in the WTO – but on social issues more generally. Even organisations set up apparently to deal with social questions – of which the ILO is the leading example – must face up to this process of mediation. That raises numerous further questions: is the organisation sufficiently open to all interested parties or groups such that it carries a degree of *participatory legitimacy*? [81] Does it undertake a proper process of agenda setting such that it carries a degree of *transparency*? To whom is the IGO accountable? To member governments, to civil society, to MNEs, to no one? The organisation must be *constitutionally recognised* and for it to be so it must *justify* itself to those who are interested in its actions.[82]

Against this background there are at least two main strands of response to the above question. The first can be termed a 'normative liberal approach' which has its origins in the constitutional liberal tradition of Western political economy, having as its emphasis the need to preserve market freedom and the rule of law.[83] The second can be termed a 'functionalist regulatory' approach which has its sources in social and political theories that see regulation as an important function of government and which does not necessarily see the market mechanism as an appropriate method of social and economic organisation.[84] Each approach will construct a different idea as to the proper function of IGOs in the field of standard setting.

Thus, the first approach, as exemplified in the writings of Ernst-Ulrich Petersmann, advocates a new human rights regime for international institutions, including economic institutions such as the WTO.[85] According to Petersmann, there should be a new, free trade oriented, human rights revolution in the WTO.

Phillipe Sands and Pierre Klein, *Bowett's Law of International Institutions* (London, Sweet & Maxwell, 5th Ed., 2001), pp. 292-6.

[81] This in turn raises the issue of whether civil society as represented by NGOs should be involved in IGO activities: see Petersmann, *ibid*., pp. 35-7. See too for a cautious acceptance of NGOs as observers but not decision-makers David Henderson, *The MAI Affair: A Story and its Lessons* (London, Royal Institute of International Affairs, 1999), pp. 57-60.

[82] See further Chalmers, *op. cit*., Note 79, pp. 206-16. See too the contribution by Melissa Lane in this volume on the idea of moral responsibility and popular accountability. The argument presented there relates to corporations but, arguably, also has relevance to determining the legitimacy of other actors, such as IGOs, as standard setters.

[83] See further Razeen Sally, *Classical Liberalism and International Economic Order* (London, Routledge, 1998) and see Martin Loughlin, *Public Law and Political Theory* (Oxford, Clarendon press, 1992), Ch. 5.

[84] Loughlin, *ibid.*, Ch. 6.

[85] Petersmann, *op. cit*, Note 80.

Following the tenets of German 'Ordo-liberalism',[86] he argues that the new economic constitution of the global economic system is best served by an international rule of law based on the fundamental human right to free trade.[87] This right should appear not only in the law of the WTO but also as a directly effective individual right enforceable before the national courts of member countries.[88] Thus the constitutional role played by the WTO is that of a body aimed at entrenching fundamental economic freedoms which are then observed by nation states. This approach presupposes the continuing strength of the national legal order and does not see in global economic integration the end of the fully functional nation state.[89] The IGO is, therefore, only a source of ordering rules which its members will observe at the local level. It does not substitute itself for the local: subsidiarity is at the heart of the project. However, it is a subsidiarity of means and not principles. The latter are clearly to be developed in concert by states acting through the WTO, which becomes a kind of proto-global legislature seeking to entrench free trade by allowing markets to develop as fully as possible.[90] In this process it also becomes a body setting up a fundamental norm that seeks to limit national sovereignty in that, once the 'human right' of free trade is embedded in the WTO 'constitution', members cannot depart from it in their national legal order. It thus seeks to prevent future national governments from reneging on that right, thereby preserving the protection of free markets for the indefinite future.

Three points can be made in response to this idea. First, a 'human right' to free trade seems to be a philosophical nonsense. It is no more than a right for corporations to trade across borders, one aspect of the commercial right to private property, a right that can be regulated where the public interest requires.[91] Only in marginal cases would actual live humans enjoy this right. Even the small trader would most likely trade through an incorporated entity. Secondly, it assumes away the very problems that this suggestion is seeking to resolve, namely, that individual states would freely subordinate their discretion to an IGO notwithstanding real

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[86] On which see further Sally, *op. cit*., Note 83, Ch. 6.

[87] Petersmann, *op. cit*., Note 80, pp. 31-33.

[88] *Ibid*., pp. 33-4. In this Petersmann follows the 'bottom-up' approach advocated by the German ordo-liberal Ropke and more recently by Jan Tumlir: see Sally, op. cit., Note 83 Chs 7 & 8.

[89] Indeed, as de Sousa Santos asserts from a post-modern perspective, while the nation state may be being de-centred as the focus of legal activity in the globalisation process, it remains in charge of that process. It can just as easily re-centre itself in certain areas for example, protection of TNC rights or political surveillance: *op. cit*., Note 33, pp. 197-200.

[90] It should be noted that the Ordo-liberal position is distinct form that of the Anglo-Saxon liberal tradition, in that it does not accept the notion of markets as 'spontaneous orders' but, rather, that markets tend towards failure if they are not maintained through controls over private economic power especially through anti-trust controls: Sally, *op. cit*., Note 83, pp. 109-10, 113.

[91] For example Article 1 of the First Protocol to the European Convention on Human Rights asserts that: 'Every natural or legal person has the right to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.' See further Tom Campbell in this volume, who assesses the case for market-based rights more fully.

disagreements over whether this would be in the national political interest of each member. Indeed, WTO members would probably never agree to such a principle without qualifications preserving national interests – the very condition that a human right to free trade is trying to prevent. In reality the suggestion rides on the fact that states are simply not that interested in a universal free trade order. Thus, IGOs are sought to fill in normative gaps in national legal orders that local political reality stubbornly refuses to fill.

There is a strange symmetry between this position and that taken by those seeking to regulate corporate behaviour through international standards. Though their aim is quite distinct from that of the normative liberals, they too see in IGOs the source of new legislative rules. What is different is a greater scepticism towards the beneficial effects of free market capitalism. Thus their model of the 'constitutional' IGO is not so much one of facilitating market evolution, but that of market regulation. The IGO is not, therefore, the guardian of private economic rights but their controller. In the more critical conception, the very system of capitalism may itself be subjected to evaluation as a system that regularly denies fundamental human rights.[92] This approach appears to have less faith in the ability of national legal orders to protect fundamental social and ethical standards than the liberal approach has in the role of national law in its project. As noted earlier, it is the perceived failure to preserve, or, in the case of developing and transitional economies, to introduce, national rules controlling business in the social and ethical fields that has prompted calls for IGOs to do this instead. Furthermore, the assumption is that social and ethical rules will trump free trade rules. They are to be of a higher order than those rules.

Thus both of the above approaches seek to use IGOs as a source of new ordering principles, but they differ on the ability of national legal orders to implement them once adopted. There is, however, one point over which there appears to be a growing consensus. It seems widely accepted that IGOs, as currently constituted and run, are lacking in real democratic legitimacy. Thus, both normative liberals[93] and regulatory functionalists[94] agree that civil society groups, as embodied in NGOs, need fuller representation in the organs of IGOs and that the deliberations of IGOs should be open and subject to public scrutiny. This is a matter that has led to IGO responses that increase the participation of NGOs, albeit informally in some cases.[95] The major remaining issues concern whether NGOs should act merely in a consulting capacity or have a more active part in decision-making and in the scrutiny of IGO practices, and whether all, or only some, NGOs should be permitted

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[92] See de Sousa Santos, *op. cit*., Note 33, p. 289.

[93] See Petersmann, *op. cit*., Note 80, pp. 35-7; 'John H. Jackson, *The Jurisprudence of the GATT and WTO* (Cambridge, Cambridge University Press, 2000) Ch. 21. ' World Trade Rules and Environmental Policies: Congruence or Conflict?'.

[94] See De Feyter *op. cit*., Note 72, p. 240.

[95] Jeffrey Dunoff, 'The Misguided Debate over NGO Participation at the WTO' *Journal of International Economic Law* 1 (1998), p. 433; Daniel Esty, 'Non-Governmental Organisations at the World Trade Organisation: Cooperation, Competition or Exclusion?' *Journal of International Economic Law* 1 1998, p. 123. See, for other IGOs, Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' *Michigan .Journal of International Law* 18 (1997), p. 183.

to take an active part, given that not all NGOs represent wide constituencies and that they will vary in their levels of professional competence.[96]

4. CONCLUDING REMARKS

From the foregoing discussion it is clear that a discourse on ethics and international business is developing. This may be justified philosophically by appeals to a 'social contract' and to the need of all actors, including non-state actors, to observe the preservation of human dignity through adherence to fundamental human rights. On the other hand, the precise content of this discourse remains open to ideological contest. There are at least three main positions in this. The first, a 'hard libertarian' position, adheres strictly to a Lockean version of the social contract and limits the ethical agenda to the protection of private property and basic market freedoms. It seeks no wider social duties to be observed by corporations and, indeed, sees such wide duties as being illegitimate. The second position, that of the 'neo-liberals', emphasises the benefits of an 'economic constitution' based on international free trade, but, unlike the libertarian position, it is not opposed to the protection of fundamental rights or the environment.[97] The precise role to be played by such standards is not fully explained, although there is a clear rejection of the 'right to development'. The third position, that of the 'regulatory functionalists', which includes both pro-market and (so-called) anti-capitalist positions,[98] sees serious problems in the unrestrained operation of MNEs in an increasingly de-regulated (or under-regulated) global economy and seeks, in response, to develop a global code of corporate social responsibility as described in detail above.

These three positions are contesting the agendas of IGOs. Here it is important to note that different IGOs have different cultures that respond more or less sympathetically to each of the above positions. For example, it is hard to envisage UNCTAD ever denying the existence of a right to development as such, though it would be open to debate on what that right means in practice.[99] On the other hand the WTO is often, perhaps not entirely accurately, seen as a purveyor of 'hard libertarianism'. It is, in fact, closer in detail to the 'neo-liberal' position, and in practice it is willing at least to hear out alternative social positions, as witnessed by the informal access now given to NGOs to WTO dispute settlement panels.[100] The World Bank, too, is engaged in dialogues with governments, development institutions, the business world and NGOs as to the meaning, content and operationalisation of corporate social responsibility, which have, so far, gone furthest in relation to the environmental monitoring of project proposals. [101]

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[96] De Feyter, *.op .cit*., Note 72, Ch. 7. and see Henderson, *op. cit*., Note 81, pp. 57-60; Dunoff, *ibid*., ; Esty, *ibid.*

[97] On which see further Jackson, *op. cit*., Note 93.

[98] See Donaldson, *op. cit*., Note 7 and Klein, *op. cit*., Note 28 as examples of each approach.

[99] See further UNCTAD, *International Investment Agreements: Flexibility for Development* UNCTAD Series on issues in international investment agreements (New York and Geneva, United Nations, 2000).

[100] See Dunoff, *op. cit*., Note 95.

[101] See World Bank Group 'Corporate Social Responsibility and the World Bank Group' (Washington DC, Business Partnership and Outreach Group, Briefing Note 6, November 2000)

In this process, as discussed earlier, IGOs acquire a quasi-legislative status and are perceived as affecting a re-arrangement in political relations between states and within states. Again the explanation of this process, and its constitutional effects, is ideologically charged. Thus 'neo-liberals' remain wedded to the nation state, seeing it as retaining real power which needs a degree of constitutional ordering 'from above' through the granting of fundamental economic rights that can be invoked before national courts by individual right holders 'from below'. In this way overall welfare is best served through the safeguarding, by law, of market responses. This places limits on the state's actions but it does not weaken the state as such.[102] By contrast 'regulatory functionalists' see the nation state in the globalising capitalist economy as fundamentally weakened, especially in the social dimension. Therefore a new global code of social regulation is needed 'from above' to redress this alleged weakness. Thus IGOs will displace nation-states to the extent that they provide rules that the latter are no longer willing to enact. What is not well articulated is how this global code will be enforced in practice. The implication seems to be that national law could be used, though this would suggest that the weakening of the national legal and political order is being exaggerated for the sake of making a point.

The interesting observation here is that those who support greater international economic freedom, and its attendant economic integration, do not problematise the power of the state. This suggests that it is correct to surmise, as de Sousa Santos does,[103] that the nation-state is de-centring itself on some but not all issues. That is not the same as saying that the state is withering away in the face of global capital. In fact the call for global ethical business standards is in reality a call for the re-regulation of the socio-economic sphere in the nation state. Thus too much should not be read into, or expected from, the 'global standards movement'. National action is still essential to the cause of re-regulation, with the global dimension remaining a 'longstop' of minimum standards below which no state could fall.

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[102] See further Martin Wolf, 'Will the Nation-State Survive Globalisation?' *Foreign Affairs* 80 (2001), p. 178.
[103] See de Sousa Santos, at Note 89.

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CHAPTER SIX

Human Rights, Globalisation and the Modern Shareholder Owned Corporation[1]

As the many have noted, the task of articulating human rights and encouraging or requiring their observance has been thought until relatively recently to fall principally on governments. This view is well illustrated by the story of the United Nations Declaration of Human Rights. Created in the immediate post war period, it was an expression of resolve articulated by nation states intent on building international institutions committed to protecting and advancing human rights. Created by governments acting collectively, the protection of human rights that the Declaration called for was then assigned largely to governments acting individually and collectively. Human rights were enshrined in constitutions; the Canadian constitution is an example. Laws designed to protect minorities from discrimination were passed. Provision was made for refugees, though it was not always as generous as it might be. Social safety nets were put in place including health insurance, unemployment insurance, old age security and so on. Constitutional guarantees were put in place to restrain governments in the exercise of their powers thus protecting freedom of expression and of the press, freedom of assembly, the right to a fair trial and so on.

One consequence of the assumption that protecting and enhancing human rights was a government responsibility, however, was *a de facto* division of responsibilities between governments and the private sector. The private sector assumed primary responsibility for generating wealth while the public sector accepted responsibility for ensuring respect for human rights including freedom from 'fear and want'.

I have described this division of responsibilities elsewhere as forming a tacit social contract. Its effect was to encourage many in the corporate world to pay little attention to human rights as a corporate responsibility.[2] Of course, this division of

[1] Earlier version of this paper were read at the International IIPE Biennial Conference 2002, 'Restructuring the Public Interest in a Globalising World', Brisbane, Australian and the Zicklin Centre for Business Ethics Research, The Wharton School. I would like to thank participants on those occasions whose comments and observations have contributed to the development of this chapter.

[2] See my discussion of these issues in 'Human Rights and Business Ethics: Fashioning a New Social Contract', *The Journal of Business Ethics* 27, (2002) pp. 205-214.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 105–127.

responsibility was not understood to imply and did not mean that corporations could ignore human rights issues. To the contrary, embedding respect for human rights in the workplace has been one of the central goals of the post war human rights movement. Rather, what it meant was that the fundamental human rights obligations of corporations were those set out in law. Neither did this in any way attenuate respect for human rights on the part of the business sector since obeying the law is widely regarded by the business community as a fundamental obligation.

What then, it might be asked, is the issue? What if anything has changed or needs to be corrected? The problem, it would appear, is that the capacity of governments to set standards that protect human rights has been undermined by the forces of globalisation. Hence they are increasingly limited in their capacity to play their traditional (post second world war) role. At the same time, the reach and power of multinational investor owned corporations are growing. It would seem that if the protection and enhancement of human rights is to be maintained or extended under conditions of globalisation, the private sector is going to have to play a much more significant role than in the past.

A central obstacle to accomplishing this shift, however, is a currently dominant cluster of management theories and theories of the firm that hold that the primary and perhaps even sole purpose of the firm is to maximise profits. From the perspective of these theories, if profit maximisation requires respect for human rights, there is no problem. If it does not, as frequently it would seem not to, then corporations have an obligation to their shareholders not to allow human rights concerns to impede with their profit maximising *raison d'être*.

In what follows, I want to examine the implications of this cluster of theories for understanding the nature and role of the modern multinational investor owned corporation. Specifically, I propose to ask:: *Do private sector, investor owned corporations have an ethical obligation to respect, advance respect for and protect human rights as set out in the UN Declaration of Human Rights?*

I. THE NORMATIVE FOUNDATIONS OF CORPORATE SOCIAL RESPONSIBILITY

1.1 Articulating the Problem

Whatever the historical merits of the post second world war allocation of the responsibility for the protection and advancement of human rights, globalisation has made a re-examination of that allocation increasingly important. What globalisation has not altered is the widely shared view that human rights have a central role to play in the ordering of social and economic relationships. Neither has it altered a view implicit in the very concept of human rights, namely, that ensuring their respect is a collective responsibility. What globalisation **has** altered, however, is public confidence in the capacity of post war national and international political instruments to ensure that respect for human rights is progressively broadened and

practised. Exacerbating this loss of confidence is the sense that there is an unresolvable tension between the economic forces that are driving globalisation, specifically competition and the profit motive, and the human rights agenda set out in documents like the United Nations Declaration.[3]

For reasons explored elsewhere,[4] it would appear that there is no obvious and direct way to answer the question at the centre of this discussion. That is to say, there does not appear to be a foundation for developing an answer common to the various strands of both management and human rights doctrines and theories. Without a common foundation, it is unlikely that there can be agreement on the question at issue given the widely divergent approaches and values build into the various viewpoints. That being the case, we might more profitably ask: 'Can we build a foundation that can be seen to be grounded on relatively uncontroversial values and principles widely acknowledged by business practitioners and management theorists that might provide a bridge to the construction of an answer to our under-riding question?'

One way to approach would be to step back and ask more simply: 'Do investor owned corporations have any ethical responsibilities at all?' And if so, what is the relationship between those responsibilities and the profit-generating role of the modern investor owned corporation?

What is significant about this more general question is that even the most conservative of the neo-classical[5] accounts of the nature and purpose of the modern corporation agree that corporations and their managers have ethical obligations. Milton Friedman, whose views are widely quoted in support of profit maximising and shareholder theories of the firm, acknowledges that corporations do have ethical responsibilities which he describes as having three elements: an obligation to maximise profits; an obligation to honour certain fundamental rules of the game; and finally, an obligation to respect local ethical custom. Of these three elements, the first two will be treated as the more fundamental for our purposes.

Profit maximisation is a fiduciary obligation owed exclusively to shareholders. The rules of the game cited are open and free competition without deception or fraud. The obligation to respect certain fundamental 'rules of the game' is owed to all players in the game, including shareholders. Few participants in the debate here being engaged would dispute that private sector, for-profit corporations do indeed have these two obligations.

Three observations point toward the foundations of a shared view of corporate obligations. First, there is a clear tension between the pursuit of profits and staying within the rules of the game. If this were not the case, there would be no need for enforcement. But of course enforcement is required as is illustrated by the many examples of business people and corporations that have strayed from the rules. Few

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[3] See for example Naomi Klein's *No Logo* (London: Flamingo Harper-Collins, 2000) and Robin Broad's *Global Backlash: Citizen Initiatives for a Just World Economy* (Oxford and New York: Rowman and Littlefield, 2002).

[4] See for example my discussion in 'Business Ethics and Stakeholder Theory', *Business Ethics Quarterly* 12 (2002) pp. 113-143.

[5] Sometime also described as neo-liberal. I will use both expressions interchangeably in what follows.

recent events have proven the point here more dramatically than the Enron/Andersen saga, where key corporate managers played as closely to the letter of the rules as they could and then appear to have strayed out of bounds in the pursuit of profit maximisation, the enhancement of share value and personal enrichment.

Second, playing within the rules and doing so intentionally and publicly can be profitable. That is to say, good ethics can be and no doubt frequently is good business. Ethical management does have instrumental value and is therefore contingently and strategically connected to good management.[6]

Third, the relationship between profit maximisation and the rules of the game is a non-contingent relationship. The 'rules of the game' are essential to the creation of markets. This is not just a contingent fact about the way markets work, though the rules have an important instrumental role to play in ensuring that markets function efficiently. Rather the rules of the game are integral to market activity. Markets, as Tom Campbell points out, 'cannot operate without an effective practice of contractual relationships that involve mutual trust and obligations'.[7] This is not a matter of mere convenience. It is an operational requirement. The rules here are constitutive of the activity. Without the rules, there is no game.

It is in part because certain ethical values are constitutive of the game that explicitly endorsing those rules and publicly emphasising one's commitment to play by the rules and even to go beyond them can be a good business practice. Codes of ethics, in which corporations commit to such things as honesty and integrity, are in this sense good public relations.[8] It does not follow, of course, that the rules cannot be broken or that breaking them might not be quite lucrative on occasion. If that were not so, as we have already noted, there would be no need for enforcement.

What the need for enforcement points too is a moral tension created by the interplay of profit maximisation and the rules that allow markets to operate. If the only reasons for respecting the rules of the game were instrumental or contingent, there would be no moral tension. There would be only practical tension of the sort that accompanies all tough management decisions under conditions of uncertainty. The tension here is of a different order. It would not exist unless the obligation to play by the rules was non-contingent and non-instrumental, that is to say, a moral obligation.[9]

We have then an answer to our initial question. Investor owned corporations have specific ethical obligations that arise from their engagement in the trading of goods and services in markets whose function is to facilitate that exchange. What does not follow, of course, is that they have human rights obligations that are not legally grounded. The ethical obligations that corporations have are the obligations

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[6] For a discussion of these issues see William Shaw's account of the 'Narrow View: Profit Maximisation' in *Business Ethics* (Fourth Edition) (Wadsworth, 2002), p. 165. See also Milton Freidman's *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962); and Theordore Levitt, 'The Dangers of Social Responsibility', *Harvard Business Review* 36 (1958) both of whom are referred to by Shaw.

[7] See this volume at p. 26.

[8] For an excellent discussion of this point, see Condren, *Business and Professional Ethics Journal* 14 (1995) pp. 69-87.

[9] This theme is explored at greater length in Cragg, 'Business Ethics and Stakeholder Theory', *Business Ethics Quarterly* 2 (2002).

essential to the functioning of market economies. Because they are focused on the functioning of the market, they are essentially self serving. Human rights obligations do not fall into that category as history so amply illustrates. For example, the conditions under which goods are produced, is irrelevant to their efficient exchange in a market, assuming, of course, that those producing them have done so within the rules of the game. International trade agreements, for example the agreements negotiated through the World Trade Organisation, which prohibit the creation of national barriers to importing goods because of the conditions or manner in which they were produced, illustrate this fact.[10] The rationale for the rule is concern with the erection of non-tariff barriers to trade. The effect on the other hand is to create a real obstacle to the extra-territorial protection of human right abuses through national legislation. The resulting tension is at the centre of some of the most intense confrontations between advocates and opponents of globalisation.

Some have suggested that the tension between free trade rules and human rights protection of the sort just set out is proof that protection of human rights in a market economy cannot be an obligation of investor owned corporations or their managers. This does not follow, of course, any more than it follows that the tension between profit maximisation and the ethical values captured by the 'rules of the game' required to create a market demonstrate that ethics and profit maximisation are incompatible. Clearly they are not. To the contrary, the one requires the other. What remains to be seen is whether the same might also be true for human rights.

1.2 Corporations and the Law

A fiduciary obligation to shareholders and the obligation to play by the rules of the game are not the only obligations that neo-conservative management theorists have identified and assigned to the modern investor owned corporation. Corporations, it is widely acknowledged, have, in addition to these obligations, an obligation to obey the law. Although not widely explored in the literature, the view embedded in neo-classical theories of the firm, namely, that corporations have an ethical obligation to obey the law, is as firmly grounded as the view that corporations have an obligation to 'play by the rules of the game'. This obligation is not understood by shareholder or profit maximisation theorists as a blind obligation. It is neither different in texture from nor more esoteric than the obligation to obey the law as it applies to individuals.[11] It is what we might describe as an obligation to obey the law, other things being equal. It holds unless there are strong countervailing moral reasons to do otherwise. Further, it is an understanding that is fully consistent with the positions of those who would cast the net of moral obligations of the multinational investor owned corporation much more widely than would those with a narrow or

[10] Under WTO rules, members of the World Trade Organisation cannot legally block the import of goods because of the conditions under which they are produced or manufactured.

[11] This is not to say that it is grounded on the same considerations that apply to individuals. As we shall see, corporations have a particular character is as much as they are legal artefacts. The obligation of corporations to obey the law, as we shall see and as I have argued in 'Business Ethics and Stakeholder Theory' (see note 8), is grounded on their particular relation to the law.

neo-conservative view. It is therefore a third element that might well become a building block for a foundation on which to build a more widely shared view of the obligations of the modern investor owned corporation.

What justification for the view that corporations have an obligation to obey the law is offered by commentators of a neo-conservative persuasion? The answer to this question is not easy to come by in as much as none of the shareholder theorists that advocate a narrow view of the obligations of the modern corporation seem actually to have undertaken to justify it. In this respect, it has some of the characteristics of a dogma. Nonetheless, it is a view that is firmly grounded. The reason lies in the role of the law in creating the modern corporation.

Law is constitutive of corporations just as the basic rules that Friedman points to are constitutive of the market. Just as a market cannot operate efficiently and effectively, if at all, where deception, coercion and fraud are governing factors controlling human interactions, so too corporations cannot exist where human relationships are not law governed.

Law is constitutive of corporations in a manner that is analogous to the way in which rules are constitutive of games. The analogy has two dimensions. First, rules make games possible. They do this in two ways. They define what the game is. And they set the conditions of participation. To understand the game of chess requires knowledge of the rules that make chess the game it is. To play chess requires a willingness to play by the rules. In intensely competitive games, or games, enforcement may be required. But enforcement or enforcement machinery is not a defining feature of games. The rules may be informal, flexible, ephemeral, or spontaneous. However, regardless of the form they take, they are a requirement, that is to say, a defining characteristic.

Rules are constitutive of games in a second sense as well. Rules not only make games possible. They also define the particular character of particular games. What makes chess different from checkers, or hockey from football is not reliance on rules, a characteristic they share. Rather it is the content of the rules that define the nature of specific types of game and set games apart from each other. Rules seen from this perspective will vary from game to game. Rules are what games have in common. It is also what sets them apart. Playing games requires a willingness to play by the rules whatever they are. Playing a specific game requires a willingness to play by the specific rules of that game.

The law plays an analogous role for corporations. Corporations can only come into existence where there is a legal framework that makes their creation a legal possibility. What corporations are and what they can do is defined by law. To use the words of the American jurist, Chief Justice John Marshall, a corporation is ‘an artificial being, invisible, intangible, and existing only in the contemplation of the law’.[12] That is to say, the law is to corporations what rules are to games.

The law makes incorporation possible. That is to say, the law creates a general power of incorporation subject to conditions set out in legislation. The law also

[12] See Thomas Donaldson, *Corporations and Morality* (Englewood Cliffs, NJ: Prentice Hall, 1982) for a development of this theme.

provides fundamental protections for those investing in a modern corporation. Limited liability is a key example. Limited liability ensures that the liabilities of investors in for-profit corporations are limited to money invested. An investor stands to lose whatever is invested but nothing more. The effect and the justification of limited liability is the way it supports and encourages investment.

The power to incorporate and limited liability are conferred by law. In the absence of a legal framework with the required legal provisions, the modern investor owned corporation could not exist. We might refer to these general legal provisions as the macro-legal environment. They create what has been described as an ideal environment for pooling capital and business talent for the purpose of generating profits.[13]

Equally important to corporations is what might be described as the micro-legal environments that govern their operations. These micro-environments take many forms. For resource extraction companies, the micro-legal environment will include a license to operate that determines the conditions that a corporation is legally obligated to respect in developing or extracting a particular resource. The licence to operate that mining companies require sets them apart from other kinds of companies. In the absence of a licence, a mining company is unable to put capital to work with a view to the profitable development of a natural resource.

Patent law is a second example. Patents create intellectual property rights by conferring a monopoly on the use of a patented 'invention' on the patent holder. In the absence of patents, intellectual property rights remain unprotected and the incentive to engage in costly research and innovation is significantly changed.

1.3 Corporations, the Law and the Public Interest

We are now in a position to ask why a society might be persuaded to create the legal framework that made it possible to form corporations and also to facilitate their operation. It is hard to accept that a society or government might be motivated simply and solely by the desire to allow investors to generate private wealth. It is even harder to accept that the legal frameworks required for the existence of corporations and their capacity to produce goods and services of specific types in specific markets are put in place with a view to allowing owners to make as much money as possible without regard to public benefits or harms resulting from their activities.[14]

The history of the modern corporation confirms this view. Codified laws allowing for the creation of organisations whose purpose is to carry on commercial

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[13] In the May 9th, 2002 *Economist* review of David Moss' book entitled *When All Else Fails*, Nicholas Murray Butler, the then president (1911) of Columbia University, is quoted as claiming that the limited liability company outweighed even electricity as the 'the greatest single discovery of modern times'. James Gillies, the founding Dean of York University's business school makes similar claims in his book entitled *Boardroom Renaissance: Power, Morality and Performance in the Modern Corporation* (Toronto: McGraw-Hill Ryerson, 1992) p. 27, for example.

[14] Donaldson (1982) asks a similar question (Chapter Three of *Corporations and Morality*. Englewood Cliffs, NJ: Prentice-Hall) namely why a society would choose to have corporations, noting, among other things, that corporations need legal status.

transactions, have a history going back to the Code of Hammurabi in 2083 B.C.[15] The history of the modern investor owned corporation, however, can be traced to the early modern period of European history with the actual incorporation of business enterprises.[16] James Gillies in *Boardroom Renaissance* provides the following account:

> Monarchs normally granted authority to form (business) organisations in the form of letters patent. The grant usually permitted the creation of a monopoly for the purpose of achieving some specific public goal such as the building of a road or canal. As time went on the public purposes for which charters were granted constantly expanded and, eventually, chartering private corporations became the common way to deal with public needs.[17]

An example is the charter granted to the Governor and Company of Adventurers Trading into Hudson Bay which assigned the company 'the exclusive right to trade and commerce', 'possession of the lands, mines, minerals, timber, fisheries etc.' as well as the 'full power of making laws, ordinances and regulations at pleasure and of revoking them at pleasure.'[18]

Thus the corporations of the early modern period were created with a view to advancing public interests and were assigned responsibility for advancing those interests in their charters. Indeed, incorporation could at this time be said to be an explicit or formal social contract granting the privilege of engaging in profitable business activities in return for the assumption of public responsibilities. The reciprocal nature of the benefits justified the granting of the privileges in question by requiring that they be exercised in accordance with the advancement of public interests or purposes. Were this the end of the story, it would not be difficult to identify, at least in general terms, the social responsibilities of corporations and to begin to build bridges across to human rights obligations.

Unfortunately, it is not the end of the story. The legal framework within which corporations operate underwent significant modifications beginning early in the nineteenth century in response in part to charges of favouritism, corruption and unfair monopolies. As a result, the mercantile idea that corporations should be chartered only where their activities would advance public goods was gradually replaced with a legislated framework requiring only that those wishing to incorporate register their companies following a set of largely formal and non-

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[15] The early history of 'corporations' is set out briefly by James Gillies in *Boardroom Renaissance* Chapter 2 p. 28 ff.

[16] See John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and Their Relation to the Authority of the State* (New York: G.P. Putnam's, 1905) for an historical account of the history and evolution of the modern corporation from its medieval and early modern roots.

[17] *Boardroom Renaissance* (Gillies,1992) p. 29. See also Janet McLean, 'Personality and Public Law Doctrine', *University of Toronto Law Journal* 123 (1999) p. 130; and for a more detailed account, M.J. Horwitz, *The Transformation of American Law 1870-1960* (Oxford: Oxford University Press, 1992) pp. 65ff; and G.S. Alexander, *Commodity and Propriety* (Chicago: University of Chicago Press, 1992).

[18] Quoted by Gillies (1992) p. 30; from Gusatvis Myers, *History of Canadian Wealth* (Chicago: Charles H. Kerr & Company, 1914) p. 39.

demanding bureaucratic procedures.[19] Incorporation thus became a legal right that could be activated with minimal effort. It is these changes, Horwitz claims, that laid the foundations for the emergence of big business or the large modern corporation.[20] They also had the effect of disentangling incorporation from the notion that corporations, in return for the privilege of incorporation, should serve public interests as identified in their charter of incorporation.

What emerged in law to take its place was the view that the primary obligation of corporations was to serve the interests of their shareholders.

1.4 Corporations, Free Markets, Globalisation and the Public Interest

The shift in law from the idea that incorporation was a privilege to the idea that incorporation was a right to be conferred by law on the performance of a set of legal formalities was accompanied by two theories that have exerted a good deal of influence over the evolution of modern understandings of the obligations of the modern corporation. The first is the view that corporations are natural entities whose creation is an expression of the right of association. The second is the view that the public benefits of corporate activities are best left to the operation of Adam Smith's 'invisible hand'.

The thesis that corporations are 'natural entities' emerged as a theme in legal theory and legal interpretation in the nineteenth century to challenge the idea that incorporation was a privilege that the state granted at its own discretion. For our purposes, its importance lies in its hostility to 'the (then) dominant artificial entity view of the corporation as a creature of the state'.[21] Emerging with it was the view that corporations were an expression of the right of freedom of association. Both views gave implicit backing to the view that the primary obligation of corporations was to those who created them. Both views had the effect of encouraging sceptical treatment of the thesis that corporations had an obligation to advance public interests broadly rather than narrowly defined.

Whether the emerging scepticism was well grounded in either case is another matter.[22] It is surely anomalous, at least on cursory inspection, to suggest that corporations are either natural or private entities with rights that others have a general obligation to respect while denying a similar and reciprocal obligation on the

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[19] It is tangentially interesting to note that eliminating bureaucratic discretion and replacing it with non-discretionary procedures and laws is currently advocated as a way of reducing corruption in government administration. It is possible that similar considerations motivated the shift from an approach to incorporation involving the exercise of extensive bureaucratic and political discretion to a largely rule governed system in the nineteenth century.

[20] See Janet McLean, *op. cit.* p. 130, who attributes this view to Horwitz (1992) p. 68.

[21] M.J. Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory,' *The Transformation of American Law 1870-1960* (Oxford: Oxford University Press**,** 1992): 65-108; traces the emergence of this theory. See also Janet McLean's 'Personality and Public Law Doctrine,' *The University of Toronto Law Journal* 123 (1999).

[22] A matter, it must be acknowledged, that has been vigorously debated in a variety of quarters. See for example, Donaldson's 'Challenging Corporate Responsibility,' *Corporations and Morality* (Englewood Cliffs, NJ: Prentice-Hall, 1982).

part of corporations where the rights of others are at stake. However, I propose to set aside that theme, which in any event is explored at some length by others elsewhere.[23]

What is more immediately relevant to this discussion, I suggest, is the observation that the legal frameworks that structure and facilitate the activities of corporations and ensure the efficient operations of markets go well beyond the protection of the right of individuals to assemble and organise. The law provides a legal framework for incorporation, protects the right of investors to share in profits by way of dividends, limits the liability of investors thus opening the door to the pooling of capital without which the modern corporation could not exist, regulates markets to ensure that rules essential to the operation of the market are respected and creates laws, frequently at the request of corporations themselves, whose purpose is to facilitate and encourage profitable economic activity.

A persuasive illustration of all this is the phenomenon of globalisation itself, which, as a variety of commentators have pointed out, is the creature of national public policy decisions by governments and the enforcement by national governments of international treaties, for example, NAFTA (The North American Free Trade Agreement) which now includes Mexico, and the WTO (World Trade Organisation). It is difficult to see how the creation of the extensive national and international legal architecture that frames corporate activity in today's world could be justified on grounds simply of the right of individuals to assemble and do business.[24]

References to 'the invisible hand' of the market have also been inappropriately used to disarm the view that corporations have an obligation to advance public as well as private interests and goods. This is because their purpose is to persuade governments and the public more generally that corporations should be left to pursue the private interests of shareholders, presumably profit maximisation. However, what 'invisible hand' theories in fact do is relocate the focus on public interests from the intentional activities of the directors or managers of corporations to the undirected workings of the market. That is to say, implicit in all 'hidden hand' theories is the view that the best way to ensure that economic activity generates public benefits is to leave business people free to pursue their private interests unfettered by concerns for the social impacts of their activities and let the hidden or invisible hand of the market direct their efforts to the realisation of public benefits.[25]

This view, that the justification for free markets is their unintended, unguided tendency to serve public interests, is one of the most constant themes of neo-

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[23] See for example Donaldson, *Corporations and Morality*, *op. cit.*

[24] This conclusion is reflected in many places including the commentary of business theorists. For example, in his book *The Marketing Imagination* (New York: Free Press, 1986) p. 7. Theodore Levitt remarks that 'if no greater purpose (for corporations or business than amassing profits) can be discerned or justified, business cannot morally justify its existence'. Craig Smith in N.C. Smith & J.A. Quelch, (eds), *Ethics in Marketing* (Richard Irwin, 1992) p. 6 echoes this conclusion and argues that the essence of the debate lies not in whether business has ethical obligations but in determining what those obligations are. See also Donaldson (1982), *op. cit.*

[25] See, for example, Donaldson, *Corporations and Morality* p. 62. See also Amartya Sen's discussion in *Development As Freedom* (New York: Anchor Books, 2001) p. 26.

conservative management theory and one of the dominant neo-conservative justifications of globalisation. It is a theme, furthermore, that has been increasingly and explicitly appealed to as criticisms of globalisation have mounted. The opening paragraph of a the 'Findings of a Commission on Economic Reform in Unequal Latin American Societies' which outlines the policies that have facilitated and encouraged globalisation illustrates the point.[26]

> In the past 15 years the dominant direction of economic policies worldwide has been to reduce barriers to foreign trade and investment, sell state-owned companies to the private sector, and tighten fiscal and monetary practices. In a seminal article in 1990 economist John Williamson labelled this policy package the 'Washington Consensus' ... The policies emphasised stabilisation of prices to return developing countries to a path of sustainable growth and structural adjustment measures to make economies more efficient and competitive.

A recent report financed by nine of the world's largest mining companies and emanating from the Mines and Minerals Sustainable Development Project takes up the same theme. It sets out 'the justification' for these policies in the following way:

> The core argument (is) that liberalising markets and dismantling barriers to trade and investment would cause rapid economic growth. This radical medicine might worsen social dislocation, harm cultural identity, or strain environmental resources, but it was assumed that economic growth would create enough wealth to repair the damage.[27]

The same perspective is captured well in the 'Declaration and Plan of Action' issued by the leaders attending the Summit of the Americas in Quebec City, Canada in the spring of 2001. Included in the Declaration is the following:

> Free and open economies, market access, sustained flows of investment, capital formation, financial stability, appropriate public policies access to technology and human resources development and training are key to reducing poverty and inequalities, raising living standards and promoting sustainable development.

The Declaration goes on to say:

> ... free trade, without subsidies or unfair practices, along with an increasing stream of productive investments and greater economic integration, will promote regional prosperity, thus enabling the raising of the standard of living, the improvement of working conditions of people in the Americas and better protection of the environment.

The common thread throughout these policies, justifications and declarations is the assumption that left to its own devices, the pursuit of private economic interests will generate substantial and public, social and economic benefits. Further, if market activity does not spin off a fair distribution of public benefits, it will at least generate the resources governments require to ensure that the goal of a fair distribution of economic wealth generated by market activity is realised.

What clearly underlies this perspective, then, is both an understanding and an expectation that, if free market economic activity is facilitated and encouraged, substantial economic and social benefits by way of such things as poverty reduction,

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[26] By the Carnegie Endowment for International Peace and the Inter-American Dialogue entitled 'Washington Contentious: Economic Policies for Social Equity in Latin America'.

[27] From the report of the MMSD project entitled 'Breaking New Ground', Chapter One, p. 20.

improved living standards, improved working conditions, and more effective protection of the natural environment will result. What is at stake, then, is not the view that economic activity, however it is organised, should have as one of its goals and justifying features its capacity to contribute to the public good. Rather what is at stake is how best to ensure that economic activity contributes to that end, that is to say, the most efficient and effective way to organise economic activity with a view to generating public benefits. The end, namely the public goods, to which corporate economic activity must contribute if government facilitation and encouragement of that activity is to be justified, is not at issue.[28]

Can we then say that it is an implication of neo-liberal economic theory that corporations themselves have an obligation to contribute to the public good? Given the point that we have now arrived at, the answer would appear to be both yes and no. The legal framework within which corporations pursue their profit making activities is built on 'the assumption that the corporation is the most effective type of organisation for the conduct of business and it is the function of law to facilitate its activities'.[29] Governments are justified in ensuring that the law does have this function to the extent that the conduct of business does contribute directly or indirectly to the realisation of important public goods.

1.5 Corporations and the Idea of a Social Contract

Let us review briefly where the discussion has now led us. If the argument that has brought us to this point is sound, there is an implicit understanding and expectation common to both the broad and the narrow views of the ethical obligations and social responsibilities of corporations. The common understanding is that public support for particular economic policies and the legal frameworks required to implement those policies is grounded on the expectation of public benefits. Free market economic policies are justified by their advocates as the most effective and efficient way of satisfying those expectations.

That public economic policy should serve to advance public interests is therefore not controversial.[30] That being the case, we have yet another building block around which there is wide agreement on which to build an answer to the question to which our discussion is seeking an answer.

This would seem to leave us with three options. First, leave 'the just distribution of wealth' to 'an impersonal and self-executing market system' guided 'as if by an invisible hand'.[31] Second, assign to governments primary responsibility for ensuring

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[28] The concept of a public good or public goods has received a good deal analysis and definition. See for example Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986). The public goods most frequently cited by defences of neo-conservative economic policies are such things as poverty reduction, improved standards of health and safety, particularly in the workplace, improved standards of living, improved standards of health care and so on. It is these kinds of benefits that I shall have in mind in references to the public good or public goods in what follows.

[29] Gillies (1992) p. 36.

[30] Though, of course, claims about the efficacy of neo-liberal economic policies in the pursuit of public goods certainly are.

[31] See Horwitz (1992) p. 66.

that the economic activities of the market contribute in appropriate ways to the public good. Third, accept that globalisation has resulted in changes that now require a collective reallocation of responsibility for ensuring that the public goods, that have been acknowledged to be the goal of public policy and the justification for globalisation, are indeed realised.

History has provided ample evidence for rejecting the first of these options.[32] The impact of globalisation on the capacity of national governments to ensure that the wealth generated by international commerce is fairly shared has cast serious doubt on the second option. Which leaves us with the third to be examined and evaluated. That it is an increasingly popular option is evidenced by its endorsement by governments, powerful multinational corporations and prominent business leaders.[33] Henry Ford's statement to the Harvard Business School in 1969 suggests that some business leaders have been aware for some time of changing public attitudes about the proper allocation of responsibility for ensuring that commercial activity contributes on balance to the public good. In his speech, Ford is quoted as saying:

> The terms of the contract between industry and society are changing... Now we are being asked to accept an obligation to serve a wider range of human values and to accept an obligation to members of the public with whom we have no commercial transactions.[34]

Is this, then, evidence of the existence of a reformulated social contract? And if it is, what does it imply about the human rights obligations of the modern corporation? The answers remain less than clear.

As we have seen, the expectation that the market based activity of corporations will result in public benefits or goods does not in itself and cannot by itself justify the view that corporations have an obligation to contribute intentionally to that end. However, if the public and their governments are persuaded to construct and support the construction of legal systems that facilitate globalisation by explicit or implicit appeals to the thesis that opening markets is the most efficient and effective way of generating public benefits from economic activity and if the expected benefits are not realised, support for the system that facilitates the activity is likely to be affected. Corporations have therefore a significant interest is maintaining confidence in a system of laws that makes their activities possible and profitable.

There is a good deal of evidence that widely shared expectations that globalisation will lead to widely shared public benefits or goods have not been met and can no longer be guaranteed by the 'hidden hand' of the market unregulated or undirected. There is also increasing evidence, as we have seen, that globalisation itself is undermining the capacity of sovereign governments to intervene with laws and regulations designed to ensure that expectations of public benefits from corporate activity are met. That is to say governments would appear to be increasingly constrained by market forces and by a legal architecture designed to

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[32] An option that was in any event rejected even by Adam Smith, as Amartya Sen (1999) points out, *op.cit.*

[33] See for example the MMSD project report referred to in note 33 above.

[34] Quoted by Thomas Donaldson, *Corporations and Morality* p. 36.

facilitate market activity from imposing legal obligations on corporations designed to regulate their conduct in the pursuit of public goods both within their borders and beyond.

If we assume that the option of legally imposed obligations has become seriously constricted because of the development of legal frameworks designed to facilitate and encourage globalisation, the private sector would appear to have only two options. The first is to ignore the widely shared understanding and expectation that economic activity should and will generate public benefits and to accept whatever risks that might entail. Or alternatively, corporations could move to assume some degree of responsibility for ensuring that market based business activity did generate the kind of benefits that would justify continued confidence in globalisation and its legal supports. We might ask additionally, what implications this would have with respect to human rights.

2. CORPORATIONS, HUMAN RIGHTS AND THE PUBLIC GOOD

2.1 Micro-Legal Environments and the Public Good

Although some commentators have undertaken to build an understanding of the obligations of corporations based on the kinds of considerations set out in Part I above, the task is not an easy one, in part because of the very general, system-focused nature of the expectations involved and the diffuse, unfocused nature of the public goods and public interests at issue. One way of dealing with this concern is to shift from a focus on the justification of macro-legal frameworks to what might be described as micro-legal frameworks, that is to say, frameworks defining the legal environments of specific types of commercial activity.

The micro-legal environments in which corporations work are crucially important because they define and frame corporate activities in quite specific ways. They are also environments that are directly linked to on-going public policy debates and legislative initiatives in which corporations frequently find themselves deeply involved. The sums of money spent by for-profit corporations on lobbying governments and funding political parties are just two indications of their importance. Hence it should be easier working at this level to identify understandings and expectations and to build bridges from those understandings and expectations to the protection and advancement of human rights.

The case of patent protection illustrates the possibilities in this regard. Patents that protect property rights to inventions and the products of research are a good example of the impact of a micro-legal environment on corporate activity. Significant for our purposes is the fact that the creation and shaping of patent law has given rise to extensive public debates regarding its purpose and justifiability. By examining this debate we can see the how patent protection is justified by appealing to the value in advancing public goods.

Canadian patent protection legislation says that an invention may be patented if it amounts to 'a new and useful process, machine, manufacture or composition of matter'. Although not explicit, the idea that an invention must be useful suggests social and not just private and personal value. Take for example pharmaceutical research. Patent law characteristically gives pharmaceutical companies exclusive rights to market drugs resulting from their research for a specific period of time. Canadian law, for example, provides patent protection to drugs resulting from research for a basic period of twenty years. The protection is highly valued by pharmaceutical companies and generates very generous profits. Acknowledgment of an understanding of reciprocal public benefits is explicit in the following advertisement that appeared in the March 27, 2002 issue of *The Globe and Mail*, a Canadian newspaper that is sold nationally. The advertisement reads as follows:

Protecting patents for the benefit of Canadians

Bringing a new drug to market takes years of clinical trials. More years applying for regulatory approval. An investment of over $750 million. And above all, foresight – in the form of adequate patent protection from a government committed to innovation.
Fostering a climate in which new medicines can be developed adds to our economy and helps keep our healthcare system moving forward. **At AstraZeneca, that is our commitment to healthcare**. (Emphasis as printed in the advertisement.)

Context adds considerable depth to the point. In Canada, healthcare is to a large extent publicly funded. So to make a commitment to healthcare is to make a commitment to something that is clearly recognized and would be understood by readers to be a commitment to advance a public good.

The message communicated by this advertisement is clearly not an anomaly or an example of a drug company moving aggressively into a leadership position. For example, as this paper is being written (May, 2002), the Supreme Court of Canada is considering a request for a patent on the Harvard University Oncomouse, a mouse genetically engineered to be susceptible to cancer. One of the briefs presented to the court points to the research incentive that patent protection provides. Implicit in this argument is an appeal to the social benefits that can be expected to follow from patent protection. Other briefs to the Supreme Court point to the social costs that would follow a decision to issue a patent and its implications for a society's understanding of the natural world.[35]

2.2 Micro-Legal Environments, the Public Good and Human Rights

Although there are sharp differences about whether patent protection is essential to or the most effective way of enhancing medical research, there can be little doubt that it is seen to be essential by pharmaceutical companies engaged in the search for new drugs. Neither can there be any question that patent protection has shaped and

[35] For example, the brief presented by William Samson, a lawyer for a broad coalition of Canadian churches.

continues to shape medical research and the activities of pharmaceutical companies in significant ways. Not surprisingly, therefore, pharmaceutical companies engaged in research have lobbied governments heavily to achieve the desired patent protection. They have supported their position by acknowledging the expectation of public benefits and by committing to assist in realising those benefits.

Can we build a bridge from a shared understanding that in return for patent protection, a pharmaceutical company like AstraZeneca has an obligation to ensure public benefits by way of improved healthcare result from its commercial activities, to an obligation to respect human rights?

The fundamental benefit conferred by the protection of human rights is identified in Article 2 of the Universal Declaration as freedom from discrimination on grounds 'such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Discrimination typically blocks those discriminated against from enjoying access to things of value that would otherwise be available to them. That would include access to the benefits of the pharmaceutical products of medical research directly, or indirectly via access to medical services like hospitals. If the access to patented drugs was restricted through systematic discrimination, could the products of the pharmaceutical companies whose activities were protected and facilitated by patent laws be said to be enhancing public healthcare, as promised for example by AstraZeneca in the advertisement reproduced above?

The issue is broadened if we include 'the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment' (Article 23). These rights are directly related to the ability to participate in the economy and to reap the economic benefits of so doing. Where the access of people to medical treatment requires the purchase of drugs, job related discrimination is an effective block to the capacity to access the benefits of patented drug therapies sold at market prices. The public benefit of medical research is thus denied to those members of the public who are the object of discrimination. The same is true of the economic benefits of medical research related to job creation. An economy that creates a variety of job opportunities for members of the public is generating a public good. This is one of the reasons that legal environments encouraging medical research through patent protection among other things are created and justified by the relevant governments.[36] However, as access to the job opportunities are restricted or blocked, the public value of the activity at least in that respect is attenuated. The status of a benefit as a public good, then, is a function of public access to that good. Securing respect for human rights in modern economies is crucially important if public access to public goods is to be ensured.

[36] It was a major argument used by the Canadian federal government to extend patent protection to 20 years and thus block the ability of generic manufacturers to produce generic substitutes at substantially lower prices after a much shorter period of time. The burden of the extension of the period of protection, it was recognized, would be carried by taxpayers. The benefits in research investment in Canada and particularly in Quebec, a province that has traditionally experienced unemployment at higher levels than the Canadian average, it was argued publicly, justified in part, at least, the required changes to the law.

It follows, I suggest, that a pharmaceutical company that seeks to justify patent protection both by reference to the public benefits expected to follow and by a commitment to help ensure the realisation of those public benefits, is, by implication, putting itself under an obligation to respect human rights in its own operations and to advance respect for the protection of human rights where it is able to do so.

2.3 Generalising the Argument

Respect for human rights is intrinsically valuable for those so treated. Social interaction governed by human rights principles communicates respect that in turn elevates the quality of life of those affected. This impact is independent of other impacts or benefits. It has value regardless of other aspects of one's social status, job, or personal attributes and talents. Equally, being discriminated against generates intrinsic harms. Practices that identify some people as morally inferior to others by virtue of some arbitrarily selected characteristic are degrading not just because of their consequences but because of the message they communicate, namely: 'You don't count!'; 'You are inferior!'; 'You do not belong where we belong!'; 'you are not fully human!'. The fact that there is not a universal consensus on the content and range of principles to which this applies is beside the point. What is crucial is that the abuse of human rights communicates messages of this sort.

Respect for human rights also confers instrumental goods. It means that discrimination does not block individuals and groups from access to the economic benefits of market economies on grounds unrelated to their ability to participate in, contribute to, and share benefits arising from, market transactions.

There is a third feature of human rights that is significant in this context. They are by their nature universal in scope. To respect human rights is therefore to confer a good that is by its nature inherently public. It is also to put in place an instrument for ensuring that social and economic benefits generated by economic activity are publicly accessible and therefore acquire the character of public goods.

It follows that human rights have a constitutive role to play in ensuring that the expectation of public benefits resulting from the economic activity of corporations are realised as **public** benefits or goods. A commitment to respect and advance respect for human rights on the part of corporations doing business in market economies can therefore be seen to be a constitutive element of a public corporate commitment to work toward ensuring that public benefits flow from its economic activities.

2.4 Human Rights and International and Corporate Codes of Ethics

Is there any evidence of this 'reality' impacting the understanding multinational corporations have of their obligations? Ethics codes are worth examining from this perspective.

I suggested at the beginning of this section that micro-legal environments rather than macro-legal environments were more likely to yield relatively explicit

examples of the emergence of shared public/corporate understandings of the obligations of corporations. Debates over the justification of patent laws and decisions to grant a 'licence to operate' are on-going. The benefits that justify creating these kinds of micro-legal environments so important to the pursuit of particular kinds of economic activity of value to corporations are therefore more likely to be discussed and debated as laws are created and amended. Furthermore, corporations are more easily drawn into discussions of their role in ensuring that their economic activity generates public benefits when debates of this kind take place. Those environments are also more likely to reveal the strategic value of acknowledging the importance of realising those benefits. And they are also more likely to reveal the strategic value of making a commitment to assist in bringing them about.

The macro-legal environment that determines what corporations are and what they can do is more general. It is more deeply entrenched legally and institutionally and therefore less subject to review and reformulation.[37] The modern corporation has also become a common place, a recognised engine of economic growth. In recent years, however, the legitimacy of the modern corporation has been subjected to increasingly detailed public scrutiny and debate. Concerns about environment impacts, social disruption and the very uneven distribution of economic wealth has led to growing concerns about trade liberalisation and its justification.

Faced with mounting criticism, both governments and a growing number of multinational corporations have felt compelled to set out in more explicit terms the obligations of governments on the one hand and corporations on the other to ensure that the benefits of globalisation are more fairly shared. Indicative of this development is the phenomenon of corporate and industry-wide codes of ethics.

Codes of ethics, setting out understandings of the obligations of corporations, have emanated in general terms from one or a combination of three sources, government, the corporate sector and the voluntary, not for-profit or NGO sector. What is remarkable about the codes that have emerged is their agreement about two things central to our discussion. First is agreement either explicit or implied by the provisions of the codes themselves that corporations should understand themselves to have an obligation to ensure that their economic activity contributes to the public good. Second is the increasingly widely shared tripartite understanding that to do so, corporations should accept that they have an obligation to respect and advance respect for human rights.

A few examples will help to illustrate these two observations. The International Code of Ethics for Canadian Business, drawn up by a group of leading Canadian multinational corporations with a view to facilitating and assisting individual (Canadian) firms in the development of their policies and practices, asserts that:

> Canadian business has a global presence that is recognised by all stakeholders as economically rewarding to all parties, ... and that facilitates economic, human resources and community development ...

[37] The contours of corporate law, for example, have remained relatively stable for most of the past century and are very resistant to change.

The code proposes that Canadian companies doing business outside of Canada should:

> • support and promote the protection of international human rights within (their) sphere of influence; and
>
> • not be complicit in human rights abuses.

While the OECD 'Guidelines for Multinational Enterprises', drawn up by the governments involved do not explicitly identify a corporate obligation to contribute to the public welfare of the communities in which the operate, they do quite explicitly call on multinational enterprises to '(r)espect the human rights of those affected by their activities ...' and '(d)evelop and apply effective self regulatory systems, practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.'

The Code of Ethics on International Business for Christians, Muslims and Jews identifies four core values that business should respect: justice, mutual respect, stewardship and honesty and goes on to propose that:

> Business has a responsibility to future generations to improve the quality of goods and services, not to degrade the natural environment in which it operates and seek to enrich the lives of those who work within it.

Although the codes that have been drawn up by private sector, government or voluntary sector organisations vary a great deal, they generally express an understanding that business activity should bring with it public benefits and that those benefits should include respect for and the protection of human rights.[38]

Virtually all large multinational corporations today have codes of ethics. While those codes do not reflect the same consensus with respect to human rights found in international and voluntary sector codes, a significant number acknowledge an obligation to ensure that their activities benefit the communities and societies in which they operate as well as an obligation to respect and advance respect for human rights within their own operations and their spheres of influence. Companies that have codes that include explicit commitments of this kind include: Royal Dutch Shell, Placer Dome, the Body Shop, Levi Strauss, Nike, Rebook, Nestle, Alcan Aluminium, Nortel and Motorola.[39]

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[38] For a recent analysis of the content of corporate codes of ethics, see document on the OECD web site entitled 'Codes of Corporate conduct – An Expanded Review of their Contents' by the Working Party of the Trade Committee. (TD/TC/WP(99)56/Final) (Accessed 16 January 2004)

[39] 'Voluntary Codes: Principles, Standards and Resources' is a resource tool developed by a Social Science and Humanities (SSHRC) funded research project entitled 'Voluntary Codes: The Regulatory Norms of a Globalized Society?'. This resource can be found at the web site of the Business Ethics Program, Schulich School of Business, York University, Canada, http://www.schulich.yorku.ca/ssb-extra/businessethics.nsf (accessed 16 January 2004).

3. PROBLEMS, IMPLICATIONS AND CONCLUSIONS

Let us review briefly where the argument has led us. Corporations, I have suggested, are legal artefacts whose nature and character are shaped in numerous ways by the laws that frame their activities. The relationship between corporations and the law is an active one which is mediated by an expectation and understanding, sometimes explicit, sometimes implicit, that the purpose of the law as it relates to corporations is to create a legal environment in which corporations can pursue their commercial activities efficiently and effectively in the expectation and with the understanding that the commercial activities of corporations will contribute both directly and indirectly to the public good. We have seen that such an understanding is entirely consistent with a division of responsibilities that locates responsibility for ensuring the understanding is respected and the public expectations realised largely in the hands of government as indeed seems to have been the case for much of the second half of the last century.[40] Furthermore, the understanding is fully consistent with the need to rearticulate and reallocate responsibilities for ensuring that public expectations are realised in the event that the capacity and/or inclination of governments to ensure that the public expectation of reciprocal benefits is realised should decline. Finally, review of the understanding and the expectations on which it is based indicates that, under conditions of globalisation, respect for and a commitment to advance respect for human rights is both constitutive of the public good to which corporations have an obligation to contribute and empirically necessary if public goods are to result from commercial corporate activity in global markets.

There are a number of concerns to which these conclusions give rise. In what follows, I shall address three of the most pressing of those concerns.

First, the macro- and micro-legal environments that shape the nature and character of the modern corporation are generated by constituent elements of legal and political systems in response to the political dynamics and imperatives of national or sub-national societies or peoples. How, it might be asked, could understandings between corporations and the societies that create the legal structures upon which they rely generate global obligations, that is to say, the obligation to contribute public goods to publics that had no part in the creation of the legal frameworks in question? Corporations are headquartered in specific countries but operate globally. Their existence as corporations is a function of the laws of the countries in which they are incorporated. Much of what they do is out of the legal reach of their country of origin which is the source of much of the problem in the first place. How then can moral obligations outreach the legal systems that give rise to the moral obligations?

There are a number of directions from which this worry can be addressed. Moral obligations typically outreach legal obligations in many situations. Furthermore, while the stretch here might appear to be a very substantial one, it should be

[40] As proposed in the first part of this paper and note 1.

remembered that global corporate activity depends quite directly on the existence of effective legal systems wherever a corporation chooses to do business. Commerce, wherever it takes place, relies on the existence of laws that ensure that the market can operate, laws that protect private property, criminalise theft, enforce contracts and so on. When that legal framework is seriously undermined, the capacity of corporations to do business is seriously impaired. The disintegration of the Argentinian economy taking place as this chapter is being written (May 2002), for example, is certainly at least in part a result of the disintegration of legal frameworks governing the activity of financial institutions which in turn has undermined the capacity of corporations, individuals and the government to engage in commercial activities. It might well be argued that the disintegration of the legal frameworks governing the operation of Argentina's financial institutions was intimately connected to a widening belief that the country's financial institutions were undermining rather than enhancing public interests.

Be that as it may, however, the crucial point to be made here has to do with the nature of human rights themselves. Human rights are, after all, **human** rights. A moral commitment to respect human rights in one jurisdiction is in effect a commitment to respect human rights *simpliciter*. Human rights are universal in their scope. Companies that make a commitment to respect human rights in their Canadian operations, for example, but explicitly ignore human rights when they do business where human rights are not protected or respected as a matter of course, are being hypocritical.[41]

This response, however, triggers a second worry. Given the profit seeking nature of the modern investor owned multinational corporation, is it not likely that any actual public commitment to human rights will be motivated not by a moral commitment but by a recognition of the instrumental or pragmatic value of a public commitment? And is this not likely to undermine confidence in public pronouncements whether in the form of a code of ethics espousing a commitment to respect human rights or in some other form?

There is, however, a response. Understanding the nature and reliability of public corporate commitments to respect specific moral standards like human rights standards has two important dimensions. First, it is significant that respecting and encouraging respect for human rights is not just a cost for corporations as they pursue their business objectives. They also play a part in creating an environment where the efficient and effective corporate pursuit of profitability is also enhanced. Where human rights are respected, business has access to human resources that would otherwise not be available, potential and actual employees are encouraged to develop skills and knowledge for their own benefit and that of employers, and working conditions are created that are conducive to labour productivity.[42] Where

[41] This was a fundamental element of arguments urging divestment on the part of multinational corporations headquartered in countries like Canada and the United States who had operations in South Africa under conditions of apartheid.

[42] Michael Trebilcock (2002) comments for example that '(d)ata show almost a one-to-one relationship between labour productivity and labour costs in manufacturing in a wide range of developed and

human rights are respected, benefits are shared in ways that can and often do build employee morale. Respect for human rights can also contribute to good community relations, reduce exposure to security and reputational risks, and help to build corporate reputation. That is to say, respect for human rights can have significant instrumental or pragmatic value.

The instrumental value that can flow from a commitment to respect human rights, can also be the source of worry, however. For if respect for human rights is sometimes advantageous for profit seeking corporations, it can also be an impediment. Environments where human rights are not respected can offer strategic advantages, lower wage rates for example. Respecting human rights can confer disadvantages as well as advantages. When this happens, corporations motivated solely by instrumental or pragmatic considerations may very well lose their appetite for high standards of business conduct.

This issue of motivation cannot be ignored. Modern investor owned corporations are profit seekers. They do have fiduciary obligations to their shareholders. And managers are judged on their ability to increase profit margins and maximise share value. Further, exactly these kinds of consideration do play a significant role in the gradual acknowledgment on the part of corporations of obligations to contribute public benefits or more specifically to respect and encourage respect for human rights. It is not uncommon to find high principle defended on purely pragmatic grounds. For example, Gerald Holden, global head of mining and metals for Barclay's Capital in London, England, the biggest financier of mining projects in the world attributes the willingness to commit publicly to high standards of ethical behaviour, including respect for human rights, to a desire to avoid what he describes as 'reputational risk'. The corporate world has discovered that ignoring such things as human rights can carry substantial costs. Avoiding those costs then becomes the justification for undertaking the commitment.[43]

Motivation does impact behaviour. It leads to an obvious and much asked question. If the concern is reputational risk, is the commitment anything more than good public relations? It is not insignificant, for example, that Shell Oil spent considerably more communicating its change of heart following the execution of the Ogoni seven in Nigeria than it did addressing the environmental, social and economic issues that led to the political action that led in turn to the executions in the first place.[44]

The real issue here is whether corporations are likely to honour commitments where risk reduction or enhanced profitability is unlikely to follow? The record in this respect is not encouraging. This, of course, is why many critics have argued that self regulation is no substitute for legal regulation.

This is a large and important issue. In response to it, we can say briefly only three things. Unmonitored corporate commitments are unlikely to result in high

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developing countries' and references Dani Rodrik, *Has Globalisation Gone Too Far?* (Washington, D.C.: Institute for International Economics, 1997).

[43] *Ibid.*

[44] This issues here are described in detail by Richard Boele *et al.* in a case study entitled 'Shell, Nigeria and the Ogoni: A Study in Unsustainable Development', *Sustainable Development* 9 pp. 74-86.

standards of corporate conduct where strategic analysis suggests that profits and ethics are likely to diverge, something that corporate behaviour suggests is all too common. But second, it is not clear that legislation or monitoring by governments will necessarily make a significant differences for all the reasons canvassed earlier. That suggests that serious changes in corporate respect for high standards of ethical conduct, including support for the protection and advancement of human rights, are unlikely in the absence of independent third party monitoring supported by the involvement of voluntary sector organisations.

The question of implementation, however, is another story. What has been at issue throughout this discussion is one of obligation and not one of performance. Bringing performance into line with obligations is obviously crucially important. But determining the existence of obligations is a necessary first step. It is that first step that has been the preoccupation of this paper. If the argument is persuasive, the modern corporation under conditions of globalisation does have an obligation to respect and promote respect for human rights. All of which leaves one last substantial worry. What exactly is required of corporations operating in global markets in fulfilling their obligations to respect and encourage respect for human rights. Again the question is not easily answered. However, it is a question, fortunately, that other contributions to this volume of essays do address. I leave to the reader the task of assessing the effectiveness of those answers.

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CHAPTER SEVEN

Business and Human Rights

The idea that businesses have obligations corresponding to human rights is relatively new, still controversial, and involves some revision of the thinking that is expressed in the central instruments of international human rights law. Despite all of that, might the idea be defensible? I shall claim that it is. I shall claim that businesses are in a position to protect and promote human rights in places where human rights are routinely violated, and that where the violations are taking place close to a business's operations, and are known to be violations of the most basic rights, some sort of intervention is obligatory. I shall also claim that when businesses do intervene, they do not turn into non-businesses, forsaking commercial purposes and becoming full-time warriors in a moral crusade. Speaking up against forced labour or brutality on the part of the local military is not incompatible with manufacturing or with carrying out a construction contract. On the other hand, I concede that when businesses do promote or protect human rights, they sometimes fill a vacancy wrongly left by governments, and often by electorates. This raises the question of whether businesses have a role in promoting human rights only because states are not fulfilling *their* undoubted obligations. My answer to this tricky question is going to be that businesses can and ought to play a role anyway, but I fear that the accompanying argument will be less than conclusive.

1

The claim that businesses have obligations to protect and promote human rights is controversial, but the claim that they have opportunities to do so is not. Within their offices or factories, at their oil drilling platforms and pipelines or mines, on their construction sites, they are able to introduce standards of safety, working conditions, job security, and so on that are much higher than those that are typical of the countries in which they operate. Opportunities beyond their own facilities also exist. Businesses, especially big businesses, are influential, and governments that rely on their investment for economic development, or even for corrupt personal enrichment, will not be unwilling to listen to what businesses have to say about a wide range of topics, including human rights. Whether a company is equipped to make effective, well-informed, representations is another matter. And there is the question of whether the costs of equipping itself in this way are costs that can be

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 129–143.

justified to shareholders and other stakeholders. This question is particularly pressing where the option of not getting involved is at first sight not only far cheaper and simpler, but where it can also be redescribed as paying attention to a company's real or primary objectives, namely producing things to sell at a profit.

I believe that when businesses have the opportunity to promote or protect human rights where they operate, they are often also obliged to do so. For example, they are obliged to do so where the rights being violated are very basic, and the violations are systematic. The objection that companies do not have obligations of this kind because they have only commercial purposes in these countries, and that human rights is not their business, is rebuttable. It is true that companies do not invest in countries with human rights violations *in order* to improve human rights. It is true, but irrelevant. Consider the parallel claim that tourists travelling by car in a certain country are not in that country in order to help road accident victims. This can be true without its being true that tourists have no business helping at the scene of a road accident. Even the fact that the country the tourists are visiting has emergency services charged with seeing to accident victims does not mean that the tourists should drive by without a thought if they are in a position to benefit the accident victims. And the argument for their stopping and helping is all the stronger if the country has no emergency services, and there is no prospect of an ambulance arriving to take the victims to hospital. In some places, companies are like tourists who find themselves in a position to help in an emergency. The urgency of the needs of the victims of the emergency, and the relative scarcity of alternative help, puts claims on the resources of the company, even if the company, like a passing tourist, is in no way responsible for the emergency.

Now the analogy between the investing company finding itself at the scene of human rights abuses and the tourist confronted with the victims of the traffic accident is rough, but the dissimilarities between companies and tourists tend to *add* weight to the argument for company involvement in human rights. Investing companies, when foreign to the countries that they invest in, are less like tourists than medium-term, or long-term, or permanent, residents. What goes on in the country has more to do with them than with people who are quickly passing through. The human rights abuses that companies confront do not crop up suddenly and unexpectedly, like the road accident: they often predate the entry of the company and are known in advance to be features of local life. Again, they are not features of life which, like the accident on the road, can pass unnoticed if one's eyes are averted at the right moment, or that can be kept at a distance by driving away. The company may be tied to the place where human rights abuses are taking place, and it may depend on the services or good will of those who are guilty of the abuses. Where they consist of abuses by the military of people in places close to the operations of the investing company, they are likely to weigh anyhow in a company's deliberations about the safety and well-being of the people *it* is introducing to the area. An oil or mining company moving into a site of tensions between local people and a perhaps ill-disciplined or corrupt military force will self-interestedly ask whether it might become entangled itself and whether there are risks to its employees, for example, of being kidnapped as a result. The company may not

choose to look beneath the surface of the tensions and ask whether violations of rights are at their source, but it cannot ignore the tensions themselves, and this may be a way in which something not initially registered as a human rights problem nevertheless imposes itself on a company's attention.

If the tensions weigh at all in a decision to go into a country or in a deliberation about the costs of staying, and if human rights abuses are in fact at the source of the tensions, then looking beneath the surface and giving weight to human rights abuses may be an obligation that companies have not to local people but to the pre-existing employees whom they are sending in. These are the people who run the risk not only of kidnap, but of dirty hands when they are asked to make pay-offs to the local military or when they turn a blind eye to their abuses in return for protection against sabotage. If military abuses consist of forced labour or imprisonment or torture or murder, then these may well be far too gross for employees to wish away or pretend not to exist, and they may wish to leave the company rather than put up with these things in its service. In short, if a company can afford to operate in a setting of human rights abuses at all, it may be able to afford to do so only to the extent that steps are taken, by itself or by other bodies or by itself and other bodies, to *end* those abuses. The tourists who are faced with the road accident do not necessarily have a self-interested reason, let alone an urgent self-interested reason, to help the accident victims. But companies may have an urgent self-interested reason for improving a local human rights situation.

Where the risks of going into a country are known in advance to be high, should an investing company go in at all? This is a hard question to answer in the abstract. The imposition of sanctions by human rights-respecting countries or the UN is normally a good enough reason for companies not to *start* doing business there, but what about companies that are already present and who face big losses if they pull out? And what about countries where human rights abuses are known to take place, but sanctions have not been imposed? Investment in China is often thought to be objectionable on human rights grounds, and yet China is far from being diplomatically or commercially isolated. Human rights-respecting countries routinely encourage trade with China, and the market opportunities there are so vast, that countries and companies would probably be willing to suffer international opprobrium rather than lose them. Where companies have long been present in countries whose human rights record suddenly declines, and the costs of disinvestment are high, withdrawal may be morally optional rather than compulsory. Where the company is not allowing its facilities to be used for suppression and is not bolstering the local government with pay-offs and financial support, it may sometimes be morally permissible for it to stay, so long as it puts all the pressure it can on the government to change its ways. Merely staying in and keeping quiet is not enough, even if the company is far from aiding and abetting human rights abuses, and none are taking place close to its operations.

It would be a mistake to suppose that all companies investing in countries with human rights abuses run the same moral risks. The greatest risks are probably run by companies in extractive industries, whose assets lie in the ground or under the sea and even in ideal conditions take years and years to extract. When they lie in the

territory of a rogue jurisdiction or a country undergoing civil war, the chances of a company's recovering its investment and emerging after decades with its reputation intact are quite slight. It is different for a company that maintains short-term contracts, or one that can service a dubious country from a base in a more salubrious setting. An airline that flies to a notorious capital but that operates through local agents there, is less entrenched and at less risk than a construction company building roads or telecommunications links that will make ruthless military rule more effective. Again, a company operating in a country with great poverty or illness and virtually no transportation or health services as a result of corruption and manipulated elections, is much more likely to have resources that are essential for relieving great need, than a company operating in a more developed country in which only one political party is legal. Both companies operate in countries with poor human rights standards, but the likely consequences of poor human rights standards are worse in one place rather than another.

In distinguishing between the area in which interventions by companies seem optional rather than obligatory, two criteria are naturally applied. One, which I have already alluded to, is the criterion of urgency. The more urgent the needs of people are – the more they depend on certain things to stay alive or free from intense pain or fear – the more the urgency counts as a reason for *anyone* who can to help them to make whatever resources there are available. It is urgency that seems to justify governments in commandeering, for example, ships or food stocks or lands that are privately held in a national emergency, and it is urgency, too, that would excuse an individual's breaking into private property to get to a telephone to arrange for life-threatening rescue. In the same way, a company airstrip might be pressed into service in a humanitarian emergency, even if the airstrip has up to then only been maintained for the purpose of evacuating company employees in an emergency, or as a convenience for visiting executives who would otherwise have a time-consuming journey by land. The principle of urgency also applies if it comes to the company's attention that, on their doorstep, people's lives are being threatened, or their labour or land seized at the whim of the local military. Urgency may not justify an armed intervention by employees of the company: it may only justify representations to the local police or the national government or the military authorities, or perhaps the diplomatic representatives of the home country of the company. But urgency does justify anyone, and so people running companies, in making reasonable efforts to address the needs of people.

Urgency is one criterion; direct involvement is another. A company that can foresee that its operations will involve the displacement of people or the disruption of a local way of life, is responsible for a certain kind of loss. Even if the loss kills no-one or forces no one to do anything, so that it does not make a claim on resources on the basis of urgency, it can still call for redress because it is brought about by the company, and because the costs to local people of displacement or disruption can be high. A company that is directly involved in creating disruption has an obligation to minimise the costs to local people of the disruption; but has it got obligations, too, if it is operating in an area where other companies, perhaps other companies in the same industry, are causing disruption and those companies do *not* have the same

scruples? Has it got, in that case, an obligation to try to influence those other companies to minimise the disruption *they* are directly causing? The further the company is from direct involvement, the weaker is the claim that it has an obligation. But even if it has no *obligation* to persuade other companies to minimise disruption, it has a reason to do so, the very same reason that weighs with the company in persuading *itself* to minimise disruption in its own activities.

Connected to the criterion of direct involvement is that of relevance. A car-rental company operating in a one-party dictatorship lives with human rights violations, namely institutional violations of certain civil and political rights – but its car rental operations may or may not contribute to those violations. If the company offers its services only to whites in a country in which there are apartheid laws, it might be complicit in human rights abuses, and it would be complicit, too, if its contributions to the ruling party kept or helped to keep multi-party democracy from being established. But if it is not complicit in those ways, and operates otherwise legally and blamelessly, has it the same sort of reason to try to lobby for multi-party democracy as an oil company has to persuade other companies in its industry to minimise disruption to communities living near its oil wells? Intuitively, it seems to have a weaker reason to intervene, and perhaps no full-fledged obligation at all. On the other hand, a company operating private hospitals in a country with very uneven access to medical care might have a natural interest in taking a public stand on equal rights to health care in the same environment. The right has an obvious relevance to its business.

Though the criteria of direct involvement and relevance suggest that different companies have different full-scale obligations, these criteria do not always get companies off the hook even where they create *no* full-scale obligations. To go back to the case of the oil company with scruples about its local community and environment, although it may not do anything wrong if it refrains from lobbying other members of its industry to raise their standards in relation to these things, it is unclear that it must cost much – either in money or in prestige or in good relations between members of the same industry – to make the *case* for higher standards. Differently, companies are sometimes in a position to influence governments even in human rights not immediately relevant to their operations, because these companies are one of the few corporate bodies from the human rights-respecting world that is willing to *speak* to the offending government. Here the *pariah* effect can weaken the importance of relevance. I shall return to this point when I discuss a real-life case of which I have direct experience.

2

So far, when I have spoken of the obligations of companies, I have meant the *moral* obligations of companies in relation to, for example, health, or torture, or forced labour. Companies have obligations to help those whose lives or liberty are under serious threat in their vicinity, because some of these threats put people in urgent and undeniable need of help from *anyone* who can help, and companies in their vicinity sometimes can. Is it important to the argument I have been making to talk

about a *human right* to be spared death, forced labour and so on, as opposed to talking about a moral obligation to respond to severe harms? Is it important, accordingly, for the relevant obligations of companies to be characterised as human rights obligations? The argument I have been making fits into three different debates, and only one of these demands a pointed use of the concept of human rights. First, there is a debate within business and within the academic business ethics literature over whether companies have moral obligations grounded on the requirements of *social* justice, indeed any moral obligations not derived from ownership and contractual commitments.[1] Second, there is a debate among theorists and practitioners of human rights about whether powerful and rich organisations other than states can be asked or required to share the burden of discharging the human rights obligations of states.[2] Third, there is a debate, engaged in by philosophers but occasionally also the public, over the scope of human rights.[3] It is to this debate that pointed talk of human rights obligations on business is particularly relevant. Human rights obligations are a sub-class of moral obligations. The defining marks of this sub-class are disputed, and it is unlikely that plausible defining marks will allow all of the rights that are mooted by the international human rights covenants to count on reflection as human rights. In particular, some of the human rights obligations that human rights campaigners say *businesses* have, such as the obligation not to disrupt communities, may not correspond to something that is uncontroversially a human right. That is, the supposed right of a community to be spared displacement or disruption may not belong to a unitary and philosophically defensible collection of human rights. So to say that a multinational oil company has a human rights obligation not to disrupt a community that lives near an oil field may be disputable three times over. First, it asserts the existence of a *moral obligation* on a business that is arguably outside the area where businesses have moral obligations. Second, it implies the existence of a *human right* to be spared disruption that communities arguably don't have because no-one has such a human right. And third, it asserts the existence of a human right that, even if it exists, may correspond to no human rights duty that a *business* has.

My argument in the last section established that there *are* moral obligations of businesses grounded on social justice – the obligation to try and stop forced labour, for example – and that the moral obligations of business extend beyond those arising from incorporation and contractual commitments. Some of the things that companies

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[1] For the view that the moral responsibilities of business are narrow, see Milton Friedman, 'The Social Responsibility of a Business is to Increase its Profits', reprinted in T. Beuchamp and N. Bowie, (eds), *Ethical Theory and Business*. 5th Ed. (New York: Prentice Hall, 1997), pp. 56-61. See also E. Sternberg, *Just Business* (New York: Little Brown, 1994) and E. Vallance, B*usiness Ethics* (Cambridge: Cambridge University Press, 1995). On the other side, see, for example, R.E. Freeman, 'The Stakeholder Theory of the Modern Corporation' in Beauchamp and Bowie (eds). *op. ci*t., pp. 67-75; N. Bowie, *Business Ethics: a Kantian Approach* (Oxford: Blackwell, 1998); and T. Sorell and J. Hendry, *Business Ethics* (Oxford: Butterworth-Heinemann, 1994*)*.

[2] See the Report of the International Council on Human Rights, 'Business Wrongs and Rights: Human Rights and the Developing Legal Obligations of Companies' (Geneva, 2001) and the pamphlet issued by Amnesty International and the Prince of Wales Business Leaders Forum, *Human Rights: Is it any of your Business?* (London, 2000).

[3] See in this volume the papers by James Griffin and David Archard.

have moral obligations to do, such as to bring their influence to bear to stop military brutality or forced labour on its doorstep, correspond to things that people have human rights to be spared. It does not follow that the relevant obligations of companies are human rights obligations. Companies may have moral obligations to stop things that states have human rights obligations to stop, without companies themselves having human rights obligations to stop those things. States have primary responsibility or perhaps sole responsibility for keeping armed forces under control, and this is a human rights responsibility, because armed forces that are out of control pose a great threat to societies in which each is able freely to lead his own life, and human rights are rights to those effectively creatable conditions which permit one freely to live one's life. It is because a state has a human rights obligation to keep the armed forces under control that it has a duty to prevent military brutality. The obligation on *companies* to bring their influence to bear to stop military brutality in their locality certainly complements and even resembles the state's human rights obligation to stop the same brutality, but it is not part of a general obligation to enable each person in the relevant society freely to lead his life, and so it may not be strictly a human rights obligation itself. It is nevertheless a genuine obligation directed against the same harm as a human rights obligation is directed against, and establishing that such an obligation exists may be what people are trying to establish who say that companies have human rights obligations. To this extent, then, the argument of the last section is an argument to the conclusion that the moral obligations of businesses it mentions are human rights obligations.

The argument concentrates on obligations that businesses have to prevent kinds of harm that human rights obligations are supposed to prevent. And to put the reality of some of these obligations entirely beyond doubt, I have been concentrating on cases where the relevant harm – the loss of life or injury through brutality, rather than, for example, mere disruption – is of a kind everyone has a reason to prevent. The existence or high risk of such a harm establishes a duty on everyone who can, to try and help, and businesses may be able to succeed in helping, with, what is more, relatively little risk or cost to themselves. The relevant right to be spared harm may not always be a *human* right, because being spared that harm may not be necessary to being enabled to lead one's own life in a society. But even when the right to be spared harm is not a human right, harm or pain always generates an objective reason for it to to be cut short,[4] and this reason is a reason for everyone, and so for people in businesses, to act to cut it short. It is this sort of reason – which sometimes amounts to a human rights obligation and sometimes doesn't – which I tried in the last section to establish businesses have.

Human rights obligations, however, are often understood specifically as legal obligations under certain pieces of international and domestic law, and when one asks whether companies are *legally* obliged to do any of the things I have so far suggested they are morally obliged to do, the answer is probably 'No', or is very often 'No'. The principal human rights instruments, the ones that can plausibly be

[4] For the relevant notion of an objective reason, see Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986), pp. 153-163.

claimed to give content to the concept of human rights, are either not legally binding on anyone or are binding on states who agree to be bound by them. The Universal Declaration of Human Rights (1948) is not legally binding except occasionally as international customary law; the two Covenants associated with it – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both 1966) – *are* binding on the countries who sign up to them in their entirety, but not all countries have done so, and some have signed up to some clauses of the covenants but have opted out of others. It is true that the United Nations Charter, Article 55, commits all members of the UN to promote universal respect for human rights, but this is not supposed to make accession to the Covenants superfluous, and so it is a question what states are committed to by Article 55 when they join the United Nations Organisation. Companies are not parties to the Covenants *or* to the UN Charter, and though the Universal Declaration of Human Rights applies to companies by being addressed to everyone, it no more binds businesses than it binds states.

States can pass laws that *require* companies in their jurisdiction to observe or promote certain human rights standards, and it is sometimes possible to sue companies whose headquarters are in such a jurisdiction for the failure of its subsidiaries to protect and promote human rights elsewhere. But even the governments of human rights-respecting countries are reluctant to compel companies to keep to human rights standards, and, in principle, a company whose binding human rights obligations in one country proved cumbersome could re-establish itself in a place where it had no such obligations, or none apart from routine obligations under labour or environmental legislation. In the face of the mobility of at any rate many multinationals, the uncertain enforceability of strict domestic human rights legislation for companies, and the dependence of Western governments on these companies for industrial investment, the promotion of human rights has come to be seen as, if an obligation at all, then an obligation a company acquires by imposing it upon itself in the form of a promise or undertaking to the general public. These informal, self-imposed human rights obligations, are much more typical of the ones recognised by business and by states than domestic human rights law for companies.

Very recently, the United Nations, which is the source and sometimes the enforcer of the main human rights instruments, has tried to develop a set of principles that it expects or hopes businesses to abide by in relation to human rights. The Global Compact, as it is called, asks companies to protect and promote human rights within their sphere of influence; to desist from violations in its own operations; to uphold international labour standards, including the freedom to organise trade unions, the ban on child labour, and the elimination of discrimination; and to protect the environment in different ways. It asks that these standards be observed as a condition of UN support for international free trade. The Global Compact reflects a series of tensions in human rights theory and practice that are partly independent of business, and that have become acute since the 1990s. It also reflects trends in the conduct of the Western democracies since the 1980s. The tensions and the trends contribute to a confused understanding of the basis for the

human rights obligations of business, in my opinion, and so they are worth making explicit.

To come first to the tensions in human rights theory and practice, there has been a growing recognition that states are not the only, and sometimes not the principal, violators or protectors of human rights in the world as we now have it. So-called 'non-state actors' have become extremely important. These include, in the category of protectors of human rights, campaigning NGOs and charities, such as Amnesty or Medecins sans Frontieres, certain media organisations and individual journalists and film makers, university-based units, and members of religious orders. They also include, in the category of human rights violators, warlords, gang leaders, political party organisations, and traffickers in people and drugs. Businesses, sometimes the same businesses, arguably belong to both the categories of human rights *respecting* non-state actors and human rights *violating* non-state actors. Notably philanthropic retailers can turn a blind eye to child labour in their supply chains, for instance; and companies that have unrivalled labour standards can be guilty of displacing native peoples or propping up corrupt governments abroad. Human rights-*promoting* non-state actors have grown in prominence as the UN system has strained to meet its monitoring and intervention commitments. Human rights-*violating* non-state actors have grown in prominence as states have got weaker in the post Cold War settlement or through civil war, or very differently, through various kinds of decentralising and privatising reforms. The Global Compact can be seen as one of many initiatives that give human-rights-promoting non-state actors an official role in international human rights practice. Human rights practitioners and theorists argue amongst themselves over whether non-state actors have sometimes gained *too* much prominence, and some claim that it is time for the states to reassert themselves and assume the leading role in human rights promotion and protection that they once had.

The second background trend that bears on the Global Compact is the waxing of neo-liberalism, the ideology according to which free markets and free enterprise are the other side of the coin of effective democracy. Under this ideology Western democratic states in the 1980s and 1990s divested themselves of commercial operations that in a previous era they had nationalised, and they started transferring the provision of public services – such as education, libraries, prisons, and transportation, to private companies. In some Western countries that once had a very large array of state-provided public services, privately provided such services have often been touted as more cost-effective and beneficial than what they replace. The idea that the private sector is better at organising and delivering services than the public sector dies hard, and it is not just at the level of states, but also internationally, that the attractions of adding private finance to public finance for projects of all kinds, including human rights projects, are felt. The privatisation of parts of the public sector sounds good when it is allied to the distinction between state and civil society. Transfers of moral responsibility from the state to volunteer groups or volunteer groups plus businesses, is better for neo-liberals than the concentration of moral responsibility in the state.

A third trend that bears on the Global Compact is the impact on international business of the post Cold War settlement. Not only are many Western companies involved for the first time in new democracies that were once part of the Soviet bloc, but international trade agreements are making it harder for governments to manipulate markets by subsidy or by trade barriers. These are specific aspects of a process that is often vaguely referred to as globalisation, and among other things, they bring the businesses of the developed world into every nook and cranny of the planet, including places where there is no working legal system and sometimes no real government or security force either. In other words, commercial operations are taking place in environments hostile to commercial operations, and no change to these environments is imminent. Finally, and by no means least important, multinational businesses have got bigger. Already huge corporations have merged in the car manufacturing industry, in pharmaceuticals, in petroleum exploration, production and retailing, and in telecommunications.

Especially against the background of this last trend, big businesses are importantly different from other non-state actors. They are not only infinitely richer and more powerful as forces in the world than humble NGOs, university groups and even warlords with private armies; the biggest of them have more revenue than many states, including developed medium-sized states. For other non-state actors as well as other state actors in the human rights world, big businesses with an international presence are more like state actors than some *real* state actors. Collectively, they strike some people as *bigger* than state actors: they represent the uncontrollable transnational power of international capital. This supposedly vast but shadowy force is the target of the demonstrations that have dogged meetings of the WTO and the G8. And it brings us to what is perhaps rhetorically and practically the hardest thing to get clear about when one discusses the human rights obligations of companies: namely the relation between their size, wealth and international presence, on the one hand, and their human rights obligations on the other. In the thinking of the UN and many human rights NGOs alike, it is the status of businesses as powerful global players that, above all, justifies the official recognition by them and by everyone else of their human rights responsibilities. This is a leading theme of the speech on business and human rights that the UN Human Rights Commissioner, Mary Robinson, gave in December 1999, and it dominates much speechifying and writing by governments and NGOs, both those who are sympathetic and those who are unsympathetic to business. Those who are unsympathetic to business, and there are many of those among the human-rights promoting governments and non-state actors of the world, say that big businesses are individually as powerful as states, without being democratically accountable and democratically constrained as states are. They think big businesses have untold power without accountability, as well as an interest in ignoring human rights when it costs money or influence to respect them. Those who are sympathetic to business *also* think that multinationals have untold power, power that exceeds that of states at times, but insist that these same businesses have an interest and a will to channel their power in directions that states and international bodies that are democratically accountable suggest it should be channelled. For both the opponents of business and

the sympathisers the power and wealth of business counts as a reason, perhaps the main reason, for businesses to give something back to the world they tower over.

If I am right about the prevailing image of business in the human rights world, then it is a far cry from the image of the tourist with resources responding ad hoc to a local emergency. The latter image, however, is a better guide to action and more faithful to the vulnerabilities of business, even big business, than the image of the giant with the world at its feet. First of all, it is not necessary to be rich and powerful in order to discharge many human rights obligations, and the most expensive of these obligations, such as the right to health care or to provide a fair court and prison system would not fall on companies, rich or otherwise, in any case. Second, as already mentioned, not all rich and powerful companies run the same risks of violating human rights or are faced with promoting or protecting human rights in highly unpromising environments. Undifferentiated talk of business obligations to promote human rights, and images of businesses with no specific location in the world but bestriding the world, ignore the greater foreseeable risks of human rights violations that attend some places and some forms of business and the greater obligations of companies in those businesses and those places to attend to human rights problems. Third, companies that are rich and powerful now can suffer losses or collapse later, losing not only the capacity to run a human rights program but to trade full stop. Do companies that run into trouble lose their human rights obligations because they lose their huge wealth and power? Not if huge wealth and power are not necessary to discharge human rights obligations That human rights obligations do *not* derive from wealth and power can be seen from the fact that not even tiny businesses can blamelessly neglect the safety of its workers, or prevent them from joining a trade union. Again, some super-rich *individuals* have the assets of many medium-sized companies combined, and may have personal influence with the governments of several countries. George Soros may fit into this category. Does he have the same human rights obligations as the medium sized companies operating in those same countries? I have never heard anyone claim as much. Human rights obligations arise from a class of moral risks associated with one's commercial and other activities. To the extent the risks are common to commercial enterprises, they arise from having employees, and from the protections that employees are owed in relation to safety and the labour market. But beyond these common risks there are many others connected with human rights that vary with the kind of commercial enterprise and that do not depend on the least on wealth. Even super-rich individuals lack some of the common or garden human rights obligations of some medium sized companies because they are not large-scale employers, and some large scale companies lack human rights obligations that small companies have, because their operations are confined to countries with the most exacting human rights standards.

The power and wealth of some businesses is not what *gives* them their human rights and other moral obligations; it is what enables them to discharge those obligations and to promote others that they are not obliged to provide. A company that loses its wealth and power retains its obligations but may become less and less able to discharge them except at the cost of ceasing to trade. On the other hand, a company that has the wealth and power to discharge its obligations and more, may

not recognise its obligations, or recognise them and over-estimate the costs of discharging them. Or it may take any reduction in its profits or any deterioration in its trading conditions as sufficient justification for opting out of human rights obligations. In these respects, however, a business is not essentially different from an individual who is well able to help those in severe need, but who thinks (mistakenly) that it is even more urgent to put aside money for his pension, or who regards any one-off piece of major expenditure as a reason for opting out of contributions to charities that help those in medical need.

Although the *obligations* that a company has do not necessarily vary directly with the size of its assets, the size of its assets and its influence may permit it to do things that go way beyond its obligations at relatively small cost. Here the distinction between not violating human rights and promoting human rights is relevant. Under the Global Compact companies are asked not only to abide by the human rights instruments, which is obligatory, but to promote human rights within their spheres of influence. This latter responsibility does not seem to be one a company is strictly obliged to take on, unless it commits itself to doing so off its own bat, and there is plenty of scope for a company to promote human rights very modestly, by, at one extreme, writing letters, say, and at the other, much more robustly, by helping to pay for human rights monitoring or human rights training or for adding its influence to international diplomatic efforts to promote human rights. The bigger the wealth and power of a company, the easier it is to get involved in these beneficial but admittedly non-obligatory human rights activities. The money costs will be easier to bear; the channels of influence will already be open; the credibility required to get a hearing from other companies or from international diplomatic bodies will already be present.

I do not deny that, the bigger and wealthier the company, the easier it is also for it to *avoid* the significant exertion of influence, while appearing to exert itself. The wealthier it is, the easier it is for a company to represent human rights *in*activity as activity, and trivial human rights activity as major human rights activity. The very same resources that enable it to exert influence can also pay for public relations exercises. Worse for the companies, because they operate in a human rights community that is often deeply anti-business, many reasonably sincere efforts to do what is expected of them under the Global Compact and other agreements can be dismissed as public relations even when they are not. I think that this tension between the different possible uses of a firms' resources and between the different ways in which the results can be represented by companies and the human rights community are ineliminable, and, on the whole, useful for the promotion of human rights. It *helps* human rights promotion for companies to exercise the maximum influence on human-rights violating governments, and it helps that the threshold that has to be reached for these efforts to be credible is the threshold of independent acknowledgment that these efforts are having an effect, say acknowledgment by a respected human rights NGO.

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I come finally to the question of whether businesses only have human rights obligations by default, because nation states, which are, so to speak, the *real* bearers of human rights obligations, are so bad at fulfilling them, and leave a vacuum that other corporate entities, especially big multinationals, are wrongly expected to fill. I have already argued against treating large businesses as having major human rights responsibilities on account of the size of their assets and their status as de facto world players in international affairs. If businesses are being assigned human rights responsibilities by the international community because they are regarded as quasi-states, that, too, is questionable. Again, to the extent that the nation states of the world or the UN system are giving companies this status because they want to be relieved of some of the financial burdens of development, environmental protection and human rights promotion, it is arguable that the moral roles of both states and businesses are not only changing but are being *deformed*.

How much truth is there in this line of thought? Not much. According to me, companies have some human rights obligations – obligations to try and stop torture, killing and slavery – because every agent, corporate or private, does. Of course, this claim is compatible with states taking greater responsibility for human rights, and with electorates paying more for it. This claim is compatible too, with the claim that, in the world as we have it, both states and electorates do not care enough about human rights. According to the line of thought I'm opposed to, nation states, alone or in combination, have a virtual monopoly on human rights obligations. Nation states in an ideal world would see to human rights within their borders, and there would be international military or diplomatic interventions when nation states were unable or unwilling to protect local human rights, or where they were active in violating them. In an ideal world, still according to the picture I reject, businesses would not get involved, though they would respect international efforts at the level of nation states to isolate and weaken human rights violating countries. Businesses, even big businesses, would not operate in their own right in countries against which there were international sanctions, and they would never pay for human rights monitoring or training. The reason that in an ideal world nation states would have sole or leading responsibility for human rights is that in an ideal world these would be democratically elected and controlled, as would international groupings of nation states. This form of accountability would ensure that the widest interests were served by those enforcing human rights obligations. The interest of business players would always be narrower.

Although this thinking is not without plausibility, it does not seem to me to constitute an argument for withholding a human rights role from companies even when states are much more active than they are at present. At most, it seems to be an argument for not regarding companies, even the biggest multinationals, as the equals of democratic nation states in human rights activity. And notice that it is only democratic states that count, since undemocratic states may represent interests

considerably narrower than those of a business. Even when one takes the class of democratically elected countries as the leading or sole custodians of human rights activity, however, a role for businesses is not ruled out. Individual democratic countries can invite companies to co-operate with them in human rights work, and groupings of democratic countries can do so as well. The really hard cases are where a democratically elected government is at loggerheads with a company over the company's presence in a country, or where a company is present and sanctions have been imposed by the UN or some other legitimate international grouping. In such cases, are governments of nation states always right and companies who disagree with them always wrong? Certainly not. It is true that democratic governments have *this* much authority: whether right or wrong, they can expect companies headquartered locally to explain their presence in a human-rights violating country. They can even pass a law penalising countries with foreign operations in human rights-violating regimes. But they may do these things and these things not be as effective in improving a human rights situation as quiet diplomacy on the part of a business.

Especially in countries that suffer extreme diplomatic isolation, business channels for making human rights and other sort sorts of representations may be among the *only* channels by which the isolated governments are able to engage diplomatically with the wider world. The greater the isolation, the greater the value to isolated governments of *any* foreign contacts, especially where those contacts are at home, as businesses often are, in the world that is isolating the rogue government. In the one case I have extensive first-hand knowledge of, namely the case of Premier Oil and Burma, a relatively small multinational is finding that it is able to aid a diplomatic process that has already had some small human rights successes in the form of newly-signed decrees, prisoner releases, and human rights training. Premier has co-operated with the engagement efforts of the Australian government, often at the cost of very bad publicity in Britain and, in past years, hostile statements from the UK Foreign Office. Premier has also been active in lobbying other oil multinationals in Burma and other European Union multinationals to observe human rights standards in their foreign operations. The company did not embark on these initiatives enthusiastically. It was pushed into doing something by pressure applied to it by NG0s like the Burma Action Group, individual chapters of Amnesty UK, and the World Development Movement, some of whom organised demonstrations at Premier Oil shareholders' meetings. Now it devotes a major budget not only to doing what it is obliged to do but to promoting human rights in Burma.[5] The public relations benefits of doing so have been small, because Premier Oil has been so vilified itself for operating in Burma, even though its investment predates by two years the take-over of the current military government. But their initiative is an example of what business adds in the real world to human rights efforts also being undertaken by states and NGOs. Even in an ideal world the local knowledge that businesses have, their expertise, their local infrastructure and their efficiency in moving people and things quickly would be important assets to the human rights

[5] Since this paper was written, Premier Oil has sold its operations in Burma.

movement, when businesses are willing to make them available. I have been trying to distinguish the real reasons why businesses ought to make them available from the reasons sometimes given.

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CHAPTER EIGHT

Autonomy as a Central Human Right and its Implications for the Moral Responsibilities of Corporations

If the responsibilities of corporations consisted solely of their legal responsibilities, then, apart from the moral responsibility to obey the law, the question of 'the moral responsibility of corporate organisations' – and so the purpose of this volume – would be moot. This is not to say that it is a trivial matter to assert that corporations should take obedience to law to be a non-negotiable obligation. Exponents of the 'nexus of contracts' view of the corporation have suggested that managers bear no general obligation to avoid violating regulatory laws, but should simply include the expected penalty for such violations in their cost-benefit analysis.[1] But while some corporations may indeed make such calculations, most legal as well as scholarly analyses of the moral responsibilities of corporations generally presuppose that they will meet their legal responsibilities, in order to ask whether there are further moral responsibilities which go beyond those currently imposed by law. If there are, these will require one of two responses: either corporate virtue, or legal reform. Without any deprecation of the importance of the latter, or of institutional mechanisms for controlling corporate behaviour generally, this chapter will inquire into the moral responsibilities which corporations should be asked to shoulder in relation to human rights as a matter of voluntary compliance.

A problem for any such inquiry, however, is that corporations are in their essence creatures of law. The parameters within which a corporation is constituted and can act are set by on the particular legal regime within which it is chartered. While a general moral discussion like this one must abstract from such parameters, they will force themselves upon our consideration as soon as the case of any specific corporation comes into question. Let us however confine ourselves to the moral domain, so far as possible. This is a domain which is potentially vast, but which the present volume usefully delimits by its focus on human rights. The advantage of such a focus is that human rights have been defined in internationally recognised conventions and treaties: they have legal standing. But human rights also have the peculiar feature of asserting a claim to moral validity regardless of whether any

[1] See, for example, Frank H. Easterbrook and Daniel R. Fischel, 'Antitrust Suits by Targets of Tender Offers', 80 *Michigan Law Review* 1155 (1982), p. 1177 n. 57 : 'Managers not only may but also should violate the [legal] rules when it is profitable to do so.'

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 145–163.

given legal regime obtains, or whether a given country has ratified a given convention.

The resultant tension between the legal duties associated with human rights, and the moral claims which they express, is exacerbated in the case of corporations. International law recognises a few basic peremptory norms, which make anyone – individual or state, natural person or legal person – criminally liable for committing such crimes as genocide, piracy, war crimes, crimes against humanity, aircraft hijacking, or enslavement. Although case law in relation to corporations and such crimes is less well established than is the case for individuals and states, the unusual weight and definiteness of the duties involved gives corporations good reason to keep well on the safe side of such laws. There are other crimes – such as torture, execution, rape, and forcible displacement – explicitly defined in international law as being actionable only against states.[2] And the major international human rights instruments also impose the duties involved more or less explicitly on states. The responsibility of non-state agents, including corporations, in relation to most human rights is an open and currently evolving legal question. Appeal to the legal duties of corporations cannot therefore shut off debate about their moral responsibilities in relation to human rights, both because the law is unsettled, and more fundamentally because the moral claims embodied in human rights always potentially reach beyond the positive rights and duties already established in given laws.

If the law as it currently stands cannot exhaustively establish the moral responsibilities of corporations in relation to human rights, who has the authority to do so?[3] Arguments about moral responsibilities implicitly assert the authority of reason, and in particular of reasoning about morality. But reasonable people, including philosophers, notoriously disagree about what morality requires. If corporations do not, and arguably should not, restrict their responsibilities to those dictated by law alone, the question remains how they are to determine what their further responsibilities are, and how to carry them out. The international human rights community contributes to this decision through its own evolving discussions, elaborating accounts of best practice and publicising cases of egregious violation. This chapter suggests that while it is crucial that corporations attend to these evolving practical and philosophical discussions, it is equally critical that they attend to the claims made in relation to human rights by the people whose rights they are –

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[2] I owe my understanding of the difference between the peremptory *jus cogens* norms and other human rights norms to Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labour Cases and their Impact on the Liability of Multinational Corporations', *Berkeley Journal of International Law* 20 (2002) pp. 91-159. That human rights always exceed the law is argued eloquently by Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the End of the Century* (Oxford and Portland, Oregon: Hart Publishing, 2000).

[3] On this questions, see, for example, Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (Leiden:Brill, 1999); Jedrzej George Frynam and Scott Pegg (eds), *Transnational Corporations and Human Rights* (Basingstoke: Palgrave Macmillan, 2003); David C. Korten, *When Corporations Rule the World* (Bloomfield, Conn.: Kumarian Press, 1995); Lynn Sharp Paine, *Value Shift: Why Companies Must Merge Social and Financial Imperatives to Achieve Superior Performance* (New York: McGraw-Hill, 2003).

the people affected by their operations. The argument touches both on the importance of autonomy as a human right, and the inseparability of social-economic from civil-political rights: points which are broadly accepted in the human rights literature,[4] but which have not been brought sufficiently to bear on the question of responsibility or in particular on the responsibilities of corporations. The thesis of this chapter is that taking autonomy seriously as a human right will dramatically affect the moral responsibilities which corporations may be thought to have to those whom their actions affect, and in particular can introduce a concern with the popular as well as moral acceptability of corporate actions.

We must begin by confronting a fundamental problem for the entire enterprise of this volume. For if some academics deny that corporations have a moral responsibility to obey the law, others deny that corporations can bear, recognise, and carry out moral responsibilities at all. The latter denial is partly a function of academic discipline. While corporate policymakers and academic 'business ethicists' both discuss the question of corporate moral responsibilities assuming that these are possible and actual, lawyers and philosophers writing about corporate crime debate whether and under what conditions a corporation can be held morally and legally responsible for the actions of individuals holding various offices within it.[5] The attribution of criminal responsibility after the fact does not always follow the same lines as the formulation of corporate policy before the fact, although in both cases the essential issue is that of who rightly counts as representing (speaking or acting for) the corporation.[6] But the tendencies in post-facto judgment either to dissolve the corporation into the actions of individuals, or to assign strict liability irrespective of corporate policy, should not obscure the necessary assumption that corporations are capable of formulating and executing intentions on which prospective judgment and decision depend. Academic debates about whether corporations are capable of forming or acting upon intentions at all are most plausibly resolved by considering corporate policy as the structured means by which they do so.[7]

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[4] See in this volume, Chapter Two by James Griffin on autonomy, and Chapter Three by David Archard on social and economic ('welfare') rights.

[5] See the useful collection of views on both sides of this question, focusing on the work of Peter French who is mentioned below: Hugh Curtler (ed.), *Shame, Responsibility and the Corporation* (New York: Haven Publications, 1986), a reference the mention and use of which were kindly given me by Jill Horwitz. The literature on corporate crime and the attribution of responsibility thereof is voluminous: there is an extremely helpful summary discussion by Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability', *Sydney Law Review* 11, (1988), p. 468.

[6] David Runciman has in his writing and in conversation emphasised the significance of the fact that corporations must always be acted *for* by representatives: see David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997).

[7] On this point I concur with the identification of 'corporate internal decision structures' or CIDs, in Peter A. French, *Collective and Corporate Responsibility* (New York and Guildford, Surrey: Columbia University Press, 1984), pp. 41-66, although French's view of corporations as moral persons is criticised below. Note that the debate over criminal corporate liability hinges not only on intentionality or *mens rea*, but also on the question of whether the kinds of sanctions which the criminal law applies can succeed in effecting whatever its purposes are taken to be in relation to corporations. See on this point Celia Wells, *Corporations and Criminal Responsibility* (Oxford: Clarendon Press, 1993).

If corporations can form and act upon intentions, they can count as rational agents as well as 'legal persons'. Can they, further, be moral agents – and need they be so in order for moral responsibilities to apply to them? Debates among business ethicists and philosophers about whether corporations are capable of moral agency hinge in part on differing definitions of what moral agency requires. At one extreme, Peter French insists that corporations can be full moral agents, but defines moral agents simply as those agents capable of forming intentions – so collapsing the specific question of moral agency into that of agency per se.[8] At the other extreme would be a strong Kantian picture of a moral agent as one capable of being moved to act morally because and only because morality so requires. In between lie a range of possible considerations, such as the ability to reconsider one's judgments in light of the discursively reasoned reaction of others (so distinguishing corporations from intention-forming cats) and the ability to be moved by concern for one's reputation and self-image (so, arguably, distinguishing corporations from intention-forming computers).[9] Discursively self-conscious agency, concerned with coherence and reputation, may be enough to make corporations responsive to certain moral concerns, without classing them as 'moral agents' per se.[10]

It seems plausible, then, that corporations are capable of recognising and acting on moral considerations albeit not for ideally Kantian reasons, and desirable that they be assigned moral responsibilities not in virtue of their peculiar status as 'artificial persons' but in virtue of some more general theory of morality and its implications for various kinds of entities and agents (otherwise, corporations could turn out to have radically different moral responsibilities from, say, partnerships, which would be an odd result from a moral point of view[11]). For example, while some moral obligations are ill-formed with respect to corporations (such as those of parenthood or friendship), it may be that corporations can serve as agents of justice.[12] The moral claims which corporations recognise typically function as side-constraints on the pursuit of their basic financial goals. It is not that they substitute some specific moral goal for the goal of amassing profits, but rather that they

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[8] French, *Collective and Corporate Responsibility*, p. 38: 'to be a party in responsibility relationships, hence to be a moral person, the subject must be at minimum an intentional actor', although he observes that practices of responsibility attribution go beyond the consideration of intentionality alone.

[9] Thomas Donaldson draws the cat contrast in his *Corporations and Morality* (Englewood Cliffs, New Jersey: Prentice-Hall, 1982), p. 22, in the service of his denial that corporations are moral agents; see his comments on the various exchanges between him and French in 'Personalising Corporate Ontology: The French Way', in Curtler (ed.), *Shame*, pp. 99-112. The computer or 'intelligent machine' is offered as a metaphor (not as a contrast, as in the text here) for corporate agency by Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (Berkeley, Los Angeles, and London: University of California Press, 1986), pp. 49-51, another reference which I owe to Jill Horwitz.

[10] On the significance of discursive status for free agency, see Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Cambridge: Polity Press, and Malden, Mass.: Blackwell, 2001). One important advantage of not classing corporations as 'moral persons' is that one can more easily avoid assigning them the kind of respect for their own interests and rights which moral persons ordinarily deserve. The recent tendency of American courts to find that corporations enjoy certain constitutional rights is an alarming illustration of the danger of the latter route.

[11] Alyssa Bernstein has made this point vividly to me, as does Dan-Cohen, *Rights*, pp. 41-51.

[12] Onora O'Neill, 'Agents of Justice', *Metaphilosophy* 32 (2001) pp. 180-95, reprinted in Thomas W. Pogge, (ed.) *Global Justice* (Malden, Mass.: Blackwell, 2001).

recognise a limit on their actions in pursuit of that goal, and/or recognise certain other acts or omissions which are incumbent upon them in its pursuit. For example, a corporation may adopt the value of safety (and in particular of protecting lives) as an overriding value which can trump any cost-benefit analysis; or they may adopt the value of reducing pollution as a constraint on the way they do their business. In neither case would the conception of the company's core mission necessarily alter. Rather, the way in which that mission is to be carried out is specified in one way rather than another.

Some human rights considerations can function in this same way, as straightforward side constraints on corporate action ('don't kill' , 'don't torture' , 'don't enslave'). But some responsibilities associated with human rights may be more complex, and it is to their specification that we now turn. Because the normative value of respecting human rights is already contained within the assertion of the rights themselves, it is plausible to suggest that any competent agent – natural or artificial – capable of acknowledging those rights should do so. The term 'acknowledge' in the previous sentence is deliberately vague: to show that it needs specification, by the identification of the specific duties which human rights impose, and which may differ according to different agents. States themselves may have at least four different kinds of obligations in relation to human rights. Consider the helpful typology given by Mark Bovens for the related case of constitutional rights:

> 1. An obligation to respect: the government must respect the freedoms of the citizens and refrain from violating these.
>
> 2. An obligation to ensure: the government shall actively work to give direct and concrete substance to the rights of citizens.
>
> 3. An obligation to promote: the government has an obligation to foster the realisation of these rights, for example, by means of long-term policy programs.
>
> 4. An obligation to protect: the government must protect citizens against unlawful violations of their constitutional rights by other citizens.[13]

Which, if any, of these obligations do corporations share, or is the content of their obligations quite distinct from those of governments? The obligation to respect is the only one which would seem uncontroversially to apply to corporations as to any other agent. The formulation of the United Nations Secretary-General's Global Compact essentially restricts itself to this one point: its first principle calls on corporations to 'support and respect the protection of international human rights within their sphere of influence', and its second, to make sure that they themselves 'are not complicit in human rights abuses'.[14] This formulation seems to reserve

[13] Mark Bovens, 'Information Rights: Citizenship in the Information Society', *The Journal of Political Philosophy* 10 (2002), pp. 1-25, at 21.

[14] The statement of the principles can be found on www.unsocialcompact.org (last checked 4 December 2003).

responsibility for human rights to states, as does the UN Universal Declaration of Human Rights, while asking corporations only to respect their 'protection' while offering their 'support' to those (presumably states) who actually provide that protection.

Is there anything more which corporations can and should do in relation to human rights? The notion of 'protection' in both Bovens' typology and in the Global Compact has at least one inherent weakness. For both restrict themselves (Bovens with good reason given his own purposes) to the consideration of 'protection' of human rights as something provided *by* the state: the state is to protect individuals from the violations of their rights by other individuals or agents. But it is a tragic commonplace that states themselves can be the most grievous and systematic violators of the rights of individuals, both their own citizens and others. Corporations operating in such perverse states may be able to 'respect' human rights in their own operations – although in reality, the interests of such states in exploiting or fostering corporate activity very often puts companies in the position of profit from, and sometimes collusion with, 'profitable' violations of human rights conducted or condoned by the state.[15] But to 'support … the protection of human rights' in such circumstances, as the Global Compact demands, could require a far more affirmative stance by the company: pressuring the state to act, not simply waiting for it to do so. Here, the ancillary function envisaged by the Global Compact of 'supporting' action by others, may merge into the more demanding stance of helping to 'promote' (adapting Bovens) the long-term realisation of human rights by promoting a change in state policy toward protection and support.

What about the possibility that corporations may and should themselves work to 'ensure' (adapting Bovens: 'work to give direct and concrete substance to') human rights – is this a legitimate aim for corporations to (be expected to) adopt, and what exactly might it involve? Consider first the latter question. For some rights, working to give them direct and concrete substance might be close to the work of promoting by pressuring the state already canvassed above: to ensure the right to be free from torture, for example, might involve companies in pressuring states to reform their judiciaries and rein in death squads, though it could also involve indirect pressure on the state such as supporting the work of local human rights groups. For other rights, working to give them direct and concrete substance might involve actions which the company could take itself: to ensure the right to education, for example, could involve building schools.

We must distinguish here between such modes of 'ensuring' rights, and what might be termed the 'securing' of rights. Emma Rothschild has observed that 'security is a political relation';[16] it follows that to 'secure' a right is to give a person an effective political claim, something which cannot be done without the involvement of the state. But without securing someone's right to X, it may be possible to secure their possession or enjoyment of X (itself a step beyond their mere

[15] Ramasastry, 'Corporate Complicity', a point I owe also to a talk at the BP/Cambridge Executive Education Programme in March 2002 by J. Adam Tooze.
[16] Emma Rothschild, 'What is Security?', *Daedalus* 124, 3 (1995), pp. 53-98.

but insecure possession or enjoyment of X).[17] To 'work to secure the direct and concrete substance of a right' might reasonably be interpreted as providing someone with a fairly secure possession or enjoyment of some X, which can itself serve as a basis for making a more effective political claim to having or enjoying that X as a (as of) right. Corporations can help to ensure rights for example by helping people to understand their moral entitlement and how it might be converted into a legal or political one, and perhaps helping governments on the one hand or people on the other to establish the appropriate relation in which rights would be respected. Alternatively, with state backup, corporations could also legally undertake to make certain goods or services available to a certain population, and to set up a monitoring mechanism through which people could claim their entitlements to those goods or services. This would begin to approach the securing of a right to the good or service by the corporation, although this would be bounded by the legal frameworks in which the right and the corporation were respectively embedded.[18]

Some of the examples of how corporations might relate to human rights in the preceding paragraph are quite radical. The reader may be wondering, is it really right for corporations to pressure governments into abolishing torture, let alone for corporations themselves to establish schools? The argument here has not established that such actions are morally obligatory, only that they represent a possible and plausible interpretation of the human rights responsibilities of corporations which must be considered. Context is certainly a crucial factor here. The role of the corporation in pressuring governments belongs in the context of what were called above 'perverse' states – states which are ignoring or actively violating human rights. In these circumstances companies – like other agents operating in the area, such as church groups or unions – may well incur moral responsibilities to do what they can to stop other agents from violations on which they are bent. A possible role for corporations in establishing schools or hospitals, on the other hand, arises for consideration in the context of weak states as well as perverse ones. It must be recognised as an historically and morally fraught suggestion in the context of past colonialist practices by non-state actors, including companies:[19] the legitimacy of such actions, as well as the danger that a weak state will be made still weaker by corporate philanthropy taking over infrastructural responsibility, must be carefully weighed. But it is important to recognise the possible range of actions open to corporations in relation to human rights, and to be willing to debate the circumstances in which each such action is appropriate – rather than simply

[17] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press, 1989), pp. 39-40; see also Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), for the general distinction between having X and being secure in having X, in particular when X is some freedom.

[18] I am indebted to Tom Campbell (moral rights), Geoffrey Brennan ('more or less' secure rights) and Philip Pettit (institutional mechanism) for raising these points with me in discussion of this paper .

[19] The dangers of such attitudes in the eighteenth century were impressed on me by Emma Rothschild and Richard Tuck, at a Common Security Forum meeting on a previous version of this paper at the Centre for History and Economics, Cambridge University, January 2002, though I doubt that I have taken their full measure into account even here.

assuming that all corporations can or should ever do is stand passively by, even in an evil, collapsed, or disintegrating state.

Unfortunately many discussions of corporations and human rights have assumed a rather traditionalist picture not only of the state, but also of the range of human rights involved. The focus has tended to be solely on the 'negative' civil rights such as freedom from torture, or if 'positive' economic and social rights are raised at all, these are primarily labour rights.[20] But as James Griffin's chapter in this volume (Chapter Two) argues, the best philosophical account of human rights treats civil, political, economic and social rights as inextricably linked. Thus one cannot simply avert one's eyes from the question of corporations' moral responsibilities to provide schools, food, or housing, though one may reach varying conclusions about it. Further, the value of autonomy is both an important right in itself and a key organising and generating principle for the whole domain of human rights. It is to the implications of autonomy as a human right that we now turn.

Autonomy is the ability to be meaningfully self-determining within the social world, or as Joseph Raz has said, to be the '(part) author of one's life'.[21] This is why it is central to a philosophical understanding of human rights and their social function: one must understand oneself as autonomous in this way in order to be able to recognise and claim one's rights as rights (though one need not be autonomous, nor able to recognise and claim one's rights, in order to have them). Fully to be able to assert and exercise any other human right, is to be able to do so autonomously. This is why the state's prerogative of deciding how to institutionalise certain human rights, makes best sense when the state is democratic. For only then will people (ideally) secure a voice in choosing how their rights will be operationalised and realised. Without a meaningful right to political participation as equals, the meaning of all other rights risks distortion to serve the interests or concerns of the powers that be. This is why political autonomy and personal autonomy are two sides of the same coin, or co-constitutive as Habermas has argued.[22] But the constituting relationship does not run only from personal to political autonomy. Political autonomy can also help to shape personal autonomy, by fostering a range of adequate options to choose among, the relevant information to inform that choice, and the internal capabilities and skills to make meaningful choice possible.[23]

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[20] But see the assertion of the indivisibility of human rights (albeit with emphasis on 'labour rights in the workplace') as part of the justification for holding multinational enterprises as well as states responsible for 'observing' fundamental human rights, in Peter T. Muchlinski, 'Human Rights and Multinationals: Is There a Problem?', *International Affairs* 77 (2001), pp. 31-47 at 43. Note that the terminology of 'negative' and 'positive' rights is crude and misleading, since the paradigm negative rights such as freedom from torture can require a great deal of positive action to establish judicial oversight of the police and so on. See Chapter Three in this volume for further remarks on this point.

[21] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, and New York: Oxford University Press, 1986), p. 369: 'The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'

[22] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1996).

[23] The importance of an adequate range of options for autonomy is emphasised by Raz, *Morality*, while

Without such autonomy, the attempt to guarantee human rights risks lapsing into what we might call 'human rights paternalism'. This would not be a danger in an ideal regime in which all human rights were fully and adequately protected, because the very meaning of a 'right' would in that context provide the individual with the ability to make a political claim when his or her rights were being misinterpreted by others or by the state. But in the imperfect world in which we live, the attempt to promote or ensure human rights, or even simply to respect them, cannot ignore the judgments of the people whose rights they are in helping to determine the precise way in which those rights should be realised and enjoyed.

At least two points follow for the moral responsibilities of corporations. The first is that corporations may have a responsibility in providing information about their own activities which is necessary for people individually, and as citizens, to be able to judge those activities. Very often corporations enjoy an enormous informational advantage over local groups, for instance with regard to the environmental impact of industrial activities, or even (more controversially) about the corrupt practices of the state. They should consider how far maintaining this informational monopoly is consistent with respecting the human rights, and in particular the right to autonomy, of a local population. Beyond this, one may wish to consider other actions which corporations can take (or indeed, omit) which could help to foster the capacities necessary for exercising personal and political autonomy among people whom they affect. It would be self-contradictory and absurd to say that corporations must foster people's autonomy for them. Yet the range of social and personal capacities and resources necessary to support people in their ability to formulate and evaluate moral claims both of themselves and of others should be considered an essential element of human rights and indeed a right in itself. These capacities and resources are ones which companies, like other social institutions, can play a role in nurturing and providing among their workforce and sometimes among the broader community. And while this may seem to militate against a narrowly conceived conception of corporate interest – turning passive peasants into active agitators, to put it crudely – in fact it is prudent in the long run for companies to nurture this capacity among those with whom it is engaged and those whom its operations affect. The moral of Hegel's classic argument about the master's need for recognition from the slave applies (without further analogical prejudice) to the relationship between corporations and those whom they affect in their operations.[24] For if popular voices are not capable of being heard (either because of their inability to speak or the corporation's inability to listen), the likeliest response will be the passive resistance if not the subversion characteristic of dissatisfied slaves.[25]

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that of a repertoire of skills and abilities is emphasised by Diana T. Meyers, *Self, Society, and Personal Choice* (New York: Columbia University Press, 1989).

[24] G.W.F. Hegel, *Phenomenology of Spirit*, trans. A.V. Miller with analysis of the text and foreword by J.N. Findlay (New York and Oxford: Oxford University Press, 1977).

[25] Jon Altman at the Centre for Aboriginal Policy Research, Australian National University, has designed a research project to test the thought that building institutional and financial-literacy capacities may form a necessary part of corporate engagement with Aboriginal peoples.

This brings us to the second major point about autonomy in relation to corporate moral responsibilities, which turns on the difference between what might be called moral acceptability and popular acceptability. Now there is one way of understanding this distinction which is inimical to the meaning intended here. This misleading interpretation would set moral and popular acceptability as in principle (or at least potentially) wholly opposed. Moral acceptability would reflect whether a decision or action were acceptable before the 'court of morality', while popular acceptability would reflect whether a decision or action were acceptable to a particular group of people: if the group in question had no concern for, or no adequate grasp of, moral principles, the two forms of acceptability could come apart altogether. But there is another and better way to understand the distinction, and that is to cast (the valuable face of) popular acceptability as a subset of moral acceptability itself. Here the function of popular acceptability would be the ability of a group to specify rather than to reject what morality demands in the case of (say) their own rights or the rights of others. On this view popular acceptability counts as a form of moral acceptability, one which it is morally permissible (if not obligatory) to consider, and which works to make moral demands concrete rather than to nullify them.[26] The abstract demand for human rights would in this latter case have to be interpreted by what those rights concretely mean to the people whose rights they are. It is in this latter sense that this chapter suggests popular acceptability should count as one element in corporate moral responsibilities in relation to human rights. To respect human rights is (*inter alia*) to respect autonomy, and to respect autonomy is to seek popular acceptability for the policies one chooses to try to respect, support, ensure or promote human rights.

It is worth noting that the rough distinction between moral and popular acceptability appears within the current waves of criticism of the operations of multinationals. Some campaigners who are primarily exercised by the way unregulated economic globalisation can undercut political protection, demand (in effect) that the moral and legal regulations applied to corporate operations in the West be extended to their operations elsewhere; why should workers in the Philippines have fewer rights than those in Australia or America? This is a moral approach rather than a popular one: the concern is not that the Filipino workers have no voice in formulating the correct standard of rights, rather that they simply don't enjoy the benefits those rights would provide to Western workers. In contrast, campaigners who are primarily opposed to the powers of multinational corporations to transform local environments and societies in virtue of their operations, will tend to call for a voice for local people in controlling such development – this is an example of the popular approach which may shade into the legal approach, or which may challenge the latter in order to give local people more of a voice than is currently provided them by law.

There is of course an important third dimension of acceptability for corporate action: legal acceptability. Many human rights claims are made in order to assert

[26] James Griffin helped me to see in discussion that popular acceptability must be a subset of moral acceptability if it is to be morally acceptable.

that the moral right involved should be recognised by the law: the goal is for the moral to become the legal, which would save companies from having to consider separate moral claims beyond their general duty to obey the law. Similarly, one of the best ways to make popular accountability a reality, while avoiding the pitfalls of trying to define who 'the [relevant] people' are for a given question, and how to ensure their voice will be heard, is to fold it into the legal mechanisms provided by the state. But there are inevitable gaps in the provision of the law. First, there will always be a gap between the recognition of need for some legal action, and its being taken – sometimes a considerable one. Second, there may be cases where a given state will not pass a law, yet the moral and/or popular demand must be met. Third, there are cases where a moral or popular claim may not be legitimately imposable by law, being outweighed by other principles, yet the claim still has a broad moral force. As stated at the outset of this chapter, then, we cannot expect a discussion of 'the moral responsibilities of corporations' to resolve itself wholly and without remainder into their legal responsibilities. And this holds true also for that subset of the moral domain where popular acceptability belongs. While in some sense legal acceptability must itself be a subset of the popular, where the relevant 'public' is that involved in the law-making procedures of the state, it is more helpful here to keep the two categories distinct.

The notion of popular acceptability is deliberately broad, and in its modal formulation blurs across two axes of continua of ways in which acceptability might be manifested. On one extreme of the first axis is a case without any formalised expression of acceptability (the fluidity of public opinion or riot), on the other, cases where there are express governmental procedures for gauging acceptability. On the extreme of the second axis is a case where assent is assumed unless dissent is expressly registered, on the other extreme, cases where procedures are used to elicit more or less explicit forms of assent from everyone (compulsory voting at the very extreme). And one might also divide the space into more and less deliberative forms of expressing acceptability. The point in this three-dimensional space which is achieved in any one case will be the result of interaction, perhaps by negotiation, perhaps by confrontation, between groups of people, or individuals, and the corporation.

Who are the people who may assert a claim of popular acceptability against a corporation? There are a very large numbers of candidates for this role, many of them often if vaguely described as 'stakeholders' – employees, consumers, creditors, suppliers, local residents where the company operates, as well as shareholders. Of these groups, shareholders and consumers have probably the greatest freedom of exit; the issue of employees is a major one which requires a separate study of its own; and the role of creditors and suppliers is only beginning to be recognised. Of the groups just mentioned, moreover, while the corporation may owe them certain moral responsibilities, it is implausible (with the major and critical exception of employees) to consider these to derive primarily from human rights. The remainder of this chapter will accordingly focus on the case of local residents where companies operate, and in particular, on the case of local residents in the areas where multinational extractive corporations operate. Most of these areas are in relatively

weak states, a fact which will colour the analysis here significantly. The reason for choosing this context is to bring out the difficult choices which can confront corporations, but it must be remembered that the ideal would be for such weak states to be replaced with strong states, rather than that the weak state be considered as a paradigm for the state as such.

It is in primarily in relation to local residents that corporations exercise a subset of their powers which may be termed 'prerogative powers'. These powers are best understood by reference to a rough classification of corporate powers, as follows:

1) agency powers: powers to act as an agent relative to other agents in the marketplace or to a state, states, or international bodies
   a) contractual power
   b) prerogative power: powers to act not exhausted by contract
2) communicative powers
   a) ability to try to create or reshape preferences of individuals or other agents
   b) ability to try to create or reshape the political rules of the market game
3) managerial powers: powers to direct and control the actions of their workers
4) possible result of effective combination of 1, 2 & 3: market power, or in extreme case, monopoly power

Contractual power is a central and characteristic feature of that agency: the power to bind and be bound by contracts both with workers (which then inducts them into the realm of managerial power) and with other firms and even states and other actors. But the power to contract does not exhaust the domain of corporate agency. Corporations have constrained discretion to decide how to exercise their contractual powers; they also have powers gained in virtue of their contracts, as well as in virtue of the property they hold: powers to alter local environments by acting on their own property, for example. They also have some freedom to act within the broad constraints of their charters so as to meet the objectives set down therein: to set up corporate charitable foundations, for example, consistent with their fiduciary duties to shareholders. Some of these powers are already regulated by the state, while others could be, should sufficient cause be shown and the necessary political processes achieved. But just as was argued for the relation between moral and legal rights, so it is true for the relation between prerogative and regulated powers: either because of temporal lags, state failure, or principled state restraint, there will remain an ineradicable grey area in the exercise of prerogative powers and of quasi-monopoly powers, which authorisation by the state cannot wholly eliminate. I call such powers 'prerogative' by analogy with Locke's discussion of the prerogative of the political ruler, who may act for the public good where the laws are silent.[27] So

[27] Barry Hindess observes that Locke and other liberals recognised that similar prerogatives might be exercised by individuals against one another in civil society, but that they were not concerned to regulate these politically, believing that individual concern with reputation – with what Locke called the 'Law of Opinion and Reputation' – would make the domain of civil society sufficiently self-regulating. See Barry Hindess, 'Democracy and the Neo-Liberal Promotion of Arbitrary Power', *Critical Review of International Social and Political Philosophy* 3 (2000), pp. 68-84, at pp. 73-74. One way of seeing the

where contracts and political authorisation fall silent, corporations retain the power to act in ways which may be based on contract, but which affect many people who are not directly party to that contract. It is the exercise of such discretionary powers which NGOs and anti-capitalists often find most objectionable, in that they can give corporations broad sway over the conditions and way of life of a local people most of whom have never chosen to contract with it. Yet if such discretionary powers are inevitable, as I believe they are, then the question becomes whether they can be made subject to popular acceptability. This demand cannot be evaded by a corporation's claim that their moral responsibilities have been exhausted by the granting of legal authorisation, say by a national state, to operate.

Legal acceptability, for example via the authorisation of a company to extract a certain resource, does not in itself guarantee the popular acceptability of the company's specific actions. This parallels democratic politics, in which authorisation of an official or body to act does not in itself guarantee that the decisions made will be in the public interest. In both cases people may seek additional controls. But such a search may itself involve new kinds of tensions and difficulties. These claims can be illustrated by looking at the specific case of intervention by extractive corporations in localities: oil and gas or mining corporations which need to establish large-scale plant over a period of years. One advantage of extractive corporations is that they typically have to make large and fixed investments over comparatively long periods of time in specific areas (mines, wells); thus they should be a good case for popular acceptability, as their operations touch specific local communities which might seek to make them more acceptable; on the other hand, the national authorisation required for them to be present can come into tension with such efforts to exert local control over acceptability. The difficulties I will examine apply even where national institutions are relatively meaningfully democratic in their functioning. These difficulties arise at two stages, authorisation and operations.

To begin with authorisation.[28] State ownership of mineral, oil and gas resource rights is asserted in many countries and the decision to develop those resources will typically be taken by the national state, in view of the 'impact' on national

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pressure for corporations to conform to moral standards is as attempting to bring them more securely within the realm of operation of the law of opinion – to give the artificial person of the corporation the same interest in a good reputation as natural persons, even if the source of the interest may be partly different – and so to make it more likely that their actions will aim at or at least be constrained by the notion of the public good.

[28] In addition to the state-locality tensions on which I focus, it is worth noting that the autonomy of state decisions is itself squeezed by the assertion of international environmental standards: 'To the extent that international media and NGO attention is placing pressure on companies to conform with contemporary developed world standards wherever they operate, this trend is effectively subverting the legitimate state-company relationship, impinging on the sovereignty of states in the region [this discussion is about the Asian Pacific, though the point applies generally] by taking the power to decide on issues of environment and development, and about acceptable and unacceptable corporate behaviour, away from the host country.' Glenn Banks, 'Changing Notions of Certainty and Security in Asia-Pacific Mining', in Donald Denoon, Chris Ballard, Glenn Banks and Peter Hancock (eds), *Mining and Mineral Resource Policy Issues in Asia-Pacific: Prospects for the 21st Century* (Canberra: Research School of Pacific and Asian Studies, Australian National University, 1995), pp. 38-44, at 41.

development, despite the very specific 'impact' which will be felt in a given locality. The fact that the state itself may earn royalties cannot be ignored in any attempt to assert democratic control over the ministers and bureaucrats who may somehow contrive to benefit from those royalties. But in any case the decision to extract a valuable natural resource, owned by the state, will be likely to hinge on national-level considerations rather than on representations from the locality. (Note that such decisions are different from the standard NIMBY cases, where an incinerator (say) may be situated in any one of a number of sites; extractive resources such as oil, gas, and minerals are found in specific and limited locations, though logging may be more like a NIMBY case depending on the distribution of forest cover in a given country.)

We need not infer here that the locality necessarily wishes to block development. In case of the Alaskan National Wilderness Refuge, for example, many locals and the state government are strongly in favour of development, against what they perceive to be national-level arguments about ecology which ignore or override the particular interests of region and state. Similarly, mining developments in Papua New Guinea have elicited a wide range of local responses, from the eagerness of the local community (I will unpack that term shortly) and the company to set up the Porgera mine, to the state's 'shotgun marriage' between community and company in the case of Lihir.[29]

There are two complementary dangers in the relation between locality, state, and corporation at the authorisation stage, which comprises the decision to develop, the awarding of a contract to one company or venture scheme, and the agreement of compensation and royalties. They can be summed up in relation to the role of the state by Albert O. Hirschman's lapidary comment: 'Political power is very much like market power in that it permits the power-holder to indulge either his brutality or his flaccidity.'[30]

The danger which comes more readily to liberal minds is state brutality, that is, the danger that local interests will be overlooked or overridden. It may happen that the interests of the locality are unlikely to be decisive or even influential in the national context which will track national interests as a whole, including local interests among these but not giving them priority. This is so even if the consequences for local life may be very serious. (The decision to close enterprises for national reasons can have similar effects: the coal mining towns in England and Wales suffered disproportionately and grossly when the nationalised coal mines were closed down under Thatcher and Major.)

The other danger, less apparently likely but documented in the case of recent developments in Papua New Guinea, is that the state will capitulate to local demands in an attempt first to secure authorisation, and then or subsequently also to ensure that the development can proceed unmolested by protest or sabotage. For while states hold the official power of authorisation, local populations hold the ultimate

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[29] Colin Filer, 'Participation, Governance and Social Impact: The Planning of the Lihir Gold Mine', in Denoon et.al., *Mining*, pp. 67-75, at 72-73, with quotation from 73.

[30] Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States* (Cambridge, MA and London: Harvard University Press, 1970), p. 58.

power of sabotage: they cannot usually exit as a group (although individuals can move away) but they can seek to risk, or to force, the company's decision to exit. Thus mining companies in the Pacific region have concluded that they must 'placate the locals or forget mining'.[31] Sometimes due to state recognition of this fact, sometimes to company recognition of it, and sometimes to both, recent trends in Pacific mining development have swung toward the benefit of locals at the expense of the state, even in the contracts of authorisation drawn up by the state. Either state or company or both recognise, sometimes as a result of agitation and organisation by local groups, that the benefit flow must go primarily to the locality if the mining operation is to be viable. In this case the generalisation that 'the essential strategy of the global corporation makes it an antagonist of local interests everywhere'[32] will not apply – though just what definition of local interests the corporation will have reason to advance in such a situation remains to be seen.

This trend may both result from and reinforce local perceptions of the weakness and insignificance of the state. An extreme version of pre-existing local views is recorded in the case of the Lihir development in Papua New Guinea by Colin Filer. Mark Soipang, Chairman of the Lihir Mining Area Landowners Association, declared in the course of negotiations with the national and provincial governments over the distribution of equity in the mine: 'The developers are foreigners, and the State [sic] is only a concept. It is us, the landowners, who represent real life and people.'[33] Even if pre-existing views of the state are more moderate than this, the skewing of equity and royalties away from the state to the locality (in the Lihir case, eventually by 100%, as the state gave up its claims altogether in order to meet local landowner demands) is likely to undermine state legitimacy both symbolically and practically. The practical effect again has two interacting sources, as the state is deprived of the resources with which to make its presence felt in the region, and the locals are meanwhile able to lean on the company to provide services in its place.

If we turn from the stage of authorisation to the stage of operation, we find several interesting developments. First, companies may discover that the undermining of the state caused by or reflected in the authorisation contract, has landed them with a new set of responsibilities as perceived by the locals. And those responsibilities may not be easily or prudently circumscribed by the authorisation contract itself. Indonesian and PNG contracts specify no requirement to provide further benefits to the local community, for example, beyond the compensation agreed in the contract itself in PNG (Indonesian contracts have not in the past required local compensation at all). But companies have come to recognise either the instrumental need for infrastructure, and/or the need to pacify a restive community by providing it, and the fact that the compensation contractually agreed will not exhaust those needs. For if benefits flow exclusively to a single privileged group (such as landowners, as opposed to squatters or migrants) severe social divisions and dislocations will result. So it turns out to be in the interest of the

[31] Rolf Gerritsen, ''Capital Logic' and the Erosion of Public Policy in PNG [Papua New Guinea]', in Denoon et. al., *Mining*, pp. 82-90, at p. 85.
[32] Barnet and Müller, *Global Reach*, p. 379.
[33] Filer, 'Participation', p. 68.

company to provide additional extra-contractual benefits more generally. Thus the exercise of company prerogative powers to provide benefits to the locals will almost inevitably come to exceed the bounds of its contractual obligations.[34]

The significance of such prerogative powers is heightened by the fact that the corporation also confronts locals with an agency which monopolises (by contractual right) significant powers which can affect their ecological and social environment. In the case of the extractive industries, typically a single company or consortium is authorised to make substantial alterations to the local environment. Local communities are not brought into the market in the sense that they can choose voluntarily whether to interact with the company or not. Rather, they are confronted with a monopoly agent which has been granted control of local lands and resources and which will inevitably become a major and often the overwhelmingly dominant force in the local economy. What on a national level looked like a legitimately national decision made by representative means, serves to establish a monopoly of certain kinds of power in the local area. The citizens face that monopoly as probably the overwhelmingly dominant source of employment, as the agent entrusted with the power to modify the local environment and to carry out forms of compulsory purchase, and possibly as the source of consumer goods by operating a local store as well.

One standard solution to the existence of monopoly – break it up to foment competition, and/or introduce competition from other sources – is obviously unavailable here. The other standard solution to the existence of monopoly is regulation. This is something which the national government may try to introduce as far as it goes. But it is important to notice that the situation here is potentially worse for local people than in the ordinary case of monopoly. There the monopoly is over some service, or sector, and the ensuing disadvantage is typically suffered by consumers. Here the monopoly may cover the entire humanly relevant local environment, a source of food, shelter, and other goods; and also will dominate the local employment scene to the extent of foreclosing other possible industries (while the employment offered by the monopoly may or may not be attractive). The response to monopoly on a group level, where there is no group exit although there is individual exit, can only be voice.

Thus the company cannot consider its acceptability to local people to be exhausted by authorisation from the national government. It must acknowledge its monopoly powers, and other powers, in relation to the local population of the area of operations, powers which the national government conferred but which the local population will wish to be able to engage in order to reduce the arbitrariness of their exercise. This is where the need for popular acceptability on the part of the

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[34] Chris Ballard, 'Citizens and Landowners: the Contest over Land and Mineral Resources in Eastern Indonesia and Papua New Guinea', in Denoon *et.al*., *Mining*, pp. 76-81, commenting on p. 78 on the 'pro-active' position which companies can and must take beyond their contractual agreements. See also Alan Stevens (of the Porgera Joint Venture in PNG), 'Social Planning through Business and Infrastructural Development', in Denoon et.al., *Mining and Mineral Resources*, pp. 122-128, on the need to go beyond contract and in so doing to attend to all sections of the local community, not just those specified in the contract, at p. 123.

corporation, and the possibility of active participation by local people, comes in. The company may (and should) feel an obligation to listen to locals in virtue of the powers which it exercises, both prerogative and monopoly, over them. And locals will certainly seek to participate vocally in influencing the company's exercise of such powers.

There is a further complication however in the operation of such 'voice'. Companies need to define the locals who are relevant to their operations (for purposes of compensation or general benefit or legitimating voice), and this will almost certainly not coincide with pre-existing political or geographical or identity boundaries. If those owed are defined as landowners, for example, then it becomes imperative for as many people as possible to define themselves as landowners. Thus the corporation seeking legitimate partners is always going to be involved in a mutual process of definition of those partners, as locals reorganise themselves to take advantage of corporate offers and intentions. It is the state which would seem to be the legitimate authority in this process. But the contest between state and local power may de-legitimise or marginalise the state's role. And as the corporation will tend to be more immediately responsive than the state, both because of its greater interest in resolving immediate conflicts and often because of its greater institutional capacity to act, there will be an incentive for locals to marginalise the state even further and deal exclusively with the company.

Thus arises the possibility both of Potemkin groups defined by the company, and of Potemkin groups defined by some locals against the interests of others. Moreover, the success of one group of locals in striking a deal with the corporation may either undermine the position of localities elsewhere, or spur emulation, so that the distribution of power and resources among localities will be a function of what they can each get for themselves rather than a national conception of distributive justice. Finally, those adults authorised to receive compensation or benefits may squander them so as to deprive future generations (including their own already living children), as well as dependents (such as wives and widows) of the economic support which they would have derived from the resource for which compensation is being paid. Democratic legitimacy in the isolated kingdom of civil society is difficult to fix and to check.

The best solution to these difficulties lies in the state, where that state is neither too weak nor too perverse to play a constructive role. States can establish legal forums for the expression of popular acceptability, similar to those involved in the planning process for land use in most advanced democracies.[35] And they can adjudicate between the groups of locals contending for the ear of the corporation. One way in which the needs and desires of both corporation and people affected by its actions could be addressed, would be by setting up under the aegis of the initial authorising action by the state, a forum for review and discussion of the use of the powers so authorised, with independent representation in addition to that of state and company, and advisory status to both state and company. Such a forum would be

[35] The relevance of the planning process to these kinds of concerns was urged on me by both David Howarth and Peter Muchlinski.

bound by agreed norms for publicity and transparency of the comments and responses made by all parties. This would provide a focus for community concerns and a way of relating them to the national powers of authorisation, while not pretending that all community concerns could have been exhausted in that initial act.

In conclusion, it is important to remember that a single-minded emphasis on the popular acceptability of corporate action has problems and pitfalls, many of which can be mitigated by remembering the companion roles of moral and legal acceptability as well. Considering popular acceptability alone, one sees that a local community may benefit from their assertion of their potentially subverting power, or the company's or state's recognition of it; but they, as well as the state and company, may suffer from the subversion of the state's capability and legitimacy which that may entail in turn. Similarly, some locals may be empowered by being included in the groups with which company (or state) are willing to contract or to interact with otherwise, but others may lose out from the process of (re-) constitution of group identity which democratic involvement with the corporation demands. Finally, companies and groups of locals may become locked in mutually self-defeating games of calling each others' bluff, that is if locals are not simply sidelined (or worse) by companies who have decided to draw and hold a line in terms of their contribution to the local community.

Nevertheless, popular acceptability remains an ineradicable dimension of the achievement of genuine moral acceptability on the ground in a specific situation, even if the relevant public is divided. The promotion of human rights in relation to corporate activities, in particular, requires concern for autonomy which can be expressed in part by the acknowledgment of popular acceptability. The challenge is to maintain a healthy tension between legal and popular forms of acceptability, while not sacrificing moral acceptability but remaining sensitive to different interpretations of what morality might demand. Popular forums to monitor the implementation and consequences of legal authorisation agreements, may help to enable both companies and local groups to articulate their understandings of acceptable behaviour and acceptable interaction. In the realpolitik world of power differences between multinational corporations and many local groups in particular, NGOs may play a brokering role in enabling the voices of the latter to be heard, but observers and evaluators of this role should be sensitive to the problems of representativeness and group definition discussed above.

One might think of the powers thus expressed and developed as popular 'auditorial' powers in relation to corporations (drawing on the senses both of 'auditory' and of 'auditing'). These would in some cases fall short of the 'editorial' powers recently proposed by Philip Pettit[36] in relation to democratic political institutions, which allow citizens the chance to try to 'edit' state decisions, in that they would not give specified powers to change corporate behaviour, but only specified and formalised opportunities to be heard either in live or electronic forums. But in other cases, especially where implementation of an authorised agreement was

[36] Philip Pettit, 'Republican Freedom and Contestatory Democratization' in Ian Shapiro and Casimir Hacker-Cordón, (eds), *Democracy's Value* (Cambridge: Cambridge University Press, 1999), pp. 163-190.

in question, auditorial powers might become truly editorial. The exercise of power, particularly monopoly power, where exit is impossible or difficult, requires the exercise of voice on both sides: on the side of the monopolist, explaining itself and its activities, and on the side of the citizens, interrogating, advising and sometimes demanding. Where the control and equality of the vote are lacking, establishing institutional channels of auditability will at least allow scrutiny by all parties of the voices being heard and the content of what they say. The aim would be for the auditorial powers of citizens (both in home and host countries) to inform the exercise of prerogative and monopoly powers of the corporation and to monitor whether further legal controls or corporate self-modification are needed in order to ensure that the exercise of these powers are popularly acceptable. State, community, and corporation will and should contest the terms and voices to be listened to, and the results of that contest, while imperfect in any given case, will provide the only way of ensuring multiple faces of acceptability for corporate agents and so of respecting, promoting, and helping to ensure the autonomy of at least some of the agents with whom they interact.[37]

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[37] Valuable comments on previous versions of this paper were provided by the other contributors to this volume and by participants in seminars where it was presented at the ANU, Harvard, and Cambridge, including especially David Archard, Alyssa Bernstein, Geoff Brennan, Mark Bovens, Tom Campbell, Simon Deakin, John Dryzek, David Estlund, James Griffin, Ross Harrison, Barry Hindess, David Howarth, Jill Horwitz, Sharon Krause, Andrew Lovett, Harvey Mansfield, Gerry Mackie, Janet McLean, Seumas Miller, Peter Muchlinski, Glyn Morgan, Philip Pettit, Matt Price, Emma Rothschild, David Runciman, Tom Sorell, Marc Stears, Richard Tuck, Dana Villa, and Thad Williamson. The paper was prompted in part by concerns raised during my work as a Core Faculty member of the BP/Cambridge Executive Education Programme, and I am grateful to the participants and other members of the faculty and planning groups for the stimulation and challenges they have provided.

PART THREE

PUBLIC SECTOR

RESPONSIBILITIES

SEUMAS MILLER

CHAPTER NINE

Moral Rights and the Institution of the Police

In this chapter I discuss the relationship between moral rights and the institution of the police.[1] I argue that the protection of moral rights is the central and most important moral purpose of police work, albeit a purpose whose pursuit ought to be constrained by the law. So while police institutions have other important purposes that might not directly involve the violation of moral rights, such as to enforce traffic laws or to enforce the adjudications of courts in relation to disputes between citizens, or indeed themselves to settle disputes between citizens on the streets, or to ensure good order more generally, these turn out to be purposes derived from the more fundamental purpose of protecting moral rights, or they turn out to be (non-derivative) secondary purposes. Thus laws against speeding derive in part from the moral right to life, and the restoring of order at a football match ultimately in large part derives from moral rights to the protection of persons and of property. On the other hand, handing out summonses to assist the courts is presumably a secondary purpose of policing.

It is important to state a number of things at the outset. First, this is a *normative* account of policing, not a *descriptive* account; it is an account of what policing *ought* to be about, not what it has been or is about. Moreover, it is a normative theory of the *institution* of the police, that is, of the proper ends and distinctive means of the institution of the police. So it is not a theory about specific police methods or strategies; it is not a theory of, so to speak, best practice in policing. Accordingly, I will not here have anything much to say about disputes between crime-fighter and peace-keeper models of the role of police officers, or in relation to arguments concerning community-based policing or zero-tolerance policing. That said, a normative theory of the institution of the police will have important implications for questions of police methods and strategies, though often these will not be straightforward or obvious. At any rate, such questions are not my concern here.

[1] See the *United Nations Code of Conduct for Law Enforcement Officials.* Most of the articles in this code specify the human rights constraints on police officers. However, Article 1 stresses the duty to protect persons, and the commentary (under c) notes the duty of police to provide aid in times of emergency.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 167–188.

Naturally, whether or not a descriptive theory of an institution is warranted depends on empirical facts. Moreover, the falsity of the *descriptive* theory would put pressure on the acceptability of any *normative* theory of institutions. If it turned out that no institution of that kind at any time or place *in fact* involved to any extent the pursuit of the moral good proposed in some normative theory of that institution, then this would make it implausible to claim that the institution, nevertheless, in general *ought* to aim at that good.

Second, I am assuming a particular notion of moral rights. Moral rights are of two kinds. First, there are human rights; moral rights that individuals possess solely by virtue of being humans, for example, the right to life and the right to freedom of thought. Second, there are institutional (moral) rights; moral rights that individuals possess in part by virtue of rights generating properties that they have as human beings, and in part by virtue of their membership of a community or morally legitimate institution, or their occupancy of a morally legitimate institutional role. Thus the right to vote is an institutional right, since it exists in part by virtue of possession of the rights generating property of autonomy, and in part by virtue of membership of a political community. Again, the right to arrest and detain someone for assault is a moral right possessed by police officers. This right is in part dependent on membership of a morally legitimate police institution, but it is also in part dependent on the human right of the victim not to be assaulted.

Moreover, I am assuming the following properties of moral rights. First, moral rights generate concomitant duties on others, for example, *A*'s right to life generates a duty on the part of *B* not to kill *A*. Second, human rights, but not necessarily institutional moral rights, are justifiably enforceable, for example, *A* has a right not to assaulted by *B*, and if *B* assaults, or attempts to assault, *A*, then *B* can legitimately be prevented from assaulting *A* by means of coercion. Third, bearers of human rights in particular do not necessarily have to assert a given human right in order for the right to be violated, for example, an infant may have a right to life even thought it does not have the ability to assert it (or for that matter to waive it).

Third, the conception of policing that I am offering is a teleological conception; it is a conception in terms of the ends or goals of policing. Moreover, it is a teleological conception according to which the most important end or purpose of policing is the protection of moral rights.

Fourth, on the view that I am advocating, while police ought to have as a fundamental purpose the protection of moral rights, their efforts in this regard ought to be constrained by the law. So I am insisting that police work ought to be guided by moral considerations – namely, moral rights – and not simply by legal considerations. This enables me to avoid the problems besetting theories of policing cast purely in terms of law enforcement or protection of the state. [2] Such theories are faced with the obvious problem posed by authoritarian states, or sometimes even democratic states, that enact laws that violate human rights, in particular. Consider

[2] John Alderson, *Principled Policing* (Winchester: Waterside Press, 1998) at times seems to advocate a view close to the one that I am proposing. However, at other times he seems to be elaborating the view that human rights are merely side constraints on policing, rather than a *raison d'etre* for police work. See especially Chapter One.

the police in Nazi Germany, Soviet Russia, or Iraq under Saddam Hussein. These police forces upheld laws that violated the human rights of (respectively) Jews, Soviet citizens, and Iraqi citizens (including Shi'ite Muslims' religious rights). By my lights the officers in these police forces simultaneously violated human rights, and abrogated their primary professional responsibility as police officers to protect human rights.

Further, on the view that I am advocating police engaged in the protection of moral rights ought to be constrained by the law, or at least ought to be constrained by laws that embody the will of the community in the sense that: (a) the procedures for generating these laws are more or less universally accepted by the community, for example, a democratically elected legislature, and; (b) the content of the laws are at least in large part accepted by the community, for example, they embody general policies with majority electoral support or reflect the community's moral beliefs.[3] So I am in part helping myself to a broadly contractarian moral constraint on policing, namely the 'consent' of citizens; although by my lights consent is not the *raison d'etre* for policing, rather it provides an additional (albeit necessary) condition for the moral legitimacy of policework. Moreover, I am refraining from providing police with a licence to pursue their possibly only individually subjective view of what counts as an enforceable moral right. What counts as an enforceable moral right is an objective matter. Nevertheless, someone or other has to decide what are to be taken to be enforceable moral rights and what are not to be so taken, and in my view ultimately this is a decision for the community to make by way of its laws and its democratically elected government. Here I take it that in a properly constituted democracy the law embodies the will of the community in the sense adumbrated above.

And there is a further point here. The law concretises moral rights and the principles governing their enforcement, including human rights as well as institutional moral rights. To this extent the law is very helpful in terms of guiding police officers and citizens in relation to the way that abstract moral rights and principles apply to specific circumstances.

In short, in my view police ought to act principally to protect certain moral rights, those moral rights ought to be enshrined in the law, and the law ought to reflect the will of the community. Should any of these conditions fail to obtain, then there will be problems. If the law and objective (justifiably enforceable) moral rights

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[3] Here I am assuming that large fragments of a legal system can consist of immoral laws, and yet the system remains recognisably a legal system. See Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1998) p. 101. I am also assuming that for a legal system to express the admittedly problematic notion of the will of the community, it is at least necessary that the overwhelming majority of the community (not just a simple majority) support the content of the system of laws taken as a whole – even if there are a small number of individual laws they do not support – and support the procedures for generating laws, for example, they have a democratically elected legislature. See Seumas Miller, *Social Action: A Teleological Account* (New York: Cambridge University Press, 2001) pp. 141-151. Finally, I am assuming that the fact that a party or candidate or policy or law secured (directly or directly) a majority vote is an important (but not necessarily decisive) consideration in its favour, and a consideration above and beyond the moral weight to be given to the existence of a consensus in relation to the value to be attached to voting as a procedure.

come apart, or if the law and the will of the community come apart, or if objective moral rights and the will of the community come apart, then the police may well be faced with moral dilemmas. I do not believe that there are neat and easy solutions to all of such problems. Clearly, if the law and/or the citizenry requires the police to *violate* moral rights then the law and/or the citizenry will be at odds with the fundamental purpose of policing. Accordingly, depending on the circumstances, the police may well be obliged to disobey the law and/or the will of the community. On the other hand, what is the appropriate police response to a citizen violating someone else's objective moral right in a community in which the right is not as a matter of fact enshrined in the law, and the right is not supported by the community? Consider in this connection women's rights to (say) education under an extremist fundamentalist religious regime such as the former Taliban regime in Afghanistan.[4] Under such circumstances an issue arises as to whether police are morally obliged qua police officers to *enforce* respect for the moral right in question. Again, I suggest that they may well be obliged to intervene to enforce respect for such a moral right.

Normatively speaking, then, the protection of fundamental moral rights – specifically *justifiably enforceable* moral rights – is the central and most important purpose of police work. As it happens, there is increasing recourse to human rights legislation, in particular, in the decisions of domestic as well as international courts. This is an interesting development. However, it must also be pointed out that the criminal law in many, if not most, jurisdictions already in effect constitutes human rights legislation. Laws proscribing murder, rape, assault, and so on, are essentially laws that protect human rights. So it is clear that whatever the historical importance of a statist conception of human rights – human rights as protections of the individual against the state – a statist conception is inadequate as a *general* account of human rights. Human rights in particular, and moral rights more generally, also exist to protect individual citizens from their fellow citizens, and individual citizens from organisations other than the organisations of the state.

In this connection please note that I do not say that the protection of (legally enshrined, justifiably enforceable) moral rights is the *only* goal of policing; merely that it is the *central and most important* goal. Nor do I hold that police are, or ought to be, preoccupied with seeing to it that *all* moral rights are secured. Roughly speaking, police are, or ought to be, engaged in moral rights work to the extent to which the moral rights in question are ones that justify and require the use of coercive force for their protection.[5] Some moral rights are not justifiably enforceable, for example, a wife's moral right to the sex her husband promised her when they got married. Other moral rights do not necessarily, or in general, require the use of coercive force for their protection. For example, a physically disabled person might have a moral right to appropriate access to public buildings such as libraries and government offices, and such access might necessitate the provision of

[4] Regarding the role of the religious police of the Taliban in the Department of the Promotion of Virtue and Prevention of Vice see Ahmed Rashid's *Taliban, The Story of the Afghan Warlords* (London: Pan Books, 2001) Chapter Eight.

[5] Though no doubt all human rights need protection from time to time.

sloping paths as opposed to stairs. But the securing of this right for the disabled might call only for action on the part of the local council; there might be no need for the police to be involved.

Here the distinction made by Henry Shue is relevant. Shue distinguishes between three sorts of duties that correlate with what he calls basic rights.[6] These are the duties to: (i) avoid depriving; (ii) protect from deprivation; (iii) aid the deprived.

In relation to police work, (ii) above, the duty to protect from deprivation is especially salient. Police are typically engaged in protecting someone from being deprived of their right to life, liberty or property. Note that in providing such protection police are different from other occupations in that they are entitled to employ the use of, or more often, the threat of the use of, coercive force. This is, of course, not to suggest that police always or even typically use coercive force, or threaten to use it; rather the claim is that this recourse to coercion is a distinctive and routine feature of policing, and is in some sense 'the bottom-line' when it comes to realising the proper ends of policing.

At any rate, the account of the institution of the police that I am offering promises to display the distinctive defining features of the institution of the police; namely, its use of coercive force in the service of legally enshrined moral rights. On this account the institution of the police is quite different from other institutions that are either not principally concerned with moral rights, or that do not necessarily rely on coercion in the service of moral rights. Consider business. Many business organisations do not have the securing of moral rights as a primary purpose; nor should they. On the other hand, moral rights are an important side constraint on business activity. Now consider welfare institutions. There is a human right to a subsistence living, and aiding the deprived (to use Shue's terminology) is a fundamental purpose of welfare institutions. However, aiding the deprived does not necessarily or routinely involve the use of, or threat of the use of, coercive force. Thus welfare institutions are different in kind from policing institutions.

It might be argued that contemporary military institutions meet our definition of the institution of the police. Consider so-called humanitarian armed intervention in places such as Somalia, Bosnia, Rwanda, Kosovo and East Timor. Whether or not each of these armed interventions was principally undertaken to protect human rights is a matter of controversy. At any rate, I make three points in response.

First, the nature and evolution of military and policing institutions is such that the lines have often been blurred between the two. Thus, in the British colonies the police historically had a paramilitary role in relation to what was regarded as a hostile population. The Royal Irish Constabulary is an example of this. Indeed, according to Richard Hill:

> Coercion by army and by police have always been distinguished by differences of degree, rather than kind, and through most of the history of policing there was no clear demarcation between the two inter-woven strands of control situated towards the coercive extremity of the control continuum … Historically, constables were generally considered to be a reserve military body for mobilisation by the state in potential or

[6] Henry Shue, *Basic Rights* (Princeton: Princeton University Press, 1996) p. 52.

> actual emergency; conversely soldiers were frequently called upon to conduct duties generally considered to be of a 'policing' nature.[7]

But from this is does not follow that there are not good reasons for a *normative* theory of *contemporary* policing in liberal democracies to make distinctions between the fundamental role of the police and that of the military. Such reasons would include the well-documented and high problematic character of para-military police forces, including in relation to the violation by such forces of individual moral rights, and the tendency for such forces to become simply the instrument of governments rather than the protectors of the rights of the community and the servants of its laws.

Second, while contemporary military forces may undertake humanitarian armed interventions from time to time, this is not, or has not been, their fundamental purpose; rather national self defence has avowedly been their purpose.

Third, to the extent that military institutions do in fact take on the role of human rights protection by means of the use of coercive force, then they are being assimilated to police institutions. It is no accident that recent humanitarian armed interventions are referred to as episodes of international *policing*.

There are some other objections to my account of the institution of the police. I try to deal with the most important of these later on in this chapter.

In the first section of the chapter I offer a brief account of moral rights and the cognate notion of social norms. In the second section I present my theory of policing as the protection of legally enshrined moral rights by means of coercive force. In the third and final section I deal with some residual issues arising from the use of harmful methods in policing, including methods that under normal circumstances would themselves constitute human rights violations.

1. MORAL RIGHTS AND SOCIAL NORMS

Moral rights are a basic moral category; but they are far from being the only moral consideration. Here we note that moral rights comprise a relatively narrow set of moral considerations. There are many moral obligations that are not, and do not derive from, moral rights, for example, an obligation to assist a friend who is depressed, or not to cheat on one's boyfriend.

The point of human rights is to protect some basic human value or values. On James Griffin's account, human rights arise from the need to protect what he calls personhood.[8] At the core of his notion of personhood is individual autonomy. Certainly, autonomy is a basic human value protected by a structure of human rights. However, I have some reservations about Griffin's account; specifically, it might turn out to be too narrowly reliant on autonomy. Perhaps the right not to be

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[7] Richard S. Hill, *Policing the Colonial Frontier: The Theory and Practice of Coercive Social and Racial Control in New Zealand, 1767-1867* (Wellington, NZ: Government Printer, 1986) Part One p. 3.

[8] James Griffin, 'Human Rights' this volume pp. 31-43.

tortured does not simply derive from a right to autonomy; perhaps it derives, at least in part, from the right not to suffer extreme pain intentionally inflicted by another.[9]

At any rate, whatever the correct theoretical account of human rights might be, I assume that Griffin is right to set out a relatively limited set of moral considerations as being human rights. These will include the right to life, to physical security, to freedom of thought, expression and movement, and to freedom to form human relationships, including freedom to choose one's sexual partner. They will also include the right to a basic subsistence; so they will include rights to food, water, and shelter.

However, moral rights will include a range of other moral rights that go beyond human rights and that might be termed 'institutional moral rights'. As mentioned above, these are moral rights that depend in part on rights generating properties possessed by human beings qua human beings, but also in part on membership of a community or of a morally legitimate institution, or occupancy of a morally legitimate institutional role. Such institutional moral rights include the right to vote and to stand for political office, the right of legislators to enact legislation, of judges to make binding judgments, of police to arrest offenders, and of patients to sue doctors for negligence.

Here we need to distinguish between: (a) institutional rights that embody human rights in institutional settings, and therefore depend in part on rights generating properties that human beings possess as human beings (these are institutional *moral* rights), and; (b) institutional rights that do not embody human rights in institutional settings (these are not necessarily institutional *moral* rights, but rather *mere* institutional rights). The right to vote and the right to stand for office embody the human right to autonomy in the institutional setting of the state; hence to make a law to exclude certain people from having a vote or standing for office, as happened under apartheid in South Africa, is to violate a moral right. But the right to make the next move in a game of chess, or to move a pawn one space forward, but not (say) three spaces sidewards, is entirely dependent on the rules of chess; if the rules had been different, for example, if the rules prescribed that each player must make two consecutive moves or pawns can move sidewards, then the rights that players have would be entirely different. In other words these rights that chess players have are *mere* institutional rights; they depend entirely on the rules of the 'institution' of the game of chess. Likewise, (legally enshrined) parking rights, including reserved spaces, one hour parking spaces, and so on, in universities are *mere* institutional rights, as opposed to institutional *moral* rights.

A large question that arises at this point is the status of property rights. Are such rights institutional *moral* rights or *mere* institutional rights. It would seem that at least *some* property rights are institutional *moral* rights by virtue of being in part dependent on rights generating properties that human beings have qua human beings. Specifically, some property rights depend on the rights generating properties of: (1) the need to have exclusive use of certain physical material eg this food and water, and physical space eg this shelter, and; (2) individual or collective *labour*,

[9] This is a point made by Tom Campbell in discussion.

including labour that *creates* new things eg tools or ornaments that an individual or particular group has made. Some of these property rights might be individual rights eg to personal effects, some might be collective rights eg to occupy a certain stretch of territory and exclude others from it. At any rate, I will assume that some property rights are institutional *moral* rights.

Some (but not all) moral rights, including many (perhaps all) human rights are, or ought to be, embodied in the laws governing a community. This is most obvious in the case of many of the so-called negative rights, such as the right to life, the right to physical security, and the right to property. Murder, assault, rape, theft, fraud, and so on, are criminal offences. Moreover, the police have a clear and central role to investigate and apprehend the perpetrators of these crimes – the rights violators – and bring them before the courts for trial and sentencing.

Naturally, there are large fragments of the legal system concerned with matters other than criminality. For example, there are all manner of disputes of a non-criminal nature that are settled in the civil courts. These often involve important questions of *justice* that are not human rights issues. On the other hand, many of these disputes involve institutional moral rights, for example, who gets what part of the estate of some deceased relative or of the property formerly jointly owned by a husband and wife now involved in divorce proceedings. Moreover, in so far as a dispute is, or gives rise to, an issue of justice, then moral rights are involved at least in the sense that the disputants have a moral right to a just outcome.

To the extent that law enforcement by police is enforcement of moral rights, whether enforcement of criminal law or not, the police are undertaking their fundamental role (on my account). On the other hand, the police do have a legitimate role in relation to law enforcement, where the laws in question do not embody moral rights. This is a matter to which we return later in this chapter. Suffice it to say here that the law enforcement role of the police in relation to matters other than the enforcement of moral rights is, in our view, either a derived role or it is a secondary role.

It is also the case in Anglo-Saxon countries, in particular, that there are some human rights that are not embodied in the law. In Australia it is not unlawful to refrain from assisting someone who is drowning or starving. Yet the right to life is a human right, and therefore there is a concomitant moral obligation to assist someone who is drowning or starving, or at least to do so in situations in which in assisting such a person would not put oneself at risk of harm.

The moral and legal issues in this area are complex. However, in my view it ought to be unlawful to refrain from assisting persons whose lives are at immediate risk, and whom one can assist with minimal cost to oneself. Indeed, there ought to be a variety of so-called Good Samaritan laws, and the reason for this is that human rights ought to be protected, and some Good Samaritan laws protect human rights.

So I hold that in general violations of human rights ought to be criminalised. If this were the case – and it already is to a considerable extent – then the police would have a central role in relation to the enforcement of human rights by virtue of having a role in relation to the enforcement of the criminal law.

One of the interesting implications of this is that there would be a shift in the line of demarcation between the so-called police service role and the law enforcement role (especially criminal law enforcement role) of police. Typically, the police service role is contrasted with the law enforcement role; the rescue operations of Water Police or of police dealing with dangerous mentally deranged persons are supposedly service roles, not law enforcement roles. In one sense the contrast here is already overdrawn; the law with respect to water craft needs to be enforced, as does the law in relation to dangerous mentally deranged persons. Moreover, questions of policing *methods* should not be confused with questions of what actions ought to be criminalised and what ought not. In relation to some criminal offence, for example, juvenile gangs engaged in assaults, it might be more productive for police to engage in preventative strategies, such as restorative justice techniques, rather than simply arresting/charging and locking up offenders. More important, in so far as Good Samaritan laws with respect to so called positive moral rights were enacted, then many police activities previously regarded as service roles would become in part law enforcement roles (indeed roles of enforcing criminal laws). But it is important to stress here that the criminalisation of violations of certain positive moral rights is entirely consistent with an overall reduction in acts regarded as criminal, for example, decriminalisation of laws in relation to cannabis and prostitution. After all, smoking cannabis and selling sex are not activities which in themselves necessarily violate anyone's moral rights.

Thus far I have sought to make a connection between moral rights and the law on the one hand, and law enforcement and the institution of the police on the other. This has enabled me to present, albeit thus far in very general terms, the view that the fundamental point of policing is to enforce certain moral rights viz. justifiably enforceable moral rights. However, there are other competing views. One such influential contrasting view holds that the law embodies social morality in general.[10] On this view, in so far as the role of the police was to enforce the law, then their role would be to enforce social morality. Should this view be preferred to mine?

The notion of social morality is to be understood as the notion of the framework of moral values and principles that a society accepts and conforms to, that is, the framework of *social norms*.

Elsewhere I have offered and defended a detailed account of the notion of a social norm.[11] Roughly speaking, according to that account, a social norm is a regularity in behaviour among a group of individual persons such that: (a) each (or at least most) believes that each (including him/herself) morally ought to conform, and; (b) the belief of almost any individual that each (including him/herself) morally ought to conform is in part dependent on almost everyone else's belief that each morally ought to conform. So conformity to social norms is based on an interdependence of attitude – specifically, interdependence of moral beliefs.

Given the above account of social norms, it is easy to see why citizens feel that they ought to obey many of the laws of the land, and in particular criminal laws. For

[10] I take it that Lord Devlin's account is a version of this view. See Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).
[11] Miller, *Social Action op.cit.*, Chapter Four.

the criminal law is typically in large part an explicit formulation (backed by penal sanction) of a society's social norms. Citizens believe that they ought not to flout the laws against murder, theft, rape, assault and so on, because these citizens have internalised a system of social norms which proscribes such behaviour. Putting matters simply, for the most part any given citizen does not commit murder in part because s/he believes it is wrong for s/he to murder, and in part because others believe it is wrong for s/he to murder.

Unfortunately, there are some citizens who have not internalised the system of social norms, or who have not sufficiently internalised that system. Accordingly, there is a need to buttress the system of social norms by the construction of a criminal justice system. The latter system involves the detection of serious moral wrongdoing, and the investigation, trial and punishment of offenders.

Accordingly, it is tempting to view the role of the police as the enforcement of social morality understood as the structure of social norms in force in the community. This picture is an appealing one. However, it is inadequate in two respects.

Firstly, the notion of a social norm, and of social morality, are relatively wide notions; considerably wider than the notion of a basic moral requirement that ought to be enshrined in the criminal law (or the legal system more generally). Note also that the notion of an action or omission required by a social norm is considerably wider than the notion of a duty correlative to a moral right. For the notion of a social norm – and therefore of social morality – embraces regularities in behaviour (including omissions) that are the subject of some moral attitude. So they include behaviour that is outside the purview of the criminal law, or indeed the law more generally. For example, social norms prescribe and proscribe sexual behaviour that is not necessarily, or even generally, the subject of any legal requirement. Moreover, there is a great danger in widening the law to embrace all of social morality. Consider in this connection the threats to individual autonomy posed by puritanical polities such as Calvin's Geneva or agencies such as the Department for the Promotion of Virtue and the Prevention of Vice under the Taliban regime in Afghanistan.[12]

Secondly, the notion of a social norm – and of social morality – is an essentially subjective notion; it refers to the values and principles that are *believed in*, and in conformed to *as a matter of contingent fact*, by the members of some presumably morally sentient community. So social morality stands in contrast with objective notions, such as the notion of human rights. Or at least there is a contrast here for those of us who believe that the notion of a human right is an objective notion. It might be thought, nevertheless, that the subjective character of social morality is no obstacle to its being deployed – via the notion of the criminal law in particular – to define the proper role of the institution of the police. After all, the criminal law is itself subjective in the above sense. The criminal law is a de facto set of laws; it is not necessarily the set of laws that *ought to* exist by the lights of some objective

[12] Rashid, *op.cit*., Chapter Eight.

moral standard.[13] And it might be thought that the proper role of the police is to enforce the law in general, and the criminal law in particular, as it is; not as it morally ought to be.

Once again, this is an issue to be addressed in more detail later in this chapter. Here I simply record my view that a normative account of the role of the police must be cast in terms of objective notions, not subjective ones. The de facto role of the police in apartheid South Africa was the enforcement of the laws of apartheid, and of the Serbian police, for example, the so-called Red Berets of the Serbian Interior Ministry of Belgrade, the ethnic cleansing of Muslims in Bosnia, but these are not the morally legitimate roles of police forces.[14]

The upshot of the discussion thus far is that the view of police simply as enforcers of social morality is untenable. We cannot make a connection between the notion of social morality and the criminal law (especially) on the one hand, and the criminal law and the enforcement of the criminal law by the police on the other, and thereby erect a normative theory of the role of policing as the enforcement of social morality. Rather we ought to prefer the related, but competing view, that the fundamental role of the police is to protect legally enshrined (justifiably enforceable) moral rights, and for two reasons. First, the notion of justifiably enforceable moral rights is a suitably narrow one to qualify as the fundamental purpose of policing, unlike the notion of social morality. Second, the notion of justifiably enforceable moral rights is an objective notion, again unlike the notion of social morality. Putting matters simply, justifiably enforceable moral rights are an *objective* set of *fundamental* (actual or potential) social norms that are capable of being enshrined in enforceable law. As such, justifiably enforceable moral rights are an appropriate notion to provide the moral basis for policing, or at least the central and most important moral basis for policing.

So much for the discussion of human rights and social norms, and their relationship to the institution of the police. In the next section I consider in detail the relation between moral rights and the institution of the police.

2. MORAL RIGHTS AND THE INSTITUION OF THE POLICE

I have elsewhere provided a teleological normative account of social institutions.[15] According to that account, the ultimate justification for the existence of fundamental human institutions such as government, the education system, the economic system, and the criminal justice system, is their provision of some moral or ethical good or goods to the community. The existence of universities is justified by the fact that the academics that they employ discover, teach and disseminate the fundamental human good, knowledge. The existence of an economic system, including the free market system, is justified by the fact that it contributes to the fundamental human good, material well-being. The existence of governments is justified by the fact that they

[13] The criminal law is not simply a set of laws. For some theoretical accounts of the criminal law see A. Duff (ed.), *Philosophy and the Criminal Law* (Cambridge University Press, 1998) and Dworkin, *op.cit.*
[14] See Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* (London: Penguin, 1997) p. 224.
[15] *Social Action op. cit.*, Chapter Six.

provide the fundamental social good, leadership of the community, and thereby contribute to prosperity, security, equitable distribution of economic goods, and so on. In short, the point of having any one of these institutions is an ethical or moral one; each provide some fundamental human or social good(s).

Moreover, these moral goods, or at least believed moral goods, are, normatively speaking, the *collective* ends of institutions, and as such they conceptually condition the social norms that govern, or ought to govern, the constitutive roles and activities of members of institutions, and therefore the deontic properties (institutional rights and duties) that attach to these roles. Thus a police officer has certain deontic powers of search, seizure and arrest, but these powers are justified in terms of the moral good, legally enshrined human rights (say) that it is, or ought to be, the role of the police officer to maintain.

It is also worth noting here that there is no easy rights versus goods distinction. Human rights certainly function as a side constraint on the behaviour of institutional actors. But equally the securing of human rights can be a good that is aimed at by institutional actors.

Further, a defining property of an institution is its substantive functionality (or telos), and so a putative institutional entity with deontic properties, but stripped of its substantive functionality, typically ceases to be an institutional entity, at least of the relevant kind; would-be surgeons who cannot perform surgery are not surgeons. Equally, would-be police officers who are incapable of conducting an investigation, or who cannot make arrests or exercise any form of authority over citizens, are not really police officers. Here, by substantive functionality, I have in mind the specific defining ends of the institution or profession. In the case of institutions, including professions, the defining ends will be collective ends; they will not in general be ends that an individual could realise by his or her own action alone. In short, the theory of institutions, and of any given institution, is a *teleological* theory.

Further, institutions in general, and any given institution in particular, require both a teleological *descriptive* theory, and a teleological *normative* theory. Naturally, whether or not our commitment to teleological descriptive theories of institutions is warranted depends on empirical facts. If it turned out, for example, that most or all institutions did not have collective ends that were regarded either as intrinsic moral goods, or the means to intrinsic moral goods (derived moral goods) – that is, the participating agents did not in fact seek to realise the relevant putative defining collective ends – then my teleological descriptive theory would be false; I would have to abandon it. Moreover, the falsity of the teleological *descriptive* theory would put pressure on the acceptability of any teleological *normative* theory of institutions. If it turned out that no institution at any time or place *in fact* involved to any extent the pursuit of the relevant kind of collective end that was an *objective* (intrinsic or derived) moral good, then this would make it implausible to claim that institutions nevertheless in general *ought* to aim at collective ends that are objective (intrinsic or derived) moral goods.

Thus far I have spoken in terms of the theory of institutional action where institutions have been taken to be different and separate ‘entities’. However, there is also a need for a theoretical account of the *interrelationships* between different

institutions. It is clear that on our teleological account of institutions any given institution is to be understood in terms of the collective end or ends to which its activities are and/or ought to be directed. However, there still remains the question of the relationships between institutions. One issue concerns the extent or degree of any required relationship. Another concerns the nature of the required relationship. As far as the extent of the relationships is concerned, in the post-Enlightenment West this interaction between institutional organisations belonging to the same society has typically taken place in the context of a commitment to a basic separation between them. Governments must stand apart from corporations lest public and private interests are confused, and corporations must stand apart from one another in the interests of competition. In communist regimes, by contrast, the doctrine of organisational (or at least institutional) separation, including separation of powers, has not been adhered to. Japan constitutes an interesting third model. While Japan is obviously in some sense a liberal democratic state, there has been an extent of government, corporation and bureaucracy linkage that is at odds with the notion of institutional separation. Moreover, there is some evidence that in recent years in the western liberal democracies the doctrine of institutional separation is under threat in the face of policies coming under the banner of so-called economic rationalism. Such policies include the privatisation of law enforcement agencies and prisons, and the out-sourcing of administrative functions.

As far as the *nature* of the relationship between institutions is concerned, this is presumably to be determined primarily on the basis of the extent to which the differential defining collective ends of institutions are complementary rather than competitive, and/or the extent to which they mesh in the service of higher order ends. In this connection consider the complementary ends of the institutional components of the criminal justice system *viz*. the police (whose end or purpose is to gather evidence and arrest suspects), the courts (whose end or purpose is to try and sentence offenders) and the prisons (whose end or purpose is to punish, deter and rehabilitate offenders). Consider also that certain institutions, for example, the government and the police, might be meta-institutions in the sense that they have a role in relation to pre-existing institutions, for example, the family, and the economic system. That role might be to assist or to protect these pre-existing institutions, or at least their members.

Having discussed social institutions in general I now need to turn to the institution of the police in particular.

In times of institutional crisis, or at least institutional difficulty, problem solving strategies and policies for reform need to be framed in relation to the fundamental ends or goals of the institution; which is to say they need to be contrived and implemented on the basis of whether or not they will contribute to transforming the institution in ways that will enable it to provide, or better provide, the moral good(s) which justify its existence. However, in relation to policing, as with other relatively modern institutions – the media is another example – there is an unclarity as to what precisely its fundamental ends or goals are. Indeed it is sometimes argued that there can be no overarching philosophical theory or explanatory framework that spells out

the fundamental nature and point of policing, and that this is because the activities that police engage in are so diverse.

Certainly, the police are involved in a wide variety of activities, including control of politically motivated riots, traffic control, dealing with cases of assault, investigating murders, intervening in domestic and neighbourhood quarrels, apprehending thieves, saving people's lives, making drug busts, shooting armed robbers, dealing with cases of fraud, and so on. Moreover they have a number of different roles. They have a deterrence role as highly visible authority figures with the right to deploy coercive force. They also have a law enforcement role in relation to crimes already committed. This latter role involves not only the investigation of crimes in the service of truth, but also the duty to arrest offenders and bring them before the courts so that they can be tried and – if found guilty – punished. And police also have an important preventative role. How, it is asked, could we possibly identify any defining features, given this diverse array of activities and roles?

One way to respond to this challenge is to first distinguish between the activities or roles in themselves and the goal or end that they serve, and then try to identify the human or social good served by these activities. So riot control is different from traffic control, and both are different from drug busts, but all these activities have a common end or goal, or at least set of goals, which goal(s) is a moral good(s). The human or social goods to be aimed at by police, will include upholding the law, maintaining social order, and preserving human life.[16]

Indeed, policing seems to involves an apparent multiplicity of ends or goals. However, some ends, such as the enforcement of law, and the maintenance of order, might be regarded as more central to policing than others, such as financial or administrative goals realised by (say) collecting fees on behalf of government departments, issuing speeding tickets and serving summonses.

But even if we consider only so-called fundamental ends, there is still an apparent multiplicity. For example, there is the end of upholding the law, but there is also the end of bringing about order or conditions of social calm, and there is the end of saving lives. Indeed Lord Scarman relegates law enforcement to a secondary status by contrast with the peace-keeping role.[17] Moreover, the end of enforcing the law can be inconsistent with bringing about order or conditions of social calm. As Skolnick says: 'Law is not merely an instrument of order, but may frequently be its adversary'.[18]

Can these diverse and possibly conflicting ends or goals be reconciled? I suggest that perhaps they can, and by recourse to the notion of justifiably enforceable moral rights. The first point here is that the criminal law in particular is, or ought to be, fundamentally about ensuring the protection of certain moral rights, including the rights to life, to liberty, to physical security, to property and so on. The moral rights enshrined in the criminal law are those ones regarded as fundamental by the wider society; they constitute the basic moral norms (social norms) of the society.

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[16]Different theorists have seen one of these goals as definitive. See, for example, J. Skolnick and J. Fife, *Above the Law: Police and the Excessive Use of Force* (New York: Free Press, 1993).
[17]Lord Scarman, *The Scarman Report* (Penguin, 1981).
[18] Jerome Skolnick, *Justice Without Trial* (New York: Macmillan, 1966).

Naturally, some of these are contentious, and as society undergoes change these moral norms change – for example, in relation to homosexuality – but there are a core which there is reason to believe will never change or ought not to change, for example, the rights to life, freedom of thought and speech and physical security.

Notice here that I am offering a normative teleological account of the institution of policing, but one that is reliant on a descriptive teleological theory. The descriptive theory tells us that the criminal law in particular in modern democratic states is principally concerned to protect basic social norms which turn out in large part to be objective moral rights. The teleological theory alerts us to the possible discrepancy between the criminal laws as they are, and as they ought to be. Specifically, some criminal laws might seek to embody social norms that are not moral rights, or even objective moral standards of any kind. Or criminal laws, or the law more generally, might fail to embody justifiably enforceable moral rights, including some human rights. This is so in relation to some so-called positive human rights. As we pointed out earlier, such human rights call for Good Samaritan laws to be enacted.

The second point is that social order, conditions of social calm and so on, which are at times contrasted with law enforcement, are in fact, I suggest, typically necessary conditions for moral rights to be respected. A riot or bar room brawl or violent domestic quarrel is a matter for police concern precisely because it involves, at least potentially, violation of moral rights, including the rights to protection of person and property. Consider in this connection interregnum periods of disorder between the ending of military hostilities and the establishment of civil order, such as the looting, revenge killings and so on that took place on a large scale at the close of the recent war in Iraq.

The third point to be made here pertains to the enforcement of those laws that do not appear to embody justifiably enforceable moral rights. Many of these laws prescribe actions (or omissions) the performance (or non-performance) of which provides a social benefit. Consider the laws of taxation. The benefits provided by taxation include the provision of roads and other services to which arguably citizens do not have a moral right, and certainly not a justifiably enforceable moral right. On the other hand, taxes also enable the provision of benefits to which citizens do have a justifiably enforceable moral rights, for example, medicine for life-threatening diseases, basic welfare.

The fourth point to be made here pertains to the justification for enforcement of the law by police. I have argued that certain legally enshrined moral rights are justifiably enforced by police, as are laws that indirectly contribute to the securing of these rights. The moral rights in question are justifiably enforceable moral rights. Now clearly there are laws that are not of this sort. Many of these laws are fair and reasonable, and the conformity to them enables collective goods to be provided. But what is the justification for their enforcement by police? I suggest that the fact that they provide collective benefits and/or that they are fair and reasonable do not of themselves provide an adequate justification for their enforcement. Perhaps consent to the enforcement of just and reasonable laws that enable the provision of collective benefits provides an adequate moral justification for such enforcement. Here there is

an issue with respect to the degree and type of enforcement that might be in this way justified; deadly force may not be justified, even if it is consented to in relation to fair and reasonable laws that enable collective benefits to be provided. Moreover, as is well known, there is problem in relation to consent. Evidently, there is not in fact explicit consent to most laws, and the recourse to tacit consent seems not to offer a sufficiently strong and determinate notion of consent.

At any rate, I want to make two points here in relation to what is nothing more than a version of the traditional problem of the justification for the use of coercive force by the state to enforce its laws.[19] First, self-evidently there is no obvious problem in relation to the enforcement of laws that embody *justifiably enforceable* moral rights, including human rights. Moreover, there may well be other laws that can justifiably be enforced (up to a point) on the grounds that not only are they fair, reasonable and productive of social benefits, but in addition citizens have consented to their enforcement (up to that point). Second, I want to suggest that notwithstanding our first point, there are fair, reasonable and socially beneficial laws with respect to which enforcement is not morally justified. Further, there may not be an adequate justification for enforcement of some of these laws, even if enforcement were to be consented to. The reason for this is that the nature and degree of enforcement required to ensure compliance with these laws – say, use of deadly force – is not morally justified.[20] Certainly recourse to deadly force – as opposed to non-deadly coercive force – is not justified in the case of many unlawful actions; specifically, unlawful actions not regarded as serious crimes. Indeed, this point is recognised in those jurisdictions that have made it unlawful for police to shoot at many categories of 'fleeing felons'.[21] It is more often than not now unlawful, because immoral, to shoot at (say) a fleeing pickpocket.

At any rate, I cannot pursue these issues further here.. Rather I will simply assume that the general human and social good that justifies the institution of the police is the protection of justifiably enforceable moral rights. Accordingly, such moral rights ought to be respected by social norms, and ought to be enshrined in the law, especially the criminal law.

But policing has a further important distinguishing feature. The end or moral good to be secured by the institution of the police is the protection of justifiably enforceable moral rights. But that is not all that needs to be said; I need also to speak of the *means* by which this end is to be achieved.

Egon Bittner has propounded a very different theory of policing to the one I have suggested. However his account is insightful. Bittner focuses attention on the means deployed by police to secure those ends. Bittner has in effect defined policing in terms of the use or threat of coercive force.[22] Bittner defines police-work as: 'a

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[19] See Dworkin, *op. cit*., p. 190.

[20] This is consistent with their being a moral obligation to obey these laws; we are speaking here of the justification for the *enforcement* of such laws. For an account of the moral justification for obeying the law see *Social Action op.cit*., pp. 141-51. See also David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988), Chapter Three.

[21] See Seumas Miller, 'Shootings by Police in Victoria: The Ethical Issues' in T. Coady, S. James, S. Miller and M. O'Keefe, (eds), *Violence and Police Culture* (Melbourne University Press, 2000).

[22] Egon Bittner, *The Functions of Police in Modern Society* (Cambridge, Mass: Gunn and Hain, 1980).

mechanism for the distribution of non-negotiable coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies'.[23]

Bittner's account of policing is inadequate because it fails to say anything about the goals or ends of policing. Moreover, coercion is not the only means deployed by the police. Other typical means include negotiation, rational argument, and especially appeal to human and social values and sentiment. Indeed, whole taxonomies of police roles have been constructed on the basis of different mixes of methods and styles of policing. There are Peace-keepers and Crime-fighters, and there are Social Enforcers and Emergency Operators.[24] Here I need to stress that I am not advocating one or other of the possible configurations of these mixes. Hitherto, I have spoken of the ends of policing, and especially the fundamental purpose of ensuring the protection of justifiably enforceable moral rights. Now I am speaking of the means – and associated roles – by which to achieve that purpose. Clearly, there are different ways to achieve a given end; there are different means, including different role mixes, by which to realise the fundamental end of policing as we have described it. Whether to emphasise the Crime fighter or the Peace-keeper role, for example, ought to be settled in large part on the basis of which is the most efficient and effective means to ensuring the protection of (justifiably enforceable) moral rights. To this extent my theory of policing is neutral on questions of police methodology, and in relation to disputes between advocates of law enforcement roles and service roles for police.

To return to Bittner: Bittner in drawing attention to coercion has certainly identified a distinctive feature of policing and one that separates police officers from, say, criminal justice lawyers and politicians.

Further, Bittner in stressing the importance of coercion draws our attention to a fundamental feature of policing, namely, its inescapable use of what in normal circumstances would be regarded as morally unacceptable activity. The use of coercive force, including in the last analysis deadly force, is morally problematic; indeed it is ordinarily an infringement of human rights, specifically the right to physical security and the right to life. Accordingly, in normal circumstances the use of coercive force, and especially deadly force, is morally unacceptable. So it would be morally wrong, for example, for some private citizen to forcibly take a woman to his house for questioning or because he felt like female company.

Use of coercive force, especially deadly force, requires special moral justification precisely because it is in itself at the very least harmful, and possibly an infringement of human rights; it is therefore in itself morally wrong, or at least, so to speak, a *prima facie* moral wrong. Similarly locking someone up deprives them of their liberty, and is therefore a *prima facie* moral wrong. It therefore requires special moral justification. Similarly with deception. Deception, including telling lies, is under normal circumstances morally wrong. Once again use of deception requires special moral justification because it is a *prima facie* moral wrong. Intrusive surveillance is another *prima facie* moral wrong – it is an infringement of privacy.

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[23] Bittner, *op.cit*.

[24] See, for example, John Kleinig, *The Ethics of Policing* (Cambridge, UK: Cambridge University Press, 1996) pp. 22f.

Therefore intrusive surveillance requires special moral justification. And the same can be said of various other methods used in policing.

The point here needs to be made very clear lest it be misunderstood. Police use of coercion, depriving persons of their liberty, deception and so on, are morally problematic methods; they are activities which considered in themselves and under normal circumstances, are morally wrong. Therefore they stand in need of special justification. In relation to policing there is a special justification. These harmful and normally immoral methods are on occasion necessary in order to realise the fundamental end of policing, namely the protection of (justifiably enforceable) moral rights. An armed bank robber might have to be threatened with the use of force if he is to give himself up, a drug dealer might have to be deceived if a drug ring is to be smashed, a blind eye might have to be turned to the minor illegal activity of an informant if the flow of important information he provides in relation to serious crimes is to continue, a paedophile might have to be surveilled if evidence for his conviction is to be secured. Such harmful and normally immoral activities are thus morally justified in policing, and morally justified in terms of the ends that they serve.

The upshot of our discussion thus far is that policing consists of a diverse range of activities and roles the fundamental aim or goal of which is the securing of (justifiably enforceable) moral rights; but it is nevertheless an institution the members of which inescapably deploys methods which are harmful; methods which are normally considered to be morally wrong. Other institutions which serve moral ends, and necessarily involve harmful methods, or *prima facie* wrongdoing, are the military - soldiers must kill in the cause of national self-defence – and political institutions. Australia's political leaders may need to deceive, for example, the political leaders of nations hostile to Australia, or their domestic political enemies.

I have suggested that policing is one of those institutions the members of which need at times to deploy harmful methods; methods which in normal circumstances are morally wrong. In response to this we need first to ask ourselves why it is that morally problematic methods, such as coercion and deception are inescapable in policing. Why could not such methods be wholly abandoned in favour of the morally unproblematic methods already heavily relied upon, such as rational discourse, appeal to moral sentiment, reliance on upright citizens for information, and so on?

Doubtless, in many instances morally problematic methods could be replaced. And certainly overuse of these methods is a sign of bad police-work, and perhaps of the partial breakdown of police-community trust so necessary to police work. However, the point is that the morally problematic methods could not be replaced in *all* or even *most* instances. For one thing the violations of those moral rights which the police exist to protect are sometimes violations perpetrated by persons who are unmoved by rationality, appeal to moral sentiment, and so on. Indeed, such persons, far from being moved by well-intentioned police overtures, may seek to coerce or corrupt police officers for the purpose of preventing them from doing their moral and lawful duty. Hence the truth of the claim that the use of coercive force in particular remains the bottom line in policing, no matter how infrequently coercion

is in fact used. For another thing, the relevant members of the community may for one reason or another be unwilling or unable to provide the necessary information or evidence, and police may need to rely on persons of bad character or methods such as intrusive surveillance.

So the use of harmful methods cannot be completely avoided; indeed the routine use of such methods in policing is unavoidable. It remains important to realise that these methods are in fact morally problematic; to realise that coercion, depriving someone of their liberty, deception, invasion of privacy and so on are in fact in themselves harmful. Indeed, these methods constitute *prima facie* wrongdoing, and some of them constitute – under normal circumstances – human rights violations. In the final section of this chapter I consider some of the elements of this means/end problematic in policing.

3. MORAL RIGHTS IN POLICING: MEANS AND ENDS

In drawing attention to the use of harmful methods by police I am far from denying the moral acceptability of these methods. The key point is that the use of any particular harmful method be morally justified in the circumstances. When police officers act in accordance with the legally enshrined, and morally justified, principles governing the use of harmful methods they achieve three things at one and the same time. They do what is morally right; their actions are lawful; and – given these laws are the result of properly conducted democratic processes – they act in accordance with the will of the community.

Nevertheless, the use of harmful methods in the service of moral ends – specifically the protection of (justifiably enforceable) moral rights – gives rise to a number of problems in policing. Here I will mention only four.

Firstly, the working out of these moral principles and the framing of accompanying legislation is highly problematic in virtue of the need to strike a balance between the moral rights of victims and the moral rights of suspects.

Obviously suspects – people who are only suspected of having committed a crime, but who have not been tried and found guilty – have moral rights. Suspects have a right to life, a right not to be physically assaulted, and a right not to be subjected to psychological harassment or intimidation. More generally, suspects have a right to procedural justice, including the right to a presumption of innocence and a fair trial.[25]

On the other hand, the police and the criminal justice system do not principally exist to protect the rights of suspects. They exist to protect the rights of victims and to ensure that punishment is administered to offenders.[26] Accordingly, if the police believe on the basis of evidence that a particular person is guilty of a serious crime then the police are obliged to do their utmost to arrest and charge the suspect, and provide sufficient evidence to enable his or her successful prosecution.

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[25] Here I am assuming that rights to procedural justice are institutional *moral* rights.

[26] This is putting things simply, even simplistically, but it makes no difference to the main point I am seeking to make here. Consider in this connection the restorative justice movement; it sees itself as an alternative to punishment oriented conceptions of the criminal justice system.

However, there is inevitably a certain tension between these two moral requirements of the police – the requirement to respect the moral rights of suspects (including the duty to make available evidence that may assist a suspect) and the requirement to apprehend, and provide evidence to ensure the conviction of, offenders. And the procurement of such evidence may inevitably involve the kinds of justified, but harmful, actions we have been speaking of.

This tension has to be somehow resolved by framing laws that strike a moral balance between on the one hand ensuring that the rights of suspects are protected, and on the other providing the police with sufficient powers to enable them to successfully gather evidence and apprehend offenders (especially rights violators).

This tension, and any resolution of it, is further complicated by the social, institutional and technological contexts in which they operate. A set of laws might be thought to have struck an appropriate ethical balance between the moral rights of suspects and the provision of necessary powers to police, until one considers the criminal justice institutional context. For example, if putting young offenders into the system merely has the effect of breeding criminals, then this needs to be a factor taken into consideration in framing laws, including laws governing the nature and extent of police powers. Similarly, technological developments, such as surveillance technology and high-level encryption products, can justify either restrictions on police powers or extensions to police powers.

A second problem in this area arises when the three desiderata mentioned above come apart. That is, a problem arises when what the law prescribes is not morally sustainable, or at least is not morally acceptable to the community or significant sections of the community. Dramatic examples of the gap between law and the morality of significant sections of the community include the discriminatory race laws in South Africa under apartheid, the laws against homosexuality in Britain earlier this century, and the current laws in relation to prostitution and cannabis in parts of Australia. Other kinds of examples include obvious loopholes and deficiencies in the law. For example, legislation in relation to telephone interception in this country might be thought to reflect appropriate moral principles, yet other forms of surveillance using new technology are not yet subject to laws reflecting these principles.

In all these kinds of situations police are placed in an invidious position, and one calling for discretionary ethical judgment. It is a lose/lose situation. In the first kind of example, while they are under a moral obligation to enforce the law, they may be unsure that the laws they are enforcing are in fact morally justifiable. Certainly, they are aware that the laws in question are regarded as immoral by significant sections of the community. Recourse to justifiably enforceable moral rights, including human rights, is helpful in this context. For in so far as such rights provide an objective moral standard, and in so far as this objective moral standard comes to be widely accepted, then the uncertainty arising from subjective moral standards will cease to be a problem.

In the second kind of example, the law may allow police to engage in activities they believe to be immoral and which the community believes to be immoral, and yet engaging in these activities may enable them to secure convictions they would

otherwise be unable to secure. Clearly the resolution of this problem lies in bringing the law into line with objective moral principles.

A third problem in this area remains even after the provision of laws that strike the appropriate moral balance mentioned above, and even when laws are not in need of revision. This problem seems to arise out of inherent features of police work.

There is a necessity for police to be given a measure of professional autonomy to enable them to exercise discretion. Thus individual police officers have a significant measure of legal authority.[27] They are legally empowered to 'intervene – including stopping, searching, detaining and 'apprehending without a warrant any person whom [they], with reasonable cause suspect of having committed any such offence or crime'[28] – at all levels of society.

Moreover, the law has to be interpreted and applied in concrete circumstances. There is a need for the exercise of discretion by police in interpretation and application of the law. Further, upholding and enforcing the law is only one of the ends of policing, others include maintaining of social calm and the preservation of life. When these various ends come into conflict, there is a need for the exercise of police discretion, and in particular the need for the exercise of discretionary *moral* judgment.

The unavoidability of the exercise of discretionary moral judgment in policing means that it will never be sufficient for police simply to learn, and act in accordance with, the legally enshrined moral principles governing the use of harmful methods. On the other hand, our normative teleological account of policing in terms of the goal of protecting (justifiably enforceable) moral rights provides the theoretical means to satisfactorily resolve some of these dilemmas requiring discretionary moral judgment.

A fourth, and final, problem concerns the proper scope of the institution of the police. It is evident that transnational crime is on the increase. Accordingly, national law enforcement agencies are increasingly involved in transnational (and therefore trans-jurisdictional) law enforcement collaboration. Further, there has been a growth in private policing, including in the area of criminal investigations of fraud and white-collar crime. It might be thought that these developments threaten an institutional conception of policing. Given these developments, does it still make sense to talk of the institution of the police? I suggest that it does still make sense. Very briefly, while the notion of an institution is tied to the realisation of certain ends, it is not necessarily the notion of a compartmentalised entity unrelated to other like institutions. We can still think of a specific organisation as an institution, notwithstanding the fact that it has strong and important collaborative connections with like institutions, and notwithstanding the fact that other somewhat dissimilar organisations perform similar roles. Of course, this says nothing about the desirability of these developments. On the teleological account of institutions that I am offering, whether or not transnational collaboration and/or private sector

[27]On general issues of autonomy and accountability in policing in Australia see David Moore and Roger Wettenhall, (eds), *Keeping the Peace: Police Accountability and Oversight* (University of Canberra, 1994).

[28]*NSW Crimes Act* No. 40 Section 352, Sub-section 2(a) (1990).

policing, is to be welcomed or spurned depends on its contribution to the moral good that justifies the institution of the police, namely, the protection of legally enshrined, justifiably enforceable, moral rights.

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CHAPTER TEN

Human Rights in Correctional Organisations in Australia and Asia: Some Criminological Observations

1. INTRODUCTION

The central question to be addressed in this chapter must be: to what extent do correctional agencies in Australia and Asia demonstrate a respect for the human rights of people in their care? Before attempting to answer that question, however, some general observations will be made about corrections in Asia and the Pacific in order to provide some background or context. Also, some general criminological conclusions about prisons will be made before the human rights issues are addressed.

Some of the material in this paper will draw on observations made during visits of inspection by the author over the past decade to prisons in China, Japan, Vietnam, Malaysia, Singapore, Papua New Guinea, Hong Kong, Thailand, India, Samoa, Tonga, Mongolia and Fiji, as well as public and private prisons in Australia and New Zealand. Interesting and informative as all these visits are, any conclusions from these visits must be drawn with considerable caution because of the obvious inclination of administrators to show visitors, especially foreign visitors, only the best, and also because of the limitations of discussions conducted through interpreters. Nevertheless, to state one of my conclusions right at the beginning, I am firmly of the view that we in the West do not have all the answers, and can learn from the correctional policies and practices of our neighbours elsewhere in Asia.

For example, I have seen in a Chinese prison a master class of computer students who were writing software, and in the same prison I have seen post boxes to be used by prisoners who wanted to lodge complaints with external authorities if they were not satisfied with the internal complaint-resolution process. I have also seen prison workshops in China, Japan, Hong Kong and Malaysia that would outstrip the productivity of any prison workshops in Australia. I have also seen drug offender treatment programs in Singapore, Malaysia and Hong Kong, albeit rather more authoritarian than we might like in Australia, which claimed success rates far higher than would be found anywhere in this country. Even in relatively economically undeveloped nations such as India and Papua Guinea, I have seen arrangements

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 189–203.

made for the care of female offenders' babies and spouses of prisoners that would exceed any similar programs in Australia.

None of these observations are in any way scholarly, but they do provide some sort of background to any assessment that might be made of the current operations of correctional organisations in Australia. In my view there are three features which dominate any discussion about prisons in Australia at this time. In the first place, there is considerable overcrowding as a result of the doubling of the total number of Australian prisoners over the past 15 years. The rate of increase has not been as rapid as in the United States, but it is still to be regretted as it cannot be shown that increasing the number of people in custody has any impact on the incidence of crime. It costs a lot of money but it does not make us safer.[1]

Secondly, Australia has a far higher proportion of its prisoners in private prisons than any other nation in the world. That proportion is around 15 per cent, compared with about four per cent in the United States and nine per cent in the United Kingdom. This is a very controversial subject, but in my view prison privatisation in Australia over the past decade is to be welcomed as it has brought a breath of fresh air to an industry that was otherwise almost totally resistant to change and was dominated by employee unions or associations. Private prisons are now to be found in a number of other nations, including South Africa, New Zealand and Canada, and are now widely seen as a permanent feature rather than something experimental.[2]

The third important thing to be said about Australian prisons is that, over the past decade or more, in virtually all public and private prisons, considerable effort is made to deliver programs to prisoners which will address the underlying factors which led to the criminal behaviour resulting in imprisonment. Thus, programs in anger management, interpersonal relations, cognitive skills, drug and alcohol treatment, and sex offender treatment may be seen in many Australian prisons, all of which supplement the more traditional education and trade training activities. This development is to be welcomed but there is a need for more comprehensive, rigorous and independent evaluation. (Similar developments are no doubt also to be seen in prisons in many other nations.)[3]

2. COMMON MISUNDERSTANDINGS

There is much misunderstanding by members of the general public about how prisons operate and also by many of the people whose job it is to operate them! For example, it seems to be assumed by the public that imprisonment is a universally nasty experience and that prisoners are kept inside by walls and bars and by the vigilance of guards. In reality that is the case with only a small minority of

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[1] D. Biles, 'Crime and Imprisonment: An Australian Time Series Analysis', *Australian and New Zealand Journal of Criminology,* 15.3 (1982), pp. 133-153; W. Spelman, 'The Limited Importance of Prison Expansion' in A. Blumstein, and J. Wallman, (eds), *The Crime Drop in America,* (Cambridge: Cambridge University Press, 2000), pp. 97-129.

[2] R. Harding, *Private Prisons and Public Accountability* (Open University Press, Buckingham, 1997).

[3] L. Motiuk, and R. Serin, (eds), *Compendium 2000 on Effective Correctional Programming* (Correctional Service of Canada, 2001).

prisoners, the overwhelming majority being cooperative and compliant, even to the extent of contributing to the good order and smooth operation of the institution. Most prisoners would certainly not choose to be in prison, but, once there, they generally make the most of their lives inside. (At one stage of my life, for a period of four years, I spent one half of each week in a maximum-security prison as an education officer and the other half as a university student taking psychology and other subjects like history and philosophy of science. For the whole of that period, the most stimulating and intellectual conversations in which I engaged were in the prison rather than the university!)

Another false assumption that is often made about prisons is that they are failures because the recidivism rate is unacceptably high. This mistake is often made by prison staff and is cited to explain poor staff morale. If one looks at the population of any maximum or medium security prison in Australia, around 75 to 80 per cent of the prisoners would be found to be recidivists (as they have been in prison at least once before the current episode) and this fact is mistakenly taken to indicate the recidivism rate. In contrast to this, if one examined the subsequent criminal and prison careers of a cohort of first-time prisoners one would find only about 30 per cent ever returned to prison. The clear majority of first timers stay out and, of course, are never seen again by prison staff, who are aware of their failures that keep coming back. This is one of a number of errors made about prison due to a failure to differentiate between *stock* and *flow* statistics.[4] (In my judgment, a prison population comprising 75 to 80 per cent recidivists is probably about right, as the only people who really should be in prison are those who commit very serious offences and those who are persistent offenders.)

A third misunderstanding about prisons is that they are dangerous places because the incidence of death in prison is very considerably higher than the equivalent incidence for similar age and gender groups in the general community. This is an error made, not only by prison staff, but also by criminologists. The basic facts are undeniable, death rates are higher in prisons than in the community, but that is not a sensible or useful comparison. A more useful comparison would be between law-breakers in custody and law-breakers in the community, and this comparison can be made by examining populations of persons serving probation, community service and parole orders and comparing the death rates of that group with a matching group of prisoners. When this is done, it is quite clear that the death rates from all causes (suicide, homicide, accidents and natural causes) are much higher in the community group. The conclusion must be that for people who lead hazardous life-styles, prisons are protective, not dangerous. For all of their short-comings, prisons do provide three meals a day, basic health-care, a greatly reduced chance of death by drug overdose, and so on. (I must place on the record my personal anxiety about this empirical generalisation. My concern is that some elements of the public might think that, if prisons are protective, then sending offenders to prison must be good for them, whereas my fundamental belief is that the deprivation of liberty must be used

[4] R. Broadhurst, and R. Maller, 'Aboriginal and Non-Aboriginal Recidivism in Western Australia: A Failure Rate Analysis', *Journal of Research in Crime and Delinquency,* 15-1 (1988), pp. 83-108.

only as a last resort. The number of people in prison must always be kept to an absolute minimum.)

3. PRISONERS' RIGHTS

Now to the question of the human rights of prisoners. In his comprehensive volume 'Human Rights: Australia in an International Context', Peter Bailey[5] cites with approval Article 10 of the International Covenant of Civil and Political Rights which says in part:

> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Bailey sees this statement as 'perhaps the first move towards recognition that persons in prison have rights', but he points out that this covenant and other instruments, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Australian Guidelines adapted from the UN Rules, are of little or no value if they are not enforceable. Bailey reluctantly concludes that none of these instruments is enforceable and therefore:

> The lack of rights of prisoners must represent one of the major deprivations of human rights, and one of the more important longer term problems, in the Australian criminal justice system.

Bailey was the Deputy Chairman of the Human Rights Commission, under the Chairmanship of the Honourable Dame Roma Mitchell, for the life of the commission from 1981 to 1986. During this time he reports that 'a continuing flow of complaints was received from prisoners', but the commission had no authority to investigate issues raised by offenders convicted of offences against State or Territory laws. The commission could, however, investigate complaints by offenders convicted of offences against the laws of the Commonwealth, or Federal prisoners, but they constitute only between three and four per cent of all prisoners in Australia. Furthermore, as Federal prisoners are held in prisons run by the States, under s.120 of the Constitution, and as no payment is made by the Commonwealth to the States for this service, the commission could have been in a difficult position if it were seen as telling the States how to do their job.

In order to make some progress in this sensitive and controversial area, Bailey reports that the Human Rights Commission in 1986 commissioned distinguished criminologist Professor Gordon Hawkins to prepare an occasional paper on Prisoners' Rights. This was done, and a conference on the subject was planned for the following year, but the commission was terminated in late 1986 with the establishment of the Human Rights and Equal Opportunity Commission, which is still in existence but has no jurisdiction with regard to prisoners.

The paper prepared by Hawkins was probably an extension or adaptation of a lecture that he gave the year before in Melbourne on Prisoners' Rights. In that

[5] Peter Bailey, *Human Rights: Australia in an International Context* (Melbourne: Butterworths, 1990).

lecture, the annual Sir John Barry Memorial Lecture, Hawkins[6] endeavoured to establish what rights were held by prisoners by reviewing in detail the Prison Rules and Regulations applying in each State and Territory at that time. He found many references to rights, for example a section in the Northern Territory regulations was headed 'Prisoners to be Informed of Rights', but nowhere did he find a list of those rights. What he found was not statements of rights but details of a variety of concessions or privileges which, at the discretion of the administration, are subject to forfeiture, revocation or postponement. Even in relation to such basic matters as food, clothing, accommodation, medical treatment, hygiene and safety the wording of the rules was never expressed in terms of rights. Hawkins concluded, somewhat gloomily, that prisoners in Australia were 'rightless or close to rightlessness'.

He concluded his lecture by posing the provocative question: does it matter? After all many, if not all, prisoners have been guilty of the violation of the rights of others, and it could be said that there is more concern for the rights of offenders than the rights of victims. Hawkins suggests three answers to his question. In the first place prisoners are at a greater risk than any other section of the community of suffering the kinds of harm, deprivation or restriction which constitute an infringement of rights. Secondly, he argues that the unequal power relationship between the prison and the inmate imposes a continual moral duty on the powerful to act justly, and with due deliberation. Here he quotes the Scandinavian prison administrator, Hans Mattick[7] , who said:

> It is perhaps gratuitous to assert that those who have been convicted of breaking the law are most in need of having respect for the law demonstrated to them.

Finally, Hawkins argues that the use of imprisonment involves imposing on a highly selected sample of offenders a punishment which is both questionable and an extremely severe penalty – the deprivation of freedom. Having deprived them of what is, in a free society, the most fundamental and precious right, apart from the right to life, he argues that we are under a moral obligation to ensure that their other rights are not curtailed more than is absolutely necessary for custodial purposes.

4. A SECONDARY QUESTION

I would like to take this argument a little further and suggest that while the question of prisoners' rights is important, for the reasons given by Hawkins, it is a secondary question when seen in the context of the primary question of whether any particular individual should be in prison at all. There are a number of different ways of establishing this point, but probably the simplest is to point to the enormous variations in the use of imprisonment that exist between nations and between jurisdictions within nations. Right now in Australia, there are almost exactly 21,500 people in prison, which is 147 prisoners for every 100,000 adults. We call that the

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[6] G. Hawkins, 'Prisoners' Rights – The John Barry Memorial Lecture', *Australian and New Zealand Journal of Criminology*, 18-4 (1985), pp.196-205.

[7] Hans Mattick, *The Prosaic Sources of Prison Violence* (Occasional Paper No 3, Chicago: University of Chicago Law School, 1972).

imprisonment rate. In New South Wales the rate is 158, while in Victoria it is 91. The difference in the use of imprisonment between our two most populous jurisdictions has persisted for at least two decades, generally with a slightly larger gap between the two rates, but the important point is that the difference has nothing to do with the incidence of crime in the two jurisdictions. The most thorough and rigorous attempts to explain the difference have failed to show that New South Wales is safer than Victoria because of its higher imprisonment rate. Neither has the opposite been shown to be true: Victoria does not imprison proportionately fewer offenders because it has less crime. The truth is there is very little, if any, measurable difference between the crime rates of New South Wales and Victoria. Crime rates and imprisonment rates march to the beat of different drummers.

The differences between imprisonment rates of the other Australian jurisdictions is even greater, but I have focussed on New South Wales and Victoria, because they contain the highest populations, they are geographically contiguous, and they have no obvious differences in culture, demographics or socio-economic development. The relevance of these data to the issue of prisoners' rights lies in the fact that many prisoners, perhaps almost half in New South Wales, could argue with some justification that if they had happened to live in Victoria there is a reasonable chance they would not have been in prison at all. The prisoners' rights issues of food, health-care, access to programs, work, recreation and sports, and so on, all seem trivial compared with the prior question of whether one should be in prison or not.

At the international level, the differences in the use of imprisonment are even greater than the internal differences observed in Australia. The three nations which lead the world are the United States, South Africa and Russia, which each have imprisonment rates which are between four and five times the Australian rate. The painstaking work of British researcher, Roy Walmsley, suggests that some 8.6 million people were held in penal institutions throughout the world in the year 2000.[8] Walmsley produced data on the number of convicted and unconvicted prisoners in some 200 independent nations, and yet almost exactly one half of the world total were held in just three nations: United States (1.85 million), China (1.4 million) and Russia (1.05 million). In the Asia and Pacific region, the use of imprisonment is relatively low, but Singapore has a rate which is almost exactly three times the Australian rate. Perhaps surprisingly, the Chinese rate is much the same as found in Australia, and, at the other end of the scale, the Indian rate is only about a quarter of the Australian rate. The Indian statistics might seem attractive, but it is a matter of concern that about two thirds of all Indian prisoners are unconvicted remandees awaiting trial and only a minority are actually serving sentences. (If one calculated the imprisonment rate for India on the basis of the number of convicted prisoners under sentence, the rate would be so low that one might ask if there is any criminal justice system operating in that nation at all.)

[8] Roy Walmsley, 'World Prison Population List' (London: Research Findings No 116, Home Office, 2000).

5. CONDITIONAL RIGHTS OR MORAL RIGHTS

Whether or not it is accepted that the issue of human rights in prisons is a secondary question, it could be argued that the conclusion reached by Hawkins in 1985 is overstated and out of date. A visitor to any modern prison virtually anywhere in the world would observe prisoners being fed reasonable meals, receiving professional health-care, participating in education, training, recreational and sporting activities, and so on, and from these observations may infer that prisoners certainly enjoy a number of basic rights, even if their right to movement is restricted. These rights would include: the right to life (except for those sentenced to death), the right to adequate nutrition, the right to health-care, and the right to participate in various self-improvement programs, but the results of these observations are not the end of the story.

In my view, what was observed was not the exercise of rights but the enjoyment of privileges which were earned as a result of good behaviour. The apparent 'rights' were conditional upon the individual prisoner being polite and well-behaved, and also conditional upon the prison staff having the resources and motivation to meet the needs of the prisoners. They are not enforceable, and do not apply to all prisoners. As indicated earlier, the vast majority of prisoners are compliant, even to the point of contributing to the management of the prison, but for the small minority of prisoners who do not fall into this category (and for those prisoners held in extremely impoverished nations, or in institutions where the staff see their role as simply ensuring security) human rights are hard to find.

There are numerous situations that could be described to establish this point, but only a few will be used here. When a prisoner throws a plate of hot food over a prison officer, an act which is not entirely unknown in maximum security prisons, the officer is unlikely to immediately offer the prisoner an alternative menu! In reality, the prisoner is more likely in this situation to be denied any right to nutrition, at least in the short term. Similarly, when a prisoner destroys or misuses educational materials, disrupts religious services, or attempts suicide or homicide, the consequences for his or her access to human rights will be obvious and understandable.

At an even more serious level, the situation of hundreds, if not thousands, of young men in prisons in Mongolia and other Eastern European and Central Asian nations who are suffering from tuberculosis, and are receiving little or no medical treatment, even the notion of a right to life is illusory. The grim reality is that they will die in prison.[9] The situation of thousands of prisoners suffering from HIV/AIDS in many African nations is exactly the same as far as any right to life is concerned.

A dramatic illustration of the lack of enforceable human rights for prisoners is to be found in all of the major newspapers around the world at the time of writing (January 2002) with pictures being published of 'unlawful combatants' from

[9] V. Stern, *Sentenced to Die? The Problem of TB in Prisons in Eastern Europe and Central Asia* (London: International Centre for Prison Studies, King's College London, 1999).

Afghanistan in detention at Guantanamo Bay, Cuba. The prisoners were handcuffed and chained, wore taped-over goggles and earmuffs (thus ensuring a high degree of sensory deprivation) and were forced to kneel in a crouching position, and yet this was described at the time as humane treatment by some American and British political leaders.

In each of these illustrations, it is clear that any human rights that the prisoners may seek to claim were dependent on either their own behaviour or the behaviour of their custodians. The rights are conditional, not absolute, and therefore a far cry from the fine language used in United Nations protocols which allow for no exceptions. A recent analysis of human rights in prisons in Europe[10] also illustrates the fluid or conditional nature of those rights, by presenting in detail the decisions of the European Commission in relation to such matters as close body searching and the solitary confinement of prisoners. In virtually all cases, the Commission found that the practices were reasonable in the circumstances. Similarly, a recent Australian study[11] argued that providing prisoners with information about prison rules and regulations enhanced their 'empowerment' and ability to cope with the system, but it made no claim to the rights being absolute.

A recent Australian publication brings together the views of twenty-two noted contributors on many aspects of prison management and prisoners' rights.[12] In the concluding chapter, the principal editor, David Brown, uses the historical issues of voting rights, rights to sit on juries and rights to sue at common law as a legal subject to examine the continued pertinence of notions of 'civil death', 'convict taint' and 'forfeit' to the current treatment of prisoners. He also explores the limitations on the citizenship experienced by prisoners and concludes that they are typically 'partial' or 'conditional' citizens, 'neither enjoying full citizenship nor entirely outside it'. This conclusion would seem to echo the conclusion of Hawkins above.

Perhaps it could be argued that the inferred rights observed by the visitor to a modern prison are 'moral rights', or indications of what conditions should apply to all prisoners, and, as such, are not to be confused with legal or enforceable rights. Perhaps so, but in that case it is suggested that the wording of statements of rights should change 'shall' to 'should' so that, for example, Article 10 of the ICCPR reads:

> All persons deprived of their liberty should be treated with humanity ...

and all of the other protocols would be similarly watered down to become exhortations of what is desirable, rather than statements of what is required as a matter of law or international agreement.

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[10] A. Reynaud, *Human Rights in Prisons* (Strasbourg: Council of Europe Directorate of Human Rights, 1986).
[11] S. Rosa, *Prisoners Rights Handbook* (Redfern: NSW Council for Civil Liberties, 2000).
[12] D. Brown, and M. Wilkie, *Prisoners as Citizens: Human Rights in Australian Prisons* (Annandale: Federation Press, 2002).

A contrary view has recently been expressed at considerable length in a major publication of the International Centre for Criminal Law Reform and Criminal Justice Policy. Here it is asserted:

> The human rights in question are *identified and protected by national and international law*. Among the relevant international instruments are the Universal Declaration of Human Rights, The International Covenant of Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Declaration on the elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Prevention and Punishment of the Crime of Genocide, the Standard Minimum Rules for the Treatment of Prisoners and the Vienna Convention on Consular Relations[13]

There follows an analysis of the contributions made by each of these instruments (and another dozen or more similar instruments) to a list of subjects of relevance to prisoners and detainees and correctional administrators. The subjects include: right to contact the outside world, right to prompt and fair trial, right to information, right to make complaints, visitors and correspondence, language rights, religious rights, and so on.

The monumental effort required to create this list may be seen as commendable as the result is a unique reference document which will have many uses, especially in the academic world, but the assumption that the rights identified are protected by national and international law must surely be fallacious, for the reasons given earlier. Whatever meaning is given to the word 'protected' it certainly does not mean that the rights are either absolute or enforceable. The rights that have been identified are no more than guidelines which can serve a useful role in the framing of prison rules and regulations which ought to apply in a progressive and humane correctional administration. More than that, however, as a simple matter of managerial competence, a correctional administration which is seen as endeavouring to respect the dignity and humanity of prisoners is one which is more likely to gain the cooperation and trust of prisoners and this may well be associated with achieving lower levels of recidivism that otherwise would be the case.

6. UNCONVICTED PRISONERS

I have argued elsewhere that the term 'unconvicted prisoner' should be seen as a contradiction as an alleged offender may be remanded in custody only to ensure his or her appearance in court for trial, to prevent the continuation or repetition of an offence, or, in rare cases, to protect the alleged offender from harm. There is absolutely no justification for an innocent person remanded in custody to suffer any indignity, loss of comfort (including, in my view, deprivation of food or alcohol or loss of normal sexual relationships) or any other restriction beyond those required to ensure that the goals of remand in custody are met.

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[13] International Centre for Criminal Law Reform and Criminal Justice Policy, *International Prison Policy Development Instrument,* Section III 'Inmate Rights and Treatment of Prisoners' (Vancouver, Canada, 2001). (Italics added)

Unconvicted remandees present a special case as far as human rights are concerned as at least one piece of national research has shown that the majority of persons held on remand are not sentenced to prison anyway,[14] as they are either released to bail before the trial, are acquitted, or, if convicted, are either fined or sentenced to one or other of the range of community-based, or non-custodial, penalties that are now available to the courts. Furthermore, there is considerable evidence, albeit largely anecdotal, which suggests that conditions in Australian prisons for remandees are even less pleasant than are conditions for sentenced prisoners. Certainly, it is the case that remandees are about twice as likely to die in custody than are prisoners under sentence.[15]

There have also been reports from time to time that remandees have pleaded guilty to the charges against them in order to expedite their removal to the mainstream of the prison which has many more opportunities for work, education, recreation and sport than is the case in the remand section. It is always difficult to confirm such reports, but there is no doubt in my mind that remandees are, in general, relatively more deprived as far as activities are concerned compared with convicted prisoners.

This is not a minor issue as the numbers of remandees can be seen to be increasing at an even faster rate than the total number of prisoners. Some years ago, I think in the 1970s, I wrote an article for one of the magazines under the title 'Unconvicted Prisoners: the Forgotten Ten Per Cent' and it was pointed out to me some weeks later that I had made a serious mistake as the real percentage was closer to 15 per cent. It is now over 20 per cent, or 4500 of our 21,500 prisoners, and for some unaccountable reason the proportion in South Australia is 35 per cent. So, for Australia as a whole, over one in five of the people currently in prison are being held in the legal no-man's land of remand in custody. (To make my position clear, I am not opposed to the use of remand in custody in appropriate cases, particularly in cases where an alleged offender is charged with other serious offences while on bail for earlier charges, but what is needed, in my view, is a total rethink of the types of physical and social conditions that are imposed upon people in that situation.)

7. THE ROLE OF THE OMBUDSMAN

In the past two to three decades, all States and Territories have created positions called the Ombudsman, or Parliamentary Commissioner, with specific responsibilities for responding to complaints from the public about any aspect of public administration, including complaints from prisoners. In some jurisdictions, complaints from prisoners comprise between one third and one half of the Ombudsman's work load. The fact that prisoners can ventilate their grievances in this manner is to be commended, but the whole process has become so overburdened with the high numbers of complaints that it has become routine. In most cases the

[14] J. Walker, *The Outcome of Remand in Custody* (Canberra: Australian Institute of Criminology, 1986).
[15] D. Biles, and D. McDonald, *Deaths in Custody: Australia 1980-1989, Research Papers* (Australian Institute of Criminology, 1992).

Ombudsman, on receipt of a complaint from a prisoner, informs the relevant correctional authority which responds with its version of the facts or events which prompted the complaint. This version is nearly always accepted by the Ombudsman and very seldom is there any face-to-face investigation. It is difficult to see how the Ombudsman system could be made more effective without a considerable increase in expenditure and the appointment of many more investigating officers.

The people who occupy the position of Ombudsman in each Australian jurisdiction generally perform a useful function in that they provide a different level of accountability and may, in some cases, make recommendations which are accepted and which have the effect of changing some aspects of correctional policy and practice. It must be acknowledged, however, that they have not had the radical impact on correctional administration that was envisaged at the time when the positions were created. There is no doubt, however, that the one right which all prisoners have is the right to complain, and they exercise that right in significant numbers, even though the outcomes are very seldom favourable.

8. UNIQUE AUSTRALIAN ISSUES

The Australian Federal structure creates problems in many areas of life, but none more than in the area of criminal justice and corrections. In the area of the economy, Australian economists often use the term ‘vertical fiscal imbalance’ to describe the fact that the central government has the greatest capacity and authority to raise money from taxation, but it is the states and territories which are primarily responsible for the delivery of services and therefore see themselves as in greater need of revenue from taxation. A similar situation exists in criminal justice. It is the national or Commonwealth government which negotiates, signs and ratifies treaties, such as the International Covenant on Civil and Political Rights (incorporating the pledge to treat all persons deprived of their liberty with respect and dignity...), but it is the states and territories which are responsible for the treatment of prisoners. We could perhaps invent a term such as ‘vertical criminal justice imbalance’ to describe this state of affairs. (This may be a little overstated as the Commonwealth government is in fact responsible for one form of deprivation of liberty, that pertaining to the detention of illegal immigrants, but, even here, the Commonwealth does not now provide the service itself but contracts out the work to the largest private prison company in Australia.)

The problem of vertical imbalance has some potential consequences which are of practical significance as it is the Commonwealth that is required periodically to certify that Australia complies with ratified international treaties. The practical, and I guess ethical, problem is how can the Commonwealth make such a certification when it has little or no expertise in the area and does not seem to take much interest in it? The Commonwealth, of course, is quick to defend its boarder protection policy, but it keeps itself at arms length from the mechanics of detention, and it takes no official interest in the more important areas of deprivation of liberty, the state and territory prisons and police watch-houses. An exception is the very expensive interest that the Commonwealth showed in the subject of Aboriginal

deaths in custody. During the life of the Royal Commission into Aboriginal Deaths in Custody, from 1987 to 1991, it may not have been totally unreasonable for the Commonwealth to express a view on the recognition of human rights in our prison and police custody systems, as a vast amount of information on those subjects was collected by the Royal Commission, but more than a decade after it concluded its work there seems to be little basis for the Commonwealth to form an opinion.

9. AN INSPECTOR OF CUSTODIAL SERVICES

A possible solution to the problem outlined above would be for the Commonwealth to appoint an inspector of custodial services with authority similar to that of Her Majesty's Chief Inspector of Prisons in the United Kingdom. The British approach is mirrored at the state level in Australia with the appointment in Western Australia in 2000 of an Inspector of Custodial Services who is accountable to the state parliament and is required to inspect and report on all state-run prisons. It is understood that his authority will be extended in the near future to include private prisons and police custodial facilities, but it is not envisaged at this time that he will oversee the operation of Immigration Detention Centres. The Western Australian development is being watched with interest by other Australian correctional authorities and could feasibly provide a model for the Commonwealth to establish a national inspector to oversee all forms of detention. If that were to happen, the Commonwealth would be in a stronger position to speak with authority on the subject of compliance with human rights treaties, but it would also be in a stronger position to oversee the most recent development in this area, the international transfer of prisoners.

10. THE INTERNATIONAL TRANSFER OF PRISONERS

This is a subject that has been discussed a number of times by the Asia and Pacific Conference of Correctional Administrators, most recently at the 21st annual conference in Chiang Mai, Thailand, in October 2001. Within that group of over 20 nations, there has been a noticeable shift of support in favour of the idea of international transfer. There are still nations in the region that are opposed to the idea, but the majority are now either in favour or at least prepared to consider the idea.

We in Australia are at an interesting stage as the Commonwealth Parliament passed legislation in 1997 which paved the way for international transfers, and since then reciprocal legislation has been passed by each of the six states and the two territories. In 2001 a bilateral treaty was signed between Australia and Thailand, but this still has to be ratified by the Commonwealth before any transfers will take place. When the scheme is fully operational, it is likely that the result will be more Australian citizens who have been imprisoned overseas coming back to serve their sentences here than the number of foreign offenders going back to their home countries. My guess is that the overall increase will be not more than 30 to 40 per year for the whole country. In my view, this development is something that should

be warmly welcomed for humanitarian reasons, as far as offenders and their families are concerned. It may also assist rehabilitation as it certainly aims to keep families together. Furthermore, in my opinion, this is the sort of international cooperation, and mutual trust between nations, which is a sign of maturity and is the basis for a more peaceful world.

The United Nations has produced a Model Agreement on the Transfer of Foreign Prisoners, but Australia will place greatest reliance on a European Convention on this subject because it is widely accepted throughout the world. Australia will also have to enter in bilateral treaties where multilateral treaties are found to be inappropriate. When an international scheme is operational, the Commonwealth will necessarily play a central role because of its dominance in foreign affairs, and therefore, willingly or not, the Commonwealth is being forced to gain a level of expertise about corrections that would have been seen as an anathema as recently as a decade ago.

11. PRIVATE PRISONS AND HUMAN RIGHTS

As mentioned earlier, Australia has a higher proportion of its prisoners in private prisons than any other country in the world, and there has been much debate on the desirability or otherwise of this development. It has been claimed in the media that private prisons are associated with a higher proportionate number of deaths in custody than are public prisons, but the statistical evidence shows the opposite to be true.[16] Deaths per 1000 prisoners per year are significantly lower in private prisons than public prisons, a finding which is particularly surprising as private prisons hold proportionately more unconvicted remandees, than do public prisons, and, as mentioned earlier, other research has shown remandees are about twice as likely to die in custody than are convicted and sentenced prisoners. It is to be noted, however, that private prisons have only been operating in Australia for a little over ten years and therefore it is much too early to draw conclusions as to their overall effectiveness.

Nevertheless, it could be argued that private prisons are required by their contracts to be much more accountable than public prisons, and this could be interpreted as a higher level of compliance with human rights protocols. Modern contracts for private prisons specify what the contractor must supply in considerable detail, and they cover such matters as time out of cells, food service requirements, health-care, education and training that must be offered, drug treatment services, and so on, all of which are the type of details covered in United Nations instruments such as the Standard Minimum Rules for the Treatment of Prisoners. Furthermore, the contracts specify the financial penalties that will be imposed if the performance measures are not met. For example, an escape from a private prison in Victoria will incur a fine of $25,000 on the contractor, while smaller fines are imposed for less serious shortcomings. For obvious reasons, public prisons do not face financial

[16] D. Biles and V. Dalton, 'Deaths in Private and Public Prisons in Australia: A Comparative Analysis', *Australian and New Zealand Journal of Criminology,* 34-3, (2001), pp. 293-301.

penalties if they do not meet performance expectations, and therefore it could be argued that private prisons are leading the way in Australia as far as respect for human rights is concerned.[17]

12. SOME TENTATIVE CONCLUSIONS

No one could seriously argue that human rights are fully and universally respected in correctional organisations in Australia or south east Asia. The conclusion of Hawkins over a quarter of a century ago that prisoners in Australia are 'rightless or close to rightlessness' is probably as accurate now as it was then, and such rights as can be identified seem to be conditional upon the behaviour of both the prisoners and the staff, with the exception of the right to complain. To be sure, considerable advances in corrections have been made over that period of time, but there have also been some significant negative developments, especially with regard to increasing prisoner numbers. If the argument presented earlier (to the effect that human rights is a secondary question in corrections, the primary question being whether particular individuals should be in custody at all) is accepted, then the massive increase in prison populations around the world in recent years must lead to the unequivocal conclusion that corrections as an industry is going backwards and questions of human rights are even less relevant than they were previously.

On the other hand, it is possible to argue that increasing crime rates and increasing imprisonment rates are indications of increasing sophistication, even civilisation, as behaviour that was not approved but was not subject to official intervention on behalf of the state in the past, is now dealt with with the full force of the law. This argument has some attraction when it is applied to domestic violence, some sexual offences and even some areas of white collar crime, but an examination of the offences leading to imprisonment today shows that property offences, with or without illicit drug associations, are predominant. The criminal law in practice does not seem to have penetrated very far beyond its preoccupation with the protection of private property and the physical safety of individuals.

The picture should not be one of total doom and gloom, however. As mentioned earlier, correctional institutions today give greater emphasis to treatment programs that aim to remove or reduce the underlying causes of criminal behaviour than ever before, and there are now many more offenders dealt with by non-custodial options than ever before. Also, we are seeing the beginnings of a new class of correctional specialists who are professionally qualified and ready to work across the whole field of corrections. Finally, it must be admitted that the physical aspects of imprisonment, the provision of single cells with en suite toilet facilities, reasonable food services, health-care, recreational and educational opportunities have now largely become the standard. This standard is constantly threatened, however, by the curse of overcrowding, but the days of 'durance vile' in Dickensian fortresses are

[17] Public Interest Disclosure: Professor Biles, in his role as a consultant criminologist, has in recent years received fees for services rendered to a number of public and private suppliers of correctional services.

largely in the past for the majority of prisoners, if not for all, at least for most economically advanced nations.

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CHAPTER ELEVEN

Human Rights, the Moral Vacuum of Modern Organisations, and Administrative Evil

In 1948, the United Nations, the closest approximation yet of an institution that might pretend to speak for all humankind, formally adopted the Universal Declaration of Human Rights. Three years before that, the last of the SS Concentration Camps were liberated by the advancing Allied troops marking the end of the Holocaust of World War II, the signal event in human history that fully unmasked the reality of administrative evil.[1] A little over a half-century later at the dawn of a new millennium, what can we say about the moral condition of the modern organisation – an important context in which human rights will be honoured or neglected? We argue here that the modern organisation – a phenomenon of the culture of technical rationality – encourages little optimism for the protection and enhancement of human rights. It remains a task of considerable difficulty to make organisations safe havens for morality and human rights.

This is not to suggest that human rights do not have a place – and quite possibly a brighter future – in both public and private organisations. The basic existence of human rights can hardly be argued against any longer, as James Griffin has shown.[2] Moreover, Archard argues persuasively that certain welfare rights also merit status as human rights,[3] and Campbell makes a clear case that human rights no longer fall exclusively under the purview of legal institutions and nation states, but now have a legitimate claim on the decisions and behaviour of both public and private organisations.[4] Other chapters in this volume discuss promising ways of generating acceptance of moral norms by organisations, including those norms associated with human rights.[5] While fully supportive of these and other trajectories that enhance the scope of human rights and moral responsibilities, the argument here is both to point out how easily organisations can go badly wrong, and concomitantly, that the task of expanding human rights and moral responsibilities in organisations is formidable.

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[1] Guy B. Adams and Danny L. Balfour, *Unmasking Administrative Evil* Revised Edition, (Armonk, NY: M. E. Sharpe, 2004).
[2] James Griffin, 'Human Rights, But Whose Duties', Chapter One this volume.
[3] David Archard, 'Welfare Rights as Human Rights', Chapter Two this volume.
[4] Tom Campbell, 'Moral Dimensions of Human Rights', Chapter Three this volume.
[5] See, for example, the Chapters by Doreen McBarnet, Peter Muchlinski, Melissa Lane, Wesley Cragg, Seumas Miller, and Costas Douzinas.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 205–221.

The task is a formidable one because of the cultural context of the modern organisation. That cultural context may be characterised as one of technical rationality – that is, a way of thinking and a way of living that elevates the scientific-analytical mindset and belief in technological progress.[6] In the US, technical rationality developed in full form in the beginning years of the twentieth century. Two streams converged during this period, and released a potent set of ideas and practices into the social and political world – ideas and practices which are still in ascendancy. The first stream arose from the development of epistemology in Western culture, and comprised the scientific-analytic mindset – the legacy of seventeenth century enlightenment thinking and the shift from a belief in divine authority to belief in the power of individual reason. The second stream arose from the Great Transformation of the nineteenth century and encompassed the technological progress characteristic of this period of rapid industrialisation, along with its unparalleled succession of technological developments. The coalescence of these developments into a culture of technical rationality has been highly relevant to the moral condition of the modern organisation.

The modern organisation is a creature of the culture of technical rationality.[7] Technical rationality's close cousin, 'functional rationality,' is the logical organisation of tasks into smaller units in the interest of efficiency, and of course, this sort of task specialisation is ubiquitous in the modern organisation.[8] Mannheim contrasted this with 'substantive rationality', the ability to understand the purposeful nature of the whole system of which a particular task is a part. Technical rationality is also similar to 'instrumental reason', which is the narrow application of human reason for instrumental aims.[9] Until the modern era, reason was conceived as a process incorporating ethical and normative concerns as well as the consideration of merely instrumental aims.

For organisations, this narrowing of the concept of reason has had profound consequences. Technical rationality has led to task and knowledge specialisation, the successive application of the 'latest, most up-to-date' technique (including both machines and management schemes), and an inhospitable context for ethics and morality. Organisational practice is based on technical expertise and pragmatic action, and organisations are now staffed primarily by professionals. Many have seen professionalism as a source of ethical standards for organisational practice.[10] Professional ethics, however, has also been captured by technical rationality, emphasising as it does the technical expertise of the individual practitioner (not to

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[6] See, for example, Daniel Yankelovich, *Coming to Public Judgment* (Syracuse, NY: Syracuse University Press, 1991); William Barrett, *The Illusion of Technique* (Garden City, NY: Anchor Doubleday, 1979); and Jacques Ellul, *The Technological Society* (New York: Vintage, 1954).

[7] Guy B. Adams and Virginia Hill Ingersoll, 'Culture, Technical Rationality and Organizational Culture', *American Review of Public Administration* 20, no. 2 (1990), pp. 285-302.

[8] Karl Mannheim, *Man and Society in an Age of Reconstruction* (New York: Harcourt, Brace and World, 1940).

[9] Max Horkheimer, *The Eclipse of Reason* (New York: Oxford University Press, 1947).

[10] See B. Baumrin and B. Freedman, (eds), *Moral Responsibility and the Professions* (New York: Haven Publications, 1983); and M.D. Bayles, *Professional Ethics* (Belmont, CA: Wadsworth, 1981).

mention the relative status and power of the profession). The net result is an organisational context that leaves ethics and morals as an afterthought.

Accounts of behaviour in organisations are focused on the utility-maximising individual as the locus of ethical decision-making. In short, the ethical problem is construed as one of individual conformance to legitimate authority as a function of self-interest. The fact-value distinction,[11] a key component of the scientific-analytic mindset, further separates the individual from substantive judgments by limiting the field of ethical behaviour to questions of efficiency and proper or innovative implementation of policy (as determined by those with who deal in the realm of values – policy makers). In effect, the ethical purview validated by technical-rationality relieves, and even prohibits individuals in organisations from making substantive value judgments.[12] There is more to say about the moral condition of the modern organisation, to which we shall return. First, however, an overview of the argument presented herein may be useful.

We begin by providing a definition of evil, and differentiating it from administrative evil. Next, we consider some of the dynamics of evil and administrative evil, including perspective, distance, language, dehumanisation and the tacit dimension of social life. We then focus on the way in which modern organisations, through the presence of powerful social dynamics, can foster both evil and administrative evil. The Space Shuttle Challenger disaster is offered as a case illustration of some of these social dynamics. Finally, we suggest that professional ethics, co-opted by a culture of technical rationality, offers little assistance in avoiding administrative evil. Other approaches to addressing the moral vacuum of the modern organisation are needed. Let us first turn to a discussion of evil and administrative evil.

1. EVIL AND ADMINISTRATIVE EVIL

Evil is only barely accepted as an entry in the lexicon of the social sciences. Social scientists much prefer to describe behaviour and avoid morally loaded rubrics, to say nothing of a term traditionally belonging to religious discourse. And yet, evil reverberates down through the annals of human history, showing little sign of weakening in the new century. Those instances when humans knowingly inflict great pain and suffering on other human beings, we call evil.

Evil is defined in the Oxford English Dictionary as the antithesis of good in all its principal senses. A more practical definition of evil has been provided by Katz:

> ... behaviour that deprives innocent people of their humanity, from small scale assaults on a person's dignity to outright murder ... (this definition) focuses on how people behave toward one another – where the behaviour of one person, or an aggregate of persons is destructive to others.[13]

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[11] Herbert A. Simon, *Administrative Behaviour* (New York: The Free Press, 1976).

[12] See for example, Ross Poole, *Morality and Modernity* (London: Chapman and Hall,1991); and John Ladd, 'Morality and the Ideal of Rationality in Organisations', *The Monist* 54 (1970), pp. 488-516.

[13]Fred E. Katz, *Ordinary People and Extraordinary Evil: A Report on the Beguiling of Evil* (Albany: State University of New York Press, 1993), p. 5.

This behavioural definition, while useful, is too expansive. Rather than a continuum of evil as suggested in Katz' definition, we propose a continuum of evil and wrong-doing, with horrible, mass eruptions of evil, such as the Holocaust and other instances of mass murder, at one extreme, and the 'small' white lie, which is somewhat hurtful, at the other.[14] Somewhere along this continuum, wrong-doing turns into evil. Both ends of this continuum are important to recognise, because the road to evil often begins with the small, first steps of wrong-doing.

The culture of technical rationality has introduced a new form of evil that we call administrative evil.[15] What is different about administrative evil is that its appearance is masked within the ethos of technical rationality. Ordinary people may simply be acting appropriately in their organisational role, just doing what is expected of them while participating in what a critical observer (usually well after the fact) would call evil. Under conditions of what we term moral inversion, ordinary people can engage in acts of administrative evil while believing that what they are doing is not only procedurally correct but, in fact, good. Because administrative evil is masked, no one has to accept an overt invitation to commit an evil act, because such overt invitations are very rarely issued. Rather, the 'invitation' may come in the form of an expert or technical role, couched in appropriate language, or it may even come packaged as a good and worthy project (moral inversion).

People have always been able to delude themselves into thinking that their evil acts are not really so bad, and we have certainly had moral inversions in times past, but there are three important differences in administrative evil. One is our modern inclination to un-name evil, an old concept that does not resonate with the technical-rational mindset. The second difference stems from the modern, complex organisation, which diffuses and fragments information and individual responsibility, and requires the compartmentalised accomplishment of role expectations to perform work on a daily basis. The third difference is found in the way the culture of technical rationality has analytically narrowed the processes by which public policies are formulated and implemented, so that moral inversions become more likely. Our focus in this paper is on the second difference – the organisational context of administrative evil.

Evil then occurs along another continuum: from acts that are committed in relative ignorance to those that are knowing and deliberate acts of evil, or what we would characterise as masked and unmasked. Plato maintained that no one would knowingly commit an evil act; the fact that someone does so demonstrates ignorance. Individuals and groups can engage in evil acts without recognising the consequences of their behaviour, or when convinced their actions are justified or serving the greater good. Administrative evil falls within this range of the continuum, where people engage in or contribute to acts of evil without recognising that they are doing anything wrong.

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[14] See Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Vintage, 1978), for the moral seriousness of even 'white' lies.

[15] Adams and Balfour, 2004.

2. DYNAMICS OF EVIL AND ADMINISTRATIVE EVIL

How are we to understand the dynamics of evil? Thousands of years of human religious history have provided ample commentary on evil, and philosophers have discussed it at length. While there was a time when locating evil in the symbolic persona of the devil provided adequate explanation of its origins, the modern scientific era (the culture of technical rationality) both demands a more comprehensive explanation of the origins of evil, and makes it nearly impossible to give one. One author has argued that the modern age has been engaged in a process of un-naming evil, such that we now have a 'crisis of incompetence' toward evil: 'A gulf has opened up in our [modern] culture between the visibility of evil and the intellectual resources available for coping with it.'[16] Evil may not yet have become unnamable, although in its organisational manifestations it often goes unseen. Perspective, distance, language, dehumanisation and the tacit dimension of social life are all important to the dynamics of evil and administrative evil.

2.1 Perspective and Distance

In recognising when evil has been done, authority is given to the perspective of the victim. It is the body or psyche of the victim that has been marked by evil. The witness and testimony of the victim(s) carry moral authority as well, and provide the foundation from which our judgments of good and evil are often made. Still, there is a distortion from the victim's perspective, that is, an act of cruelty or violence (or the perpetrator of that act – or both) is typically described as evil – most typically, as entirely evil. Baumeister refers to this as the 'myth of pure evil'.[17]

The perpetrator's description of the same 'evil' act differs from that of the victim, often dramatically. Baumeister refers to the this as the magnitude gap:

> The importance of what takes place is almost always much greater for the victim than for the perpetrator. When trying to understand evil, one is always asking, 'How could they do such a horrible thing.' But the horror is usually being measured in the victim's terms. To the perpetrator, it is often a very small thing. As we saw earlier, perpetrators generally have less emotion about their acts than do victims. It is almost impossible to submit to rape, pillage, impoverishment or possible murder without strong emotional reactions, but it is quite possible to perform those crimes without emotion. In fact, it makes it easier in many ways.[18]

The magnitude gap is centrally important in seeking to understand evil. From the victims' perspective and most often in hindsight, evil is more readily identified. But from the perspective of the perpetrator, the recognition of evil is problematic. From the perpetrator's perspective, the act of cruelty or violence was perhaps 'not so good' (not to say, evil), but considering other factors, say, prior injustices or some

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[16] A. Delbanco, *The Death of Satan: How Americans Have Lost the Sense of Evil* (New York: Farrar, Strauss and Giroux, 1995), p. 3.
[17] Roy F. Baumeister, *Evil: Inside Human Cruelty and Violence* (New York: WH Freeman and Company, 1997), p. 17.
[18] *Ibid.*, p. 18.

provocation, perpetrators rather easily produce rationales and justifications for even the most heinous acts: 'The combination of desire and minimally plausible evidence is a powerful recipe for distorted conclusions'.[19] The importance of perspective in recognising evil may be captured by the old adage: Whether one sees evil depends upon where one stands. One can only 'stand' elsewhere by a mental act of critical reflexivity, in which one has to reflect critically on one's own position, entailing both a recognition of context and empathy (seeing from the perspective of others).

Distance is also important, both in terms of space and time. It is clearly more difficult to name evil, and do so convincingly, in one's own historical time period. Consider the genocide in Rwanda and ethnic cleansing in the former Yugoslavia. Even from the distant perspective of a concerned nation – the US – evidence during the time of those events was spotty. While one could argue that the evidence was sufficient to have taken stronger action, the point is that a social or political consensus is not so easily achieved when events are unfolding and the situation is murky. In hindsight, and when we are no longer called upon to do anything, it is much easier to name such events as evil with very widespread agreement (but only if a Serb and Bosnian or Kosovar; or Hutu and Tutsi, are not part of the discourse). Geographic and cultural (or racial) distance matter as well. The Rwandan genocide was horrific, but after all, it was in Africa. Bosnia and Kosovo were murkier, more difficult, because they were in the West, in Europe. Naming the Holocaust as evil is made easier because it was perpetrated by Germans, but even so, it took the passage of nearly twenty-five years before there was much discussion of this signal event in the US.[20] Both distance and perspective are powerful constituents of the mask of administrative evil. Naming any evil in our own culture, even many years ago, is made more difficult because we have no distance from our own culture and professions. To recognise administrative evil in our own time is most problematic of all, because we have neither distance nor perspective without an explicit and somewhat difficult effort to create them (critical reflexivity). Unmasking administrative evil in our own time and in our own culture is fraught with difficulty, because in essence, we wear the mask.

2.2 Language and Dehumanisation

Given that much of what we do on a daily basis is taken for granted or tacit,[21] two additional elements make us susceptible to participation in evil, without us 'knowing' what we are doing. The first of these is language. The use of euphemism or of technical language often helps provide emotional distance from what we are really doing.[22] 'Collateral damage' from bombing raids is a euphemism for killing civilian non-combatants and reducing non-military property to rubble. In the Holocaust, code words were used for killing: 'evacuation', 'special treatment', and the now well known 'final solution'. In cases of moral inversion, such use of

[19] *Ibid.*, p. 307.
[20] Raul Hilberg, *The Destruction of the European Jews* (New York: Holmes & Meier, 1985).
[21] See for example, Michael Polanyi, *The Tacit Dimension* (Garden City, NY: Doubleday Anchor, 1966).
[22] George Orwell, *Shooting an Elephant and Other Essays,* (New York: Harcourt and Brace 1950).

language can prevent us from connecting our actions with our normal, moral categories of right and wrong, good and evil. The annihilation of entire towns and villages– that is, the uprooting of a whole community, the expropriation of their property, and their evacuation to forced labour or death camps, was called 'resettlement' or 'labour in the east'. Such language provided the minimal evidence needed to convince people that not only was such activity not evil, rather, it was socially appropriate or even necessary. Language can facilitate moral inversion, and often masks administrative evil.

Dehumanisation is another powerful ally in the conduct of evil. If one does something cruel or violent to a fellow human being, it may well be morally disturbing. But if that person is part of a group of people who are (that is, have been redefined as) not 'normal', not like the majority, such action becomes easier. If those people can be defined as less than human, 'all bad', rather like vermin or roaches (a classic moral inversion), extermination can all too easily be seen as the appropriate action. 'They' brought it on themselves, after all. As Albert Speer, Hitler's Minister of Armaments, said about Jews: 'If I had continued to see them as human beings, I would not have remained a Nazi. I did not hate them. I was indifferent to them.'[23] Dehumanisation also can foster moral inversion and mask administrative evil.

2.3 The Tacit Dimension

Tacit knowing – the taken-for-granted nature of our daily habits of action – is essential to our ability to function in a social world in which even the simplest activity is enormously and dauntingly complex if each component and step has to be articulated and thought about explicitly.[24] But the taken-for-granted also bears on our human capacity to participate in evil, as Baumeister notes:

> Another factor that reduces self-control and fosters the crossing of moral boundaries is a certain kind of mental state. This state is marked by a very concrete narrow, rigid way of thinking, with the focus on the here and now, on the details of what one is doing. It is the state that characterises someone who is fully absorbed in working with tools or playing a video game. One does not pause to reflect on broader implications or grand principles or events far removed in time (past or future).[25]

Most of our daily lives in social institutions and organisations is taken for granted. Not only do we not stop and think about everything that we do (which would socially paralyse us), we hardly stop and think about anything. We do not have to make a decision about which side of the road we will drive on when we start our automobile; indeed, 'side of the road' does not come up on our conscious 'radar screen.' In most of what we do on a daily or routine basis, we are simply engaged in well worn habits of action. There is nothing to prompt us to stop and question. So it is with administrative evil. In a culture which emphasizes technical rationality, being 'at work' for most means being narrowly focused on the task at hand. This is our typical focus of awareness, which drives out, or at least minimises, our subsidiary

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[23] Albert Speer, *Inside the Third Reich.* (London: Weidenfeld and Nicolson, 1970), p. 315.
[24] Polyanyi, 1966.
[25] Baumeister, 1997, p. 268.

awareness of ethics and morality (and other contextual matters as well). Acts of administrative evil are all too easily taken for granted as well.

3. THE SOCIAL DYNAMICS OF EVIL IN ORGANISATIONS

Individualism, one of the core values of US culture, is a barrier to our understanding of group and organisational dynamics – and administrative evil. In our culture, we are inclined to assume that each individual's actions are freely and independently chosen. When we examine an individual's behaviour in isolation or even in aggregate, as we often do, that notion can be reinforced. However, our culture's emphasis on individualism blinds us to group and organisational dynamics, which typically play a powerful role in shaping human behaviour.

It is an easy but important error, to personalise evil in the form of the exceptional psychopath, such as Charles Manson (often without considering how they might be a product of our culture). This proclivity draws a cloak over social and organisational evil. Yet the term 'mob psychology' still has a resonance for most. We have a long history in the United States of public lynching, clearly a recurring example of social evil. Even more to the point, thousands of people have been subjected to administrative evil in dehumanising experiments, internment camps, and other destructive acts by public agencies and private organisations, often done in the name of science and/or the national interest.[26]

Modern organisations, as we have already noted, can be the locus of both wrong-doing and evil. Indeed, they are the home base of administrative evil. Organisations can be engaged in such activities both internally and externally. Internally, these acts would be inflicted on members of the organisation; while externally, customers, clients or citizens in various combinations would be the victims. And of course, organisations may be involved in wrong-doing or evil activities that impact both those outside and inside the organisation.

As we have said, modern organisations are characterised by the diffusion of information and the fragmentation of responsibility. With diffuse and scattered information, literally no one in the organisation may have a complete enough picture to know about the destructive activity. Those that might have enough of a picture to infer a problem, may well assume that higher management must be aware of the problem and be choosing to do nothing about it. With regard to responsibility, those in operational units may note a problem, or a part of a problem, but are likely inclined to understate it so as not to bring negative news to superiors. Not knowing may be replaced by 'strategic ignorance', in which organisational actors may decide that is the safer approach.

The longer wrong-doing or evil activity persists, the more difficult it becomes to acknowledge it. The notion of 'sunk costs', borrowed from economics, is descriptively helpful here. Each step along the way in which such activity is not

[26] See Sanford Nevitt and Craig Comstock, (eds), *Sanctions for Evil* (San Francisco: Jossey Bass, 1971); and D. E. Stannard, *American Holocaust: The Conquest of the New World* (New York: Oxford University Press, 1992).

halted, becomes an additional commitment to that trajectory. This dynamic can be described as 'successive ratification'. As a consequence, bringing such activity to a halt (to recall a product, or ground a fleet, for example) requires a really quite decisive action. One needs clear and overwhelming evidence to do so, for one can be certain that no thanks will be forthcoming. Allowing normal processes (the status quo) to continue requires no action at all – momentum alone becomes a very powerful social force.

In many cases, a 'turning point' is reached, at which administrative evil turns into evil, and those actively participating in it also become evil-doers.[27] The mask is removed from administrative evil at this turning point. This is the moment at which people in the organisation realise or discover that the organisation has been engaged in administrative evil – in the more egregious cases, for example, those involving the death of innocent others. Occasionally one can find cases of organisations in which people have knowingly engaged in harmful, destructive acts – that is, evil plain and simple – the unmasked version. More often, the activities that constitute the wrong-doing are thought by the participants (or at least some of the participants) to be benign or even beneficial. But now, at the turning point, the painful truth is seen.

At this point, personal guilt and shame – and organisational liability – are immediately present, because, in hindsight, most reasonable observers would say that someone should have known what was occurring. Since it is readily apparent that others are likely to react as though those involved should have known, relevant actors are likely to feel a level of guilt and shame commensurate with 'knowingly' doing harm or evil. This in turn becomes a powerful psychological incentive to deny the harm or evil. If the wrong-doing or evil stems from management, such denial is likely to be read by those lower in the organisation as sufficient direction to collude in a cover up or lie. Apprehension over the potential loss of one's job is often sufficient incentive for such collusion.

While the psychological incentive to deny and cover up are clearly powerful, individuals in the organisation have made a fundamental shift at the turning point from engaging in harmful or evil activities unknowingly to doing so knowingly. This is the evil turn.[28] It is evident that the incentives to cover up are socially powerful, if not indeed overwhelming, because we also know that a cover up is highly unlikely to succeed, and often results in the complete disclosure of the harmful or evil activities. Denial and cover up are chosen in the face of knowing they are unlikely to work. We see these dynamics at work in the case of the Space Shuttle Challenger disaster, to which we now turn.

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[27] John M. Darley, 'Social Organisation for the Production of Evil', *Psychological Inquiry* 3 (1992), pp. 199-218.

[28] John M. Darley, 'How Organisations Socialise Individuals into Evildoing', in D. M. Messick and A. E. Tenbrunsel, (eds), *Codes of Conduct: Behavioural Research into Business Ethics* (New York: Russell Sage Foundation, 1996).

3.1 The Space Shuttle Challenger Disaster

The Space Shuttle Challenger disaster can be explained and understood from a technical standpoint (O-ring failure, for example), but the underlying factors that led to the disaster have more to do with organisational dynamics than with a technological failure or flaw.[29] These dynamics represent a typical organisational pathway that can lead to administrative evil when no one intends evil. Despite, and in part because of, its reputation as a high performance organisation, the National Aeronautic and Space Administration, and more specifically, the Marshall Space Flight Centre (MSFC), developed organisational dynamics that tacitly endorsed covering up mistakes and denying the existence of persistent problems. By openly punishing those who were the bearers of bad news, or who caused shuttle launches to be delayed for any reason, the leadership at MSFC enacted an atmosphere of defensiveness and intimidation that produced the conditions under which warnings of an O-ring failure could be dismissed as misguided or trivial, and where the espoused value of putting safety first could be replaced with a primary concern for meeting unrealistic launch schedules. This case illustrates how an organisation can lapse into administrative evil. For the leadership of MSFC, concern for safety gradually became more wish than reality in a tacit effort to preserve the agency's status, funding, and image of high performance.

On January 28, 1986, the Space Shuttle Challenger was launched at 11:38 am. Just over a minute later, it exploded, killing all seven people on board. Among the seven on board was Christa McAuliffe, the 'teacher-in-space', who was also the first civilian to participate in a manned space flight. The Presidential Commission which examined the incident and had to penetrate an attempted cover up, called the event an 'accident'.[30] Others refer to it as a disaster, because there was prior knowledge of the O-ring problem (the cause of the explosion) and because two of NASA's contractors actually recommended against launching during the sequence of events leading up to the launch.[31] In other words, this was an event that should have been prevented from happening.[32] We argue here that the organisational dynamics at MSFC effectively shut down public disclosure of errors and potential problems, and thereby contributed materially to the Challenger disaster. In doing so, the organisation lapsed into administrative evil, and in the aftermath of the disaster, at least flirted with the turning point to unmasked evil.

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[29] Virginia Hill Ingersoll and Guy B. Adams, *The Tacit Organisation* (Greenwich, CT: JAI Press, 1992).
[30] William P. Rogers, *Presidential Commission on the Space Shuttle Challenger Accident: Report* (Washington, D.C.: Government Printing Office, 1986)
[31] J. J. Trento, *Prescription for Disaster: From the Glory of the Apollo to the Betrayal of the Shuttle* (New York: Crown Publishing, 1987).
[32] Committee on Science and Technology, *Investigation of the Challenger Accident: Hearings before the Committee on Science and Technology* (Washington, D.C.: U.S. House of Representatives, 1986) Two volumes.

3.1.1 A Flawed Design

We know that it was the failure of an O-ring (a rubber seal – a larger version of the O-ring used in a faucet) that caused the Challenger to explode. We also know that the Space Shuttle, like any complex mechanical system, inherently involves risk. In complex systems, risk is always present and accidents are 'normal'.[33] Cars, airplanes, experimental aircraft and Space Shuttles have accidents, some of which are catastrophic and lead to loss of life. Some have argued that thinking of such accidents in terms of causation, let alone blame or culpability, may be misguided. They suggest that accidents are simply an inherent result of the risk that is present in all of the technological systems that pervade modern society.

This argument has validity in the sense that, in launching some number of Space Shuttles, a crash at some point is bound to happen. Perfection in technical systems (really, socio-technical systems) is not possible, because of both flaws in materials and human error. Indeed, in the early 1980s, the Air Force did its own risk assessment of a Shuttle crash, and calculated a one in thirty-five probability of such a crash.[34] Prompted by that assessment, they removed their satellites from the Shuttle's payload roster, reasoning that they could achieve better reliability with ordinary rockets. NASA management by contrast assessed the probability of a Shuttle crash at an astonishing one in one hundred thousand. What we see in the case of NASA, and particularly Marshall, are a series of organisational decisions and reactions that, over time, lost touch with engineering realities and created a far greater likelihood of disaster than should have been the case.[35] NASA had a consistent approach to the management of the highly complex systems it worked with – namely, 'project management'. which sought to balance cost, schedule, and weight, while maintaining reliability. In the case of the Shuttle program, cost considerations were paramount from the very beginning; it was grossly oversold and under-budgeted from the beginning.[36] In 1972, NASA promised sixty shuttle flights per year. In 1983 and 1984 as the Shuttle became 'operational,' there were four and five flights respectively, with a peak of nine in 1985. As Vaughan notes, NASA top management made decisions that were significant compromises for the agency:

> ...they made bargains that altered the organisation's goals, structure and culture. These changes had enormous repercussions. They altered the consciousness and actions of technical decision makers, ultimately affecting the Challenger launch deliberations. Also, NASA top administrators responded to an environment of scarcity by promulgating the myth of routine, operational space flight.[37]

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[33] Charles Perrow, *Normal Accidents: Living with High-Risk Technologies* (New York: Basic Books, 1984).

[34] Mark Maier, *A Major Malfunction: The Story Behind the Space Shuttle Challenger Disaster* (Binghamton, NY: The Research Foundation of the State University of New York, 1992).

[35] Diane Vaughan, *The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA* (Chicago: University of Chicago Press, 1996), p. 406.

[36] Maier, 1992.

[37] Vaughan, 1996, p. 390.

Budgetary cost constraints were program-wide, but most vivid in retrospect was NASA's choice of Morton Thiokol's design for the Solid Rocket Booster (SRB), used to rocket the shuttle into space. NASA management cited Thiokol's 'substantial cost advantage' as the chief reason for awarding them the contract for the SRB.

However, NASA engineers had flagged Thiokol's design as unacceptable, even before the contract was awarded.[38] In 1977 and 1978, NASA engineers at Marshall again raised concerns over this fatal design flaw. When the O-ring design (using a clevis and tang approach) turned out even worse than expected in flight, concern mounted. As Shuttle flights continued, the O-rings did not 'seat' (that is, provide a good seal) as expected, and compounding the problem, hot gases from inside the rocket 'blew by,' eroding not only the primary seal, but the secondary seal as well. In 1982, NASA officially reclassified the SRB (Solid Rocket Booster) joints from 'criticality 1R' (meaning that a failure would be catastrophic, but that it was a redundant system – by having a second, back-up O-ring) to 'criticality 1' (meaning that the back-up didn't work and could not be counted on – no redundancy). As the Presidential Commission noted: 'The Space Shuttle's Solid Rocket Booster problem began with the faulty design of its joint and increased as both NASA and contractor management (Thiokol) first failed to recognise it as a problem, then failed to fix it, and finally treated it as an acceptable flight risk'.[39]

In August, 1985, a briefing was held at NASA headquarters on the O-ring problem, in which resiliency, the ability of the O-ring to return to a normal shape from an oval shape (which was negatively impacted by colder temperatures, that is, the colder the temperature, the longer it took for the seal to return to its round shape), was highlighted as the number one concern.[40] Marshall management insisted on recommending that flights continue, as attempts were made to rectify the field joint problem. This decision was what NASA headquarters wanted to hear, but it effectively escalated the risk of disaster to the point that it was only a matter of time before one occurred.

3.1.2 The Fatal Launch

A wild card was introduced into the equation when it became apparent that record low temperatures were expected the night before the launch. The coldest prior launch (January, 1985) had been at a seal temperature of 53 degrees; this launch looked like it would take off at below-freezing temperatures. Since cold temperatures, which seriously impacted resiliency, had been flagged as the number one concern on O-ring erosion, this news could not have been more unwelcome at Morton Thiokol, where a meeting of engineers rather quickly agreed that this launch should be stopped, if the expected low temperatures materialised.

A teleconference on the evening before the launch was convened between Thiokol, the Marshall Space Flight Centre and the Kennedy Space Centre to present

[38] Maier, 1992.
[39] Rogers, 1986, p. 148.
[40] Maier, 1992.

the Thiokol engineers' concerns. They recommended against launching at a temperature below 53 degrees. To put this recommendation in context, throughout NASA's history the practice had always been that a contractor's role was to show NASA that its system was safe and ready to launch. That is, the contractor had an affirmative responsibility to show NASA it was safe to 'go'. In this particular instance, something completely different happened. NASA managers, affiliated with the Marshall Space Flight Centre, now put Thiokol management in the position of proving that it was unsafe to launch – a complete reversal of standard NASA practice. Thiokol managers got the picture that they were not telling NASA what it wanted to hear, namely, that it was OK to launch. After a recess, Thiokol management, in disregard of their engineers' best thinking, then used the same data charts to 'conclude' that launching was OK.

2.1.3 The Marshall Space Flight Centre

Morton Thiokol, as the prime contractor on the Solid Rocket Booster, and Marshall, as the Project Manager for the SRB, were the responsible parties for the field joints and their O-rings, which were a growing problem as Shuttle flights continued. A pattern of censoring problematic or negative information for higher ups within NASA had become evident on Mulloy's part and on Marshall's part more generally. There were a series of decisions made within NASA, Marshall and Thiokol that, as they accumulated (successive ratification), communicated an acceptance of the safety of the O-rings, leading to a false sense of security. Interestingly, Larry Mulloy, the SRB Project Manager, noted that more time and concern was spent on the parachutes, which were not functioning properly in returning the spent Boosters safely back to the ocean surface so they could be picked up and reused.[41] The parachutes were so prominent a concern because they had immediate and considerable cost implications. Put another way, cost considerations seriously eroded over time the necessary level of attention to safety issues.

The three space flight centres, Marshall, Johnson and Kennedy, but particularly the former two, were engaged in a competitive rivalry, and the least favoured Centre would be the one which slowed the launch schedule. William Lucas, Director of MSFC, was determined that Marshall would win that competition:

> Lucas' management style, combined with the production pressure the centre was experiencing, not only exacerbated the inter-centre rivalry but resulted in competition between the three Marshall projects. Each Project Manager vied with the others to conform to the cultural imperatives of the original technical culture .... They competed to meet deadlines, be on top of every technical detail, solve their technical problems, conform to rules and requirements, be cost-efficient, and, of course, contribute to safe, successful space-flight .... No Project Manager wanted his hardware or people to be responsible for a technical failure. To describe the pressure at Marshall simply as production pressure is to underestimate it. It was, in fact, performance pressure ... that permeated the workplace culture.[42]

[41] Vaughan, 1996.
[42] *Ibid.*, p. 218.

Lucas let it be known that, under no circumstances, would Marshall be responsible for delaying a launch.[43] A delayed launch initiated by Marshall would contradict – and therefore threaten – the organisation's 'can do' image. And indeed, in the twenty-five Flight Readiness Reviews in the Shuttle Program's history, not a single time had Marshall indicated that a launch should not go forward as planned, although they were responsible for a number of the technical glitches that delayed launches.

Lucas was notorious for reprimanding – or more accurately, verbally tearing apart – subordinates who made mistakes, in public meetings.[44] This meant that the preferred choice for Marshall employees was not to make mistakes, but perfection being difficult to produce at all times, camouflaging any mistakes would be the next choice. Lucas and other managers were quite predictably told what they wanted to hear (no mistakes, no delays, no problems), not what they needed to know.[45] While there were several levels of Flight Readiness Review within Marshall, the highest level, the Marshall Centre Board, was notorious:

> The Marshall Centre Board FRR was the quintessential embodiment of Marshall culture. Although Marshall's Level IV and III FRRs were adversarial and rigorous, they paled in comparison to the Lucas-embellished culture of the more formal, large-audience Centre Board review. The Centre Board was the final in-house review before Marshall Level III Project Managers made their assessments of flight readiness at Level II and Level I before Johnson and NASA top administrators respectively. Lucas presided. Here we see the distinctive Marshall performance pressure...[46]

Vaughan quotes more extensively from a personal interview with Larry Wear, one of Marshall's program managers:

> The Centre Board would be held in a humongous conference room that looks like an auditorium. It's an open meeting. There might be one hundred – one hundred fifty people there .... It's great drama .... And it's an adversarial process. I think there are some people who have, what's the word, there is a word for when you enjoy somebody else's punishment ... masochistic, they are masochistic. You know, come in and watch Larry Wear or Larry Mulloy or Thiokol take a whipping from the Board.[47]

Quite apart from the Challenger disaster, Marshall's unwillingness to 'fail' or 'lose' by grounding the fleet until the fatal design flaw could be fixed, and its increasingly rigid and pressurised approach to the Flight Readiness Review process, essentially guaranteed that a Shuttle disaster would occur sometime soon.

William Lucas' leadership placed Marshall at an escalated level of risk because, even if Challenger had not been launched, the destructive organisational dynamics virtually assured a Shuttle disaster resulting in the loss of astronauts' lives in the near term. Nobody at the Marshall Space Flight Centre, Lucas surely included, set out to make mistakes, but the organisational dynamic which manifested itself during and before Challenger put lives at unnecessary risk, and represented a case of

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[43] Michael McConnell, *Challenger: A Major Malfunction* (New York: Doubleday, 1987).
[44] Roger Boisjoly, personal telephone conversation with author, July 17, 1997.
[45] R. W. Smith, *The Space Telescope* (New York: Cambridge University Press, 1989).
[46] Vaughan, 1996, p. 219.
[47] *Ibid.*, pp. 219-220

administrative evil. We can see clearly from the Challenger case how many different groups of professionals – most of whom would think of themselves as embodying professional ethics – were nonetheless drawn into actions and non-actions that led first to unacceptable risks and finally to the tragedy of seven unnecessary deaths. When NASA, Marshall and Morton Thiokol, each responded independently and spontaneously to the explosion of Challenger with a cover up, administrative evil was nearly unmasked via their 'evil turn'. These attempted cover ups did not last very long, and were largely unsuccessful because of the high profile investigation and two whistleblowers. However, what we see in the Challenger case does not suggest a healthy organisational climate for ethics and morals.

3.2 The Technical Rational Approach to Ethics in Organisations

The most fundamental moral challenge to the technical-rational approach to professional ethics is that one can be a 'good' or responsible manager or professional and at the same time commit or contribute to acts of administrative evil. As Harmon[48] has argued, an ethics captured by technical-rationality has difficulty dealing with what Milgram[49] termed the 'agentic shift', where the professional manager acts responsibly towards the hierarchy of authority, policy, and the requirements of the job or profession, while abdicating any personal, much less social, responsibility for the content or effects of organisational actions. There is little in the way of coherent justification for the notion of a stable and predictable distinction between the individual's personal conscience guided by higher values that might resist the agentic shift, and the socialised administrator who internalises organisational values and obedience to legitimate authority. In the technical-rational conception of organisational ethics, the personal conscience is always subordinate to the structures of authority. The former is 'subjective' and 'personal,' while the latter is characterised as 'objective,' and 'public.'

Many of the administrators directly responsible for the Holocaust were, from the technical-rational perspective, effective and responsible administrators who used administrative discretion to both influence and carry out the will of their superiors. Administrators such as Adolph Eichmann and Albert Speer obeyed orders, followed proper protocol and procedures, and were often innovative and creative while carrying out their assigned tasks in an efficient and effective manner.[50] Ironically, the SS was very concerned about corruption in its ranks, and with strict conformance to its professional norms.[51]

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[48] Michael M. Harmon, *Responsibility as Paradox: A Critique of Rational Discourse on Government* (Thousand Oaks, CA: Sage Publications, 1995).

[49] Stanley Milgram, *Obedience to Authority* (New York: Harper and Row, 1974).

[50] M. Keeley, (1983), 'Values in Organisational Theory and Management Education', *Academy of Management Review,* 8 no3 (1983): pp. 376-386; Raul Hilberg, 'The Bureaucracy of Annihilation.', in F. Furet (ed.), *Unanswered Questions*: *Nazi Germany and the Genocide of the Jews* (New York: Schocken Books, 1989), pp. 119-133; and Harmon, 1995.

[51] Werner Sofsky, *The Order of Terror: The Concentration Camp* (Princeton, NJ: Princeton University Press, 1997).

As Rubenstein[52] points out, no German laws against genocide or dehumanisation were broken by those who perpetrated the Holocaust. Everything was legally sanctioned and administratively approved by legitimate authority, while at the same time, a number of key programs and innovations were initiated from within the bureaucracy.[53] Even within the morally inverted society created by the Nazis, administrators carried out their duties within a framework of ethics and responsibility that was consistent with the norms of technical-rational administration. The moral vacuum of modern organisations is clearly revealed by the fact that the vast majority of those who participated in the Holocaust were never punished, and many were placed in responsible positions in post-war West German government or industry, as well as the US National Aeronautics and Space Administration and other public and private organisations in the US. The need for 'good' managers to rebuild the German economy and to develop the American rocket program outweighed any consideration of the administrative evil in which they were complicit.

The same emphasis on technical rationality that impacted the organisational sphere also narrowed the conception of ethics within professionalism. Hilberg points out that the professions were 'everywhere' in the Holocaust.[54] Lawyers, physicians, engineers, planners, military professionals, accountants and more all contributed to the destruction of the Jews and other 'undesirables'. Scientific methods were used in ways that dehumanised and murdered innocent human beings, showing clearly how the model of professionalism consistent with technical rationality drives out moral reasoning. Ethics became an ineffective component of professionalism, as it has in many other examples of administrative evil in the US and elsewhere.

The historical record is such that one concludes that the power of the individual conscience is weak relative to that of legitimate authority in modern organisations and social structures more generally, and that current versions of professional and organisational ethics do little to limit the potential for evil in modern organisations. Even if the individual finds the moral strength to resist administrative evil, the culture of technical rationality provides little in the way of guidance for how to act effectively against evil. As organisational practice is now construed, one can voice disagreement with a policy internally, but if this does not result in a change of policy, the only acceptable courses of action that remain are exit or loyalty.[55] One can resign and seek to change policy from the outside (leaving only silent loyalists in the organisation), or remain and carry out the current policy. This was the choice faced by German civil servants in the early 1930s, as observed by Brecht.[56] If legitimate authority leads in the direction of administrative evil, it is unlikely to provide legitimate outlets for resistance. In a situation of moral inversion, when duly

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[52] Richard L. Rubenstein, *The Cunning of History* (New York: Harper and Row, 1975).
[53] Christopher Browning, 'The Decision Concerning the Final Solution', in F. Furet (ed.), *Unanswered Questions: Nazi Germany and the Genocide of the Jews* (New York: Schocken Books, 1989), pp. 96-118; and Sofsky, 1997.
[54] Hilberg, *op. cit.*
[55] Albert O. Hirschman, *Exit, Voice and Loyalty* (Cambridge, MA: Harvard University Press, 1970); and Harmon, 1995.
[56] A. Brecht, *Prelude to Silence* (New York: Oxford University Press, 1946).

constituted authority leads in the direction of evil disguised as good, neither professional ethics nor organisational ethics has an effective answer for those working in organisations.

If the Holocaust teaches us anything, it is that individual managers, far from resisting administrative evil, are most likely to be either helpless victims or willing accomplices. The ethical framework of technical rationality exalts the primacy of an abstract, utility-maximising individual, while binding managers to organisations in ways that make them into reliable conduits for the dictates of legitimate authority, which is no less legitimate when it happens to be pursuing an evil policy. An ethical system that allows an individual to be a good manager while committing acts of evil is necessarily devoid of moral content, or perhaps better, morally perverse. Norms of legality, efficiency, and effectiveness – however 'professional' they may be – may lead all too easily to organisational wrong-doing and administrative evil.

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CHAPTER TWELVE

Humanity, Military Humanism and the New Moral Order

1. ON THE HUMANISM OF RIGHTS

Human rights have become the new morality of international relations, a way of conducting politics according to moral norms and rules. As justification for state policies or as the vague rhetoric of dissent, human rights are now the canonical text of the new moral disposition of world affairs, 'the core of international law'.[1] The signs of this new 'liberal internationalism'[2] are everywhere. Military force has been placed in the service of humanity in the form of humanitarian wars; economic sanctions have been repeatedly imposed by the UN for humanitarian purposes; politics are being criminalised through the increased use of domestic and international courts; finally, human rights and good governance clauses are routinely imposed by the West on developing countries as a precondition of trade and aid agreements. In this climate, it sounds naïve to question the meaning and scope of humanity or the range of normative resources it can mobilise. Yet this is one of the most urgent tasks of our time.

What entities are the legitimate bearers of rights? The answer appears obvious: humans, rights exist for the sake of humanity, they are the acme of humanism. But if we question the self-evidence of commonsense, the intellectual reasons for creating human rights instead of rights for all living beings are not evident. *Humanitas* is not self-defining or self-determining. Classical natural law and early modern definitions of rights drew their normative force from claims about what counts as characteristically human and derived their prescriptions from the nature and needs of 'humanness'. But the definitions of the 'human' differed widely according to age, place and school of thought and, similarly, the position of humanity in the world and its relation to other beings has varied enormously throughout history. Human slaves have been excluded from humanity throughout history; in the Middle Ages, on the other hand, pigs, rats, leeches and insects accused of various crimes were formally

[1] Anne-Marie Slaughter, 'A Liberal Theory of International Law', *ASIL Proceedings 94* (April 2000), p. 246.
[2] Anne Marie Slaughter, 'Towards the Age of the Liberal Nations', *Harvard International Law Journal*, 33 (1992) 393.

T. Campbell and S. Miller (eds), Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations, pp. 223–242.

summoned to courts of law, tried with all the pomp of due process and acquitted or convicted and punished.[3] Legal recognition has not followed the modern understanding of humanity and, as a result, human rights give rise to a number of difficult conceptual and ontological questions.

Can we have a concept of rights without having a definition of who or what is human? And even if we were to assume that we have an answer to the question of humanity, when does the existence of a human being and the associated rights begin and when does it end? What about embryos, clones, genetically modified beings and cyborgs? What about animals? The animal rights movement has placed the legal differentiation between human and animal firmly on the political agenda and has drafted a number of bills of animal entitlements. Important philosophical and ontological questions are involved here. At the deep end, the divide between humanity and animality is challenged and humans are seen as a non-privileged species in the continuum of the cosmos.

Companies and other non-human legal persons have been given legal rights, of course, for centuries. Christopher Stone, an American law professor has argued that trees, parks and other natural objects too should be given rights,[4] and a French author has called for turning greenbelt zones into legal subjects with the power to go to court, through representatives, to protect their ecosystem from intrusion.[5] Legal subjectivity has not been exclusively bestowed on humans and, its use as an economic strategy indicates that the distinction between humanity and its others is not strict or immutable. The meaning of humanity was not conclusively settled when we abandoned classical thought or settled for a weak sense of natural law *à la* Hart.[6] According to Leo Strauss, the question of human nature has continued to 'haunt modern thought and has become more complicated as a result of the contradictions engendered by positive science and historicism'.[7] But how did we arrive at the concept of human nature and humanity?

Premodern societies did not develop ideas of freedom or individuality. Both Athens and Rome had citizens but not 'men', in the sense of members of the human species. The *societas generi humani* was absent from the *agora* and the *forum*. Free men were Athenians or Spartans, Romans or Carthaginians but not persons; they were Greeks or barbarians but not humans. The word *humanitas* appeared for the first time in the Roman Republic. It was a translation of *paideia,* the Greek word for education, and meant *eruditio et institutio in bonas artes.* The Romans inherited the idea of humanity from Hellenistic philosophy, in particular stoicism, and used it to distinguish between the *homo humanus,* the educated Roman and *homo barbarus.* The first humanism was the result of the encounter between Greek and Roman

[3] Jean Vartier, *Les Procès des Animaux du Moyen Age à nos Jours* (Paris: Hachette, 1970); Luc Ferry, *The New Ecological Order*, trans. Carol Volk (University of Chicago Press, 1992), pp. ix-xvi.
[4] Christopher Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects', *Southern California Law Review* (1972).
[5] Marie-Angèle Hermitte, 'Le Concept de Diversité Biologique et la Création d'un Status de la Nature', in *L'homme, la Nature, le Droit* (Paris: Bourgeois, 1988).
[6] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1979), pp. 189-194
[7] Claude Lefort, *The Political Forms of Modern Society*, in John Thompson, (ed.), (Cambridge: Polity, 1986), p. 240.

civilisation and the early modern humanism of the Italian Renaissance retained these characteristics. It was presented as a return to Greek and Roman prototypes and was aimed at the barbarism of medieval scholasticism and the gothic north.

A different conception of *humanitas* emerged in Christian theology, superbly captured in the Pauline assertion, that there is no Greek or Jew, free man or slave. All men are equally part of spiritual humanity which is juxtaposed to deity. They can all be saved through God's plan of salvation and enjoy eternal life in the true city of heaven. If, for classical humanism, man is a *zoon logon echon* or *animal rationale*, for Christian metaphysics, man is the vessel of the soul. Only humans, not animals, trees or spirits, possess an immortal soul, only humans can be saved in Christ. During the Middle Ages, the only subject was the King, God's representative on earth. But the religious grounding of humanity was undermined by the liberal political philosophies. The foundation of humanity was transferred from God to (human) nature, in a process which strengthened the intellectual trend and the political determination to recognise the centrality of individuality. This was the most dramatic effect of the Enlightenment. By the end of the Eighteenth century, the concept of 'man' came into existence and soon became the absolute and inalienable value around which the whole world revolved. Humanity, man as species existence, entered the historical stage as the peculiar combination of classical and Christian metaphysics.

Humanism believes that there is a universal essence of man and that this essence is the attribute of each individual who is the real subject.[8] As species existence, man appears without differentiation or distinction in his nakedness and simplicity, united with all others in an empty nature deprived of substantive characteristics except for soul, reason and free will. This is the man of the rights of man, an abstraction that has as little humanity as possible, since he has jettisoned the traits and qualities that build human identity. The universal man of the declarations is an unencumbered man, human, all too human. His soul unites with all others in Christ and his ontological minimalism links him to humanity philosophically. As species existence all men are equal, because they share equally soul and reason, the *differentia specifica* between humans and others. But this equality, the most radical element of the Declarations, applied only to the abstract man of species existence and his institutional foil, the legal subject. It had limited value for non-proper men (that is men of no property) even less for women and was denied altogether to those defined as non-humans (slaves, colonials and foreigners). Indeed the history of human rights unravels in the gap between the abstract man of the Declarations and the various parts of humanity habitually excluded from the protection of rights.

By the middle of the nineteenth century and after the abolition of slavery, humanity reached its final modern formulation in juxtaposition to the non-human world of animals and objects. At the same time, the invention of the fully 'human',

[8] 'If the essence of man is to be a universal attribute, it is essential that *concrete subjects* exist as absolute givens; this implies an empiricism of the subject. If these empirical individuals are to be men, it is essential that each carries in himself the whole human essence, if not in fact, at least in principle; this implies an idealism of the *essence*. So empiricism of the subject implies idealism of the essence and vice versa', Louis Althusser, *For Marx*, trans. B. Brewster (London: Allen Lane, 1969), p. 228.

which characterises the acme of modern humanism, created the precondition for the parallel emergence of the non-human or subhuman as its necessary, infernal double. The *homo barbarus*, the partner and foil of the *homo hominus* becomes an all-powerful and threatening presence only after humanism has declared the self-evident nature of humanity. We can trace the beginning of the concentration camps, of the 'non-human vermin' of Auswitch and the 'cockroaches' of Rwanda in this most banal and obvious of definitions which introduces a strict distinction and hierarchy: human and subhuman, man and superman, us and the terrifying absolute others. What history has taught us is that there is nothing sacred about any definition of humanity and nothing eternal about its scope. Humanity cannot act as the *a priori* normative principle and is mute in the matter of legal and moral rules. Its function lies not in a philosophical essence but in its non-essence, in the endless process of re-definition and the continuous but impossible attempt to escape fate and external determination.

Classical humanism, to which all modern versions return, juxtaposed, as we saw, the *humanum* to the *barbarum.* As Joanna Hodge put it, all versions of humanism are followed by a 'double marking, of a return to half-understood Greek ideals and a gesture of setting oneself apart from some perceived barbarism'.[9] The humanism of rights, like all humanism, is similarly based on the definition of the essence of humanity and a desire to go back to the classical sources of the *humanum*, evident in the extravagant claims of early modern legal humanists and their contemporary followers that Greece and Rome developed first the institution of rights. Again, legal humanism was a discourse of exclusion, not just of foreign barbarians but also of women and people of colour. To be sure, the various political and legal philosophies differ in their definitions of the human essence. For liberals, legal humanism protects freedom and dignity, for left liberals and socialists, it promotes equality and liberty while, for multi-culturalists, it safeguards a multiplicity of values and life plans determined in each community by local conditions and historical traditions. In all cases, however, individual and collective human possibilities are demarcated and restricted in advance, through the axiomatic determination of what it is to be human and the dogmatic exclusion of other possibilities.

These criticisms are equally applicable to the concepts of humanity that underpin the most heated debate it human rights, that between universalism and cultural relativism. Both positions exemplify, perhaps in different ways, the contemporary metaphysical urge: each side has made an axiomatic decision as to what constitutes the essence of humanity and follows it, like all metaphysical determinations, with a stubborn disregard of opposing strategies or arguments. They both claim to have the answer to the question, 'What is human value?' and to its premise, 'What is (a) human?' and take their answers to be absolute and irrefutable. But both universalism and collectivism are extensions of the metaphysics of subjectivity. The former is, as we have seen throughout, an aggressive essentialism which has globalised nationalism and has turned the assertiveness of nations into a world system.

[9] Joanna Hodge, *Heidegger and Ethics* (London: Routledge, 1995), p. 90.

Community, on the other hand, is the condition of human existence but communitarianism has become even more stifling that universalism.

The individualism of universal principles forgets that every person is a world and comes into existence in common with others, that we are all in community. Being in common is an integral part of being self: self is exposed to the other, it is posed in exteriority, the other is part of the intimacy of self. My face is 'always exposed to others, always turned toward an other and faced by him or her never facing myself.'[10] But being in community with others is the opposite of common being or of belonging to an essential community. Most communitarians, on the other hand, define community through the commonality of tradition, history and culture, the various past crystallisations whose inescapable weight determines present possibilities. The essence of the communitarian community is often to compel or 'allow' people to find their 'essence', its success is measured by its contribution to the accomplishment of a common 'humanity'. But this immanence of self to itself is nothing other than the pressure to be what the spirit of the nation or of the people or the leader demands or, to follow traditional values and exclude what is alien and other. This type of communitarianism destroys community in a delirium of incarnated communion. The solid and unforgiving essence of nations, classes or communities turns the 'subjectivity of man into totality. It completes subjectivity's self assertion, which refuses to yield'.[11] Community as communion accepts human rights only to the extent that they help submerge the I into the We, all the way till death, the point of 'absolute communion' with dead tradition.

The community of being together, on the other hand,

> is what takes place always through others and for others. It is not the space of the egos – subjects and substances that are at bottom immortal – but of the Is, who are always others (or else nothing) ... Community therefore occupies a singular place: it assumes the impossibility of its own immanence. The impossibility of a communitarian being in the form of a subject.[12]

In this sense, community is transcendence without a sacred meaning and resistance to immanence, 'to the communion of everyone or to the exclusive passion of one or several: to all forms and all violences of subjectivity'.[13] The modern creation of society, as a space of competing atoms, forces and signs, has been commonly seen as the outcome of community's destruction. But according to Jean-Luc Nancy, the historical sequence is different: society emerged not out of disappearing communities but out of disintegrating empires and tribes, which were as unrelated to community as is postmodern society. It is only after the disappearance of the society of atomistic subjects that the non-immanent community of singular beings-in-common will have an historical chance. The community of non-metaphysical humanity is still to come.

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[10] Jean-Luc Nancy, *The Inoperative Community* (Minneapolis: University of Minnesota Press, 1991), pp. xxxviii.
[11] Heidegger, 'Letter on Humanism', in *Basic Writings,* ed. David Farrell Krell (HarperSanFrancisco, 1977), p. 221.
[12] Jean-Luc Nancy, *The Inoperative Communit*., p.15.
[13] *Ibid.*p. 35.

The continuing pathos of the universalism/relativism debate coupled with its repetitive and rather banal nature indicates that the stakes are high. Postmodern mass societies and the globalisation of economics, politics and communications increase existential anxiety and create unprecedented uncertainty and insecurity about life prospects. In this climate, the desire for simple life instructions and legal and moral codes with clearly defined rights and duties becomes paramount. Codification transfers the responsibility of deciding ethically to legislators and resurgent religious and national fundamentalisms, to false prophets and fake tribes. In an over-legalised world, rules and norms discourage people from thinking independently and discovering their own relation to themselves, to others, to language and history. The proliferation of human rights treaties and the mushrooming of legal regulation are part of the same process, which aims to relieve the burden of ethical life and the anxiety or, in Heidegger's terms, the 'homelessness' of postmodern humanity. International human rights law promises to set all that is valuably human on paper and hold it before us in triumph: the world picture of humanity will have been finally drawn and everyone would be free to follow his essence as defined by world governments and realised by technologies of dismembering and re-assembling the prosthetic human.

But are human rights not the value or principle which resists these tendencies and raises human life and dignity into the end of civilisation? If this is the case, they have not been successful in resisting the endless objectification of humanity. It is arguable that human rights may participate rather than oppose the dismembering and re-assembling operations of technology and law.[14] If technological objectification is the metaphysical urge of modernity, it could not be otherwise. But another aspect of their action becomes important in the context of modern value nihilism. If the satisfaction of endlessly proliferating desire is the only morality left in a disenchanted world, rights become the last human value. Human rights are the values of a valueless world, but their action is not ethical in the Greek sense or moral in the Kantian. When they move from their original aim of resistance to oppression and rebellion against domination to the contemporary end of total definition and organisation of self, community and the world, according to the dictates of endless desire, they become the effect rather than the resistance to nihilism. As Bauman puts it,

> when the job of fragmentation is done, what is left are diverse wants, each to be quelled by requisition of goods and services; and diverse internal or external constraints, each to be overcome in turn, one-constraint-at-a-time – so that this or that unhappiness now and then can be turned down or removed

or turned into the next human rights campaign.[15]

Nietzsche had realised the metaphysical link between the modern individual and the operation of rights.

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[14] See Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000), Chapter 12.
[15] Zygmunt Bauman, *Postmodern Ethics* (Oxford: Blackwell, 1993), p. 197.

> In fact it was Christianity that first invited the individual to play the judge of everything and everyone; megalomania almost became duty: one has to enforce eternal rights against everything temporal and conditioned.[16]

Individualism and egalitarianism, the two apparently opposed grounds of human rights, are in reality allies, according to Nietzsche, in a world where the individual is the only (valueless) value left. 'The modern European is characterised by two apparently opposite traits: individualism and equal rights; that I have at last come to understand.'[17] While individualism claims to promote difference and uniqueness, it is only a form of egalitarianism which makes people, fearful of an existence without meaning and values, to demand that everyone should count as their equal, in other words the same, in an endless quest for personal gratification. But when individual desire is turned into the ultimate principle its protective value is devalued. The individual is an extremely vulnerable piece of vanity, predicted Nietzsche. His prophesy has become the bitter truth of our century.

2. MILITARY HUMANISM

Throughout history, people have gone to wars and sacrificed themselves at the altar of principles like nation, religion, empire or class. Secular and religious leaders know well the importance of adding a veneer of high principle to low ends and murderous campaigns. This is equally evident in Homer's Iliad, in Thucidides' chilling description of the Athenian atrocities in Melos and Mytilene, in the chronicles of the crusades and in Shakespeare's historical plays.

The moralisation of war is relatively easy when the moralisers are victims of external aggression, but the crusaders, the empire builders, the colonialists and the Nazis were not lacking in moral high ground either. The ability to present most wars as just and the lack of a moral arbiter who could sift through conflicting rationalisations has made the just war one of the hardest moral mazes. The question of the justice of a war has always presented an interesting paradox: for the warring parties there is nothing more certain than the morality of their cause, while for observers there is nothing more uncertain than the rightness of the combatants' conflicting moral claims. As C.H Waddington put it,

> the wars, tortures, forced migrations and other calculated brutalities which make up so much of recent history, have for the most part been carried out by men who earnestly believed that their actions were justified, and, indeed, demanded, by the application of certain basic principles in which they believed.[18]

War is the clearest example of what Lyotard has called the differend:

> As distinguished from a litigation, a differend would be that case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their

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[16] F. Nietzsche, *The Will to Power,* trans W. Kaufmann and R.J. Hollingdale (New York: Vintage, 1968), p. 765, III, p. 401.
[17] *Ibid.*, 783, III, p. 410.
[18] C.H. Waddington, *The Ethical Animal* (London: Allen & Unwin, 1960), p. 187.

> differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits that rule).[19]

It is against this background of moral undecidability that we must examine the theory of 'just war' and its contemporary version in the 'humanitarian' wars of the last decade. The theory, first developed in the Middle Ages, was an attempt by the Church to serve Caesar without abandoning fully its pledges to God. But the key element which allowed a war to be blessed by the Church was its *justa causa*, its mission to promote the faith and punish its enemies. The theological theory of just war, based on a radical distinction between the faithful and the faithless and immoral, allowed the conduct of wars aimed at annihilating the infidels. The justness of the cause permitted the conduct of total war on the morally inferior if not subhuman enemies. It justified the unremitting violence of the Crusades, the genocidal attacks on the Indians and indigenous people of the newly discovered lands and, later, the atrocities of the religious wars which, conducted on both sides in the name of the true faith, knew no limit in their attempt to annihilate the morally degraded enemies.

According to Carl Schmitt, the emergence of the *Jus Publicum Europaeum* in the Eighteenth century replaced the endless and inconclusive medieval discussions about the meaning of the just cause.[20] The modern theory of the just war aims to remove theological and moral concerns from the conduct of international relations and is the clearest sign of the emergence of a system of relations based on sovereign states. The modern law of war disassociates the just war from a *justa causa* and relates it to a just enemy, defined as an external sovereign, a foe who shares at the formal level all the attributes rights and duties of statehood. A war between sovereigns is just because the combatants are formally equal actors (*hostes aequalitur justi)* who, as a result of their equivalent status, accept legal formal and conventional limits on the aims and conduct of war. The rapidly developing early modern European public order does not care about the justness of the cause of a war but about the status of the warring parties as sovereign actors with the rightful power to decide and conduct war.

For Schmitt, the modern international order replaced the morality of ends with that of sovereignty. The European wars of the Eighteenth and Nineteenth centuries were no longer total and the question of regulation of violence moved from ends to means.[21] The *justus hostis,* the legally recognised enemy, is distinguished from the infidel, the aim of the war is no longer to annihilate barbarians. But while the war between European sovereigns became regulated and limited, Schmitt insists that this 'normalisation' was grounded on its exception, namely, the awareness of the difference that separates the Europeans from the rest of the world. 'War is conducted

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[19] Jean-Francois Lyotard, *The Differend,* trans G. Van den Abbeele (Manchester: Manchester University Press, 1989), p. xi.

[20] Carl Schmitt, *der Nomos der Erde in Volkerrecht des Jus Publicum Europaeum* (Berlin: Ducker & Humblot, 1997 (1950)).

[21] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical illustrations* (London: Penguin, 1980) is the best introduction to the topic.

differently between Europeans and non-Europeans as indeed among Europeans outside continental Europe'.[22]

A second consequence of the change was the 'enemies within', those political and social forces which challenge the internal *ordre publique,* but do not have sovereign status, could not be recognised as formal enemies, worthy of some respect and constraint. They were reduced to the condition of bandits, terrorists, rebels, in other words infidels to the claims of sovereign statehood. They became either absolute enemies, targets of elimination through total war or people not entitled to be considered as enemies and therefore targets of police action and criminal sanctions. As Ananiadis puts it, the

> negotiation of the relations between self and other under the principle of sovereignty promotes the morality of exclusion and leads inescapably to the elimination of difference. But the converse is also true: the existence of a difference that must be eliminated, or of an exception, is the necessary precondition for the construction of sovereignty.[23]

Modern European sovereignty was based on the recognition of other sovereigns and the consequent limitation of actions against them under the principle of reciprocity and on the consequent exclusion of non-European and non-state actors from the dignity of recognition and equivalence.

All this seems to have changed in the late twentieth century. We are told that the new world order is based on respect for human rights; that universal moral standards have been legislated and accepted by the international community and can be used as the new *justa causa*; finally, that legal tribunals and moral directorates have been set up to navigate through conflicting moral claims. The willingness of western powers to use force for apparently moral purposes has become a central (and worrying) characteristic of the post-Cold War settlement. But Waddington's law still stands. The Serbian brutalities were carried out in the name of national sovereignty, territorial integrity and the defence of history and culture against terrorist and foreign aggression. Nations owe their legitimacy to myths of origin, narratives of victory and defeat, borders and imagined or real historical continuities but not to humanity. On the Western side, Waddington's 'basic principles' have been re-defined as reason, human rights and cosmopolitanism and have helped generate an 'ethical impulse' in public opinion which has put some pressure on western governments. But who authorises the discourse of the universal? Will universal human rights overcome moral disagreement or are they one side of the conflict?

The Kosovo war can provide us with some tentative answers. This was the first war of the new world order officially conducted in the name of the postmodern just cause, human rights. The Gulf war was dominated also by the language of rights and law. But the obvious and blatant aggression of the Iraqi regime against Kuwait meant that the rudiments of the post-war international order were brutally violated and the American-led response could be glossed in the terminology of international

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[22] Gregory Ananiades, 'The New Nomos of the Earth: Thoughts on the Contemporaneity of Carl Schmitt', *Contemporary Issues*, 22 (December 2000), p. 39.
[23] *Ibid.*, p. 48

legality. That was clearly not the case with Yugoslavia, which claimed undisputed sovereignty over Kosovo and presented its action against ethnic Albanians as police action against secessionist insurgency. It is ironic therefore that the response of NATO can be seen as the first case of police action by the new world order. The Kosovo war established the parameters of a new type of sovereignty no longer based on the nation-state. The actions of NATO were initiated and carried out in circumstances where its overwhelming force guaranteed the outcome of hostilities and the quasi-moral international order under construction justified the action against the Serbs in the name of humanitarian values. We had, in other words, a combination of violence and morality, a new type of just war, which justified the extremity of its means through the proclaimed morality of its ends.

We can detect three central characteristics of this emerging order. First, it is a moral order, in which human rights provide the justification for the new configuration of political, economic and military power and the cause for the conduct of just wars. Secondly, it concentrates overwhelming material force (economic, technological and military) and, as a result, the importance modernity has placed on the regulation of just means suffers. And, finally, the action against those resisting the new order takes the form of a police operation which aims to prevent, deter and punish criminal perpetrators rather than political opponents. Conversely the enemies of the new order have often willingly adopted the role of the terrorist assigned to them, of the great criminal who reverses moral principles in the name of a different and higher morality. By committing atrocious acts of terror in the name of religion or justice, the enemies perversely confirm both the moral nature of the new order (the justice of ends) and its pre-occupation with efficiency (the destructive effectiveness of means).

One could start by noticing that the traditional jurisprudential divide between natural law and positivism does not hold in international law. A close look at the history of state and empire building indicates that natural/human rights claims always accompanied the project of state building.[24] Similarly, the role of human rights in the construction of the post-world international order was central even though quite ambiguous. The key principle of international law, from the United Nations Charter to all major treaties, were those of national sovereignty and non-intervention in the domestic affairs of states. While the victorious powers fought tooth and nail over the definitions and priorities of human rights, civil against economic or individual against collective, they unanimously agreed that these rights could not be used to pierce the shield of national sovereignty. Human rights were a major tool for legitimising nationally and internationally the post-war order, at a point at which all principles of state and international organisation had emerged from the war seriously weakened. The contradictory principles of human rights and national sovereignty, schizophrenically both paramount in post-war international law, served two separate agendas of the great powers: the need to legitimise the new order through its commitment to rights, without exposing the victorious states to scrutiny and criticism about their own flagrant violations.

[24] Costas Douzinas, *The End of Human Rights,* Chapter 5.

Something similar appears to be happening in the post-Cold War era. Human rights are rapidly becoming the basis of the constitution of the new world order and construct it as a principled and moral arrangement. Constant emphasis was placed on the moral purpose of the Kosovo campaign and conversely on the immoral indeed inhuman nature of the Serbs which justified the use of extreme means. The statements of the politicians on both sides of the Atlantic still ring in our ears and there is no need to quote them here extensively. But the exaggeration was not restricted to self-serving politicians. Jurgen Habermas in a newspaper article entitled 'Bestiality and Humanity' stated that NATO's peacekeeping operation was a 'step on the path from the classical international law of nations towards the cosmopolitan law of a world civil society'.[25] The idea of an emerging cosmopolitan order, which brings together legality and morality under the promise of perpetual peace is the most striking characteristic of the post-Cold War era.

The proclamation of the new moral order in Kosovo was accompanied by the blatant demonisation of the Serbs. The controversial historian Daniel Goldhagen claimed that,

> the majority of the Serbian people, by supporting or condoning Milosevic's eliminationist politics, have rendered themselves legally and morally incompetent to conduct their own affairs (sic) and a presumptive ongoing danger to others. Essentially their country must be placed in receivership.[26]

Similarly, Barry Buzan stated that people have the government they deserve and when a government reflects its people and promotes policies inconsistent with basic human rights then 'the war must and should be against both government and people'.[27] The insidious idea of collective responsibility of a whole people for the actions of their leaders was not lost to the military.[28] A few weeks after the start of the war, General Michael Short of the US Air Force told journalists that what was necessary for success was to hit civilians. His tactic was going to be:

> no power to your refrigerator. No gas to your stove, you can't get to work because the bridge is down – the bridge on which you held your rock concerts and all stood with targets on your heads. That needs to disappear.[29]

The unjust, inhuman enemies of the international moral order deserve no mercy. They must be punished paradigmatically in order to establish the moral authority of the new military humanism. The punishment grounds the right of the punisher to mete out the medicine.

And yet the moralisation of politics and the criminalisation of political opponents can scarcely resolve conflict. The West does not have a monopoly on morality and

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[25] Jurgen Habermas, 'Bestialitat und Humanitat', *Die Zeit*, 29 April 1999.
[26] *The Guardian,* 29 April 1999.
[27] Barry Buzan, 'The Conduct of War', *Bulletin of the Centre for the Study of Democracy*, 7.1 (Winter 1999-2000), p. 2.
[28] In the tense days after the terrorist attacks on New York and Washington, certain parts of the American media demonised the whole Arab nation and indeed all Muslims. This could be seen as a mirroring effect of the demonisation of the United States by extremist Muslims, who were prepared to commit suicide and take with them the innocent citizens of the 'Great Satan'.
[29] *The Observer*, 16 May 1999, p. 15.

human rights are not the only code that claims universal validity. Serbs massacred in the name of threatened community, while the allies bombed in the name of threatened humanity. Both principles, when they become absolute essences and define the meaning and value of culture without remainder or exception, can find everything that resists them expendable. We can see why by briefly exploring their structure as they move from the moral to the legal domain. Universal morality claims that all cultural values and norms are not historically and territorially bound but should pass a test of universal consistency. As a result, judgments which derive their force and legitimacy from local conditions become morally suspect. But as all life is situated, an 'unencumbered' judgment based exclusively on the protocols of reason goes against the grain of human experience. The morality of religion and community on the other hand is potentially even more murderous. It draws its strength not from abstract ideas and universal reasoning but from specific stories of domination and humiliation and from concrete aspirations of retribution and redemption. What these two apparently lethal enemies have in common is the arrogance of moralism: if there is one moral truth but many errors, it is incumbent upon its agents to impose it on others. The agent of 'real' morality, be it the ethical alliance and representative of the universal or the proud communitarian and religious zealot, knows what morality demands. Universalism easily leads to imperialism and an impotent communitarianism to atrocities and massacres like those we recently witnessed.

Moral differentiation is supported by a second factor, far removed from the realm of morality and closer to the calculations of force. As Schmitt argued in the *Nomos der Erde* when overwhelming military inequality characterises the warring enemies, the idea of a just war between formally equivalent enemies is undermined. The inferior opponent is no longer considered as a *justus hostis*, he stops being an external enemy and combatant and becomes the object of suppression, normally reserved for the enemy within. Inequality of means promotes the idea of inequality of status and ends. The powerful considers his superiority as an indication of moral righteousness, of a just cause, which allows him to turn the enemy into a common criminal who must be punished. The impotent enemy becomes a quasi-internal rebel and the war against him takes on the character of police action. Moral argument and force support each other harmoniously so that the old distinction between just ends and just means of violence meticulously analysed by Walter Benjamin in his *Critique of Violence* is no longer relevant. Moral ends justify the overwhelming means and overwhelming force generates morality.

Overwhelming force characterised the Kosovo campaign at all levels. Its most apparent result was the strict hierarchisation of the value of life. The United Nations monitors were withdrawn, in March 1999, before the bombing campaign started. More importantly, every precaution was taken during the war to eliminate the likelihood of NATO casualties. The possibility of engaging ground troops was repeatedly and categorically denied by NATO spokesmen until late in the campaign. The bombers flew at extremely high altitudes which put them beyond the reach of anti-aircraft fire. The tactic was successful: NATO forces concluded their campaign without a single casualty. But there were serious side-effects too: total air

domination without the willingness to engage in a ground war did not stop Serb atrocities. Evidence emerging after the war shows that the ethnic cleansing intensified and the worst massacres occurred after the start of the bombing campaign. The number of Albanian victims is still disputed and is now calculated in the low thousands but it is reasonable to conclude that the declared war aim of 'averting a humanitarian catastrophe' failed badly. Secondly, as a result of the high flight altitudes of the bombers, the likelihood of civilian 'collateral damage' increased significantly. Civilians were killed in trains and buses, in TV stations and hospitals, in the Chinese embassy and other residential areas. One of the most grotesque mistakes was the killing of some 75 Albanian refugees whose ragtag convoy was hit repeatedly, on April 14. Part of the explanation offered by a contrite NATO was that tractors and trailers cannot be easily distinguished from tanks and armoured personnel carriers at an altitude of 15,000 feet.[30]

From Homer to this century, war introduces an element of uncertainty – the possibility that the mighty might lose or suffer casualties. Indeed, according to Hegel, the fear of death gives war its metaphysical value, by confronting the combatants with the negativity that encircles life and helping then rise from their daily mundane experiences towards the universal.[31] In this sense, the Kosovo campaign was not a war but a type of hunting: one side was totally protected while the other had no chance of effectively defending itself or counter-attacking. Many (retired) army and armchair generals argued during the campaign that it could not be won swiftly without ground troops. They were proved partly wrong. A war without casualties for your side, an electronic game type of war or Reagan's unbeatable 'star wars' may be the dream of every military establishment. But a war in which a soldier's life is more valuable than that of many civilians cannot be moral or humanitarian. In valuing an allied life at hundreds of Serbian lives, the declaration that all are equal in dignity and enjoy an equal right to life was comprehensively discredited.

This apparent divergence indicates the nature of the new military humanism as a combination of morality and might, values and effectiveness. While in modernity, morality and might were related externally as ends and means and were often in conflict, they have now become fully integrated into a morality/force amalgam. The wide acceptance of the morality of action increases its effectiveness and the success of an action augments its moral force and persuasiveness. To that extent, the success of an operation cannot be judged morally in isolation from its military conduct and, similarly, the morality of an action cannot be separated from its military outcome. But the new moral-military order does not carry out such compartmentalised judgments. Morality exists if it is effective and military action is moral if it

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[30] None of this explains or justifies the atrocities committed by Serbs and the systematic ethnic cleansing of the Kosovo Albanians. No moral arithmetic exists to allow us to compare the number of massacred Albanians with that of the maimed Serbs. Nor would a few Texan or Scottish dead soldiers balance out the hundreds of killed civilians. To paraphrase the Holocaust survivor Emmanuel Levinas, in every person killed the whole humanity dies.

[31] Hegel, *The Phenomenology of Spirit* A.V. Miller, (trans.), (Oxford: Oxford University Press, 1977), pp. 272-3.

succeeds. On those grounds, Kosovo was the first successful just war of the new moral order. The obvious failures of its aftermath, the extensive ethnic cleansing and murder of Serbs, the inability to reach a political solution and the spread of the war into Macedonia can be seen as the not totally undesirable side-effects of the new order. When morality replaces politics and military action, policies, a sense of permanent crisis with recurring emergencies becomes dominant. Moral principle necessary diverges from the messy world of social, political or ethnic conflict and creates the context, the justification and the potential for permanent military action.

Finally, the application of overwhelming force according to the principles of the new morality gave the Kosovo campaign the character of a policing operation. The close links between sovereign action and policing have been discussed by Benjamin, Schmitt and Agamben.

> Whereas the sovereign is the one who, in proclaiming a state of emergency suspending the validity of the law, marks the point of indistinction between violence and law, the police operate in what amounts to a permanent 'state of emergency'. The principles of 'public order' and 'security', which the police are under obligation to decide on a case-by-case basis, represent a zone of indistinction between violence and law perfectly symmetrical to that of sovereignty.[32]

The policing character of military humanism is apparent at many levels. Anthony Giddens has argued in his *Third Way* that the liberal-democratic state is the 'state without enemy'.[33] This 'foeless' society is now reproduced at the international level. There are two aspects to this: first, the new just or humanitarian war does not attack a *justus hostis,* an enemy who belongs on the same place as the attacker, but attempts to stop, apprehend and punish criminals or rebels. Secondly, the universal morality and military might of the new order makes its reach truly global.

A main strategic goal of the United States, during the Kosovo and Afghan campaigns, was to build an international coalition supporting the action with various degrees of involvement. President Bush repeatedly stated after September 11 that 'whoever is not with us is with the terrorists', a threat based on total disregard for the principle of state sovereignty. The enemies of the new order are terrorists and all means of suppression are justified in the campaign against terror. If we concentrate on the Kosovo campaign its policing character was evident in a number of ways: the continuous presentation of the Milosevic regime and of the Serbs as criminals; the attacks on civilian installations and the acceptance of a certain degree of 'collateral damage'; the exclusive use of air bombardment as the means of war and the desire to protect fully the policemen/soldiers; finally, the huge pressure put on the Belgrade regime to surrender Milosevic to the Hague tribunal in return for large sums in aid, a practice that recalled the rewards and bounties offered for the arrest of great criminals to the authorities. In all these actions, the political opponent was painted as a common and brutal criminal, someone who violates the universal moral codes for selfish, cruel or mad ends. Indeed, all recent wars involving the United States have been characterised by what one could call a 'posse' mentality the first aim of which

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[32] Giorgio Agamben, 'The Sovereign Police' in Brian Massumi, (ed.), *The Politics of Everyday Fear* (Minneapolis: University of Minnesota Press,1993), p. 62.

[33] Anthony Giddens, *The Third Way* (Cambridge: Polity, 1998), p. 70

was to arrest some evil person or bring an evil regime to justice. Noriega in Panama, Mohammed Aideed in Somalia, Sadam Hussein in Iraq, Milosevic in Yugoslavia, and Osama Bin Laden were the master criminals. Similarly the Granada and Haiti invasions were presented as operations to stop and punish criminal activities. No area of the globe can be abandoned, since the new integrated order can be disturbed by activities in its most remote reaches.

Secondly, this type of globalisation leads to the gradual abandonment of the territorial principle of modern statehood wedded to geographical landmarks, historical separations and political demarcations. Territory and place, the dominant characteristics of modern sovereignty, are being replaced by a boundless global space which, unlike the mountains and seas and frontiers of twentieth century international relations, does not hinder operations but has become an infinite resource of the new order. Space with its all-seeing, all-listening satellites creates a mirror for the earth of the new millennium.

The largely undefended bombardments of Yugoslavia and Afghanistan are the ultimate sign of the military superiority of one side and became acceptable only because the enemy had been successfully presented as morally inferior criminals against whom the use of lethal technology is not only justified but indispensable. More importantly however air bombardment is symbolic of the boundlessness of a new type of power not constrained by geographical boundaries and state frontiers. It is no coincidence that the first wars of the new moral order were air campaigns as was the attack on Manhattan and the Pentagon, the ‘first war’ of the twenty-first century, according to President Bush. While modern sovereignty was bound to place, the new order is both modelled on the openness of space and uses space as its most appropriate conduit. It is organised horizontally alongside planes of activity, which bear no relation to the constraints earth places on human activity. No geographical limits, state frontiers or claims to sovereignty can restrict or restrain the writ of the new order. Technology and communications provide the means of global presence and the morality of humanism the eternal values of its action. Space and time become resources rather than hurdles for the new moral order. Limits placed hitherto by state sovereignty simply call for the local adjustment of action, public opinion reservations for an intensification of the moral message that qualifies the action. Its real limits are formed by pragmatics and utilitarian calculations: Rwanda did not have much strategic, political or economic interest for the new order; neither did Afghanistan after the Soviet defeat. But when recent events showed that ‘remote’ places like Afghanistan are possible sources of disturbance, American policy included them in its list of candidates for correction.

But the criminalisation of the enemy on a global scale can have dreadful side effects. A painful lesson from the atrocities of September 11 was that enemies of the new moral order, themselves the keepers of another truth and the enforcers of a different morality, have adopted the role of criminals and are comfortable in their designation as terrorists. When politics becomes policing and policies moral action, some political opponents willingly take on the rogue roles assigned to them and bring to atrocious completion the caricatures of their motives and evil.

The attacks on America had all the characteristics of an evil reversal of the new order. The terrorists used hijacked passenger airliners as a combination of fighter aircraft and missile, as manned and guided missiles. By doing this, they adopted and reversed the globalising principle that the most symbolic strike and most effective punishment of enemies/infidels is delivered from the air. The immediate reaction to the atrocities illustrated the conceptual difficulties created by the emergence of the new order while the ideas, arrangements and principles of the old are still alive. When President Bush announced that the attacks meant war against terrorists and those who harbour them, a clamour of voices from the least hawkish parts of commentators responded, 'Yes, but who is the enemy?' The question that kept coming back was, 'How can we speak of war if we do not have an enemy state or government or President to declare war against?' But while the imagery of sovereign states and of recognisable enemies still dominates the liberal imaginary, the response advised by most American and British commentators is consistent with the priorities of the new order. The terrorist atrocity was presented as an attack on civilisation and freedom, which called for a 'crusade' led by the Americans leading the freedom-loving nations. Secondly, the military response, while unconventional in the absence of a state-enemy should use 'decisive force' as Wesley Clarke, a former allied commander in Europe argued and, should involve 'information, law enforcement and military force'.[34]

The discussion of law enforcement is further evidence of the intellectual difficulties facing old analytical and legal models. Michael Ignatieff argued that the

> most effective response may not be the instant vengeance of a cruise missile but concerted international police work that leads to arrest, extradition, trials and imprisonment of perpetrators.[35]

Geoffrey Robertson went furthest in this respect arguing that the terrorists attacks should be described as 'crimes against humanity' and treated according to the remedies and sanctions available in international law. Others less aware of the fine distinctions of international law called the attacks 'war crimes' arguing that they were acts of war and crimes at the same time, indicating again the conceptual difficulties created by this new type of criminal hostilities and the acceptable response to them. To be sure, current international law still wedded to the remnants of state sovereignty does not recognise non-state sponsored terrorism as a crime against humanity. Robertson has argued consistently that terrorism of all kinds should be subjected to the laws of war irrespective of its links with a state or states. Its perpetrators should be delivered to the International Criminal Court, which should be hastily established and all international law provisions and restraints should be applied to the military action against the culprits. These usually include

[34] Wesley Clarke, 'Decisive Force', *The Guardian*, September 15, 2001.
[35] *Financial Times*, September 13.

the authorisation of the Security Council, proportionality in the conduct of operations and compliance with the laws of war.[36]

But the main character of the new moral order is precisely that it does not make clear distinctions between moral and legal arguments or between enemies and criminals. In all recent wars, the role of international law was secondary. With the exception of the Gulf War and Somalia, the Security Council was bypassed. The Kosovo campaign in particular could hardly be reconciled with the current state of international law. Policing operations follow a different logic from that of wars, which are supposed to comply with the niceties of international law. As a more realistic professor of international law put it:

> terrorists benefit from no privilege as soldiers under the laws of war … They are therefore, legally speaking, 'unprivileged combatants' – to be fought on military terms with respect to non-combatants in their midst but if captured treated as criminals.[37]

This was of course the position adopted by President Bush in relation to the Taliban prisoners held in Cuba, despite the universal condemnation by international lawyers. War and police operations have been merged in the same way that morality and force have become largely interdependent.

The arguments from international law have some value but they miss the main point: in a just war against criminals, international law becomes part of the process of moralisation of politics. A prominent aspect of this tendency is the proliferation of international penal courts and tribunals. The creation of more permanent criminal courts and other quasi-legal institutions will allow the new moral order to assume fully the mantle of legality and to mobilise legal procedures in advance of the action and not only after the event, when it can be criticised as victor's justice.

Undoubtedly, all measures that remove human rights and their administration from governments, the main villains of the piece, are welcome. Independent judges, sensitive to the plight of the oppressed and dominated of the world and appointed for long periods with security of tenure, are better qualified to judge war criminals than diplomats and *ad hoc* governmental representatives. But as we know from domestic experience, the individualisation and criminalisation of politics has rarely ended political conflict. Similarly, one suspects that not many wars or atrocities were prevented because leaders feared for their fate, if defeated, and, not many dictators will be deterred by Pinochet's sojourn in Surrey. In the light of recent events it is important to comment, however, on the attitude of the United States towards the international criminal court. While the Americans were the greatest enthusiasts for the Yugoslav and Rwandan tribunals, they fought hard, using threats and rewards, to prevent the universal jurisdiction of the court.[38] They claimed that the court would be used for politically motivated prosecutions against American soldiers when, as the world's last superpower with global interests, they invade or intervene on foreign

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[36] Geoffrey Robertson, 'There is a Legal Way Out of This', *The Guardian*, September 14, 2001 and see his *Crimes Against Humanity* (London: Penguin, 2000). In the same vein see Ann-Marie Slaughter, 'A Defining Moment in the Parsing of War' *Washington Post,* September 16, 2001.

[37] Kenneth Anderson, 'Language, Law and Terror', *Times Literary Supplement*, September 21, 2001.

[38] 'US troops will quit, allies warned', *The Guardian*, July 10, 1998, p. 3.

soil. The Americans tried to restrict the court's jurisdiction to nationals of states which have ratified the treaty, something which would have undermined the premise behind the new court. The conference, anxious to include the major international military power in the treaty, seriously restricted the court's powers and weakened its independence, but did not give the absolute guarantee that no American soldier would ever be brought before the court. As a result, the United States was one of seven countries, which included the 'usual rogue' states of Iraq, Libya and China, to vote against the final and much compromised version. And when Clinton signed the treaty of Rome, on the last day of his presidency, he set into motion a series of events that may jeopardise the very existence of the fledgling world court. International law experts have been asked to find ways for President Bush to 'unsign' the treaty; the American Service Members Protection Act discussed in Congress in the summer of 2001 authorises the president to use force to free Americans 'captured' by the court, a provision which has given the legislation the nickname of the Hague Invasion Act.

The United States usually promotes the universalism of rights. Its rejection of the world criminal court was a case of cultural relativism which took the form of an imperial escape clause. It was also an implicit admission that war crimes are not the exclusive preserve of 'rogue' regimes. The new order is characterised by its moral commitment but also its flexibility, in which moral language and legal procedure are easily interchangeable. It should not surprise us. This is not just a question of the hypocrisy of power. A claim to universality is made by a particular; the power that defines the parameters of the universal can exempt itself from its application. Universalism, domestically and internationally, comes with an opt out facility. A second alternative for the dominant force is to claim the power to interpret authoritatively human rights provisions now that the struggle over their content has ended with the resounding victory of the West. Again the authority to interpret the law conclusively was evident in the American position over the Guatanamo Bay prisoners. It was France that pronounced the universal in early modernity and the United States in the new moral order. But we also know that the moralisation of politics through religious or moral/quasi-legal imperatives does not last long. Spanish soldiers met the advancing Napoleonic armies, allegedly spreading the spirit of modernity, with banners bearing the legend 'Down with Freedom'. On current form, it would not be surprising if developing countries were to meet the 'humanitarian' advances with cries of 'Down with Human Rights'. At that point, human rights, the last utopian discourse, will have lost their end of resisting domination and oppression and their value will have reached its end.

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