ARTICLE

SHOULD TREES HAVE STANDING? REVISITED: HOW FAR WILL LAW AND MORALS REACH? A PLURALIST PERSPECTIVE†

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A dozen years have passed since the *Southern California Law Review* published *Should Trees Have Standing?—Toward Legal Rights for Natural Objects.*[1] The United States Forest Service had granted Walt Disney Enterprises a permit to develop Mineral King Valley by construction of a major resort complex.[2] The Sierra Club won a temporary restraining order in the federal district court, but then lost on appeal before the Ninth Circuit for want of standing. The Club, the court of appeals reasoned, had not shown itself to be "adversely affected," and was therefore not a proper plaintiff.[3] "The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it."[4]

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† Early drafts of this Article, or parts of it, were presented at Boston University as part of its Symposium on "Humanity and Nature: An Exploration of Rights and Values"; to the American Society of Landscape Architects, in New Hope, Pennsylvania; at the Wissenschaftzentrum (Science Center, Berlin); at McGill Law School; at the University of Iowa Law School, as the 1985 Ida Beam Lecture; at the University of Toronto, as part of its 1985-86 Legal Theory Workshop series; and at U.S.C. Law School, as part of its Faculty Workshop Series. In addition to the general criticisms that these exposures provided, I benefited from the comments on particular sections by Layman Allen, Richard Craswell, Charles Kennel, Michael Levine, Rod Macdonald, Tom Morawetz, Peggy Radin, Edwin Smith, Matt Spitzer, Jeff Strnad, and, especially, Richard Warner.

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1. 45 S. CAL. L. REV. 450 (1972) [hereinafter cited as *Trees*].
2. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).
3. *Id.* at 32.
4. *Id.*

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It occurred to me that if standing were the barrier, why not designate Mineral King, the wilderness area itself, as the plaintiff "suffering legal wrong," let the Sierra Club be characterized as the area's attorney or guardian *ad litem*, and get on with the merits? Indeed, that seemed to be a more straightforward way to address the really motivating issue, which was not how all that gouging of roadbeds would affect the Club and its members, but what it would do to the valley.[5]

When I started writing *Trees*, *Sierra Club v. Morton*[6] was already pending appeal to the United States Supreme Court. There was no possibility of getting an article in print in time for the lawyers to work the approach into their briefs, were they to find it attractive. Nonetheless, with the comradely support of the Law Review staff, my hastily drawn essay was wedged into a special Symposium issue on Law and Technology, which had a chance of being published while the Court still had *Sierra Club* under consideration.

The Court upheld the Ninth Circuit's decision, the four-man majority affirming that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[7] But Justice Douglas opened his dissent with warm endorsement of the theory he had just then browsed in *Trees*: "The critical question of 'standing' would be simplified and also put neatly in focus if we . . . allowed environmental issues to be litigated . . . in the name of

5. Moreover, even if injury to the valley "itself" were deemed a meaningless notion that required redescription in terms of injury to present or future human interests *in consequence of* alteration of the valley, there were still technical legal bases that may have warranted denominating the valley itself plaintiff. In contrast with denominating the Club (or its members) party plaintiff, suit in the name of the valley might contribute to the presentation of a broader spectrum of interests—as a "stand in" for all, and not merely a few particular hikers or boaters, whose injuries through effects on the valley would thereby be welcome in evidence. The valley would constitute a superior "class representative," as it were. See *Trees, supra* note 1, at 475. Other technical implications might be evaluated favorably. For example, in some circumstances, by denominating the natural object party plaintiff, and accounting "its" damages as the cost of making it whole, *see infra* text accompanying notes 36-37, the federal jurisdictional amount for diversity jurisdiction not otherwise satisfiable under Zahn v. International Paper Co., 414 U.S. 291 (1973) (federal class action by 200 owners of property fronting Lake Champlain against pollution dismissed on grounds that not every individual class member suffered damages in excess of $10,000), could be met, and the case heard in a federal forum.

6. 405 U.S. 727 (1972).

7. *Id.* at 734-35. The majority expressly pointed out that nothing in its opinion barred the Sierra Club from amending its complaint to rely on, for example, harms suffered by "its individualized interest, as a basis for standing." *Id.* at 736 n.8. The Sierra Club proceeded to amend in such a manner as to emphasize infringement both of its own associational interests and some individual interests. *See* Amended Complaint, Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972); *see also Sierra Club*, 348 F. Supp. at 220 (motion to dismiss amended complaint denied).

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the inanimate object about to be despoiled, defaced, or invaded . . . ."[8] Justice Blackmun, in an opinion joined by Justice Brennan, would have construed available case law as supporting the Sierra Club's position on the pleadings submitted, but in the alternative would have permitted the "imaginative expansion" of standing for which Justice Douglas was willing to speak.[9]

The wire services got onto it overnight, finding something amiably zany in a law professor who "speaks for the trees." The article was brought out in book form utterly without re-edit[10]—essentially photocopied, in fact—and sold briskly. I was brought out on television. My name and condensed, chattily uncritical versions of the piece began to

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8. 405 U.S. at 741 (Douglas, J., dissenting) (footnote omitted).

9. *Id.* at 756-58. One attorney, skeptical of the *Trees* thesis, rhymed his doubts:

If Justice Douglas has his way —
 O come not that dreadful day —
We'll be sued by lakes and hills
 Seeking a redress of ills.
Great mountain peaks of name prestigious
 Will suddenly become litigious.
Our brooks will babble in the courts,
 Seeking damages for torts.
How can I rest beneath a tree
 If it may soon be suing me?
Or enjoy the playful porpoise
 While it's seeking habeas corpus?
Every beast within his paws
 Will clutch an order to show cause.
The courts, besieged on every hand,
 Will crowd with suits by chunks of land.
Ah! But vengeance will be sweet,
 Since this must be a two-way street.
I'll promptly sue my neighbor's tree
 For shedding all its leaves on me.

Naff, *Reflections on the Dissent of Douglas, J., in* Sierra Club v. Morton, 58 A.B.A. J. 820, 820 (1972). The style, although it fails to confront us natural object advocates head-on, prose to prose, took hold. In disposing of a suit by a tree owner to recover from a negligent driver for injuries to the tree, the Oakland, Michigan County Appeals Court affirmed dismissal with the following opinion in its entirety:

We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is prest
Upon a mangled tree's behest;
A tree whose battered trunk was prest
Against a Chevy's crumpled crest,
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three
We must uphold the court's decree.

Fisher v. Lowe, 122 Mich. App. 418, 333 N.W.2d 67 (1983), *quoted in* 69 A.B.A. J. 436 (1983).

10. William Kaufmann, the publisher, did, however, arrange to beef up the commercial package with a gracious foreword by biologist Garrett Hardin.

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embellish the sort of journals that carry pictures. A revised mass-market paperback edition was issued by Avon Books, unsentineled by footnotes. At the faculty club, my own standing took on the slight sully that public notoriety brings an academic.

I had not been an environmental lawyer or teacher—still am not—and my own attentions soon settled back to other things. But the movement in which *Trees* played a modest part rolled on without me. Several complaints were filed (or drafted) in the name or interest of nonhumans—including a river,[11] a marsh,[12] a brook,[13] a beach,[14] a national monument,[15] a commons,[16] a tree,[17] and a species[18]—with

11. Byram River v. Village of Port Chester, 4 ENVTL. L. REP. 20,816 (D. Conn. 1974) (suit in name of river and other plaintiffs to enjoin pollution by municipal sewage treatment plant dismissed for lack of in personam jurisdiction and transferred to Southern District of New York; no reservations were expressed, however, regarding the river's appearance as a plaintiff); *see also* Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975) (motions to dismiss by all but one defendant denied). A stipulation was subsequently approved. *See* 6 ENVTL. L. REP. 20,467 (1976) (defendant undertaking to conduct and monitor project in environmentally protective manner).

12. Sun Enters. v. Train, 394 F. Supp. 211 (S.D.N.Y. 1975), *aff'd.*, 532 F.2d 280 (2d Cir. 1976) (suit in name of Brown Brook and No Bottom Marsh, among others, unsuccessfully challenged Environmental Protection Agency issuance of sewage disposal permit).

13. *See supra* note 12.

14. Complaint, Life of the Land v. Ariyoshi, 59 Hawaii 156, 577 P.2d 1116 (1978) (potential adverse impact on Makena Beach and violation of state environmental policy listed as failures of environmental impact statement for construction of water storage and transmission facilities).

15. Complaint, Death Valley Nat'l Monument v. Department of the Interior, 6 ENVTL. L. REP. 65,306 (N.D. Cal. 1976) (complaint filed by environmental groups in name of national monument and other plaintiffs, alleging failure to fulfill a trust obligation owed to the monument and to the other plaintiffs under the National Park Service Organic Act of 1916, ch. 408, 39 Stat. 535 (codified at 16 U.S.C. §§ 1-4 (1970)), and the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1970), and alleging the violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4347 (1970)), by permitting strip mining operations by private concerns within the Death Valley Monument).

16. Complaint, Hookway v. United States Dep't of Transp., No. 74-2242-S (D. Mass. 1974) (seeking to enjoin road realignment that would affect town common in violation of NEPA).

17. Ezer v. Fuchsloch, 99 Cal. App. 3d 849, 160 Cal. Rptr. 486 (1979). This action by landowners for injunctive relief against neighbors was based upon a restriction recorded by their predecessors in interest providing that no shrub, tree, or other landscaping would obstruct any lot's view. The trial court granted a mandatory injunction requiring that defendants trim their pine trees to afford their neighbors a view of the ocean. On appeal, the defendants argued that the trial court failed to consider the rights of the pine trees to exist untrimmed independent of the interhuman rights created by the restrictive covenant. Judge Jefferson ultimately rejected the argument, invoking a passage from *Trees*, *supra* note 1, at 457-58, to explain his reasoning:

> To say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights that human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment.

Ezer, 99 Cal. App. 3d at 864, 160 Cal. Rptr. at 486.

18. Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985 (D. Hawaii 1979) (declaratory and injunctive relief granted endangered bird species and others against state resources

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somewhat ambiguous results.[19] A woman brought suit as "next friend and guardian for all livestock now and hereafter awaiting slaughter," to challenge as "inhumane" and unconstitutional the orthodox Jewish throat-cutting ritual which prescribes that the animals be conscious when knifed, shackled, and hoisted.[20] In Hawaii, a laboratory assistant "liberated" two dolphins from the university's tanks into the Pacific Ocean so that they could "exercise their freedom of choice" whether to return to captivity.[21] Tried for first degree theft, the liberator raised, without success, a "choice of evils" defense grounded on the argument that the dolphins were jural "persons."[22]

As the political climate became increasingly sympathetic to environmentalists' concerns (even in the face of the "energy crisis"), two separate lines of development affected the viability of *Trees'* thesis as a contribution to environmental strategy. First, in regard to naming a natural object as a party plaintiff, several factors, including judicial liberalization of standing requirements,[23] extended employment of

agency which had allowed feral sheep and goats to endanger birds' critical habitat). Note that a suit in the name of a species presents problems distinct from those raised by a suit on behalf of individual members of the species; the species can experience no pleasures or pains, and, as such, has no interests. *See infra* text accompanying note 67; *see also* Committee for Humane Legislation v. Richardson, 540 F.2d 1141 (D.C. Cir. 1976) (suit successfully challenging action by Secretary of Commerce as violation of Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. §§ 1361-1406 (1976), for permitting commercial tuna fishing in manner which infringed the optimal carrying capacity of affected habitat for porpoises).

19. None of the claims yet brought on behalf of a nonsentient natural object has been unjoined by a human or association of humans. Thus, the courts have not been pressed to discuss the hypothetical whether suit in the name of the natural object alone, and not merely captioned as coplaintiff, would have been adequate to support the action. Indeed, judging from my communications with counsel in most of the cases cited, it is quite conceivable that favorable publicity has dominated any other strategy in the decision to list the natural object as coplaintiff.

20. Jones v. Butz, 374 F. Supp. 1284, 1287-89 (S.D.N.Y. 1974) (standing granted to plaintiffs as "taxpayers, . . . consumers and citizens" to challenge exception in Humane Methods of Slaughter Act of 1978, 7 U.S.C. § 1902 (1970) as violative of establishment and/or free exercise clause of first amendment; plaintiff's petition was denied).

21. State v. LeVasseur, 1 Hawaii App. 19, 613 P.2d 1328 (1980) (rejecting defense arguments to interpret Hawaiian law to include a dolphin in definition of "another"; liberator given a six-month jail term plus five years probation.)

22. *Id.* at 24-27, 613 P.2d at 1332-34.

23. The Sierra Club, in Sierra Club v. Morton, pressed for an expanded interpretation of section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970). 405 U.S. at 732-33. As noted, it failed on its first draft, but succeeded with a minor amendment. *See supra* note 7. Environmental plaintiffs in comparable cases have not found standing a bar. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (unincorporated group of law students given standing to challenge freight increase ordered without the filing of environmental impact statement) [hereinafter cited as *SCRAP*]; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1970) (citizen group successfully challenged Department of Transportation highway plan that would have

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environmental impact requirements,[24] increased statutory provision for "citizens' suits,"[25] and expanded reliance on public trust concepts,[26] provided environmentally sympathetic lawyers with an alternate route through the courthouse door. While one can conceive of situations in which these strategies will fail, where naming the environmental object might succeed,[27] the environment's own standing has become more of a theoretical knot than a practical constraint on the supply of environmental litigation. On the other hand, once the case is in the courthouse, the other facet of *Trees*—evaluating and dealing with damage *to the environment*—remains as problematic as, and even more pressing than, ever. Several statutes, including the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA),[28] the Federal Water Pollution Control Act Amendments of 1972 (FWPCA),[29] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[30] permit suits by the state or another "public trustee" to recover "damages to the natural resources" from spills of oil and other hazardous substances. These provisions elevate several questions that were once

threatened a park); *see also Committee for Humane Legislation*, 540 F.2d 1141; *Palila*, 471 F. Supp. 985.

24. *See* NEPA, 42 U.S.C. § 4332(C)-(F) (1982). A good example of extended employment of environmental impact reports is found in *SCRAP*, 412 U.S. 669.

25. Provisions for "citizens' suits" to enforce environmental laws are increasingly common under state law. See sections 2(1) and 3(1) of the Michigan Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1202(1), .1203(1) (West Supp. 1985). Congress has passed similar legislation. *See* Clean Air Act (CAA), 42 U.S.C. § 7604(a) (1982); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300J-8 (1982); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (1982); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1365 (1982); Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1349(a) (1982).

26. Arrangements for public trustees to make claims for damages appear in FWPCA, 33 U.S.C. § 1321(f)(4)-(5) (1982); the Trans-Alaska Pipeline Authorization Act (TAPA), 43 U.S.C. § 1653(a)(1), (c)(1) (1982); and the Deep Water Port Act of 1974 (DWPA), 33 U.S.C. § 1517(i)(3) (1982).

27. The various devices cited in *supra* note 25 require, at the least, a federal or state statute that might be construed as touching the controversy. This leaves unrevieweable much private action which affects the environment absent some other basis for challenge. In many circumstances, the action complained of, even if by the federal government, may not always equal the task of lawyers who want to raise claims on behalf of, or touching, unconventional claimants. *See* Animal Lovers Volunteer Ass'n, Inc. v. Weinberger, No. 84-6163 (9th Cir. Dec. 31, 1984) (denial of emergency motion for injunction in suit to enjoin Navy from shooting 1,200 wild goats on San Clemente Island denied). The *Animal Lovers* court supported its one-page decision by stating: "We find appellants' standing to bring the action extremely questionable. . . ." This opinion is not officially reported, but a journalistic account appears in the Los Angeles Times, Jan. 1, 1985, § I, at 3, col. 1.

28. 43 U.S.C. § 1813(b)(3) (1982); *see also id.* § 1813(a)(2)(C) (1982) (establishing an Offshore Oil Pollution Compensation Fund from which claims may be satisfied for "injury to, or destruction of, natural resources").

29. 33 U.S.C. § 1321(f)(5) (1982).

30. 42 U.S.C. § 9607(f) (1982).

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considered purely academic to a judicially significant level. For what types of natural resource damages, how calculated, can a public trustee recover?[31] In cases of toxic spills that despoil the environment, will the measure of damages extend to restoring the "resource" to its original condition (making the environment "whole"), even if the cost of restoration exceeds the consumption and use value or even the willingness of a majority of contemporary humans to pay for it? Or will it be restorable only to a state of equivalent value to us? If the particular injury is irreversible and irreparable at any price, can the trustee apply any damages recovered to general revenues, or will funds have to be applied (under some sort of *cy pres* doctrine) to the next closest feasible use "for the environment?"[32]

In enacting CERCLA, Congress foisted onto the Executive the task of providing regulations to resolve such quandaries.[33] But the statutory deadline has come and gone without—as of the time of this writing—any response. Part of the delay must be attributed to the political delicacy. But part owes to the philosophical difficulty: such questions are not quickly solved. In all events, because the concept of *damage to the environment* has yet to be given an adequate judicial—much less the mandated administrative—definition, the damages aspect of the original thesis now seems peculiarly ripe for reexamination.

But quite aside from whatever impact *Trees* has made or will make on the "real world" of legal definitions and courthouse strategies, it has enjoyed an independent career in the journals, quite out of proportion to the sparseness of citation in judicial opinions.[34] I should have expected reviewers who would consider me a Born Again Pantheist, but not the

31. *See* E. YANG, R. DOWER & M. MENEFEE, THE USE OF ECONOMIC ANALYSIS IN VALUING NATURAL RESOURCE DAMAGES 71-77 (1984); *see also* DuBey & Fidell, *The Assessment of Pollution Damage to Aquatic Resources: Alternatives to the Trial Model*, 19 SANTA CLARA L. REV. 641 (1979).

32. *See infra* text accompanying note 89.

33. Under 42 U.S.C. § 9651(c) (1982), the President, by December 11, 1982, was to have promulgated "regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from" harmful conduct regulated by CERCLA and TWFCA.

34. *But see* Sierra Club v. Morton, 405 U.S. at 742 (Douglas, J., dissenting); Ezer v. Fuchsloch, 99 Cal. App. 3d 849, 864, 160 Cal. Rptr. 486, 493 (1979); Anthony v. Commonwealth, 2 Pa. D. & C.3d 746 (Envtl. Hrg. Bd. 1976) (challenge to action of Department of Environmental Resources, resulting in the encasement of a stream, instituted by nonriparian with environmental sympathies, but whose property was not affected by the actions complained of). The *Anthony* court held that the plaintiff's interest as a user of downstream parks was too remote to support standing, observing in dictum that "[p]erhaps one day the environment will have standing to sue on its own behalf through a guardian appointed as trustee .... However the Pennsylvania courts by which we are bound, and for that matter the federal courts, are along [sic] way from recognizing that concept of standing." *Id.* at 753 n.1 (citations, including citation to *Trees*, omitted).

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intimations of one commentator that I was flirting with communism.[35] (The gist was that if we couldn't own *things*, what else was there?) More recently there has come, from across the Canadian border, a virtual Symposium of fresh testament to the continuing allure, or at any rate vulnerability, of what I had to say in 1972.[36] "The only stone which could be of moral concern and hence deserving of legal rights," I am chided, "is one like Christopher."[37] And with these challenges come, from a new generation of editors, a fresh request: Is it not about time for me to, as we once said, put up my dukes?

I think, indeed, it is. I enjoy now the luxury of less breathless circumstances than those I worked under originally. More important, with the passage of time, there has grown a larger and more mature body of related literature to draw from. Thus, inevitably, in rereading what I wrote in 1972, I can better understand why some people imputed to me propositions that I did not want to own, and did not consider myself obliged to carry. Nevertheless, when I look back over the heart of my original position, I find myself more encouraged to clarify and expand than recant. Indeed, if I have a principal reason for rejoining the discussion (such as it is) after the passage of so much time, I would say it is the conviction, as I watch our moral lives complicate, that the path along which *Trees* set out, with more passion, perhaps, than compass, has headed us toward areas increasingly worthy of speculation.

The present essay does not, however, take the form simply of a renewed and updated plea for the environment. My interest in the environment remains. But it appears here as one element of a more expansive inquiry into the legal and moral status of what I call unconventional entities generally—not merely lakes and mountains, but robots and embryos, tribes and species, future generations and artifacts. The idea is to consider as a matter of general theory on what basis, and in what manner, a thing might qualify for legal and moral standing or considerateness. But such an inquiry, once begun, cannot stop short of probing some fundamental assumptions of law and morals. Before I am done this time, my weakness to speak for unconventional, unbefriended entities shall have forced me to offer the outlines of an unconventional, unbefriended view of normative thought generally.

35. McClaughry, *Farmers, Freedom, and Feudalism: How to Avoid the Coming Serfdom*, 21 S.D.L. Rev. 486, 514-17 (1978).

36. *Law and Ecological Ethics Symposium*, 22 Osgoode Hall L.J. 281-348 (1984).

37. Elder, *Legal Rights for Nature—The Wrong Answer to the Right(s) Question*, 22 Osgoode Hall L.J. 285, 285 (1984).

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Put briefly, the position that emerges is this. The conventional approach to ethics is to develop a single coherent body of principles, e.g., utilitarianism or Kantianism, and to demonstrate how it applies to all moral dilemmas more satisfactorily than its rivals. This conventional view of the ethicist's mission, which I call Moral Monism, strikes me as dubious. First, it collides with the fact that morals involve not one, but several distinguishable *activities*—grading actors, selecting actions, evaluating institutions, and so on. Second, there is the variety of *things* whose considerateness commands some intuitive appeal: normal persons in a common moral community, persons remote in time and space, embryos and fetuses, animals and species, beautiful things and sacred things. Trying to force into a single coherent framework all these diverse moral activities as they touch our thought regarding all these diverse entities strikes me as quixotic. Worse, it imposes strictures on thought that stifle the emergence of more valid moral judgments.

The alternative conception I propound—what I call Moral Pluralism—invites us to conceive moral activities as partitioned into several distinct domains, each governed by distinct principles and logical texture. Each domain is conceived to be distinguishable in its respective capacity to produce a single right (or wrong) answer, and in the firmness of the judgments with which it deals, e.g., whether it speaks in terms of what is mandatory, permissive, or (more loosely) morally welcome. Under this view, there is some shift in how we conceive the aims and ambitions of morals; a shift in how the dilemmas of practical reasoning are defined, attacked, carried to solution, and justified. Moral pluralism is not without its own difficulties. I only hope that this early delineation will mark it worthy of further concerted attention.

I. THE HISTORICAL LEGACY

In its largest compass, my aim in *Trees* was, and remains now, a critical examination of the prevailing legal and moral view of the world. What things can and ought to count in our thinking and institutional arrangements, and in what ways? Conventionally, in both law and morals the fundamental concepts and rules each generation inherited and passed along were responses to the perceived image and needs of ordinary persons living in shared communities. More specifically, the subject matter of conventional legal and moral thinking were CNPPs: "Contemporary Normal Proximate Persons."[38] CNPPs are typical adult humans

38. In law, the practice of classifying persons as "normal" and "abnormal," in those terms, is of long standing. *See* T. HOLLAND, JURISPRUDENCE 132-33, 328-46 (1908).

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not of unsound mind or suffering from any other peculiar disability (hence, normal persons), and not significantly distanced from one another either in space (hence, proximate) or in time (hence, contemporary). We are dealing, in other words, with normal members of a common moral community.

By using a single term I do not mean to imply that there has been, throughout history, a single, stable conception of "personhood." At every point in time there have been contesting notions of what a person is, or could be—and the prevailing view has left its stamp on our institutions. From the Renaissance through Freud, there has been growing recognition of man's interior mental life, a recognition that in both law and morals entailed increasing provision for excuses, motives, and intentions, as distinct from the publicly accessible, external world of action. But the conception of other significant human properties has persisted through time relatively unchanged. CNPPs experience pleasures and pains (rather similar to our own we imagine), and are capable of practical reasoning. They can speak for themselves, exercise moral choice, and assert and waive the sorts of claims needed to govern their reciprocal relationships. Overall, the framework of rules that evolved (I am still speaking of moral rules and legal rules in their common roots) responded to some such image, with some malleability as that image itself matured.

Now, of course, like any other broad generalization, this one could stand enough qualifying to fill a separate book. Much of morality's history, and not a little of the law's, has concerned man in his relations, not with other man, but with (and through) God. And even when the emphasis has been secular, some accounting has had to be made for creatures who did not fit the CNPP mold—who were not Contemporary Normal Proximate Persons—but were too conspicuous to be ignored entirely. These "Unorthodox Entities" (UEs, as I shall sometimes call them) ranged from natural persons of "special" sorts, infants, lunatics, the unborn, slaves, and so on, to such nonhumans as animals, species, the dead, and various sorts of corporations: nations, municipalities, business organizations, and universities.

In some instances, Unorthodox Entities were fitted into the CNPP framework by overlooking distinctions that might have been drawn. Under this approach, by denominating the UE a "person," it was thereby treated indistinctly from a CNPP; that is, brought under the same rules. Some of these efforts were abandoned, and now appear anachronistic, such as the occasional criminal trial of an animal during the middle

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ages.[39] But disregard of other facially apparent differences persists. Most significantly, we still live by the practice that evolved, in the law at least, of treating corporations *as if* they were natural persons, thus according to them much the same bodies of legal rights and duties as those to which CNPPs are subject.

In other instances, the assimilation of Unorthodox Entities involved formulating special limited exceptions to the general rules of what was expected of, and towards CNPPs. Witness the prevailing treatment of infants, the insane, and the terminally comatose. They are, as a starting point, *persons*—but persons under disability and, therefore, while subject to the CNPP framework as a basis, are subject also to certain specially tailored pleas and defenses deemed suitable to their particular disabilities.

Regardless of the exact "solution" adopted, the general point is that wherever it was felt necessary to begrudge a UE some accounting, the aim has been to do so with such minor tamperings as would leave the CNPP orientation intact.

A recent California case will illustrate this attitude as it operates in law. A woman had provided in her will that if she should predecease her dog, the dog should be destroyed. She died first, but before the dog could be destroyed such a public outcry was raised that the legislature intervened with a special bill saving it.[40] The outcome received wide media attention as a victory for animal rights. But in fact the bill, closely read, evidences little heresy to the CNPP orthodoxy I am describing. The woman, the legislature reasoned, had not really wanted her dog to be destroyed; she just did not want it uncared for. Had she known the circumstances (that one of the attorneys would be prepared to offer "it" a good home), she would not have provided for its destruction. Thus, in the last analysis, the animal was spared not so much on its account, as on that of its late owner.[41]

To see this same phenomenon at play on the morals side, we have to go no further than orthodox philosophy's treatment of cruelty to ani-

39. *See infra* text accompanying notes 100-02.

40. Act of June 16, 1980, ch. 182, 1980 Cal. Stat. 402, 403. The case was finally disposed of in Smith v. Avanzino, No. 225,698 (San Francisco Super. Ct. June 17, 1980), *cited in* Carlisle, *Destruction of Pets by Will Provision*, 16 REAL PROP. PROB. & TR. J. 894, 894 (1981). In like vein, see *High Court Gives Dog a Reprieve*, L.A. Times, Apr. 15, 1983, pt. I, at 46, col. 1. The California Supreme Court has issued a stay of execution when the life of a dog was to be taken pursuant to a "biting dog" ordinance. The owner argued against the ordinance on the grounds that it deprived him of his property without due process of law. *Id.*

41. Of course, the result, the dog's salvation, was the same whatever the rationale adopted. But from the larger point of view, the way we describe and justify what we are doing may make a

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mals. The problem was to find a basis on which to condemn the more extreme "inhumane" practices without recognizing that the animals themselves had independent moral claims, a recognition whose implications would have been alien, and therefore perhaps unsettling, to the CNPP framework. The most generally accepted solution was that being cruel towards animals threatens to rub off, making *us*, that is, we CNPPs, less trustworthy and nice in our dealings with each other.[42] In this manner, sentiments that might have expanded into deep challenges about legal and moral duties to animals were deflected into talk about indirect duties to other persons. Comparable redescriptions are ubiquitous.[43] Posthumous obligations are justified on the basis that respect for the dead conduces to our mutual benefit while living, nothing more. Our obligations to wildernesses are in like vein presented as obligations towards one another in respect of enjoying wilderness. What we thereby discourage is any lingering critical attention on the thing *or* on conventional modes of thinking.

In summary, it would be wrong to conclude that neither law nor morals has had anything to say about Unconventional Entities. But in general, it is fair to conclude that the predominant attitude, the framework of rules,[44] and even the preeminent rationale for the exceptions have reflected an assumption that CNPPs are alone, or in some privileged way, considerate. The considerateness of other "things" has been deemed either unintelligible or purely derivative.[45]

A. PRESSURES ON THE CNPP FRAMEWORK

For centuries, society has been able to accommodate the occasional Unconventional Entity that seemed to require some legal or moral atten-

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considerable difference in how we view ourselves as moral beings and, through that conception, how our future unfolds.

42. *See* Golding, *The Primacy of Welfare Rights*, 1 SOC. PHIL. & POL'Y 119 (1984). Golding claims that animal books for children originated

> to ween children away from cruelty to animals, for cruelty to animals leads to a hardening of the heart which will later show itself in one's dealings with one's fellows. . . . [C]ruelty to animals was, for the eighteenth-century English child, the moral—or perhaps immoral—equivalent of watching violence on television.

Id. at 120.

43. For reductionist arguments regarding species, see Russow, *Why do Species Matter?*, 3 ENVTL. ETHICS 101 (1981); regarding the dead, see Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243 (1981); and regarding animals, see J. SALMOND, JURISPRUDENCE 299 (12th ed. 1966).

44. I speak here of "the framework" but, as we shall see later in the text, there are several contending frameworks (e.g., Kantian, utilitarian) each of which is CNPP homocentric in its own way.

45. This is less so of fetuses and the deeply disabled, who, although not CNPPs, have sparked some defenses on grounds not reducible to CNPP benefit—typically that, while not CNPPs (as defined), they nonetheless "have rights."

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tion, without any challenge to the CNPP framework deep enough to force an articulation and defense of its underlying philosophical assumptions.[46] Recently, however, several developments have collaborated to make the interest in UEs, and the pressure on conventional thinking, more acute and widespread. Together, these developments raise the question whether there might not be "other ways"—other than the received, intuitive ways—to think about our relations with Unconventional Entities.

1. *Scarcity*

First, there has been an apprehension of impending worldwide scarcity. A sense of *limits* has always provided the drive for law and ethics. As Hume observed, if goods were in unlimited supply, questions of distributional justice would not arise.[47] The customs, etiquette, and property laws that develop around a water hole in the desert are different from those that develop in regions where water is plentiful. Today, however, it is not just a water hole but the whole earth that one fears is running dry of basic resources. These threats have intensified and extended our interest in distributional justice: What are the ethics of dividing a stable or even shrinking pie with the spatially and temporally remote? One reaction to scarcity, the augmentation of the national debt, has reached such a level that we can no longer disregard the moral dimensions of the burdens we are imposing upon the unborn. And there are the problems of endangered species: it has been estimated that ten to twenty percent of the earth's species living in 1975 will have disappeared by the close of this century.[48] This is a specter that, having entered into public consciousness, puts pressure on the existing moral and legal framework to come up with new principles for the conservation and stewardship of what we are coming increasingly to think of as "spaceship earth."[49]

2. *Technology*

The second source of pressure comes from accelerating advances in technology. It would probably be trite, and certainly wrong, to claim

46. The statement is more true of contemporary Western society than of some others.

47. D. HUME, AN INQUIRY CONCERNING THE PRINCIPLES OF MORALS 15 (C.W. Hendel ed. 1957).

48. N. MYERS, THE SINKING ARK 5 (1979), *cited in* Smith, Book Review, 55 S. CAL. L. REV. 769, 771 (1982) (reviewing P. EHRLICH & A. EHRLICH, EXTINCTION: THE CAUSES AND CONSEQUENCES OF THE DISAPPEARANCE OF SPECIES (1981)).

49. Boulding, *The Economics of the Coming Spaceship Earth*, in ENVIRONMENTAL QUALITY IN A GROWING ECONOMY 3 (H. Jarrett ed. 1971).

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that every new scientific development is destined to multiply our moral perplexities. New advances in birth control techniques, a "late pill," for example, could defuse the abortion debate with its slightly unpregnant question, "Is the fetus a 'person'?" A dramatic breakthrough in resource technology—say fusion or the capacity to extract hydrogen from sea water on a commercial scale—could soften the sense of impending scarcity referred to above, and thereby ameliorate some of the distributional dilemmas.

Nonetheless, even if each and every technological advance does not promise to complicate law and morals, the net impact seems destined to have dramatic implications for the status of UEs. With increased power to preserve life, we have to face the question, when are we permitted to let life pass away? What is the right, morally and legally, of a human vegetable to die with dignity? With the growing power to create life (even, with genetic engineering, to create new forms of life)[50] other questions come in tow. What lives and life-forms ought we to choose to create? Which forms can we put at risk or destroy? Are there any obligations to genetic material per se? We are, moreover, acquiring the power to build complex robots, and create artificial intelligence (AI). We can connect mechanical devices with human tissue and organs to come up with biological-technical hybrids. We can repair a baby girl with a baboon's heart, clone cells, and "farm" organs of dead bodies and unborn fetuses to service the living. What moral and legal constraints do these abilities put us under? Does an embryo have rights? And, if so, who is to assert them?[51] And—on the other side of the coin—what place need we make in law and morals for the conduct of robots, AIs, and clones? Is the day so far off when we will be wondering what obligations we ought to hold towards, even expect of, *them*?[52]

50. Biologists claim the ability to create "supertrees," new species of trees that are faster growing, taller, denser and straighter than ordinary trees, more resistant to disease, and capable of flourishing on less soil. Wall St. J., Mar. 9, 1984, at 25, col. 1. Are we morally obliged not to "improve" nature so?

51. *See* A Bill to Amend the Human Tissue Act of 1982 and the Freedom of Information Act of 1982 to Prohibit Agreements Relating to Surrogate Motherhood and for Other Purposes, Legislative Assembly, Australia (Oct. 25, 1984) (establishing procedures, including elaborate consent mechanisms, for embryo implants).

52. In April 1985, the Center for Disease Control reported the first case of a robot killing a human, a Michigan worker whom the robot pinned. *See* Wall St. J., Apr. 16, 1985, at 1, col. 5. Perhaps at this point of robot technology there is not any morally or legally significant difference between a person crushed by a robot and a person crushed by a tractor. But can we say with assurance that there is no credible theory of criminal procedure and no conceivable machine we shall create such that a proceeding against the machine would be indefensible or incoherent? On the

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Perhaps most significantly, advances in technology have extended the reach, intended and unintended, of our conduct. The injury Cain did his brother was done on the spot, at arm's length. But with present power, the harm we do (one has only to think of toxic effluents) can stretch across the earth and linger well into the future, slaying unseen brothers, strangers to us both in space and time. These distances dilute the forces that animate and direct moral thought in kinship groups and small communities—shame, guilt, empathy, and anxiety.[53] And at the same time, the potential universe of our obligees—the very number of persons whom we know our actions do or could affect—seems to overwhelm us with the impracticality of extending throughout the world the familiar moral demands that evolved in the adjustment of relations among CNPPs. Can we really subscribe to a morality that impels our being responsible to *everyone* in the same way?

3. *The Bureaucratization of Life*

Third, the conventional framework needs to confront the growth and proliferation of corporations and bureaucracies. More and more, the world, particularly in developed societies such as ours, is being shaped by business organizations, pension funds, labor unions, governmental agencies, associations, and all the various other formal and informal bureaucratic structures whose population explosion is one of the most striking demographic trends in this century. These institutions combine persons in such a way as to amplify their power exactly as it obscures their accountability.

Several sorts of problems ensue. First, how does the prevalence of bureaucracy, and the consequent division of responsibility, alter our con-

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contrary, one can imagine two lines of understanding and development converging. On the one hand, robots are destined to become more mysterious; as the program grows more complex, the output will become less foreseeably a product of our original intentions. On the other hand, regarding humans, we are equally destined to reduce the range of unfathomable mystery, of "free will" in personal conduct. As a result, even if we never treat artificial intelligence and robots as we treat humans under today's criminal law, it is conceivable that under a future criminal code the two might come to be treated more and more alike, with both errant humans and errant machines "reprogrammed," each in the appropriate way, by comparable procedures of testing, examination, and the like. See the discussion of putting inanimate objects on trial, *infra* text accompanying notes 99-108.

A robot question has been raised already, in, of all places, the tax context. In response to a proposal that worker-replacing robots be required to pay federal income taxes, the "Treasury points out that inanimate objects are not required to file income tax returns." TAX NOTES, Oct. 1, 1984, at 20 (reference doc. 84-6442).

53. This perception is not a new one. *See* E. ROSS, SIN AND SOCIETY 9-12 (1907) (lamenting the consequences of industrialization in almost the very terms used in the text).

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ception of the appropriate way to deal with the ordinary persons, the CNPPs within them?

Second, there is the moral and legal status of the corporation, the bureaucratic—and, in our terms, unorthodox—entity, *itself.* When a corporation has been implicated in, say, a toxic chemical spill, under what circumstances is it appropriate to (in morals) blame and/or (in law) prosecute the corporate form, e.g., the manufacturing corporation or municipality, entities that are, in our terms, UEs? Or are blame and punishment appropriately reserved for CNPPs only?[54]

4. *Moral Maturation*

Side by side with scarcity and advances in scientific technology, and the burgeoning of bureaucracies, the moral and legal order has been complicated by what we might call the moral maturation of mankind. This is not to claim that civilization has been marked by unremitting moral progress towards people getting better and better every day in every way. But it is probably true, as Darwin maintained, that history displays a continual extension, overall,[55] in the range of objects receiving man's "social instincts and sympathies."[56]

There are several explanations for this development. Certainly it has been reinforced by intellectual sophistication generally. We have acquired a farsightedness in predicting and appreciating consequences of our actions that our forebearers, frequently to their convenience, were free from. But it little matters whether we regard this moral maturation as a symptom of technology or consider it a development of independent interest for the sociobiologists to examine. Whatever the explanation, the consequence is to place additional pressure on the CNPP orientation.

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54. *See* Stone, *A Comment on "Criminal Responsibility in Government"*, 27 NOMOS 241 (J. Pennock & J. Chapman eds. 1985).

55. Obviously, although the extension has been generally continuous through history, it has not been without its setbacks.

56. C. DARWIN, DESCENT OF MAN 119, 120-21 (2d ed. 1874); *cf.* J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 283 (J. Burns & H.L.A. Hart eds. 1970) (1st ed. 1823).

> The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate.

Id. (emphasis in original; citation omitted).

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Throughout civilization, the more "we" have recognized that another person, family, tribe, or whatever is like us, both in the properties "it" possesses and the common fate we share, the readier we have been to connect ourselves with moral filament. By extension of the same process, the more we are learning about animals, plants, and, in a way, all of existence, from subatomic motion to cosmic phenomena, the more we are struck with the sorts of similarities that stir empathy[57] (several recent studies have suggested evidence that trees communicate)[58] and the often unanticipated interdependencies that cause concern. This appearance, that we are all, even amidst so much conflict, part of one fragile global community encourages rearranging the legal-moral framework so as to make some place not only for the infirm, insane, and infants, but for animals, plants, indeed, for the entire planet, in some sense, as an organic whole.[59]

B. The Crisis in Framework

What pressures have these developments placed upon the conceptual legacy? To illustrate, we might take as paradigmatic of the conventional dilemmas a typical knot of the ethics books—one in which CNPPs are tied. "You see a stranger lying unconscious in the roadbed; do you have a moral or a legal duty to drag the stranger to safety?" Or "A has made a promise to B; under what circumstances is A relieved of the legal and (alternatively) moral obligations to keep it?"

Surely not every moral and legal dilemma associated with the developments I have traced above forces our thought to run along radically different channels. But coming to the fore today are moral and legal conundrums of a seemingly more complex, and, in ways I shall illustrate, multi-layered kind than the traditional dilemmas. They are less satisfactorily modelled by the familiar CNPP-oriented frameworks.

As a paradigm of this "new" sort of dilemma, let me use the so-called Bowhead whale controversy, which can be condensed, for our pur-

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57. L.A. Times, June 6, 1983, pt. I, at 9, col. 4; *see also* Sterba, *Sharks Are Cuddly? Well, No, But They Aren't So Bad Either*, Wall St. J., July 22, 1983, at 1, col. 4 (fear of sharks stems from ignorance of their real habits).

58. *See, e.g.*, McDermott, *Biologists Begin Eavesdropping on "Talking" Trees*, 15 Smithsonian Mag., Dec. 1984, at 84.

59. I do not mean to suggest that the evolution of morals has been expressed only in a widening scope of entities deemed morally considerate; there has been a parallel growth in protectable interests, of "harms" that have come to be deemed morally wrongful to inflict.

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poses, to the following.[60] The lands over which the United States Government has dominion include the submerged bed of the Beaufort Sea. The Department of Interior has proposed to lease this acreage to oil corporations for purposes of exploiting oil and gas that may underlie the region. To carry out exploratory drilling (and, certainly, in order to support development, if commercial size reserves should be discovered), drilling platforms will have to be constructed in the path that the Bowhead whale, an endangered species, uses to reach its sole known spawning ground. Oil spills could be disastrous.[61] Also, oil exploration often involves dynamiting (the explosions' echoes are used to map geophysical structures) which could destroy the whales' hearing, and thus their ability to navigate and survive. To make the situation more complex, if the whales successfully avoid these hazards by adjusting to a course that takes them somewhat to the north of their present route, they will be out of the range of a native tribe, the Inupiat Indians. The Inupiats regard hunting Bowheads as integral to their culture.

Let me survey for a moment the various sorts of conflicts that might be thought to arise from this situation, conflicts between or regarding[62] things of different types. (Later, I shall examine whether we can substantiate the intuition that there are here real—and really different—conflicts, calling for some revisions in the way we think about law and morals.)

First, there are conflicts of *Natural Persons versus Natural Persons.* The interests of the contemporary Indians, who want the Bowhead undisturbed (except by themselves) are at odds with most citizens, who, as consumers,[63] have an interest in a secure source of petroleum products (such as oil and fertilizers) and who even stand to gain financial benefit through the government's oil lease revenues. Observe that while this conflict has some of the elements familiar to conventional CNPP analyses,[64] it lacks others. Unlike the hypothetical bystander who practically

60. The materials that follow are drawn from North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980), and Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1977).

61. P. EHRLICH & A. EHRLICH, *supra* note 48, at 190.

62. In a strict manner of speaking, there cannot be conflict between us and species, because species, as such, have no interests. The implications are examined in the text *passim*.

63. Of course, not all CNPPs are dominated by their consumer interests. Presumably those with a conservationist inclination would prefer for both the Inupiats and oil companies to leave the whales unhazarded.

64. Analyses, because even in establishing relations among CNPPs there are contending principles that drive contending evaluations. These are examined in the text *passim*.

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stumbles into the drowning person's thoroughly vivid presence, the petroleum consumers are widely separated both culturally and geographically from the Indians. It is not evident to what extent we all share a single (whatever this might entail) "moral community."

There are also conflicts that might be cast as *Natural Persons versus Corporations*. The native Americans are at odds both with the Department of Interior (a public agency) and with the oil companies that wish to participate in the lease-sale (private corporate bodies).

There are conflicts of *Corporations versus Corporations*. The Village of Kaktovik, a municipal corporation, is aligned in court against ARCO, an oil company, with the National Wildlife Federation, a nonprofit corporation, appearing as intervenor.[65]

There is, in addition, a highly charged set-off of *Nation-states versus Nation-states*. The United States, as a nation-member of the world body, is signatory to an International Whaling Convention (IWC). Other signatories include Russia and Japan, who have long been under pressure from the United States to reduce their whaling. Now, in the Bowhead controversy, Russia and Japan have rejoined that if the United States is to honor *its* treaty obligations under the IWC, it must crack down on the Inupiat's "harvest" of Bowheads or be subject to charges of hypocrisy and see its world leadership on the whale conservation issue erode.[66] Hence, on the plane of world bodies, and in the terms that apply among nations, the United States is in conflict with Japan and Russia.

Beyond these various conflicts, there are other colorable interests or values or things which might demand a moral or legal accounting. There are, of course, the whales. And there is the Indian *tribe* or even *culture* to account for, by which I mean to denote not merely the interests of a particular Indian or Indians, but the value of a community, freighted with ways of life that transcend and survive the lives of individuals.[67] There are, moreover, analogous problems of *species* to consider. The survival of a species presents separate questions from the survival of any individual member, e.g., whale. In fact, foresters and zookeepers must often confront such conflicts directly: the preservation of a species can

65. The reductionist's response is that for purposes of moral analysis, all these conflicts touching various corporate bodies, including nation-states, can and should, for purposes of clarity, be redescribed in terms of conflicts touching the individual persons affected *through* the corporate bodies. I question this position. *See infra* text accompanying notes 312-23.

66. *See* Adams v. Vance, 570 F.2d 950, 956 n.13 (D.C. Cir. 1977).

67. *See infra* text accompanying notes 157, 188, 312-23.

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call for winnowing out or penning up individual members. The individual in this illustration, the whale, has intelligence, can experience pleasure and pain, and has, in short, several of the properties of a natural person, at least in degree. But a species *itself*—in this regard, like a corporation itself—lacks these properties. Species have neither sentience nor even substance, and thus talk of the interests or claims of a species raises some of the same conundrums as when we speak of the interests or claims of a corporation, tribe, or culture, per se.

We must consider, as well, the interests of (alternatively, our interests in) future generations. Our present actions—draining domestic oil reserves, eliminating or altering the Indian culture, infringing the population of Bowhead whales—are going to influence the resources that the future has available to it, its recreational opportunities, even its tastes.[68] And, finally, some urge us to consider the affected habitat,[69] or perhaps something even more encompassing, the whole ecological balance or the whole earth.

Now, as I readily grant, because some persons *feel* that there are unconventional values at play, not adequately accounted for by predominant conceptions, does not mean that a coherent accounting for such values can be provided, much less that such an accounting would be right. The alternative is to maintain that there are no queer values or interests running around, that these apparent "conflicts" can be redescribed, without any loss of morally or legally significant insight, in terms of the CNPPs and our interests as we have conventionally conceived them. Is this so?

C. A RE-EXAMINATION: LET'S START WITH RIVERS

In what ways, and with what justification, might UEs be accounted for in moral thought and legal rules? Which of them can simply be eliminated from normative concern by redescribing problems exclusively in terms of ordinary human interests in them? There is a growing body of literature—or rather, several bodies of literature—which examines the moral and legal significance of a particular UE. One body focuses on animals, another on embryos and fetuses, another on future generations, another on the dead. There is an environmental literature, now featuring its own excellent journal, *Environmental Ethics*. Each literature ventures

68. *See infra* text accompanying notes 133-34, 284-85.

69. *See* Smith, *The Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361 (1984) (emphasizing habitat, rather than individual animals or species, as the proper focal point of concern in environmental-protecting legislation).

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an occasional glance at the other to draw ad hoc comparisons and contrasts. But there has been little effort in the direction of developing the general theoretical foundation on which *all* these particular efforts must rest. What does it mean to be legally and morally considerate, and what properties does it suppose—properties of the *thing*, and properties of *law* and of *morals*?

Where should a general theory start? Inasmuch as we cannot deal with all UEs simultaneously and with equal depth, I will set aside for the moment the easiest of the hard cases (e.g., embryos and animals) and concentrate only on the most implausible contenders. What space is there in law and morals, what toehold even, for the subset of UEs—I will call them Ds for "Disinteresteds"—that are devoid of feelings or interests except in the most impoverished or even metaphorical sense?

1. *What Are the Disinterested Entities?*

Let us establish in a little more detail the boundaries of this class I am volunteering to represent. By stipulation, no member has "interests" expressible in terms of its own preferences. Even within this class, however, there are distinctions we might draw, reserving the possibility that some distinct accountings may be warranted, depending upon the various theories that may emerge. There are, to begin with, wholly inanimate things that always were inanimate: rocks and rivers. If they cannot care what happens to them, why should we? There are man-made inanimates: artificial intelligence presents perhaps the most interesting considerations. There are Ds that were not always so disinterested: corpses;[70] and Ds with the potential to be otherwise: embryos. There are trees and algae, which, while without conscious preferences, are nonetheless living organisms with biological requirements. There are what we discern as functional systems, but not systems that conform to the boundaries of any organism, for example, the hydrologic cycle. Habitats are of this sort; that is, while the habitat may include higher animals, we may find ourselves wishing to speak for some value not redescribable, without loss of meaning, in terms of the various things that the habitat sustains in relation. There are various sorts of natural and conventional membership sets: species, tribes, nations, corporations. Finally, for the sake of

70. *See* P. JACKSON, THE LAW OF CADAVERS (2d ed. 1950). As concerns posthumous obligations in morals, see Partridge, *supra* note 43 (duty towards dead reduced to interests of living; mistreatment of dead by living actor will lead to a society in which the actor's own will may be ignored or his posthumous reputation defamed).

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completeness we might keep in mind such "things" that in the happenstance of our language are rendered as *qualities*, for example, the quality of the light in the Arizona desert at sunset. There are events that might be of interest, such as the flooding of the Nile.

2. *What Are We Asking?*

Suppose that we retain the principal focus on some such classes of "things" as I have described. What, specifically, are we asking about them? There are at least three distinct inquiries. One emphasizes law; the second, morals; and the third, (meta)ethics. The first inquiry, which turns on the intelligibility of legal options, we might put this way: Considering the general character of Ds and considering the general character of law (of torts, crimes, contracts, etc.), how, if at all, *could* we account for Ds in law and at what costs? That issue I will consider in part II. The second question, which emphasizes moral theories, is this: Considering how we could adjust the legal system to provide various Ds with various sorts of recognition in the law—that is, fit them into the legal framework coherently—why *ought* we to do so? What sorts of moral positions would serve as justification? I will discuss this in part III. The metaethical inquiry, which will be analyzed in part IV, is this: Can the *moral positions* suggested in part III meet the standards we may rightly require of an *acceptable moral theory*? In part V, I will return to the Bowhead setting to illustrate the view that emerges, what I call Moral Pluralism. The Conclusion will survey some of Pluralism's prospects and problems as a general moral viewpoint.

II. LEGAL CONSIDERATENESS

Let us take the legal side of the inquiry first.[71] The question here is one principally of intelligibility. What legal arrangements touching Ds

71. There are two ways to sequence the exposition. The first is to regard the problem from a moral perspective in the first instance; under this strategy, one articulates and defends some general theory of morals, and then derives from that theory various sorts of moral claims, including claims to legal treatment, which can be raised on behalf of various types of unconventional entities. For example, someone who addressed morals first would ask on what bases *ought* we to be concerned about rivers? Then, how ought this concern to be carried forward in shaping the law? The other approach, that which I adopt, is to ask first what would giving a river various positions in this system look like—and then, *ought* we to commit ourselves to *that* system? By filtering the arrangements that are legally unintelligible, and clarifying the implications of the remainder, the focus of the deferred normative inquiry is shifted. The emphasis is not on "Does X have a moral right (from which some legal status can be derived)?" Rather, we ask: "Is such and such an arrangement of the legal system (treating a river *this way*) morally superior to alternative arrangements?" We thus proceed to evaluate a package of rules, reserving the possibility that the sort (character, or strength)

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are sufficiently coherent that they merit advancing to the next step, consideration of whether they are defensible and desirable as a matter of policy or morals?

One's initial response is apt to be "none." For when you first hear it, the notion of giving a thing—a tree, a river—legal status sounds silly. But much of the apparent silliness stems from two popular misconceptions about what the proposal means. The first mistake is to suppose that when someone speaks of conferring legal *status* they must be talking about legal *rights*. In fact, the situation is much more complex. We may be motivated to give something legal recognition, constitute it a jural person, for reasons that have nothing to do with *its* legal rights, but are designed to secure the rights of others. For example, the courts may give a stillborn viable fetus the status of "person" in order to fulfill a technical prerequisite enabling the parents to file a malpractice case against the doctors.[72] Giving the fetus its independent legal status is designed to nail down the *parents'* legal rights.

This first misconception is commonly compounded by a second one involving the relation between *legal rights* and *moral rights*. Specifically, it is supposed that the only basis on which we can support according a thing a legal right (or other legal recognition) is if we can show it has something like its own moral right, underneath. That, too, is a distortion, which I shall take up below.

Let me begin, here, by placing *legal rights-holding* in perspective. The short of it is that having a legal right is one way to provide something legal recognition. But it is not the only way. When the law criminalizes dog beating it manifests a concern for dogs. It does so, however, by creating a prospective liability for the dog beater who is made answerable to public prosecutors at their discretion. In no accepted sense does such a statute create a "right" in the dog. The same principle is at work in legislation establishing animal sanctuaries and laws that impel cattle transporters to provide minimally humane standards at the risk of losing their certificate. The law is enlisted in an effort to secure advantages for UEs, but *legal rights* are not called upon. The federal government recently issued regulations requiring fishermen who accidentally land sea turtles on their decks to give the turtles artificial respiration

of moral argument required for one package need not be of the same sort—need not appeal to the same principles—as one for another package. Indeed, we ought not to foreclose the possibility that people who subscribe to different moral views may yet (each on their own rationale) agree on some range of choices as to what constitutes the right legal system.

72. *See* Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712; *see also* MacDonald v. Time, Inc., 554 F. Supp. 1053 (D.N.J. 1983) (plaintiff's libel action surviving his death).

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if necessary.[73] The technique is set out in detail. But the term "turtle's rights" is never mentioned. Nor need it be. The turtles are provided a measure of legal protection by creating enforceable legal duties *in regard* to them, duties enforceable by others.

Nor are relations built upon duties the only alternative to those built upon rights. We could give an algae colony an *immunity* from governmental action, say, the draining of a stream.

What this should remind us is, that while allocating rights is a fundamental way of manifesting legal concern, one which I emphasized in *Trees*, such concern can be implemented through a broad range of arrangements, not all of which can be forced into the classic "rights-holding," or even "duties-bearing," mold. Therefore, let me introduce, as the more comprehensive notion, *legal considerateness*. A terse operational definition would look like this. Consider a lake. The lake is *considerate* within a legal system if the system's rules have as their immediate object to affect (as to preserve) some state of the lake, the law's operation turning upon proof that the lake is not in the state the law requires, without any further need to demonstrate anyone else's interests in or claims touching the lake.

We can illustrate by reference to a lake which is being polluted by a factory. Under conventional law, the pollution of the lake can be restrained at some plaintiff P's behest if P can show he has a legally protectible interest in the lake, e.g., that the lake is on land owned by P, or that, as owner of lakeside property, P has a right to the water in a condition suited for his domestic or agricultural use. Changes in the state of the lake (its degradation) are relevant to plaintiff's proof, but plaintiff's case cannot stop with the proof of such changes. The plaintiff has to prove that he has some right in respect to the lake's state, which right the factory is infringing. Damages, if any, go to the plaintiff. If the court awards the plaintiff an injunction, it is *his* injunction; he has the liberty to sit down with the factory owners and negotiate an agreement not to enforce it, to let the pollution restart—if the factory owner makes an offer that is *to P's advantage*.

Contrast that system to one in which the rules empower a suit to be brought against the factory in the name of the lake (through a guardian or trustee); the factory's liability is established on the showing that, without justification, it degraded the lake from one state which is lawful, to another, which is not.

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73. 50 C.F.R. § 227.72(e)(1)(i)(B) (1984).

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In the first system described, the lake is not legally considerate. It has no claims that are not wholly parasitic upon the rights of some person ready and willing to assert them. In the latter system, it is the lake that is considerate, not the person empowered to assert the claims on its behalf.

Now, if this were intended as a jurisprudence text, we might proceed to divide the broad category, legal considerateness, into the whole array of terms with which legal philosophers deal: rights, duties, privileges, immunities, no-rights, and all the rest. For our purposes, however, we can simply employ, as terms comprehending the two broad sides of legal considerateness, *legal advantage* and *legal disadvantage*. The question I will pursue in this broadly stated form is to what extent and in what senses can we coherently effectuate situating Ds in a position of legal advantage and legal disadvantage (hereinafter Advantage and Disadvantage), respectively?

A. Are Interests a Requirement of Legal Considerateness?

At this point, someone is bound to object that all this talk about "positioning" a D in a position of Advantage or Disadvantage is empty. Real advantage and disadvantage depend upon benefit and detriment and these terms cannot be applied to Ds intelligibly. Our interlocutor may grant that when, for example, dog beating is made criminal, it is done at least in part for the dog's benefit; an animal can be *really* advantaged. But in regards to an arrangement that nestles the lake in the protective custody of guardians and prosecutors, no one could describe it as being "for the lake's *benefit*" in any ordinary sense. We have put the lake roughly in the *place* that a person might occupy in a legal system, to a person's advantage; but it is a place that can be of no advantage to the lake, only to people.

From the fact that the lake itself is beyond benefiting, two lines of criticism might be fashioned. The first goes to *motive* or *justification*: because Ds cannot be benefited, the benefiting of a D can never *motivate or justify* making Ds legally considerate. That is true, but it misconstrues what is going on here. In this part, I am asking to what extent the D *could* be made legally considerate, that is, be constituted the focus of the legal system's attention, upon whose state the courts would take evidence. There are many reasons lawmakers might choose to place a D, say, a lake, in such a position, other than (what would be, granted, a mistaken belief) that restricting changes in the lake's state S would make the lake happier or advance its welfare. At this point, it does not matter

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whether we suppose the lawmakers to be animated by the belief that the lake is home of an evil-tempered god who likes the lake just as it is. What reasons, if any, might be considered rational and good is a separate problem, the subject of succeeding parts. (In advance let me just say that to act in consideration of a thing is not synonymous with acting to advance its welfare.)

The second objection, however, cannot be deferred, for it goes to the heart of our present inquiry about what arrangements a legal system *could* implement. Whatever might motivate and justify the lawmakers to try to make Ds morally considerate, how can we coherently plug into the legal rules an entity that has no welfare? We can imagine our interlocutor putting it this way: "All right," he says, "let us suppose that, somewhere in the text that follows, you will be able to demonstrate that, notwithstanding the unavailability of any appeal to the D's own welfare, there exists at least some rational basis why we might wish to devise legal rules in which a D, a lake, say, is made legally considerate, as you use the term. We will even agree to a strong considerateness, which provides D a court-appointed guardian, empowered to get up in court and argue in favor of damages for D. But now comes the cruncher. With the lake itself being utterly indifferent as to whether it is clear and full of fish or muddy and lifeless, when its guardian gets up to speak, *what is there to say*?

My answer will sound, I am afraid, anticlimactic. As in any situation in which a guardian is empowered to speak for a ward, what the guardian says will depend upon what the legal rules touching the ward provide. Obviously, since the D can neither be benefited nor harmed in any ordinary sense, the state of the D, for the preservation or attainment of which the lawyer speaks, will have to be some state the law decrees to be the legally mandated one, defined without any reference to the D's own preferences or even "best interests." What we should be asking, then, is this: What states of a D, unrooted in the D's interests, welfare, or preferences, are available for the law to embody in legal rules, and what would be the implications of embodying them?

B. Intactness as a Legal Advantage

To examine what sort of legally defined Advantages might be conferred on a D, and with what implications, let us begin by considering a system that takes as its target preserving the *intactness* of the D. For example, lawmakers could provide stiff criminal penalties for polluters,

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and fortify this "advantaging" by assimilating the lake into the civil liability rules in a way that approximated constituting the lake a rights-holder with guardian. The result would be that if someone violated established effluent standards, to the lake's Disadvantage (in this system, read: to its alteration), a complaint could be instituted not only in the name of the people, but in the name of the lake, as party plaintiff, against the polluter. As I spelled out in *Trees*, this suit could be initiated and maintained—as suits are maintained as a matter of course for infants, the senile, and corporations—by a lawyer authorized to represent it, by ad hoc court appointment, or otherwise.[74] Assuming that the guardian had to show damages, the law could simply provide that the lake's *legal damages* were to be measured by the costs of making the lake "whole" in the sense of restoring the lake to the condition it would have been in had its "right" to intactness not been violated. If the defendant's liability were established (if the upstream plant were found to have violated the applicable standards), it would have to pay into a trust fund, for the Advantage of the lake, funds adequate to cover such items as aeration, restocking with fish and aquatic plants, filtering, and dredging. If anyone considers this farfetched, note that a federal court has allowed such a suit to be brought in the name of the Byram River (the river that forms part of the interstate boundary between Connecticut and New York) against the Village of Port Chester, which had been polluting it.[75] And it is certainly plausible that FWPCA and CERCLA will be construed as authorizing similar litigation.[76]

Can it really be this easy? The answer is, no. An intactness standard can "make sense," in the sense that it can be implemented intelligibly. But it may not make sense when evaluated as policy. An intactness standard will be resisted when the costs of preserving and restoring the D exceed its evident consumption and use value to human beings.[77] And even if one recognizes a moral reason to pay for the D's preservation or

74. *See Trees, supra* note 1, at 451-58. I have learned since then that this basic idea was less innovative than I originally imagined. *See* Mullick v. Mullick, 52 I.A. 245 (P.C. 1925) (suit touching location and custody of consecrated Hindu idol remanded in order that idol might appear by a disinterested next friend to be appointed by court).

75. Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D.N.Y. 1975).

76. See, for example, how this sort of plan is to be implemented in the federal level under CERCLA, 42 U.S.C. § 9607(f) (1982). Superfund; CERCLA Natural Resource Claims Procedures, 50 Fed. Reg. 9593 (1985) (to be codified at 40 C.F.R. pt. 306) (proposed Mar. 8, 1985).

77. *But see* Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 456 F. Supp. 1327, 1344-45 (D.P.R. 1978), *aff'd*, 628 F.2d 652 (1st Cir. 1979) (owners of tanker responsible for oil spill destroying millions of small marine animals held liable for $5,526,583 in damages on a "replacement cost" basis, to compensate for the total value of the damages caused to the environment and/or natural resources as provided in Puerto Rican law).

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sum in excess of its beneficial values (as we do in undertaking the rescue of persons), we must avoid commitment to a higher price tag than we ought to pay. Unfortunately, assuring a payment ceiling on protective arrangements in this area presents a special complication. That complication arises not from the fact that Ds lack interests, as such, but from the fact that they lack preferences. Thus, it is one of the common "general theory" problems that has to be faced in connection not only with lakes and forests, but also with some "higher" UEs such as whales, primates, and mental defectives, entities that, while capable of interests, are restricted in their capacities to express *preferences*.[78]

To understand the difficulty introduced by the want of preferences, we must consider for a moment the significance preferences play in the legal system's ordinary operations, that is, as concerns dealings among CNPPs. As has been well rehearsed in the literature, an allocation of entitlements is only a first step in establishing a framework for further market and political activity. Suppose A is given some initial entitlement, and B another. If both would rather it be otherwise, they are capable of trading so that each is better off. When we move into the area of involuntary exchanges, the mechanisms for adjustment shift, but preferences still underlie the system's workings. The person who accidentally or deliberately drives a truck into my car has carried out a private "taking" of my property, and has to compensate me. Roughly speaking, compensation aims to restore me to a position of indifference, that is, to a point where I have no reason to prefer my pre-accident position to the position I find myself in after the accident plus compensation.

If we return to the question of distributing entitlements to Ds, we can now see, more clearly, what the real complication is. The problem is not the intelligibility of assimilating Ds into the system. We can easily give them claims, and lawyers to speak for them. But there is a severe and sobering implication. If the only kind of advantage we can dole out to a D, e.g., the lake, is to make it whole in this way—to substitute pure physical *intactness* for other goods (such as a balancing of preferences)—

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78. *But see* Lamb, *Animal Rights and Liberation Movements*, 4 ENVTL. ETHICS 215, 231 (1982) (remarking on potential of nonhumans to communicate preferences to us, particularly as humans attend to the problem); Vessels, *Koko's Kitten*, 167 NAT'L GEOGRAPHIC 110 (1985) (narrating success in communicating with gorilla via sign language). I have observed elsewhere that a lawn can, in a sense, communicate its needs to us by turning from green to brown, *see Trees*, *supra* note 1, at 471, but I grant it is not as evident why needs of this sort are as morally significant as preferences, and thus substantiate a lawn-regarding morality that speaks with the same firmness of judgment as morality that spells out our relations with persons. It is concessions of this sort that lead me to propound moral pluralism.

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then, once assigned, our initial allocation will not thereafter be modifiable to the highest use by ordinary law and market mechanisms. The implication is not just to give some special recognition to the entity over and above market (and ordinarily understood shadow market)[79] evaluations; it is to withdraw the entity from market accountability entirely. Such a rule entails imposing a sort of freeze upon selected aspects of the status quo—an ironical outcome, since nothing seems quite as "unnatural" as enduring unchange.[80]

Comparable postures—rules removing all cost/benefit considerations—are not unknown in the law. We do not do a cost/benefit analysis of free speech claims (at least not openly). The fourteenth amendment's prohibition on racial discrimination cannot be evaded by a showing that enforcing the Constitution imposes an *unreasonable* burden. The Delaney Clause once prohibited the inclusion in any foodstuff of any substance that might, in any amount, elevate cancer risks in any degree.[81] Indeed, this is precisely the approach the Endangered Species Act of 1973 (ESA) sought to implement in its original form.[82] Interpreting that legislation in *TVA v. Hill*,[83] the Supreme Court held that notwithstanding the $100 million which had been spent on a huge dam project, the whole project had to halt if one endangered species—a snail darter—would be placed at risk of elimination.

Now, we *can* arrange the system this way, that is, devise rules so that the intactness of certain things will be insulated from all balancing of preferences which market considerations would express. But note that in the most celebrated instances where we have approximated such a posture—as with constitutional rights to speech, press, jury trial, etc.—there is a strong and widely shared political foundation for the rule. In the

79. *See infra* note 120 and accompanying text.

80. Moreover, wherever we were to adopt such a "freeze" position, we would be faced with the further question whether to express it in what we might call the imperative form or a weak form. In the imperative form, the Advantage would be construed as carrying an obligation that we CNPPs intercede to prevent change from whatever cause, however indirectly *we* may be responsible. For example, if the forests surrounding the Sahara were a full advantage-holder in this imperative sense, we would have an obligation, on the forests' behalf, to set the Sahara back, even if the drought that was extending the Sahara was considered the proximate cause. (What if the Sahara had an Advantage?) I presume that, for most Ds, the assignment of a status-freezing Advantage in this imperative sense would require more powerful arguments than I can presently imagine.

81. 21 U.S.C. § 348(c)(3) (1982) (providing in pertinent part: [N]o [food] additive shall be deemed to be safe if it is found . . . after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal . . . .").

82. Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973).

83. 437 U.S. 153 (1978).

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absence of comparably persuasive arguments, rules that originate as prohibitive policies have tended to erode as their conflict with prevailing desires became apparent.[84] For example, the result of the controversy over saccharin was to amend the Food and Drug Acts in such a way as to weaken the Delaney Clause.[85] After the Supreme Court succored the snail darters, Congress amended the law to relax endangered species protection in some circumstances.[86]

The point is this: I have not yet demonstrated that there is *any* argument for preserving a D intact, a chore to which I will turn in part III; much less have I shown that any such argument could meet the demands of a valid moral theory (parts IV, V, and Conclusion). But we can anticipate that if the costs of preserving a D intact are high, the legal arrangement, if it is not to be diluted and evaded, will require not only a moral argument to back it up, but a fairly sturdy argument, at that.

As a preliminary intuition, is it possible that there are Ds with respect to which so strong a showing could be made? In *Trees*, I suggested as a possibility the Grand Canyon, which, owing to its uniqueness, grandness, and association with national heritage, might find support on mixed moral bases for so privileged a position—to be treated like an environmental first amendment, as it were.[87] But regarding most other Ds, even if people are persuaded to sacrifice something for their conservation, we have to anticipate that the costs of *intactness* will ordinarily appear unacceptable—even morally unacceptable. For example, suppose that we wish to gird a river with a series of small hydroelectric dams that, relieving the demand for oil, will be worth $1 million to us in present value. We know that after damming, the river simply cannot be exactly the same as it was before. Even if we discern an obligation to sacrifice *something* to keep the river in its present condition, we may not feel obligated—it may not be *right*—to forego our own competing benefits, e.g., warming the houses of the poor. What, then? Recall that in comparable situations when the rights of a CNPP are affected the law's response is to award the "victim" (e.g., the private owner of a stream condemned for public purpose) a lump sum calculated to make him indifferent. But we

84. *See generally* S. YAFFEE, PROHIBITIVE POLICY (1982).

85. The moratorium on the authority to enforce the Delaney Clause with respect to saccharin (a food additive) was passed as Pub. L. No. 95-203, § 3, 91 Stat. 1452, 1452 (1977). The moratorium will end two years after the date of the Saccharin Study and Labeling Act Amendment of 1983, Pub. L. No. 98-22, 97 Stat. 173.

86. *See* Pub. L. No. 95-632, § 7, 92 Stat. 3751, 3752-60 (1978) (amending ESA to provide detailed procedures under which proponent of environment-affecting action may be awarded exemption from strict requirements).

87. *See Trees*, *supra* note 1, at 486.

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have no way to judge whether some compromise solution we might offer the river (through its guardian) is *fair enough*, is *compensatory*. Are we on the horns of a dilemma so fatal—all or nothing—that the assignment of Advantage to Ds has to be regarded as unsupportable in all but the most extraordinary circumstances?

This, I take it, illustrates the central challenge of the legal segment of our inquiry: that the implementation of Advantages to Ds threatens to back us into such an extreme position where we would not only be handing *them* Advantages, but Advantages of so strongly inalienable a sort that we would be unable to reach compromises merited by our own legitimate claims. What we need are more flexible alternatives within the legal system to carry forward as candidates for moral evaluation.

1. *Boundaries*

One way to moderate the stark hardening of prohibitive Advantages would be to build into the rules some boundary conditions. This would not be out of character with familiar CNPP legal rights. To take an obvious example, persons have a right to federal jurisdiction in civil cases, if, and only if, the amount in controversy exceeds (depending on the controversy) $20 or $10,000.[88] By analogy, we have the option to assign to some Ds we choose to protect—for example, an endangered species such as the snail darter—a value (not necessarily limited to its "consumption value," even in the broad sense) of, say, $25 million. This would mean that while we, the human lawmakers, were prepared to forego up to that amount to preserve the species, if the social benefits of some proposed species-jeopardizing action exceeded that sum, then the action would go ahead, with the $25 million either being applied to mitigate the risk, or allocated to some other part of the environment, perhaps to preserve some closely related, endangered species.[89]

Similar boundary constraints could be placed upon the liability rules. We could require the polluter of a lake to return it to pre-pollution condition unless the amount required to restore it exceeded, if not an

88. U.S. CONST. amend. VII (jury trials in federal civil cases where value exceeds $20); 28 U.S.C. § 1332 (1982) (federal court jurisdiction in complaints based upon diversity for amounts over $10,000).

89. There is a rough analogy in the *cy pres* doctrine, whereby courts will attempt to preserve a testator's general intention when it would be impossible or illegal to give it literal effect. CERCLA, 42 U.S.C. § 9607(f) (1982), contemplated damages higher than replacement costs: "the measure of . . . damages shall not be limited by the sums which can be used to restore or replace such resources." *Id.* In fact, the liability for various environmental injuries under CERCLA is limited by monetary boundary constraints, not to exceed $50 million per incident. *See id.* § 9607(c).

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economist's "use value," some fixed figure $X million, perhaps an amount higher than use value.[90] If, however, making the lake whole was infeasible at any price, then, instead of demanding an infinite sum in damages, we could require that the $X million be put into repairing the lake as much as possible, or that it be diverted for the benefit of some other similar body of water.[91]

Moreover, we are not limited to monetary values as a means to express boundary parameters. Constraints can be defined in physical terms. A river could have to "suffer" (as we all do) certain de minimis "injuries"; but, say, if its dissolved oxygen should fall below so many parts per million, or if the aggregate biomass it supports should decline below so many specified tons, then the guardian would be authorized to set the law in motion, in whatever way specified. (It is interesting to observe that the MMPA has a boundary condition written into it: individual mammals may be taken, but not beyond the point that the optimum sustainable population of a habitat is infringed.)[92]

2. *Ideals*

From boundaries expressed in quantified terms, it is a short step to enlist some looser notion of ideals as a way to preserve flexibility. That is, while we cannot orient the law to D's welfare, we can orient it to some ideal state of D, without (as with boundaries) undertaking to express that ideal in a specific set of numbers. An enlisting of ideals is not unfamiliar to law. Certainly there are many circumstances in which the law glosses over what an individual *desires* with normative notions of what the individual most importantly *is* and *can become*. In a comparable fashion, we can incorporate in D-affecting legal rules norms that capture the essential state the thing ought to have. For example, regarding a river, rather than using an exact standard expressed in terms of parts per million to determine when its state had been violated, the standard would be whether the river's "riverhood" was being endangered.

90. Use value being the marketplace or commercial value the lake would have to its users, e.g., commercial fishermen, if it were restored to its pre-pollution condition.

91. Compare the disposition reached in the litigation against Allied Chemical for having allowed the toxic chemical Kepone to spill into the James River; Allied could not be expected to return the river to purity, but agreed to fund a trust to perform research and implement programs to mitigate the environmental effects of Kepone. *See* Goldfarb, *Kepone: A Case Study*, 8 ENVTL. L. 645, 660 (1978).

92. *See* Committee for Humane Legislation v. Richardson, 540 F.2d 1141 (D.C. Cir. 1976). The MMPA was amended in 1981 to substitute "optimum sustainable population" for "optimum carrying capacity of a habitat." Pub. L. No. 97-58, § 109, 95 Stat. 979, 982-86 (1981).

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Within such a loose, ideal-oriented construct, there is room for compromise. The guardian of an ecosystem might sue to prevent the reduction in a particular species, the threat to which would hazard the stability of the ecosystem's interdependent populations. If the law sanctioned the stability of interdependent populations as a rough measure of the ecosystem's essential nature, then the guardian, with court approval, might be warranted to settle the suit if the harmer agreed to stock an alternate species, less likely to be threatened by the particular project, but equally well linked to the life chains of the ecosystem.[93]

There are obvious questions about both the boundaries- and the ideals-based alternatives. One is certain to wonder how, in selecting the critical boundary variables or supplying content to the key ideal (riverhood, ecosystem), we can avoid being, on the one hand, either totally arbitrary, or, on the other, guilty of smuggling in whatever standard advances our own human interests. This is part of a larger issue that I return to in part III. Here, let me only say that we should not underestimate the capacity of commonsense intuition, reinforced by ordinary language and an understanding of physical processes, to provide us with coherent notions about the essence of things quite independent of what we *want* those things to be. We are able to speak of the "death of a star," quite aside from what state we *want* the star to be in, or anything we might *do* about it. And while the categories of classification that are selected in biology—whether something has vertebrae, nurses its young, climbs trees, etc.—undeniably reflect human "interests" in the broadest sense, surely we have a notion of what a genus or species *is*, and can talk coherently about the design of arrangements to preserve one, without appealing to our own welfare.

There is a second objection: that, at least where ideals are concerned, the concepts are likely to be too vague—even too meaningless—for courts to work with. How would a judge identify the point at which a river's riverhood was being infringed?[94] I doubt that it would be any harder than deciding due process or negligence or many other things. There is simply a difference we might trust judges to recognize between, on the one hand, ribbing a river with dams, while leaving the total flow

93. The science to support such judgments is growing. *See* Schamberger & Kumpf, *Wetlands and Wildlife Values: A Practical Field Approach to Quantifying Habitat Values*, in ESTUARINE PERSPS. 37 (V. Kennedy ed. 1980) (discussing "habitat suitability indexes" for various species in various habitats).

94. There might be a different ideal of riverhood for different rivers: an ideal for the Colorado River and an ideal for the Tehachepee River.

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and course intact, and, on the other hand, so depleting the river's waters that it simply peters out and never reaches the sea.[95]

C. THE D AS A SUBJECT OF LEGAL DISADVANTAGES

Thus far, I have been examining situations in which the law might situate a D in a position of Advantage, epitomized by (but not limited to) being denominated party plaintiff. I want to turn now briefly to examine legal considerateness' other side. Can we conceive of situations in which we might intelligibly arrange to place a D in a position of Disadvantage? To identify the issues, I will consider only the most facially implausible of several conceivable Disadvantageous positions,[96] viz., situating the D as a defendant in a criminal matter.[97] My analysis here mirrors my analysis on the Advantage side. Whether we might *want* or *ought* to so situate a D depends upon an analysis of the system that would result (most importantly the sort of sanctions envisioned), in the light of criminal law theories. What I want to demonstrate is that some such arrangements *could* be carried through *coherently*, and therefore merit advancing to such a normative assessment.

Let me illustrate with an episode that occurred at the Nuremberg trials. Von Papen, one of the defendants, complained that Hitler should

95. Compare the thinking that would go into a judgment of riverhood with what is involved in a prisoner's rights case. Some restrictions imposed upon an inmate are simply part of what is entailed and intended by the imprisonment. But at some point, the prison conditions cannot be reconciled with the essence of the prisoner as a person: some sense of his *personhood* is violated. How does the judge decide when this point is reached? We simply trust him to come to a right result (perhaps guided by the precedent that develops over the years), even if we know that at the bottom of it all there is little more than some sort of intuitive metaphysics at play. *See* Note, *Creatures, Persons, and Prisoners: Evaluating Prison Conditions Under the Eighth Amendment*, 55 S. CAL. L. REV. 1099, 1118-21, 1131 (1982) ("respect for persons" whether articulated through the philosophies of Kant, J.S. Mill, or Agape, may provide superior conceptual basis than "decency" and "dignity" in guiding courts in eighth amendment prison condition challenges).

96. If a trust fund were established for the support of a wronged river, and the river subsequently runs rampant, sweeping away houses on its banks, could the fund be invaded in the interests of the homewoners? (Assume the river to be subject to strict liability and ineligible to avoid mass tort liability through declaration of bankruptcy.)

97. Being constituted a defendant in a criminal matter is not equivalent to being Disadvantaged. It depends on the treatment the entity would receive in the alternative. To illustrate, a Detroit suburb recently impounded a prize sheep dog with plans to destroy it, for allegedly killing an 87-year-old woman whom, the owners contended, had died of a massive heart attack. The dog was tried, even allowed " 'character' witnesses to testify about [its] gentle disposition." *Pampered Dog on Trial for His Life in Woman's Death*, L.A. Times, Jan. 17, 1985, pt. I, at 22, col. 3. After a hearing that took on "all the trappings of a murder trial," the dog was ordered defanged, neutered, and confined to home." *Prize Dog Spared in Death of Woman, 87*, L.A. Times, Jan. 23, 1985, pt. I, at 4, col. 1. In Virginia, a dog sentenced to death for barking was reportedly given a reprieve by an appeals court, the death penalty being considered too harsh a punishment. L.A. Times, Sept. 24, 1983, pt. I, at 10, col. 1. Whether these dogs were criminal defendants, technically speaking, is not clear from the newspaper reports.

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have been indicted and tried, notwithstanding the fact that Hitler was presumed by all to be dead; he was, in our terms, a D.[98] Now, surely, if punishing the guilty is the only function of the criminal law, Von Papen's suggestion has to be regarded as incoherent. But the proposal need not be so viewed, precisely because there are competing (and supplementing) views of the criminal process, not grounded in punishment or just deserts, from the perspective of which trying a deceased, disinterested Hitler would have made sense.[99] For example, particularly at Nuremberg (and, to a less dramatic degree, in all criminal trials), we are concerned with deterring others from like offenses, staging ceremonies of denunciation and engaging in moral education and development. Moreover (what I presume motivated Von Papen), one could argue that the acts of the other defendants would have been evaluated more justly had Hitler's role been kept more vividly in the foreground.

One can say that the example does not carry very far since, had we tried Hitler posthumously, we would have been doing so for acts committed while he was a CNPP—a moral agent, capable of moral choice, of blameworthiness, and so on. That seems a far cry from trying rivers or rocks, which at no time in their existence satisfy these familiar conditions for criminal responsibility. Indeed, the case is not one I am particularly anxious to brief. (A technologically advanced AI may someday present a more plausible case.) Yet, if only to clarify the conceptual situation, we should recall that not all the elements we associate today with, say, murder, are indispensible to criminal prosecution, many of them having emerged, in fact, rather late in legal history. Everyone knows that there were times when animals—even lower animals and inanimates such as trees—were subjected to criminal penalties, sometimes after elaborate trials. In Exodus, it was provided that an ox who gored "a man or woman, that they die," should be put to death.[100] Plato, apparently carrying forward long-standing notions of Attic law, provided similarly in his *Laws*:

98. *See* R. CONOT, JUSTICE AT NUREMBERG 507 (1983). The prosecution's chief reservation was that naming Hitler "might generate rumours of his survival." Justice Jackson, who had given the idea consideration, ultimately decided that "there was no point in trying a dead man," dropped Hitler as a defendant, and replaced him with Von Papen. *Id.* at 26-27.

99. One may point out that, had we "tried" Hitler, one traditional element of a criminal trial, that the defendant be allowed to respond to his accusers, would have been unfulfilled. But I am not sure that that would have rendered the proceedings something other than "a criminal prosecution" (a problem now of semantics). Presumably, Hitler would have had a lawyer to speak for him, as had Martin Bormann who, although also presumed dead, was tried anyway, and sentenced to death by hanging in absentia. *See* Opinion and Judgment, Nazi Conspiracy and Aggression, International Military Tribunal, Nuremberg, Germany, at iv, 190 (1947); *cf.* MacDonald v. Time, Inc., 554 F. Supp. 1053 (D.N.J. 1983) (libel suit not mooted by plaintiff's death).

100. *Exodus* 21:28.

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"[T]he kinsman of the deceased shall prosecute the slayer for murder."[101] In 1120, a Bishop of Leon was said to have excommunicated the caterpillars that were ravaging his diocese, and in 1565 the Arlesians asked for the expulsion of grasshoppers.

> The case came before the Tribunal de l'Officialité, and Maître Marin was assigned to the insects as counsel. He defended his clients with much zeal. Since the accused had been created, he argued that they were justified in eating what was necessary to them. The opposite counsel cited the serpent in the Garden of Eden, and sundry other animals mentioned in Scripture, as having incurred severe penalties. The grasshoppers got the worst of it, and were ordered to quit the territory, with a threat of anathematisation from the altar, to be repeated till the last of them had obeyed the sentence of the honourable court.[102]

Today, we look back on tales of that sort as relics of a primitive legal system that no one could possibly defend. But why? Even in modern law, the absence of blameworthiness and criminal intent need be no bar to prosecution, as witnessed by the persistence (if not growth) of strict and vicarious liability offenses. And recall that not very long ago it seemed just as mindless to prosecute corporations (which are, in the terms of this article, Ds) as it does to have prosecuted oxen.[103] Indeed, my guess is that the reasons one might offer for proceeding against an ox would look much like those we now give for trying corporations. In neither case are we likely to be motivated by the defendant's "own good."[104] In both cases, prosecuting *the thing* may be viewed as an effective, although indirect, way of modifying the behavior of the people best positioned to exercise control over the instrument (on the one hand, the owners and managers of the corporate bureaucracy and assets, on the other, those best positioned to tether or fence the oxen) without colliding

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101. PLATO, LAWS IX, in DIALOGUES 258 (B. Jowett trans. 3d ed. 1892), *quoted in* 1 E. WESTERMARCK, THE ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS 254 (1912).

102. E. MARTINEGO-CESARESCO, ESSAYS IN THE STUDY OF FOLK-SONGS 183 (1866), *quoted in* 1 E. WESTERMARCK, *supra* note 101, at 254-55.

103. *See* Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21, 22-23 (1957). Note that the Bible provides that, "in the case the oxen shall have proved wont to gore before, the animal's owners thereof shall surely be stoned." *Exodus* 21:79. In contemporary terms, this means the corporate veil would be pierced, and the "equity owners" held personally accountable.

104. Note, however, that people commonly spank dogs "for their own good." I have recommended focusing prosecutorial effort on corporations, rather than, or in addition to, the corporate agents, as part of a process aimed at reforming/rehabilitating the corporate organizational structure. *See generally* C. STONE, WHERE THE LAW ENDS 119-248 (1975). However, I do not suppose anyone would go so far as to argue, as has been done regarding persons, a UE's "right to be punished." H. MORRIS, ON GUILT AND INNOCENCE 45-46 (1976).

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too blatantly with traditional and respected notions of personal responsibility, burdens of proof, and so on.[105]

Proceeding against the thing may, moreover, be a dramatic gesture with educational value. I suppose some such reason partially explains the treatment of pirate ships as defendants. If "she" engaged in piracy, she could be made the subject of an action, quite aside from the fate of those who steered her in sin and who might have escaped capture.[106] In such fashion, the wrongfulness of piracy was dramatized, the ship was specifically deterred from further wrongdoing, and the compensatory aspects of justice were advanced.[107]

And what about *vengeance*? Are we really confident enough about its explanation and legitimation to dismiss it as entirely incoherent as applied to any entity that lacks free will or, at least, a will capable of malice? Perhaps. But concepts like free will are too uncertain, the dynamics that drive our feelings too complex, for one to reject the possibility out of hand. Consider Adam Smith's remarks: "[T]he dog that bites, the ox that gores, are both of them punished. . . . [N]or is this merely for the security of the living, but, in some measure, to revenge the injury of the dead."[108]

For such reasons, we cannot categorically aver that there are no circumstances in which we might plausibly put a D on trial.

SUMMARY

In summary of this brief review of the legal recognition of Ds, let me make clear that I am not claiming that each and every D could (much less should) be put in each and every position the law has carved out for CNPPs. There is a threshold question of intelligibility, policy aside. For each arrangement, there is a question of the form: Could *that* entity be fitted coherently into *that* legal provision? It makes no sense to accord a

105. Some suppose that the corporation can be guilty only in consequence of its agents' guilt, on a *respondeat superior* basis, but this need not be so. Corporate criminal liability may stand upon proof of *the corporation's* guilt, even if charges against all indicted agents are dismissed. *See* American Socialist Soc'y v. United States, 266 F.2d 212 (2d Cir. 1920). There are even statutes that impose penalties only upon corporations, without reaching its agents. *See, e.g.*, Sherman v. United States, 282 U.S. 25 (1930) (Safety Appliance Act held to impose penalties only on common carriers subject to Act, not applicable to officers). *See generally* Stone, *supra* note 54.

106. *See* United States v. Cargo of the Brig Malek Adhel, 43 U.S. (2 How. 210) 91 (1844).

107. Although we must grant that the moral support for the practice will appeal to utilitarian or other homocentric bases, unentangled by any concern for punishing the ship itself.

108. A. SMITH, THEORY OF MORAL SENTIMENTS 137 (1907), *quoted in* 1 E. WESTERMARCK, *supra* note 101, at 251.

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tree the right to sit on a jury, or to make a will. But surely a tree could be the beneficiary of a will,[109] and decisions to cut one down, even by its owner, could be made subject to administrative review.[110] And while the argument for making trees defendants is one that will not root easily, it is at least *conceivable*—and therefore susceptible of evaluation—as evidenced by the fact that it once was so. Holmes reminds us that under the laws of Alfred, if a tree fell and killed a person, it was to be executed, its corpse delivered to the person's kinsmen to chop up and put to revengeful and beneficial use at the hearth.[111]

The basic point I want to carry forward is this. As concerns the positioning of *things* in law, making them legally considerate in various ways, a test of coherence leaves us much wider latitude than is commonly recognized. However, to say that any particular arrangement is *coherent* is not to say that it is *wise*, much less *morally right* or *morally welcome*. Indeed, each of the many options has costs that are easy to enumerate: the inflexibility that comes from assigning entitlements that will be practically inalienable, the added court burden—perhaps even the erosion of judicial credibility—should judges be regarded as subordinating identifiable human interests in favor of things that cannot care. But whether these costs are too great in any situation turns on another inquiry—the moral dimensions of our subject, to which I shall now proceed. Which of the intelligible arrangements, if any, are defensible, and on what grounds?

III. THE DISINTERESTED ENTITIES IN MORAL THOUGHT

With these observations on how Ds *could* be fitted into law, let us proceed to the more fundamental, and far more complex, questions of morals. Supposing that, as a matter of intelligibility, we could adjust the

109. Whether present law would sustain a trust (presumably an "honorary trust") for maintenance of a tree is unclear; I have heard of such arrangements, but cannot find in the law reports any legal traces, either sustaining the arrangement or forbidding its implementation as "capricious." *See also* A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS §§ 124.2-.7 (1960) (honorary trusts for animals, monuments, saying of masses, etc., often enforced; but, in general, bequests to (what I have denominated) Ds are presumed to fall as capricious). However, a trust established to maintain a tree "for the ornament of a town" might be for a valid municipal purpose, i.e., be upheld on an instrumentally homocentric basis. *See id.* § 373.

110. The city of Carmel, California employs a city forester to oversee the village's 37,500 trees, all of which are filed and cross-referenced on a computer in support of implementing a local "ordinance prohibiting the cutting down or radical trimming of trees on private property without a permit." N.Y. Times, Aug. 15, 1982, § 10, at 17, col. 4.

111. O.W. HOLMES, THE COMMON LAW 19 (M. Howe ed. 1963). At a later period, under Edward I, a tree from which someone fell to death was deodand, that is, forfeited to the Crown, even if its owner (if it had one) was blameless. *Id.* at 23.

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legal system to provide various disinterested entities recognition in the law—that is, fit them into the legal framework as legally considerate—why *ought* we to do so? What would an argument in favor of any such legal arrangement look like? And, beyond the particular question, "How ought Ds to be accounted for in law?", on what basis ought they be accounted for in moral thought generally?

A. ARGUMENTS BASED UPON HUMAN UTILITY AND HUMAN RIGHTS

As we saw in part II, it is an all too common mistake to suppose that all questions of legal *considerateness* boil down to questions of legal *rights*. In this part there is an analogous and compounding error to confront: to suppose that the only basis for arguing that A has a legal right (to or from B) is to demonstrate that A has a moral right (to or from B). Here, too, there is a fragment of truth on which the mistaken generalization rests. Some legal rights associated with ordinary humans—including some of the most fundamental, such as freedom of speech and freedom of worship—are connected with strong claims of moral right whose recognition antedated the constitutional provisions that secure them. With such an image in mind, there is a temptation, when considering whether an animal or tree or future human should have a legal right, to suppose that the proponent has the burden of demonstrating that the entity has some independent moral right underneath.

But this need not be so. One perfectly plausible moral basis for making Ds legally considerate, even according them legal rights, is when doing so is calculated to advance human welfare. Such a proposal can be carried through quite apart from whether the D can be shown to have an independent moral right, and, indeed, quite apart from whether it is even of any independent moral interest. Corporations, for example, are accorded all sorts of legal, even constitutional rights, operationally distinct from the rights of their members. This is a practice that has the support of persons who would not argue that corporations are themselves moral agents to which moral rights and duties can be ascribed. To *justify* positioning corporations as holders of legal rights (and bearers of legal liabilities), one need go no further than showing that a regime in which corporations are so positioned is preferable to one in which they are not, preferable in terms of the beneficial consequences to contemporary humans. These consequences are ordinarily deemed superior for utilitarian reasons, such as creating a more favorable business environment for

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capital accumulation and assuring lower transaction costs for people engaged in commerce. But one might place the legal recognition of corporations on some nonutilitarian, yet still purely human-oriented moral footing, as well—for example, that taxing corporations conduces to a morally superior distribution of wealth, or that providing fourth amendment rights to private corporate associations such as the NAACP advances social interests otherwise inadequately protected.[112]

Similarly, one can support the legal personification of many Ds (providing for suits in their names, etc.) because it is the most sensible way of promoting *our* ends, without ever reaching questions about whether any independent value (moral rights or whatever) attaches to the D, as such. A legislature, averse to the risk of toxic wastes on humans, might be well disposed to create a guardian-enforced right in bodies of water to enjoin toxic-induced changes in *their* status quo, at a threshold before an irreversible hazard to humans has become proveable. This would be a system in which Ds were made *legally* considerate;[113] but it does not presuppose their being *morally* considerate. To supply moral warrant for the arrangement, one need not look beyond a sheerly conventional utilitarian calculus. Similarly, someone persuaded that among basic human moral rights was the right to a clean environment could well support the assignment of legal rights to the environment simply as a means of securing the moral rights of persons.[114]

B. Other Bases for D Legal Considerateness

There are many illustrations of this sort, where making a D legally considerate, endowing it with *its* legal Advantages that preserve its intactness or ideal essence,[115] can be regarded as instrumental to the advancement of claims grounded in ordinary CNPP rights and interests, where those rights and interests are conceived and calculated in the most straightforwardly familiar, homocentric ways. Most people, I suspect, are prepared to consider the problem in those terms, and to reform legal and other social arrangements to the extent the proposals demonstrably

112. *See* NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1956); *see also infra* text accompanying notes 312-23 (suggesting moral considerateness for a tribe independent of moral considerateness for its members).

113. That is, while the legislative *motive* for establishing the rule would be human benefit, the focus of proof within the legal system would "stop" with the state of the D; in this sense the D, and not persons affected through the D, would be legally considerate.

114. Consider how the "natural right" of the riparian landowner produced a legally enforceable body of rules assuring that the stream continue its "natural flow." *See* S. Powell, Real Property 781-83 (P. Rohan ed. abr. 1968).

115. *See supra* text accompanying notes 75-95.

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inure to the benefit of contemporary (or, slightly more problematically, future)[116] humans.

The falling out occurs at the next step: where it appears that we are being asked to spare wilderness areas, rivers, and what-not (and thus to forego timber and living space), not from consideration of our interests understood as the set of individual preferences integrated into a social welfare function, but from consideration of *something else*. The objection is not just that such sacrifices are unwarrantable. More severely, it is common to feel that a moral argument aimed at justifying sacrifices in collective welfare from consideration (somehow) of things devoid of interests is not even *intelligible*. There is no "something else."[117]

The objection might be put this way. A moral dilemma grows out of, and operates to resolve, conflicts. All conflicts are conflicts of interest. We might have conflicts of interest among ourselves *in regard to* a particular river. But this means that we would protect a certain state of the river to the point, but not beyond the point, that our collective interests *in it*, somehow compromised among ourselves (by whatever collective choice rules prevail), warrant. But the river has no independent interests.

Recall that in our discussion of law, it was possible to finesse the lake's lack of real independent interest by presuming that the law-making body would mandate some particular state of the lake, S, to be its legally protected state. Legal interests and legal harms are what the law says they are. But when we step back to put ourselves in the position of legislators, and ask what we might consider to arrive at those standards, *other than our interests,* there is a corresponding question that definitions cannot stifle: How, not in legal fiction, but in credible fact, can any legal position we put the river in make *it* better or worse off? The implication, our critic will claim, is that any apparent conflict involving rivers is illusory.

Whatever truth there be to the claim that only persons have interests, it is also misleading, if taken to disparage the moral considerateness of nonpersons. Of course, to speak of a moral dilemma, there has to be a conflict felt: an interest that tugs one way, and an interest that tugs the other. (That much is inherent in a dilemma.) But there is no reason why the conflict cannot be a conflict within a single person. The "conflicting

116. *See infra* text accompanying notes 130-36.

117. Or, as P.S. Elder puts it in his criticism of *Trees,* with some debt to Gertrude Stein, "When you get there, there's no *their* there." Elder, *supra* note 37, at 288 (emphasis in original).

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tugs of interests"—so far as that is required—may be one's own. Indeed, if morals are to be intelligible, we must take special care that our talk about interests (and preferences and utility) allows for a conception of conflict between what we take to be our interests *before* carrying through a moral analysis, and what we take our interests to be *afterwards*.

To illustrate, imagine a businessman hastening on his way to a meeting, who sees along the roadside the proverbial baby drowning in six inches of water. If he does not stop to save the baby, it will drown. His initial inclination is to hurry past, for if he stops, he will forego the final opportunity to execute a favorable contract. He then thinks about certain other things, including the value of the human life expiring in the water, the prospective parental grief, the community's legitimate expectations, and so on. He saves the child.

How shall we analyze the businessman's actions in terms of his interests? In some perfectly defensible sense of the terms, we might say that his interest was to save the baby, that to do so was what he preferred or was of more utility to him. But if we elect this manner of speaking, we obscure the very process we are trying to illuminate: how moral reasoning contributes to amend our initial preferences into our morally reflective ones. To preserve the distinction, we do better to say that our businessman recognized as his *initial* or *utility preference*[118] signing the contract (sacrificing the child). But after moral reflection about what he ought to do, he reached a *morally corrected preference*: to save the child (foregoing the contract).[119]

This distinction is vital if we are to carry forward the notion of a nonhomocentric morality of actions touching Ds. Return to the question of damming a wild river. Ultimately, the preferences the decision reflects will be our own, not the river's. That much is true, trivially. Only persons, certainly not rivers or fish, decide under moral influence. The real

118. Initial and utility preferences are not interchangeable. In our illustration, the businessman's initial inclination may have been dominated by nonutility considerations, such as the moral force of a promise made to the other party to attend their meeting on time. I am construing every element bearing upon the decision as initial (real chronological sequence aside) to the point that influence is added by consideration of the child's jeopardy and the agent's obligations toward the child, the community, and so on, in ways we intuit to raise moral considerations.

119. J.C. Harsanyi uses a comparable strategy in conceiving each individual to hold two sets of preferences, his "subjective preferences," defined as his preferences as they actually are, and his "ethical preferences," which must satisfy the additional characteristic of being "impersonal." Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 315 (1955), *discussed in* A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 141 (1970). Sen examines the connection between Harsanyi's concept of impersonality and the more familiar notions of universalizeability and fairness.

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issue regards how that decision is reached. Surely, we will calculate the river's utility to us. Presumably, that utility would be estimated by reference, first, to the consumption and use values of the river in each alternative state. (How do the revenues to be gained through electricity and irrigation by damming the river compare to the loss of revenues from impeding barge traffic?) Next, we would add a "shadow price" to account for the fact that not all the river's utility can be captured in markets. That is, many of the benefits of a river are so far-reaching and diffuse that not all those who benefit can be excluded from, and therefore forced to pay for, the benefits each derives. Examples are the nonmarketable benefits associated with recreation and aesthetics. The "shadow price" aggregates what people *would* sacrifice in dollar terms to preserve such benefits, if they were honestly to reveal their preferences and could be made to pay for them.[120] It is hard to imagine anyone considering the damming of the river who would dispute the relevance of those calculations.

To clarify what *is* in dispute, let us call the conventional shadow price of the economist the "base shadow price" to distinguish it from what I will call the "morally corrected shadow price." The market value plus the base shadow price measures what I referred to as utility preferences, e.g., all value that would be ascribed to the river *other than through conscious moral reflection of any other sort.*[121] The "morally corrected shadow price," if—for this is our question—there is one, refers to

120. For example, it would include the beauty of the river, to the extent that people would pay to view it, if they would otherwise be excluded from viewing it. Larry Tribe introduces shadow pricing in a similar context, but it is not clear that he draws a sharp line between (i) the conventional welfare economist's usage, which takes into account what those who determine market prices—fully informed of their tangible benefits—*would pay* in fact if they could be forced, and (ii) what morally *ought to be paid,* whatever the collective preferences. *See* Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law,* 83 YALE L.J. 1315, 1319 (1974). The distinction collapses if one is a conventionalist in morals, but is critical if one rejects conventionalism, as I do. *See infra* note 188. Tribe does suggest cultivating experts on "fragile values." Such experts could include independent moral observers, moral "correctors," as I use the term, insofar as they seek to operate from a moral viewpoint such as those in the text following; on the other hand, if they are simply called upon to improve our estimate of how present and future persons, fully informed of the facts, would collectively (in fact) value the objects in question, they would be operating in the service of conventionalism. The former enterprise, but not the latter, accords with pursuing my notion of "morally corrected shadow price" in the text immediately below.

121. The definition is not without problems. It emphasizes conscious valuation. What of the person who so instinctively values the continuance of the river that the value is a settled part of the person's intuitive utility function? The answer (as best as can be given) is that, as with many distinctions in this area, I am supposing an ability to distinguish, through introspection, what we desire from considerations of our utility in some sense, from what we want (as Kant would put it), "from duty," the "influence of inclination" to be disentangled by some sort of thought experiment, and set

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the utility preferences adjusted[122] as a consequence of further moral reflection, to express the value which on some moral view we *ought to* be entering into our analyses, whether conventionally recognized or not.

Granted, by recasting the issue in this terminology, we do not provide an answer. But at least we get some productive focus on what the discussion is, or ought to be, about: *is there any moral argument touching upon a D that can support a rightful modification of the market plus base shadow price, specifically so that a legal arrangement not warranted by those measures of value—because we would be sacrificing "too much"—would yet be warranted by some morally corrected price?*

The skeptic's response—that there is nothing else to reflect about—goes something like this. Agreed, that where we are considering relations with ordinary persons, it may be legitimate to amend our original utility preferences by adopting a corrective moral viewpoint.[123] But that is possible because persons, we all agree, are morally considerate. Some such corrective procedure *may* even apply to modify our relations touching higher animals such as nonhuman primates and whales. They, too, may be morally considerate. "But," it will be said, "no such modification of our thoughts concerning Ds is appropriate or even conceivable. Through legal fiction, you may be able to make your Ds legally considerate; but there is no moral legerdemain through which you can make them morally considerate."

Let's examine this position.

We can grant, at the start, that Ds utterly lack any number of properties deemed significant in the literature: the capacity to form projects, the power to exercise moral choice, a sense of justice, even the capacity to understand what is happening to them. A person whose initial inclination is to do X can be persuaded not to do X because X is the wrong thing to do. Such a dialogue is out of the question with Ds, which is why a volcano and a rampaging river may do harm, but they cannot do wrong. All this can be expressed by conceding that, unlike humans, Ds

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aside altogether. *See* I. KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 68 (H. Patton trans. 1964). To develop this ability is, I take it, one of the aims of moral education.

122. Conceivably the adjustment could be downwards as well as upwards. After initially valuing a D, we might, on further reflection (of what it symbolized, of its ugliness, of how its existence disrupted the realization of a valid human or ecological ideal) determine that it should be (morally) valued at less than what has been conventionally supposed.

123. The possibility of such a correction would not be conceded by a utilitarian so doctrinaire as to suppose utility judgments are never constrained by anything else. My impression of philosophy today is that such folk are an endangered species. *See* Scanlon, *Rights, Goals, and Fairness*, 11 ERKENNTNIS 81 (1977).

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are not moral agents, not holders of preferences correctable by ethical reasoning. But it is a long leap from the fact that persons are *the only audience* of moral discourse, and therefore the only prospective *obligors,* to the inference that only CNPPs have *moral relevance,* and therefore comprise the only class of prospective *obligees.* It is not, let me grant, an utterly irrational leap. It can be fortified if one adds an additional premise, something like: "You have no obligation to behave morally except towards those things capable of responding in kind to you." Some philosophers seem to endorse such a restriction, suggesting that the ambit of our obligees is conditioned by a potential for reciprocity.[124] But such a restriction is too confining. It would dismiss the moral considerateness not only of natural objects, animals, and the dead (Is there nothing to be said for Antigone?), but also of the many humans, such as the deformed neonatal and the comatose, who lack the capacity to exercise moral choice, and the spatio-temporally remote, who cannot exercise it in our favor. In sum, it is hard to maintain that being a *moral agent* is a recognized requirement of being a *moral patient.*[125]

There is a second line of skeptical response which recognizes the agent-patient distinction, but would dismiss Ds for failure to be *holders of moral rights.* This is a requirement that finds favor with those disposed to support obligations towards abnormal humans and animals, which, even if not possessing all the properties requisite for full moral agency, may yet "hold moral rights." Although there is considerable dispute as to what *that* requires, most of the rights literature appears to assume, at the least, having some sort of interests is a prerequisite.[126] Ds, by definition, do not have interests. Therefore, it can be argued, regarding any revision of our thinking touching Ds, one of the routes most

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124. Jan Narveson carries out the implications of such a position as a limit to our obligations with respect to animals. Narveson, *Animal Rights,* 7 CAN. J. PHIL. 177 (1977), *criticized in* T. REGAN, THE CASE FOR ANIMAL RIGHTS 151-56 (1983); *see also id.* at 165-74 (an analysis of John Rawls' views: although animals are owed indirect duties, such as the duty not to be cruel to them, we do not owe them duties of justice because being a moral agent is a necessary and sufficient condition of being owed duties of justice). John Mackie is a bit ambivalent, suggesting that his reciprocal-advantage approach "would seem to provide for no duties towards non-participants," but that, by taking "human flourishing [over time] as the foundation of morality," it "must include elements that look after the well-being of children and that ensure some respect for the needs of future generations." J. MACKIE, ETHICS 193 (1977).

125. The terms are favored by Tom Regan. *See* T. REGAN, *supra* note 124, at 151-56.

126. *See* R. FREY, INTERESTS AND RIGHTS—THE CASE AGAINST ANIMALS 18-27 (1980); A. MELDEN, RIGHTS AND PERSONS 198-223 (1977); Feinberg, *The Rights of Animals and Unborn Generations,* in PHILOSOPHY AND ENVIRONMENTAL CRISIS 51 (W. Blackstone ed. 1980); McCloskey, *Rights,* 15 PHIL. Q. 115 (1965).

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familiar to contemporary moral philosophy—invoking a rights discourse—appears to be blocked.

The question whether we can raise on behalf of a D a moral right (which I doubt) or something that plays an equivalent role in moral discourse (which is possible) is one to which I will eventually return.[127] But the answer is not dispositive of the issue here, which concerns the D's *moral considerateness.* Just as we saw, in part II, that not all legal considerateness can be boiled down to legal rights (and legal duties), so not all moral considerateness can be expressed in terms of moral rights (or even moral duties). Consider the conventional good samaritan dilemma, above. We need not reach the question of whether the child in jeopardy has a *right* to the passerby's rescue, or even whether the passerby has a *duty* to the child, in order to say that it would be *morally commendable* for the passerby to rescue the child, or that the passerby would be *advancing some good.*[128] Similarly, to support the welfare system, one need not argue that the poor have some sort of moral right to welfare, although it is sometimes put that way.[129] The laws may be defended as good or as morally welcome, however this good might be expressed, e.g., in terms of conducing to a better society, or as rightly recognizing the considerateness of those benefited. In the same way, to support placing a D in a certain legal position, one is not required to prove that the D has a moral right to be so situated. There is prima facie support for the arrangement if one demonstrates it is morally better to so amend the law, i.e., that the amendment would advance some good.

This drives our skeptic to a third, fall-back position: even if some notion of "good," not "rights," is made the key to moral evaluation, we have not detached ourselves from *interests.* Any moral revision of our thinking still requires an accounting of the interests of the things on whose behalf our disposition is to be revised—else, where lies the good in sacrificing our more obvious desires? If we discern some good in improving the lot of the poor, even at some sacrifice of general welfare, it is

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127. *See infra* pp. 63-66, 127-40.

128. This statement is obviously true of a pure utilitarian, who holds that the comparative utility of states controls, and that therefore rights and duties are dispensable. But I go further and suggest that the status of moral rights, even in nonutilitarian theories, has been overblown. In this respect, at least, I find myself in agreement with R. FREY, *supra* note 126, at 168-71 (concluding his argument that animals do not have rights with observation that humans do not have them either).

Note that the moral commendability of rescuing a stranger would provide prima facie support for a law making it a legal duty to rescue.

129. The poor who had fallen beneath some level of poverty might, indeed, have a right to relief; I will not argue the point. I am only saying that the level of relief which is *good* is not bounded by the level (if any) to which the poor have a *right.*

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because we can identify some human interests that have been advanced. On the other hand, if we are asked to make a collective sacrifice in consideration of a river, and are told to exclude from our thoughts reference to the CNPP interests affected thereby, where is the good in it to be found? Indeed, what are we being asked to think about?

This, I take it, and not "Is a D a moral agent?" or "Can a D have rights?" is the real and really tough issue. Is it possible to devise any coherent and defensible account of how moral reflection regarding things without interests of their own, not including our potential pleasure from those things, can serve to amend our initial preferences? Let me sketch six theoretical strategies from which such a viewpoint could, I believe, be developed.

1. *Appeals through Future Generations*

The first approach may sound almost like a confession and avoidance—a confession that a "real" D-regarding argument cannot be made, and an avoidance by diverting appeal through the anticipated interests of future generations. Even if Ds lack interests, future generations may have an interest in at least some Ds. Hence, it seems no trick to derive a present reason for modifying some contemporary, D-affecting conduct.

This argument offers a facially plausible prospect of motivating and justifying our D-affecting actions without wandering outside the familiar framework of welfare-connected theories; we merely pool *their* interests with *ours*. Unfortunately, much of the attractiveness is deceptive, for on close inspection the future generations route turns out to be neither easy nor, in the last analysis, a way around the morass about D considerateness.

Some of the difficulties stem from our ignorance, particularly as we project to futures that are increasingly remote. We do not know (i) who—what sorts of, or how many people—will be living in the distant future, (ii) what effect contemporary action, such as the destruction of a habitat, will have on them, in view of their alternatives, or even (iii) what their preferences will be, assuming that we are committed to respect their preferences in some degree.[130] For all we know, our descendants will be

130. The factual uncertainties have been deemed so great that they have been urged as a basis for discounting the interests of remote futures entirely. *See* Passmore, *Conservation*, in RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS 49, 51 (E. Partridge ed. 1981) ("The uncertainty of the harms [to future generations] we are hoping to prevent would, in general, entitle us to ignore them . . ."). Martin Golding, putting forward the sharing of a common conception of the good as a basis for moral relations, discounts the obligations owed to the more remote

content to while away their time playing the progeny of Pac Man, and will consider us, their ancestors, at best quaint for having derived pleasure from the idea of there being wild lions and untamed rivers that almost none of us ever actually went off to see.

But even if we set aside ignorance about facts, serious problems of value remain to be dealt with. At the threshold, there is the question, not unproblematical, of the considerateness of future persons. Why ought we to subordinate *our* welfare for *theirs*, for creatures we shall never meet, who are in no better position to return the favor than a contemporary river?[131] And even if we acknowledge the rightness, in principle, of doing something on their behalf—for they will have interests—there are the questions of *what*, and at *how much sacrifice*? Establishing principles for intergenerational comparisons is complex. Does anyone seriously propose to count the interests of each future person equally with a contemporary's—to make of all humans through time one big moral community? Such a commitment has to deal with the fact that, because there are potentially so many of *them* relative to the mere four billion of us presently on the planet, the aggregate weight of their interests will simply swamp ours, effectively leaving our wants to count, in the final analysis, for naught. There is no way out through straightforward comparisons of utility; there are questions of *justice* that cannot be ducked.[132]

Moreover, even if we do clear these hurdles, concluding that we are obligated to account for their interests somehow, i.e., according to some discount rate, there is a further error in supposing that the only remaining task is that of predicting their tastes. In making that prediction, we are at least dealing in facts, although facts of an uncertain kind. The task is harder, because those very tastes (hence, their interests) are destined to be affected by the legacy we leave them.[133] Therefore, even if we are

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future generations on the grounds that we are increasingly less confident about "what we ought to desire for them." Golding, *Obligations to Future Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS, *supra*, at 61,70.

131. "Why should there be obligations to future generations? We have entered no social compact with them . . . . Under any moral theory, why should there be obligations to nonexistent persons?" Stearns, *Ecology and the Indefinite Unborn*, 56 MONIST 612, 613 (1972). Indeed, there may be more to be said for a sacrifice in consideration of the river than of the remote future person. We begin our consideration of future persons confronting the fact that, while they may be thankless for some of what we do, they will be obligated to us for their technology, their culture, their very lives. We, on the other hand, are obligated to them for nothing. On behalf of the river, one can at least say it has been a source of benefit for us that we have done nothing to create.

132. *See* T. PAGE, INTERGENERATIONAL JUSTICE AS OPPORTUNITY (California Institute of Technology Social Science Working Paper 389, June 1981), *reprinted in* ENERGY AND THE FUTURE 35 (D. MacLean & P. Brown eds. 1983).

133. *See* Tribe, *supra* note 120, at 1327.

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committed in principle to account for their interests, we cannot, in discharging our obligations to them, passively rely upon our best possible projection of their preferences. We are drawn outside the realm of predicting facts about them, and forced to construct some ideal-glossed image of them, of what they *ought to be*. And that, of course, implicates us in a matter of normative choice. Ought they to be the sort of persons who prefer real trees or plastic trees[134]—or are we willing that they be indifferent? This is not a question that can be answered solely by regarding future generations. It draws us into regarding—really thinking about and valuing—both future persons and Ds, as best we can.

By underscoring these complications, I am not aiming to reject the future generations strategy, which many readers will consider my most (some will say, my only) plausible alternative to appeals regarding Ds that make them wholly instrumental to CNPP interests. But as we consider the problems—even paradoxes—that come from trying to fit future generations into a traditional welfare mode, three points emerge. First, many people who are prepared to take the future into account—who think of themselves as regarding future persons as morally considerate—will, upon analysis, discover their real concern is less with treating future persons indifferently from ourselves, as with *advancing a good*; that good is admittedly hard to define, but only with considerable awkwardness can it be forced into the mold of an extended utilitarianism. Second, whichever way future-regarders conceive themselves—as advancers of some hard to define good, or as extended universe welfarists of some complex sort—we should not expect to extract more in the way of moral guidance than general maxims. One such maxim is Brian Barry's suggestion that we might have an obligation not to narrow their "range of opportunities" to something less than ours.[135] Another is Joel Feinberg's position that we are obliged, in all events, not to hand them over the moral equivalent of a used-up garbage heap.[136] I am not disparaging principles of this sort, which, though vague, form the basis of saying *something* about constraints on actions touching at least *some* Ds—not to exhaust the land, not to eliminate life in the oceans, and not to destroy the atmosphere. But judgments on that level may not satisfy the many persons whose intuitions about our D-affecting conduct require a finer-grained moral

134. *Id.*

135. Barry, *Circumstances of Justice and Future Generations*, in OBLIGATIONS TO FUTURE GENERATIONS 204, 243 (1978) ("the overall range of opportunities open to successor generations should not be narrowed").

136. Feinberg, *supra* note 126, at 64-65 ("Surely we owe it to future generations to pass on a world that is not a used up garbage heap.").

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guidance. How do we quiet our moral unease about ruining particular rivers and forests, actions that seem morally problematic, but which would not have draconian effects on remote futures? And third, carrying through the problem of exogenous tastes (the fact that their tastes will be influenced by what we give them), we realize that one whose moral stance is future-person regarding has also to be, Janus-faced, a D-regarder, as well. That is to say, we cannot carry out a commitment to care for future persons without regard to the question: What things do we want them to value and disvalue?

2. *Anthropocentric Idealism*

To generate concern for Ds through future generations (above) is to retain human *wants* as the touchstone of moral analysis, at least in form.[137] That is, in considering how far we ought to sacrifice our preferences for theirs, there is an implicit assumption that, at least as an ideal, wants are the basic given moral data, the currency for whatever compromise justice dictates. But surely that is not the only foundation on which moral reflection can be based. Historically, few moral theories have accepted one's wants as either given or good without qualification. More commonly, our desires have been regarded as a variable, subject to domestication by some dominating virtues. The self-interest in which the rational person acts—if it must be put that way—is our moral self.

To make a place in moral philosophy for virtue does not, in itself, place our conduct towards Ds on a moral footing. It is one thing to enlist a character ideal to support the judgment that kicking dogs is wrong. But it is not apparent why anyone should pass harsh judgment upon the character of someone who kicks a rock. In fact, one reason why character-based theories have appeal is that while they temper the crudest welfare strategies, they do not break with welfare entirely. The virtues that most readily come to mind—benevolence, kindness, justice—are regardful of the *interests* of others. In formulating good character—in a listing, if you will, of the virtues—is there some basis to allow for the agent's conduct with regard to some Ds? An affirmative answer is what I will call the Anthropocentric Idealist Strategy.

Anthropocentric idealism can take two distinct routes. The first is to take the position that to conceive of everything outside one's self as mere resource for one's own gratification (whether the "thing" be a man or a woman, a slave or a river) distorts and constricts what is worthy in

137. At least in form, because, as I have indicated, I doubt that we can express an acceptable coherent account of wants without some, possibly suppressed, appeal to ideals.

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human character. Sheer, unmoderated use of other things is akin to avarice, gluttony, and lust. The second route is to hold that there are specific virtues for the attainment of which some specific Ds are instrumental, perhaps even necessary. This route continues to find in certain Ds a moral considerateness based upon what might be called a reflected basis.

Whichever route is pursued, we have to proceed with the frank recognition that, with respect to Ds, many virtues, cruelty and uncivility, for example, do not apply. Thus, any moral relations with Ds which Anthropocentric Idealism can substantiate will, of necessity, be less constricting and detailed than those we have with persons, even with animals. Nonetheless, it is not beyond the reach of an imaginable Anthropocentric Idealism to develop and defend some relevant ascriptions for conduct that touches upon lakes, species, or pretty vistas. While one cannot be *brutal, vindictive* or *sinful* towards them,[138] one can be *callous* or *unfeeling*. I agree with Joel Feinberg that we should consider it wrong for a person to crush a beetle encountered in the wild, or to extinguish a species (even on the assumption—always empirically problematical[139]—that the survival of the species would constitute no harm to anyone).[140] But I am not satisfied simply to leave the misconduct labelled, as Feinberg does, "a free-floating evil"—"free-floating" because we cannot ground it in any conventional notion of harm. If we are committed to work those intuitions into a coherent morality, we do better to ground it in a notion of human virtue that accounts for, and provides some guidance in regard to, some D-affecting conduct.

It is not farfetched to suggest that there is a human ideal which the beetle crusher does not attain.[141] Nor is it idle to suggest that a person who has been exposed to—and reacted to—the grandeur of great valleys or the majesty of mountains is *better* for it, than if he had passed the time playing pushpin. This position is akin to the claim that fine character requires fine art; so that the wanton destruction of a beautiful art work, even if the majority prefers it destroyed, or even if there is not a single

138. It is interesting to consider how far from interhuman conduct the concept of "sin" may extend. *See Japan and the Sin Against Whales*, N.Y. Times, Aug. 15, 1984, § 1, at 22, col. 4 (arguing for reform in the whale treaties from consideration of whales).

139. *See* Sterba, *Before You Squash that Bug, Be Sure it Isn't One We Need*, Wall St. J., Oct. 5, 1983, at 1, col. 4.

140. Feinberg, *Legal Moralism and Free Floating Evils*, 60 PAC. PHIL. Q. 122, 135 (1980).

141. Kant condemned, "[A] propensity to the bare destruction . . . of beautiful though lifeless things in nature is contrary to man's duty to himself. For such a propensity weakens or destroys that feeling in man which . . . does much to promote a state of sensibility favorable to morals . . . ." I. KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE 106 (J. Ellington trans. 1964).

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person who protests, might nonetheless be judged by an independent moral observer to be prima facie wrong.[142]

3. *Entity Idealism: The "Intrinsic Good" Strategy*

Both the theories I have sketched thus far can be classed as fundamentally anthropocentric. The first is anthropocentric in orienting towards the wants of future humans; the second in orienting towards some ideal of human virtue. Both invite us to revise our original judgments by training our thoughts on Ds. They are, in that sense, D-regarding. But in each case, the claims for modifying conduct in regard to Ds are ultimately founded on the well-being (including spiritual well-being) of persons.

A more radical, because less anthropocentric, viewpoint[143] orients towards things themselves, or some quality the thing embodies or symbolizes because that thing or quality is a good *intrinsically*. By this it is meant that the thing is to be valued not because of any antecedents (that God made it) or consequences (that because of it people will be more happy or more virtuous). The thing is valued simply because the universe is better for containing it.[144] To illustrate, using the preceding strategy, someone would condemn the destruction of an endangered species because to do so would retard the evolution of some human virtue. Under the strategy now being examined, the destruction would be condemned because the existence of the species is a good, and its destruction wrong, irrespective of consequences for the virtue or welfare of humans or for anything else.

A popular way to dramatize this strategy is to imagine a last-person-on-earth scenario. H, the sole surviving human of a nuclear catastrophe, is about to die. At the last moment before expiring, H can, by pushing a button, destroy some other of the surviving *things*: the Mona Lisa, a forest, the Grand Canyon, the last remaining herd of elk, or the elements without which the ecosystem of the oceans will collapse into lifelessness.

142. Of course, insofar as such an argument echoes Kant's position, *supra* note 141, that abuse of nature violates our duties *to ourselves*, it will be regarded leerily by environmentalists on the same grounds animal advocates raise against "indirect duties," viz., that the position of the "thing" is made precariously contingent upon notions of human virtue.

143. All moral viewpoints are anthropocentric in the fairly trivial sense that it is unavoidably humans who, as the moral agents addressed, are valuing. But it does not follow from this that the object of our valuing is, in all cases and in all ways, simply *our* lives and *our* conditions.

144. For an undertaking of this style, see Regan, *On the Nature and Possibility of an Environmental Ethic*, 3 ENVTL. ETHICS 19 (1981), *discussed in* Pluhar, *The Justification of an Environmental Ethic*, 5 ENVTL. ETHICS 47 (1983).

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Is there anything a moral observer might say about the rightness or wrongness of taking any of these things with H—here granting, as we must, that appeal to the welfare of succeeding humans is unavailable?

So far as intuitions go, I think that most of us will agree on some answers: that, for example, H's utterly wanton destruction of the elk and forest would be wrong. But is there anything in the notion of invoking intrinsic goods to provide some foundation for these intuitions? And will it carry far enough to substantiate the considerateness of, say, the Grand Canyon?

In common with other moral viewpoints, it is easier to think of something the moral observer might say with respect to the animals, in whom one can more readily identify intrinsic goods familiar from conventional moral theories: a life that can be snuffed out, a plan that can be frustrated, a nerve that can transmit pain. Anyone determined to support the considerateness of a D confronts the task of identifying some comparable basis, some intrinsic good in something, that cannot be killed, frustrated, or pained. That seems hard to accomplish without assuming a somewhat dogmatic stance to escape saying "X is a good because . . . X is a good." Yet, all moral philosophies have their hardest going at the same starting point, the identification of the basics, the intrinsic good, or goods it will champion. Utilitarianism adopts a particular psychological state, pleasure, as the intrinsic good—although not, as we know, without controversy. Other philosophies adopt other goods, e.g., Kant's good will. Is it conceivable that we might defend as an intrinsic good something (or some attribute) without feeling, will, or interests?[145]

There is at least one reason to launch such a brave venture with heart: Hume's classic caution that we cannot derive what *ought* to be from any description of what *is*. From the fact that a person has some quality (sentience, autonomy), we cannot demonstrate, without introducing some often unexpressed or ultimately unprovable body of principles, that therefore we *ought* to be just to him. It is equally true that, from the fact that X lacks any property, e.g., interests and preferences, we cannot conclude, without more being said by way of moral theory, that we have therefore no obligation regarding X, or that X is of no conceivable moral concern whatsoever.

145. Query: How closely does this describe the impersonal God of Spinoza? The wise man was to love God and seek to be united with God, *see* S. HAMPSHIRE, SPINOZA 170 (1951), but God had no personal attributes, e.g., interests or feelings, *see id.* at 30-50.

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Of course, it is one thing to say that X's lack of interests does not entail its moral inconsiderateness. It is quite another to establish the positive, that there are other properties of a D that, in alliance with a yet-to-be identified moral world-view or principles, justify their independent moral regard. We still face the basic question: Could sacrifices out of regard for any other properties (other than the thing's life, its rationality, etc.) enjoy comparable and deserved support from our moral intuitions?

As far as intuitions go (putting aside whether those intuitions can be, or need be, fleshed into a body of general principles) the answer, I do not hesitate to say, is yes. The environmental movement is testimony to the widespread feelings of support for nature's worth, even when those sentiments do not prevail. And in many instances, enough concern is being mustered, e.g., for wilderness areas and endangered species, that laws are passed protecting them from disturbance. (A bumper sticker recently appeared in Southern California proclaiming "I save water for Mono Lake.") It is true that conservationists, if pressed to justify their sentiments, incline to adopt welfare language ("so others can enjoy it"), often with a future generations gloss. But that, I suggest, is not a true reflection of—indeed it handicaps the development of—the genuine moral feelings that lie behind these movements.[146] If I may permit myself just one passage from the original *Trees*:

> When conservationists argue this way to the exclusion of other arguments, or find themselves speaking in terms of "recreational interests" so continuously as to play up to, and reinforce, homocentrist perspectives, there is something sad about the spectacle. One feels that the arguments lack even their proponents' convictions. I expect they want to say something less egotistic and more empathic but the prevailing and sanctioned modes of explanation in our society are not quite ready for it.[147]

One way to ready the society for another, possibly more valid and perspicuous way of reasoning about these problems, is frankly to confront and examine the view that some Ds merit moral considerateness in virtue of some intrinsic good they embody.

Now, an intrinsic goods strategy is headed for unnecessary controversy if one insists that the properties to which our attention is aimed can be intelligible without reference to humans. For example, if one maintains that beauty, in whatever it resides, is an intrinsic good, then the

146. *See also* Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 209-12 (1974).

147. *Trees, supra* note 1, at 490.

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character and feelings of the valuer, the beauty finder, are obviously implicated. Nonetheless, when someone describes a lake as beautiful, what he is describing is not his own character and feelings (as though he were describing his toothache); he is describing the lake.[148] And if he subscribes to a moral theory that includes beauty as one of its foundational goods, he is suggesting that in determining the rightness of our actions regarding the lake, then that quality—the beauty—is as significant as, if not more significant than, whatever psychological state, e.g., feelings of pleasure or awe, we derive from that beauty.[149]

Of course, beauty is not the only property the establishment of which as an intrinsic good would have moral implications for Ds. If the goodness of *life* can be established,[150] it would imply at least the prima facie rightness of noninterference with the lives of trees, although it would require no moral accounting in respect of a rock.[151] On the other hand, so far as we can establish the values of *beauty* and *uniqueness*, it would seem to imply priority to a unique lake—Oregon's Crater Lake is an obvious candidate—over a "competing" ordinary tree. To value flow, majesty, and hoary age would provide some basis for an argument to preserve a river.

Granted, the development of moral concern for Ds from such an intrinsic goods basis has special problems to confront.[152] Which properties are to be supported as goods-in-themselves, and on what basis? In cases of conflicting indication—the awesome age and uniqueness of a

148. This point is illustrated in P. EDWARDS, THE LOGIC OF MORAL DISCOURSE 105-10 (1955).

149. The proponent of an intrinsic goods viewpoint can coherently orient evaluations to a mix of objective and subjective standards, viz., (1) that what justifies regard for the lake is not the psychological state regarding it causes, but the property that happens to cause that psychological state, and (2) that insofar as we grant there are different sorts of pleasures (psychological state feelings) and pleasure is an element of moral valuation, the pleasures of the special sort, those associated with the quality valued, e.g., beauty, are to be given priority over other pleasures in determining what is morally correct action. And, of course, an intrinsic goods theorist need not fasten on pleasure; the proponent might value features of things that, from the subjective viewpoint, inspire feelings that are less confidently classed as pleasurable, than as, for example, terrifyingly awesome or hauntingly dreadful.

150. Life as an intrinsic good is implied in A. LEOPOLD, A SAND COUNTY ALMANAC 252 (1966). For Albert Schweitzer's position, see *infra* note 158.

151. For that matter, the *life* principle would appear to permit some less than life-threatening infringement of a living thing (e.g., the trimming of a tree as in Ezer v. Fuchsloch, 99 Cal. App. 3d 849, 160 Cal. Rptr. 486 (1979) (discussed *supra* note 17), particularly when a rock highly valued on some other-than-life basis (Mount Rushmore?) is otherwise jeopardized.

152. By special problems, I mean to distinguish the problems which all six viewpoints I am now reviewing face in common, and which are dealt with in the text, *infra* section III(c).

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lake versus the hoary beauty of a forest—there is an obvious quandary.[153] Moreover, an intrinsic goods approach is imperiled with collapse into the rankest relativism. Someone will say, "Assuming beauty makes something morally considerate, X may be beautiful to you, but it isn't beautiful to me," or "I agree that the river is majestic, but then I find more majesty in the grandeur of a great hydroelectric project, and I say the river be dammed." And there are conflicts of perspectives. We have all experienced that something which seems, from a distance, quite ugly (asymmetric, insipidly colored, etc.) may yet appear, under a microscope, breathtakingly beautiful. Similarly, something ordinarily conceived as inanimate, for example, the soil, can, considered in functional context, be valued by those who identify life as a good.[154]

There are these difficulties, among others. But I shall show that none of them is unique to, or necessarily more intractable than, those that plague any moral viewpoint. If we are unpersuaded (and I believe most of us are) that all moral judgments can be elaborated from a single, psychological feeling state, or reduced to a thinly veiled or complex conventionalism, some other referent—some other good or goods—seems called for. It is not surprising, and I deem it defensible, that there should be a multiplicity of candidates including beautiful things, irreplaceable things, things of symbolic import, incomprehensible things, and things that stir us with awe and even with dread.

4. *Attitudinal Idealism: The Mental Complex Strategy*

Another strategy has recently been proposed by Donald H. Regan, working with an idea of G.E. Moore.[155] Moore—at least by one interpretation—espoused as an intrinsic good (perhaps the highest good) not beauty, per se, nor beautiful things, per se, but the contemplation of beauty. More specifically, Moore can be read to suggest that what is intrinsically valuable is a complex consisting of (i) the beautiful thing, (ii) the person contemplating the beautiful thing, and (iii) the contemplator

153. On the other hand, as I shall show in part IV, quandaries of the very same sort plague all moral theories that are not, like utilitarianism, dominated by a single maximand. There may be conflicts of this sort for which there is no right—only two morally unwelcome—outcomes; this, I shall suggest, need not be regarded as destructive of the principles that led us to value the lake and the forest.

154. This sort of pyramidal interdependency was to form the basis for the "land ethic" suggested by Aldo Leopold. *See* A. LEOPOLD, *supra* note 150, at 252.

155. See D. Regan, *Duties of Preservation*, in THE PRESERVATION OF SPECIES (B. Norton & H. Shue eds. forthcoming 1986) (Working Paper PS-1, Center for Philosophy and Public Policy, University of Maryland, Jan. 1983). For an undertaking of intrinsic value style, see T. Regan, *supra* note 144.

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taking pleasure in the thought of the beautiful thing. Regan suggests a comparable analysis applicable to Ds. In his view, it is not necessary to suppose that a species or the Grand Canyon or whatever has any value *in itself*; the thing itself is neither good nor bad. But Jones' contemplating the Grand Canyon, taking pleasure in the existence of the Canyon itself, and wanting to know more about it can be intrinsically valuable, that is, "good just for what it is." Conversely, what would be intrinsically evil would be a complex involving our last survivor, above, viz., (i) the canyon, (ii) the contemplation of the destruction of the canyon, and (iii) the taking of pleasure in contemplation of the canyon's destruction.

Sketched so summarily, the Moore-Regan view may seem an unduly complicated way to achieve so uncertain a foothold. Some will feel we have done nothing but shift attention from puzzles about things to puzzles about complexes: which complexes, then, are intrinsically valuable? We are faced in a direction, but have little hint of the path. Nonetheless, this strategy circumvents the principal objection to the ideal entity view, viz., that it purports to lodge the intrinsic value in a mere thing, independent of persons. The Moore-Regan view seats it, more comfortably, many will feel, in some human mental furniture. Moreover, Regan demonstrates that he can make advances on a number of problems, such as the last survivor hypothetical, more satisfactorily than the competing noninstrumental viewpoints. And if the emphasis on attitudes sounds strained, it resonates ideas that are not unfamiliar. To my mind it recalls a commentary of E.H. Gombrich regarding the Buddhist influence on Chinese art:

> [N]othing was more important than the right kind of meditation. To meditate is to think and ponder about the same holy truth for many hours on end, to fix an idea in one's mind and to look at it from all sides without letting go of it. . . . Some monks . . . meditated on things in nature, on water, for instance, and what we can learn from it, how humble it is, how it yields and yet wears away solid rock, how it is clear and cool and soothing and gives life to the thirsting field; or on mountains, how strong and lordly they are, and yet how good, for they allow the trees to grow on them.[156]

5. *Way-of-Life Ideals*

The fifth viewpoint contains elements of all the strategies above: regard for present and future human welfare, for the virtues, and for

156. E.H. GOMBRICH, THE STORY OF ART 105-08 (13th ed. 1972).

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whatever properties of things and thoughts which may make them morally considerate. But it combines them in a way that is not easily reduced to the sum of its parts, a way that places emphasis not on particular virtues or the goodness of particular things, but on a good *way-of-life*.

This is a strategy that is easier to illustrate than to define.[157] Suppose that the members of a tribe have been brought up in a way of life, perhaps fortified by oath, not to disclose certain tribal secrets, and to continue a certain ritual, specifically, a prescribed form of prayer at a sacred burial ground, located on a tranquil, majestic mountain. Suppose that thereafter all the members of the tribe other than A abandon the tribal ways, breaking their oath. They disclose the secrets, cease observation of the rituals, and even waive any moral claims they may have on A not to do likewise. Suppose that on these facts A claims that continued observance of the rituals is the morally right, perhaps even obligatory thing to do. We can imagine, for example, that he alone wishes to file an action resisting efforts by the Department of Interior to lease the sacred grounds for development of a ski resort. How would he justify his decision?

To begin with, the rightness of his continued observances cannot be adequately expressed in terms of their consequences—for example, that his conduct (or the practice of ritual observances generally) will somehow redound to the greatest good of the greatest number. Nor do I think A could credibly invoke his fellow or future tribesmen as the basis for his continued observance of the rituals. There is no reason why his obligations to them should survive the exit of A's contemporaries from the tribe and their express release of all claims they might have had on A arising from the oath.

Granted, we can force such an analysis upon our reasoning; but it will be just that, *forced*. An account that exclusively regards others cer-

157. A good way of life is obviously closely connected to the good character and virtue of Anthropocentric Idealism, above. But one may possess virtues, without living a good flourishing life. *See* A. CAMUS, *The Myth of Sisyphus*, in THE MYTH OF SISYPHUS AND OTHER ESSAYS 90 (J. O'Brien trans. 1955) (pointing out that Sisyphus had the virtue of knowing acceptance of his fate, even happiness, but that his life was absurd). Moreover, to say that one has virtues is not to settle the real question of the moral life, which virtue will dominate in any particular crisis; hence, the way-of-life has an affinity with—gropes with the problems of—existentialism.

Two exemplars of this style—although not written with specific regard for Ds—are Richard Wollheim and David Wiggins. *See* R. WOLLHEIM, THE SHEEP AND THE CEREMONY (1979) (opposing a "narrowly conceived" utilitarianism in favor of another viewpoint, less consequential, concerned with "cultivation of the individual" and entwined with such phenomena as ritual); Wiggins,

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tainly does not characterize the path our thinking takes, and I doubt that it does justice to the reasoning of anyone who does not begin with a dogmatic conviction that there can be no moral justification not fully explicable in the most conventional CNPP terms. Moreover, while anyone who sympathizes with A's claim would be tempted to say favorable things about A's character, a character-referring justification needs to give an account of (i) why a certain character is good (to be valued), and (ii) why this good character or virtue, assuming it to be manifested in *this* action, could not be answered and expressed in other conduct.

For these reasons, A's actions may be more satisfactorily evaluated if we eschew prying any single element out of a larger context. This context includes such factors as ancestral tradition, filial piety, the intrinsic good of a sacred place, the intrinsic good of a beautiful place, and the oath viewed as an undertaking *to the tribe*—a D—not redescribable, without loss of meaning, as an undertaking to his co-tribesmen (who, as I say, released him). In short, A would say—and I daresay we would understand him—that he was moved by honor, piety, beauty, by all the things and principles that tied his moral life together and gave it meaning. Not isolated facts, or particular consequences, but the whole package militates towards continued observances at the gravesite. And note that if such an ideal of a morally good life can be sustained, it gives a moral reason for preserving the gravesite—or species or lake or whatever—not from moral considerateness of the thing considered in isolation, but because the thing plays an intrinsic role in realizing what we can recognize as a good, flourishing life. On this view, too, the moral support adduced for conserving the thing is unaffected by its lack of interests. Some, like Albert Schweitzer, seek an ideal life by leaving civilization to minister to natives; others, to minister to habitats. Both have a claim to living good and meaningful lives.[158]

Truth, Invention, and the Meaning of Life, 62 PROC. BRIT. ACAD. 331 (1976). Tribe subscribes to a view that could also be classed with these way-of-life ideals. *See* Tribe, *supra* note 120, at 1327.

158. A man is ethical only when life, as such, is sacred to him, that of plants and animals as that of his fellow men, and when he devotes himself helpfully to all life that is in need of help. Only the universal ethic of the feeling of responsibility in an ever-widening sphere for all that lives—only that ethic can be founded in thought. The ethic of the relation of man to man is not something apart by itself: it is only a particular relation which results from the universal one.

A. SCHWEITZER, OUT OF MY LIFE AND THOUGHT 158-59 (C. Campton trans. 1961); *see also* Note, *Reverence for Life and Rights for Nature*, 3 PACE L. REV. 689 (1983). This passage from Schweitzer is quoted by the court in the dog destruction case, Smith v. Avanzione, No. 225,698 (San Francisco Super. Ct. June 17, 1980) (discussed *supra* text accompanying note 40). Carrying forward the implications is complex. What things are surrogates for, or, without sacrifice in goodness of life, replaceable by, other things? My answer is that the habitat saver cannot take up collecting beer cans and live as good a life. But that perhaps lies beyond what philosophical argument can *demonstrate*—it may

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6. *The Morality of the Transcendent Self*

The final viewpoint sounds the most unfamiliar—the most mystically oriental, one might say. It goes something like this: Western moral philosophy is preoccupied with individualistic egos. Witness the fashion of using as models for moral behaviour contracting and games. The predominant assumption is that "rationality" consists in negotiating to one's personal advantage, or playing to win. Such a starting point lands us, however, in positions that are intuitively unacceptable. One way to combat these excesses is to retain the individualism, but to hedge our notion of "rational" with what are in fact substantive moral constraints. We have just reviewed some strategies those constraints can take: an appeal to certain virtues, to the intrinsic good of certain things (it is not (morally) rational to treat other persons as a means to your ends), or to some model of an ideal life. By contrast, the strategy of this sixth approach is not to constrain the concept of the rational moral self, but to expand it.

The steps proceed as follows: The most primitive morality (conceptually, if not historically) is hedonism, self-interest of the narrowest and most immediate sort—a concern only for the gratification of the persons we *now* are. From there, we come to consider and care for the persons we shall become, i.e., we extend the selves in which we are interested from our egos at this instant to our egos through time. Altruism, the next step, extends our boundaries outwards to include other persons,[159] recognizing thereby a social self, and creating a community of persons. Even if we go no further, the notion of a community of persons supports the considerateness of those Ds, such as historic landmarks, that conserve and integrate with the community.[160] But there is no compelling reason to stop there. Globalism, or some more inclusive holism, simply extends our egos one step further. One remains, we might say, *self-interested*; but the self in which one is interested is more encompassing than the human community.[161] This is a concept not as familiar to western as to eastern philosophy; but the dividing line between self and not-self can hardly be thought objectively determined.[162] Where the boundary is

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lie more within the province of what poetry and the arts can make *manifest*. *See infra* text accompanying notes 352-56.

159. The first step, from prudence to altruism, is suggested in T. NAGEL, THE POSSIBILITY OF ALTRUISM 79 (1970).

160. See, for example, John Costonis' arguments that preserving historic landmarks may foster "cultural stability and individual, group, and community identity." Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 361, 418 (1982).

161. *See Trees, supra* note 1, at 495-500.

162. *See* N. BROWN, LOVE'S BODY 141-44, 146-47, 159-61 (1966).

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drawn has ramifications not only in our feelings, on our psychological outlook, but on our moral outlook as well. So far as we have *choice* over so basic a variable, let us ask: On what theory of rationality is it evidently less rational to identify with some larger planetary whole than to take as one's unit of moral concern a more narrowly ego-bound self?

C. These Six Viewpoints: What Can We Make of Them?

Where do these six viewpoints (neither mutually exclusive nor collectively exhaustive) leave us? In this space, I can scarcely aspire to elaborate, defend, and carry through their application to each and every class of D. I will be satisfied if I have thus far established simply this niche for Ds. One cannot dogmatically dismiss the possibility of at least *some* morally defensible viewpoint (not determined exclusively by the advancement of CNPP-welfare as CNPPs in assembly would construe it) from which a moral observer can evaluate *some* conduct affecting *some* Ds in *some* ways. As related to our law-reform inquiry, a rational person may have several prima facie reasons to place a D in a position of legal Advantage or Disadvantage, even if doing so should entail some subordination of our morally unreflected preferences. In parts IV and V, I will have more to say about the metaethical burden that a proponent of some such theory has to carry: can any of these D-accounting viewpoints meet the requirements we can rightly demand of a moral theory? But preliminary to that, we should observe that establishing the prima facie accountability of Ds is not the only chore with which a satisfactory D-accounting moral theory has to contend, if it is going to make much difference in how we think and act.

First, what is needed is not just a moral viewpoint that accounts for Ds in principle. We need a moral viewpoint rich enough to advance us through the ontological conundrums. By reference to what principles is the moral (and legal) world to be carved up into those "things" that will count? Is the unit of our concern the ant, the anthill, the family, the phylum, or the genus? Why a river, rather than a watershed—or the hydrologic cycle? A holistic, global perspective has a special burden: since the whole is continuously in flux, on what basis do we distinguish changes that are good from those that are bad?

Second, suppose we can dispose satisfactorily with the carving. Suppose, even, that we proceed to justify how prima facie moral regard for the rightly ontologized D might *originate*. There will remain the question—even if moral obligations to a D, or morally commendable actions

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touching a D, can be conceived to originate—how can they be *discharged*?

The distinction may sound tenuous, but a moment's reflection will show that in many situations it is easier to demonstrate how moral regard for a D might originate than to say what it entails the regarder to *do*. For example, I think it can be said that someone who accepted the position of trustee for a D under a testamentary trust would have moral (as well as legal) obligations towards it.[163] It is more problematic how the trustee for the D would do right by it, i.e., discharge those obligations. In the case of a living organism, such as the tree, our sense of its needs would seem to provide adequate guidance. Although the trustee cannot make the tree happy, the trustee is obliged to dispense the trust's funds to assure that it is watered and fertilized, and that the veterinarian's fees are paid when it gets sick. But in the case of other Ds—our ever-hounding lake, for example—the discharge problem is more complex. What would the testamentary trustee for a private lake be obliged to do, assuming the obligations are not specified in detail in the instrument? The answer will have to be something like *preserving* the lake within constraints of the sort discussed in connection with legal rules, viz., in accordance with some flexible notion of the lake's ideal essence.[164]

The problem is that we customarily associate discharging a general duty[165] with an eye on *benefiting* the thing, e.g., advancing the child's "best interests." Once again, the fact that Ds cannot be benefited in any straightforward way rises to vex us. What do we do in regard to the many Ds incapable of being benefited even in the sense in which we can "benefit" the tree?

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163. This conclusion is not undermined by the fact that a trustee's duties to act "*for* the tree" would have originated by actions not of the tree (as though the tree had saved the trustee's life), but of the testator. In general, to say that a derivative obligation has, somewhere in its pedigree, an ancestral tie to some person is not to say that the obligation is *to that person*, the originator, P, in the sense that the obligor is to act for P by, for example, maximizing P's welfare. If the trustee accepts a position to act for the tree, then (so far as he can determine what it *means* to act for the tree, see below) it is an obligation whose direct regard is towards the tree, no less than towards the deceased.

The validity of such a trust under present law is in some doubt. *See supra* note 109. The law's reticence may stem not from the tree's want of interests, but from concern that there is no person positioned to monitor the trustee's performance and complain when appropriate. However, there seems to be no reason (other than cost) why the burden of supervising might not be placed, as in the instance of charitable trusts, upon a public representative, ordinarily the attorney general.

164. *See supra* subsection II(B)(1).

165. By "general duty" I mean a duty that does not particularize the conduct that is obliged; a trust providing that a certain tree is to be watered with 20 gallons of water twice monthly is not a general duty—and is drafted in such a way as to obviate the benefit question.

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What is needed is some notion of an action morally commendable in regard to X, that is not dependent upon benefiting X. I do not consider it conceptually impossible. For example, with an ideal way-of-life theory, there are duties discharged (or, at least, good acts performed) by acting in the right way, as regards the thing. Consider the recent litigation seeking to forbid the mass burial of aborted fetuses without religious graveside rituals.[166] The fact that the fetuses would be made no better off by the ritual is not regarded as a satisfactory response. Under theories other than the way-of-life viewpoint, the morally commendable performance may be indicated once the ontology is established, by reference to the same principles. Under a theory that provides consideration for riverhood on account of majesty, the prima facie wrong would be to drain the river to an unmajestic trickle.

The hardest problems are probably those I have left for last: the distributional dilemmas. It is not enough to carve up the world,[167] establishing *what* is to be of moral considerateness. Nor is it enough to agree how that regard translates into prima facie good (or bad) acts. What are we to do in the case of conflicts, not conflicts of *interests* (because Ds lack them) but conflicts of *indication*? For example, suppose that, working within one of the six viewpoints, a prima facie case can be made for preserving some D. If it is to make any difference in our conduct, the presumption cannot be rebutted by the slightest showing of conflict with some other good, such as human utility. In other words, even if the continued existence of a species or the state of a river is granted to be a good, how do we make adjustments for that moral fact in the face of other competing goods?

In analyzing distributional justice among persons (itself an enormously complex subject), it is common to introduce a concept of human rights. Welfare-improving principles may be invoked as establishing a sort of prima facie basis for distribution, with moral rights introduced as

166. *See* Feminist Women's Health Center, Inc. v. Philibosian, 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918 (1984), *cert. denied*, 105 S. Ct. 1752 (1985) (prohibiting on establishment grounds plans by the county district attorney to arrange religious burial services for fetal tissue scheduled for disposal).

167. The sixth, holistic viewpoint, because of its very reluctance on principle to carve up the world, has its own special problems with which to contend. If the whole—everything as it is—is right, what can be wrong? On what conception of "considerate" can we imagine *everything* being considerate? *See* Hunt, *Are Mere Things Morally Considerable?*, 2 ENVTL. ETHICS 59 (1980). For an affirmative answer, see Brennan, *The Moral Standing of Natural Objects*, 6 ENVTL. ETHICS 35 (1984).

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side constraints.[168] Or rights may be regarded as establishing distributional presumptions to be overcome (if at all) only by the strongest showing of general welfare,[169] or in the face of some conflicting, "higher" right.

Small wonder, then, that much of the UE literature, particularly with regard to animals, fetuses, and the terminally infirm, has been drawn into a discussion of whether the things with which they are respectively concerned have rights. The standard gambit is to survey the properties of ordinary persons that have been proposed as a warrant for human rights, and to identify in the UE the same properties, or enough of them, to warrant granting the UE rights in *pari materia*. Inasmuch as my primary concentration is on Ds, it is not my aim to evaluate how successful those assimilative efforts have been in regard to UEs generally. Suffice it to concede that, considering the controversy over the assimilation of animals, even higher animals, into a rights-discourse, an argument that Ds have moral rights (putting it that way) will have no easy burden. Later, I am going to examine how far something to that effect can be pressed; but I want to foreshadow that effort by deflating the significance of rights-talk somewhat. I am unpersuaded that the debate over whether something can have moral rights merits as central a place in ethics as it is contemporarily being accorded.

First, the emphasis on rights cannot be predicated on the idea that rights are absolute and, in that sense, the fundamental unit of moral analysis.[170] To judge from the way rights are employed in ordinary interpersonal relations, while the asserted rights cannot be overridden by mere utility, there always seems to be *some* showing of *some* countervailing interest on which the claim of right can be overridden. Most would agree that even my right to liberty can be trumped if prosecutors demonstrate that I have engaged in particularly egregious conduct, e.g., murder. Those who maintain otherwise, absolutists of some sort, have to be understood as holding for rights expressed on such a high level of generality that, while possibly useful in shaping the general framework of moral discourse, are fated to exercise slight influence on the final outcomes of actual conflicts. This suggests that the difference between mere moral considerateness, on the one hand, and rights-holding, on the other,

168. Scanlon, *supra* note 123 (examining problems of constraining utility with rights).

169. R. DWORKIN, TAKING RIGHTS SERIOUSLY at xi, 92, 269 (1977).

170. Nozick does not demonstrate that persons have (somehow) fundamental rights; he just asserts it as a premise. R. NOZICK, ANARCHY, STATE AND UTOPIA 1 (1974). At the other extreme, the pure, thoroughgoing utilitarian, evaluating by reference to utility features of states, is prepared to dispense with both rights and duties.

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is more a matter of degree than is suggested by the energies expended on rights-discourse in much of the literature.

Second, much of what is sought to be gained by rights talk—namely, firming up one set of claims in the face of countervailing arguments—can be secured equally well by speaking of duties and, I think, in the case of Ds (indeed, of any UEs), secured more plausibly. We have already seen in the tree legacy illustration how duties in regards to a D can be coherently expressed without reference to the D's rights. (The executor has a duty to water the tree whether or not the tree has a right to be watered.) Rights are equally dispensable when regard for the D originates on other bases, e.g., because of the intrinsic worth of the D, or on account of a way of life to which the D is integral. That is, the conduct someone wants to persuade us to follow by arguing that a river has a right, say, that we not pollute it (absent some strong showing of conflicting value), can be equivalently expressed in the form: We have a duty not to pollute the river (absent the showing of what we may presume to be the same conflicting value). Moreover, we ordinarily think of rights as waivable by the rights-holder, and therefore pertaining to moral agents, not to UEs. Construing the UE as the object of a moral agent's duty avoids the controversy over the significance of the UE's inability to waive its rights.

Of course, even if, as concerns Ds, an analysis built upon duties is a more plausible strategy than one built upon rights, we are still left with the task: From where then do the duties come? If I defer getting down to that, I have reason.

Neither discourse, neither one framed upon rights nor one framed upon duties, can be understood independent of a larger framework of supportive and underlying principles. Any inventorying of properties, that is to say, asking whether *this* looks like the sort of thing that will support a right or duty, has to depend upon an investigation of the whole framework in which the right or duty is situated. For example, let us suppose that my promising Jones to play chess gives Jones a right to expect me, and me a duty to be there at the appointed time. I subsequently discover that I cannot both make the chess appointment on time and also plug a toxic leak that is destroying the ecological balance of a stream. In what sense does Jones' right that I show up or my duty to be there answer the question whether I am obligated to show up in the final analysis, all circumstances, including the emergency, considered? If "right" and "duty" are to be understood in a conclusory sense, as the bottom lines of some moral derivations, then the antecedent premises are

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critical: one wants to know what the antecedents were, and how we got from there to here how the conclusion was drawn from them. On the other hand, if "right" and "duty" are not being used in a conclusory sense, and they are operating in thought along with other principles in determining whether my succoring the stream is to be given overriding moral priority, one still needs to know what the other principles are and how the conclusion was drawn from them.

The point is, wherever the existence of rights or duties are entered into a controversy, we are pressed to look behind and around them, to whatever set of moral principles they are alleged to derive from, as well as to companion principles. Hence, neither rights nor duties are the atoms of our attention; as tools of analysis they appear to be intermediate and perhaps elidible, depending upon the framework. What we are after, then, are not just principles of D rights or D duties, but a whole moral framework that supports D considerateness. Moreover, I am holding open the possibility that in our relations with Ds, both rights-talk *and* duties-talk are too stern, and a framework that adopts some milder tone is required. But are there other alternatives that can do the job, that are, in their guidance, rich and fine-tuned enough to adjudicate among at least *some* competing courses of action, each of which enjoys a prima facie basis for being considered morally welcome? It is to this larger question, that of frameworks, to which we must now turn.

IV. WHAT CAN WE DEMAND/EXPECT OF A MORAL FRAMEWORK? A BRIEF FOR PLURALISM

I have offered six possible viewpoints from which, separately or in supportive combination, one might develop an ethical framework which conceives Ds as morally considerate. I have outlined the chores such a framework would have to perform. It should give a justifiable account of (i) how prima facie considerateness for a D originates, (ii) how the ontological conundrums (which Ds are considerate) are to be resolved, (iii) the manner in which the prima facie considerateness ought to be manifested, and (iv) the distributional dilemmas: how we are to resolve conflicts when more than one course of conduct appears morally welcome.

But where do we go from here? To press ahead, we have to know something more about the constraints an ethic-builder is under. *What is an ethic supposed to look like*?

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Presumably, to produce an ethic is to produce a framework for testing and, if need be, correcting our initial disposition on other than narrowly prudential grounds. I am supposing that, to be rendered coherent, it may invoke an independent moral observer for whom the community's conventional notions of welfare and interest are not conclusive. But is the platform from which that independent observation is made to be framed in principles, maxims, paradigm cases, or other mental material? Is it required to provide, in the instance of each moral dilemma it recognizes as a dilemma, one right answer? Or is it enough to identify several courses of action equally acceptable, perhaps identifying for elimination those that are wrong or unwelcome? And, as among contending frameworks, need we select and defend but one? That is, may we proceed to put forward a set of concepts, principles, and so on that will govern its own moral jurisdiction, e.g., our relations with Ds, on its own terms? Or are we constrained to provide a single coherent set of principles that will govern throughout, so that any ethic we champion either has to oust or absorb its contenders with a more general, abstract, and plenary conception?

At this point, the inquiry extends beyond the moral considerateness of Ds and takes on a subject of much broader interest, one that goes to the very bedrock of moral philosophy. How are we to conceive the moral enterprise? This turns out to be one more area in which the author's leanings will appear, to many, unorthodox.

A. Moral Monism

So much is going on in contemporary moral philosophy that one hesitates to generalize about what is and is not orthodox. At the hazard of some caricature, let me offer a few sweeping, but I trust not unsympathetic, impressions. Much of the effort in moral philosophy appears divided (as all academic and artistic endeavors divide) into camps. The camps are usually assembled under the banner of some set of general principles that the camp's adherents are committed to carry and defend. We have already examined some of them. In one camp there are those, typified by utilitarians of various schools, who orient morality to consequences. An act (or general rule) is "good" if it brings about a state of affairs better than any other state of affairs within the actor's influence. The better state is associated with that state exhibiting the most pleasure, or that which achieves some optimal compromise in advancing collective preferences.

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Within such schools, the general boundaries that fence off alien positions having been drawn, most of the internal effort is spent on such matters as defining what consequences, e.g., psychological states, are good, and assessing the rules for making interpersonal comparisons. Other camps (deontologists), typified by the Kantians, emphasize, in various ways that I have already touched upon, duties and ideals. The word "deontic" comes from the Greek verb, "to bind," the notion being that there are at least some things one ought to do because one is bound to, irrespective of consequences. In camps of this sort, most of the internal effort is spent considering where our duties lie, how they originate, and in testing, in the light of universalized principles, particular intuitions about how we ought to act in concrete situations. Contractarians, such as Rawls, orient morality to practices that rational persons would subscribe to if they were in an original negotiating position, "behind a veil of ignorance"—not knowing what contingencies of ability, wealth, and so on would in fact fall their lot.[171]

These camps have their major and important differences, well discussed in the literature. Later, I shall try to give the major camps a more precise definition.[172] But the point of interest here is that underneath all the rivalry, there is striking, if ordinarily only implicit, agreement on two related tenets that, together, endow moral philosophy with what might be called its prevailing sense of mission. Each school is *monistic* and each is *determinate*. By monistic, I mean that the enterprise is conceived as aiming to produce, and to defend against all rivals, a single coherent and complete set of principles, capable of governing all moral quandaries. By determinate, I mean that the ambition of that framework is to yield for each quandary its One Right Answer. Anyone who wavers between frameworks, or will not claim for his selected orthodoxy the most ambitious powers of resolution, tempts suspicion of "not taking morals seriously."

Sometimes these suppositions are made fairly express, as when we are told that the task of the ethicist is to find "a complete set of valid ethical principles from which all true ethical statements can be deduced," principles "that have roughly the same relation to the totality of valid ethical statements that Euclid's axioms and postulates have (or were intended to have) to his theorems."[173] More often, the monist spirit goes

171. J. RAWLS, A THEORY OF JUSTICE 136-42 (1971).

172. *See infra* text accompanying notes 217-42.

173. R. BRANDT, ETHICAL THEORY 5 (1959). Contrast David Wiggins, who, complaining about "the dragooning of the plurality of goods into the order of an axiom system," asks

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unstated, and has to be inferred from the form that assault takes on the rival camps. The accepted maneuver is to volley a hypothetical quandary that the foe's principles cannot handle, or for which they produce an intuitively unsatisfactory answer. So strafed, the besieged scholars are expected to splinter into confused, undisciplined factions, primed for surrender. The underlying assumption is distinctly monist: if an ethical system cannot satisfactorily dispose of every conceivable dilemma, it *will not do*, and must withdraw entirely across all fronts.[174]

I am not saying that everyone engaged in moral philosophy would avow this position as self-evident if it were made explicit.[175] Some would probably not. Occasionally there appear in the literature projects that can be construed as laying claim to a limited turf only.[176] Yet, monism appears so ingrained that even a philosophy which originates with limited ambitions may find its backers championing its banner in every corner of the moral globe. Bernard Williams suggests that such has been the history of utilitarianism.[177] Bentham was animated by a desire to reform

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> Why is an axiom system any better foundation for practice than, e.g., a long and incomplete or open-ended list of (always at the limit conflicting) *desiderata*? The claims of all true *beliefs* (about how the world is) are reconcilable. Everything true must be consistent with everything else that is true. But not all the claims of all rational concerns or even all moral concerns (that the world *be* thus or so) need be reconcilable. There is no reason to expect they would be; and Aristotle gives at 1137b [of the Nichomachean Ethics] the reason why we cannot expect to lay down a decision procedure for adjudication in advance between claims, or for prior mediation.

Wiggins, *Deliberation and Practical Reason*, in ESSAYS ON ARIOSTOTLE'S ETHICS 221, 239 n.8 (A. Rorty ed. 1980) (emphasis in original).

174. *See* J. SMART & B. WILLIAMS, UTILITARIANISM, FOR AND AGAINST (1973) (pitting a utilitarian against a deontologist in just such a battle).

175. Historically, there have been occasional proponents of plural, possibly conflicting goods. Isaiah Berlin believed that a society's political structure, to be good, required a tolerant accounting for the citizenry's good faith belief in conflicting moral goods, but he did not directly examine the case that there were plural goods in fact (and not only in conventional belief). His position seems to be that we arrange political institutions as though it were so. *See* I. BERLIN, TWO CONCEPTS OF LIBERTY (1958). Mark Platts sketches the case for a pluralistic ethical intuitionism, which he regards as "austerely realistic" and conformable to his general views on semantics and epistemology. M. PLATTS, WAYS OF MEANING (1979) (especially Chapter 10). And there are sympathies for pluralism in the Aristotelian tradition, as expounded by David Wiggins, *supra* note 173.

176. For example, John Rawls expressly recognized that the notion of justice he examined, even extended to "rightness as fairness,"

> fails to embrace all moral relationships, since it would seem to include only our relations with other persons and to leave out of account how we are to conduct ourselves toward animals and the rest of nature. I do not contend that the contract notion offers a way to approach these questions which are certainly of the first importance; and I shall have to put them aside.

J. RAWLS, *supra* note 171, at 17.

Nozick conjectures the possibility of "utilitarianism for animals, Kantianism for people," but the context suggests that is not a prospect he feels committed to develop. R. NOZICK, *supra* note 170, at 39-40.

177. J. SMART & B. WILLIAMS, *supra* note 174, at 135-36.

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social institutions, typified by the prison system. Hence, utilitarianism's original emphasis was to provide guidance to lawmakers in devising principles for legislative rules that would apply across broad populations.[178] Bentham's followers have, perhaps with more enthusiasm than he, worked to extend utility to every corner of personal conduct, including for example, interfamily relations.[179]

Whatever may be the status of monism in academic circles today, no one, as far as I am aware, has undertaken to examine and develop expressly and in any detail the case for its antithesis, moral pluralism.[180] As a rough start, would it be so strange to hold oneself utilitarian when it comes to legislating a general rule for social conduct (say, in deciding what sort of toxic waste program to establish) and yet not be principally utilitarian, nor even a consequentialist of any style, in arranging one's affairs among kin or friends, or deciding whether it is right to poke out the eyes of pigeons? And surely being committed to utilitarianism as a basis for choosing legislation does not entail judging a person's character solely by reference to whether, on balance, that individual advances the greatest good of the greatest number of persons.

Considering how much moral philosophy has been written, the fact that no one has come forward to champion a systematic pluralism is odd. For one thing, the ambitions of the monists, to oust all rivals from the entire moral terrain, seem hard to jibe with prominent features of moral life and reasoning. Understanding these features is necessary for putting in perspective not only the moral status of Ds, but of moral philosophy itself.

The first hindrance to monism is the fact that ethics involves not one, but several distinct activities. One involves making personal choices. At other times, we are using moral language not to sort out our own choices, but to prescribe conduct for others. At still other times, the emphasis shifts away from current choices (our own or someone else's) towards a special sort of description, or moral grading. We may be assessing an actor, an action, a social institution, or a prevailing practice. Sometimes evaluations arise in explanations ("His goodness held him

178. This seems to be a generally accepted view. *See* J. BENTHAM, *supra* note 56, at xxxviii.

179. On the other hand, whatever animated Bentham originally, he did put forward utilitarianism as a principle of morality, generally, as well as of legislation, as the title *An Introduction to the Principles of Morals and Legislation* indicates.

180. *See supra* note 175.

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back."). And moral talk comes up in other ways: in punishing and rewarding, praising and blaming, creating and invoking justifications and excuses, and building up moral credit.

Of course, all these activities are related. In evaluating an historic figure or a character in fiction, we are practicing in the use of moral predicates, and in some sense committing ourselves to how we will use them in various "live" situations. Yet, it is not at all clear that the bases for our moral judgments remain constant throughout, or even that the moral terms need be based upon the same unified principles or paradigms as we shift from activity to activity. For example, what is right for *us* need not be right for *others*. (We might be obligated to hold ourselves to a higher standard.) Nor is it self-evident that the way we decide an act is a good (meaning permissible) act need follow the exact line of thought we employ in deciding whether it be a good (meaning commendable) act, or a good act (meaning it is mandatory). Surely one can intuit the possibility of different patterns obtaining, an intuition whose logical structure I examine below.

In like vein, to regard eating animals as wrong does not seem to me to entail not eating animals; we might consider someone to be a *better* person, morally, who does not eat animals (for such and such reasons) and credit accordingly the character of our friends who are vegetarians on principle. Or we might think the practice wrong in the sense that some justification was owing ("my doctor said beef liver would alleviate my anemia"), but not a justification that had to carry the weight demanded of a person who has killed another person ("self-defense"). Hence, the monist project faces the burden: can all the moral activities, with all their nuances of judgment, be brought under the governance of any, even the most blandly general, single parent principle, e.g., the Categorical Imperative?

The second hindrance to monism stems from the diversity of entities that have at least a colorable claim to moral recognition: some have sentience (higher animals); some are abstract or class concepts (corporations, cultures, species); some have intellectual talent, at least of a sort (AI); and some are genetically human, either capable of experiencing pain (fetuses) or nonsentient (early stage embryos). At this point, I do not want to beg the question which it is my burden to develop: Is there some rational framework into which (at least some of) the UEs, in particular my current clients, Ds, can be fitted as morally considerate, and in what way? But as a start, there is all the evidence, not only in the popular media but in the academic literature as well, of a growing sentiment

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that moral discourse has to provide at least *some* UEs *some sort* of satisfactory moral accounting that they are not now receiving. Among the orthodox schools, the acknowledgement that some revisions are in order takes the form of each school's determination to show how it can accommodate some of our sympathetic intuitions according to its own lights.[181] These are laudatory, and in some degree successful efforts. Yet, when we consider the diverse and peculiar properties that the entire range of unorthodox entities presents, it seems doubtful that any single framework—not one of the conventional frameworks certainly—can make many adoptions without stretching itself so unrecognizeably as to jeopardize its original appeal.

For example, since utilitarianism can be extended to anything that experiences pleasure and pain, future persons and animals can be drawn into the moral community, at least as obligees if not as obligors. But as we have already seen, utilitarianism's efforts to handle future generations ties it in some awkward, if not paradoxical, knots.[182] Nor is it clear that utilitarianism can satisfy the concern that backs the animal liberation movement. A utilitarian, who has trouble enough providing an adequate account of human rights, is all the more tested to provide an equivalent for animals. Even if bears *count* along with the rest of us, if the pleasures derived from bear baiting outweigh whatever losses the torture occasions the bears (and the squeamish), bear baiting is *morally right*; those opposed to it are, for a utilitarian, morally nonsuited.[183] Moreover, there is no way to extract from utilitarianism any direct (as opposed to instrumental) support for species, as such, since species (like tribes and nations and embryos) experience no pleasures or pains.[184]

It is not only the utilitarians whose capacity to account for unconventional entities appears to fall short of satisfying popular—or, at any rate, growing—intuitions. The utilitarian's principal contenders all require, in various ways and with various justifications, putting oneself in

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181. *See, e.g.*, P. SINGER, ANIMAL LIBERATION (1975) (essentially an attempt to bring animals into an extended "preference" utilitarianism).

182. *See supra* notes 130-36 and accompanying text.

183. Tom Regan's nonutilitarian defense of animal rights is animated to avoid just such limits as he claims to find in the preference utilitarian approach of Singer. *See* T. REGAN, *supra* note 124, at 218-26.

184. Of course, winnowing out the weak and "excess" members of a species can be regarded as utilitarianism par excellence. In law, at least, under the MMPA, the focus is not on individual marine mammals, but "the optimum carrying capacity of their [a threatened species'] habitat" (since amended to "optimum sustainable population," 16 U.S.C. § 1362(8) (1982)). *See* Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141, 1151 n.39 (D.C. Cir.) ("Balancing of interests between the commercial fishing fleet and the porpoise is entirely a legislative decision, dictated at present by terms of the Act."), *modifying* 414 F. Supp. 297 (D.D.C. 1976).

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the place of another (by dint of what it is in vogue to call thought experiment) and testing whether we could really *will* the conduct under evaluation if we assumed the other's position, role, and/or natural endowment.[185] Now, while such a hypothetical trading of places is always problematical, it seems least so when we are trading with (or universalizing across) persons who share our culture, whose interests, values, and tastes we can therefore presume with *some* confidence. But even that slender assurance is destined to erode the further we venture our imaginations beyond the familiar CNPP domain. With what conviction can we trade places with members of spatially and temporally remote cultures, with aboriginal tribes, or our own descendants in some future century? And, of course, if we wish to explore our obligations in regard to the dead, trees, rocks, fetuses, artificial intelligences, species, or corporations, trading places is essentially a blind alley. It is one thing to put oneself in the shoes of a stranger, perhaps even the hooves of a horse, but quite another to put oneself in the banks of a river. ("How would I feel if I were a river, and ribbed with dams?")

The fact that orthodox moral philosophies, each with its own CNPP orientation, can provide the most limited accounting for various unorthodox entities, except perhaps as *resources*,[186] certainly is not proof that the orthodox philosophies are wrong, or have to be reconstructed beyond recognition. What do we say to the adherent of one of the predominant schools, who flatly asserts that any UE that the school cannot account for (except in its certain limited way) cannot (save in that limited way) have moral significance?

The first step in a rejoinder is to call moral monism into question. As intellectual style, it is anachronistic wherever it crops up, and particularly out of place in an area as complex as morals. The second step is to present an alternative conception, pluralism. The third is to demonstrate that, with reference to the standards by which morals are judged, pluralism provides a more satisfactory model for defining and handling moral issues. I shall turn to these chores in that order.

B. CALLING MORAL MONISM INTO QUESTION

First, is monism as I have defined it, an inherent feature of morals? Certainly its attraction is understandable. In all intellectual activity,

185. A contractarian of a Rawlsian sort, although not technically trading places with *another person*, has to be placed under such constraints of knowledge, and so on, that the move comes close to the same thing: to making the contractor another (we might say in law, "quasi-") person.

186. Or, as in the case of some entities, such as species or corporations, to recharacterize them with descriptions expressed only in terms of their members.

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some of the drive and satisfaction lies in unifying fragmentary observations under principles of increasingly general application, in bringing wholeness out of diversity. Hence, throughout intellectual history, one finds a tendency, as one force among many, in the direction of monism.[187] Not too long ago, theology would have claimed itself qualified to govern—to provide the unifying principles for—all areas of human thought, from biology to astronomy to morals.

On the other hand, I doubt that many theologians today would claim that their principles account for and command so broad and unified a domain. Nor do contemporary geometricians still believe, as did their predecessors, that Euclid's is the only geometry. In mathematics, Gödel and others have laid to rest any hope of discovering the one grand and complete set of axioms from which all true statements of mathematics can be derived. The same sort of partitioning has taken place in the empirical sciences. We currently conceive the body politic as comprised of humans; the human body, of cells; cells, of molecules; molecules, of atoms; and atoms of subatomic particles and/or waves. Yet, we recognize a separate body of "laws" as governing at each level: political science, anthropology, sociology, molecular biology, and quantum physics.

Certainly, many scientists harbor the hope of tracing phenomena on one level of description to phenomena on another—of someday unifying, say, the laws that govern the movement of subatomic particles with those that govern the planets. Yet, while what goes on in our cells undoubtedly influences what happens in Congress, few hold out the promise of attacking a problem in political science with the same principles one brings to bear on molecular biology.

The issue I am raising is this: If, as I maintain, ethics consists of (or has the potential to be viewed as comprising) several *activities* and *entity groupings* as distinct, roughly, as physics, biology, sociology, and astronomy, and if it has to deal with subject matters as diverse as persons, dolphins, cultural groups, and stars, why has ethics not pursued the same path as the sciences—or, rather, paths? That is, why has it not partitioned?

Part of the answer (although only part) lies in the heavier empirical burden that the sciences bear. In science, the general hypotheses are confirmed by, or collide with, "the facts" with which they claim to deal.

187. For insights into the "methodological monism" of Nietzsche, see A. DANTO, NIETZSCHE AS PHILOSOPHER 216 (1965).

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One effect of such collisions is that the hypotheses, or the facts, or both, need to be continuously re-evaluated, refined, and restated—in effect, kept in rough equilibrium with each other. As part of this process, overly broad generalizations are honed down on reality. A view that all matter is comprised of fire, earth, air, and water, sorted about by fate, cannot persist. Initial conceptions flow into different channels in the form of separate, or at least separable, sciences, each supported with its distinct technology, concepts, and principles; each layer is occupied with its own aspirations of depth and resolution.

In ethics, the nature and impact of the collisions between theory and reality are not of the same character. In science, if A, relying upon a set of principles, claims, say, that rocks are subject to gravity, and B, relying upon a different set, says they are not, tests can be devised to tell who has the better principles. Indeed, it is ordinarily assumed to be a prerequisite of a scientific statement's meaningfulness that it be subject to empirical verification. The celebrated contrast with ethics is this: If A (subscribing to certain moral principles) claims that a promise, in such and such circumstances, ought to be kept, and B (subscribing to other principles) says that the promise is breakable, there is, in a sense, a contradiction. But we are dealing with contradictory claims about what ought to be, rather than contradictory descriptions of a state of affairs that empirical testing can moderate. I do not want to overstate the classic, easily exaggerated opposition between science and ethics (or between fact and value). But whatever qualification the distinctions require, moral principles probably have greater resiliency, more capacity to survive with their imperialist ambitions unchecked, than those of science.

Such reasons may help explain the persistence of monism in morals. But that hardly justifies our continuing along the same path without reflection. Even science sanctions some dual versions of the world. For example, quantum mechanics includes, side by side, wave versions and particle versions of the "same" phenomena. In ethics, the determination to purge all but a single version appears all the more quixotic, because the domain of morals is so vast, variegated, and subtle. Those ambitions are, moreover, distorting, for the commitment to make every moral judgment responsive to the dictates of one Big Comprehensive Theory forces us to disregard some of the data, to settle for an increasingly bland generality in our rules, and to estrange our moral thought from our considered moral intuitions. Hence, the more we try to force every diverse dilemma

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into one common mold, the less we can expect detail, insight, and direction in the real, concrete choices we face; the less will our final judgments carry genuine conviction.

C. FOUNDATIONS FOR MORAL PLURALISM

I have criticized the assumption that all ethical activities (prescribing acts, grading actors, etc.) are, in all contexts (among Contemporary and Proximate Natural Persons, across large spaces and many generations, between species), evaluated by the same features (intelligence, sentience, capacity to form projects), or even that they are subject, in each case, to the same overarching principles (utilitarianism, Kantianism, etc.). The alternative I propound, what I call moral pluralism,[188] invites us to conceive of morals as partitioned into several coherent domains. These I call "planes." The planes are understood as frameworks that support the analysis and solution of particular moral problems, roughly in the way that algebra and geometry provide frameworks for the problems to which they are respectively suited.[189] Each plane is composed of two elements. First is its ontological commitment. That is, each plane embeds judgments as to what things are to be dealt with. In geometry, we posit and talk about lines and points. Each moral plane embeds judgments as to which things and qualities of the world are to be deemed morally considerate within its framework, for example, whether sentient things, moral agents, or abstract entities like nation states and species.[190] Second, there is, for each plane, what I call its moral governance, viz., the rules, principles, and so on, to which its ontology, its moral version of the world, is subject. (To revert to the mathematical comparison, in a geometry, the rough analogue of governance is the system of axioms, theorems, and corollaries which govern what moves can

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188. The view of moral *pluralism* I develop is not to be confused with moral *relativism*, the view that each moral judgment must be related to a particular time and place, its validity turning upon whether it correctly identifies the prevailing moral sentiment (or, in some versions, accords with the implicit premises) of the relevant community. This is a view a pluralist can reject. *See infra* text accompanying notes 339-42.

189. "Roughly," because, for example, algebra and geometry are capable of more closure, that is, of discriminating one correct, precise answer to each question one can raise within their frameworks.

190. *See* ARISTOTLE, NICHOMACHEAN ETHICS at 1113a (W. Ross trans.), *reprinted in* THE BASIC WORKS OF ARISTOTLE 971 (R. McKeon ed. 1941) ("the good man judges each *class of things rightly*, and *in each* the truth appears to him") (emphasis added). The frameworks I speak of might be viewed as the intellectual carrying forward of different treatment for different *classes of things*. *See also* N. GOODMAN, WAYS OF WORLDMAKING (1978) (not directly concerned with normative versions of the world, but congenial to the analysis that follows).

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be made with the lines, points, and so on.) Let me expand upon the ontological commitment and the governance in turn.

1. *Moral Maps*

To grasp the ontological element of moral pluralism, an analogy to mapping, albeit rough and incomplete, provides an instructive starting point.

Perhaps the most striking characteristic of mapping is that for a single terrain we can plot many maps depending upon our interests: road maps, political maps, weather maps, topographical maps, soil maps, and maps of populations, manufacture, and mineral deposits. Each map presents its own salient features in a coherent way, depending upon the anticipated interests of travelers, hikers, or mineral explorers. Most of them conform in some common, dominant features—for the United States, the national boundaries and perhaps some major reference points, such as large bodies of water and principal rivers. But each of the maps also eliminates or accentuates features in such a manner as to respond to *its* questions: mean climatic conditions, altitude, roadside services, and so on. There is no one map that is right for all the things we want to do with maps, nor is one map more right than another. Indeed, we do not regard them, because of their variances, as inconsistent. We may in fact choose to overlay maps, that is, combine salient features. The hiker may want a map that combines the altitudinal features of a topographical map with the rain data of a climate map and the paths of a trail map.

In considering the analogy to morals, one principal parallel has already been intimated: the possibility that moral discourse can be partitioned into different domains depending upon the entities subject to like consideration and/or the moral activity in which we are engaged. To illustrate the latter, as we move from one moral activity to another, there are shifts in the data that are deemed relevant, perhaps even "inadmissible." For example, in judging a person's character, we incline to map considerable data that bears upon the person's life, his or her whole past and aspired future. By contrast, where the emphasis is on evaluating societal rules and institutional arrangements, it is persuasive to argue, as Rawls does, that there are certain things about one's personal abilities and prospects which those doing the evaluation *ought not to know*, that must be considered hidden behind a "veil of ignorance."[191] In evaluating

191. Else, Rawls imagines, all persons, as a rational egoists, will favor institutional arrangements favoring their own strengths and weaknesses. J. RAWLS, *supra* note 171, at 136-42.

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personal conduct, we commonly want[192] a map that will distinguish members of our immediate kin (color them blue) from those whom we have benefited in the past (green) and those who have special reason to rely on us (orange).[193]

There is food for thought, too, in the multiple functions of maps. They assist us in evaluating practical alternatives, e.g., to plan journeys. But at other times we consult an atlas merely to satisfy curiosity, or to evaluate the actions of statesmen and generals. In none of these uses are maps decisive. The trip we finally plan or our final evaluation of someone's strategy will depend upon independent information and feelings. No map, we might say, is decisive of any judgment we might make with it.

But this indecisiveness ought not to be misunderstood—in particular, it is not to say that the map has no influence at all. Consider an atlas in the service of selecting the route for a trip. Typically, we start with an initial inclination: we want to get from here to there, from Los Angeles to Boston. Even if we assume that the inclination arises independently from and will not be altered by any information on any of the maps available, we are bound to learn from the map that there are only so many routes, or that there is no road along *this* way that will be reliably passable in winter; *that* way, we will encounter road construction. Thus, even if nothing on any map will dissuade us from traveling to Boston, what the various mappers mapped may still modify our behavior in important ways: as to which route is best (or which routes to eliminate), when to take the trip, what to expect, how to prepare.

Moreover, we would be wrong to suppose that a map has the potential to affect the details of a decision, e.g., a journey, while dismissing its role in dissuading us entirely from our original inclination. In terms of the travel analogy, the mapped information may not only influence how we get to Boston; it may lead us to consider and select another destination that we would not otherwise have thought of.

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192. Whether what we commonly *want* is *right* is a separate question, to which our wants are relevant, although certainly not conclusive. Answering this separate question, I think the pluralist model is also the right way to go about getting right answers.

193. *See* Toulmin, *The Tyranny of Principles*, 11 HASTINGS REP., Dec. 1981, at 30, 35.

> In our relations with casual acquaintances and unidentified fellow citizens, absolute impartiality may be a prime moral demand; but among intimates a certain discrete partiality is, surely, only equitable, and certainly not unethical. So a system of ethics that rests its principles on 'the veil of ignorance' may well be fair, but it will also be—essentially—an ethics for relations between strangers.

Id. at 35.

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Maps, moreover, are provisional. One reason is that the mapped territory may change. Over time, coasts recede, deltas form, rivers meander, lakes dry up, and continents drift. Other changes result from filling in details as our knowledge advances and the focus of our interests shifts. Ancient maps recorded some of the most obvious geographic details—major continents and oceans; today's record air quality and subsoil water tables.

In this there is a strong parallel in the development of ethics, even for those who, like myself, are not in the last analysis out-and-out relativists. Some basic duties and virtues make an early appearance in civilization—certain interfamilial obligations, for example, and certain virtues, such as courage. These, we might say, are as apparent to a primitive eye as mountains, and as slow to drift as continents. Some of civilization's moral progress owes to the discovery of new terrain: power over the atom and the gene work real changes in moral landscape, exposing paths that did not exist theretofore. Some of it comes about because the world has changed: population expands, resources deplete, and so on. But much of the evolution does not reflect changes in the world so much as refinements in the qualities of the world we are both inclined and able to discern. We want to emphasize, or put in new perspective, the moral relevance of things that have always been around us: the lakes and the lame.

It is worth considering, too, the way in which maps support thinking and convey information. Like pictures, maps operate in a particularly vivid, readily graspable way. A road map does not make a discursive statement about the road between cities A and B; it *shows* something about the road in the context of other roads, cities, mountains, and so on. Moreover, by variations in, for example, color tones, the map's imagerial capacities can be enhanced. For example, by increasingly darker hues, a map of population or of vegetation can represent increasing densities of population or growth.

This quality—the imagerial presentation of relations and degrees—is particularly useful in developing a conception of practical reason in which ultimate judgments are less logical than impressionistic, and in which the morally salient qualities of the world, including rationality, sentience, and autonomy are not qualities that entities—humans, dolphins, pigs—either possess or do not possess, so that they can be clearly divided into Xs and non-Xs. It is, I think, a truer picture of the moral world, and the source of some confusion in moral reasoning, that qualities we deem morally significant are often present in degrees. (Consider

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the question, "How human or how alive is the embryo?" in analyzing abortion or feticide.)

2. *Moral Governance*

Of course, even at its most useful, the map metaphor illuminates only a part of what is required to conceptualize pluralism. A map is simply a familiar example of how the objects of our interest can be presented in plural, nonconflicting ways. But a map does not tell us either what to map or what operations to perform with a map when we have it. Those are matters of governance, of the concepts, rules, principles, and so on, to which the domain is subject.[194]

The question is this: If we are to pursue the possibility of bringing to bear upon these different maps different governances, by reference to what elements might the governances vary? Earlier, I suggested that conventional substantive principles could vary according to activity and domain. One can plausibly support utilitarianism as the governing principle for legislation that will affect a large number of CNPPs (at least in ways that infringe no rights) and Neo-Kantianism as the governing principle for conduct affecting another person unable to consent, such as the unconscious victim in the stream. But, particularly if we consider accounting for UEs, which present a broad and finely shaded range of properties, we need to canvass a richer stock of governance variables. The limited focus is not a defect only when we try to apply morals to UEs. It is a weakness of moral philosophy even in its ordinary application to ordinary interpersonal affairs. Much of the literature concentrates on familiar substantive rules and some of the critical terms that those rules embed ("rights" and "duties"). In the process, other elements of moral discourse are correspondingly slighted.

These "slighted" elements I will refer to as elements of *logical texture*.[195] By that term I denote a whole cluster of governance variables that stamp each plane with its characteristic detail. Without resolving

194. One may well ask whether each viewpoint's ontology is also subject to "rules and principles"—i.e., in virtue of what are *these* things gathered together on *this* map? The short answer is that insofar as we have rules and principles to guide us in what to map and what maps to use on a particular occasion, they are not identical to the rules and principles that govern *across* maps. Whether a utilitarian evaluates actions from the perspective of CNPPs only, or from the perspective of persons plus some other animals, is a choice that is not fully determined by the utilitarian principle itself. *See supra* note 56.

195. The term, and, indeed, the conceptual approach, is indebted to Friedrich Waismann, *Language Strata*, in LOGIC AND LANGUAGE 226, 235, 238-42 (A. Flew ed. 1965); *see also* Waismann, *Verifiability*, in LOGIC AND LANGUAGE, *supra*, at 122, 125.

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the governance to the point of filling in details of texture, responses to moral quandaries are woefully underdetermined by reference to the more familiar principles.[196] For example, to declare ourselves utilitarian so far as a governing principle goes would say something; it would eliminate concern for any species, per se, since the species cannot experience pleasures or pains. But of the things that are sentient, which are we to count, and are we to count them all equally? I include these as questions of logical texture, because they bear a resemblance to the question, what entities, classes, and so on will be countenanced in texturing a framework for more familiar systems of logical expression?[197]

Moreover, even when we have resolved the entity variable, declaring ourselves extended Kantians, perhaps, under a duty to treat all sentient creatures equally, texture variables remain. The notion of equality brings along its own problem of grain, of the appropriate level of generality. To say that two things (persons or creatures) have to be treated "equally" must be understood as *treated alike in relevant ways.* But what are the relevant ways: by what actions are a caribou and a circling wolf to be treated "alike"? Obviously, this is only a special instance of a more widespread dilemma. Consider the injunction to "treat all persons similarly situated equally." How can we apply it except by reference to a set of independent rules that constrain "similarly situated" and the relevant properties that must be dealt with equally? If special pleadings are to be eliminated, maxims of universalization require tandem rules of moral salience to evaluate whether the grain of description is illegitimately self-serving or otherwise inappropriate.[198] Here, too, the question of grain—

196. The text might be read to suggest that the logical texture variables are *additions* to the substantive variables. But, of course, here, as elsewhere, the line between form and substance is hard to draw. Ideally, in examining logic we aspire to identify formal constraints on expression and belief. This is the spirit in which Hare tried to demonstrate a logical, purely formal character to "ought," one as neutral between substantive outcomes as the logic of mathematics is to the question how many objects there are in the world. R. HARE, FREEDOM AND REASON 86-98, 186-87 (1963). But efforts to impose such purely formal constraints upon ethical thought are not very convincing. *See* J. MACKIE, *supra* note 124, at 83-102 (illustrating difficulties of universalizing in formal, value-neutral ways). On the other hand, the blurring between substantive principles and logical style is of no embarrassment to the instant enterprise. I am perfectly satisfied to regard the examination of "logical styles" as advancing the search for variables of moral governance in addition to, whether or not of a different type from, the more familiar variables of substantive principle. The aim is to enrich the selection and detail of the planes we have to work with and choose among. It is of no ultimate significance that an element of a plane be characterized as logical or substantive since in the last analysis they will operate together to endow the plane with its governance character.

197. *See* R. CARNAP, MEANING AND NECESSITY 206-15 (1964) (regarding procedures for constructing a linguistic framework in terms of the kinds of entities, properties, and so on that would be accepted).

198. *See* Herman, *The Practice of Moral Judgment*, 82 J. PHIL. 414 (1985).

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of appropriate description—is not resolved by agreement on the principle. Lacking consensus on texture, two people can agree that the principle "equals must be treated equally" holds—and yet remain in wide disagreement as to the application.

Another element of texture, what I call *mood*, can perhaps best be approached by contrasting morals with the law. Law, like morals, often speaks in negative injunctions, i.e., "Thou shalt not . . . . " But the law never stops there, with "Thou shalt not kill" or "Thou shalt not park in the red zone." In law, one always goes on to specify the specific sanction that is attached, viz., in the one case, ". . . or face the death penalty"; in the other, ". . . or face a $26 fine." The sanction, of course, expresses the relative severity of the offense, with the result that the legal discussions are imbued with precisely tuned nuances. As a question of designing legal sanction, abortion need not take the form, "Is abortion good/bad?" Rather, we ask: "Should abortion be subjected to the penalties of first degree murder? Should the abortionist be liable to a misdemeanor fine? Should the abortionist, if a doctor, face suspension of license?" By contrast, much of moral philosophy is conducted at a level of binary abstraction. Every act is assumed to be *either* good *or* bad; there is either a duty to kill a suffering patient or no duty to do so; a right to die or no right to die.

Conventional monist moral discourse, then, not only presumes there to be one answer, it forces that one answer to take a form of goods and bads, rights and obligations, that are stripped of all nuance of force or mood—of what might be morality's equivalent to the variety of sanction enlisted by law. By contrast, the pluralism I propound seeks to avoid such dogmatism, enriching and refining the detail of moral discourse by systematizing variations in mood.

It might be thought that such questions of logical texture are simply dependent upon the substantive principles with which they may be associated. But I am skeptical that the resolution of the texture variables are fully determined by the substantive principles in any straightforward way. The question whether to count the pleasures and pains of all sentient creatures or of only some—a threshold decision for the utilitarian—cannot itself be derived from the utilitarian principle. Nor can we derive constraints of morally salient descriptions, without which the categorical imperative is only loosely directive, from the categorical imperative itself. To put it another way, to subscribe to one of the dominant substantive principles does not determine how one will resolve the underlying textural variables. There are, I shall show, several sets of options remaining,

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each of which will produce considerable differences in the viewpoint, or, as I would now term it, moral plane.

But is it possible to canvass the textural variables—the grab bag of pragmatics, as some might call them—in any systematic way?

This is a venture that will take us through a thicket more dense and more abstract than any we have faced thus far. Keeping a single illustration in mind may provide some helpful continuity. Let us take an actual incident. A bison has fallen through the ice into the Yellowstone River in Yellowstone Park and is in danger of drowning. A passer-by, witnessing its struggle, wants to rescue it. The Park Service classifies the event as a natural occurrence, with which it refuses to intervene as a matter of policy.[199]

We will proceed under two headings. The first heading deals with actions; here, our subject matter is, generally speaking, prescriptions, e.g., "You ought (or ought not) to save the bison." The second heading deals with, broadly, particular types of descriptions, the moral grading of agents (or institutions, or things), e.g., "The would be rescuer of the bison is a good (or bad) person." and "Nature, as it unfolds, independent of human intervention, is a 'good.' " The character of grading is distinct enough, that I will defer dealing with it until part V.

D. The Logics of Moral Discourses I: Prescriptions[200]

If we are going to pursue the logical character available for prescriptions, it may be useful to begin by recalling a few elements of familiar logic.[201] The point is not to suggest that moral discourse, with all its shifting subtleties, can be girded onto a system of steely primitives and axioms, and walled over with theorems. Indeed, we will emerge from the exercise with a clearer picture of where the rewards of such an effort end and where the folly begins. The aim is, rather, two-fold. First, we should try to identify whatever formal scaffolding we *can* provide. The

199. A fascinating account appears in Robbins, *Do Not Feed the Bears?*, NAT. HIST., Jan. 1984, at 12, 14-16.

200. There is an obvious debt to the suggestive title of Paul Edwards' lively book, *The Logic of Moral Discourse*, but I have no reason to believe that his views would accord with those I present. *See* P. EDWARDS, *supra* note 148.

201. Or logics; those familiar with logic will recognize that in the text that follows, in illustrating one variant of modal logic, I compress into "familiar logic" several distinguishable enterprises including the sentential and the predicate calculus. In regard to the limits of analogizing deontic logic to traditional logics, e.g., whether it really provides rules of inferences, see *Symposium on Deontic Logic*, 2 THEORY & DECISION 1-78 (1971). For my purposes, the idiosyncracies of deontic logic, qua logic, are of no import.

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aim of logic, as far as it extends, is to furnish some standards against which we test our tentative conclusions as we proceed. What, in moral thought, is the equivalent of contradiction, and when are we guilty of it? Second, the very effort to formalize morals, though doomed to fall short, is destined, also, to turn up ambiguities in our ordinary, less self-conscious ways of putting things. It thereby generates a larger set of options from which to fashion a larger and richer array of planes.

The project might be put this way. It has become fashionable to speak of developing and testing our tentative moral conclusions by recourse to thought experiments. I am examining how far we can advance the notion of thought experiment into something less metaphorical and more rigorous. Can we point the way to more specific intellectual procedures that might vary from domain to domain, even across domains that regard Ds as morally considerate? In this spirit, let us start with high ambition, with an effort to develop a "deontic logic," that is, a logic of normative prescriptions.

How extensively can any logical notation system scaffold the questions of morality? The materials with which familiar logic deals are ordinary indicative sentences that assert propositions about states of affairs, for example, the single conventional symbol

(1) p

can be taken to stand for the sentence, "it is true that (or it is the case that) the bison is in the river." There are operators, e.g., "∋x.Gx" for "there is some x, such that x is G" and "(x)" for "it is true of all x's that . . . ." There are connectives, e.g., "-" for "not," "v" for "or," and "&" for "and." There are fundamental axioms, including the Law of Excluded Middle,

(2) p v -p

That is, the bison is either in the river or it is not.[202] And there is a Law of Contradiction,

(3) - (p & -p).

202. This is called "excluded middle" because any third, i.e., middle possibility, is excluded.

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That is, it cannot be the case that the same bison is, and also is not, in the same river.

Now, as I have already warned, no one is suggesting that every aspect of moral discourse, in all of its domains, can be straitjacketed with formal notation and theorems.[203] (The same disavowal would have to be made, of course, respecting any natural discourse.)[204] Here, in particular, Aristotle's wisdom still holds: we should not expect of an ethicist the same sort of proofs as we demand from a geometrician.[205]

But this cannot be read as expelling all logic-like formalization from moral thought. Obviously, neither the syllogism[206] nor some sort of universalization is left behind. But when we try to press further with some logical texture of prescriptions, as compared with sentential logic, several novelties are apparent at the outset. Most important, in contrast with propositions ("the bison is in the river"), prescriptions ("you ought to leave the bison in the river"; "it is permissible to remove the bison from the river"; and "you may get the bison out of the river") concern themselves with what ought, or must, or is permissible, *to be*, rather than with *what is*.[207] More specifically, we can say that when we are dealing

203. Nor am I maintaining that the paths our minds must track in reaching moral solutions are confined by such rules as we can explicitly provide. On the contrary: just as ordinary, nonmoral reasoning characteristically proceeds largely unconscious of logical demands, so, too does practical moral reasoning proceed largely unconscious of whatever we might pass off as moral logic. In both cases, some good logic is built into intellectual habit. In ordinary reasoning, conscious efforts to be logical may occur sporadically, as a check to determine if our thinking needs a midcourse correction, or even after we have muddled our way to a tentative conclusion. So it may well be with whatever logical texture we can produce for moral thought. (Although I suppose it is possible to maintain that there are no such checks on moral reasoning, because in each instance right and wrong are recognized by a sensitive conscience in a flash of intuition—or not at all.)

204. Even with regard to ordinary (nonmoral) discourses, formal logic provides what might be called some scaffolding for thought, but it falls considerably short of filling out the discourse's logical texture in our broad sense. Formal logic deals with relations among statements, rather than with the formation of beliefs about the world, or the conditions under which those bodies of belief are true (or valid, or justifiably assertable). Consider the theologian's jibe: "Logicians are more interested in reasoning rightly than in right reasoning." J. NEWMAN, A GRAMMAR OF ASSENT 72 (1914).

205. [P]recision is not to be sought for alike in all discussions, any more than in all the products of the crafts . . . . We must be content . . . in speaking of [ethics] . . . to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true and with premisses [sic] of the same kind to reach conclusions that are no better . . . . [I]t is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs.

ARISTOTLE, *supra* note 190, at 1094b, *reprinted in* THE BASIC WORKS OF ARISTOTLE 936 (R. McKeon ed. 1941).

206. H. AIKEN, REASON AND CONDUCT 96 (1962) (making the more general point about the transportability of logic to morals: "If all *s*'s are *p*, and *a* is an *s*, then *a* is a *p* regardless of whether *p* is a descriptive predicate such as 'yellow' or a normative predicate such as 'good.' ")

207. Similar to commands ("Close the window!"), assertive prescriptions have no truth value. ("The window is shut" is either true or false depending upon whether the window is or is not shut;

with prescriptions we are focusing on *transitions between states.* Following Von Wright,[208] I will employ "T" to read "transition from," and the basic element of prescriptive logic becomes:

(4) pT-p,

which we will read, "a transition of the state of the bison being in the river to a state of the bison not being in the river."[209]

Second, it is not just a new element that we need, one that shifts attention from a static state of affairs to a dynamic transition between states. We also require some appropriate *operators.* The predicate calculus' operators are concerned with the properties of things, e.g., an existential operator, to express the notion that there exists *some* X that has some property ("some bison are in Yellowstone"). A prescriptions discourse requires operators to express its three basic notions.[210]

To build upon the thoughts expressed, in ordinary discourse, by "ought," we employ the operator "O," so that

(5) O (pT-p)

"Close the window" can be prudent or rude or ill-timed, but not true or false.) This has led some to disdain any further interest in morals beyond what an analysis of "emotivism" might produce. *See* Stevenson, *The Emotive Meaning of Ethical Terms*, in LOGICAL POSITIVISM 264 (A. Ayer ed. 1963) (The "emotive meaning of a word refers to the responses that use of the word produces in people." It is described as an "aura of feeling which hovers about a word." *Id.* at 273.) Although in the text that follows I stress the prescriptive character of one important class of ethical judgments, I take the view that those prescriptions can be right or wrong, or if one prefers, "valid" or "invalid," subject, at the least, to constraints of rational acceptability.

208. G. VON WRIGHT, NORM AND ACTION (1963). For the suggestion of applying Von Wright's work to law, I am indebted to an unpublished paper of Robert D. Cooter, Why Lawyers and Economists Do not Think Alike (copy on file with the *Southern California Law Review*).

209. Note that our original state p could be changed to another state without rescuing the bison; painting the bison green (or going for a walk), for example. If the bison's color were a property of the universe that the language recorded, painting the bison green would also yield -p, and pT-p would not express the meaning assigned to (4). Were we committed to a richer language, we should be referring to pTq, where q is specified as a state in which the bison is rescued. For purposes of illustration, I am assuming a primitive language which discriminates between two states only: bison in and bison out.

210. Whether three operators are *required*, or whether less will do, is problematic, and debated in the literature. *See Symposium on Deontic Logic, supra* note 201. Certainly, given the right logical connectives, it seems possible to make at least some translations from expressions employing one operator to expressions employing another, without apparent loss of nuance. *See infra* note 213. I choose to employ all three operators to insure preserving a range of nuances or "moods" warranted by distinctions I believe are rightly made in conventional moral discourse. *See Symposium on Deontic Logic, supra* note 201.

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will be read, "the state of affairs, the bison being in the river, ought to be transformed into the state, the bison not being in the river."[211]

For morally "permitted," "§ " is employed as an operator, so that

(6) § (pT-p)

will be read, "it is permissible that the bison be removed from the river."

To express the idea of an action being morally "mandatory," "!" is employed, so that

(7) ! (pT-p)

will be read, "the bison must be removed from the river."

Using this notation system, a considerable range of ideas can be expressed simply by transporting the familiar connectives of sentential logic, e.g., "-" (not),[212] "&" (and), "v" (or), "p → q" (if p, then q), and "p≡" (p if and only if q). For example, working with (6) and "-" (not), we can express

(8) § (-pTp),

that is, it is permissible to put the bison in the water.

We can also capture the notion:

(9) § - (pT-p),

that is, it is permissible not to remove the bison, and

(10) -§ - (pT-p),

211. A richer notation can indicate whether the prescription applies universally, i.e., whether it enjoins all moral agents so to act, or applies to some indicated subset only (a "done-by" operator). To simplify the presentation in the text, the universal application is presumed, except in the instances otherwise specified.

212. Transporting the negation from familiar to prescriptive logic may be deceptive in its apparent simplicity. In expressions such as (8), it is being used exactly as it is used in any ordinary logic, to negate an asserted state of affairs. But in, for example, (9) and (10), it is made to carry a normative prescriptive burden, a task a bit more complex.

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that is, it is not permissible not to remove the bison.[213]

How much aid can any of this be in clarifying and carrying through any particular moral analysis: what about the bison, which continues to flounder while we do derivations? One reward is to bring out a variable not ordinarily appreciated, and, indeed, to make some headway in systematizing what I referred to earlier as variables of mood. That is, the task of morals is usually conceived of as determining the rightness of actions. However, (5), (6), and (7) are all consistent with the rightness of removing the bison—each, however, in a different sense or mood. It is one thing to conclude that it is *permissible* to remove the bison; another to say that one *ought* to do so; another, to say one *must*. (6) presupposes an actor inclined in the direction of rescue, and conveys the sense that it is "all right" to follow this inclination. (7) presumes to address those who are not (as well as those who are) so inclined. Rescue is morally better than nonrescue. Further, to say one ought to rescue (5) need not carry the same sense as (7), that one morally must rescue. Certainly, in conventional moral discourse we make a distinction between that which it is morally better to do, that which is to one's credit, and that which one is absolutely obligated to do, that which is (perhaps) one's duty.

I recognize that this proposal—that we sanction these nuances through independent operators—is not uncontroversial. Some will maintain that all prescriptive judgments should be collapsed into one single operator: perhaps it is another face of monism to insist that morality speak with an imperative voice, or not at all. In favor of giving formal recognition to these distinctions of mood there is, however, the fact that the distinctions resonate throughout ordinary moral talk. There is also the fact, of peculiar value to my project, that the richer the fund of variables, the broader the range of moral frameworks we can build; hence, the better the prospects of carrying through construction of one of the D-regarding viewpoints. A morality that says one is (strongly) obligated (!) to rescue a bison or a butterfly may be unlivable, and to that extent unacceptable.[214] If all morality is reduced to ! or !-, finer shadings of feeling

213. Either because to remove the bison is imperative (!) and thus, the equivalent of (7), or perhaps because, while removing it was not imperative, one ought (O) to remove it in the softer sense of (5). In (7), the suggestion is that three operators are redundant over some range. For !, we can substitute -§ -, without loss of nuance (one *must*, meaning that it is not permissible not to). But can we express !- (must not) in terms of § and connectives? And is -!- (pT-p) equivalent to (6), or to something only an O (ought) can render?

214. Hilary Putnam includes as among the desiderata of a moral three which I find agreeable: "(1) . . . one's basic assumptions, at least, should have *wide appeal*; (2) one's system should be able to withstand rational criticism; [and] (3) . . . the morality recommended should be *livable*." H. PUTNAM, REASON, TRUTH AND HISTORY 105 (1981) (emphasis in original).

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are never expressed. By contrast, a morality that draws out our relations with unorthodox entities in O or § terms may have enough plausibility to gain some foothold in thought. Once established, it may then enable us to develop measures of insight and direction that would otherwise be suppressed.

Everyone wants to avoid, or at least minimize, contradictions, obviously.[215] But when we try to transport into the area of prescriptions a correspondent to the axiom of noncontradiction, we discover certain ambiguities in what a contradiction *is*. To illustrate, suppose that, working within some loose moral framework, I can advance my reasoning so far as to reject (falsify or invalidate) the prescription,

(11) O (pT-p).

From falsifying (11), *what follows*, that is, what conduct is ruled out? In sentential logic, the axioms (2) and (3) make comparable questions unproblematical. If there is a bison, which we demonstrate not to be in the river, then we know where the bison is (within the texture of "river"). It is not in the river. If p is not the case, then -p is so. But when we try to transfer the laws of contradiction and excluded middle to prescriptions, we run into a systematic ambiguity. One way to contradict (11) is to place the negation outside the operator, thus:

(12) - O(pT-p).

Translated into ordinary language, this construes the contradiction of (11) as "it is not the case that you ought to remove the bison from the river." (But what does this leave open? Might you yet be required to (!); might it be permissible (§)?)

But it seems no less coherent to "contradict" (11) with an internal negation generated by placing the negation sign between (hence, internal to) the operator and the state description, viz.,

(13) O- (pT-p).

(13) construes the contradiction of (11) to be the assertion, not that there is no obligation (an absence of obligation) to rescue the bison, but that there is an obligation to see that there be no rescue. But even at this,

215. See *infra* text accompanying note 229.

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there is ambiguity in the intended meaning that the rules of a finely textured stratum would be expected to dispel.[216] Without a further clarifying notion, (13) could express that (i) the state of affairs, the bison being in the water, is morally better than the state of affairs, the bison out of the water, and the agent is under an affirmative obligation to do whatever is within his power to prevent the transformation. (If you see the bison making it out on its own, you are obliged to drive it back with a good thwack.) On the other hand, one might want to convey a sense that is "softer" and more specifically directed, viz., (ii) that without implying the superiority of either state of affairs (if the bison gets out on its own, all right) *the agent* is obliged to *forbear* rescue, i.e., let nature take its course—the view, apparently, of the Park Service. Clarifying the intended meaning of (13) in the direction of (ii) could take the form of a notation specifying the addressee of the command, e.g., A {O-(pT-p)}, understood to carry the sense that the Agent ought not to rescue, perhaps adding § (pT-p) to confirm the permissibility of change in the state of affairs, as by the bison's self-rescue, thereby eliminating the first sense (i).

Parallel ambiguities occur when we employ the permissive (§) or mandatory (!) operator. For each there is both an external and an internal negation, not merely, as in the familiar sentential calculus, a unique "opposite":

(14) -§ (pT-p) (external)

(15) -! (pT-p) (external)

(16) § - (pT-p) (internal)

(17) !- (pT-p) (internal).

The external negations can be read that it is not permitted to (not mandatory to) remove the bison; the internal negations, that it is permissible (mandatory) not to do so. On both sets of readings, even then, ambiguities comparable to 13(i) and (ii) remain.

The variations are undoubtedly complex—even more complex than I have indicated. But, once more, for the pluralist, this sort of thing is to be regarded less as a problem than a promise: the more variables from which to choose, the more governance options from which to fabricate a

216. As will be seen, *infra* text accompanying notes 221-22, ambiguities of this sort cannot occur in a single maximand system, since the "best" state of affairs, either p or -p will dominate. But in what I shall refer to as nonmaximand systems, some sort of decision rule, such as an axiom, would be required to distinguish the right meaning.

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fitting moral version—or versions—of the world. For example, in regard to wild animals and species it seems to me morally quite intelligible to maintain the position:

(18) -O (-pTp) & § (pT-p) & {A O-(pT-p)}.

That is: it is not the case that they ought to be placed in the river (without good reason); it is permissible that they be succored by natural (nonhuman) action; yet also that the agent ought to forbear rescue, should they be in the river. Such a position would not imply that animals and species are of no moral considerateness. But we would have fabricated from elements of available logical texture a relationship that few would suppose to hold among CNPPs. But this is one more way in which the governance to which CNPPs are subject is distinct.

Thus far, my foray into the logical texture of prescriptions has referred to concept properties, e.g., description grain, and to the formal properties most nearly expressible in a notational language mimicking the artificial language in which familiar logic is expressed. But there is much more to the logical texture of moral reasoning, more potential variants, than this skeleton of concepts, operators, and connectives. There are variables of what might be called *logical style*.

Style variables could be grouped in several ways. One basis would be by reference to techniques of validation. Some moral viewpoints aspire to mimic geometry, to validate by deduction from unchallengeable "axioms." Utilitarianism, by contrast, is mathematical: to support a judgment, theoretically addable properties are summed. Other moral viewpoints might be structured with reference to paradigm cases, accepted instances of good and evil conduct.[217] An action is good if it fits the paradigm; the concept of *fit* replaces *deducible* as the key. A grouping that enjoys considerable support in the literature implicates a supposed fundamental division between moralities that are in their orientation (i) consequential or teleological[218] (goal oriented) and (ii)

217. Paradigms have been broadly discussed in semantics and epistemology, often as responses to the problems of open texture. *See* Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 204-07 (1981) [hereinafter *Semantics*]. However, there has been little effort to build normative theories around them, particularly as touching prescriptions. ("This is a good act because it is a paradigmatic good act.") It appears that paradigmatic analysis is viewed as more appropriate in categorizing particulars for descriptive purposes (whether X is truly a tiger) than for normative purposes (whether killing a tiger is truly a good act). Michael Moore, in propounding a realist moral theory, rejects reliance on paradigm examples supplied by convention in favor of searching for the best theory of the "hidden nature" of evaluative words. See Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1144-46.

218. From the Greek *telos* meaning "end" or "goal."

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nonconsequential or deontological[219] (duty oriented).

In part because I find the last-named dichotomy problematical,[220] I will adopt, for organizational purposes, a division between systems which (1) refer all moral (prescriptive) questions to a single maximand, and (2)—defined by exclusion from (1)—all other systems. In this division, as in the conventional consequentialist/nonconsequentialist dichotomy, classic utilitarianism serves as a paradigm of the first group; classic Kantianism can serve as a paradigm of the second. But under the classification employed here, there is a difference both in the properties that lead to their separation and the systems with which they are grouped.

1. *Single Maximand Transitive Systems*

The first group of moral systems in the division that I will employ regards as the sole standard for establishing right conduct the maximization of some single function capable of fully ranking all alternative states of distinct moral interests.[221] Perhaps the key element to which such a system aspires is *transitivity*.

To understand the nature of transitivity, and its implications for moral systems, consider three lumps of coal, A, B, and C. The lumps exhibit several common properties with respect to which we might wish to compare them, e.g., place of origin, weight, aesthetic appeal, and hardness. Of these, only the relationship "heavier than" is asymmetric and transitive. If A is heavier than B, and B is heavier than C, then A is heavier than C. Where L stands for lump X, and > for "greater weight than," we can represent the transitive relationship as follows:

$$L_A > L_B > L_C.$$

219. From the Greek verb "to bind."

220. It seems always possible to restate a supposedly rule-regarding, nonconsequential prescription in a way that makes it absorbable into consequential terminology. For example, suppose it is maintained that there is an absolute duty to rescue the bison (! (pT-p)), irrespective of consequences. It is meant by this that the act is mandatory even if the resultant state, -p, hazards humans or threatens starvation of an already excessively large herd. But it is not clear why this duty to perform an action cannot be redescribed and defended as a duty to bring about a consequence, viz., the state of affairs in which persons rescue bisons generally (or in which a particular person has rescued a bison), irrespective of other consequences. Bernard Williams examines the prospects of distinguishing consequentialism "from anything else" in J. SMART & B. WILLIAMS, *supra* note 174, at 82-93; *see also* J. MACKIE, *supra* note 124, at 68.

221. One can imagine a system that enlisted a single maximand with the ambition only of identifying the best alternative across a choice set, that is, without pretense of ranking the remainder. I know of no proponent of that variation.

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Because of this relationship, the considerable flexibility of indirect comparisons can be achieved by establishing a weight measurement system, in which the heavier object is assigned the larger numeral (in pounds, kilos, or whatever). What "indirect" implies is that we need not "play off" each object against the other in direct competition on the scales. We can compare them indirectly through a system of common measurement.

Utilitarianism, and the various other systems I group with it, represent efforts to achieve for morals what the weight system achieves for objects. With utilitarianism, the "objects"—its lumps of coal—are states of affairs. The property is happiness (or, in a variant, units of utility, called "utils"). This property is presumed to be measurable, like weight, and the sole good with respect to which all states of affairs, S_1, S_2, S_3 . . . S_n, can be compared. Specifically, S_1 is morally superior to S_2 if it displays more happiness; worse if it displays less. Moreover, because the property that defines the good is transitive, we can produce a rank ordering across all states that a moral agent can bring about:

$$S_1 > S_2 > S_3.$$

The ambitions to yield such an ordering are not unique to utilitarianism. The same may be said of any moral system that purports to employ a single maximand in such a way that (i) all morally relevant differences among states can be referred to the same measurable property and (ii) in all cases, the morally better state is identifiable with the higher number. These same properties could be adapted to a qualified utilitarianism that adopted not aggregate or average happiness as its standard, but the happiness, at any margin, of the bottom (least happy) ten percent of the population.[222] Or, for another example, one can conceive of a moral system that regarded the amount of Christian love, Agape, if that is measurable, as overriding any other possible considerations, so that a world with q amount of Agape would be necessarily better than a world with q-1 amount of Agape, notwithstanding any other qualities it might display, e.g., pain.

Putting aside how defensible such alternatives would be as compared with utilitarianism,[223] in at least one important element of logical

222. This would be a variety of the "maximin" principle which Rawls supposes would emerge from primordial bargaining, i.e., institutions would be created that would maximize the position of the least well off. *See* A. SEN, *supra* note 119, at 135-41.

223. It is worth musing whether ranking the world's moral progress by reference to Agape would be more unrealizeable or unappealing than the classic utilitarian's efforts to measure and aggregate happiness.

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style the two would be the same. In each system, the rightness of rescuing the bison depends upon comparing the state of the world in which the bison is in the river, S_p, to that in which it is rescued, S_{-p}. In each system, the dominant technique is simply mathematical: the comparison is carried out by summing the measure of the relevant property in the respective states. In the case of utilitarianism, the calculations would take into account, among other things (depending upon the scope of those creatures whose feelings counted), the pleasures and pains (i) of the bison's would be rescuer, (ii) of the onlookers, (iii) of the bison, and (iv) of those who might dine on the carcass (the bear and vultures). Presumably, a utilitarian accounting would consider, as well, the expenditure of effort, that is the social cost of rescue, in terms of, for example, alternate uses of labor and machines (snowmobiles, rope, etc.).[224]

But once such calculations are performed, what is a single maximand advocate claiming? It is worth observing that even for a system as apparently straightforward as utiliarianism, there remains some ambiguity in selection of operators, referred to earlier.

Certainly, there is one conceivable version of utilitarianism which integrates with the !, must, operator only. On this view it is not merely §, permissible, or O, in the sense of morally better to bring about, so far as is within one's power, the happiest state of affairs; in all cases, one (morally) must (!) do so—no ifs, ands, or buts. Perhaps this is the logical texture of utilitarianism that most of the literature assumes. But is there not some appeal to adopt, across some domains, an alternative logical style, a system expressed in O-based commands? Under such governance, to say O(pT-p) would carry the sense that A ought to rescue the bison—it is recognized as the right thing to do, so far as morals are concerned—but it need not carry the sense that the rescue is morally mandatory. On this interpretation, we could say that while it was morally better if the bison were rescued than if it were not, a nonrescuing agent would not be subject to the ostracism or whatever informal sanctions the society attaches to failure to do "the absolutely required thing," much less would it be right for criminal codes to penalize a person for failure to rescue.[225] Such a dilution might be regarded as the price of extending moral standing outwards from persons to some class of UEs;

224. Note that so far as the utilitarian measures the costs of getting from p to -p, the goodness of the action *is* being accounted for—though it expresses itself in comparisons of resources available in alternative consequent states.

225. Or, as I suggest below, we may wish to develop an O-based discourse in connection with character: there are acts neither mandatory nor impermissible which, however, integrated into one's life as part of a pattern, are relevant to evaluations of character.

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one might argue, "*This* extension of considerateness to Xs is rational: but only in the context of a moral governance that speaks on *that* (diluted) basis."

More generally, the point is this: a supporter of moral pluralism is not suggesting, merely and obviously, that we must consider the applicability to different maps of different moral systems distinguished by their substantive rules, e.g., utilitarianism versus contractualism. Potential systems are distinguishable by fine details of logical variables, as well. To identify oneself as a utilitarian, or to commit to utilitarianism across some maps, leaves the morality one therefore subscribes to considerably underdetermined. This underdetermination goes beyond such well-recognized problems as how to measure and compare the relevant states (What *is* pleasure? Is it measurable on a single scale with pain? How are different creatures' pleasures and pains to be weighted?). There are open variables of logical character to be resolved as well, viz., is one committed to draw judgments of a !-based, §-based, or O-based character? How one responds—for which domains—contributes to determine the logical character of various moral strata with which a rational moral agent constructs his or her moral world view.

2. *Nonmaximizing Systems*

Thus, under utilitarianism, and all other single maximand systems, the solutions to quandaries appear highly indeterminate until these variables are resolved. Nonetheless, the attractiveness of such systems remains the promise (or illusion) of simplicity: all actions can be sorted and ranked by reference to a single measurable good. Of course, the corresponding defect is that even if the ambiguities could be resolved, it is hard to maintain that all moral conduct, with all its complexities, answers to a single index of measurement. Indeed, the literature bulges with illustrations in which we would stand to advance utility by conduct that appears to almost any sensitive conscience immoral. Sen puts the case of a mob whose utility from bashing Pakistani students outweighs the utility loss to their victims.[226] Is the action therefore right? One conventional response to such a case is that some standards other than utilitarianism are called for.[227] Another is to introduce additional stan-

226. A. SEN, *supra* note 119, at 7-9.

227. Whether a utilitarian can extricate himself from such an unwelcome commitment by adopting rule utilitarianism, as Rawls once proposed, *see* Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955), seems highly doubtful. *See* J. MACKIE, *supra* note 124, at 136-38.

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dards to utilitarianism, the one or the other to operate as a "side constraint."[228]

Unfortunately, whether our response is to substitute for or to constrain the single maximand system, the alternatives present most of the same variables to resolve—plus some new ones.

a. *The Orestes Quandary*: First, there is the obvious problem that once we abandon a single maximand, there may be no rule to govern a case deemed morally significant. The idea of there being no rule is worth unpackaging. There might be no rule in the sense that, while there is a moral system, it is simply silent as to an intuited moral problem. For example, the system might govern man's relations to man in exquisite detail, but have nothing to say on the rightness or wrongness of actions towards animals—on the moral difference, say, between a world in which bison are suffering and one in which they are not.

But I am more interested here in the prospect of having no rule for reasons that shade into formal defect. This can occur not because the system is silent on the issue, but because we find ourselves with prescriptions that conflict. An example would be where Rule 1 obligates us always to come to the aid of a living creature in jeopardy, and Rule 2 obligates us never to interfere with nature's course. I refer to this as the Orestes Quandary, after the dilemma of Orestes whether to avenge his murdered father when, his mother being his father's murderer, the avenging would amount to matricide. Note that in a completely determined, single-maximand system one outcome or the other—state S_1 (mother alive-father unavenged) or S_2 (mother dead-father avenged)—would, one presumes, be indicated. But when, as here, no single overriding principle is available, the two rules taken together (protect thy mother; avenge thy father) amount in their own way to no rule at all for the situation at hand.

The interesting question, which reverberates throughout this subsection, is whether a system of moral governance that has the potential for such a quandary should be regarded as fatally defective, so that the entire system must be amended or withdrawn. Is it a requirement of a valid moral viewpoint that it yields one, and only one, right prescription for every dilemma it recognizes? Brandt calls inconsistency in a group of ethical principles "a fatal defect," "a mortal thrust."[229] But he proceeds

228. *See generally* R. DWORKIN, *supra* note 169 (adopting the individual right to concern and respect as a value that constrains all utilitarian calculations); Scanlon, *supra* note 123 (emphasizing consequentialist reasoning in interpreting and justifying rights and using rights to place limits upon utilitarianism).

229. R. BRANDT, *supra* note 173, at 16-17.

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to recognize that we live with codes which fail to specify which rule is to dominate in case of conflict, "leaving [the] decision to individual judgment."[230] This comes close to granting that a practical moral system may leave us with inconsistent directives, which I believe is the more defensible position, even of the governances we commonly employ in human affairs. And it follows that at least across some planes (of rocks and rivers?) a system of rules and principles that can give us some satisfaction in some cases should not collapse if, in other cases, it should prove not only incomplete but, in some circumstances, actually inconsistent.

b. *The Sisyphus Prescription*:[231] Even if there exists a single covering rule, plaguing possibilities are not eliminated. Consider the prescription:

(20) !(-pTp) & !(pT-p).

This can be understood as saying, if one finds the bison out of the river, one is mandated to place it in the river; conversely, if one comes upon the bison in the river, the mandate is to save it.

My interest here being in logical possibilities, I am not concerned with analyzing from what moral principles such a prescription might be derived or defended in terms of a substantive morality. Certainly (20) seems, at best, pointless.[232] And, as with the Orestes Quandary, it is hard to see how (20) could stand in a single maximand system; assuming that either p or -p was measurably superior, the act that produced either one or the other would dominate. But once we move out from under the domination of a single maximand, we have to decide either to accept a system that allows an occasional "direction" of the sort (20)—it is not, after all, *meaningless*—or to guard against it by introducing an axiom mimicking the traditional axiom of noncontradiction,

(21) -[!(pT-p) & !(-pTp)].

230. *Id.* at 18. Brandt's example is drawn from the Ten Commandments, which enjoin us to do no work on the Sabbath and to honor our fathers and mothers. What if one's parent requires, during Sabbath, some work? Brandt's response seems rather lame for one who has maintained that inconsistency is "a mortal thrust": "A difficulty like this is inherent in *any* set of moral rules of the form, 'Always do. . . .' . . . 'There is always a *strong obligation* to do. . . .' " *Id.* (emphasis and first and third ellipses in original).

231. I adopt the term from G. VON WRIGHT, *supra* note 208, at 147.

232. (20) does have the air of a traditional Navy work rule, the point of which is to keep seamen busy and practiced in discipline on long cruises; perhaps, on some comparable view, keeping people buffaloed is good?

If we made (21) axiomatic, a system that yielded interesting, suggestive directions for action, but also entailed, in a few cases, something like (20), would have to be withdrawn or revised. Or we could refuse to adopt such a restriction, in recognition that perhaps in some moral realms, the rules required to make sense of things generally will entail an occasional queer (and ultimately nondirective) edict. Whichever choice we make, to invoke (21) or not, we are fixing one more element of the plane's logical character. And, as I observed in response to the Orestes Quandary, it is conceivable that we would exercise a different option depending upon whether the moral governance with which we are concerned deals with CNPPs, remote persons, nonsentients, and so on.

3. *Multiple Choice Criteria*

The Orestes and Sisyphus prescriptions may appear contrived. But when we advance to consider more typical dilemmas—situations in which both the fact situation and the applicable rules are more richly and realistically detailed—the problems presented are not more tractable. The most common difficulty arises from the presence of multiple choice criteria (MCC):[233] in effect, there is more than one applicable criterion for determining what is right (whether expressed in terms of O, §, or !), with no overriding master principle to integrate them into one right answer.

To demonstrate that the problem is one ubiquitous in moral analysis, and not merely a by-product of efforts to assimilate UEs and Ds, let me take an illustration from a familiar CNPP context. Consider the question of how to allocate advanced medical technology, such as renal dialysis units, when there are more patients dying of kidney failure than there are devices to go around.

There are several morally appealing bases on which such devices might be allocated. Because in this subsection we are concerned with governance on other than a single maximand basis, we can disregard as the sole principle for allocation both unconstrained utilitarianism, which would make the decision turn solely on the relative utility to society of the various allocations of the machine, and unconstrained queuing (first

233. I adopt the term from, and am indebted for some of the following analysis to, Matthew Spitzer's seminal employment of social choice literature to attack problems involving the combining of *criteria* (desiderata), rather than, as in the conventional literature, the combining of *voters* (desirers). *See* Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke, *the FCC, and the Courts*, 88 YALE L.J. 117 (1979).

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come, first served), which would also produce a unique transitive ordering. Indeed, most of the commentators feel that such cases call for us to (somehow) blend a whole range of factors.

Based upon one proposal[234] we might include the following criteria to be considered:

1. *A Progress-of-Science Criterion*: Of two applicants, A and B, A will be favored if the scientific information gained from treating A promises to be superior to that gained from treating B.

2. *A Prospect-of-Success Criterion*: A will be favored over B if the prospect of success with A is greater.

3. *A Life-Expectancy Criterion*: A will be favored over B if A's life expectancy, if brought to health, is greater.

4. *A Potential-Future-Contributions Criterion*: A will be favored over B if the prospective service to the community of a healthy A exceeds that of a healthy B.

5. *A Past-Services-Rendered Criterion*: A will be favored over B if society is under a greater obligation to A for services A has rendered.

6. *A General Equitable Criterion*: A will be favored over B if A had more reasonable expectations of receiving the device—if, for example, A had reasonably relied upon assurances from the staff that A would be preferred over B.

Suppose that there are four applicants, A, B, C, and D, whose claims to the one available device are to be determined under these criteria. Suppose further that we can unambiguously rank the strength of each one's claim under each criterion, from strongest (top) to weakest (bottom) as follows:

1	2	3	4	5	6
A	B	C	A	B	C
B	A	B	C	A	B
C	C	A	B	C	A
D	D	D	D	D	D

Something comes of this: we can eliminate D, who ranks last under all criteria. But then what? If Criteria 1, 2, 3, and 4 are all deemed to express utilitarian considerations, we can collapse those four into a single utilitarian ranking, which we will imagine to be U, leaving us with the following table:

234. *See* Rescher, *The Allocation of Exotic Life-saving Therapy*, 79 ETHICS 173, 176-80 (1969).

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	U	5	6
Best	A	B	C
Middle	B	A	B
Worst	C	C	A

This leaves us with the question of how to combine these disparate rankings so as to yield a single right decision. The analysis would have been comparable if we had illustrated with two animals in danger: how ought we to account for their relative usefulness, rareness, beauty, and human-like qualities? The problem is one that recurs throughout practical reasoning. For example, anyone who proposes to combine utility with rights has a tough time explaining how two such different things are to be *combined*.

The point is not that multiple criteria are of no assistance. We saw that the option that ranks consistently last under each criteria is rightly eliminated. And it is conceivable that in some MCC analyses a single option, say A, might score best in every category. But in the great number of cases not so easily dispensed, what ought we to do?[235]

First, we can devise and defend a system of weighted points, perhaps plane by plane, assigning to different criteria different multipliers according to their moral importance. Such a system would extend the prospects of producing a single winner (indeed, it would restore, somehow, single-maximand properties). But that leaves us with the obvious problem of how to justify the weightings.

The second alternative is to countenance a certain degree of ambiguity, that is, to renounce the aspirations of producing one right answer. A viewpoint may be regarded as a contribution to moral thought if it constrains, but does not eliminate, alternatives. At that point, left with several options to choose from, we might take the position that the remaining alternatives are in fact equally good—or equally evil. Or it might be that one is really better (worse) than the others, but it lies beyond the province of formal method to make the discrimination; lacking any basis for appeal to identifiable rules or paradigms, we are left in the last analysis to our educated feelings, our intuitions. Some people will regard such indeterminancy as totally invalidating any moral viewpoint that allows it. Others, however, might accept the openness as a welcome

235. For a more formal effort to axiomatize a multicriteria choice process and apply it to real social choices, see Spitzer, *supra* note 233.

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condition of our moral lives—of the freedom from which our moral character is to be built.[236]

4. *Sole, Nonmaximand Prescriptions*

There are nonmaximand systems that aim to avoid such difficulties as the Orestes, Sisyphus, and MCC dilemmas. Like classical utilitarianism, they offer a single, overriding principle; but, unlike utilitarianism, they make no pretense to maximize anything. Some of these alternatives are rule based, e.g., Kant's Categorical Imperative, which enjoins us "never to act except in such a way that I can also will that my maxim should become a universal law."[237] Other alternatives are less rule regarding than paradigm or person regarding, for example, the Aristotelian and Paulist traditions, which on some interpretations regard the emulation of a person (in the one case, an ideally good person;[238] in the other, an actual historical person)[239] as more important than following any set of laws, as such. We can imagine that if Orestes had been a Kantian, faced with a choice between Rule 1 (avenge father; kill mother) or Rule 2 (fail to avenge father, mother lives), he would have asked which of them could be generalized into a maxim that he could will to serve for all mankind. On some views of Christianity, he might be expected to resolve it on the basis of what Christ would have done. It is obvious that such approaches are problematical unless the maxim or paradigm addresses the case in the most unambiguous way. Less obvious is that, even if the terms/paradigm are clear, attempts to substitute a nonmaximand for a maximand prescription give rise to some additional problems of their own.

5. *Intransitivity: Cycling and Agenda Dependency*

Earlier, I reviewed how measurable properties such as "heavier than," "larger than," and "warmer than" can yield a rank ordering across all things being compared in respect of that property, i.e.,

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236. "Most of the actions that we perform are neither right nor wrong, good nor bad. They fall, rather, within the zone of moral indifference." J. FISHKIN, THE LIMITS OF OBLIGATION 20 (1982).

237. I. KANT, *supra* note 121, at 70.

238. ARISTOTLE, *supra* note 190, at 1113a, *reprinted in* THE BASIC WORKS OF ARISTOTLE 970-71 (R. Mckeon ed. 1941). The good man is the norm and measure of the moral truths in each class of thing. *Id.* at 1113a, *reprinted in* THE BASIC WORKS OF ARISTOTLE, *supra*, at 971. Moreover, in matters of virtue, the good man (the man of practical wisdom) is the measure of moral truths, *id.*, and "what is best . . . is not evident except to the good man." *Id.* at 1144a, *reprinted in* THE BASIC WORKS OF ARISTOTLE, *supra*, at 1035.

239. In the tradition of, for example, T. KEMPIS, OF THE IMITATION OF CHRIST (circa 1470).

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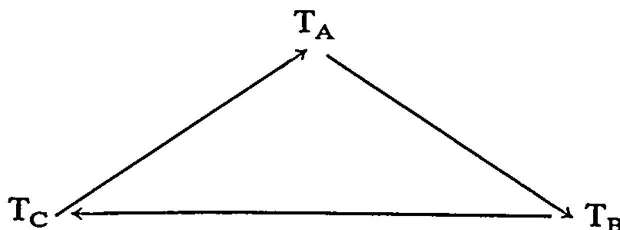
$$A > B > C > D > \ldots.$$

But it is well known that not all properties yield such a ranking. Consider three basketball teams, A, B, and C. It is possible that Team A, with its intimidating center, can beat Team B (which lacks outside shooting ability); Team B can beat Team C; but Team C (because its offense is strongest exactly where A has its one weak point) can beat Team A. Once more, when $A > C$ stands for "A beats C":

(20) $A > B$ & $B > C$ & $C > A$.

Graphically, the situation, which we will refer to as *cycling*, can be depicted as follows:



The potential for such an outcome is why the popular wire service rankings of teams is problematic. "Better than" is not "heavier than"; it is not "illogical" to find A ranked above C, even if Team C had beaten Team A in their only meeting.

When a moral system renounces ambitions of transitivity, cycling presents a comparable problem in moral analysis. Suppose one is a Kantian, committed to abide only by maxims that can be willed for all mankind. As such, I might judge it my duty to save the bison under a sympathy-for-all-living-creatures maxim that I am prepared to generalize and prescribe for every person similarly situated. However, comparing the outcome that action will produce—leaving the bison to maraud on land—with shooting the bison, I might will the latter, under a special-sympathy-for-safety-of-persons maxim that I am equally prepared to generalize. Moreover, when I compare shooting the bison with pushing it into the river, letting nature thereafter "take its course," is it not possible I could embrace the latter, under a universalizeable maxim based upon the notion that humans ought not to stain themselves with the direct killing of a living creature? Taken together, these rules would be represented graphically, on an O base, as (where s represents the bison shot, p, the bison in the river):

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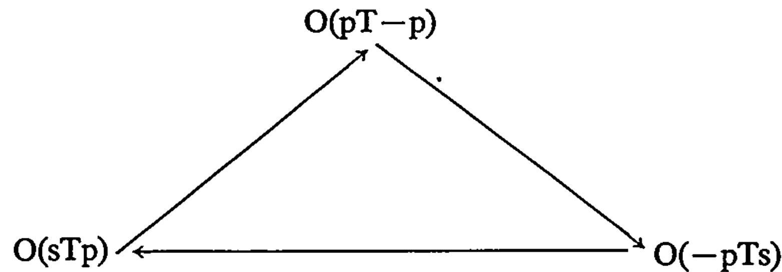

Closely related to the problem of cycling is the problem of agenda dependency. To understand this concept, it serves to compare, once more, the lumps of coal[240] with the basketball teams. In determining which lump is heaviest, the order in which the various lumps of coal are paired makes no difference to the final outcome. That is, whether we first weigh lump A and lump B, "pitting" the heavier against lump C, or whether we begin with lumps B and C, pitting the heavier against lump A, the same lump will emerge the winner. In other words, the correct identification will be independent of the order in which the alternatives are taken up for consideration, i.e., the agenda. Note that this is not the case where the relationship is intransitive, as among basketball teams. Under assumption (20) above, if Team A and Team B meet in the qualifying round, the winner will be A, which, facing C in the finals, will lose. But if B draws C first, C will vanquish B, and A will take the tournament. That is why seedings are so significant in athletic tournaments: they have the potential to determine outcomes. And in this lies a further problem with nontransitive moral systems: we find them to have some of the character, and complications, of "better than" in basketball tournaments rather than "better than" in classic utilitarianism. Some styles of moral reasoning, otherwise appealing and fashionably received, may turn out to be agenda dependent.

Agenda dependency is most evidently a problem for an intuitionist. If most people's intuitions are not transitive, one would expect dissatisfaction with a process of seeking to identify general moral principles from intuitions about the rightness of outcomes in a series of thought experiments. It is hard to see how the decision that prevails can fail to be influenced by the order in which the hypotheticals are taken up for consideration. I do not know how an intuitionist would respond, because it is not, as far as I know, a question that many moral philosophers have confronted. Ken Kress has pointed out that sequencing presents comparable problems for a coherence theorist, such as Ronald Dworkin, to deal with: the set of beliefs that provides the most coherent explanation of all

240. *See supra* text following note 221.

the data, principles, and so on may depend upon the fortuitous order in which the data is processed, e.g., which controversy was decided first.[241]

Problems of agenda dependency are not eliminated by replacing intuition and senses of fittingness with a system of rules, so long as the rules remain nontransitive. To illustrate, suppose the following: D, just deceased, had, upon entering the hospital, signed a living will authorizing the hospital staff to remove his heart for transplant. The hospital ethics committee has adopted the following rule for organ transplants: "Transplant organs will be distributed to applicants in the order of their application, except that when two applicants are related by blood, the organ shall go to the younger."[242] The three claimants, A, B, and C, had applied to the hospital for a transplant in the order: A, B, C. A is B's older sister (by the same father); C is B's younger brother (by the same mother); A and C are unrelated by blood.

Now, note that if the hospital staff initiates its decision by examining the folders of A and B, B (the younger of that pair of siblings) will prevail over A; and when B's case is then compared with C's, C, the younger of the two, will be awarded the heart. On the other hand, if the staff begins by comparing B and C, A will be awarded the heart. And if consideration begins by comparing A and C, B will be awarded the heart.

The point is this: systems organized on nontransitive principles run the risk of cycling (20). On the basis of some coherent set of rules, finding oil reserves may dominate saving Bowhead whales; saving whales dominate preserving the Indian culture; and preserving the Indian culture dominate finding oil. Which alternative prevails is therefore dependent upon the fortuities of agenda. By introducing agenda rules it is possible to establish a determinate winner. But the outcome will appear arbitrary unless the agenda rules are themselves part of a morally defensible package. That is not to say that no such rules—as elements of defensible governances—could be devised. It is to say that fixing the character of those rules is a further task for anyone determined to work through the details of a comprehensive ethical viewpoint.

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241. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369 (1984).

242. I will not try to articulate and defend a substantive basis that might make this rule more appealing than any rivals, although some will observe that I have combined a broadly appealing equitable principle, queuing—or, more plainly, first come-first served—with a consideration favoring, in any familial gene pool, the probability of that family's genes being represented in the next generation.

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Summary

This subsection has been lengthy enough to warrant a small summary of its own.

I have expressed my doubts that the same moral governance can be convincingly applied across all domains. We have therefore been examining the possibility of pluralism, viz., that for different domains, there are different governances. There then arose the question: Of what differences might different governances be composed? In response, I have undertaken to identify some elements of moral discourse's logical texture.

I began by partitioning the prescriptive evaluations ("you ought to do act A") from gradings of character and other things ("X is a good person"), treating the former in this section, and reserving the latter for the section that follows.

In regard to prescriptions, variables include the familiar substantive rules and principles, and their combinations. But these rules considerably underdetermine the logical texture, and so underdetermine outcomes. Much depends upon how one constrains the grain and substance of morally salient descriptions. Further variations lie in the texture of the concepts, such as "equality" and "cruelty," which implicates questions about how much vagueness, ambiguity, open texture, and so on is to be condoned. Even when a prescription is satisfactorily unambiguous as far as state descriptions go—we are agreed that q is better than p, and we know what p and q mean—there are operator variables to consider: questions of the moods O, §, and !, and the relations among them. There seem to be systematic ambiguities in expressing contradictions, that is, whether the contradiction of O(pTq) is to be determined by the internal negation or the external, or both. As we shift away from viewpoints that enlist a single maximand, the alternatives are underdetermined in further respects. We must either rule out or admit certain outcomes that are logically possible, but strange: the Orestes Quandary, the Sisyphus Prescription, cycling, the difficulties presented by MCC, and so on. How one resolves these problems determines whether we countenance a governance (or some governances) in which the aim of morals is to produce one right answer to every prescriptive quandary, or whether we settle for a governance with more modest ambitions.

But where does this leave us? Ethics seems difficult enough when it revolves around contending substantive principles. Emphasis on additional elements of logical texture may be received as downright disheartening.

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There is a lot of work to be done, not only for those concerned with the status of UEs, but for those doing mainstream moral philosophy as well. On the other hand, this richness of variables, if demoralizing to a monist, represents, to a pluralist, opportunity. The richer the range of variables, the greater the potential to construct a flexible *community* of moral frameworks, each appropriate to its own domain. For example, defending moral regard for lakes may seem silly—or even unintelligible—if the rules of moral discourse compel us to bring our position under the same governance that applies to a sentient contemporary moral agent. But we are not limited to treating lakes as *either* indistinct from humans, and subject to the exact same rules (I am not even sure what this would look like), *or* cutting them off from regard completely. There is the prospect of a middle ground. Perhaps there is no way we can sensibly inject into the relationship with lakes prescriptions that carry the sense of what one must (!) affirmatively do, or what is morally impermissible (-§). But that would still not rule out developing intelligent (though quite vague?) things to say about one's moral obligations regarding lakes—in terms perhaps of ought (O) prescriptions, even in the softest sense of what is morally welcome. Such judgments, in turn, could then be entered along with other elements into the package of considerations that bear upon the ultimate, and ultimately complex, decision regarding what to do in a particular situation. The potential significance of these soft operators ought not to be disparaged, for legitimating even the slenderest moral considerateness can tip outcomes that are, on other considerations, closely balanced.[243]

Many questions remain open: whether we can fashion coherent patterns from this material of logical textures; whether any such patterns can be defended as appropriate governances for certain planes; at what point all pretense of logic peters out, and imagination and intuition take hold; and whether, indeed, the image presented is a defensible way to go about ethics—all these are other matters to which we shall return, after the glancing appraisal of character which I have been deferring.

243. Consider whether we ought to warn remote future generations about where we have stored toxic wastes. Considering the total costs of the waste disposal programs, the warning is a modest item of the budget. Yet, even that commitment requires *some* animating concern, because we have to figure out how the message can be understandable by persons whose language may have evolved into something that bears no evident traces of any contemporary tongue. *See Reducing the Likelihood of Future Human Activities that Could Affect Geologic High-Level Waste Repositories* (Battelle Memorial Inst., Human Interference Task Force 1984).

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E. The Logics of Moral Discourses II: The Place of Character and Innate Qualities

Seal Killers Aren't Evil, but Seal Killing Is[244]

Most of the contemporary literature in moral philosophy is preoccupied with *choice of action*:[245] what is the right thing for someone to do in a particular situation? This explains the extensive attention given to prescriptive discourse in the preceding section. One almost forgets that today's nearly one-sided emphasis on "quandary ethics," as it has been called,[246] is of rather recent origin. In earlier western, and certainly in nonwestern traditions, ethics has been thought also to involve something broader: "What is good character?" or "how to live?"[247]

Now, certainly, an interest in actions is not inconsistent with an interest in character, since good character is typically associated with a propensity to do good acts. There are, however, three distinct views of the role character might play.

On the first view, the emphasis remains where it was with prescriptions, on solving a quandary. Should the passer-by rescue the bison? Whether the agent's choice was right or wrong will be evaluated without reference to the agent's character. This choice being hard, however, the agent may employ a character-oriented maxim as a guide, in the same spirit in which customs or conventions may be guides: "Act in situation S as E (an exemplary character) would do." (St. Francis of Assisi would, we presume, save the bison.) The essence of this first view is to regard character as the *dependent variable*. Concentrating on character may help the agent decide, but the important thing is action; whether the agent's character is good is to be inferred, in the last analysis, from the independently evaluated goodness of the acts chosen.

On a second view, the focus remains on right conduct, but character is regarded as an *independent variable* in the evaluation of the action. On this account, the judgment whether the agent's actions are good accounts for variations in individual character. This is not the conventional view. Most traditional moral analysis, while routinely prepared to account for differences in *situation* in evaluating actions, considers it improper,

244. Headline from the Los Angeles Times, May 10, 1983, pt. II, at 5, col. 3.

245. Although not wholly; most notably, much of John Rawls' work, for example, *A Theory of Justice*, *supra* note 171, and much of the social choice literature, *see, e.g.*, A. Sen, *supra* note 119, is concerned with evaluating institutional arrangements.

246. Pincoffs, *Quandary Ethics*, 81 Mind 552 (1971).

247. The how to live tradition is carried on by some contemporary philosophers, *see* R. Wollheim, *supra* note 157; Wiggins, *supra* note 157, but it is not at this point a central dialogue.

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within special limited exceptions, to include description of the agent's personal history, personal beliefs, values, ambitions, life plan, and so on. Part of the reluctance is that special pleadings are troublesome enough when situational variations are accounted for. Allowing for variations in character is all the more problematic. If there are, for example, privileges right for me *considering my character*, but not necessarily right for you, *considering your character*, then much relies upon open-ended descriptions of the most highly subjective and potentially self-serving sort. What would we make of Hitler's claim that his actions were "right for me" because they flowed from his character and fitted—is not *Mein Kampf* the evidence—into his life plan?

Such considerations support the predominant view that one's good actions establish one's character—not the other way around. Yet, having indicated some of the difficulties, let me give an example where I think such an accounting of character is plausible. Consider once more the bison struggling in the river. Let us imagine: (i) that the bison cannot be rescued without some hazard to the would-be rescuer and (ii) that the only rope strong and handy enough to do the job lies in an unlocked truck, the owner of which has wandered off. Thus, to rescue the bison will require not only a personal risk, but a nonpermitted opening of the truck door and borrowing of the rope, a form of trespass I will assume to constitute a prima facie, if minor, moral wrong.

Now let us imagine that there are two onlookers, one of whose whole life has been dedicated to conservation, wilderness, and the protection of living creatures, particularly wild ones. This onlooker frequently lectures on the need for environmental protection and often appears to testify on its behalf before legislative committees. I am inclined to argue that for this person it would be right, at least in the sense of § (pT-p), and perhaps of O(pT-p), to rescue the bison, notwithstanding the personal risk and minor trespass it would involve. Yet, for the other passer-by, particularly considering the personal risks of a rescue, the same conduct appears (at most) permissible; we would be less inclined to say that the second onlooker is obligated or mandated to borrow the rope and rescue the bison.[248]

1. *Character As an Intrinsic Good*

Both the conceptions above regard good character as instrumental. On both views, what is ultimately valued are good acts, the goodness of

248. *See* Pincoffs, *supra* note 246, at 559-60; *see also* J. SMART & B. WILLIAMS, *supra* note 174,

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character being conceived alternatively as wholly dependent on the goodness of the agent's choice (the first view), or as one additional factor in evaluating the choice's goodness (the second). Both views of character can be assimilated into the general analysis of prescriptions. But there is a third, more radical employment to which character might be put: one not in the service of action evaluations, but as a good in itself. This is the view that I am principally interested to examine here, since it seems to implicate some distinct properties of logical style.

Let us grant, at the start, that the difference between character as means and character as good can be presented as a mere difference in emphasis. It is difficult to imagine an evaluation of good character that disregards a conception of good acts. But even should some such *connection* be inevitable, the connection could be of two sorts.

On the one hand, the linkage could be conceived as strong, but with character regarded as dominant. That is, rather than evaluating the agent's character depending upon how we evaluate the actions that flowed from it, we could evaluate the actions depending upon what we antecedently, and, on this view, more basically, identified as good character. Its proponents would hold that Creation was a good because God did it, rather than God did it, because to do so was good. Presumably, someone who argued for the primacy of character would point out that even among those whose avowed focus is on actions, their analysis is typically dominated by an implicit valuation of character, e.g., that the preference- or pleasure-satisfying character is a human ideal.

On the other hand, it does not take so complete a reversal to account for character as an independent good. One can suppose that evaluations of actions and evaluations of character each proceed according to their own rules, i.e., on separate strata. There is a suggestion of this in the fact that there are some predicates we characteristically apply to acts and not to persons, and vice versa. For example, "rectitude" is principally a term of character, while "atrocity" is more applicable to acts. Moreover, while many more predicates are common to both acts and character, e.g., "good act" and "good person," the rules that govern their use, while assuredly related, need not be identical. No fault criminal liability may express the idea that the act is bad and ought to initiate a penalty, but that the actor's character is not to bear the stigma of blame. And surely someone sympathetic to utilitarianism as a standard for act-evaluating actions is not committed to evaluate an agent as a good person

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at 99-100 (laying stress on character notions such as integrity as uneliminatable in evaluating conduct, and not adequately accounted for by utilitarians).

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on the basis of nothing more than a history of maximizing the greatest good of the greatest number.

Hence, of the several planes on which moral discourse is conducted, I am suggesting that some are drawn to accent what is required for the evaluation of actions, and others for the evaluation of character. Although there are enough common considerations to assure some loose linkage, or mimicry, the two activities would be conceived as governed by independent rules. By detaching the enterprises, differences that now lie latent and obscure can be identified and developed. Specifically, a plane which regarded the two as being of independent, detachable interests and which accented character would account for and expand upon the following differences:

(1) In evaluating character, we bring to bear more data regarding the agent's history, ambitions, and so on than is ordinarily deemed relevant (or appropriate) in the evaluation of actions. Indeed, character evaluations are commonly in the form of whole-life evaluations.

(2) Conceivably, not only more, but different sorts of information are relevant. On at least some theories of act evaluation, all that counts is the outcome. But in evaluating character, motives always count. For example, the consequences are the same whether a person kills a bison accidentally, in self-defense, or from spite for nature. A pure consequentialist has a hard time explaining why the three acts should be evaluated differently. But no one, I imagine, would be indifferent to A's intention in evaluating A's character. Similarly, I suspect that someone who was utilitarian in act evaluations, and who saw nothing useful about the salvation of some endangered species (nor who found redeeming utilitarian virtue in characters inclined to so fritter their time), might yet find such a character admirable.

(3) In evaluating character, a given action may be placed in a different moral light than when the action itself is being evaluated. Acts neither good nor bad in themselves may, in the aggregate and in light of a pattern, provide probative evidence of the actor's character because of the way the conduct disappointingly conflicts with, or marvelously reinforces, the life the person has selected. Certainly it seems possible to speak without irony of noble Brutus, the more noble for having joined the conspirators, without approving of Ceasar's assassination.

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(4) The evaluation of actions always involves some amount of generalization. If act *a* is good, it is always because acts of the same character are good.[249] In making character evaluations, we do not seem so strongly committed to generalize. There is more tolerance of, even appreciation of, what is uniquely good about the particular person being evaluated.[250]

2. *The Logic of Evaluation Predicates*

My inclination to afford character a separate treatment gains further impetus from the point, already alluded to, that the logical style of character assessment and other gradings appears to differ from that of prescriptions. Most significantly, the basic element in a prescription is a transition in states, which we accentuated by repeated reference to pT-p. Here, at least when character assessment is elevated to an independent interest,[251] the basic element seems to be of a form Gx; that is, we predicate of the agent x that x is good—or heroic or wicked. I will proceed to concentrate on evaluative predications of character, a discourse girded on the response to two questions: (i) What moral grading descriptions (good, evil, licentious) will apply to (ii) what range of entities (persons, children, institutions, nations)? But we should keep in mind that in terms of logical properties, the grading of character has much in common with any other grading. Hence, the present analysis is relevant to analysis of any allegedly intrinsically good *quality*, e.g., beauty, or intrinsically good *thing*, e.g., a lake, or an intrinsically good *way of life*. Any of these, recall, could form the basis of a moral viewpoint that provides a coherent account of the moral considerateness of Ds.[252]

In regard to the logic of these gradings, one might consider some further contrast with prescriptions. In the case of prescriptions, the strategy of the discourse exerts demands on the texture of the rules and concepts, that they be fine grained enough so as to clarify choices for our conduct. After all, the focus of interest is not on the application of a

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249. See the exchange between Professors Neil MacCormick and Steven J. Burton in PROCEEDINGS OF CONFERENCE ON "REASON IN LAW" (C. Foralli & E. Pattaro eds. forthcoming 1986) (conference held in Bologna on Dec. 12-15, 1984).

250. In fact a man's character is likely to exhibit itself in his making obligatory for himself what he would not hold others obliged to do. A man does not attain moral stature by what he demands of others but by what he demands of himself; and that he demands more of himself than [of] others is not something in itself admirable, but is what is to be expected if he is to have a distinct moral character.

Pincoffs, *supra* note 246, at 563.

251. I call the interest in character independent when the evaluation of character is the final object of an activity, and not as a means to forming prescriptive judgments.

252. *See supra* notes 137-62 and accompanying text.

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term, per se, but on what to *do*, however we label it. By contrast, a discourse of moral grading takes qualities as its direct object. By being liberated from the pressures to support one action or the other, it allows for richer and looser, even overlapping nuances.[253] A person who did not go to the aid of the struggling bison might be callous, cruel, knavish, heartless, inconsiderate, heedless, or unfeeling; in light of the person's past history, we might add that he was hypocritical, insincere, deceitful, inconsistent, unreliable, etc.—all without saying that he was obligated (O) to perform the rescue, much less that rescue was mandatory (!).

With such unruly nuances in play, with what logic can character discourse possibly be yoked? An entity of which some property q is predicable—a person, a nation, an animal—cannot both be q and -q, cruel and not cruel. And there is some room for syllogism,[254] although it fails to do much of the work we need.[255] Thus I believe that here, in the region of ethics concerned with moral grading descriptions—when we mull whether a lake is valuable or a life flourishing—attempts to assimilate moral activities to science and mathematics are even more strained than when we consider prescriptions. It seems to me that whatever logical style we can bring forth from all this finds more fruitful guidance when we look towards aesthetics.[256]

To locate the common grounds that ethics and aesthetics share, a mutual contrast with science is useful. Throughout much of normal sci-

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253. This is less true in those cases where we make a character grading conscious of consequences that will be attached, e.g., that someone is dishonest within the context of appointment to public office.

254. *See* H. AIKEN, *supra* note 206, at 94-95.

255. The question whether to label "cruel" an onlooker who did not attempt to rescue the bison could be structured in the following manner:

Major Premise:	Any person who without justification allows a sentient creature to die is cruel;
Minor Premise:	B unjustifiably allowed a sentient creature to die;
Conclusion:	B is cruel.

To that extent, at least, some logic is operative. But of course, the syllogism's contribution to what we need is small. The major premise is hardly unproblematical; as for the minor, was not rescuing the bison unjustifiable considering the risk? Perhaps B was not cruel, merely callous—or even steadfast in a moral resolve not to interfere with Nature. In all events, can a single action or inaction define one's character?

256. Unfortunately, the tendency of ethicists generally has been to put a distance between their subject and aesthetics in order to avoid what might be considered a sullying alliance. It has been wrongly assumed that intellectual respectability requires an assimilation to (an oversimplified view of) science and mathematics. The law school by-stander can only hope that with the waning of positivism generally in epistemology and in ethics there will be more common effort between ethicists and aestheticians in the future.

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ence,[257] we can lay down a fairly precise rule that if certain things are done, a certain result will follow: if water is brought to such and such a temperature at such and such a pressure, it will boil. With aesthetic concepts, the place of such rules seems limited. We cannot specify what combinations of colors and lines will bring a painting to the point of being beautiful, charming, or even graceful. The same limits appear to apply to ethical predicates: what element can we prescribe adding to a person's character, what particular action can that person undertake, to *ensure* rectitude?[258]

We must grant that part of the contrast is not one between ethics and aesthetics, on the one hand, and science, on the other, as much as one between vagueness and precision, wherever they be found. Vagueness thwarts governance by formal rules, even to the point of paradox. Consider Mark Platts's "proof" that there can be no such thing as a heap:

(1) One grain of sand is not a heap.

(2) If n grains of sand are not a heap, then neither are $n+1$ grains.

(3) Therefore no number of grains of sand is a heap.[259]

"Good and "beautiful," one might say, are simply vague, like "heap." But with aesthetic and ethical predicates the troubles run deeper and more rampant. With ordinary vague terms like "heap" or "bald" or "warm," we can at least specify that an increase in grains, a decrease in hair, a rise in temperature, all operate unambiguously *in the direction of* heap, bald, and warm. With aesthetic concepts, that is often, perhaps characteristically, impossible. Can anyone specify as a general rule what one adds to make a painting more beautiful, or takes away to make it less garish? As Frank Sibley has pointed out, "Things may be described to us in non-aesthetic terms as fully as we please but we are not thereby put in the position of having to admit (or of being unable to deny) that they are delicate or graceful or garish or exquisitely balanced."[260] While there

257. I use normal science in Kuhn's sense, that is, activity within an accepted paradigm. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23-34 (1962). In choosing between frameworks and paradigms, the role of aesthetics in the broad sense—in favoring a more or less elegant solution—remains. *See* Judson, *Where Picasso and Einstein Meet*, NEWSWEEK, Nov. 17, 1980, at 23.

258. Note that where prescriptions are concerned, at least some writers—utilitarians and welfare theorists—have been encouraged to seek a scientific precision. No one, as far as I know, has even tried to do the same in the treatment of character.

259. M. PLATTS, *supra* note 175, at 218.

260. Sibley, *Aesthetic Concepts*, in PHILOSOPHY LOOKS AT THE ARTS 64 (J. Margolis ed. 1978).

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may be certain features, such as slimness, lightness, or lack of intensity of color, the presence of which will count only towards, not against, delicacy, "these features . . . count only *typically* or *characteristically* towards delicacy; . . . no group of them is ever logically sufficient."[261]

Now, at first this claim may sound no different from an allegation of open texture, which infects all terms of a natural language.[262] We cannot lay down a list of necessary and sufficient criteria even for a naturally existing kind of thing such as a "tiger" either: what if someday we should discover a tiger-like creature that met all our present criteria but proved to be a vegetarian and was born from an egg? I am not certain, but I think that with respect to character predicates the openness is more serious. As distinct from most predicates, features which are characteristically associated with one aesthetic term or verdict may also be associated with other predicates so different as practically to constitute their opposites. The features we associate with terms like "flaccid," "weakly," "washed out," "lanky," "anemic," "wan," and "insipid" characteristically include pale color, slimness, lightness, sharp contrast, and lack of angularity—virtually identical with the range of features that support "delicate" and "graceful."[263]

The comparison with aesthetics does not mean it is bootless to *search out* better and worse procedures for organizing thought, settling differences, garnering insights—better and worse logical styles in a loose sense. I agree with Michael Moore that inquiries into the meaning of these terms cannot stop with conventional usage; the moral commitment is to search for the best theory we can devise about what sort of quality moral terms refer to.[264] But this suggests that the best theory is destined to involve us (more with moral grading than with prescriptions) in heavier reliance on narrative, example, and paradigms, and in the training of morality's equivalent to taste.[265] Learning the piano, for example, involves music theory, but also a strong dose of listening to pianists. Someone with training *points out* certain features that make a performance

261. *Id.* at 69 (emphasis in original).

262. Waismann, *supra* note 195, at 126-27. For a discussion of open texture and natural kind words, see *Semantics*, *supra* note 217, at 200-07.

263. *Semantics*, *supra* note 217, at 204-07; Sibley, *supra* note 260, at 69; *see* A. CROCE, AFTERIMAGES 44 (1979) ("Cynthia Gregory was steadfast about turning her points and then her flexed feet into the ground, and Makarova was steadfast about *not* doing it. But both gave fine performances . . . .") (emphasis in original).

264. *See* Moore, *Moral Reality*, *supra* note 217, at 1144-45.

265. Narrative is also employed to some degree in learning to evaluate good and bad acts: but with act education, I think there is more emphasis upon extracting criteria and constructing general

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whatever it was, good or bad—the timing, the phrasing, etc. ("Just listen again.")

It is similar with ethics, but particularly with character. Much of what we learn, we learn through narrative: exemplary stories about good and bad persons.[266] Our attention is drawn to the morally salient aspects of the story elements, to implications, parallels, precedents, and to how implied ideas of virtue cohere with other related ideas. Up to some point there is pointing out, explaining; but beyond that, only pointing. Perhaps the region of *pointing* carries as far as it does because in ethics, as in aesthetics, there is a sense that some people have better trained perception and taste, persons whose opinions, therefore, carry an authority beyond what they can *tell* us.[267] This emphasis upon taste implies that some of the attention in moral training is turned inward, towards self-analysis and improvement of our own sensitivity and its use. What factors might be influencing our judgment of an opera or of a person—and which of those factors are illegitimate? Which biases should count? And which should be discounted as illegitimate?

None of this settles the substantive questions: What are the virtues—of human character and of the earth? What makes a person or a lake good? But it does suggest something about the character and ambitions of the grading enterprise. Throughout ethics there are affinities with aesthetics, but particularly in this area where the texture of judgments is most open, and trained intuition dominates. We should not expect to produce formalized rules, even to the extent that was essayed in the region of prescriptions.

We have seen, moreover, the special significance the grading enterprise has for our principal thread of inquiry. Conduct regarding Ds may be subject to a separate set of moral inquiries—character assessments—quite aside from whether morality can provide prescriptions that it is, say, morally mandatory (!), or even morally welcome (O), not to disturb the floor of a remote forest. The separate enterprise is whether we can

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rules than upon the evaluation of character and art, which, as observed in the text, are more liberally evaluated "on their own unique merits," rather than as of a sort.

266. Selecting who the good and bad people are is, obviously, a difficulty for substantive ethics. It is notorious that Aristotle, for whom the solution would appear most critical, never achieved it to general satisfaction.

267. It was on this basis that Aristotle suggested a contrast between ethics and science. Scientific judgments he deemed accessible to anyone with ordinary sensory abilities, but in ethics (as in the arts) we recognize the authority of the "man of practical wisdom." ARISTOTLE, METAPHYSICS 1013b (W. Ross trans.), *reprinted in* THE BASIC WORKS OF ARISTOTLE 753-54 (R. McKeon ed. 1941).

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draw a pattern of such conduct under the looser rules of the virtues, in order to hold the undisturbed forest floor to be a good—and to judge that the person who continuously disturbs it wantonly to be, if not wicked, morally insensitive or of wrong character. The rules of this enterprise are hardly clear. But whatever their detail, I think it is quite intelligible to emerge with a judgment of the sort with which this subsection began: perhaps "seal killers aren't evil, but seal killing is." The evaluations of act and of character are subject to separable governances in either or both of which different *things* may be, each in its way, morally considerate.

V. MORAL PLANES, MORAL PLURALISM

We are now in a position to illustrate how the concepts of multiple maps and of variable governances can be combined into the notion of *moral planes* which forms the basis of my pluralist analysis. For purposes of illustration, I will return to the Bowhead Whale controversy introduced earlier.[268] Recall that the search for oil in the Beaufort Sea gives rise to several quandaries that can be conceived to involve our sorting out relations among different *sorts* of entities: contemporary persons, future generations, whales, Indian tribes, corporate bodies, species, habitats, and so on. How would the viewpoint suggested advance our moral understanding of this situation? What distinctive attack on a problem does a pluralist *make*?

Pluralism holds, first, that we have to decide in which of the several moral activities we are engaging. In what immediately follows, I will focus on prescriptive discourse—specifically, what ought the society, collectively, do?—rather than upon a discourse aimed at morally characterizing the various actors, or one that aims at the alteration of underlying tastes. I cannot, in this space, essay to provide the right answer—if there is *a* right answer—to the question whether we ought to go ahead with the Beaufort exploration, and, if so, under what conditions.[269] But I can indicate some of the elements a pluralist analysis would require and the

268. *See supra* text accompanying notes 60-69.

269. Of course, if we are asking whether the Beaufort development ought to proceed at a certain pace under a certain set of conditions, a thorough evaluation, for all but die-hard nonconsequentialists, would require an analysis and comparison of many far-ranging alternatives. Among those options, we could proceed with the Beaufort Sea development at various levels of intensity, explore for oil somewhere else, shift energy reliance away from oil, or reduce energy requirements through conservation. Each alternative presents wide-ranging and often distinct considerations. My aim here is to tear off an almost manageable portion of these problems that will illuminate the prior discussion. To this end, I will ignore the further-ranging alternatives and concentrate on evaluating alternative conditions within the scope of the Beaufort development, with particular emphasis on the

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direction it would take. To begin with, what does "mapping" here involve?

A. The Empirical Maps

1. *E1: Natural Feature Map*

The first map—the basic map which other maps will overlay—is an ordinary empirical map displaying natural features of the affected region. This is required because, while evaluation of the Beaufort Sea development will be made from several moral perspectives, each perspective requires certain common geological and geographical information. Specifically, so far as risk to whales enters into consideration (and it does, to some degree, directly or indirectly, on all evaluative planes), one wants a display of the properties of which those risks are a function, for example, the existing whale migration routes, the geophysical properties of the ocean floor and the structure being drilled, the tidal patterns, the water temperature, and physical properties of petroleum products likely to be discovered. All of these properties are mappable on conventional, if specialized, maps drawn to display all environmental features disturbable by the development in a manner that would put the whales in jeopardy.

2. *E2: Action Influence Maps*

The function of the second map—or, more accurately, series of maps—is to reflect the fact that there are different levels of Beaufort Sea development possible, ranging from no action to intensive accelerated development. For each of these plans, there are associated disturbances of the environment depicted in E1 and thus, for each plan, associated whale-related risks. For example, each area of proposed geophysical dynamiting presents a zone of risk, as does each proposed construction of a drilling island. Thus, for each plan, one should be able to produce a map that depicts as shadings across the topography the whale-hazarding zones of influence. I call these the *action influence maps*, because they aim to display the influence of proposed action.

Now, the data on these maps, E1 and E2, can be combined with biological analysis to display risk-to-whale probability configurations for each developmental plan of varying intensity and precaution. The highest risks will be where zones of maximum hazard on E2 overlap existing migration routes on E1.

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hazards associated with the ecosystem and native tribes through oil spillage, dynamiting, construction, and the like.

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Note that what is involved thus far is, if highly speculative, in principle an empirical enterprise. *Valuing* each level of risk involves, however, something more than gathering and presenting the dangers to various creatures of the various levels of projected risk. In valuing, we have to allow for the fundamental moral questions: what values are we to consider, and in what way? At this point, we have to overlay on the empirical maps what I will call Moral Reference Maps. They are maps in that they map natural features. But they vary in the features that they map, and each is associated with a distinctive governance: the rules, style, and texture of moral analysis fit for *those* salient features. It is their combinations, the natural properties and the governance that I suggest we think of as *Moral Planes.*

B. The Utility Planes

1. *U1: CNPP Preference*

The first set of Moral Reference Maps, the bases for the first set of planes, will all be utility maps, maps whose analytical value depends upon the assumption that utility preferences as well as tastes are both fixed and determinative of the evaluations. The maps vary, however, in their assumptions about *whose* tastes and preferences are deemed to control.[270] The first set of these maps (which can well be imagined as the first series of transparent overlays, resting across the empirical maps) is drawn from the stance of all CNPPs;[271] that is, the aim is to mark the terrain in such a way as to indicate the *utility to contemporary proximate humans* of all things subject to influence under the alternative development plans. We would subtract from the expected social benefits of each plan the associated social costs. These costs account for resources that will be consumed to satisfy the utility of *those who count* (here, CNPPs).

270. I am putting aside the much discussed social welfare question, how disparate preferences are to be combined, a subject to which I do not pretend to have anything to add, in order to move toward the less conventional problems.

271. Obviously, it is a matter of degree how far removed persons have to be before they are considered outside the CNPP community; is a newborn child a part of our community? An aboriginal Australian? The principal factor is whether X can feasibly be drawn into reciprocal relations, either through politics or markets. This is a rough test, but precise boundaries are not required in most cases, particularly if we presume that the aggregate interests of marginal groups (i) are not likely to deviate significantly from those of the "core" neighbor group and (ii) will probably be swamped by the core neighbor interests, in all events.

Whether the separateness of spatially remote persons warrants consigning them to separate planes is, obviously, a point of contention that will not be solved here. Peter Singer argues that degrees of need, not ties of citizenship or proximity, should determine our obligations. *See* P. Singer, Practical Ethics (1979).

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Thus, the map has to indicate each thing (broadly understood to include even such *things* as the quality of light) in the area exposed to hazard that has utility significance to contemporary proximate humans. This significance will either be positive, as with jeopardized things that are predominantly valued, such as edible fish, or negative, as with jeopardized entities that CNPPs would pay to be without, such as, perhaps, mosquitoes. To present this material on maps, we can imagine the use of a particular color, say, green, to indicate those things of positive utility, with the greatest intensity green indicating the things of highest value to collective CNPP welfare; another color, say, red, could indicate those things of negative value.[272] (Of course, ignorance of long-term consequences makes such an accounting hazardous; when future generations are considered, below, there may be a red-for-us, and a green-for-them, or vice versa.)

To illustrate, how would whales be treated in this approach? Whales are, to begin with, *green* in the sense above. Hence, the expected loss of every whale (but not *its* pain and suffering) has to be included in the calculation of costs, along with every other resource that is consumed and valued in the same way. That is, first there will be the question of true commercial price: what is the value the market would place on the bone, meat, and oil of each whale that will never reach market?[273] To this consumption price we may appropriately add some increment for a positive shadow price.[274] This accounts for those whose pleasure in the whales is not reflected in what they pay to see the whales in whale-watching boats, but who get pleasure from the thought that there are whales swimming freely about, and will support the whales on much the same basis as they support public concerts they never attend.

In sum, the first evaluative view regards all things from the perspective of the satisfaction of CNPP wants. In logical style, the operations performed with the mapped information, and that "complete" the plane, are those associated with maximizing a single objective function—utility or pleasure—as presented above.[275] There are, indeed, logical style variables remaining to be resolved. The question of the appropriate way to

272. For utility analyses, strictly speaking, maps and colors are superfluous; graphs would serve because the governance is mathematical, with no impressionistic residue. I employ the map image here to make the treatment of the utility section consistent with the treatment of the planes that follow, for which ordinal representations seem less satisfying than maps for the reasons given in the text, *supra* pp. 78-80.

273. We put aside here the fact that under present treaties and law, the killing and commercial marketability of the Bowhead is restricted.

274. *See supra* text accompanying notes 120-21.

275. *See supra* text accompanying notes 221-25.

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combine individual utility preferences—the appropriate collective choice rule for individual maps—is not uncontroversial, there being several rivals well-debated in the social choice literature.[276] Moreover, does a finding that one state is welfare-superior mean that we must (!), ought to (O), or permissibly can (§) put it into effect?[277] These, the governance variables, are matters to be worked out as the fine tuning of those who "buy into" the U1 plane, as at least one of the planes that will form a reference to govern their thinking.

2. *U2: "Extended" Utilitarianism*

There are closely related planes whose governance character is essentially the same as U1, but which differ in the way they map the world. We could appeal to a second utility plane that mapped from the stance of all contemporary sentient creatures other than humans. Or we could appeal to a plane that combined all sentient creatures—human and nonhuman alike—into a single extended utilitarian community (such as Bentham, in fact, envisioned).[278] I will refer to both possibilities as U2, although these two options might be associated with independent governances and independent judgments.[279]

On U1, the whales' pleasures/pains are accounted for indirectly to the extent those pleasures/pains are the cause of pleasures/pains of CNPPs. Hence, to the extent the harpooning of whales is a source of satisfaction to a human onlooker (H), that positive reaction counts, in the moral evaluation of the harpooning, towards making it good. That is true on U2 as well. The distinction introduced on U2 is that the whales' pleasures and pains (harpooning hurts) enter into the calculus *directly.* H's satisfaction is offset by the whale's own dissatisfaction, as well as in the dissatisfaction of other human onlookers. The whales continue to be regarded as potential items of commerce, a *resource* for the extended community, but they are now elevated to the status of *consumers* whose values count as well. That is, on U2, a "thing" whales like to nosh (plankton, say) has a positive value, regardless of its value in a CNPP utility calculation.

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276. *See generally* A. SEN, *supra* note 119, at 67-70 n.21.

277. *See supra* text accompanying note 225.

278. *See* J. BENTHAM, *supra* note 56, at 283.

279. For example, one might be persuaded (i) that animals are morally significant on their own account, and (ii) that the way to account for them is through their pleasures and pains, but (iii) that each animal's pleasures and pains do not count the same as each human's. Such a position would lead to the first option, with judgments regarding such creatures to be rendered, perhaps, in O form, where a "similar" outcome on U1, restricted to humans, would produce a judgment in ! form.

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It is conceivable that, working within such a plane, we would learn to develop compensation principles applicable to animals, perhaps even whales, in a way that would enable us to assimilate them into familiar welfare analyses. Primates, for example, cannot only communicate some of their preferences, but have been trained to do so in human-devised language.[280] With other animals, typified by whales, we have not yet reached this stage. But that does not mean that marine biologists have no idea of what whales like, of what might be called their "preference profile." It may turn out that a whale's preferences are less richly detailed than a CNPP's, if only because the richness of alternatives available to humans—bowling versus movies—do not present themselves to whales for reasons both physical and intellectual.[281] On the other hand, we could say much the same for infants and the mentally disabled, on whose behalf the law constructs rough preferences fairly routinely. Surely, unless one is prepared to deny that whales have intelligence and are capable of exercising choice, it is fair to infer that they prefer their present route through the Beaufort Sea to any other. (If the path is not determined in every minute detail by instinct, why do they select the variations they do?) True, we cannot be certain *why* and *how much* they would find an alternate route less preferable. Perhaps a more northerly path will take them into less comfortable waters in terms of temperature. Another route would involve a less familiar, more bewildering (anxiety-ridden) path. The food at greater distances from the shore line might be, even if comparable nutritionally, less palatable.

We are unclear on the details. But we do know some things about their preferences—and we could learn more. For example, I presume that those who study whales know their favorite foods and could determine experimentally what meals they would prefer to whatever they can locate on the northernmost edge of their current journey-route. (And let us simplify matters by supposing that none of their favorite fare, krill, plankton, or—God forbid!—snail darters, are recognized as legally considerate in their own right.) The point is, the more we are able to identify such interests—even roughly—the freer we are to allocate Advantages that are not beyond adjustment. We can withdraw or modify a given Advantage, to compensate the whale the way we do CNPPs, thereby mitigating the inflexibility problem, referred to above.[282]

280. *See supra* note 78.

281. On the other fin, the whales may routinely consider alternatives that would not occur to a person swimming alongside.

282. *See supra* pp. 27-31.

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To illustrate how such compensation would work, let us suppose that we regard the whales as having established an Advantage, a right, even, to their traditional migratory route—something like an easement by prior occupancy or prescription. We could regard it, I presume, as subject to condemnation, as we do the rights ordinary persons have to ordinary easements. Suppose that the government has a higher use for the whale's easement. The Treasury might realize, say, $10 billion in selling the oil rights. If so, it could well stand to pay off the whales with a trust fund of $1 million for making their new course more comfortable, and still come out ahead. This we might accomplish by, say, "chumming" the alternate, northerly route with squid, or whatever whale research indicated was high on the whales' preferences; or some of the money could be spent on parasite research. As an ideal, some such solution might be better for everyone, might constitute, in the academic lingo, an interspecies pareto improvement: the United States citizens would be better off, through a reduced tax burden and more oil; the oil companies (investors, customers, etc.) would be better off through the prospect of new domestic oil reserves; and the whales would be tided over by a trust fund expended in such a way as to leave them no worse off than before.

3. *U3/U4: The Temporally and Spatially Remote*

A third utility perspective would extend the moral community to include, alternatively, future humans or all future sentients.[283] Such planes would have to deal with special problems beyond those posed by U1. There is considerable guesswork in mapping what will be their resources. There are the value-implicating complications of endogenous tastes: how much, and in what ways, are we prepared to affect their preferences, the sorts of creatures we are going to *make them be*?[284] There is the problem of selecting a discount rate. And so on. Many of these problems—and variables—have already been referred to.[285]

The spatially remote deserve, however, an additional word. Most of the literature on remote beings focuses upon future generations, i.e.,

283. Once again separate planes are conceivable. We could (i) recognize the moral significance of future creatures, (ii) constrain our relations with them on the basis of their pleasures and pains, yet (iii) rather than combine all our pleasures and pains into a single judgment, produce two judgments, reserving for other procedures how the judgment of what is right *in regard to them* is to be combined with what is right *in regard to us*. *See infra* pp. 147-51.

284. *See supra* text accompanying notes 133-34.

285. *See supra* text accompanying notes 131-36.

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those remote in (future) time.[286] There is, however, much in common between our moral position vis-a-vis persons remote in time—the citizens of the twenty-second century—and persons remote in contemporary space—the starving millions in sub-Sahara Africa. I am not suggesting that the problems presented are exactly comparable. But in many ways, our obligations to the remote of both sort seem to stand on the same footing, and are subject to many of the same intuitions. Neither class is in a position to reciprocate our good gestures.[287] And, in both cases, intuitive feelings of the others' considerateness often appear to dilute with the "distances." One must decide whether with spatial distance, no less than with temporal, it is legitimate to introduce some principle that serves the function of a discount rate. How are high costs and benefits to persons *nearby* to be "corrected" for effects upon populations that are distant? For example, in regard to the Beaufort drilling, an increase in domestic reserves, by relieving demand in world petroleum markets, will be a benefit to the spatially remote. In weighing whether to drill, are we morally committed to treat the preferences of each spatially remote person equally with that of each of us?[288]

To clarify our obligations to the remote, as they might be approached within a utility-dominated framework,[289] we can imagine a series of planes closely resembling one another in their governance properties: $U3_a$ (future generations of persons), $U3_b$ (future generations of all sentient creatures), $U3_c$ (spatially remote persons), and $U3_d$ (spatially remote of all sentient creatures). We might be committed to treat everyone alike, or vary only by reference to the discount rate that applies. Or, the planes might be distinguished by the claims of distinct operators.

286. Is there a possible obligation to those who lived in the past? Joel Feinberg suggests it would be a wrong to hold vilifying beliefs about Nero, if they were untrue, even assuming that no one living was harmed. Feinberg, *supra* note 140 at 132.

287. Nonreciprocation is, indeed, a defining characteristic of the non-CNPP member. *See supra* note 271.

288. *See* Peter Singer holds for an affirmative answer. P. SINGER, *supra* note 271, at 264-73. The point the text means to introduce is, if the answer is negative, do the remote enjoy no consideration at all, or are there rationally defensible intermediate positions, driven, presumably, by one of the six viewpoints reviewed in the text, *supra* at subsections III(B)(1)-(6)? The complexity of transferal of ordinary justice notions to a global scale is examined in Barry, *Humanity and Justice in Global Perspective*, 24 NOMOS 219 (J. Pennock & J. Chapman eds. 1982).

289. In dealing with those whose interests are obscure and who cannot reciprocate, it may be defensible not to maximize utility at all, but to work within special ideal-oriented principles of distant neighbor-regard, something like Agape, *see* G. OUTKA, AGAPE, AN ETHICAL ANALYSIS 290-91 (1972), or one of the viewpoints outlined above, for example, a good way of life (integrated with caring for the remote) or on expanded sense of self. But these viewpoints are more likely to drive the nonutility viewpoints, discussed in the text below in connection with nonutility maps, e.g., N2, *infra* subsection V(C)(2).

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For example, the same utility principles that indicate what one must (!) do among CNPPs could transfer intact to the remote, but with a "softer" operator that did not carry the same reproach for a certain sort of conduct. Or, the concept texture might vary: with the remote, states of affairs we undertake to evaluate might be characterized in gross terms that captured extremes of fortune—mass starvation or inordinate abundance—but which did not discriminate between their having slightly more or less oil as of any moral significance.

C. NONUTILITY (MORAL PREFERENCE) PLANES

To understand the next set of planes, we have to revert to the distinction raised earlier, between one's utility preferences and one's morally corrected preferences. Much of moral theory supposes that there are certain things we ought (and ought not) to do even if the choice entails some sacrifice of (or, in a strong Kantian form, irrespective of) utility.[290]

To conceptualize such an analysis, let us review the several nonutility strata that are available, each of which could operate in support of a thought process that "corrects" the utility-maximizing outcomes indicated on the first set of planes.

1. *N1: CNPPs*

The first nonutility plane is mapped from roughly the same perspective as the first utility plane: CNPPs alone are posited as inherently valuable. Nonhuman features—say, a piece of land or an animal—are mapped as salient if they are the sort of thing with respect to which a CNPP may have a claim—a claim here thought to be governed by rules expressive of something other than pure utility. On N1, these things are, we might say, colored by some concept of natural rights, the natural right of the CNPP to or regarding the thing. Moreover, we can imagine each CNPP to be marked a single shade of blue. That is, the *utility* of different individuals varies, so that on U1 persons may be colored different shades of green (be of different utility to their community). But if we regard human beings as possessing some intrinsic considerateness not re-

290. If people were really pure utilitarians, we would have to ponder seriously the fact that there are many human bodies which would be worth more dead, sold as a source of tissue and organ, than alive, as a further glut on the labor market. Indeed, at retail prices the market value of a human body far exceeds that of the 90 barrels of oil, and other components, that might be extracted from a Bowhead whale. (The myoglobin alone of a 70 kilogram human body is worth $100,000. Note, *Organ Transplantation Crisis: Should the Deficit Be Eliminated Through Inter Vivos Sales*, 17 AKRON L. REV. 283, 292 n.66 (1983)).

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ducible to utility—the logic of N1—that intrinsic value is the same across all members of the set.[291]

Several reasons warrant bringing CNPPs into a common, distinct grouping as a way to clarify and advance problems (even if not this exclusive referent for solving them). For one, our capacity to universalize and empathize ("How would you feel if you were . . .") is more informative when we let our minds run among CNPPs inter se, than when we reach across to other things, even to relatively "near others" such as spatially and temporally remote humans. Moreover, the fact that CNPPs are uniquely capable of arranging their relations via mutual capacities to consent, to exercise, waive, and forfeit claims, affects the quality of rights and duties that prevail among us.

In terms of the Beaufort Sea illustration, an obvious claim on this plane would be that asserted by the Indians, presumably the right that their traditional hunting grounds and practices, their right to kill whales, not be infringed. On what basis can the Indians be shown to have any such moral right, such that, for example, we would be warranted to write—or interpret—these claims into law?[292] How insurmountable might we view such a claim in the face of conflicting claims—of general welfare, and even competing rights of non-Indians? Under what circumstances might such a right be deemed waived?[293]

There are different approaches to these questions, and thus different ways to flesh out a rights or duties discourse, through, for example, Nozick's work,[294] Categorical Imperative, or some contractarian approach. Indeed, this nonutility thinking enjoys, if not a clear answer, the most extensive attention in the literature. Therefore, here, in what is principally a suggestive survey of the relationship among analytic approaches, I will not presume to engage those efforts, point by point, beyond the problems I have already intimated. Let me proceed, instead, to the less orthodox, less examined relationships.

291. Notice, however, that we ordinarily allow for special, and perhaps specially powerful, kinship and earned obligations.

292. As for a possible basis of backing the individual Indian's moral claims with legal rights in this connection, there is, as well as the first amendment, the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982); *see infra* text accompanying notes 313-22.

293. For example, suppose that the Inupiats should take to hunting in gasoline powered snowmobiles and motorboats and fire at the whales with dynamite-tipped spears. *See* Visilind, *Hunters of the Lost Spirit*, 163 NAT'L GEOGRAPHIC 150, 150-51 (1983) (photograph). At what point might we be warranted to say that they have waived individualized claims based upon preserving their culture? *See infra* text accompanying notes 323-27.

294. *See supra* note 170.

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2. *N2: Persons Remote in Time and Space*

When our attention shifts from contemporary to remote persons, it still remains on *humans*. In establishing moral filament there thus remains considerable play for principles based upon universalization and empathy. The question, "How would you feel if you lived in the twenty-first century and could never see a whale?" does not admit of a confident answer. Nor, however, can it be dismissed as clearly irrelevant. This suggests that elements of familiar CNPP frameworks are not out of place. But there is this difference: remote humans are like animals in that they cannot waive or trade claims. Our relations with them have to be formed by our choices entirely. In my view, this makes it more appropriate to invoke a discourse of *our duties*, rather than to build upon *their rights*.[295]

Even if we choose to work with duties, the fabric of duties has to be sensitive to the fact that maldistributed obligations cannot be righted in the familiar ways in political and commercial arenas. Moreover, the *earning* and *forfeiting* of claims, so important in CNPP affairs, have no place in regard to the remote.[296] All this makes problematical the position that we have the duty to treat each remote person exactly as we do ourselves. It may well be that our duties towards the remote are best spelled out in terms of "floors" to conduct. In this, there is a useful, albeit imperfect, analogy between the remote and prisoners. We are not morally obligated to treat prisoners in all regards the same as everyone else. This level of equality they have forfeited[297] by their wrongful conduct. But there is yet some floor beneath which our treatment of them cannot fall; while the standard is hard to define, we may say it involves some abrogation of "basic human values," or a failure to respect their "personhood."[298]

To illustrate in the Beaufort Sea context, regarding future persons we can probably say with some confidence that if we were they, and had their tastes, we would probably *prefer* to be left a world with whales than one without. But from this forecasted preference we need not derive anything close to a duty (!) to sacrifice our preferences for theirs, or even to

295. Granted, we speak of the *legal* rights of incompetents, rights assertable on their behalf by their guardians. But the rights elocution is more appropriate in the legal context.

296. The remarks in the text may not apply to the dead, towards whom we may have to recognize obligations they have earned.

297. In this lies one disanalogy between prisoners and the remote.

298. *See generally* Note, *supra* note 95, at 1122-27 (concluding that basic human worth acts as a limitation on the quality of punishment).

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weigh their preferences equally with our own (as U3 commits us to posit). The following might be a defensible position: Except perhaps for future Inupiats, whales are not likely to play a critical role in the physical or spiritual subsistence of future persons. Without whales, future persons would still be *persons*. By contrast, some conceivable contemporary conduct, such as massive ocean dumping of untreated radioactive and other toxic wastes, would set in motion a chain of events forcing future inhabitants—those who survived—to live on a practically unrecognizable planet in practically unrecognizable ways. Can we not imagine a scenario of this sort that would condemn our descendants to live a life worse than that in any acceptable prison, to reduce them to something even beneath our concept of *persons*? An obligation to them to desist from such dumping (even if it is our cheapest alternative) could be developed on a respect-for-persons basis, reinforced, perhaps, by appeals to the intrinsic value of life in the oceans, or to a way-of-life ethic.[299]

3. *N3: Sentient Nonpersons*

When we turn from persons to other living things, the enterprise of fashioning the appropriate plane is subject to opposing tugs. On the one hand, there are strong intuitions that this kingdom has to be *divided internally*, that is, that no single nonutility plane works to intuitive satisfaction across all sentient nonhumans, from dolphins to dormice. Our capacity for empathy disappears by degrees,[300] and the attractiveness of certain principled arguments falls away, as, in descending through the kingdom of living things, we descend through variations in intelligence, capacity for emotions, and so on. On the other hand, there is a growing literature that questions the moral salience of many such variations, and argues for *combining* different species with humans on the same planes—that is, for subjecting whales and persons to the same principles, at least on some level of generality. A moral injunction not to insult another verbally appears inapplicable to pigs. But, the advocates of this combinatory position maintain, insofar as we can identify, at some more general

299. *See supra* text accompanying notes 143-54, 157-58. Under the rules of the conventional academic game, it appears incumbent to pick one of these theories and stick with it to the exclusion of any others. But as I shall demonstrate more fully below, on a pluralist perspective all three—and others—might reinforce one another without embarrassment.

300. *See* Nagel, *What Is It Like to Be a Bat?*, 83 PHIL. REV. 435 (1974) (concluding that knowing what the experiences of a bat are *really* like lies beyond our ken; but that the same difficulty affects all efforts to describe anyone's experiences in their subjective aspects).

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level of description, "insults" that apply interspecies—that affect biologically different creatures in ways morally comparable to them—the same rules apply prima facie in moral governance to persons and pigs alike.

These are all hard questions, the resolution of which will depend in the last analysis not upon the choice of competing abstract principles but upon the choice of larger packages, moral world views. I think there is little support for holding our conduct towards say, krill, squid, and plankton answerable to the same principles as we apply among persons. This need not imply that our actions regarding lower animals and higher plants is beyond the province of morals. As a starting point, however, we might opine that the texture of the applicable concepts are different. It is not the individual but larger units that are characteristically, and I think rightly, championed as considerate: the school, the colony, perhaps the habitat. Even with this allowance, the moral significance of the group may play out according to its own rules. There may be no general obligation of the mood (!) or (O) to rescue a school of krill from hazard; if the hazard they find themselves in is "nature's doing" (they are being pursued, say, by a whale), to rescue them may even be impermissible (-§). But if their hazard (a toxic spill) is the specific agent's, or, more generally, man made, then there is intuitive appeal in working out rules which point to the rescue—correcting our intervention—being permissible (§) or even mandatory (!).[301]

Moreover, we should allow for the possibilities of resting the moral considerateness of various lower life forms not on the innate good of Nature or of some of the properties of the school or habitat per se, but on the connection between the things and the meaningful life of some person. Such a view falls short of maintaining that any thing and any life can be combined into something valuable. Suppose, for example, someone whose life style, morally unreviewed, involves expending a social resource in some way utterly lacking in a redeeming social virtue: pouring gasoline off a cliff, or high-cutting timber because "it looks pretty" to that person but to no one else. These acts are not good (in any sense) because the life which they support is not morally intelligible. By contrast, a marine biologist who uses gasoline for driving a motorboat to save a school of krill endangered by drilling activity is not pouring it off a cliff. Under any of the six viewpoints sketched out earlier, it is morally intelligible to say that the biologist's actions are at least § , even though the resource is obviously being drawn away from some other use (and the

301. I am presuming that the fisherman who accidentally hooks a goose has a firmer obligation to succor it than does the world at large.

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prima facie permissiveness of krill saving may have to answer to "higher" claims on the petrol).

When we advance to the higher end of the animal kingdom, the most common question shifts from whether our relations with the creatures involve any moral considerateness at all, to whether we are entitled to treat them differently from humans. This is the thrust of the animal liberation literature. If pleasure and pain are salient (or, as to a utilitarian, dispositive), then the relevant moral universe comprises all creatures capable of pleasure and pain. We have a prima facie obligation to consider each such creature alike—subject to the same governance—at least with respect to pain-inflicting activities. In Peter Singer's view, to say, "I have a right to X because I'm human, and you don't because you're an animal," is no more defensible, without more said in justification, than racism or sexism.[302]

What is a pluralist to make of such worthy and well-reasoned arguments? To relegate higher animals to a separate plane *because they are animals* is simply to disregard the central plank of the animal liberation platform. My own inclination is to relegate higher animals to a separate plane, not because they are animals, but because they are different in morally salient ways. In effect, it is impossible to carry through an analysis of our relations in regard to animals without reference to relevant differences between men and animals, differences that the "single principle" position obscures.

Let me illustrate with our Bowhead whales, which, along with all cetaceans, present an especially interesting test case. Cetaceans are not merely human-like in terms of their capacity for pain, but, as possessors of a whole host of human capacities (including intelligence, sociability, and evidence of an emotional life), they may come as close to approximating humans as any other creatures. The other side of the story, of course, is that they are not moral agents, i.e., they cannot choose on moral grounds. We do not rely upon their commitments. I doubt that they have any sense that to favor one whale over another is "unfair." From what I have already said, it is clear that these differences do not excuse us from all moral claims in respect of them. On the other hand, it means there are substantial aspects of the moral governance touching whales that have to vary from the governance that obtains among persons. For one, any claims we recognize in our relations with them have to be of a sort that cannot be waived, traded, or forfeited. Hence, our

302. *See* P. SINGER, *supra* note 181, at 3-7.

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relations with them are more appropriately fabricated out of *our duties* than of *their rights*.[303] For example, it seems to me more odd to conceive of the whale having a right not to be killed (and to proceed to consider whether that is a right which the whale *waived* in choosing to attack our dinghy) than to speak of our having a duty not to kill a whale (and face whether that is a duty from which we are excused if the whale attacks).[304]

Granted, the preference for a duties discourse over a rights discourse itself consigns animals to a separate plane. But there is more. The duties that obtain among persons, even if not conceived of as the corollary of rights, are reasonably mindful of them. Human rights and human duties inter se are part of the same weave. Moreover, certain duties that are coherent regarding persons seem either incoherent regarding animals, or can be made sense of only if the terms are used in some special way.

Someone will say: "Do we not have a duty, at least, not to inflict pain upon whales on exactly the same terms as we have a duty not to inflict pain upon persons?" The trouble is with "exactly the same terms." The ineradicable differences between whales and persons so permeate any moral quandary that may arise, I doubt that the terms of interhuman and interspecies relations can be exactly duplicated. Consider the obligation to avoid inflicting pain. It never arises in the abstract, but in a specific context, such as "in self-defense when attacked." If a person attacks us, before we inflict pain upon the attacker, there are certain moral and legal rules about warning, and the like, that derive from human capacities. I am not saying that, in regard to the repulse of an attacking whale, the excuse for abridging our prima facie duty not to injure or kill it requires *less* circumspection than in fending off an attacking human. That the whale is blameless might cut in the opposite direction, amplifying the human's duty to retreat.[305] It does suggest, however, that if we want to work through our relations with humans and

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303. *See supra* text accompanying notes 295-98.

304. *See* Sagoff, *Animal Liberation and Environmental Ethics: Bad Marriage, Quick Divorce*, 22 OSGOODE HALL L.J. 297, 302-03 (1984). Mark Sagoff suggests an alternate basis for skepticism in regard to animal rights, viz., that we cannot assure them the most fundamental rights of survival—that it would be, indeed, biologically disruptive to try.

305. Do explorers who come across natives utterly unacquainted with "civilization" have a duty to retreat, even not to defend themselves if ambushed? *See* Price, *Overtures to the Nambiquera*, NAT. HIST., Oct. 1984, at 30, 33-34 (early 20th century Brazilian explorer ordered his men not to respond to hostilities, at considerable personal risk).

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animals, each in detail, our endeavor may benefit from the separate attention that the separation of planes promotes.[306]

Let me reiterate, however, that relegating humans and animals to separate planes, and subjecting them to slightly different governances, does not, in and of itself, waive considerateness for animals. The partitioning leaves open whether they are to receive much the same considerateness as is owed humans, or even, in some circumstances, because of their limited capacities, more.[307] And more to the point of our illustration, I have no doubt that however the whales are analyzed, on a separate higher animal plane subject to independent governance, or combined on a plane that governs them by the same principles that govern humans (with allowances for how those "same" principles apply), killing a whale is prima facie wrong: one is obligated in a fairly strong sense not to do so. Does an analysis of the threat this duty poses to the Inupiat—not to the *lives* of various Indians, but to their life style—present anything to rebut this?[308]

4. *N4: Nonsentient Entities*

When we turn our attention to nonsentient things, such as the ocean, the ocean bed, and patterns of current, certain considerations drop out, and certain thought experiments come to a quick end, as we have seen. We cannot ground any moral considerateness they may possess in their pleasures or preferences, for they have none. Moreover, for purposes of these nonutility planes, their utility to humans is stipulated to be irrelevant. What is there then to say?

Let me put forward two hypotheticals, both set in the framework of the Beaufort Sea illustration. First, suppose that one of the oil workers discovers a small arctic flower coming through the gravel. The flower is located where no one else will see it. Indeed, with winter closing in, it will die before anyone else could possibly gain any pleasure from its

306. Moreover, I am assuming that there are in our employment of morally significant terms cues to right conduct. (Which is not to say that linguistic conventions determine moral claims.) Some such terms, though applicable to our treatment of persons, usually do not apply to our treatment of animals. And even in the case of terms applicable across species there may be systematic differences in the underlying concepts. Dispossessing a family from its homestead of a hundred years is indignifying and cruel. If there is a wrong to the whales in dispossessing them from their traditional route, it is not supported by our *indignifying* them, unless we give the term (as perhaps we should) a distinct and considered stretch in meaning. Offhand, I cannot say what the correct vocabulary is; it seems to me that the project of working it out benefits from the sustained, independent attention of a separate plane.

307. *See supra* text accompanying notes 73, 305.

308. *See infra* text accompanying notes 312-27.

beauty. Would it be wrong, nonetheless, to crush it? Second, suppose that there is a way to conduct the development—by staining the water with drilling mud dyed a beautiful purple, and firing a continuous stream of gorgeous fireworks from the oil derricks—that would make the region more beautiful, a greater attraction to more humans than ever before. Would it be wrong to so "beautify" the region?

Obviously, these are hard cases; as I have already stressed, if we are compelled to bring nonsentients under the same rules as persons, it is probably impossible. I believe, however, that in both cases there is an intuitive basis, strong enough to carry through and examine, that the contemplated acts are in some mood or meaning *wrong*. That is not to say that either act is ultimately indefensible against contending values, or that the crushing of a flower is as contemptible as the crushing of a child. But in both cases a moral defense is called for, because to a sensitive conscience, which I take as my standard of pleading, something like a prima facie wrong is threatened. The intuition of wrongness need not be founded exclusively in the considerateness (innate good) of the thing; it could draw upon ideal character, an ideal way of life, or the transcendent self viewpoint,[309] each of which can be fleshed out into a plane, perhaps in some mutually supportive combination.

Note that rules of universalization would not be out of place on such a plane, although they will be limited to universalizing of the "no one ought to" rather than the "swapping places" sort. That is, working within the governance of the preceding nonutility planes, one can reason that I ought not to do *that* to X (to a remote person or higher animal), because if I were X, I would not want that done to me. By contrast, on D-regarding planes, I cannot meaningfully "trade places" with the object of regard in the same way.[310] Nonetheless, I can still put to myself the question: Am I able to will of all mankind that, if they were similarly situated, they ought to crush the wildflower? Probably we should look for answers to such questions not in terms of what is morally impermissible, but what is, less rigidly, morally "unwelcome."

5. *N5: Membership Entities*

"It is certain that God sets greater store by a man than a lion; nevertheless it can hardly be said with certainty that God prefers a single man

309. *See supra* text accompanying notes 137-62.

310. *See supra* text accompanying notes 185-86. (Although I suppose mystics and poets have aspired to such an empathetic exchange.)

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in all respects to the whole of lion-kind."[311]

Another plane (or series of related planes) would be oriented to claims on behalf of membership entities of various sorts: things such as species, nations, corporations, and cultures. We are interested here in claims set up on behalf of, or the moral interest in, the *entity*, detachable from (not fully redescribable in terms of) the claims we might set up on behalf of, or the moral interest in regard of, its *members*.[312]

All this may be made clearer, if I begin by illustrating what I am aiming at: how an argument that focuses moral regard on the Inupiats as a *tribe* constitutes a distinct strategy. If the analysis takes place within a classic utilitarian approach (U1), we would decide what was right by aggregating welfares or combining preferences in some way that gives equal weight to each person's pleasures or desires. Essentially, U1 would aggregate the utility gains to all those who benefit from increases in oil reserves and diplomatic maneuverability (roughly 200 million people), and subtract the utility losses to the several thousand Indians. Even if the benefits to each individual non-Indian are insubstantial, their aggregate "weight," we can presume, will easily outweigh the Indians'. (A welfarist could test this by asking whether the Indians could "bribe" those who favored development not to develop.) The calculations would not change appreciably if we included future generations in the universe of affected people, as per U2. By most plausible measures, the benefits to the present-plus-potential beneficiaries would still swamp the losses to the considerably smaller universe of present-plus-potential tribesmen and their supporters.

Of course, it is for just that reason—to resist such a swamping—that the Native American groups, in common with other minorities, characteristically avoid aggregated utility calculations. The conventional alternative is to ground claims in an individual rights discourse as per N1, asserting that each Indian has a strong moral interest in retaining his cultural heritage. In the legal rubric, this typically emerges as an assertion of the rights of individual Indians under the first amendment or the American Indian Religious Freedom Act.[313] One problem with adopting

311. G. LEIBNIZ, THEODICY ¶ 118 (E. Hoggard trans. 1966).

312. Of course, there are significant differences between these entities: some entities, such as species, are more or less "natural kinds" (there would be tigers whether or not there were humans to name them), and some, like the business corporation, have purely conventional origins. I doubt whether a single plane would hold them all.

313. 42 U.S.C. § 1996 (1982); *see* Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (unsuccessful suit by individual Indians to enjoin flooding of lands sacred to the Cherokee religion as infringement of free exercise rights).

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that strategy, however, is that each Indian's claimed right is destined to be met by a countervailing claim of right by the other side: the property right the rest of us have to lease the public lands, perhaps even our first amendment right to knowledge through travel, an interest abetted by inexpensive gasoline. Hence, a battle conducted on N1, carried out in the language of rights discourse, is itself inconclusive.

Thus, the introduction of N5 raises the following question: Is it conceivable that the argument for nondevelopment could be supplemented by claims of independent duties owed to the Indian *tribe* or *culture*?[314] So cast, the claims would not be a mere summing of the claims of individual Indians, hence, would not fairly be met by a summing of individual claims from the other side. They would have to be met, if at all, *on their own plane* by appropriate claims of like kind and weight, just as when two nations, albeit one large and one small, meet in a court of international law.

Unfortunately, a substantial body of literature holds such a prospect to be fruitless. Whales, citizens, stockholders, and Indians are *real things*; whereas species, nations, corporations, and tribes are mere intellectual constructs, "existing" only in some queer sense to which we should pay no mind. In the philosophy literature, this line of reasoning, termed "reductionism" or "redescriptivism," holds that a corporation or

314. As Ron Garet has maintained, both Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (refusal to review whether gender-discriminating tribal membership rule deprived a pueblo woman and her children of "equal protection of the laws" under 25 U.S.C. § 1302(8)), and Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding partial exemption to state compulsory school law for children of Amish and Mennonite religious communities), are most intelligibly understood as recognizing the right of a group, "justified only by reference to the intrinsic group good, which is groupness or communality." Garet, *Community and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1029-35 (1983).

In line with this view, I am maintaining that by adding to claims of individual rights claims of a group good, close cases such as *Sequoyah* may switch in favor of the tribe and those claiming through it. Tribal claims as such are justiciable (tribes have standing under 28 U.S.C. § 1362 (1982)), and tribal interest can prevail. *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1972) (upholding a tribal claim to lake water required for tribal livelihood). A claim by an Apache tribe for injuries to the tribe's traditional power and structure owing to 27 years of imprisonment spanning the turn of the century was held not to state a cause of action under the Indian Claims Commission Act in Fort Sill Apache Tribe v. United States, 477 F.2d 1360 (Ct. Cl. 1973), but there the internment was adjudged "a military measure taken to prevent the possibility of a resumption of warfare" after Geronimo's surrender, *id.* at 1367. The *tribal* claim, nonreduced, would appear to be strongest in instances where the actions complained of have as their direct object affecting the tribe (its cultural heritage, etc.), repressing individuals only incidentally. *See* New Rider v. Board of Educ., 480 F.2d 693 (10th Cir. 1973) (explusion of Indian for wearing hair in allegedly traditional style); Department of Interior, Office of Indian Affairs, Circular No. 1665 (Apr. 26, 1921) (tribal sun dance declared Indian offense).

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nation is nothing but contractual or political arrangements among various persons (investors, managers, citizens). *It*—the membership entity—has no interests independent of the respective personal interests of the persons the arrangements connect. When we say, for convenience's sake, that a corporation did this or that (or that something was done to *it*) there are always, at the bottom, some flesh and blood mortals who really acted or were acted upon, and are therefore the only real objects to praise, blame, or otherwise consider. For this reason, it is said, we can, at least in principle, take any statement in which *the corporation* appears, and restate it exclusively in terms of real natural persons.

The whole area is very complex. For anyone engaged in morals, there is obvious good sense in resisting efforts to obscure personal responsibility (or other moral considerateness), wherever it exists. Yet, to speak of the responsibilities of and duties towards persons does not exclude an alternative, "corporate" discourse. The man in the street, no less than the lawyer and judge, speaks of "*Ford's* blame for the Pinto design," and "*Germany's* obligations to make reparations." I am not maintaining that we can derive from the linguistic conventions a moral verity (or make any other leap from an "is" to an "ought"). But recognizing how ubiquitously and understandably references to corporate bodies appear both in law and in ordinary moral discourse, we ought not lightly to dismiss them as mere techniques for the ease of conversational effort, or as merely *standing for* persons in some unstraightforward way.

Indeed, if one had to choose either a discourse that built upon agents *or* a discourse built upon corporate bodies, there would be points to be made both ways.[315] But we are not put to an either/or choice. There is nothing more odd about employing both a "corporate" language *and* a separate "agent" language than there is about employing both a body language and a mind language as separate discourses for "the same" events.[316] In the mind/body case, we recognize that there is a relation between the two conceptual frameworks. When I say, using mental language, "I am in pain," I am prepared to assume in principle that there has occurred some change in my body that would lend itself to expression in body (physical) language. But while the two languages are related, they can be and are quite intelligibly detached. (Indeed, the trick seems to lie in divining the attachment.)

315. *See* Stone, *supra* note 54; Stone, *Corporate Accountability in Law and Morals*, in THE JUDEO-CHRISTIAN VISION AND THE MODERN CORPORATION 264 (D. Williams & J. Houck eds. 1982).

316. Just as in physics the wave and particle theories of light are not mutually exclusive.

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A comparable separation of corporation/agent planes is most plausibly discerned in connection with actions that pertain to the one but not to the other. There are certain acts people can do, that corporate bodies cannot: fornicate and swill beer, for example. It follows that while people can be licentious and inebriate, corporations cannot. Conversely, other acts—merging, dissolving, consolidating, waging war, honoring treaties—pertain to corporations, but not to humans. Of course still other things, such as being law-abiding, can apply to both, although perhaps not on exactly the same basis and in exactly the same way. Consider, by way of analogy, that when we speak of a " 'big' corporation" we mean something quite different—we support our judgment by reference to quite different criteria—than when we speak of a " 'big' person." Corporations are big in ways that are measured not in spatial, but in financial terms of earnings, profits, the book value of the assets, the number of employees and shareholders, and so on. Might the same not be true with respect to a good or a bad corporation or corporate act: that they are not measured in the exact same terms as measure good and bad humans and human acts? An agent and the entity might both be to blame for the same happening, although we would explain and characterize their blames differently.

Let me illustrate with more familiar material. Suppose that during the course of a war an officer directs his troops to commit an atrocity—to wipe out a village suspected of harboring guerillas. Assume that the officer's personal blame is clear (he has not even a glimmer of a "superior orders" defense), and let us pass on to consider the moral status of the corporate body, the nation for which he fought. May not the country be to blame as well as the officer, although in different ways, as a consequence of different failings? Clearly the power of the state was involved, both in the authority that the officer exercised over his troops, which flowed from his office, and because the resources employed, the bullets, were the resources of the state. Moreover, it was not the soldier that was bound by, and breached, the Geneva Convention, but *the nation*. Further, it was the nation, through its army, that failed to implement the corporate measures necessary to effectuate the treaty. That is, we can imagine a failure to print and arrange distribution of pamphlets instructing the troops on their obligations, a failure to implement the appropriate rules in the Code of Military Justice, or perhaps a failure to survey and enforce them. Such a nation-state failing could consist, for example, in failure to assign army prosecuting staff or Inspector Generals to ferret out cases of atrocity, to court-martial violators, and so on. In

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those circumstances, I would say that not only the soldier, but the nation-state was blameworthy—although, if one likes, in different ways, because of different failings associated with their different characters.[317]

We might approach this question of separate planes in a Neo-Kantian light. Suppose someone claims that at the heart of morality—across all or most planes—is a commitment to universalize a contemplated choice of conduct. Doing some act *a* is not blameworthy, not wrong, if I can will it to be a universal rule for the guidance of all persons similarly situated. But corporations face choices that persons do not face, choices on a different plane: honoring treaties, waging war, merging, and so on. Certainly, each person who is in a position to influence each such corporate choice faces personal moral obligations to ponder, as an actor in a particular circumstance of influence. But this does not displace the need to universalize across another universe, one involving other nation-states similarly situated. Hence, we have to separate out and clarify: Is it right for a nation to interpret a whaling treaty in *this* way, considering the rules and such that govern the plane of national conduct?[318]

What I am suggesting is the validity of, and not merely recognizing the convention of, moral discourses that map membership entities, and consider them according to their own governance. By "validity" I mean that such discourses are capable of adding to, rather than, as reductionism has it, distracting from, the insight and direction which our moral lives require. Granted, any governance we devise cannot unintelligibly ascribe to these entities *utility*, *pleasure*, or *pain*.[319] Abstract entities are Ds, and cannot be harmed the way persons are harmed. But this does

317. Note that the example concerns our evaluation of the entity as a separate thing, to its character rather than an outsider's obligations to the entity as a separate thing. For a current lawsuit in which the character *of the corporation* plays a critical role, see Nuclear Regulatory Commission, *Petition for License of General Public Utilities Corporation on the Basis of Deficient Character*, Shumaker, et. al petitioners, Aug. 13, 1984. (challenging the renewal of a license to utility on the grounds that it had displayed lack of statutorily required "character," a corporate failing not cured by shift in personnel, but presumably lingering in numerous structured bureaucratic patterns). *See also* P. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 31-66 (1984) (arguing for ascription of character to corporations based upon corporation's internal decision structures).

318. True, it is persons who *carry out* the universalizing in either case—but this does not render unintelligible the notion of an independent plane, on which the central question is: "What ought a nation to do?" In the same vein, managers of a business corporation, considering a questionably moral merger—a squeeze-out of minority holdings, for example—may have to universalize not only across other persons (what ought a similarly situated manager to do?), but also across a universe of corporations similarly situated to analyze their dilemma fully. *See* Richards, *International Distributive Justice*, 24 NOMOS 275 (J. Pennock & J. Chapman eds. 1982) (attempt to transfer general principles of contractarian analysis to relations among states).

319. Except perhaps in a distinct, even metaphorical, sense such as where "profit" is invoked as a measure of the for-profit corporation's well-being.

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not rule out the possibility of discourse regarding them, even claims being set up *in consideration of them,* on the basis of one of the ideal-regarding theories to which we have already alluded.[320]

Turning from the general to the specifics of the Bowhead illustration, to conduct an analysis on this plane, one would introduce into moral evidence any existing treaties between the Inupiat and the United States, and all legislation that recognizes tribal jurisdiction in the matter of the whale hunting. Has there, for example, been a warranted reliance *by the tribe*? Reliance *by the tribe* (as distinct from individual reliance) would be measured by attributes of tribal existence, such as tribal rituals, customs, location, laws, and so on. Relevant obligations arise under treaties between the United States and other whaling nations.[321] Treaties aside, the whole history of dealings between the Indians and the white settlers merits attention. Does our nation, the United States, owe the Indian nations, on a balancing of past benefits and past wrongs, any special considerations regarding their continued whaling? In answering these questions, the moral paradigms and precedents one consults are drawn from the history and standards of international, not interpersonal conduct.[322]

Of course, I am not maintaining that the morality of the whaling can be fully determined by examining the human membership entities, such as the nations, with no word for the whales. Analysis on the plane of nations has to be supplemented by analyses conducted on a number of planes, including one that maps *species.* But it is interesting to observe that in considering the governance of species, there is much to be learned by considering the other kinds of membership entities. That is, while tribes, species, nations, and business corporations are each distinguishable, they present a number of common questions and insights. In regard to the moral considerateness both of tribes and of species, it is natural to ask: (i) On what basis is considerateness owed to a transcendent entity?

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320. There are, for example, going back to Plato, theories of the "good state" which make properties of the state the primary focus of ethical inquiry.

321. *See supra* text accompanying note 66.

322. On this score, there may be something to learn, too, from legal and philosophic treatment of affirmative action, whereby past wrongs to a group are sought to be rectified not by benefiting those wronged, but by taking action to benefit the group (or members of the group) wronged, perhaps to the disadvantage not of the injurers, but of *their group. See* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983) (upholding remedy of Title VII action under which past racial discrimination by police department to be rectified by hiring more blacks until 50/50 staffing ratio was reached). *But see* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) (seniority system does not violate Title VII absent proof of intention to discriminate).

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and (ii) How does one identify a transcendent entity that merits independent considerateness?[323] That is, why the Bowhead, rather than cetaceans? Why the Inupiat, rather than all Alaskan Indians as a class? In both instances, to formulate an answer draws us into a consideration of uniqueness, intactness (purity), the age (lineage), number of members, the members' "sense" of themselves as a group (in species, this takes the form of breeding boundaries), and the values that the set may symbolize or give expression to, such as majesty, stoicism, independence, self-sacrifice, and so on.

So far as we ground the claim of some species, say, the eagle, or some tribe, say, the Apache, on the symbolization of boldness and courage,[324] the problem arises whether to discount the claim because there are alternative "objects" in the world that symbolize and spark consideration of the same qualities.[325] Again, to implicate such planes—and such questions—is not to say how the final choice on either plane will come out or even proceed. What I am maintaining is that by suspending any intuitive, snap judgment, and partitioning our analysis into separate lines of thought, we advance our way to an ultimately more satisfactory—more correct—solution.

My own sense is that when the Inupiat reach the point of trekking off in gasoline powered snowmobiles and motorboats to fire at the whales with dynamite tipped harpoons,[326] the tribal/cultural claims, tracked through in the appropriate matrix, will not overcome the strong prima

323. *See* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 943, 950 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) (suit brought in tribal name to recover lands allegedly alienated in violation of Indian Nonintercourse Act barred, in part, on finding that Mashpee did not continuously exist as a tribe up to and including institution of action in 1976, because of the members' altered life style and language); *cf.* Russow, *supra* note 43, at 104-05 (indicating the ambiguity and conventional basis of judgments as to what is a species).

324. This would, I think, be in line with Sagoff's analysis that we protect natural environments "insofar as we respect the qualities they express": a mountain, for example, "as a symbol of the sublime." Sagoff, *supra* note 146, at 265-66.

325. As Larry Tribe points out in rejoining to Sagoff, *supra* note 146, valued qualities can settle upon—and historically have settled upon—different objects as their symbols, and different objects have come to symbolize different things. *See* Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 YALE L.J. 545, 549 (1975).

326. They may not be far from it. *See* Visilind, *supra* note 293, at 150-51 (note the photograph of the Eskimo whale hunter). P. EHRLICH & A. EHRLICH, *supra* note 48, at 188-89, point out how modern technology has amplified the natives' kill rate. They consider the long history of commercial whaling by the advanced nations as having been a more severe threat to the species, "from which the population apparently still has not recovered." *Id.* at 189. Should the Indians pay for non-Indian sins? Moreover, if alteration in the tribe's patterns is to count against tribal claims on a "dilution" theory, is it appropriate to count changes *forced upon* the Indians, e.g., non-Indian language and religion?

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facie claim to life of individual whales (and not merely of the species). That is, even considered on its own terms, on its own home grounds, the tribe's right to kill Bowheads appears diluted, somewhat like the claims on behalf of a species such as the red wolf, which has interbred to the point of being suspect as a "natural kind."[327]

6. *N6: Qualities*

Thus far, I have imagined planes that mapped various tangible and intangible *things*. But I would not rule out resort to a planar analysis of *qualities*. In fact, I am not sure how, once we are committed to all this mapping, we can avoid it. For one thing, the distinction between things and qualities is always problematical, being rooted all too shallowly in grammatical conventions.[328] And even if we accept those conventions uncritically, the grouping of things must be secondary to, or entangled with, implicit judgments as to qualities. We can always ask, why should *these* things be mapped alike and made subject to the same governance, except in virtue of some morally salient qualities they share? One wonders, then, does it make a difference whether we imagine ourselves to be concentrating on a plane the dominant salient feature of which is *life* or *courage*, i.e., qualities, or on one that maps all *living* or all *courageous things*?

I cannot presently foresee how these various analyses are destined to work out. I do think, however, that thing maps and quality maps may display distinct logical textures. The CNPP planes, which take individual humans as the things that count, count their preferences equally or deem each person to be of equal intrinsic worth. But suppose planes on which courage, communality, and beneficence are valued qualities—valued either because they are intrinsically good, or good derivatively, as a support for human virtues or for a flourishing life. On either account objects symbolizing such qualities[329] would warrant consideration. But the considerateness would attach to the *class* of all objects that conserve or carry forward the quality.

This will not secure an argument that *each member* of each class is morally considerate, and that, therefore, no member of the class can be eliminated without some moral justification. Insofar as the considerateness of the quality is based upon the argument that the quality is an

327. Russow, *supra* note 43, at 104 & n.4.

328. That is, it is a matter of convention to have adopted a language that posits a thing, lightning, that flashes (verb), or that posits lightning flashes, a property of skies.

329. *See supra* note 324.

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intrinsic good, it would support an argument making morally welcome the survival of at least one member of the class of things that embody the quality; if *majesty*, one majestic mountain or vista. On the derivative views, the argument would take the form of preserving enough members of the class to assure that the virtue or flourishing life will be a viable prospect for mankind, one that can be assured as long as there are enough members to go around—less than all—so that each person will have the opportunity to develop the right tastes and engage in the right activities.

There is an instructive parallel in the moral arguments for preserving species, arguments which are not inconsistent with the taking of individual members, so long as the drain does not threaten the optimal carrying capacity of a critical habitat.[330] Similarly, those who value various qualities may find each of them embodied in a wide variety of objects. For example, bees are communal; but so too are beavers. Hence, an argument (exclusively) on that basis may marshall support for saving either bees *or* beavers. An argument that the elimination of both was morally unwelcome would have to come up with some distinct morally valued quality they embody, or else turn to another basis implemented upon another plane.

CONCLUSION

A. A Metaethical Winding Down

Throughout, I have deflected some of the toughest questions with repeated references to notions that will have to be developed and filled in. A general theory of unconventional entities, legal and moral, does not compress easily into a single article. This is especially so when what the general theory suggests is that there is no one particular theory in play. Certainly in some succeeding work—or works—any reader with the fortitude is entitled to be provided some fuller development and filling in. But for the present, after so many pages largely dedicated to illustrating the pluralism conception, let me close with some comments about it, about where this suggested body of work heads us, and about the criticisms to which it will have to respond along the way.

330. *See supra* text accompanying note 92; *see also* Hurka, *Value and Population Size*, 93 Ethics 496 (1983) (dealing with balance between the value of each individual member of a species as the number of members varies).

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1. *An Emphasis Not on Principles but Frameworks*

First, much, perhaps most, contemporary moral theory is engaged in a search for universal postulates, with the ambition of producing something roughly equivalent to an axiom system. Typical is the view that "an agent can only justify a particular judgment by referring to some universal rule from which it may be logically derived, and can only justify that rule in turn by deriving it from some more general rule or principle."[331] The position I am advancing is not disregardful of axioms or principles, but is skeptical of the single-minded stress on them. Substantive principles are part of, and not necessarily the most influential part of, "planes," which are the true frameworks of moral analysis.[332] It is the more comprehensive units that ought to be the primary focus of our investigations. The obvious analogy is to the role of paradigms in science, conceptual frameworks encompassing not only the substantive rules—the body of scientific laws—but also a common fund of received concepts, rules of procedure, such as standards for evidence and rational acceptability, general theories, a coherent tradition, and a shared sense of the significant questions and the acceptable techniques for solving them.[333]

2. *No Single Plane*

Moreover, I would displace the quest for a single, all-encompassing framework, pretentious to govern all moral thought, with an effort to develop different planes, each appropriate to separate moral activities and morally salient universes. By so partitioning moral analysis, we relieve the enterprise of a stricture nowhere justified—that every quandary has to be defined and attacked according to a single coherent set of rules. This nurtures the emergence of different planes, each better suited to its own type of quandary.

3. *The Role of Intuition*

But what makes a plane more or less appropriate? One determinant is intuition, by which I mean moral feelings that we cannot derive from

331. A. MACINTYRE, AFTER VIRTUE 19-20 (1981) (this view is not MacIntyre's, but that which "emerged in response to" a particular critique of emotivism).

332. It may be that a single dominant principle such as Bentham's or Kant's can provide a relatively full governance across some domains; but other domains cannot be governed so simply.

333. T. KUHN, *supra* note 257, at 10-11, 43-44. Note that in Kuhn's view the paradigm, rather than rules, is offered as the "fundamental unit" of science, *id.* at 11, 42-51, on the grounds, inter alia, that "paradigms can guide research even in the absence of rules," *id.* at 42.

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nor (even more loosely) trace to particular principles. Obviously, intuition cannot be offered as a sure guide in moral matters, since it is the very function of moral reasoning to submit our intuitions, particularly those presented in initial dispositions, to more formal critical review.

Hence, to emphasize intuition is not to imply that, to be valid, a planar viewpoint is expected to validate our initial reactions. In that case moral reasoning would have nothing to contribute. Rather, the viewpoint must have moral perspicacity; the elements of a situation to which it turns our attention must "feel right." It must carry our thoughts along lines that feel morally right to a judgment that feels morally right. I do not consider it paradoxical to suggest that the moral feelings should *themselves* feel right: consistent, coherent, rational, correct, and satisfying. We should feel that each plane, and the system of planes as a whole, provides the capacity to recognize moral dilemmas where they exist (in the right terms), and we should feel that their indicated treatment is such that our initial moral unease is quieted *rightly*.

To legitimate the role of intuition in this process is not to argue that our intuitions are fixed and complete. Like taste, which plays an analogous role in aesthetics, our moral intuitions are capable of being improved through education. Indeed, not all ethical discourse aims to evaluate actions or to grade actors. Even when we are not seeking, or cannot find, "the right answer," discussion may clarify thought and intuitions for another day, contributing to a community of perception and feeling,[334] and developing what an earlier generation would have unembarrassedly called our "moral faculties."

4. *The Role of Imagination*

It follows that my position places large stock in the role of imagination in the development of ethical capacities, as well as in the making of particular ethical choices. It is a role not often emphasized, although R.M. Hare gives it some due,[335] and Hilary Putnam has observed (in comments upon the place of literature) that "sensitive appreciation in the imagination of predicaments and perplexities must be essential to sensitive moral reasoning."[336]

334. *See* Isenberg, *Critical Communication*, in PHILOSOPHY LOOKS AT THE ARTS 402 (J. Margolis ed. 1978) (regarding art criticism in these terms).

335. R. HARE, *supra* note 196, at 94, 126-28, 181-85.

336. H. PUTNAM, MEANING AND THE MORAL SCIENCES 87 (1978).

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Let me illustrate imagination's role, and its connection to my planes, with a passage from H.H. Price. Price asks us to suppose we are Englishmen living at the beginning of the sixteenth century, brought up, from earliest years, sincerely to approve the principle "it is right to burn anyone who is a heretic," although we have never seen an actual burning carried out.

> But then one day you leave your remote valley and go to London. And while you are there you actually witness the burning of a heretic. . . . What you feel is the strongest disapproval, which could be expressed by saying what is being done here is utterly abominable.
>
> That settles the question, at least for you. In this clash between a general moral principle and a particular moral experience here and now, it is the principle that must go. It has not been falsified (as all crows are black is by seeing a grey one) . . . . But it has been nullified or put out of court by the particular moral experience you have had. . . . [Y]ou will admit that in some sense you were making a mistake when you accepted it.
>
> What sort of mistake could it be? It was this. You did not fully "realize" what it was that you yourself were approving of when you said it is right to burn anyone who is a heretic. You did not know what such an action would be like if it were actually done.[337]

What I am driving at is this. My planes, like novels, can be conceived of as providing a sort of "literature" for the development and play of imagination. Some such sort of literature is particularly valuable when we are considering UEs. To illustrate by contrast, when we are evaluating our obligations to those most closely around us, persons in our very presence, it does not take a great deal of imagination to identify the morally significant features. It surely takes *some*. But a child drowning in front of us is (like Price's heretic actually burning before us) *there* in our presence, testing our principled beliefs with the immediacy of its plight. By contrast, the child starving in Biafra, and the principles we formulate with respect to it, are abstracted from the feelings of immediacy, from real, if you will, existential choice. How do we make our relations with the Biafran child, or the river, or the tribe, less abstract? The answer is, the more we extend our interests beyond CNPPs, the more a play of imagination is required. The moral planes provide the stages, conceptual stages on which thought experiments can be played out, *drama-*

337. H. PRICE, BELIEF 401-02 (1969).

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tized in the mind in richer detail of fact, principle, and texture, than would otherwise be possible.[338]

Note that in these dramatic experiments, what we are testing is not merely the solutions—how the answer feels—but also the stage, the moral plane itself. This is particularly important in considering our moral relations with UEs, because we are not so accustomed to thinking about them as to have abstracted reliable patterns. Doing so requires sustained, imaginative concentration, undistracted by a continuous demand to make the governance framework we bring to bear upon the one thing, say, the future human, "match" in all respects the frameworks we are developing to apply to another, say, the river. The specialization improves the prospects that we will be really and rightly satisfied with, really and rightly committed to, the solution at which we arrive.

5. *Pluralism Distinguished from Rank Relativism*

Some readers will rejoin that all this accounting for beliefs and multiple planes is destined to deteriorate into the rankest relativism. Conventional relativism holds that there is one morality for you and another for me. Is not the author's conception fraught with something worse, that there are several moralities for you and several for me? Again, the answer is, not necessarily.[339] In and of itself, to subscribe to multiple planes involves no commitment as between moral relativism and moral realism.[340] That is, one can hold that there are really (and not relatively) universally right answers to moral quandaries, as immutably fixed, in theory, as the value of π, but regard these right answers as increasingly well revealed through planar analysis (just as increasingly sophisticated calculations have gotten us closer and closer to the value, to a half million decimal places now, of π).[341] For example, we have only to imagine a moral realist persuaded that the really right answer regarding our (all mankind's) obligations to future generations is to be discovered through quite different considerations than those through which we discover our obligations to whales.[342]

338. *Cf.* Wiggins, *supra* note 173, at 232 (moral questions ordinarily arise in response to a particular situation requiring the play of imagination to satisfy demands for "a high order of situational appreciation").

339. *See supra* text accompanying notes 189-98 (defending moral pluralism generally).

340. *See generally* Moore, *Moral Reality*, *supra* note 217 (defending moral realism against moral skepticism).

341. *See* Crawford, *Computing Pi*, BYTE, May 1985, at 433, 437-38.

342. It is true that by legitimating intuitions, we provide some linkage with relativism since right is linked to moral feelings, and moral feelings are not free from cultural influence. Still, some amount of linkage may be a condition of the morality being "livable," *see supra* note 214 and accompanying text, or even, I would say, credible.

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6. *Conflicts*

Even if pluralism is not equivalent to relativism, it faces similar objections. The relativist has to contend with the fact that different communities are dominated by different beliefs. One community may hold genocide to be right; another, to be wrong. Lacking any independent critical perspective from which to arbitrate, relativism appears to be left with two unmediatable moral truths. Someone will object that pluralism only multiplies these possibilities, prospective conflicts being raised not only among persons and communities, but even within any one individual. Working out a solution on one plane, someone will be persuaded to one conclusion. Thinking it through on another plane, something else appears right. What does the pluralist do about it?

To begin with, let us be clear that a moral viewpoint need not stand or fall on its capacity to induce consensus. But insofar as consensus counts as one desideratum among many, we should not be too quick to assume that as we multiply planes we multiply the potential for interpersonal disagreement. Quite the opposite may be true; a priori, it is at least equally plausible that the prospects of consensus will advance, the more alternative schema there are to buy into.

Imagine A, who feels intuitive sympathy for an endangered species of whales. A also (i) considers herself a utilitarian; (ii) supposes such a commitment to be one she has to carry throughout all morals; and (iii) cannot find adequate utilitarian grounds for pulling whale meat off the shelves. In those circumstances, A has no basis for agreement with B, who is prepared to build his prowhale sympathies on an alternative, nonutilitarian basis, say, N3. The prospect of A and B agreeing would appear to increase, however, if we introduce them to the possibilities of some delinking: A may come around to B's point of view regarding the whales, while still reserving utilitarianism as the exclusive arbiter in *most domains*. Perhaps B will agree.

On the other hand, as I say, the ability to garner consensus is neither necessary nor sufficient to determine what is right. In all events, for a nonconventionalist the problem remains: what to do about conflicting indications?

a. *The single plane solution*: The fact that there are several legitimate planes does not mean that each and every moral dilemma will require several analyses. It is conceivable that in some instances only one plane will be appropriate, e.g., a classic good samaritan dilemma which involves the rescue of a person, but implicates no other moral claims.

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Consider the example of the oil worker who comes across the lone wildflower, soon to wilt or freeze regardless of what is done to it. If there are any claims touching relations with the flower, I presume they will be drawn from a single plane alone, something on the order of my N4, above.

b. *Multiple strata: single indication*: The second alternative is that the contemplated action will admit of analyses on different planes, but that each analysis will validate the same action. That is a common experience in the analysis of practical problems: distinct mental paths are pursued, each ending in—confirming—the same conclusion. Certainly lawyers are unembarrassed to argue the death penalty from a utilitarian (deterrence) point of view *and* from a duty-oriented, Neo-Kantian point of view. If arguments based upon both theories point in the same direction, so much the better.

Why, then, should an ordinary, extralegal moral argument not be considered all the more secured because it is supported on two planes? It is easy to conceive arguments for vegetarianism that posit both the moral considerateness of animals (U2 and/or N4) and that of humans alone (as per, say, U1 and/or N2), viz., that by eating animals the planet uses protein inefficiently, thereby reducing aggregate human welfare, and even robbing undernourished remote others of a minimally human existence. One can anticipate our monist labelling such a strategy as mere rhetoric, as a way of forming and changing beliefs. Ethics, the monist will say, should seek not *beliefs* as to what is true or valid, but what *is* true or valid. I have much sympathy for that position, when it is put this way: that ethics is committed to seek moral truths, much as science is committed to seek scientific truths. In both cases, the commitment is meaningful and worthy, even if we know, on another level, that the quarry is elusive.

Still, from the commitment that truth is our quarry, what follows as to strictures on the method of pursuit? Surely the wrong way to the right answer is unacceptable. If a scientist, calculating the earth's circumference, stumbles upon the correct answer because the wrong data and bad math cancelled out, we would feel the truth had not been grasped. But what if there are several right ways to come up with the right answer? Consider how some arithmetical wizards have devised bizarre algorithms to perform complex calculations, e.g., vedic mathematics.[343]

To some ethicists, including presumably Kantians, finding the right answer in the right way may be more important than finding the right

343. J. HOUSE, MATH OR MAGIC? SIMPLE VEDIC ARITHMETIC METHODS (1976).

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answer. They might claim that action, to be moral, must flow from one's rightly determined duty. But it is not clear why this stricture should prevail. What if it turns out that the right answer is plausibly more likely to emerge if people are allowed to pursue it through different paths? This is not farfetched. Stephen Toulmin, reflecting upon his experience as member of an institutional medical-ethics committee, has observed how much more often he and his colleagues were able to agree on what was the *right decision*, than on what were the *right justificatory principles* for that decision.[344] Perhaps the answer they so variously discovered was the right one.

We could, I suppose, restrict the incidence of such outcomes by stricturing moral reasoning with a monist fiat that people must reach consensus on the right procedures and principles before they proceed any further toward the right answer. We would thereby purchase some converged consensus as to what was valid reasoning (expressed perhaps in a reduction in the number of planes), at the cost of producing more divergence of opinion as to judgment. That is, if we start with a universe of persons who agree on the final evaluation of an action (albeit for different reasons), and require them to go back and come to agreement on their technique of reasoning before they reproceed, we are creating the conditions for undoing the consensus. Perhaps under these constraints they will fail even to discover what is *wrong*. The burden should lie on the person who presses for the restriction. Until such a showing be made I am not prepared to concede as a fatal defect the prospect that in some circumstances the same answer may be indicated on different planes.

c. *Multiple planes: tractably inconsistent indications*: We are in a more difficult position when, in the consideration of a problem, we find more than one plane to be relevant—and, working that problem out, discover that the different planes indicate inconsistent actions. Plane A analysis suggests we save the bison; B suggests we shoot it. The agent cannot do both. What then?

The problem is much the same as that examined in the analysis of Multiple Choice Criteria, above.[345] (It is, recall, of the same general type as occurs when anyone commits to combine a rights analysis with a utility analysis.)[346] One response is to propose a master rule. One possibility is to weight inconsistent indications by reference to their firmness. If *a* is supported on its plane in the ! mood, it dominates *b* supported in the

344. Toulmin, *supra* note 193, at 31-32.

345. *See supra* text accompanying notes 233-36.

346. For the pluralist who is also a moral realist, the dilemma arises in the form: What if one

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O mood and *c* in the § mood. Moreover, there is the possibility of some sort of lexical ordering of strata by moral importance. Under such a rule, claims derived from (or actions indicated by) plane B would be suspended until claims derived from Plane A had been satisfied to some point. For example, our obligations to CNPPs (on a U1/N1 basis) might claim priority up to the point where CNPPs had reached a certain quality of life above the subsistence level. But when that level of comfort has been reached, considerations of animals per N4, or of future generations per U2, would be brought into play, according to the rule.[347]

One might respond that by legitimating such an appeal to a master rule we reintroduce, in those cases, a sort of monism after all. But it is an "after all" significant enough to keep pluralism from collapsing into monism. Guided by pluralism, but not as guided by monism, we defer attacking the problem with a single coherent set of principles at the start. Problems are defined and dealt with each according to separate principles, and so on. The master rule is introduced on a contingency basis only after much of the analysis has been performed. The outcome is not likely to be the same as if all problems were all pushed into, say, a utilitarian framework or a Neo-Kantian framework to begin with.

On the other hand, such rules—of weighting, of lexical priorities—are undoubtedly hard to establish and justify. In many cases, it may be that we are left to make such *a* versus *b* resolutions *as best we can*, creatively—and that there is nothing more we can say about it. Indeed, does the continuing mystery of the human brain not lie precisely in this, in its power to create solutions not fully ordained by its antecedent instructions?

Put it this way. When we get down to the point of mulling *a* and *b*, the program for further resolution may be too insubstantial, indeterminate, and unspecifiable to warrant speaking of it as constituting an independent rule or plane. It is in this sense that what we are left to is intuition. But the fact that we are so "dropped off" by methodological reasoning need not render the multiple planar analysis a superfluous gesture. Having come to the conclusion *a* on Plane A and *b* on Plane B is something; for example, it is not *d*. Moreover, reflexive intuitive consideration of *a* and *b* may uncover a third alternative, *c*, one which would

really right answer on one really right plane says do *this*, and one really right answer on another really right plane says do *that*?

347. A finely tuned rule would also account for what to do when one plane spoke in mandatory (!) terms, and other planes indicated inconsistent action, but only on a milder (§) basis.

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not have come to light, much less have been regarded as appropriate, if either Plane A or B had been considered alone.

To illustrate, let us return to the Bowhead. Assessing the Inupiat's whaling practices on either the plane that posits the considerateness of all present and future sentient creatures (U3), or that which posits considerateness of the Inupiat as a tribe and the whales as a species (N5), a not implausible conclusion is that whales may be "harvested" down to the level where the species' biological carrying mass is threatened.[348] Considering the matter on N3, which considers moral claims in regard to individual whales, any killing of a whale appears prima facie impermissible, unless perhaps the whale poses a distinct hazard, for example, threatens to stave one's boat. Trying to put these irreconcilable solutions into some sort of equilibrium, a third alternative occurs (how, we cannot specify): to allow the tribe a limited number of harpoon strikes a year, whether the strike kills the whale or not. It is just such a sort of balance—for how can any single principle yield it?—that the Alaska Eskimo Whaling Commission finally decided upon.[349] The Indians get some of the cultural value of the hunt; the endangered species gets some breathing space; the sacrifice of individual whales is countenanced but minimized.

d. *Multiple model: intractably inconsistent indications*: Suppose quandaries for which analyses on several planes not only support inconsistent actions *a* and *b*, but for which no lexical rule is available, and for which further intuitive reflection reveals no third, best-of-all, satisfying alternative *c*. What then?

The question presents the interplanar counterpart of the intraplanar problems reviewed earlier.[350] What do we do if and when the logic of our moral governance underdetermines a single answer generally? We may have to abandon the ambition to find the one right answer to every moral quandary, either because a single answer does not exist, or because our best analytical methods are not up to finding it. As Hilary Putnam puts it:

> The question whether there is one objectively best morality or a number of objectively best moralities which, hopefully, agree on a good

348. Because none of the things that morally count on those planes, viz., the general welfare, the tribe, the species, is threatened.

349. In 1979, the rule was eighteen whales taken or twenty-seven struck. P. EHRLICH & A. EHRLICH, *supra* note 48, at 189. In 1982, the number of strikes may have been reduced to five. Visilind, *supra* note 293, at 167.

350. *See supra* notes 229-42 and accompanying text.

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> many principles or in a good many cases, is simply the question whether, given the desiderata that automatically arise once we undertake the enterprise of giving a justification of principles for living which will be of *general* appeal, then, will it turn out that these desiderata select a best morality or a group of moralities which have a significant measure of agreement on a number of significant questions.[351]

In some circumstances, if we can identify and eliminate the options that are morally unacceptable, we may have reached as far as moral thought can reach. It may be that of the remaining choices, some must be regarded as equally good—or equally evil.

This does not imply that, as regards the remaining choices, one can be arbitrary, as though, from this point on, we might as well flip a coin. It is by the choices we affirm in this zone that we have our highest opportunity to exercise our freedom and define our character. Particularly if the considerateness of UEs is legitimated, people who take morals seriously, who are committed to giving good reasons, *will* come to irreconcilably conflicting judgments on many questions. At what point of disparity in well-being ought we to share our resources with the remote poor, or with an endangered species? It should be of no surprise that no acceptable moral structure, no matter how elaborate, can dispel all legitimate differences of opinion. But that is a far cry from accepting the skeptic's thrust: "Therefore all answers are equally good." Moreover, in many cases of this sort, collective coercive action is not required. The individual who concludes that there is an obligation to share can give to Greenpeace. Those who conclude otherwise need not.

That does not mean that as a moral community we should not work towards a greater, even if ultimately imperfect, consensus on progressively better answers. The very endeavor is a rightly valued element of a good society. But at any point in time there will be some range of honest and rational differences.

7. *How Do We Select Planes?*

Finally, suppose that we acknowledge the validity of an indeterminate number of moral planes, of pluralism in principle. How do we decide which planes to "buy into"? What *things* do we map as mere resources from whose—or what's—point of view? Which of the many possible governance arrangements operates across which planes? And in the context of any decision, what are the right planes to bring to bear?

351. H. PUTNAM, *supra* note 336, at 84 (emphasis in original).

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These are the questions upon which the whole enterprise stands, and they are certainly the hardest to answer.

To begin with, we have to make a fundamental distinction between the "ordinary" sort of analysis, that which proceeds within a plane, and the extraordinary analysis required by the selection of a plane and the other metaplanar quandaries, such as rules for disposing of inconsistent outcomes. In the former, the task is to arrive at some judgment by reference to the ontology, the principles, the logic, that structure the plane selected. But in the latter task—in structuring various valid planes and deciding which plane to bring out on which occasion—the style of argument, the dialectical strategies, shift radically. Whether to embrace a utilitarianism that deems only CNPPs considerate, one that extends to all present sentient creatures, or one that extends to future creatures as well—that is a decision which the utilitarian principle itself cannot resolve. There is an obvious analogy in the selection of a geometry. Within a Euclidean, Lobachevskian or Reimanian system, analysis proceeds, rather tidily, according to the postulates. But which geometry are we to employ? Which is right for which activities? Whatever else can be said on that score, we can say that the answer is not to be found *within* geometry, but outside it.

We have to start with something like this. Fabricating and selecting the right moral plane is not the sort of matter to be refereed by any familiar tests of truth. Nothing so simple determines how we select versions of the world for scientific purposes.[352] All the more in morals should we expect other overlapping notions to come into play: coherence, perspicuousness, fittingness, elegance, and intuitions about fairness. On some fundamental level, to embrace a framework that ontologizes lakes and declares that they count is no more problematical than to embrace one that ontologizes persons and declares that they count. I do not think that we have to dismiss as "intuitive" the way we handle issues like these, where intuition is regarded as a stopper. It is just that these issues lie beyond the read of academic and legal philosophy, which are more at home working *within* or talking *about* planes. When we turn to the selection of planes—what things, as bundled in what governance, count?—we are removed to another jurisdiction where our minds operate less by appeals to consistency than by provocations of irony, and even humor. The dynamic involves the demonstration of buried contradictions in our lives,

352. *See* N. GOODMAN, *supra* note 190, at 3, 120-25 (1978) (truth is not necessary or sufficient in selecting versions of the world).

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rather than of inconsistency among our ideas. Emotion has more legitimate rein (or reign); suppressed feeling and insight are unloosened and mobilized. That is why the planar choices, those that go to the ground rules of each plane and the whole, ultimate assembly of planes, are less under the sway of the stuff we academics do, than of literature, folksongs, war, art, landscape, and poetry. I do not mean to suggest that these choices are therefore outside the province of intellect. Poetry and literature, obviously, are high forms of reason; but, rather than to derive truths, they make them manifest.

Consider one of the major "metaplanar" battles of recent history: racial equality. In the words of W.E.B. DuBois, the older South was seized with "the sincere and passionate belief that somewhere between men and cattle, God created a *tertium quid*, and called it a Negro."[353] In our terms, dealing with *them* took place on a separate plane of reference. What it took to combine black and white onto one plane—so far as that has been done—has not been moral philosophy alone, although there was certainly principled debate among the abolitionists. Equally influential were a novel[354] and a war.[355] The most powerful argument I have ever read for vegetarianism—for a plane that makes animals considerate—was turned out not in philosophy, but in science fiction form.[356]

B. A FINAL PROLOGUE

Dogmatism has no place, least of all in morals. We do not really know how much our judgments of what ought to be are constrained by imperatives of breeding and biology. We do not know the influence, even the right influence, of brute events, such as famines and plagues, in shaping our planar commitments. All the years of mooting about rights has

353. W. DUBOIS, THE SOULS OF BLACK FOLKS 89 (1903).

354. I have in mind not only *Uncle Tom's Cabin*. One of the most powerfully moving antislavery "arguments" I have ever read was put together by Charles Dickens in *American Notes*. Its most effective portions proceed without any principled appeals at all. Dickens merely reprints for his audience clippings from newspapers—stories and advertisements for the return of runaway slaves, and cash-for-negroes notices, until the reader is numbed and horrified. C. DICKENS, AMERICAN NOTES 201-04 (1903).

355. The influence of the Civil War was not merely to have imposed one view of morals on the world by force. I am suggesting that the war, and its symbol—e.g., the many deaths *for that cause*—integrated into moral sensibility. "Equality" was the answer to the question: Why had so many died?

356. *See* Stewart, *The Limits of Trooghaft*, in ANIMAL RIGHTS AND HUMAN OBLIGATIONS 238 (1976). In the same vein, I have observed elsewhere that Norman Mailer's *The Executioner's Song* and the closing of Truman Capote's *In Cold Blood* may be among the most persuasive moral statements against capital punishment that we have. *See* Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1180 (1981).

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only expanded the controversy on what rights are, whether people have them, and how they combine with one another and with utility. Our understanding of duties and interests and the nature of the Good seems no more satisfactory. How, then, can we dismiss out of hand the suggestion that nonpersons can be morally considerate? That some of our actions toward them can be, if not mandatory or impermissible, at least morally welcome or unwelcome?

I am under no illusion I have made out the case for unconventional entities. (How "made out" is the case for our duties to one another?) What I have sought to do is get it past the pleadings. At the present margin of our agreement and understanding of moral theory, I am not certain how much further it can be advanced. For, if someone insists, "Show us your 'land ethic,' " a perfectly legitimate response is, "Tell me first: What is any ethic supposed to look like? How decisive need it be? On what foundation is it bound to rest?"

We are at the point where the enterprise cannot go forward without more thought given to the aims and constraints of moral reasoning generally. These are questions that need to be faced by everyone with an interest in normative thinking, and not merely by the redwood and whale advocates. Nor is it one for a lawyer alone to tackle. It is a challenge that merits the continued concerted effort of ethicists, economists, biologists, aestheticians, and anyone else willing to lend hand or paw.

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