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**CHILDREN ON THE FRONT LINES OF AN IDEOLOGICAL WAR:
THE DIFFERING VALUES OF DIFFERING VALUES**

A. SCOTT LOVELESS*

The specter of eleven and twelve-year-old children wearing army fatigues and carrying AK-47s is a scene most of the world would like to consign to history forever. For several decades now, the United Nations and numerous non-government organizations (NGOs) have sought to eliminate the use of child soldiers in armed conflict. It is ironic, therefore, that children should now be found on the front lines of another kind of battle, an age-old ideological struggle, as proponents of the Convention on the Rights of the Child¹ seek to convince the United States to join virtually every other nation by ratifying this convention.

The primary issue runs much deeper than simple cultural preferences regarding differing approaches to family law and child welfare. It might be framed thus: should the United States – a nation whose Constitution depends on the interplay of morality and law – be bound to a treaty premised on the strict separation of morality and law? Americans, and especially America’s lawyers and judges, need to understand why this distinction is of utmost, and increasingly critical, importance.

This paper will present a framework for understanding the relationship between law and morality, discuss the role of codified law within that framework, then discuss the CRC in the context of the entire “rights-based approach” to law currently in vogue with many Member States and NGOs at the United Nations, of which the CRC is only one manifestation.

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1. Convention on the Rights of the Child, *adopted* November 20, 1989, 1577 U.N.T.S. 43 (entered into force Sept. 2, 1990) [hereinafter CRC].

THE LONG-STANDING DEBATE BETWEEN NATURAL LAW AND POSITIVISM

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports It is substantially true that virtue or morality is a necessary spring of popular government. . . . Who that is a sincere friend to [popular government] can look with indifference upon attempts to shake the foundation of the fabric?²

The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere. . . . [B]eliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary.³

These quotations from George Washington and Oliver Wendell Holmes distill the positions of two ever-opposed camps. One side sees values and morality as arbitrary and having no place in law. The other thinks them fundamental. One thinks the other naïve, the other thinks the first unknowingly undermines free democracy. As the quotations attest, each position is defended with intelligence and logic, although each camp is skeptical of the reasoning, if not the motives, of the other. The one point of agreement between them is that no middle ground exists on this ultimate question, though people may find ways to disagree more or less civilly. Moral values either matter in society, or they do not.

John Locke, John Witherspoon, and the other “natural law” philosophers posited an essential connection between law and morality. Later, England’s Utilitarians – Bentham, Austin, and others – began inquiring into the difference between “the law that is” and “the law that ought to be.” The debate has since centered on whether a set of moral principles or guidelines exists that defines and provides context for good law or whether law itself defines morality.

Those on the side of a moral guideline often favor “natural law,” the assumption that an ultimate, *natural good* exists external to the human invention of law, and that this natural good dictates fundamental principles of right and wrong. Because it affects all human relationships – whether between family members, strangers, fellow citizens, or sovereign nations – this natural morality determines the success or failure of positive (government-created) law. If not consistent with this natural good, positive law is not morally valid.

2. George Washington, *Farewell Address*, AMERICAN DAILY ADVERTISER, Sept. 19, 1796, available at <http://www.liberty1.org/farewell.htm>.

3. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1919).

At best, positive law will only approximate the justice of natural morality. At worst, it will abuse and eventually self-destruct.

Those who reject the concept of natural law, on the other hand, assume that good is arbitrary. Known as positivists, such thinkers believe that good can be created by people coming together to decide what is right and what is wrong. Since no overarching morality pre-exists, the only basis for determining that one “good” is better than another is to embody it in positive or codified law.⁴ What is lawful constitutes good, *per se*. What is unlawful is, for the present, considered bad. General public attitudes serve as guiding principles, in a kind of majority-rule approach to moral direction reflected today in what is called moral pluralism or political correctness.

One difficulty in the discussion between these philosophically opposed camps is that positive law is easy to define and identify, whereas natural law’s “ultimate good” suffers from multiple definitions and a general vagueness. Positivists are content for law to have little, if any, moral content as long as it brings order to society. Their straightforward approach with its minimalist ideas of what “ought to be” is easily understood and appeals readily to human rationality. Natural law proponents, on the other hand, often seek a seemingly elusive truth on which to base their reasoning. They get by largely by pointing out the inadequacies of pure positivism, not being able to say with much exactness what should constitute or define the moral backdrop of law.

A well-known example of this schism is the debate between Professor H. L. A. Hart, advocating legal positivism, and Professor Lon L. Fuller, advocating natural law, found in the 1958 *Harvard Law Review*.⁵ Hart’s distinction between “the law that is” as the “core” and “the law that ought to be” as allowing interpretation in law through the “penumbral” meanings of words, provides an exceedingly narrow definition of “ought to be.” He allows only for courtroom flexibility, leaving judges free to “legislate” in the sense of allowing words in enacted law to alter in meaning as society changes. Fuller disparages Hart’s positivist position, urging that what law “ought to be” implies a consistency between law and a non-legal sense of right and wrong. Fuller argues that law should have an “internal morality” to keep it from becoming immoral. His concept of “immoral law,” to the pure positivist, is oxymoronic. However, according to Fuller, it is possible for law to become

4. Throughout this paper, in order to avoid confusion between the customary “positive law” and “positivistic law,” I will use the phrase “codified law” to refer to the written law established by government in the context of a natural law system such as the United States. Unless clarified otherwise in a specific instance, “positive law” will refer to the analogous black letter law arising within a positivistic legal system.

5. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

immoral precisely because the only moral obligation positivism recognizes is obedience to the law, beyond which, in Fuller's words, "[t]he fundamental postulate of positivism" is that "law must be strictly severed from morality."⁶

But even Fuller is hard pressed to provide much precision to the character of the connection between law and morality other than acknowledging its existence and its importance. He usefully notes that any law, including positivist law, provides *order*, even if it is unjust or immoral in some way. Good order, however, is provided by "law that corresponds to the demands of justice, or morality, or men's notions of what ought to be."⁷ Yet, understanding this connection between codified law and "the demands of justice or morality" is crucial in evaluating the future implications of ratification of the CRC.

THE SPECTRUM OF PERSONAL MORALITY AND ITS NATURAL CONSEQUENCES

Both law and morality are concerned with relationships between people. Law, whether we mean natural law or positive law, sets forth acceptable modes of interaction between individuals or groups. Morality determines whether those same interactions are right or wrong against a standard of "good." More precisely, codified law provides rules to keep people from doing one another direct harm. While morality also has this object, it subsumes not doing harm in a list culminating *ejustem generis* with "love thy neighbor." Legally, not harming is the sole standard. On the moral scale, not harming is a minimum standard, because the goal is to love others, and one cannot simultaneously love and do harm. Thus, morality encompasses a striving to help one another, a forging of relationships on levels of which law takes little cognizance.⁸

Most people living in a stable society recognize the need for individuals to obey codified law. Most people also realize that "not harming" is insufficient, that some level of "doing good" is also requisite if individuals are to thrive. Yet, how people incorporate into their actions this sense of duty to law and doing good beyond obeying the law varies greatly. The personal moral codes they develop and live by fall along a larger spectrum of morality, with implications in terms of their effects on the quality of interpersonal relationships, and in turn on society. While it is possible to differentiate among these theories with finer gradations (Hudson,⁹ for example, breaks the

6. See Fuller, *supra* note 5, at 656.

7. *Id.* at 644.

8. Perhaps this point is best illustrated in the subject of "family law." Once a marriage is established, law has little to do with a happy, secure marriage and family. Law generally only becomes involved if the family has broken down to the point of divorce, asset distribution, and custody issues, the general subject matter of family law.

9. DEAL W. HUDSON, HAPPINESS AND THE LIMITS OF SATISFACTION 111-32 (1996).

spectrum into roughly five categories, possibly six), for present purposes we can consider them as falling into three general categories: hedonism, individualism, and altruism.

1. Hedonistic Morality Strives for Personal Pleasure

Perhaps the most familiar Western statement on hedonism is that of Jeremy Bentham: “Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*.”¹⁰ However, one of the clearest statements of the hedonistic philosophy was provided by the ancient Greek, Aristipus:

One should strive for nothing else but to experience as many pleasures as possible and as intensely as possible, for pleasures differ neither in degree nor in quality. . . . No considerations should restrain one in the pursuit of pleasure, for everything other than pleasure is unimportant, and virtue is least important of all.¹¹

Hedonists focus on pleasure and desire satisfaction in the short term. To the extent that they consider the future, hedonists do so in terms of maintaining their ability to continue having pleasure. Other people are thus seen at best as means to the hedonist’s own ends, to be manipulated, controlled, or variously used toward the satisfaction of personal desire. While this approach to people and relationships might be effective at the personal level for a brief time, it does not engender trust or confidence between people in the long term and frequently leads to conflict. Hedonists often end up in disputes and experience tension in their relations with people who cannot or will not cooperate with them in their pleasure-seeking, or who appear to present obstacles when circumstances thwart the satisfaction of the hedonists’ desires.

In its most radical form, hedonism considers “good” whatever satisfies one’s desire for pleasure and ensures the avoidance of pain in the fullest and most immediate manner possible, regardless of the consequences to others. Because this kind of pleasure-seeking can become addictive and draw one towards greater and greater thrills, hedonism can lead to extremes that result in criminal behavior. Crimes involving physical abuse, theft, substance abuse, even murder, are manifestations of radical hedonism. In less extreme forms, hedonism is still orectic, focused on the short-term satisfaction of desire regardless of the eventual consequences, because looking out for one’s own welfare and desires is what matters most. Hedonists would thus be most likely to ignore or purposely disobey the law, requiring government to be more

10. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *THE UTILITARIANS* 17, 17 (Dolphin Books 1961) (1789) (emphasis in original).

11. WLADYSŁAW TATARKIEWICZ, *ANALYSIS OF HAPPINESS* 317 (Edward Rothert & Danuta Zielinski trans., Jan T.J. Szrednicki ed., Polish Scientific Publishers 1976) (1962).

involved in regulating their conduct than would be necessary with people holding higher codes of morality.

2. Individualistic Morality Strives for Personal Virtue, Honor, and Public Peace

The second broad category of lived personal codes having moral implications is “individualism,” roughly equivalent to *eudaemonia*, after the usage of Aristotle. This philosophy considers hedonism to be serious error, as we can glean from Aristotle’s own words. After referring to a life lived for the appetites of food and sex, he observed:

[I]t is evident that, for a man who made such a choice as *this* for himself, it would make no difference whether he were born a beast or a man. Certainly the ox in Egypt, which they honour as the god Apis, has a greater abundance of several of such things than many sovereigns.¹²

Rather than seeking indiscriminate, short-term desire satisfaction, individualists seek the satisfaction of *worthwhile* desires,¹³ those desires consistent with the best or “divine” parts within us. This often requires hard work, self-discipline, and the sacrifice of short-term desires in order to obtain long-term and honorable objectives, such as academic learning, skill and talent development, athletic prowess, or civic service. Individualists also respect the fact that others should be able to seek fulfillment and have the opportunity to excel. They therefore acknowledge the rights of others to pursue similar goals, even if they generally feel little or no obligation to assist others’ pursuits.

To individualists, moral treatment of others may be seen in terms of the *quid pro quo* – “I’ll scratch your back if you’ll scratch mine,” in accordance with the moral principle of fairness or equity. For this reason, individualists might expect either tangible or intangible rewards for good behavior, for obedience, for compliance, or for “not rocking the boat.” This emphasis on doing one’s duty can lead individualists to supply the wants and needs of hedonistic spouses or teenaged children, but they might also be tempted to tire of this “duty,” coming to see this version of morality as a burden that keeps them from their preferred tasks and enjoyments.

Other people are nevertheless important to individualists. Although individualism is as self-focused as hedonism, the individualist’s activities are pursued with the object of making oneself good, respectable, even honorable, and so people of this philosophical position tend to live by the rules in order

12. ARISTOTLE, *EUDEMIAN ETHICS* 5 (Michael Woods trans., Clarendon Press 1982) (emphasis in original).

13. ELIZABETH TELFER, *HAPPINESS: AN EXAMINATION OF A HEDONISTIC AND A EUDAEMONISTIC CONCEPT OF HAPPINESS AND OF THE RELATIONS BETWEEN THEM* 41 (W.D. Hudson, ed., 1980).

not to endanger their reputations. In this way, individualism as a moral code tends to moderate or at least stifle conflict and ill feelings between people. It does not eliminate such feelings, however. People may give individualists the honor they seek, but people are also competitors for those same honors. Impediments to personal achievement – such as limited funds, a lack of desirable jobs, and limited enrollment in an educational program – can lead to strained relationships due to a perception of competing for scarce resources. Serious crime would not be expected from a committed individualist, except perhaps for some forms of white-collar crime resulting from the sense of competition with others.

3. Altruistic Morality Strives to Promote the Common Good and to be of Service

Altruism differs fundamentally from both hedonism and individualism in that it is not orectically based. It is not centered in desire satisfaction. Where hedonism and individualism differ from each other by the types of self-interest they seek, altruism does not seek self-interest, at least not according to the standard definition of that term. The “interest” of the altruist is not competitive as an interest *apart from* other people, but is cooperatively *connected to* other people. Another’s need speaks to the altruist as a personal need. Altruists perceive a commonality of interest with all people.

Altruism as described here is consistent with the Christian concept (also found in Islam, Judaism, Buddhism, and Hinduism) of “loving one’s neighbor,” being “at one” with others; attained through genuine caring, respect for, and loving service to them. Several philosophers have recommended this way of being, including, among others, Soren Kirkegaard,¹⁴ Martin Buber,¹⁵ Jacques Lusseyran,¹⁶ Emmanuel Levinas,¹⁷ C. S. Lewis,¹⁸ and C. Terry Warner.¹⁹ Altruistic love is a spontaneous commitment to another’s welfare, the forgetting of self as distinct from the other because of the perception of a “common humanity,” to use Kristen Monroe’s phrase.²⁰

14. See SOREN KIRKEGAARD, *WORKS OF LOVE*, 37-50 (David F. Swenson & Lillian Marvin Swenson trans., 1946).

15. See MARTIN BUBER, *I AND THOU* (1970).

16. See JACQUES LUSSEYRAN, *AND THERE WAS LIGHT* (Elizabeth R. Cameron trans., 1963); JACQUES LUSSEYRAN, *AGAINST THE POLLUTION OF THE I: SELECTED WRITINGS OF JACQUES LUSSEYRAN*, (1999).

17. See EMANUEL LEVINAS, *TOTALITY AND INFINITY* (Alphonso Lingis, trans., 1969).

18. See C. S. LEWIS, *THE ABOLITION OF MAN* (1943).

19. C. TERRY WARNER, *BONDS THAT MAKE US FREE: HEALING OUR RELATIONSHIPS, COMING TO OURSELVES* 301 (2001).

20. KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY* 198 (1996).

Paldiel²¹ perceived the “essence of true altruism” in the following quotation from Johanna Eck, a German woman who had saved several Jewish women from the Nazis during World War II by hiding them in her apartment in Berlin.

The motive for my assistance? In an individual instance, none, especially. Basically, I think like this: If one of my fellow human beings is in a position of need and I am in a position to assist him [literally “stand by him”], then that is my (solemn) duty and obligation. If I fail to provide this help, then I do *not* fulfill the assignment which life - or perhaps God? - requires of me. People, so it appears to me, form a great unity, and whenever they do one another injustice, they strike themselves and everyone else in the face. This is my motive.²² (Author’s translation.)

Altruists feel the needs of others as their own; they are other-interested, that is, they perceive the group, beginning with the family, as an extension of themselves. Being of service where needed is paramount because altruists *care* about the people around them. Altruism is natural and instinctive, rather than rational, but it can be rationally unlearned and also rediscovered.

Anthropologist Dorothy Lee²³ provides some insight into the altruistic viewpoint in her studies of the Oglala, Sioux and Wintu tribes of American Indians. She demonstrates that these cultures, in which relatedness is overtly recognized and considered the ultimate value, a conception of “self” exists that is fundamentally different from the Western idea of an independent “self” interacting with other independent “selves.” Instead, these cultures mediate the sense of an “open self” that is as natural among them as our Western “closed self” is to us. This open self perceives itself as integral to the larger group – not as a separate individual who is merely responsible for others, but as a living part of the group who represents the group in him or herself.

To contrast this assumption of social relatedness with the assumption of individuality common in Western cultures, Lee recalls worrying as a teenager about her own motives. If she were to risk her own life to save someone else, would she be doing it for the sake of the endangered person or for her own sake “because I could not bear to live with myself if I did not try to save him?” She then observes:

In a society where relatedness stems from the premise of the open self, such a question would be nonsense. In such societies, though the self and the other are differentiated, they are not mutually exclusive. The self contains some of

21. M. Paldiel, *The Righteous Among the Nations: A New Dimension in the Annals of Humanitarianism*, in *MUT ZUR MENSCHLICHKEIT 157-70* (G.B. Ginzler ed., 1993).

22. *Id.* at 163 (emphasis in original).

23. DOROTHY LEE, *VALUING THE SELF: WHAT WE CAN LEARN FROM OTHER CULTURES* 11-12 (1976).

the other, participates in the other, and is in part contained within the other. By this I do not mean what usually goes under the name of empathy. I mean rather that where such a concept of the self is operative, self-interest and other-interest are not clearly distinguished; so that what I do for my own good is necessarily also good for my unit, the surround, whether this is my family, my village, my tribe²⁴

Lee points out that entire societies and cultures can be, and often are, premised on this foundational conception of social relatedness. In such communities love, service, and concern are present as part of the basic social fabric, and what we call crime is almost non-existent. In other words, to the extent that altruism is present, crime is not.

Without question, there are aspects of moral systems – the trappings and unique practices and rituals of different religions, for example – that have, or at least seem to have, the arbitrary character about them that Oliver Wendell Holmes suggests.²⁵ However, preferring one personal morality over others can only be seen as arbitrary if one overlooks how each moral code affects the quality of relationships between or among people. Because hedonism places priority on short-term desire fulfillment, it tends to ignore relationships and alienate other people, immediately or eventually, creating conflict in spite of the presence of positive law. Individualism stabilizes relationships by tolerating others while seeking one's own fulfillment, valuing others more for their contributions to or approval of one's own accomplishments; thus it tends to uphold positive law by reducing and controlling conflict. Altruism, by recognizing and valuing the relationships between people and seeking to be of service to others, builds trust, gratitude, and strong, valued bonds between people at a level of individual morality beyond legal requirement. This differential effect on human relationships at the level of the individual is at least a partial explanation of natural law.

CODIFIED LAW ESTABLISHES A MINIMUM STANDARD OF PUBLIC MORALITY

Codified law generally serves two purposes in society, and a set of laws exists for each. Known in Western law as *malum prohibitum* or “bad because it is prohibited,” the first set concerns matters of regulation. Speed limits and parking rules contribute to safety on our highways; laws against gathering artifacts in our national parks help to preserve our heritage; and laws restricting the use of fire protects private and public property. These laws restrict individual freedom in the interest of the general public. Generally speaking, however, breaking these laws is not considered wrong as a matter of basic morality except for the minimal moral obligation created by positive law to

24. *Id.* at 12.

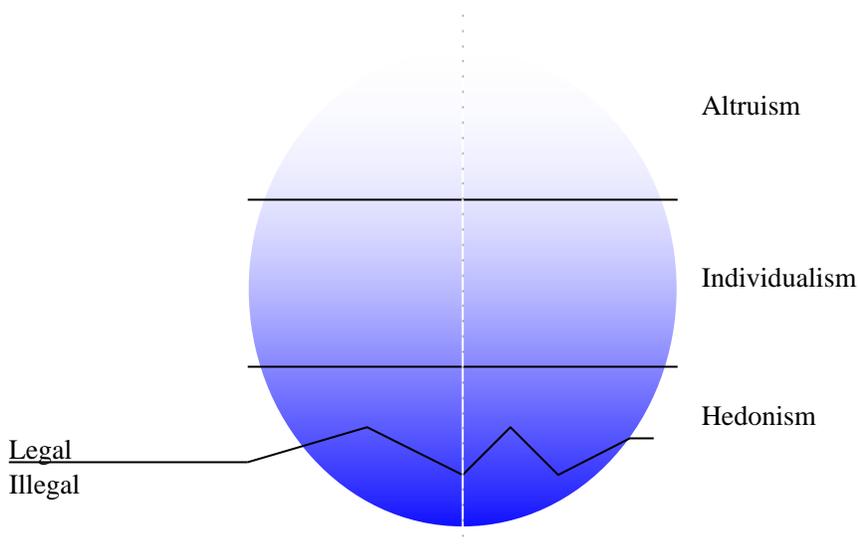
25. Holmes, *supra* note 3, at 41.

obey the law. Rather, breaking such a law is *legally* wrong, wrong because we agree to establish it as wrong. In a system of natural law, this is the necessary, though well-circumscribed, place for codified or “positive law” in the conventional sense of that term.

Positivists believe that virtually all law falls into the category of *malum prohibitum*. The most extreme among them seem to feel that even laws against murder and rape, let alone euthanasia and adultery, are only a matter of common agreement and “social construction,” that they are wrong only because they have been defined as illegal. However, in Western society and in most other cultures, we also recognize a class of crimes deemed *malum in se* or “inherently wrong.” Seen against the backdrop of the personal morality spectrum just presented, these laws – which prohibit acts such as murder, mayhem, rape, arson, and theft – are mainly concerned with the consequences of extreme hedonism, where a person might decide, in effect, “What I want matters more than what happens to you,” or “My anger at you justifies my action in destroying your property or taking your life.”

Such actions are crimes as a matter of law, but they are also considered morally wrong, or evil, under virtually any public standard of morality. The label *malum in se* is, in fact, an inherent acknowledgment of natural law and the moral basis it provides for codified law. In this respect, codified law establishes a minimum line or floor for everyone’s private moral code; it is created by government to establish a line below which society will not permit an individual’s personal level of morality to fall without punishment.

FIGURE A



The relationship between natural law and codified law is represented visually in Figure A. At any given time, society as a whole is comprised of people interacting with one another who have chosen to live by different levels of morality within natural law. Some are hedonistic, some are individualistic, and some are altruistic. Most of us probably vacillate within a limited range. The graduated vertical line in Figure A represents sublevels within each category on the spectrum of personal morality. Codified laws on all subjects attempt to prevent people from descending below a publicly acceptable form of hedonism, a moral floor, as represented by the jagged line separating legal from illegal activity. This line may move up or down as government modifies its laws of acceptable behavior. The degree of shading is intended to reflect the degree of need for government regulation.

Generally speaking, in a society allowing freedom of conscience, individuals can continue to advance up this line as far as they wish no matter what codified laws are in place; at least as of this writing, there is no U.S. law against moral goodness. People are also free, of course, to move downward toward the legal/moral floor. However, if too many people reject a higher moral code and embrace hedonism, democratic government will be stretched to the limit dealing with people breaching the legal line. Anarchy would threaten, and under the burden of trying to enforce the legal floor, the government would either fail or of necessity become more restrictive. As J. R. R. Tolkien observed through the eyes of Frodo and company in *The Lord of the Rings* trilogy, when they returned to the Shire and found that evil men had taken over the government, the supply of “everything except Rules kept getting shorter and shorter”²⁶

In the United States, natural law also provides the essential direction of common law principles, such as justice, fairness, or equity, that are used to guide the application of black letter codified law.²⁷ Since both moral law and codified law seek to maintain social order, protect fundamental rights, and eliminate crime, they work together to achieve these common interests. However, once these goals are minimally achieved to the point of legality, codified law is finished. It is concerned that citizens cause no immediate harm to each other by staying on the correct side of the line separating legal and illegal action. As long as that condition is satisfied, codified law has little to say about encouraging people to live above the moral floor of bare legality. As far as moving people upward on the scale of personal morality, codified law

26. JOHN RONALD REUEL TOLKIEN, *THE RETURN OF THE KING* 292 (Houghton Mifflin Co. 1965) (1955).

27. Cf. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1965).

can do little more than pass resolutions or provide incentives such as grants and tax breaks.

The first problem with codified law standing alone, therefore, is that because government is limited as to what it can enforce, it cannot force people to risk their lives for each other or to do one another favors; it cannot force people toward moral good. American tort law generally recognizes no duty to assist a stranger in peril. Even the “Good Samaritan Doctrine,” which provides that a person attempting to assist someone in peril cannot be charged with contributory negligence unless the attempt itself increases the harm to the imperiled person, only protects the person choosing to render assistance; it does not require one to make the choice to place oneself at risk. Codified law cannot say “should”; it is limited to that realm where it can only say “must.” Once it establishes this minimum standard, it is finished.

Morality, with its unavoidable effects on relationships, steps precisely into this breach. It provides the “shoulds” over and above law’s “musts,” urging individuals to ever higher levels of understanding and living in harmony with one another. Codified law and morality, which together make up the natural law system, thus have fundamentally different but mutually reinforcing objectives. Codified law exists to maintain public order, to avoid violence and open conflict. To the degree that morality succeeds in helping people remain above the legal line of codified law, it assists government in maintaining order – not only because moral people cause fewer problems, but because they also try to solve the problems of others, voluntarily and freely, because they care. Recall Jean Valjean’s crime of stealing bread to feed his hungry family in Victor Hugo’s *Les Misérables*.²⁸ Had, for example, a caring neighbor shared his food, Hugo would have had no story, because the government and Inspector Javert would never have become involved.

STRONG FAMILIES, RELIGION, AND DEMOCRATIC GOVERNMENT ARE MUTUALLY DEPENDENT

Natural law’s interplay between codified law and morality also creates a space for family and religion to play their roles in society. Families, for instance, provide the most natural vehicle for training both adults and children to think altruistically and thus to stay well above the line of pure legality. Social scientists, such as Merlin Myers, have noted a “morality of kinship” or tendency for family members to treat each other with more kindness and acceptance than non-kin typically do:

What these theories all come down to is that the process of human reproduction gives rise to relationships of a special kind Begetting and

28. VICTOR HUGO, *LES MISÉRABLES* (1862).

bearing generate relations of parenthood, childhood, and siblingship. These relations are unique in the fact that they are inalienable; i.e., they cannot be annulled, and they cannot be established in any other way. . . . The domain of kinship predicates a kind of morality characterized by kindness and a predisposition to love and care.²⁹

Similarly, Meyer Fortes,³⁰ in a review of observations on kinship from anthropology, summarizes that kin systems, i.e. families and extended families, are consistently governed by the “axiom of amity” or the “axiom of prescriptive altruism.” The morality of the kinship group, in some natural, unimposed way, *requires* members to act *voluntarily* in the interest of one’s family members without regard for self (in the modern or Western sense of “self”). In other words, members of family systems, nuclear or extended, tend to look out for one another, take care of each other, and generally act in the interest of the group rather than in self-interest.

Myers suggests that codified law may have come into being when large extended families or tribes living the morality of kinship began to interact with strangers.³¹ That is, legal rules became necessary for dealing with people outside of the special kinship relationship because non-family members could not be counted on to live according to the same norms or to feel obligated in the same manner as a member of the family group. In support of this point, Myers summarizes Fortes’ work as observing:

[T]hat the social universe of the individual in tribal societies (and I would add, in our own as well) is polarized into two realms of social alignment. On the one hand is the realm of kinship and the domestic domain, within which kinship morality, exhibited in the rule of amity, prevails. On the other hand is the realm of non-kinship . . . In this realm, the morality of kinship and the rule of amity do not apply. Rather, law, maximization and contract are the prevailing ethic. I maintain that social life everywhere is characterized by a continuous process of pushes and pulls between these two social spheres.³²

Even in the West – where our concept of self and relatedness to others tends to be self-centered and where family members increasingly use contracts to govern familial interactions – many families still practice a form of altruism. Family members tend to feel a duty to look out for one another at some cost, sometimes at great personal sacrifice. It would appear that despite encroachment from many modern outside influences, the family naturally practices, teaches, and promotes basic altruistic thinking and behavior, the

29. Merlin Myers, *The Morality of Kinship*, in VIRGINIA F. CUTLER LECTURE, BRIGHAM YOUNG UNIVERSITY, 7-18 (November 15, 1983).

30. MEYER FORTES, *KINSHIP AND THE SOCIAL ORDER: THE LEGACY OF LEWIS HENRY MORGAN* 251 (1969).

31. Myers, *supra* note 29, at 10.

32. *Id.* (parenthetical in original).

highest form of moral law. Indeed, I would venture to say that in every sustained culture in the world, *family*, that is, father, mother, and their children, extended to multiple generations, is the major repository of altruism and is largely responsible for the sense of caring that exists in each society. As families succeed, they rear children who will likely assist and support government by never, or seldom, approaching the legal/moral floor.

Religion is a second means for raising private morality. Religions generally teach individuals to strive for ever higher standards of personal conduct, usually encouraging altruism as the ultimate goal. They also tend to support strong families in training their children, and they provide moral teaching and social relief for those without strong families. Religion and faith thus also encourage an upward moral impetus beyond mere legality. Christians are taught, for example, that by serving others they also serve God. To the extent the people take care of one another's problems, they eliminate the need for government to do so. This is undoubtedly what James Madison had in mind when he said, "If men were angels, no government would be necessary."³³

The interplay of morality and codified law also explains why societies based on a relatively homogenous religious faith can maintain the legal floor of public morality at higher levels than can the United States – witness many Muslim nations, for example. While non-Muslims might chafe under the perceived strictness of the laws in those countries, devout Muslims do not usually object because the public laws are not inconsistent with their personal morality. By the same principle, a devout Christian or Jew or Hindu will generally have little problem with a law against illegal drug use or driving while intoxicated because he or she is not likely to wish to pursue those activities even in the absence of laws prohibiting them.

In democratic countries like our own, government and religion are more mutually dependent on one another than many people realize. Democratic government in a multi-cultural society cannot and should not promote a particular religion, nor should it persecute or outlaw any given religion, provided the religion is not engaged in seditious conduct. Yet, a free, democratic government's proper operation and successful continuation depends on a majority of its citizens being morally responsible in the manner taught by most religions. Religion, in turn, cannot and should not govern, but it depends on government to maintain a minimum level of order so that it can teach moral responsibility in a generally stable society.

Our government must be able to respect and protect the place of and connection between natural law morality and law without being viewed as thereby violating the Constitutional interpretations assuring separation of

33. THE FEDERALIST NO. 51 (James Madison).

church and state. In our system, government itself is a creature of natural law and must itself remain within those bounds even as it governs according to those principles. The different social effects of different values are real.

The Frenchman Alexis de Tocqueville, in his early nineteenth century study, *Democracy in America*,³⁴ understood the interdependence between government and religion, predicting that the success of the American experiment with representative democracy would hinge on the success of the churches in maintaining the character of the people. Too much erosion in the collective personal character, he suggested, would result in the eventual failure of America's experiment in democracy.³⁵ In *The Abolition of Man*, C. S. Lewis makes much the same point, couched in terms of natural law.³⁶ He argues that values must correspond to truth, i.e. conform to natural law, allowing people to live "within the *Tao*" of nature. Any other position is "a stance outside the *Tao*" and will lead to "the destruction of the society that accepts it."³⁷ To analogize, any attempt to disregard the law of gravity does not exempt the nonbeliever from the eventual consequences.

Much like the ingenious system of "checks and balances" built into the American Constitution, government, religion, and strong families form another three-pillared foundation that helps maintain societal balance, each part providing and receiving reciprocal support to and from the others. When any one of these three components is weakened, the others are threatened as well. It is worth noting that historically, when positivistic law has gone to immoral ends, religions and family ties have often become the targets of oppression and even persecution, largely because they were viewed as competitors for loyalty to government authority and its artificially imposed ideals.

THE DECLARATION OF INDEPENDENCE AND CONSTITUTION AS STATEMENTS OF NATURAL LAW

The Declaration of Independence and the United States Constitution were founded on the assumption of the reality of natural law, with confidence in the personal morality of the people. In the Declaration of Independence, certain rights were posited as foundational, preexisting government itself, granted inalienably by virtue of the nature of man. The Declaration does not purport to provide an exhaustive list of such rights, but it mentions four: the right to life,

34. ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (Richard D. Heffner, ed., 1984) (1956).

35. "Nor is there any [religion] which does not impose on man some duties toward his kind, and thus draw him at times from the contemplation of himself. . . . Religious nations are therefore naturally strong . . ." *Id.* at 152.

36. LEWIS, *supra* note 18.

37. *Id.* at 39.

the right to liberty, the right to pursue happiness, and finally (and decisively for purposes of that document) the right to create a new government when the former government has demonstrated a long-standing failure to meet its obligations to its citizens.³⁸ Notably, in connection with this last right, the Declaration implies a duty of loyalty on the citizenry to first try to work with the old government and not to exercise this right of creating a new government whimsically.

These inherent rights were later supplemented with the Bill of Rights, the first 10 Amendments to the American Constitution. The list of acknowledged (not created) rights was thus augmented with the freedom of religion, of speech, and of the press;³⁹ the right to assemble peaceably and to petition for redress;⁴⁰ the right to keep and bear arms,⁴¹ not to be forced to quarter soldiers,⁴² and not to be violated by unreasonable searches and seizures,⁴³ all of which are arguably derivative from or corollary to the fundamental rights described in the Declaration of Independence. The Fifth Amendment added the right to a grand jury indictment before being charged with certain classes of crimes, the right against double jeopardy, the right to due process before being deprived of life, liberty, or property, and the right not to be deprived of property without just compensation.⁴⁴ Other amendments acknowledged the right to be given a speedy and public trial,⁴⁵ to confront witnesses, to have a jury trial with the jury as ultimate fact-finder,⁴⁶ and not to be subjected to excessive bail, excessive fines, or cruel and unusual punishment.⁴⁷ All of these rights are limitations on government relative to the people. Finally, the Ninth and Tenth Amendments explicitly state that any rights and powers not specifically delegated from the people to the federal government are retained by the people or by the individual states, as the case may be.⁴⁸ Again, these rights were merely documented in the Constitution, not created by it.

Our government is thus one of limited powers, shackled by the Constitution with many restrictions. These include limited terms of office, public officials standing for periodic elections, and the well-known system of checks and balances intended to keep one branch of government or one

38. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

39. U.S. CONST. amend. I.

40. *Id.*

41. *Id.* amend. II.

42. *Id.* amend. III.

43. *Id.* amend. IV.

44. CONST. amend. V.

45. *Id.* amend. VI.

46. *Id.*

47. *Id.* amend. VIII.

48. *See Id.* amend. IX, X.

individual or group from becoming too powerful by overstepping their specifically delegated authority. Certain rights held to have been granted originally by natural law to the people were delegated from the people to the government they created. The Declaration of Independence and the Constitution recognize or acknowledge these rights as preexisting the new government *and* acknowledge the government's subservience, both to natural law and to the people who hold the rights granted by natural law. The citizens, who are only the "subjects" of their government in the specific areas delegated, remain sovereign in all other respects. The government is to serve the people, not vice-versa, and significantly, the government is accountable to its citizens, its creators, and to no one else.

However, in addition to the restrictions imposed on government vis-à-vis the citizens, certain restrictions on the *citizens'* rights under natural law are also implicitly acknowledged. While the above rights are "inalienably granted," an individual citizen can, under the terms of the Fifth Amendment, be "deprived" of those same rights under certain conditions and after "due process of law."⁴⁹ The inalienable nature of the grant of rights under natural law prevents the government from denying their existence and serves as a starting point in the relationship between our citizens and our government. Still, each citizen is required to comply with the inherent *obligations* that inescapably accompany these rights.

Thus, after certain infractions of law, and depending on the seriousness thereof, an individual's rights can be forfeited. A civil fine is a forfeiture of the right to certain property; incarceration is a forfeiture of the right to liberty; and, in extreme cases, the death penalty is a forfeiture of the right to live, all on a scale measuring the seriousness of an individual's harm to other people, the degree to which a convicted person constitutes a threat to society. The people are therefore just as bound by natural law as is the government the people created. In a natural law system, neither the government nor the people hold ultimate authority. Both defer to natural law, a plane that remains beyond the reach of either the people or the government.

THE "RIGHTS-BASED APPROACH" AS LEGAL POSITIVISM

It is precisely here, on the question of where ultimate authority resides, that natural law and legal positivism have their fundamental disagreement. Where natural law incorporates morality as a guide to codified law, subjecting the government to the sovereign control of the people who are also subject to the design of natural law, positivism insists upon the strict and complete separation of law and morality. The effect is to make government the entity that simultaneously creates rights, grants rights to the people, and then adjudicates

49. U.S. CONST. amend. V.

how the rights are to be interpreted and enforced. Government under a positivistic system, in the persons of those in charge of government, assumes the place of ultimate authority, without any external guidance.

The CRC is one of several recent international conventions emanating from the United Nations system, all of which were created in the model of legal positivism. For the United States, ratification of any of these conventions means accepting an instrument in conflict with our foundation by subjecting our citizens and their natural law rights to authority *not* founded in natural law. While other treaties ratified by the U.S. Senate represent positive law on matters traditionally handled in the arena of international law – codified law establishing our relations with other nation states – these more recent conventions purport to govern subject matter that concerns the domestic sphere. To fully understand the significance of these conventions relative to our natural law system, we must first consider their origins and subsequent development.

After World War II, the countries of the world determined to avoid any future general conflagration as they had just experienced. There was virtual unanimity that the primary perpetrators of the Nazi attempts to exterminate Jews and others considered undesirable by the Nazi social engineers should be prosecuted and held accountable for the atrocities that had been committed against so many innocent people. Wehrmacht and SS officers and even conscripted soldiers were tried as “war criminals” for the abuses of the concentration camps, gas chambers, and other diabolical means that had been employed to accomplish Hitler’s ends.

The prosecutors had little in the way of conventional “law” to use in these cases. The defendants usually argued that they were just following orders or the law of the Nazi government. The prosecutorial vehicle of choice became the “violation of human rights.” Any normal human being, it was urged, should know that what was done to these people was wrong, regardless of any law or orders they were supposedly obligated to follow. The American idea of “fundamental rights” helped to inform this movement, since this class of rights was deemed to be superior to national government, a trump to the alleged authority of the former German government, an inherent recognition of *malum in se* in international law. In other words, the “human rights” that were relied upon in these proceedings originated in natural law.

Simultaneously with these war crimes prosecutions, other steps were being taken to prevent a possible recurrence of the horrors of the recent war. In 1945 the United Nations Charter outlawed aggressive war between states.⁵⁰ Nineteen forty-eight saw the adoption of the Genocide Convention protecting

50. U.N. CHARTER art. 2, para. 3.

religious, racial, and ethnic groups against attempts at extermination.⁵¹ The Universal Declaration of Human Rights was also developed, guaranteeing government non-interference and non-discrimination in matters of race, religion (conscience), and ethnicity, for example, and declaring family as the fundamental group unit of society.⁵² The United States endorsed and ratified these early international treaties, which were in harmony with our Constitution and legal structure.

Idealists soon realized that the concept of human rights, with its potential to supercede national authority, could be used not only to end atrocities, but also to create “good.” In the positivist pattern, efforts began that were meant to influence national laws by embodying a constructed view of “good” in international documents, calling the policies thus formulated “human rights.” In particular, the United Nations, a gathering of minds already sympathetic to working toward peace and global understanding, responded to such thinking. Conventions were drafted on several key topics of concern, such as the CRC,⁵³ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁵⁴ the International Covenant on Civil and Political Rights,⁵⁵ and the International Covenant on Economic, Social and Cultural Rights.⁵⁶ Those at the UN who espouse this system of actively changing the domestic law of nations through the vehicle of positivistic international law frequently refer to these efforts as advancing “the rights-based approach” to law.

As it has since developed, this human rights movement has become a political force of its own. Michael Ignatieff refers to it as “the juridical rights revolution,” characterizing it as a revolution against the former condition of international law where states were considered sovereign, inviolable, and able to order even objectionable internal affairs in whatever way they considered appropriate. He notes that this revolution comes complete with “juridical, advocacy, and enforcement” components.⁵⁷ Through the combination of international law and human rights, the advocates of the rights-based approach hope to advance their ideas peacefully, quietly, even without the notice of most

51. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* December 9, 1948, 78 U.N.T.S. 277.

52. Universal Declaration of Human Rights, G.A. Res. 217(A) III (Dec. 10, 1948).

53. CRC, *supra* note 1.

54. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* December 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

55. International Covenant on Civil and Political Rights, *adopted* December 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

56. International Covenant on Economic, Social, and Cultural Rights, *adopted* December 16, 1966, 993 U.N.T.S. 4 (entered into force Mar. 23, 1976).

57. See MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 17 (2001).

people, but on an unprecedented scale. A truly burgeoning human rights literature thrusts itself on the world as the solution to most human ills.⁵⁸

As noted earlier, however, the CRC and these other UN conventions are based on a philosophical foundation of legal positivism, similar to most governments in the world, but unlike the natural law foundations of our own government. To many, this positivist approach seems practical, given the venue. Most proponents of the rights-based approach believe, like Ignatieff, that discussions of the foundational sources of human rights are neither useful nor necessary.⁵⁹ The real benefit of positive law, they suggest, is that potentially divisive foundational arguments can be avoided, as long as agreement on content can be achieved. Reaching agreement on content, they believe, is a good approach to world peace because it preserves the world's diversity and provides for moral pluralism. One of the examples often cited is that every country in the world except two, the United States and Somalia, have ratified the CRC. This apparent agreement is often cited as demonstrating that agreement on content can be achieved, even among some amazingly diverse cultures, but there are several flaws with this assertion.

First, the seemingly near-universal acceptance of the CRC is uniform only in appearance. Many countries ratified the CRC with expressed, documented reservations.⁶⁰ The ratifying Muslim countries, for instance, have uniformly expressed the reservation that in the event of conflict between the CRC and the *Sharia* (the general statement of Islamic law), the *Sharia* would take precedence.⁶¹ In other words, the appearance of agreement on content is only superficial, and the disagreement centers on the question of ultimate authority and the foundational sources of the human rights the convention purports to create.⁶²

58. Many books have been written advocating the use of human rights as a vehicle to accomplish world peace. See e.g. GRENVILLE CLARK & LEWIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (1966).

59. IGNATIEFF, *supra* note 57, at 54-55.

60. See United Nations, *Multilateral Treaties Deposited with the Secretary-General: Status as of 31 December 2000*, UN Doc. ST/LEG/SER.E/19 (2001) at 276-86.

61. For example, Iran's first reservation to the CRC states, "The Islamic Republic of Iran is making reservation to the articles and provisions which may be contrary to the Islamic *Shariah*, and preserves the right to make such particular declaration, upon its ratification." *Id.* at 280. When pressed on this point by the UN Committee on the Rights of the Child in January, 2002, the representative of Qatar explained that in the view of his country the CRC was entirely compatible with the *Sharia*. He continued, however, to state that if the CRC were ever to be interpreted in a manner inconsistent with the *Sharia*, the latter would prevail – a disturbing interpretation to those who view the CRC as part of a new, revisionist view of the world.

62. Committee members often emphasize to the country reporters that "the Convention is about change." (Direct quotation from several members of the Committee on the Rights of the

Next, laying aside foundational discussions in favor of positivistic law based in moral pluralism is supposedly evidence of value-neutrality, but no such thing as value-neutrality truly exists. Values are inevitable in government and in human interaction, even if they are hidden. To claim there is no dominant value, for example, is to say that all values are equal, which in turn elevates “tolerance” to the position of a de facto ultimate guiding principle, or value. In other words, one value – tolerance – is inherently *not* equal, but is placed above all other values.

However, this misguided use of the word tolerance can itself lead to abusive *intolerance*. If tolerance becomes the ultimate moral principle guiding law, there remains only a short step to say that other values don’t matter and therefore we should – no, we *must* – stop acting as if they do. Such a view endangers free speech and freedom of conscience to any who might want to teach a different highest value, such as altruism. When subject to a guiding standard of tolerance, altruism, individualism, and hedonism come to be regarded, as a matter of law, as of equal value in society. Certain notions of “sin” and “repentance,” for instance, could become illegal to advocate against or for, respectively, because it might offend the “human rights” of those whose behavior was once considered sinful.⁶³ Moreover, once the line of legality has been lowered and the “human rights” label has been attached to everything above it, changing the law to move the line of publicly acceptable morality back up a notch or two would become extremely difficult, because doing so would deny a (positivistic) “human right.” Restoring freedom of speech and religion on these issues would be virtually impossible.⁶⁴

Child to national reporters in January 2002 in Geneva, Switzerland. Notes on file with the author.)

63. In this regard, consider two recent cases, one in England as part of the European Union and the other in Canada, where human rights laws of the type being discussed have been adopted. Public expressions about homosexuality being sinful were interpreted as violations of homosexuals’ human rights and were prosecuted in human rights courts. *See R v. Hammond* (2002) (unreported case from the Wimborne Magistrates Court, Dorset, County of Dorset) (on appeal to the Divisional Court No. CO/3347/2002). A minister carried a placard with his message and was charged with human rights violations. Although he had been pelted with rocks and debris, no one was charged with assault and battery. His wounds are thought to have contributed to his death in July 2002. (Information obtained through personal correspondence with Hammond’s counsel in England, on file with the author.) *See also Owens v. Saskatchewan*, [2002] SKQB 506 available at <http://canlii.org/sk/cas/skqb/2002/2002skqb506.html> (an advertisement showing two male figures holding hands inside the universal symbol of a red circle and diagonal bar and four biblical references was held to have violated gays’ rights against being subjected to hatred or ridicule under section 14(1) of the Saskatchewan Human Rights Code. On appeal, the Saskatchewan Human Rights Commission ruled that section 14 of the SHRC “is a reasonable restriction on the appellant’s right to freedom of expression and religion.”).

64. Another recent example of the potential for this type of problem is the proposed resolution on human rights and sexual orientation advanced by Brazil, Canada, and several

This illustration demonstrates another flaw in thinking that the discussion of the foundational source of rights is not important, the glossing over of distinctions between various classes of rights. A vital aspect of the U.S. system is that, whereas fundamental rights preceded government and cannot be infringed upon by government, there is nonetheless a broad range of subject matter within which the Congress and the states are free to legislate. Thus, beyond the “inalienably granted rights” under natural law, a second class of rights results from government enactments, such as the “rights” obtained by military veterans to enjoy certain tuition benefits, the right to obtain a homestead patent to federal land, the right of qualified citizens to receive Medicare and Social Security benefits, and so forth. Ownership of land, being conditioned on reasonable taxation, falls into this category.

Once an entity or an individual satisfies the requisite conditions established under law to obtain these rights, known as property interests or “entitlements,” the rights so acquired must be respected by the government and by third parties. The government is free, however, to modify the conditions for obtaining such rights or to repeal a statutory scheme creating such rights to prevent new rights from becoming established under a given law. The homestead laws, for example, have been repealed, although the private chains of title emanating from previously issued homestead patents remain valid. The government can also grant certain conditional regulatory rights, better described as “privileges,” such as the right to a driver’s license, a permit to harvest timber, or to graze livestock on state or federal lands. These “rights” are always conditioned on the holder continuing to meet established standards. For instance, the right to drive a motor vehicle on the public roads is revocable, always conditioned on maintaining a satisfactory driving record.

In positive law, however, because no foundation exists other than the law itself, no right is sacrosanct. All “rights,” as creatures of legislative enactment, are essentially equal in character, equal in susceptibility to repeal or modification. In consequence, the rights language of these conventions blurs the distinctions, so vital under the Constitution, between fundamental rights under natural law, procedural rights, entitlement and property rights, and privileges. Similarly, if rights language expands to include health care, equal education, or adequate housing, or equal income, for example, as government’s obligation to guarantee outcomes, the “rights-based approach” becomes

western European countries before the UN Commission on Human Rights in Geneva, proposing to protect sexual orientation against discrimination. The proposal was tabled until the following session. *Promotion and Protection of Human Rights: Human Rights and Sexual Orientation*, U.N. Commission on Human Rights, 59th Sess., Agenda Item 17, at 2, U.N. Doc. E/CN.4/2003/L.92 (2003).

indistinguishable from radical socialism. The Constitution seeks to guarantee equal protection and equal opportunity, not equal outcome.⁶⁵

Because the new UN conventions seek to extend international law into the domestic sphere through the vehicle of human rights, they simultaneously weaken traditional notions of national sovereignty and dilute and impoverish the original value and role of fundamental rights. Paradoxically, the rights-based approach dilutes fundamental rights under natural law, making them the creation of positivistic law and adding many political concepts potentially or actually at odds with natural law, while simultaneously seeking to preserve their trumping power over subsequent contrary legislation.

If every legal right or privilege, perhaps even the right to a driver's license (and I have seen this claim asserted⁶⁶), is equivalent to a fundamental right, nothing is really a fundamental right any longer. Either that, or any legal subject matter covered by human rights language will no longer be susceptible of discretionary legislative action, for how can a mere Congress or legislature override the "human right" to a driver's license, or the "human rights" of a child, or the "human right" to government-guaranteed health care, housing, or education, should a later legislature wish to amend the system or adopt a different approach?

Finally, favoring the positivist approach in lieu of a foundation in natural law ignores the danger of placing ultimate authority in the government, by definition a small and elite group of fallible human beings. Whether elected officials, descendants of a specific lineage, those empowered by money, those with military authority, or a group of academics and appointed officials, any governing minority elite group will, in the name of some value or "good" such as tolerance, also tend to impose a cultural/legal ceiling on the moral spectrum in addition to its moral/legal floor. This ceiling will adjust itself to the personal moral code of the elite group or leader, often in the range of individualism, although there is nothing to prevent it from being hedonistic.

Even though the governing elite could be benign, even well-intentioned, their lack of foundation in natural law is problematic. The sincerity of such convictions does not change the effect of these agendas on the lives of people. This danger is compounded by positivism's belief in a strict separation between law and morality, which would tend to make natural law a target for

65. See generally *Washington v. Davis*, 426 U.S. 229, 239 (1976).

66. Anonymous E-mail advertisement (January 28, 2003) (on file with author) (stating in part, "Need a driver's license? Too many points or trouble? Want a license that can never be suspended or revoked? . . . The United Nations gave you the privilege to drive freely throughout the world! (Convention on International Road Traffic 1949 and World Court Decision, The Hague, Netherlands, January 21, 1958). Take advantage of your rights. Order a valid International Driver's License that can never be suspended or revoked. Confidentiality assured. No one is turned down.").

elimination, rather than a natural good. But no redefinition of “good” can change the fact that a moral spectrum does exist, together with its natural effects, and that our children and their children will ultimately suffer under any law at odds with natural moral law. As soon as a principle becomes more important than a person, there is danger to the citizens. We should think twice about the potential for unguided, positivist-based government to take law in a direction inimical to natural law.

If this eventuality seems remote in the present context, history bears a sobering message. While the original UN conventions, such as the UDHR and genocide conventions, were drafted by people who envisioned a moral response to the evil of Hitler’s regime, it should give us pause that positivistic law is what Hitler so easily and effectively wrested to accomplish his designs. In the attempt to impose his version of “good” on the world, Hitler subverted law that lacked moral guideposts. Such concerns might be dismissed if Hitler were an aberration. But even a brief recollection of recent history discloses major instances where positive law, unhinged from notions of the morality of natural law, was used to enforce a government-defined “good” on citizens of a given country or on neighboring countries, with disastrous consequences.

Ralph Hancock⁶⁷ presents an example of the kinds of problems that can arise from a false or incomplete grasp of the natural law foundations of human rights. His article thoughtfully discusses the premise that the French Terror of 1793 and 1794, that period captured by the image of the falling guillotine blade, was the result of the inadequate incorporation of natural law into the French Revolution. France’s *Declaration of the Rights of Man and Citizen* instead employed positivistic law to enforce a newly invented version of good, the one envisioned by Robespierre and the Jacobins.

Despite the common claim of both the American and French revolutions that they were based in the natural rights of man, their differing respective understandings and implementations thereof affected the two countries in distinctively different ways. Hancock describes the French Declaration as having been founded on a view of human nature “stripped of all inherently social and transcendent dimensions,” and notes that “[t]heir theories founded respect for no humanity except that which they proposed to create.”⁶⁸ Any of “the people” who disagreed with the state’s ideal could be (and were) dealt with as enemies of the state, and were guillotined, shot, and drowned en masse, be they men, women, or even children.⁶⁹ The premise of the American

67. See generally Ralph Hancock, *Robespierre and the Rights of Man: The Terror of 1793 Sprang from the Theories of 1789*, POLICY REVIEW, Summer 1989, at 38.

68. *Id.* at 43.

69. *Id.* at 38.

Revolution, by contrast, with its Declaration of Independence and eventual Bill of Rights, was

[C]onsiderably richer, more subtle, and more informed by experience than that which guided the French. It gave place, notably, to largely traditional conceptions of honor, both political and “sacred.” An appeal to nature was held to be compatible with “a decent respect to the opinions of mankind” – to the moral standards of a humanity that already existed and did not have to be created.⁷⁰

The American Revolution, in other words, was founded on respect for the people as they then existed, both base and noble, acknowledging faults, but placing faith in the moral system in which the people believed. Its founding documents gave place for individual moral strivings without presuming to create and impose a new definition of goodness toward which the citizens should be aspiring. Its government was designed to protect its citizens from outside threats to peace and security, from criminals among the citizenry, and significantly, from itself and the accumulation of government power. Beyond these basic freedoms, however, the founding documents did not guarantee outcome in any individual case; they sought to provide equal opportunity, not equal distribution of wealth; access to education, not equality of result. They counted on a major degree of self-reliance among the people and on parents to do their duty by their children.

On the moral spectrum, the primary function of the new government was to establish a floor or base level of public morality, codified in criminal and other laws, then to step aside and allow people the fundamental right to “pursue happiness,” as long as their pursuits did not harm others. It protected, in today’s terms, the “negative freedoms:” the freedom of the people from government interference, such as freedom from oppression, freedom from governmental taking of property without just compensation, freedom of religion (conscience), of speech and of assembly.

The American experiment, which married natural law and private conscience with the representative democracy form of government, is now more than 225 years old and still largely successful. The French, however, experienced 15 regime changes in the ensuing 76 years after the storming of the Bastille. From Robespierre and the Jacobins, to the Thermadoreans and Napoleon Bonaparte, a modicum of stability was achieved only after the Third French Republic was founded in 1870.

Hancock’s point, to attempt a summary, is that when government takes it upon itself to define human good and then change the people, requiring them by force of law to conform to an imposed ideal rather than allowing them to follow conscience and change themselves, it oversteps its bounds and becomes

70. *Id.* at 43.

a threat both to its own people and to other countries. Witness further the Germany of Hitler, the Russia of Lenin and Stalin, the Cambodia of Pol Pot, the Uganda of Idi Amin, the Chile of Augusto Pinochet, the Serbia of Slobodan Milosevic and, as more recently observed, the Iraq of Saddam Hussein. Government as combined moral theoretician, instructor and enforcer can become fearsome indeed, hence the importance of understanding the foundations of human rights in natural law.⁷¹ Hancock's subtitle captures the problem succinctly: "The Terror of 1793 Sprang from the Theories of 1789."⁷² The question of the source of human rights, far from being inconsequential, would appear singularly critical.

INTERNATIONAL LAW AS AN INFLUENCE ON DOMESTIC LAW

Equipped with a strong Constitution based solidly in natural law, some might think the U.S. system of government is safe from the positivist influences of a simple international treaty or convention. There may appear to be no immediate harm in ratifying the CRC, yet the threat is real. First, we are already fighting a serious battle with positivism within our own legal system. The Hart/Fuller debate continues, with Hart's position gaining ground. One reason for this trend among lawyers is perhaps provided by Professor Mary Ann Glendon:

[A]merican legal education for much of the twentieth century has placed heavy stress on the distinction between law and morality. In a laudable effort to teach students to keep their personal views or prejudices from interfering with their duties as officers of the law, law schools often unintentionally promoted the notions that morality was essentially arbitrary or unknowable; and that law and morality were not only distinguishable, but entirely separate.⁷³

Thus, even though many law students never take the esoteric subject of jurisprudence, where they might encounter the Hart/Fuller debate, the positivistic view is often advanced as a matter of professionalism. Legal education may have in this way facilitated a shift toward positivism in the American legal community. Many, of course, still sense the connection to natural law, and, like Glendon, speak of criminal law as a "repository of moral norms."⁷⁴

Justice White observed in *Bowers v. Hardwick* that "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially

71. One might suggest that the concept of "separation of church and state" can be seen as a two-way street, keeping religions out of direct government, but also preventing government from playing God.

72. Hancock, *supra* note 66.

73. MARY ANN GLENDON, RIGHTS TALK 85 (1991).

74. *Id.*

moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”⁷⁵ He supported this point by observing that, “[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language *or design* of the Constitution.”⁷⁶ I understand him to be alluding generally to what is known as “judicial activism,” exhibited in cases such as *Roe v. Wade*,⁷⁷ but I submit that such activism is least justifiable when it appears to deviate from the Constitutional design in natural law. If Congressional action can be held unconstitutional for violating the parameters of the Constitution, then court action should most certainly be similarly circumscribed.

Aside from our purely domestic struggles with positivistic law, there is a danger that the positivism of current international law might work its way into our legal system in a similar way, that is, through our court system. Even if the United States Senate does not ratify the CRC or any of the other conventions, the supporters of the rights-based approach are attempting to employ the tool of “customary international law” in the courts to accomplish the same ends, that is, the idea that if a practice or policy is accepted to a sufficient degree internationally, then it is binding even on non-ratifying countries.⁷⁸ A federal district court in New York, for example, recently purported to enforce the CRC in an immigration case, despite express contrary federal law and despite the fact that the United States has not ratified the CRC.⁷⁹

75. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). While the actual holding in *Bowers* has now been overturned, Justice White’s philosophical point remains true. We might also expect his prediction regarding court dockets to be accurate.

76. *Id.* at 194 (emphasis added).

77. Indeed, one of the most troubling readings of *Roe v. Wade* is that, by means of legal positivism, it removed abortion as a legitimate subject of moral debate in the state legislatures and created a new fundamental right out of whole cloth, certainly not in keeping with natural law and its moral ties between rights and obligations; Justice Blackmun’s exercises of the right of privacy notwithstanding. The same holds for *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). By positivistic fiat, and under the guise of the “penumbral” right of privacy, the Supreme Court has elevated private, consensual sodomy from the realm of being subject to state regulation to the stature of a fundamental right.

78. See Richard G. Wilkins, *The Impact of UN Conference Declarations on International and Domestic Law*, 2001 BYU WORLD FAM. POL’Y F. 1, 5 (2001) (historically, the notion of customary international law dealt only with long-standing practices of nation states relative to each other. Recently, however, attempts are being made to broaden this idea to include internal national policies relating to human rights). Of even greater concern, Justice Ginsberg is reported as having openly supported the idea that the Court should look outside our borders for guidance in interpreting the Constitution. “Ginsburg: Rulings in other countries are relevant here.” *Concord (N.H.) Monitor*, August 4, 2003.

79. See *Beharry v. Reno*, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002).

Full implementation of the rights-based approach, whether through ratification or through judicial activism, would be expected to soon replace conventional tort law with “human rights violations,” enforceable not only against the government, but also against individuals who “violate one’s rights.” This is the “third-party effect” of many provisions of these treaties and the interpretations thereof being advanced within ECOSOC’s conferences. I can only see such efforts to override our democratic processes via international law as a subtle attack on our democracy itself.

While this assertion may sound like an overreaction, in fact the later generation of conventions, like CEDAW and the CRC, are already demonstrating how the positivist law roots of these conventions can become distorted under the influence of special interest groups. Their subsequent interpretative documents contain increasing amounts of positivistic language recognizable as the “rights talk” of special interest groups who were unable to accomplish their political ends concerning sexual expression, women’s rights, and sexual preference through the democratic process in the United States. These groups appear to be seeking to redirect the law to advance an agenda, i.e. to impose their view of “good” on others through treaties and conventions as well as customary international law.⁸⁰ If successful, these efforts will in

80. See CRC, *supra* note 1, art. 18, 1577 U.N.T.S. at 60 (article 18 states in relevant part that “[t]he best interests of the child will be [the parents’] basic concern.”); see also UNICEF, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 227-28 (1998) (responding to the U.S. objection to the use of international law to create obligations on parents, rather than States, by explaining this assertion as having “a direct bearing on the actions of States, because it should underpin all legislation on parents’ rights” to eliminate the presumption of parental ‘ownership’ of children” and the implicit assumption “that parental rights over children could be exercised for the benefit of the parents alone”). Aside from the red herring character of this assumption, this statement makes clear that any country ratifying the CRC is expected to modify its domestic laws to conform to these positivistic, international standards; see also UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, MANUAL OF HUMAN RIGHTS REPORTING 427 (1997) (stating that “[s]tates have to adopt measures to ensure and respect [the right of child participation]. On the one hand, they are naturally required to reflect it in the national legislation, ensuring that there are effective opportunities for children to have a say, to be heard, and thus influence decisions. Law can in fact play an important role both in safeguarding this fundamental right, and in influencing attitudes of the population at large”); see also United Nations Division for the Advancement of Women, *Convention on the Elimination of All Forms of Discrimination Against Women*, at www.un.org/womenwatch/daw/cedaw/ (last visited Feb. 25, 2003) (describing CEDAW as “defin[ing] what constitutes discrimination against women and set[ting] up an agenda for national action to end such discrimination. It goes on to set out the effect of ratifying CEDAW: “[b]y accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms, including: - to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; - to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and – to ensure elimination of all acts of discrimination against women by

effect remove from the field of democratic consideration and lawmaking several subjects that are often debated but have not yet been adopted in U.S. law, such as mandated full “equal rights” for women, an effort that failed as a proposed Constitutional amendment but is now being advanced as a principle of international law.

CONCLUSION

The United States is being asked to ratify a Convention that, ostensibly, will make life better for our children. But it comes with no deference to natural law, the very foundation of our Constitution and the true best interest of our children. In sum, neither the President, the Senate, nor the Supreme Court has the delegated authority from the citizens of the United States to, in effect, transfer their (the citizens’) ultimate sovereignty over such issues to any other entity inside or outside the United States. Neither do they have the delegated authority, singly or collectively, to alter the underlying principles of natural law relied upon in the Constitution by ratifying an international convention based in a fundamentally different theory of law.

Any effort to bind the United States and its citizens to such a convention or treaty would elevate non-elected, policy-recommending committees of the United Nations to a form of directing and governing status over domestic concerns that belongs in the hands of our citizens. It would also subject us to legal oversight by authorities not of our own choosing and not in any meaningful way accountable to us. It would be a step toward subjecting the American people to the very form of government at the global level from which our founding fathers worked so hard to protect us at the national level. This action could eventually lead to a subversion of the Constitution and a denial of its natural law foundations.

Ratification of the CRC would not be merely an act of joining into a specific treaty; it would also constitute a joining into an international movement, a movement inherently at odds with the foundational premises of our Constitution. No government, much less our own, should be about the business of imposing the ideals of a minority elite on the people. Our government, at least, should be protecting the true fundamental rights of the people as granted inalienably by natural law, first by recognizing and honoring those rights itself as the limited government of those people and second by

persons, organizations or enterprises.”). The point here is that moral standards are being defined positivistically in a UN Convention, and doing so by avoiding the democratic process. Ratification of any of these conventions means abandoning the legal structure already developed in a country and adopting the rights-based approach in its place, even to the extent of establishing potential causes of action against third parties where none previously existed.

regulating individuals who harm others. All other government functions are secondary to these.

There is yet another important reason why the United States should not ratify the CRC: We should not do so precisely because the rest of the world has done so. In 1776 and 1788, the idea of forming a government based on inalienable rights naturally vested in a people who, in turn, assigned limited rights to their new government, was a novel concept in the world. Since then, it has seen remarkable success. Yet its premise in and full reliance on natural law remains almost alone as a theoretical system of government. For all of our flaws, being the one influential country in the world with a people and a government anchored to natural law may enable us to serve as a sort of world conscience, an anchor to the natural laws of justice and morality to assist the rudderless ships of world positivism from drifting too far toward oblivion. Perhaps our foundation will be enough to enable other countries to avoid another Robespierre or a like-minded committee or group of judges such as the Jacobins, another Hitler, another Stalin or Lenin, or other similar idealists. These people all “meant well” according to their own personal definitions of “good,” but in attempting to impose their version of good on the people, they ended up brutalizing those who disagreed or otherwise did not fit within their vision of ideal order. The United States has been remarkably free of this type of leader for more than 200 years. Children should not be used to test a global experiment based in a rights culture that seems to be losing track of our natural, personal duties and obligations to others, when the system we have in place has worked so well and the proposed pattern has failed so often.

Do we really want to ratify, at the federal level, an international convention that would effectively remove important aspects of appropriate child nurturance (e.g. choice of values) from the purview of parents, the state legislatures, and the electorate? Do we really want to train up the next generation to be self-focused on their “positive rights” in lieu of their “negative freedoms” from government intrusions coupled with their private, personal affirmative moral obligations to each other? More generally, do we really want to dilute the idea of fundamental rights by conflating them with all other legal rights and entitlements, in the process rendering all such rights substantively immune from amendment? Do we really want to abandon our roots in natural law? For the United States, at least, these would be tragic steps backward.

Our children already face a world in which political correctness and similar supposedly value-neutral (oxymoronic!) ideas permeate their experience. In *The Abolition of Man*, C. S. Lewis lamented that such assumptions in the education of children resulted in “[a]nother little portion of the human heritage

[being] quietly taken from them before they were old enough to understand.”⁸¹ The “rights-based approach,” including the CRC, constitutes a major effort to consolidate such ideas not only in education, but in codified law, before any of us are allowed to understand, let alone ponder our options. Our children, the supposed beneficiaries of the CRC, would be the ultimate casualties in this quiet ideological battle, the CRC a Trojan Horse. For the sake of the children, the United States should *not* ratify the Convention on the Rights of the Child.

81. LEWIS, *supra* note 18, at 11.