Distribution Agreement

In presenting this thesis as a partial fulfillment of the requirements for a degree from Emory University, I hereby grant to Emory University and its agents the non-exclusive license to archive, make accessible, and display my thesis in whole or in part in all forms of media, now or hereafter known, including display on the world wide web. I understand that I may select some access restrictions as part of the online submission of this thesis. I retain all ownership rights to the copyright of the thesis. I also retain the right to use in future works (such as articles or books) all or part of this thesis.

Signature:

_____ _____

Leah Christine Terrell Date

How Modern Morality has Lost its Way:
Discerning the Neglect of Utopia in Meta-Ethics and Applied Ethics

by

Leah Christine Terrell

Adviser-Cynthia Willett

Department of Philosophy

_____
Cynthia Willett
Adviser

_____
Andrew J. Mitchell
Committee Member

_____
Kevin Karnes
Committee Member

_____
Date

How Modern Morality has Lost its Way:
Discerning the Neglect of Utopia in Meta-Ethics and Applied Ethics

by

Leah Christine Terrell

Adviser- Cynthia Willett, PhD

An abstract of
A thesis submitted to the Faculty of the
James T. Laney School of Graduate Studies of Emory University
in partial fulfillment of the requirements of the degree of
Master of Arts
in Philosophy
2010

Abstract

How Modern Morality has Lost its Way:
Discerning the Neglect of Utopia in Meta-Ethics and Applied Ethics
By Leah Christine Terrell

The field of ethics has undergone several drastic changes in the past century. The field was long dominated by the work of meta-ethicists whose goal was to examine a broad range of questions centering around the epistemological presuppositions of moral thought. In the 1960's, however, America confronted the issues of civil rights, war, and the rise of feminism. In the face of such issues, the discipline of philosophy, where such issues would be thought to reside, was somehow lacking in significant opinion. So what can philosophers say when they can't answer the most practical of questions? Upon realizing that the search for wisdom simply could not ignore these issues, there was a shift within the discipline to the world of applied ethics. These ethicists were concerned with examining the particular issues experienced in public and private life and spawned such fields as biomedical ethics, business ethics, feminist ethics, and environmental ethics.

The shift into applied ethics, however, perhaps did not solve all of the problems it indented to. In fact, we will see here that the problems of applied ethics run just as deep as those of meta-ethics and that another Copernican revolution of sorts might be exactly what the world of philosophy truly needs. I will make the effort here to posit the need for another shift in thinking, a shift upward to the philosophical heavens, to utopia. It is here, in the discussion of utopia, that I believe we might be able to discern what the physical arena of ethics truly is: a "fabric of ethics" per se, which is warped and curved by the weight of the theories within it. By starting with the meta-ethicists H.L.A. Hart and Ronald Dworkin, moving to the field of applied ethics through Robert Nozick and John Rawls, examining the problems within applied ethics via Nussbaum and Rawls, we begin to see the "fabric" working within ethics. Finally, we must look for ways to build upon this new foundation, and so examine the fields of moral psychology, aesthetics, and finally ancient Greek morality for a renewed purpose.

How Modern Morality has Lost its Way:
Discerning the Neglect of Utopia in Meta-Ethics and Applied Ethics

by

Leah Christine Terrell

Adviser- Cynthia Willett, Ph.D

A thesis submitted to the Faculty of the
James T. Laney School of Graduate Studies of Emory University
in partial fulfillment of the requirements of the degree of
Master of Arts
in Philosophy
2010

For My Father

CONTENTS

INTRODUCTION

> *A map of the world that does not include Utopia is not worth even glancing at, for it leaves out the one country at which Humanity is always landing.*
>
> –Oscar Wilde

At the turn of the 20th century, Albert Einstein realized that the field of physics was sitting on a theoretical land mine. Through study of the behavior of light, Einstein found that the Newtonian theory of gravity in place was only one small piece of the puzzle. Einstein understood that the entire groundwork of physics was based on a problem, a gigantic misunderstanding of how gravity actually worked. Then, after ten years of research, Einstein found the solution—spacetime (Greene). In a modern-science Copernican revolution, Einstein fundamentally altered the field of physics forever from the original equations of Newton to an entirely new physical arena of a fabric built from four dimensions. With the inclusion of time as a literal dimension, Einstein was able to explain how it is gravity actually works, that celestial bodies are simply following curves in the speacetime fabric. Thus, he diffused the bomb that was sitting beneath Newton for over 200 years, and discovered the true structure in which the world exists.

The field of philosophy has encountered similar problems throughout its history. Namely, the field of ethics has undergone several drastic changes in the past century. The field was long dominated by the work of meta-ethicists whose goal was to examine a broad range of questions centering around the epistemological presuppositions of moral thought (Stanford). In the 1960's, however, America

confronted the issues of civil rights, war, and the rise of feminism. In the face of such issues, the discipline of philosophy, where such issues would be thought to reside, was somehow lacking in significant opinion. So what can philosophers say when they can't answer the most practical of questions? Upon realizing that the search for wisdom simply could not ignore these issues, there was a shift within the discipline to the world of applied ethics. These ethicists were concerned with examining the particular issues experienced in public and private life and spawned such fields as biomedical ethics, business ethics, feminist ethics, and environmental ethics (Standford).

The shift into applied ethics, however, perhaps did not solve all of the problems it indented to. In fact, we will see here that the problems of applied ethics run just as deep as those of meta-ethics and that another Copernican revolution of sorts might be exactly what the world of philosophy truly needs. I will make the effort here to posit the need for another shift in thinking, a shift upward to the philosophical heavens, to utopia. It is here, in the discussion of utopia, that I believe we might be able to discern what the physical arena of ethics truly is: a "fabric of ethics" per se, which is warped and curved by the weight of the theories within it.

In order to posit such a seemingly outlandish notion, I believe the only course to take is that of starting in the past and working our way forward so as to elucidate how we landed where we are currently, and to examine the problems that have been encountered along the way. To begin, we will start in meta-ethics, legal meta-ethics in particular, by examining the question of "what it 'law'". The main focus of

the examination will be how a society determines what is 'law', as described by the philosophers H.L.A. Hart and Ronald Dworkin, and how it is that those laws can be changed, applied, and objectively judged. The distinction between the two philosophers is that, through his analysis of Hart, Dworkin realized that something was drastically missing from Hart's work—morality. Dworkin then builds upon the work of Hart to attempt to successfully define "law" with a solid notion of morality in the background. Dworkin's insertion of morality effectively channels an idea of utopia into the linguistic exercise, and so is our first example of how the notion of utopia can move philosophy forward.

The next step will be into the world of applied ethics. Now the question has changed from "what is 'law', more to "what are rights?" To answer this question, I will turn to the theories of Robert Nozick and John Rawls for two possible solutions. Both Nozick and Rawls are engaging in the similar exercise of building a hypothetical society based on ideals in order to create a measuring stick of sorts to hold up to current society. Here, we will see both philosophers appeal to a notion of utopia in order to construct their hypothetical worlds. While a utopic vision has now been integrated into the conversation, we will still find these theorists falling short of achieving their goals. The largest reason for this failure? Lack of foundation. Thus, we will use the work of Nozick and Rawls to examine how the notion of utopia must be used not only as a vision toward an ideal, but also as the origin, or center of gravity, for morality.

Within the field of applied ethics itself, however, even an extremely similar idea of utopia can still not do the work it needs to do. In the third section of this project, we will examine how there remains a great problem of shifting between the ethically "macro" and the ethically "micro". Building on the analysis we will see of Rawls in the second section, we will add to him the work of Martha Nussbuam, a political philosopher who is deeply concerned with the discovery of utopia. Nussbuam, a critic of Rawls, attempts to discern all of the factions of society that are not included in Rawls's utopia. In doing so, however, there is further breakdown of the field of applied ethics from the inside out. The problem becomes stagnation: since Nussbaum's criticisms bring Rawls's theories to a screeching halt, the issue becomes finding a way for progress to continue in the face of severe disagreement, rather than mere philosophical squabbling. Here, we will see the need for a new scientific analogy—string theory.

Once the confusions of Newton were solved by the work of Einstein, the field of physics continued to progress. Physicists dug deeper and deeper into the workings of the molecular world and ultimately discovered the proton, neutron, and electron. In order to examine and understand this new world, the field of quantum mechanics was born. There was, however, still a very large problem. As theorists today are still attempting to explain and solve, the equations that describe the theory of relativity break down when used to explain the movements of a proton or electron. Similarly, the equations of quantum mechanics simply cannot be used in the realm of celestial bodies. Thus, physics is currently working towards a "theory of

everything". The current front-runner for this almighty theory is that of string theory. While I do not wish to explain the inter-workings of this new field in physics, I do believe the analogy is nearly exact to the field of philosophy. The issues demonstrated by Rawls and Nussbaum are the philosophical equivalents to the issue regarding the theory of relativity and quantum mechanics. Thus, it seems that the next piece of what we are missing, in addition to an understanding of the "fabric of ethics", is a kind of philosophical sting theory that could translate between the theories of the macro and the theories of the micro.

In the fourth section of this project, I will attempt to explore several places where I believe we could find assistance in solving these problems. What I believe we will find is that the overall picture of ethics, and of this project in particular, will look like Figure 1 (seen on pp. 96). This image captures the essence of the "fabric of ethics" as it is being warped by a utopic notion, with the various types of theorists we will be examining placed in various positions on the graph. Their positions are based on their connection to the utopia grounding the center of the "fabric". This final section, I believe, will demonstrate the theorists that sit the closest to the "ethical center of gravity".

First, I will look to the inspiration for this analogy in the first place—to science. In recent years the field of moral psychology has done research into how it is humans function as inherently moral beings. In the work *The Happiness Hypothesis* by Jonathan Haidt, the premise is that human beings not only borrow much of our brains from our relatives in the animal kingdom, but also that we carry

capabilities that are wholly unique. These unique places are where Haidt believes we may even find the "seat of reason" itself. If this is true, I will argue, then understanding the "fabric of ethics" where the ethical center of the brain is operating becomes utterly vital. In addition to science, I explore the possibility of clues being found in its opposite—aesthetics. The philosophy of art has long put forth the idea that art is a means to higher truth. While these theories can vary greatly, I find that two philosophers in particular, Richard Wager and Arthur Schopenhauer, significantly contribute to the conversation at hand. Their theories on the transcendent properties of art, specifically music, are exactly what the field of ethics could benefit from incorporating. If a "fabric of ethics" is a viable notion, and moral utopia is what can warp and stretch it, then understanding of this utopia, though science or transcendence, is precisely what we need.

It is to the wisdom of the original moral ethicist, however, that I believe we ultimately must return. We can attribute the most solutions to problems throughout this project to the ancient knowledge and understanding of Plato and his teacher Socrates. In addition, Plato provides the best articulation of what the philosophical "sun" might be that is warping the "fabric of ethics"—the Forms—and how to begin to connect to such utopic ideals. Plato, therefore, will be playing the largest role throughout each of the following sections, and will ultimately be shown to be the most positively influential theorist in terms of the solutions he is able to provide.

While the breakthrough of Einstein has long been established in the world of physics, the breakthrough of a "fabric of ethics" is perhaps just beginning. Admittedly, such a lofty goal is one that cannot be fully achieved in such a brief project, so I do not wish to present this work as a Copernican revolution in itself. Instead, my ultimate aim is to discern the true nature of the problem at hand, the problem of a lack of utopia and unified utopic vision; for it is only through asking the right questions that we will find the proper solutions.

SECTION 1

THE MODERN DISCUSSION OF LAW: A META-ETHICAL EXERCISE BETWEEN HART AND DWORKIN

> *It is impossible to live the pleasant life without also living sensibly, nobly, and justly*
>
> —Epicurus

Sir Issac Newton, father of the three laws of motion and the theory of gravitation, effectively revolutionized our understanding of the heavens above us. As the fable goes, the mathematical revolution that resulted in equations we still use today began with a mere apple landing on Newton's head. This seemingly mundane occurrence inspired Newton to exclaim: "Gentlemen—A stirring freshness in the air and ruddy streaks upon the horizon of the moral world betoken the grateful dawning of a new era" (Newton 3). In his work to explain the functioning of the world around us, Newton looks to the macro—to the celestial bodies—to understand our earthly forces. Similarly, Plato, in a search to explain the workings of the human soul in *The Republic*, turns initially to the macro—the state. He uses the example of his hypothetical just city, where he then makes the leap from macro to micro, from just city to just soul, where the "spirit" rules the "appetites", which are, in turn, ruled by reason. He then declares, "we have found the just man and city and what justice really is in them" (Republic 444a). While the exercises of both Plato and Newton took place long before the current project, their methods are still highly applicable. In the field of meta-ethics, legal theorists attempt to do just that—look to the macro of societal legal systems to discern the meaning of the term "law".

Meta-ethicists in the genre of legal theory, or philosophy of law, are attempting to break down the question of "what is 'law'?" In addressing this question, legal meta-ethicists break down societies and legal systems and evaluate them step-by-step, much like their predecessor, Plato. By attempting to answer such an abstract question, philosophers, such as H.L.A. Hart and Ronald Dworkin, are searching for what is at the root of human society, and, thus, at the root of humanity itself. It is in their quest that notions of utopia are not only echoed, but are subsequently (albeit perhaps unconsciously) proven to be vital.

Because the question of how to define and determine "law" is an inherently abstract one, both Hart and Dworkin strive to find the concrete amidst the intangible. While the failures and possible successes with each of their theories will be played out throughout this section, the main issue that will become clear is the need for a proper foundation. As they each search for a modern foundation, they are both left without solid ground to stand upon. A vision of utopia, we will come to see, could serve as the first brick to begin building a cohesive base.

To begin to answer the question of "what is law", a legal theorist must first search for the central case of 'law' itself, or law in its purest, most uncomplicated, and most unarguable form. Theorists are attempting to unpack, if you will, such a central case. Once such an example has been identified and examined, branching off it can lead to further discoveries. The philosopher H.L.A. Hart begins his journey by examining the central case posed by John Austin in his work *The Province of Jurisprudence Determined,* in which Austin concludes that the central case of 'law' is

nothing more than orders backed by threats (Hart 20). Hart wants to directly address this notion, stating in his first chapter of *The Concept of Law*, "Here then are the three recurrent issues: How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to, moral obligation? What are rules and to what extent is law an affair of rules?" (Hart 13). Hart's answers to these three questions are not only the core of the book, but also the core of his theory of the central case of 'law'. His process is systematic, building upon—but going deeper than—the idea of orders backed by threats, coming to his own understanding of the term as the product of an entire legal system at work, which will be fully examined and explained in later discussions. He describes his own exercise as follows:

> For [this book's] purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena (Hart 17).

Thus, even in the end of his first section, Hart attempts to change the conversation from a simple understanding of 'law' as equaling orders backed by threats to a more complicated picture involving a better understanding of the actual workings of legal systems and their relation to social systems.

Hart's first analytical step in elucidating the central case of 'law' for his own objectives is to break down the different types of rules that are being examined. In Austin's exercise, central rules are those that, as Hart notes, "impose duties" (Hart 33). Such rules dictate the proceedings of criminal courts and the ideas behind criminal law. They are non-consensual laws that are essentially the orders backed by threats for which Austin is looking. Hart, however, wants the central discussion to revolve instead around what he refers to as "power-conferring rules," which are examples of consensual laws, such as contracts and wills (Hart 33). The main argument behind this switch is that Hart believes that beginning with the central case of criminal law is essentially beginning with the exception rather than the rule. Austin's primary focus reamins on the "bad" person rather than the bulk of the population, who simply need guidance rather than punishment. Hart, therefore, wants to shift the conversation from discussing mistakes in behavior to discussing the regulation of ordinary interactive behavior. He argues, "We can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which it was designed to maintain" (Hart 35). This standard of behavior is, at its core, what Hart seeks. With the sanction subtracted, law can then be discussed as its own entity, separate from its punishment or its enforcer. Moving to law as "guidance" expands Hart's agenda beyond a subset of law to its entire rules, and thus to the field of legal theory more generally. He makes the case in his own words:

> What is most needed as a corrective to the model of coercive orders or rules, it a fresh conception of legislation as the introduction or

> modification of general standards of behaviour to be followed by the society generally. The legislator is not necessarily like the giver of orders to another: someone by definition outside the reach of what he does. Like the giver of a promise he exercises powers conferred by rules: very often he may, as the promiser must, fall within their ambit (Hart 44).

The key, therefore, to the beginnings of Hart's argument is not the announcement of something as 'law', as understood by Austin, but returning to something more basic: the idea of human behavior itself. Hart starts by noting that some mere human "habits" of behavior or develop into more generally expected "social rules" of behavior, which he will in turn use as the connection to 'law' in a modern society.

Hart begins this sequence by examining the notion of 'obligation' as it relates to the study of legal theory. He starts with this word because the notion of obligation is exactly what he believes is missing from the central case of Austin, whose primary assumption was that law existed to threaten and punish. Hart introduces his argument by stating, "There is a difference, yet to be explained, between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it" (Hart 82). Austin's theory was critically flawed, in effect, by its disconnection of "law" from a subject's beliefs or motives in following or breaking legal directions. For Hart, however, that connection is vital, as it establishes the distinction between a person being "obliged" by forced and a person's accepted "obligation" to follow the law:

> To understand the general idea of obligation as a necessary preliminary to understanding it in its legal form, we must turn to a different social situation which…includes the existence of social rules; for this situation contributes to the meaning of the statement that a person has an obligation in two ways. First, the existence of such rules, making certain types of behavior a standard, is the normal, though unstated, background or proper context for such a statement; and, secondly, the distinctive function of such statement is to apply such a general rule to a particular person calling attention to the fact that his case falls under it (Hart 85).

Thus, 'obligation' has now traveled from the realm of mere orders to the realm of social duty. From this deeper, more sophisticated form of duty, Hart can move beyond Austin's incomplete analysis to a new, more satisfying, 'concept of law'.

Building on Austin's ideas of obligation and duty, Hart realizes that the basics of human society are governed by a system of specific rules. These rules, in turn, contribute to our nature as obedient beings and, therefore, the need for a legal system in general. He posits, "Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great," and again later, "What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations" (Hart 86-87). Hart has been searching, in

effect, for the "rule"—the fundamental guidance—that precedes everything, and here, Hart finds it in the notion of social pressures that develop through our obeying nature. He deems this our "internal point of view" that the law embodies the legitimate directions for our behavior. Thus, the beginnings of our legal systems lie in the early formations of our initial social rules and conformities.

According to Hart, the foundation of special social pressure resides in the very nature of the rules themselves. He refers to the previously described social system of rules as the "primary rules of obligation," meaning the rules that first needed to establish a viable social community (Hart 91). To demonstrate the need for this additional layer of guidance, Hart, imagines a society that lives by "primary" rules alone—that is rules that "must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other" (Hart 91). Several problems develop for such a "pre-legal" society. First, with only such primitive, often unspoken rules in place, there remains scant means of dealing with ambiguities in the rules when issues arise amongst community members. Thus, there is a certain level of "uncertainty" that can arise within the society about how and when to apply the rules, fashioning a highly inefficient system as the society develops. For example, if there is simply an unspoken rule that one should not cheat on their partner, and a citizen of the community does so regardless, the society may find itself inept to deal with the situation without a pre-agreed upon system of rules and even punishment. Second, there is the problem that Hart refers to as the "*static*

character of the rules." In this society no mechanism exists to shape or eliminate any primary rules that came to be "established." The primary rules, in this sense, would seem to be lacking something altogether that would add to both their legitimacy and governing ability. Lastly, Hart signifies the inefficiency of using social pressure as the means by which the rules are posited and enforced. With only social pressure as the existing law of the land, there is no central authoritative figure for both deciding if a rule has been broken and, in such a case, deciding how to handle the situation, much like the example of a individual cheating on his or her partner. These three "defects", as described by Hart, lead him to move from a discussion of only primary rules to discovering something that transcends them.

Evidently, then, a society needs something beyond primary rules: "The remedy for each of these three main defects in this simplest form of social structure consists in supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind" (Hart 94). Hart finds that societies must invent these secondary rules to create system rules, or the rules that then govern the initial primary rules that result from human habits and societal pressure. He explains, "that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves" (Hart 98). His discussion of these new secondary rules is then, at its essence, the argument that creates a legal system, which in turn is the source of valid law.

The primary rules of recognition thus become grounded and even altered by three new "secondary" concepts put forth by Hart: the rule of recognition, the rules of

change, and the rules of adjudication. The rules of change and adjudication are exactly as they seem: they are the secondary rules that a society creates in order to determine how the primary rules are changed and how they are subsequently ruled upon and judged. Thus, these two rules combined lead to the societal need for systems such as legislatures and courts to make decisions regarding the primary rules. Because these secondary rules are not connected to "sanctions," Hart argues that for them to function in society we must emphasize the concept of the "the internal point of view." He defines this necessary perspective as, "the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behaviour," meaning that the secondary rules can only be realized, appreciated, and enforced by those who already "buy into" the system as it first began, much like how the rules of modern social clubs, such as fraternities and sororities, can only be fully understood by its own members (Hart 98). The rules they are buying into, of course, are the primary rules in and of themselves.

This internal point of view remains the most important is in the case of the first secondary rule—the rule of recognition. The rule of recognition is the closest to the original primary rules, as it is a societal agreement to identify and consider as legitimate and valid certain appropriately created social rules. Thus, the rule of recognition is the identification of whatever features the society has deemed necessary to make something a 'law'. With that insight, Hart seems to think that his analytic job is done:

> If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both jurist and the political theorist (Hart 98).

Here, however, is where Hart makes his first mistake, one that will be later be analyzed in the work of Ronald Dworkin. The problem with putting forth such a bold claim based on a system as loose as "primary rules + secondary rules = legal systems" is that these rules have no way of being judged themselves. Here, it is useful to map out the ideas of Hart to determine where the gaps actually appear, as is depicted in Figure 2.1. This diagram, as it will be compared to the work of Dworkin, works as a diagrammatic representation of the journey Hart argues that social habits must take to become law, with the vertical lines representing the creation of societal institutions in addition to mere social norms. A less convoluted way of understanding the gaps here goes back to the idea of the internal point of view, as is depicted by the diagram. By using this point of view to not only enforce but also judge the rules of society, the rules themselves lose all sense and need for objective justification. Hart, therefore, is not assuming the "ought" of the situation, as in what rules a society "ought" to have to achieve justice. He is instead conducting an "is" exercise, if you will, in answering the question of what is "law." In other words, Hart has thus proven himself to be no more than a sociologist, describing and

explaining the way societies up to this point have functioned, grown, and governed themselves. Hart, therefore, falls into the exact same trap that he accused Austin of occupying, that of merely describing the social basics instead of moving deeper towards the philosophical bedrock, and thereby contributing to the overall field of legal theory.

With this problem now brought to the forefront, the ever-important rule of recognition can now be seen as a simple listing of qualities that make some pronouncement a "law"—and one of these qualities could be that it is an "order backed by threats." In essence, the rule of recognition, as it is different for each society, could be as simple as stating, "if the leader declares it as law, then it is law." Hart again makes the blanket statement:

> In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighting up of social issues, and the need to leave open, for latter settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case (Hart 130).

If this is true, however, then the "heart" of the legal system—the primary and secondary rules—is nothing more than whatever it is. There is no basis from which to asses the "justice" created by these rules, for the job of the internal point of view

is to explain these rules rather than to subject them to outside, objective justification.

The missing step into outside evaluation, or into a deeper justification of the legal system, also demonstrates how Hart's theory provides no link between law and morality. Later in his work, Hart addresses this concern directly:

> But it is possible to take this truth illicitly, as a warrant for a different proposition: namely that a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it. Again, though this proposition may, in some sense, be true, it does not follow from it that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice (Hart 185).

With the admission of a divorce between a society's legal practices and the substantive morality embedded in these practices, Hart leaves himself no foundation to evaluate the very systems of law that he attempts to describe.

While this may not seem like a large or significant problem, the classic example of difficulty becomes a society like Nazi Germany or Stalinist Russia. There is, undoubtedly, a certain gut level reaction of outrage or disgust perhaps, that occurs when those phrases are uttered. These reactions are the very kinds that, according to the theories of Hart, are not entirely substantiated. Or, at the very least, they are not substantiated to the degree that we could readily evaluate, judge, and

deem wrong such a seemingly backward society. By the theory of Hart, such societies are not only legitimate, but practice law exactly as he portrays it.

There is, nevertheless, a visceral reaction to any laws that establish a certain sect as sub-human and therefore no longer deserving of life. Yet Hart rejects the idea that there is any "natural law" that inspires that reaction. He criticizes the idea of Montesquieu, that human beings may be governed by certain natural laws like other things in our universe. He attempts to counter Montesquieu's observation that we may be obeying the "laws of our nature" by pointing out that if the stars were not to obey their natural laws, then the law would need to be deemed false and be replaced, whereas humans can violate such 'natural' laws constantly. He goes as far as to declare:

> So, on this view, belief in Natural Law is reducible to a very simple fallacy: a failure to perceive the very different senses which those law-impregnated words can bear. It is as if the believer had failed to perceive the very different meaning of such words in 'You are bound to report for military service' and 'It is bound to freeze if the wind goes round to the north' (Hart 186-187).

The large problem with eliminating principles such as Natural Rights, in addition to the problems already listed for Hart, is that if such notions are dismissed, then they eventually cease to be observed at all. Without a reliance on anything outside of the very legal system itself, Hart's theory of the rule of recognition runs the very plausible risk of being labeled as a tautology. It is susceptible to the observation that

the rule merely declares that there is law because the society observes such statues or principles as law, and the statement could end there completely. Thus, there is law simply because the society observes it as such. Hart has exemplified the problem of attempting to ground the concept of law on an "is" instead of appealing to an "ought." Since law is, at its core, a description of how a citizen should act and how a society should function, it would stand to reason that an appeal to the "ought" must be made. That inevitable philosophical response, trying to take the concept of law even closer to its essence, came from Ronald Dworkin in his work, *Taking Rights Seriously.*

Dworkin, an American philosopher, decides explore the question of "what is law" by looking at the most difficult and controversial lawsuits. His overall goal is to fill in the gaps left by Hart and to do exactly what his title describes: analyze a legal system in such a way that rights can be taken seriously. For him, such a system is that of American law, versus the British background from which Hart stemmed. Dworkin begins his book with the following statements:

> When lawyers argue cases, or advise clients, or draft laws to meet specific social goals, they face problems that are technical, in the sense that there is general agreement within the profession as to what sort of argument or evidence is relevant. But sometimes lawyers must deal with problems that are not technical in this sense, and there is no general agreement on how to proceed. One example is the ethical

> problem that is presented when a lawyer asks, not whether a particular law is effective, but whether it is fair (Dworkin 1).

Thus, in the first three sentences of his book, Dworkin reintroduces and reinvestigates the "ought" element put aside by Hart. The task he sets himself is to analyze a very different "central case" of law—that of the difficult and often ambiguous cases faced by the legal profession and legal theorists alike:

> These questions call for an analysis of the moral concept of fault, not the legal concept that the lawyer already understands; but it is just the moral use of the concept that the doctrinal approach of English jurisprudence ignored. The record of American jurisprudence is more complex. It devoted itself largely to one issue that English theory had, in comparison, neglected: How do courts decide difficult controversial lawsuits? (Dworkin 3)

From this perspective, the work by theorists like Hart had "produced only the illusion of progress" in understanding law, for the myopic focus on systems and system rules had, "left the genuinely important issues of principle in the law untouched" (Dworkin 2). We learned more about "rules" from Hart, but little about why we care about such rules. Hence, Dworkin starts with morality at the very center of the discussion, moving him not only one step closer to a more satisfying normative picture of a successful societal system, but also one step closer to discovering a true utopia.

Morality, however, may not be the best word to attribute to Dowrkin's new perspective on analyzing law, or he is interested not in the guidance that the law provides in terms of moral direction, but instead in protection. He is analyzing, therefore, not social controls, but the safeguarding of opportunities for social action—that is, how a society protects the more important rights that it holds as fundamental and inalienable. Thus, he begins his argument with the following discovery, "They [earlier legal theorists] ignored the crucial fact that jurisprudential issues are at their core issues of moral principle," and then later concludes that, "the legal rule is comprehensible as an extension of popular theories of morality and cause" (Dworkin 9). To change the conversation from guidance to that of defense and protection of rights, Dworkin adds "moral principles" to the mix of elements that constitute "law." Rather than just the "all-or-nothing" rules upon which Hart focused, law would now have flexible, moral propositions that would protect moral interests and even provide moral direction. Dworkin recognizes that his proposal to reinsert the "ought" back into the legal discussion is one that is not yet identified in terms of the philosophy, but he is able to make the case for his inquiry:

> We must be able to state, at least roughly, what it is we all believe that is wrong. But the nerve of our problem is that we have great difficulty in doing just that. Indeed, when we ask what law is and what legal obligations are, we are asking for a theory of how we use those concepts and of the conceptual commitments our use entails (Dworkin 15).

For Dworkin, the ability to recognize our problems and mistakes is the springboard for growth and change in a moral sense. Given that we have created a society that is inherently governed by our courts and our system of laws, we must then use these institutions as the outlets for the progress he is seeking. This perspective, of course, recalls the need to look at the controversial cases courts often face, since these cases are where the pre-determined rules have not yet been applied and may only apply problematically. Dworkin is chiefly interested in the creation of new law seemingly from scratch in a complicated area where no law or rule previously applied, such as the current issues of abortion and gay marriage.

Before delving into the complex cases, it is first important to understand Dworkin's distinctions between his interpretation of Hart's rules and the conception of principles. For Dworkin, "Rules are applicable in an all-or-nothing fashion," and "Principles have a dimension that rules do not- the dimension of weight or importance" (Dworkin 24-26). This distinction between the two types of governing doctrines that Dworkin views as necessary for society derives from the functioning of society itself. Regardless of his writing in reaction to the theories of Hart, Dworkin went outside the context of the philosophical debate and looked at how individuals make decisions. Hart adeptly observes that , "For most people moral argument or decision is a matter of giving reasons for or against the morality of a certain course of conduct, rather than appealing to rules set down in advance whether by social or individual decision," and, on a more academic note, that, "Any philosopher or sociologist who wants to report for his moral practices in terms of a

code of standards must therefore say that for him morality is a matter of principle and not of rule" (Dworkin 72-73). Understanding that this is the way in which normal individuals conduct their decision making practices gave Dworkin the first step to separating Hart's ideas from his own, distinguishing purely rigid and stringent directives from those that have deeper meaning and weight in society as it functions today. For Dworkin, then, principles are not just vague moral propositions floating about for occasional guidance, they are actively perceived as part of the law itself. He makes the apt notation:

> People, at least who live outside of philosophy texts, appeal to moral standards largely in controversial circumstances. When they do, they want to say not that the standards ought to apply to the case in hand, whatever that would mean, but that the standard does apply; not that people ought to have the duties and responsibilities that the standard prescribed, but that they do have them (Dworkin 55).

Thus, the ideas of Hart deserve revision not simply for the sake of the legal world itself, but for the sake of the legal world as it relates to the actual world: a world defined and run by the principles that Dworkin has now identified, given that the people who "live outside of philosophical texts" do not deal with the world in terms of lofty theories, but instead in terms of everyday issues. From this perspective, Dworkin in turn explicates complicated cases not only through their arguments and evidence, but by the actions of one single decision maker—the judge. For it is in the

thoughts and determinations of that single mind where the principles are being considered and the legitimacy of new rules fostered.

In the legal world, even outside of a complex case that would involve the determination of a judge or judges, Dworkin finds a separate issue of distinguishing between the everyday considerations of the non-legal mind that involves principles, and the legal thinking that also operates within the same parameters. In this sense, principles must operate on two distinct, albeit extremely interrelated, levels. Dworkin describes this distinction:

> Jurisprudence poses the question: what is law? Most legal philosophers have tried to answer this question by distinguishing the *standards* that properly figure in the arguments on behalf of legal rights and duties. But if no such exclusive list of standards can be made, then some other way of distinguishing legal rights and duties from other sorts of right and duties must be found (Dworkin 68).

This distinction is then the job of the legal world, and specifically the judges, to make and uphold. The legal world then must walk a fine line between the two realms of rights and duties and must find a way to distinguish between them in terms of the creation of law, especially in the circumstance of the complex case. In such a case, the judge essentially both walks the line and creates a new type of rule from the principles he or she constantly holds in the background. Thus, the judge oscillates between the roles of both citizen and legal expert.

When judges face such a case, according to Dworkin, they must inevitably create new rules from the ground up, or rather, from the principles down, and so are enacting the model as shown in Figure 2.2. This diagram, as compared to the earlier diagram depicting Hart, demonstrates Dowrkin's journey to reach law, again with the vertical line representing the establishment of governmental institutions. (It is important to note the differences between these two diagrams, as Figure 2.2 illustrates Dworkin's reinsertion of values back into the route taken.) He argues that in such cases, "the rules did not exist before the case is decided; the court cites principles as its justification for adopting and applying the new rule"(Dworkin 28). As an example of this occurrence, he uses the 1889 New York case of Riggs v. Palmer, where the court, "had to decide whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so"(Dworkin 23). Here, the court had to decide whether or not to uphold the agreement of the will, as the laws and statues seemed to establish quite clearly, or to instead think beyond the set laws and decide the case based on a moral foundation. The court chose to do the latter, turning to principles reflected in maxims of justice for their justification. The court noted that one should not be able to profit from his fraud and cited morality outside of the constructed laws as authority for this conclusion. Needless to say, the grandson did not receive his inheritance.

In such a case when the given law simply does not encompass the complexity of the situation, the court was obliged to turn away from the rulebooks and search

the realms of moral principles. Given this occurrence, Dworkin concludes, "If judges have a duty to decide a case in a particular way, in spite of the fact that no social rule imposes the duty, then Hart's claim that social practice accounts for all judicial duty is lost"(Dworkin 57). While the argument could be made that one of the secondary rules in Hart's society could be guidance for how judges must decide cases, the way Hart structured his journey to law (Figure 2.1) did not leave room for reference to outside justification. Instead, new law can only be created in the instance of the current or old law malfunctioning, and thereby providing the judge with a specific direction. Without an ability to appeal to something like principles, Hart's judges can only fix the law as problems with the known law arise, rather than taking a leap and creating new law altogether—as, for example, in difficult cases like Brown v. Board of Education, or Roe v. Wade. Thus, by changing the conversation to principles instead of mere rules, Dworkin is able to place values and morality back into the question 'what is law' and discredit the far too limited model of Hart.

Regardless of the changes made by Dworkin, however, still questions remain unanswered by his move back into morality. The most fundamental is the nature of the principles themselves—how did everyone come to acquire such moral guidance and perspective? And how is it that society came to agree on what these principles are? This glaring hole in Dworkin's argument leaves the reader wondering how legitimate his position is when directly compared to Hart's. Dworkin sought to place values back into the law and rights discussion, and in doing so hoped to avoid the kind of relativism to which Hart's theory inevitably led. The creation of the

principles themselves, however, is simply not enough to avoid the problem of relativism, given that Dworkin gives no account of where the principles came from, or what they are based on, other than being based on other principles. He observes that, "We argue for a particular principle by grappling with a whole set of shifting, developing, and interacting standards (themselves principles rather than rules)…at this level of abstraction, in other words, principles rather hang together than link together" (Dworkin 41). The problem becomes that without the principles being based on any objective principle, Dworkin has made no real progress from the ideas of Hart. All he has done is to insert principles above one's personal values, but those principles could be just as culturally unique as Hart's social habits. While Dworkin made his revisions to Hart because he was wary of a society like Nazi Germany being able to be deemed lawful, Dworkin still cannot prove that such a society is unjust. Dworkin, therefore, still finds himself in the trap of relativism, a problem that could possibly be solved by Plato and his vision of utopia through the theory of the Forms.

Plato's theory of the Forms is in effect the precursor and foundation for Dworkin's concept of principles, only Plato viewed them as pure universals that exist outside of humanity. These Forms, which are each a value in its perfected state, such as the perfected Form of justice, are the innate knowledge that humans are born able to recollect via the intuition of their souls. In Plato's Meno, Socrates makes the case that knowledge is not something that is taught, but is recollected. The process of recollection can then "progressively improve our understanding of moral

truth and eventually lead us to full knowledge of it," as the editor of the dialog, John M. Cooper, describes (Five Dialogs 59). Socrates argues for the existence and continued practice of recollection by stating, "Then if the truth about reality is always in our soul, the soul would be immortal so that you should always confidently try to seek out and recollect what you do not know at present" (Meno 86b). Socrates find the exercise of recollection so important to the health and knowledge of a proper human being, that he says to Meno, "we will be better men, braver and less idle, if we believe one must search for the things that one does not know, rather than if we believe that it is not possible to find out that we do not know and that we must not look for it" (Meno 86c). This argument for the benefit of constant recollection and learning could be applied to the judges as Dworkin discussed them, the decision makers ruling over the most difficult cases. When one must invent law where law does not currently apply, Hart would state that one should simply look to the rules as they exist and modify them to fit the present case. Dworkin, being unsatisfied by this simple answer, instead echoed the thoughts of Socrates and argued for judges needing to seek out new law. In doing so they may appeal to higher principles, and, thus, never believe that an answer cannot be found if the current law is insufficient, but must appeal to the realms outside the law, or, the Form of Law.

Plato also expounds in *The Republic,* "if the fine dispositions that are in the soul and those that agree with them in the Form should ever coincide in anyone, with both partaking of the same model, wouldn't that be the fairest sight for him

who is able to see?" (Republic 402d). This "fairest sight" is, perhaps, even in a loose sense, what Dworkin was channeling when he made his argument for the role and decisions of judges, given that the thoughts of judges should be made with the consideration of such universal principles, or so society hopes. In fact, Plato even directly calls the balance of the soul in terms of being ruled by reason, and thus connected to the Forms, the proper "law" of the soul in the *Gorgias*:

> For in my opinion the body's arrangements have the name "the healthy," from which health comes into being in it, and the rest of the body's virtue. … The soul's arrangements and orderings, on the other hand, have (in my opinion) the name "the lawful" and "law," whence they become both lawful and orderly; and these things are justice and moderation. (Gorgias 504c-504d)

The truly healthy and the truly lawful, therefore, are individuals that are governed by reason and have used that capacity for reason to recollect the Forms. It is more than mere "principle" that judges and individuals alike are connecting to; it is something far more universal and pure—the Forms. Thus, had Dworkin taken Plato and Socrates' original ideas regarding utopic moral ideals to heart and utilized them within his own theories, then perhaps the journey from principle to law could be one based in the objective, universal, and ultimately utopic, and therefore not able to be discredited by relativism.

Now, the journey has been taken from the beginning theories of Hart, to the further developments of Dworkin, back to the very beginning theories of Plato. It is

through such exercises that the holes in modern discussions within the field of philosophy of law cannot only be clearly seen, but can been seen as fixable. The original utopic theories of Plato have thus once again played out to be the philosophical caulk, if you will, that can be used to fill and bind the spaces left by those who came after him. The journey towards true understanding of the Forms, however, is one that must always continue. As Plato prescribed, we must continue to dig deeper, or contemplate higher, until we reach the essence itself. The next step in legal and political theory will show how two philosophers, Robert Nozick and John Rawls, attempt to find the essence of a politically perfected society. We will find, however, that both fall short in the same manner as Hart and Dworkin, as they both fail to properly utilize visions of utopia.

SECTION 2

HYPOTHETICAL EXPERIMENTS IN JUSTICE: THE NECESSARY MOVE TO THE PRACTIALLY ETHICAL

> *My thesis is that morality exists outside the human mind in the sense of being not just a trait of individual humans, but a human trait; that is, a human universal*
>
> —Michael Shermer

Coming from the analysis of the question "what is law", the discussion and concern can now move to the issue of what exactly those laws are designed to protect and further. Namely, we must turn our attention to the question of rights and, perhaps more importantly, justice—what they each are, how one acquires them, and who deserves them. Rights and justice are, due to their intangible nature, ideas and general principles that must be discussed in a fairly hypothetical manner if one is to discuss them at their very essence. It can be said, of course, how rights have come to function in the world in a very real sense, but given that the nature of the answer to the question of "what is law" has been determined to be one that does not revolve around relativist ideas, the nature of the rights being defined and protected by those laws must not be considered in a relativist sense either. Discussing rights at their essence, however, can be an extremely difficult task given that rights must be thought of in terms of their abstract nature, as opposed to their concrete uses. While their concrete uses, such as being implemented in the laws of society in documents like a constitution or a bill of rights, are what individuals come to identify with, these uses and subsequent violations can only be discussed after

the nature of the right—and the nature of justice itself—has been analyzed from its very essence.

Beginning with a hypothetical situation for societal construction serves an efficient method for discerning such an abstract task. The legal theorists Robert Nozick and John Rawls are two philosophers that have searched for the essence of rights by beginning with a hypothetical situation of fledgling societies. The two differ greatly, however, in their opinions on what that original beginning situation should look like to produce what they feel are perfected societies. The main point for going through the exercise of beginning with the hypothetical situation is to design the best society from the ground up. Both philosophers search for a possible method to reach a perfected end. The idea of perfection, however, is where the two drastically disagree. Each begins with an initial idea of perfection, but Nozick determines that end as the minimal state, whereas Rawls gives us a picture of the ideal liberal state. Given these differing original opinions regarding perfection, both philosophers also design drastically different original situations for their fledgling societies to grow into the societies they envision as ideal—Nozick begins with the situation of a state of nature that man must learn to govern himself out of, whereas Rawls begins with a unique idea of an original position of human essences placed behind a "veil of ignorance" in order to ascertain a specific conception of justice and rights. Each of these theorists, therefore, has the same goal in mind of creating initial situations for societal construction that would result in their ideal societies of

perfected distributive justice, even though their versions of how to achieve this goal, and how this goal is even defined, remain vastly different.

Yet again, it was Plato, however, who first articulated the idea of the beginnings of man in essences, or Forms, that then led man to recognize utopic concepts such as Justice as both real and at work in the world. Thus, Plato had the very same perfected aim in mind when he proposed that, "when the soul investigates by itself it passes into the realm of what is pure, ever existing, immortal, and unchanging…and remains in the same state as it is in touch with things of the same kind, and its experience then is what is called wisdom" (Phaedo- 79d). Even given the extreme focus that each Nozick and Rawls put in the importance of freedom, it is Plato's vision of utopia that they are echoing. He states, in Book 3 of *Laws* that, "the lawgiver ought to have three things in view: first, that the city for which he legislates should be free; and secondly, be at unity with herself; and thirdly, should have understanding," thus demonstrating that Plato felt as though freedom was just as necessary for a successful society as did Nozick and Rawls (*Laws* 88). By looking at the differences in the exercises proposed by Nozick and Rawls, not only do their differences, successes, and failures all become clear, but also their blatant lack of utilization of a common utopian root in the ideas and exercises of Plato. Not only could both Nozick and Rawls have altered their opinions on perfection itself by further recognizing the utility of a common utopia, they each could have solved the inevitable problems that arise with each of their differing hypothetical beginning situations. Thus, it is once again through turning to Plato's

visions of utopia via the Forms that we can see how the idea of societal and individual perfection, regardless of its seemingly hypothetical nature, can be achieved.

To begin, I will examine the exercise conducted by Nozick in his work *Anarchy, State, and Utopia*, as he places himself the farthest away from the Platonic ideals at hand. Nozick begins his project by addressing several questions surrounding the governing of societies. He asks, "If the state did not exist, would it be necessary to invent it? Would one be *needed*, and would it have to be *invented*?" And then posits, "These questions …are answered by investigating the 'state of nature' "(Nozick 3). His reasoning behind this beginning is that, "considerations both of political philosophy and of explanatory political theory converge upon Locke's state of nature, we shall begin with that," which thus becomes his jumping off point for his notion of the original position (Nozick 9). Nozick begins with the state of nature as the catalyst for his hypothetical society because it is the proper beginning for the end he has in mind—the minimal state. Even in the preface he explains his initial impressions regarding the ideal societal framework:

> Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right. (Nozick ix)

Thus, with such an ending in mind, an original position of a Robinson Crusoe-esq state of nature scenario performs the work Nozick needs.

It is important to note, however, that from these initial ideas, Nozick rejects any sense that the individuals involved in the state of nature scenario come into such a situation with any foreknowledge of things such as justice or rights. He instead argues that such concepts are born out of the state of nature itself, not out of any initial perception and that, "Out of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest there arises something very much resembling a minimal state or group of geographically distinct minimal states" (Nozick 17). In fact, he goes so far as to directly claim that human characteristics, such as free will and rationality are not sufficient reason for the creation of and support of principles that protect morality and subsequent rights. He blatantly states:

> The traditional proposals for the important individuating characteristic connected with moral constraints are the following: sentient and self-conscious; rational […]; possessing free will; being a moral agent capable of guiding its behavior by moral principles and capable of engaging in mutual limitation of conduct; having a soul. […] Leaving aside the last on the list, each of them seems insufficient to forge the requisite connection. (Nozick 48)

Nozick had rejected, therefore, the idea that will we will later see in terms of Rawls, that the job of the institutions that arise in the minimal state is not to recognize such

moral abilities, or even protect and further such moral characteristics. Instead, the minimal state is just as it is named, minimal, especially for Nozick. He continues to describe the few principles that, in his opinion, the just state is responsible to uphold.

For his perfect minimal state, which is the Nozickian ideal of justice, there are only three topics with which the state can be concerned. To begin with, all three of these principles center around the idea of property, which is, for Nozick, the only true issue that would arise out of a state of nature. Be it the property of one's body not being harmed, or the property of one's goods not being stolen, an individual's right to acquire and own property is the only true fundamental right in such a minimal state. He explains, "What each person gets, he gets from others who give him in exchange for something, or as a gift. In a free society, diverse persons control different resources, and new holdings arise out of the voluntary exchanges and actions of persons" (Nozick 150). From the single notion of protection of property, Nozick then determines the three cases in which the state can, and should, participate in the upholding of the right: original acquisition of holdings, transfer of holdings, and the rectification of injustice in holdings. The three are relatively self-explanatory, the first being governed by the principle of justice in acquisition, the second by the principle of justice in transfer, and the third by the principle of rectification (Nozick 150-152). The three generally govern the possession of property, from its original acquisition, to its transfer, and any problems that may occur along the way or in the future. Nozick simplifies the entire set by putting them

all under the heading of "justice in holdings," which he simplifies even further with the following three rules:

1. A person who acquired a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2 (Nozick 151).

Problems regarding these three rules would then be dealt with by the principle of justice in rectification, though that is not listed as a fourth rule by Nozick.

Thus, Nozick essentially completes his project of creating the minimal state and describes to his readers the few instances in which the minimal state is allowed to uphold its minimal principles. The glaring truth that we are faced with, however, is that Nozick refuses to accept anything other than property as an acceptable notion to protect and govern. He argues for such a focus in these specific terms:

> Different principles are compared solely by comparing the alternative distributions they generate. Thus the principles drop out of the picture, and each self-interested person makes a choice among alternative end-state distributions. People in the original position either directly agree to an end-state distribution or they agree to a principle; if they agree to a principle, they do it solely on the basis of

> considerations about end-state distributions. The *fundamental* principles they agree to, the ones they can all converge in agreeing upon, *must* be end-state principles. (Nozick 202)

He even ends a section regarding distributive justice with the claim that, "as a summary and great simplification…we have: *From each as they choose, to each as they are chosen*" (Nozick 160). Given such a narrow consideration of rights and justice, the minimal state as proposed by Nozick leaves something to be desired for an audience that is far more used to a sweeping protection and understanding of rights and justice in general.

While Nozick may believe that his society would be even more free than the rights-focused society his audience is used to, he is only thinking of free in a negative sense—freedom from interference and from influence—when positive freedom, for resources such as education, are just as necessary to create a fully just society, as we will see with Rawls, and even Plato. In addition, Nozick seems to be making the error of focusing all of society and the state's energy on goods, rather than rights, when the two are certainly not synonymous. A focus on goods abandons the (albeit arguably) now commonly accepted importance of societal components, such as speech and religion, and the idea of "to each according to his need" or even, "to each according to their ability." To regain the neglected, yet valuable, principles that Nozick does not believe are worthy of societal protection, one must turn to a different legal theorist altogether. One must turn instead to the theories and experiments of John Rawls.

Rawls, a modern legal theorist, explores the very issues at hand in his 1971 work *A Theory of Justice,* and begins his journey by exploring alternatives to the theories of social justice that were prevalent at the time of his writing. He explains in his preface:

> What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant. In this way I hope that the theory can be developed so that it is no longer open to the more obvious objections often thought fatal to it. Moreover, this theory seems to offer an alternative systematic account of justice that is superior, or so I argue, to the dominant utilitarianism of the tradition. (Rawls xvii)

And so Rawls begins his exploration back into the realm of the social contract theories that have been, in his opinion, ignored and abandoned by the legal and social theories of the time, which were dominated instead by "utilitarianism and intuitionism" (Rawls xvii). He starts by looking at the basic role of justice in society. For Rawls, justice is both the most important and the most fundamental aspect of a proper and legitimate society. He argues that, "Justice is the first virtue of social institutions, as truth is the systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust" (Rawls 3). To find such a pure and uncorrupted theory of justice that a

society can utilize to its overall benefit, Rawls creates a hypothetical social experiment to look at a more abstract version of the social contract theory as proposed by Locke, Rousseau, and Kant. Rawls then designs an "original position", in which the people of a society decide in advance their notion of justice and the basic principles that will decide their subsequent rights and duties. The principle of justice, then, is meant to be the main guiding idea within the original position, which will then establish the principles as determined through the lens of justice. The idea of the original position, however, is one that can only function the way Rawls intends in a hypothetical arena. He explains to his audience, "This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice" (Rawls 11). Thus, Rawls finds a beginning in a realm not of reality, but of theoretical and hypothetical clarity, much like the beginning envisioned by Plato, and in doing so attempts to find the place that such a theory of justice might be able to hold in a more realistic setting.

The hypothetical nature of the original position, however, is not the only caveat made by Rawls to craft his perfect scenario for a pure theory of justice to develop. He adds to his original position the idea of the "veil of ignorance", an imaginary equalizer, or eraser, of all the characteristics humans possess once they enter the world. The need for such an imaginary construction is clear, as Rawls argues:

> Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations. (Rawls 118)

The various alternatives he references in the statement above refers to each of the specific facts one knows about himself as a member of a society, such as race, gender, socioeconomic status, level of intelligence, level of strength or ability, and so on. Thus, the individuals located in the original positions are mere essences, or simply the essences of human beings as opposed to the beings themselves. This lack of corruption by worldly or circumstantial knowledge then allows the essences to reach an understanding of justice that leads to a societal distribution of justice, and of societal goods, that is completely and entirely fair, or, as Rawls states, "justice as fairness." The notion of justice as fairness does not mean that justice is equivalent to or the same as fairness, but is instead explained by Rawls in terms of the hypothetical original position, stating, "The original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reached in it are fair. This explains the propriety of the name 'justice as fairness': it conveys the idea that the principles of justice are agreed to in an initial situation that is fair" (Rawls 11). Rawls has, therefore, begun his exercise by completely stripping

individuals down to their bare essences with no notion of their actual circumstance or situation, and places them in an imaginary situation of complete equality and, subsequently, complete fairness.

The fact that the notion is hypothetical, however, does not erase its relevance to actual societal constructions. Rawls preempts such objections and directly addresses the issue:

> It is natural to ask why, if this agreement is never actually entered into, we should take any interest in these principles, moral or otherwise. The answer is that the conditions embodied in the description of the original position are ones that we do in fact accept. Or if we do not, then perhaps we can be persuaded to do so by philosophical reflection. … We need a conception that enables us to envision our objective from afar: the intuitive notion of the original position is to do this for us. (Rawls 19)

From such a level and substantiated theoretical platform, Rawls then envisions and constructs a perfect society based on real principles and explains the means by which we achieve such an end.

The hypothetical construction of perfection does not end, of course, with the removal of worldly situations via the veil of ignorance. Rawls continues on to argue that through such an original position, the parties involved will not only be able to clearly and purely view the notion of justice and the principles that can be created to adequately support it, but that the conception of justice decided upon will be

reached through unanimous agreement. This notion of unanimity seems, for Rawls, to be basically self-explanatory. He explains:

> To begin with, it is clear that since the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the agreement in the original position from the standpoint of one person selected at random. If anyone after due reflection prefers a conception of justice to another, then they all do, and a unanimous agreement can be reached. … The veil of ignorance makes possible a unanimous choice of a particular conception of justice (Rawls 120).

Rawls has progressed, therefore, to another plateau of perfection. Now, not only is the original position perfect in its blind equality and lack of corruption, but it is subsequently perfect in its results. Such a conception of justice is, by definition, perfect. The pure essences involved in the exercise of the original position must then take such a notion and create the principles necessary to actualize, protect, and support the perfected version of justice as Rawls has envisioned it.

The most substantial move that can be made from the purely hypothetical to the actual is that of creating institutions. Rawls views the creation of governing institutions as a means for the society to take the perfected and unanimously agreed upon theory of justice from the original position and realize it in a very real sense. Furthermore, the institutions that are created can be modified and judged based on

how well they function to support and uphold the decided upon theory of justice. As Rawls observes:

> Viewing the theory of justice as a whole, the ideal part presents a conception of a just society that we are to achieve if we can. Existing institutions are to be judged in the light of this conception and held to be unjust to the extent that they depart from it without sufficient reason. … Thus as far as circumstances permit, we have a natural duty to remove any injustices, beginning with the most grievous as identified by the extent of the deviation from perfect justice. (Rawls 216)

Thus, the society actualizes their conception of justice in a realistic manner by creating institutions that uphold their previous ideas. The creation and existence of institutions, however, does not complete the story in terms of the perfect society. Institutions, charged with upholding the decisions of the original position, must then organize the fledgling society into one that can fully realize its pre-determined ideals.

Rawls then lays out how exactly these institutions are to accomplish their determined goal—protecting the perfected conception and determining the distribution of societal goods to individuals. In graceful simplicity, Rawls determines a mere two principles that can govern the justice of institutions:

FIRST PRINCIPLE

> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> SECOND PRINCIPLE
>
> Social and economic inequalities are to be arranged so that they are both:
>
> (a) to the greatest benefit to the least advantaged, consistent with the just savings principle (an understanding between generations to carry their fair share of the burden of realizing and preserving a just society), (Rawls 257) and
>
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity (Rawls 266).

The point to note here is part (a) of the second principle. The key words in this principle are "least advantaged" as it demonstrates simultaneously one of the great benefits and one of the mistakes in Rawls' conception of such a perfect society.

The idea listed in the first principle is directly related to and based on what Rawls terms as the "difference principle." Through this principle, Rawls attempts to determine to the utmost fairness the distribution of all social goods and why it should be that the goods be distributed in terms of the least advantage. He explains the concept as:

> The intuitive idea is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate. … The difference principle is a strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off, …an equal distribution is to be preferred. (Rawls 65-66)

While the difference principle may seem, on the surface, to be the great equalizing idea that a perfect conception of justice would produce, the difference principle actually works to drag society down as opposed to elevate it. Just as schools fail when set to the standard of lowest common denominator, as seen in recent trends involving policies such as No Child Left Behind, when the 'worst off' becomes the standard. Similarly, communities are dragged down to the lower standard instead of bringing the 'worst off' up to the level of the 'better off', let alone the best. The psychiatrist John Arden even writes, in his book *America's Meltdown: The Lowest-Common-Denominator,* that "We can see the LCD syndrome emerging in what we consider newsworthy, what we regard as entertaining, how we dispense medical care, and how we educate our children" (Arden 1). While Rawls would never insist that a society should adopt a policy that would make the 'worst off' even worse off, he seems to have no problem with a society adopting policies that make the 'best off', be it in talent of wealth, worse off in the interest of the 'worst off', which then creates the downward spiral towards this "LCD" society. He goes so far as to make claims such as "the advantages of persons with greater natural endowments are to

be limited to those that further the good of the poorer sectors of society" (Rawls 64). Rawls has taken the concept of leveling the playing field via the lowest common denominator to a society-wide level. The hope he proposes is that society will level off, meaning that even if the society is not the most prosperous, it will at the very least be the most fair. But is playing to the lowest common denominator necessarily fair in such a Rawlsian sense? Perhaps in the arena of economics there is a case to be made for greater assistance to those that are deemed the 'worst off', but Rawls takes a leap from the economic realm into the social one, and in this leap lies his error.

Rawls moves the discussion of fairness and equality in terms of justice to that of one's circumstance and birth, specifically familial background, natural talents, and abilities. At first, the notion seems harmless enough, and actually very related to how societies view education in modern terms. He argues that, "Chances to acquire cultural knowledge and skills should not depend upon one's class position, and so the school system, whether public or private, should be designed to even out class barriers" (Rawls 63). This conception of the job of education is positive to the extent that it begins to level the playing the field once an individual attends school, but Rawls begins to see further problems with education being the only institution capable of any actual equalization. He makes a drastic move to attack the most basic of societal institutions, the family, in terms of how one's family can contribute to their social position, abilities, and resources. He asserts that:

> the principle of fair opportunity can be only imperfectly carried out, at least as long as some form of the family exists. The extent to which

> natural capacities develop and reach fruition is affected by all kinds of social conditions and class attitudes. Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family and social circumstances. (Rawls 64)

Using this idea as a base for further discussion of social equality and fairness, he relates the idea of the family to the idea of the difference principle. With this drastic point, however, Rawls makes a grave error. In his haze of extreme fairness and borderline irrational equality, he constructs a society in which one's talents and even one's familial benefits do not belong to oneself, but instead belong to the community at large and are to be dealt with in a manner that will constantly bring up the least advantaged. Doing this relentless equalizing, however, leaves out a fundamental virtue of any utopia—happiness. Because Rawls has moved away from any notions of happiness as a traditional grounding for society, and is instead concerned with fairness and equality, he has seemingly lost the ability to account for and incorporate happiness as one of the virtues of his society in a real way.

In focusing the society's energies so fiercely on the least advantaged, Rawls's society runs the extreme, and yet very real risk of complete and utter stagnation. The level of the initial group of those least advantaged will be the level to which the entire society is forced to sink, and, inevitably, forced to stay. With no system in place for encouraging growth, expansion, and upward mobility, the society as it is thus proposed will, most likely, head in the direction of a plummet to level out at the lowest common denominator, much like Arden predicts for the current state of

America, and will be able to do little more than maintain itself the best it can given the few tools it possesses.

Rawls's argument is clearly not without flaw. The first important question that must be asked of Rawls harks back to the original position with its veil of ignorance. The 'essences' involved in the unanimous agreement Rawls believes would take place behind the veil of ignorance seemingly have a pre-existing understanding of the notion of justice. This innate impression of such an abstract concept begs the question, of course, of how these human beings, however hypothetical and stripped down, came to posses such knowledge. Rawls, in response to such possible objections, creates what he calls "the thin theory" of the good, which is what creates the original impressions that are needed to arrive at the "full" theory of the good, as is played out in the earlier exercise. Rawls defends himself:

> In contrast with teleological theories, something is good only if it fits into the ways of life consistent with the principles of right already at hand. But to establish these principles it is necessary to rely on some notion of goodness, for we need assumptions about the parties' motives in the original position. Since these assumptions must not jeopardize the prior place of the concept of right, the theory of the good used in arguing for the principles of justice is restricted to the bare essentials. This account of the good I call the thin theory: its purpose is to secure the premises about primary goods required to arrive at principles of justice. (Rawls 348)

Here, Rawls carves out an attempt at an answer to the proposed question. His response, however, leaves the reader with only more questions, as opposed to a clarified understanding. How is it that the thin theory exists? How do the 'essences' know about the thin theory, is it natural intuition? How is it assumed that the thin theory accurately and perfectly defines justice? And so he attempts again:

> However, when we ask whether the sense of justice is a good, the important question clearly is that defined by the thin theory. We want to know whether having and maintaining a sense of justice is a good (in the thin sense) for persons who are members of a well-ordered society. Surely if the sentiment of justice is ever a good, it is a good in this special case. And if within the thin theory it turns out that having a sense of justice is indeed a good, then a well-ordered society is as stable as one can hope for. (Rawls 350)

With all of this seeming justification, however, Rawls still falls short of accurately defining and accounting for this thin theory he creates. In addition, he uses this thin theory to establish the theory of justice as the principle needed for a good and well-ordered society. What he has done, unfortunately, is to base one unsubstantiated idea, the perfected theory of justice, on another unsubstantiated idea, the thin theory of the good, thus resulting in even further breakdown rather than clarity.

It is here, with the thin theory of the good, that Rawls could have used a more concrete notion of utopia, and in doing so not lost his philosophical footing. The thin theory of the good, as it is described by Rawls, is essentially Plato's theory of the

Forms, which we have already seen play out as Plato's utopic ideal. The way Rawls describes justice is even the way Plato proposes the existence of the form of Justice. As Plato writes through the voice of Socrates in the *Pheado*:

> Therefore, if we had this knowledge, we knew before birth and immediately after not only the Equal, but the Greater and the Smaller and all such things, for our present argument is no more about the Equal than about the Beautiful itself, the Good itself, the Just, the Pious, and, as I say, about those things which we mark with the seal of "what it is," both when we are putting questions and answering them. So we must have acquired knowledge of them all before we were born. (Phaedo 75d)

When Plato makes statements regarding the time before birth, he is essentially speaking about the same type of essence of a human being that Rawls uses for his original position. Therefore, it stands to reason that what Rawls was basically doing was setting up an original position using Plato's theory of the Forms of Justice and a soul's understanding and knowledge of that form before birth. If the original position was discussed in these Platonic terms, rather than the ones used by Rawls, is seems as though the discussion and the outcome would remain the same. In addition, the unanimous decision regarding the notion of justice that Rawls decides is completely accounted for by using Plato's theory, given that no actual agreement would be needed, but instead simple recognition of an already existing concept. Rather than creating something as unsubstantiated as the "thin theory", he could

have simply referenced the already credited and understood utopia of Plato, thus avoiding confusion and further debate.

The thin theory debacle is not the only mistake made by Rawls in his theory of justice. The second issue is the lack of room for growth or progress that Rawls creates for his hypothetical society. With his extreme focus on fairness and equality, Rawls seems to completely lose sight of the need for a society to make the next generation better than the one before it, not merely equal to it. Nozick even argues against the implications of this extreme fairness notion. He argues:

> An application of the principle of maximizing those worst off might well involve forceable redistribution of bodily parts ("You've been sighted for all these years, now one—or even both—of your eyes must be transplanted to others"), or killing some people early to use their bodies in order to provide material necessary to save the lives of those who otherwise would die young. (Nozick 206)

While this example may seem extreme, it clearly demonstrates the slippery slope that Rawls's conclusions regarding his society necessarily lead his readers to. Rather than finding a way to incorporate natural difference, or eventual class differences, that could actually work to benefit the society as a whole, he instead insists upon the only good being that of justice as fairness. Here, therefore, is the other instance in which Platonic utopia could be used to fix the problems with Rawls' legal theory.

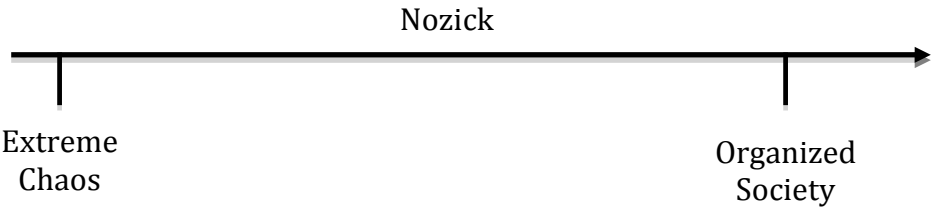
Plato, again through the use of Socrates, had strong opinions regarding both the purpose of government and the importance of education for society. He believed

that it is the government's job to not only encourage education, but encourage education in the sense of bettering the society and its citizens, not simply as some kind of great equalizer. In addition, Plato, believed that the role of a leader of a state was to leave the society better than they found it, to better the citizens as human beings with souls, not simply to make the society more fair, or, to speak to Nozick, to protect more possessions. The argument for the importance of education as a betterment of the soul then relates directly back to the idea of the Forms, given that it is through education and philosophical discovery that one is able to grow closer to understanding and connecting to the forms. Plato writes in his discussion of education in Book III of *The Republic*:

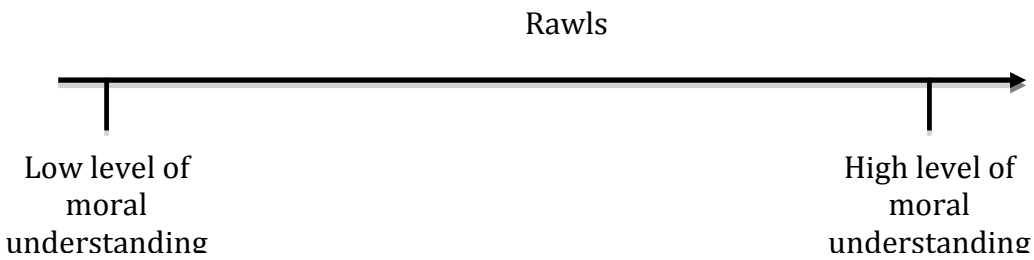
> …we'll never be musical—either ourselves or those whom we say we must educate to be guardians—before we recognize the forms of moderation, courage, liberality, magnificence, and all their kin, and again, their opposites, everywhere they turn up, and notice that they are in whatever they are in, both themselves and their images, despising them neither in little nor big things, but believing that they all belong to the same art and discipline…(Republic 402c)

It is through the understanding of the connection to these Forms that perfection of the utopia is reached. The education, especially philosophical education, needed for an individual to reach this level of connection is not only what a good citizen should be concerned with, but also what the society itself of the utopia must be concerned with.

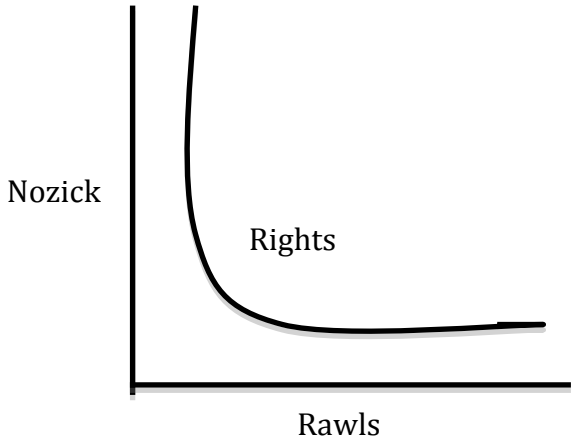
Now that we have examined how Plato can both work in the writings and theories of Rawls, I now propose that we take a step further and look at how Rawls and Nozick work when in conversation with one another, and how Plato can improve upon this dialogue. The two theorists, Nozick and Rawls, can best be seen in their interplay with one another in a basic graph form, with the two philosophers themselves serving as the two axes. Nozick, based on his previously discussed ideas on the original position of a state of nature, would form a line that would appear as follows:



This line represents what Nozick views as the journey towards what can be defined as acceptable rights. The organized society to which he is referring is, the minimal state, but it is this journey towards organization and determining acceptable rights as defined by his two principles that is important in terms of structuring the society. Rights, therefore, for Nozick are what would be found after moving away from the chaos and towards some type of organization, albeit minimal. Rawls, however, would create a line that would appear as follows:



The extremes on either end speak to the importance that Rawls places on the understanding of the human essences in the original position of morality and equality. Thus, for Rawls, rights would be determined as a society moves up the line from not understanding morality and individual dignity, to a higher level of societal understanding of justice as determined in the original position by the thin theory of the good. Each of the steps Rawls takes after the veil of ignorance has been lifted is only to further organize the society in order to fully recognize and protect rights as determined by the moral understanding achieved behind the veil. Thus, Rawls needs organization to fully realize rights, and Nozick needs some level of morality to determine the rights he decides upon for the minimal state. Thus when put in conversation with one another, they create a chart that appears as follows:



Or, for a more detailed chart, please refer to Figures 3.1 and 3.2. The curved line created by the relationship between the two theories of Nozick and Rawls represents the line that must be crossed in order for a society to be living and functioning within the realm of rights. Each philosopher even by slightly utilizing the theories of the other can clearly get a society passed the acceptable line, as demonstrated by the dotted lines in Figures 3.1 and 3.2, which represents a society that maximizes neither theory fully, but is still able to live within the realm of rights.

What if, however, simply getting passed the curved line is not enough? What if, within the realm of rights itself there is a gradient, meaning that different positions within the realm of rights represent different societies that are functioning with different levels of rights for their citizens? If this becomes the case, as is depicted by Figure 3.3, then the top most darkly shaded corner would be utopic ideal. At the very top corner a society would be achieving full moral understanding, or, at least, full moral inquiry, and would be perfectly organized accordingly, and thus be able to maximize and support the universal rights of its citizens. Figure 3.3, therefore, represents the maximization of both the original position theories of each philosopher and demonstrates how utopia, if inserted into the conversation, can take a society and help it reach its highest level of perfection.

After going through the theories of both Nozick and Rawls and their hypothetical exercises, we have seen not only two differing opinions on the proper beginning for such an experiment, but two very different outcomes. These

outcomes, however, were not without flaw. Nozick, with his original position in the state of nature and outcome being the minimal state, created a state in which the rights we have come to expect not only aren't protected, but aren't assumed to exist as inalienable in the first place. Rawls, however, did begin from an understanding of justice very close to our modern understanding, but overreached, per se, when his theory took a turn towards extreme freedom that removed talents and natural gifts from the social equation, and thus removed societal progress to maintain fairness. Thus, their theories ended with societies that would maintain themselves, but in a moral sense remain static.

Perhaps, if Plato's theories of utopia were fully incorporated and realized, legal theory could be building itself towards the top corner of their charts, instead of settling for moral stagnation once passed the line into the realm of rights.

SECTION 3:

OBJECTIONS WITHIN APPLIED ETHICS: THE NEED FOR STRING THEORY

> *The great fault of all ethics hitherto has been that they believed themselves to have to deal only with the relations of man to man. In reality, however, the question is what is his attitude to the world and all life that comes within his reach.*
>
> —Albert Schweitzer

As we have seen, John Rawls, in *A Theory of Justice*, assumes the challenge of perfecting the work on the social contract theory done by contract theorists before him. He conducts his aforementioned hypothetical exercise aimed at creating the perfect beginning situation for the later ideal society. Although his beginning notions are both unique and progressive, his work is not without fault, and consequently not without criticism. Martha Nussbaum, with her work *Frontiers of Justice*, takes up the task of filling in the cracks left by Rawls. She finds significant problems with both his original position and its hypothetical outcome, mostly in how certain marginalized sections of society, such as the disabled and animals, can still be fully supported and seen as substantial members of society. The main issue involved here is not even one that is unique to the world of philosophy. Again, the discipline of physics has long been grappling with the issue of the macro ideas of the theory of relativity not matching up to the minute concepts within quantum mechanics; a problem that the new notion of string theory touts to solve. As the physicist Brian Green describes, “The fundamental particles of the universe that

physicists have identified—electrons, neutrinos, quarks, and so on—are the "letters" of all matter. Just like their linguistic counterparts, they appear to have no further internal substructure. String theory proclaims otherwise" (Green). As we will discover, Rawls, if you will, works within the confines of the philosophical theory of relativity, whereas Nussbaum practices philosophical quantum mechanics. At its core, Nussbaum's theory is concerned with the need for human flourishing, and with how society must function in order to support that endeavor. Consequently, she turns to a theory of capabilities—the capabilities that each member of society should be allowed to fully actualize—in an attempt to reinsert what she views as the missing pieces and people from the theory of Rawls.

Each of these philosophers, therefore, has essentially the same intentions at heart: a conception of working justice for society. Their similarities in this concern and pursuit, while it may lead them down different paths to conflicting solutions, demonstrates the inherent nature of the concern itself. Rawls and Nussbaum together echo the need for an operational notion of justice throughout society, but the faults within each of their proposed solutions then fundamentally demonstrate the lack of foundation for such universal notions. It is this lack of true grounding for their claims of universality that each theorist must first fix if any progress is to be made in the field at all. While they each reach to propose a solid groundwork, is it the inevitable cracks in each of their foundations that leads to further confusion and continued debate.

To begin with the notion that each philosopher loses their footing and ultimately must continue to dig deeper, one must conduct an examination of their exercises, from beginning premises to ending propositions, in order to fully assess each theory. The connection between Rawls and Nussbaum is evident from the very beginning in each of their works. As noted in the previous section, Rawls remains focused on justice as the primary virtue of social institutions, stating laws must be reformed or abolished if they are unjust (Rawls 3).

Clearly expressing his initial concerns and motivations, he attempts to ground his reader with a profound need for justice within the laws and workings of society at large. Nussbaum, who picks up on the inherent need for justice, states in her first chapter that, "…we begin with a conception of the dignity of the human being, and of a life that is worthy of that dignity" (Nussbaum 74). Later, she echoes the sentiments of Rawls even more closely: "Justice is in the outcome, and the procedure is a good one to the extent that is promotes this outcome" (Nussbaum 82). Thus, each author chases the same goal and is, therefore, essentially pursuing the same philosophical agenda.

The most significant difference between the two philosophers, then, is their approach of how to achieve such a notion of justice. The last statement made by Nussbaum mentions this difference. She discusses the presence of justice in the "outcome", and that the "procedure" can be analyzed based on its support of this desired outcome. The procedure to which she refers is the procedure by which justice and other moral ideals are found and supported within society. The

difference here lies in which comes first—is it the procedure to attain the proper outcome, or assessing the proper outcomes in order to design the correct procedure? The answer to this question marks the fundamental difference between Rawls and Nussbaum. Rawls, with his original position behind the veil of ignorance, begins with the procedure itself to attempt to discover how the outcomes might be both possible and properly supported. Nussbaum recognizes this herself, explaining:

> Rawls's approach, like most social contract doctrines, is a procedural approach to justice. In other words, it does not go directly to outcomes and examine these for hallmarks of moral adequacy. Instead it designs a procedure that models certain key features of fairness and impartiality, and relies on these procedures to generate an adequately just outcome. Given an adequate design of the original situation, whatever principles emerge will be by definition just. (Nussbaum 81)

Rawls, as Nussbaum describes, works from the aspect of the procedure down to the detail of the outcomes. What Rawls is essentially doing, however, is working from the macro idea of the original position down to the micro concern of the specific outcomes. He believes one must begin with the perfect macro situation, for him behind the veil of ignorance, in order to obtain the most perfect series of actual outcomes, outcomes being the true consequences of the decisions reached through the procedure itself. Rawls's, original position is the appropriate initial status quo,

and thus the fundamental agreements reached in it are fair. This explains the propriety of the name 'justice as fairness,' discussed earlier.

Nussbaum, however, approaches the issue of societal justice from the opposite position, from the outcomes up to the procedure, or from the micro situations up to the macro societal dealings. She believes one must look first at the issues that must be addressed within society, and then create the procedure that will hopefully adequately address them. As she explains:

> The capabilities approach is like the criminal trial. That is, it starts from the outcome: with an intuitive grasp of a particular content, as having a necessary connection to a life worthy of human dignity. It then seeks political procedures that will achieve that result as nearly as possible, although it seems likely that such procedures will change over time and may also vary with the circumstances and history of different nations. (Nussbaum 82)

Thus, Nussbaum remains fully aware of her micro-up-to-macro structure with which she attempts to solve the problems of Rawls. She even goes on to later state that, "The capabilities approach goes straight to the content of the outcome, looks at it, and asks whether it seems compatible with a life in accordance with human (or, later, animal) dignity. This structure permits us to look at a wide range of problems and situations in which issues of justice may be lurking" (Nussbaum 87). While this switch to looking at the micro may seem appealing, and may even seem a step in the right direction, all Nussbaum has really done is to reverse the conversation in the

hopes that more will be revealed to society. Although this reversal does demonstrate instances in which Rawls's macro-down-to-micro approach fails to fully protect more marginalized sections of society (which are the instances that Nussbaum is most concerned with) the shift to focus on the micro does not actually work to provide any viable solutions to the found problems. Instead, Nussbaum ends up with an idealized picture of society that is not realistically achievable due to fairly simple issues, such as having finite resources as opposed to the infinite amount she seems to perceive, that are fixable with further examination.

To fully understand the mistakes made by Nussbaum, one must look to her analysis of Rawls that led to her proposed solution of capabilities. Nussbaum's problems with Rawls originate at his beginning, with the original position itself. As someone who is concerned with the underrepresented and ignored sectors of society, mainly the disabled and animals, Nussbaum is extremely wary of Rawls' presentation of his original position and the veil of ignorance. As Nussbaum argues:

> In so conceiving of persons, Rawls omits from the situation of basic political choice the more extreme forms of need and dependency that human beings may experience, both physical and mental, and both permanent and temporary. This is no oversight: it is deliberate design. As we shall see, Rawls recognizes the problem posed by the inclusion of citizens with unusual impairments, but he argues that his problem should be solved at a later stage, after basic principles are already chosen. (Nussbaum 109)

Nussbaum here acknowledges again, perhaps without fully realizing it, that Rawls simply moves from the procedure down to the outcome when she states that he feels that there are issues that should be addressed later. Again, she aims for a reversal of this process, but she seems to underestimate the virtue of Rawls's beginnings in the macro rather than the micro. Nussbaum reacts negatively to the principle of the veil of ignorance by itself: "Thus, although Rawls's parties themselves pursue their own well-being, with no interest in the interests of others, the parties are explicitly not intended as models of whole people, but only as models of parts of people" (Nussbaum 103). By deciding on certain principles, however, (which would be done behind the veil of ignorance) before specific issues are addressed, it gives the society a place to base laws regarding the protection of the disabled and animals. Attempting to begin simply with the fact of their disadvantaged and marginalized nature, as Nussbaum does, gives the society little grounding to work with so that proper decisions can be reached.

In fact, in this argument, there seems to be room to reinvestigate Nussbaum's interpretation of Rawls's intentions. First, Rawls is very explicit about the fact that he treats his exercise as a "purely hypothetical situation characterized so as to lead to a certain conception of justice" (Rawls 11). This is an important fact to remember when discussing the original position of Rawls, because it means that one cannot simply extrapolate from the original position itself a sense of how the real world operates. Rawls intends for his exercise to present how a hypothetical society with a perfected sense of justice via its origins in the original position could potentially

function. It is a mistake to then take this picture and attempt to impose it on the world as it is now, or attempt to modify it in the sense that it fails to apply to the world as it is now.

Nussbaum is guilty of this very mistake when she states that Rawls simply refuses to include the sections of society that Nussbaum views as marginalized in his original position. With her previous statement regarding the individuals behind the veil of ignorance being "parts of people," she seems to indicate a problem for Rawls, whereas it is exactly what Rawls needs in order for his theory to function. He treats the people behind the veil of ignorance as essences of human beings that do not know what their full human selves will be once the veil is lifted, eradicating social and natural circumstances that forge difference and conflict. Not knowing their various alternatives makes the parties not fully human, or only mere parts. By eliminating all differences, the parties are free, according to Rawls, to see justice in its pure and perfected form.

Nussbaum, however, does not entirely agree with the elimination of these differentiating factors as he has described it. She believes that Rawls has forgotten to mention the elimination of disabilities from the parties in the original position. Nussbaum does not want the discussion behind the veil to be merely about distributive justice as it pertains to material gains. She also desires the discussion to account for those who cannot speak for or take care of themselves. She proposes: "So: let the parties of in the Original Position not know what the physical impairment they may or may not have; then, and only then, will the resulting

principles be truly fair to people with such impairments" (Nussbaum 113). The problem with Nussbaum's rejection is that Rawls does seem to address this very issue in his explanation of the original position.

Rawls clearly mentions a removal of "natural assets and abilities", meaning that he does make an effort to remove physical abilities from the equation (Rawls 11). In addition, Rawls makes it clear that there is a possibility for one to become disabled later in life, just as it is a possibility for one to become poverty-stricken later in life. This possibility leads Rawls to create his two principles of justice, as discussed in the previous section. As the second begins: "SECOND PRINCIPLE—Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit to the least advantaged…" (Rawls 266). This statement echoes his earlier sentiment of conferring advantage to those who further the good of society's poorer sectors (Rawls 64). Thus, Rawls seems to be deeply concerned with assisting the least advantaged, including the disadvantaged in terms of natural ability, which could very well be the marginalized peoples Nussbaum is concerned with. While Rawls does focus on theory of distributive justice in terms of material goods, there seems to be room in his theory of this hypothetical exercise to account for the disabled and disadvantaged.

Nussbaum's problems continue on from her possible misinterpretations of Rawls to the cracks in the foundations of her own proposed solutions. As Nussbaum makes her shift from the macro of the original position to the micro of certain social discrepancies, she bases her theory on a series of capabilities. She argues that the

list of capabilities, "is an account of minimum core social entitlements, and it is compatible with different views about how to handle issues of justice and distribution what would arise once all citizens are above the threshold level" (Nussbaum 75). She then goes through an extensive description of each of the capabilities, the abridged version here lists only the main capability for each point on her list:

> The Central Human Capabilities: 1)Life; 2)Bodily Health; 3)Bodily Integrity; 4)Senses, Imagination, and Thought; 5) Emotions; 6) Practical Reason; 7) Affiliation; 8) Other Species; 9) Play; 10) Control over One's Environment- Political and Material (Nussbaum 76-77).

This list that Nussbaum has created, however, is of course in need of grounding and justification, especially if Nussbaum is aiming for her theory to be applicable to a wide range of societies. To attempt to ground her theory of capabilities, Nussbaum turns to the notion of human dignity. She blatantly states, "…the political principles of the capabilities approach are supported by independent arguments about human dignity" (Nussbaum 91). Her foundation in human dignity is not far from Rawls' foundations in the pursuit of justice. As previously noted, Rawls believes there is a "natural duty to remove any injustices, beginning with the most grievous as identified by the extent of the deviation from perfect justice" (Rawls 216). Thereby, Rawls qualifys his exercise as a kind of natural inclination and natural duty to pursue. Nussbaum's base of human dignity for her capabilities, however, is not able to do the consistent work she needs it to throughout her argument.

At first, she begins with the notion of human dignity as seemingly inherent, that each human being has, "a life that has available in it 'truly human functioning'" (Nussbaum 74). The notion of this being inherent, however, changes throughout her work, specifically when she switches her attention to animals. Once she begins describing the duty that human beings have to protect the welfare and dignity of animals, it seems that human beings suddenly have an unnatural ability to provide a kind of dignity for an animal. This dignity, on the other hand, is not exactly the dignity that Mother Nature perhaps intended: "Moreover, …human intervention is actually necessary to maintain "the balance of nature" in many cases. Preserving species, for example, requires human action, even when the threat to the species is not human in origin" (Nussbaum 374). Here, human beings are able to step into the natural or "wild" world and right the possible wrongs. Nussbaum even goes so far as to suggest that humans intervene in predator-prey relationships and protect the prey from being eaten, when it certainly seems that the dignity of the predator is inherently tied to his skills as a hunter and killer. Thus, humans have the ability to impose, or even modify the meaning of dignity as it is related to the animal realm. She goes on to say that, "…we adopt a type of paternalism that is highly sensitive to the different forms of flourishing that different species pursue" (Nussbaum 375). In this sense, the "paternalism" that she is referring to borders on a way to provide dignity for an animal, as opposed to respecting the dignity that inherently already existed. Thus, Nussbaum's notion of human dignity serving as justification for her list of capabilities is not as solid as she hoped.

In addition, Nussbaum encounters the same problem that Rawls did in terms of justifying how her theory can be universally applied. Rawls first had to create the original position so that the version of perfected justice that is realized is done so without any inconsistency whatsoever. He proclaims that the essences of human beings that reside behind the veil of ignorance are free (due to the removal of all moral distractions such as wealth and intelligence) to not only agree, but to unanimously agree. Thus, the veil of ignorance makes a unanimous conception of justice possible (Rawls 120). Rawls uses this basis of a unanimous decision to further argue for how his theory could possibly be universally applied. The question is then raised as to how the individuals in the original position are able to unanimously agree, to which Rawls responds with the "thin theory of the good." This theory is Rawls's means of justifying the universality of his ideas, given that the theory is one that all individuals are connected, but must be behind the veil of ignorance to realize. As discussed in Section 2, Rawls notes this "thin theory" strives "to secure the premises about primary goods required to arrive at principles of justice" (Rawls 348). His stretch for a foundation, however, seems fairly loose in that this thin theory is no more solid or plausible than the hypothetical creation of the original position itself. This actual lack of foundation becomes a philosophical trope, to which Nussbaum also succumbs.

Nussbaum, with her questionable basis in human dignity, then tries to reach for the ability to be universally applicable through intuition. She very clearly states in her first chapter that, "The capabilities approach is fully universal: the capabilities

in question are held to be important for each and every citizen, in each and every nation, and each person is to be treated as an end" (Nussbaum 78). In order to support such a bold statement, she must be able to hold the capabilities approach to a general standard, meaning something that, while it may need slight adaptation as she concedes, can be universally judged. Unfortunately, Nussbaum is left with her theory being heavily attacked due to its seeming reliance on intuition. She even concedes this point:

> …this approach seems to rely on intuition to a greater degree than procedural approaches. […] We can agree that the capabilities approach does indeed rely on intuition… That is, some deep moral intuitions and considered judgments about human dignity do play a fundamental role in the theory, although they are never immune from criticism in the light of other elements of the theory. (Nussbaum 83)

Even as she attempts to avoid leaving this issue as an unresolved one, she again runs into the same criticism when she begins her discussion of the severely disabled members of society. Again she is forced to concede, "Only sentiment leads us to call the person in the persistent vegetative condition, or an anencephalic child, human" (Nussbaum 187). With notions like sentiment and intuition being the driving force of her capabilities and their foundations in human dignity, Nussbaum's theory is not able to fully make the argument that it originally set out upon—to change the discussion of how to achieve true justice and freedom from Rawls's social contract to the concept of capabilities.

While each of the philosophers Rawls and Nussbaum were concerned with essentially the same social issue, that of actualizing true justice, neither were able to fully realize that notion. Without a much more solid foundation than that of intuitions and sentiments, Nussbaum is not able to make the leap from the micro up to the macro, just as Rawls was not fully able to move from the macro down to the micro via his idea of the thin theory of the good guiding the original position. Until, therefore, a better universal can be found that works within both the micro and the macro, it seems that Rawls will be forced to remain hypothetical, and Nussbaum restricted to her reliance on intuitions.

SECTION 4

CONCLUSIONS, SOLUTIONS, AND POSSIBLE PROGRESS

> *I do not know what I may appear to the world, but to myself I seem to have been only like a boy playing on the sea-shore, and diverting myself in now and then finding a smoother pebble or a prettier shell than ordinary, whilst the great ocean of truth lay all undiscovered before me.*
>
> - Newton

After taking the journey from meta-ethics, to practical ethics, to the issues within practical ethics itself, the question clearly still remains of where philosophy can go from here. Following the analogy with the world of physics, it seems that philosophy must make two steps: it must fully discover and discuss the "fabric of ethics", as I will here call it, and it must learn to connect the conversations of macro theorists to those of micro theorists, and thus discover a kind of philosophical string theory. These ideas themselves are, of course, ones that could require several hundreds of pages of debate and investigation, but I would like to fully posit here, at the end of our journey, how the notion of utopia (in a variety of forms) and utopic vision could function as the first key to solving these problems.

Such a bold suggestion itself begs the next question—what utopia? And whose utopia? The first idea I would like to explore is the other half of the analogy itself: science. In recent years, philosophy has seen the emergence of the new field of moral psychology. This combination of philosophy and psychology works to explain, through science, exactly what I am interested in—how we are "pulled" by philosophical gravity to certain conclusions that seem absolute. With psychology,

the hypothesis is that our moral notions and inclinations could possibly be explained by the way the brain functions as an organ. In 2006, Jonathan Haidt, a professor of psychology at the University of Virginia, wrote a book entitled *The Happiness Hypothesis.* The purpose of his project was to find the true intersections between psychology and philosophy and examine whether or not we have already uncovered the next "Great Idea", but have been too segregated to realize it. As he explains to his readers:

> I am a social psychologist. I do experiments to try to figure out one corner of human social life, and my corner is a morality and the moral emotions. I am also a teacher…[and] to summarize the idea that our emotions, our reactions to events, and some mental illnesses are caused by the mental filters through which we look at the world, I could not say it any more concisely than Shakespeare: "There is nothing either good or bad, but thinking makes it so." I began to use such quotations to help my students remember the big ideas of psychology, and I began to wonder just how many such ideas there were. (Haidt pp. x)

Haidt then continues on through ten main ideas of both modern psychology and ancient philosophy, looking for any and all overlap. What he discovers, while not entirely shocking, does demonstrate how human beings and the human brain tend to naturally experience a desire for unity, and even utopia.

Haidt singles in on the one pivotal feature of human psychology that seems to be the catalyst (and hopefully the explanation) for our drive for moral clarity. As he is directly interested in how "you can take advantage of modern psychology to improve your life," he centers his entire work on a practical and foundational idea he found evident in both psychology and philosophy, namely that "the mind is divided into parts that sometimes conflict" (Haidt xi). This is an idea known to philosophy at it's very beginning, with the teachings of Plato ringing loudly in the background that Reason must control our Appetites. But, for Haidt, it seems that Plato did not just stumble upon something morally significant, but something that can be both scientifically tested, and now scientifically explained. He explains how the psychological picture of the mind is, "like a rider on the back of an elephant, the conscious reasoning part of the mind has only limited control of what the elephant does," (Haidt xi). The elephant, as the school of psychology has discovered, is the remnants of our animal brain, the pieces we kept with us through the journey of evolution.

As it turns out, the human brain is comprised mostly of material that we borrow from our relatives in the animal kingdom, and only small slivers of new, truly "human", components. The brain as an organ has developed forward, away from the brain stem, growing outward as more tasks have been required of it. In humans, at the very front of the brain now sits the "neocortex (Latin for 'new covering')...[which] is particularly interesting, for parts of it do not appear to be dedicated to specific tasks… Instead, it is available to make new associations and to

engage in thinking," (Haidt 10). Following this paradigm, perhaps here, in the neocortex, is where our moral inclinations, or our moral "center of gravity", reside. Given that it is the piece of our brains that makes us wholly human, that separates man from beast, maybe this frontal growth is a piece of the puzzle of what exactly is warping the "fabric of ethics". Haidt himself has this same hypothesis:

> This growth of the frontal cortex seems like a promising explanation for the divisions we experience in our minds. Perhaps the frontal cortex is the seat of reason: It is Plato's charioteer; it is St. Paul's Spirit. And it has taken over control, though not perfectly, from the more primitive limbic system—Plato's bad horse, St. Paul's flesh. (Haidt 10)

Here, Haidt proposes that we have discovered "the seat of reason", but it seems that if we have actually stumbled upon the "charioteer", of sorts, then we have discovered much more than the seat of reason—we have discovered the neurological location of morality itself. I make this distinction because there is a difference between a charioteer gaining control over the appetites, as the Platonic analogy that Haidt uses, and his previous description of the gray matter of the neocortex being able to, "make new associations and engage in thinking." Participating in the creation of wholly new thoughts and ideas is a far greater accomplishment than mere control over animal instincts, as it requires such things as forethought, questioning, and above all else a language in which to articulate such thoughts. Thus, if psychologists have physically located the piece of the brain that

allows us to not only control our animal instincts, but to challenge and question the world around us, then it seems that Haidt speaks to how psychologists located our natural center of ethics.

While the significance of this may seem almost self explanatory (meaning that if we have created language and argument then of course we must have a brain that is capable of doing so), in terms of the hypothesis proposed in this project, I believe this discovery carries a much larger weight. If the seat of reason is a real, physical organ, than the discipline of philosophy is not simply an interesting academic discussion, but is an actual expression and perfection of a physical drive. To put it differently, humans have long been aware that if we want to perfect ourselves physically, then we must exercise the body. Philosophers from the very beginning have believed that this same principle holds true of the mind, but if an ethical center of the brain is a true organ, then exercising it in order to achieve strength, perfection, and even growth, is an actual, physical necessity. Thus, the school of philosophy could come to be regarded as scientifically as the schools of psychology, biology, and chemistry. If the human inclination towards reason and ethics is as real and necessary as our inclination toward breathing or walking, then the discussion of a "fabric of ethics" is not merely an interesting academic exercise, it is an essential understanding of the area in which the "seat of reason" physically moves and grows.

While Haidt, as a psychologist, does not appear to jump that philosophically far ahead, he does speak to an extremely similar notion of the mind having a

"vertical" component. He directly claims "that the human mind perceives a third dimension, a specifically moral dimension that I will call 'divinity'…by our actions and our thoughts we move up and down on a vertical dimension" (Haidt 183-184). What Haidt wishes to call "divinity" I wish to call "moral truth", but the notion of a "vertical" movement of the mind into another dimension is essentially the same. He attributes this movement to the connection humans have to religion, which is an inherently ethical entity, but I view this third dimension of the mind not as a realm of god, but as the realm where the fabric of ethics exists.

Haidt, in his book, uses the analogy of the work *Flatland* by Edwin Abbot to explain the experience of vertical movement within one's mind, an analogy that seems to hold for both his religious hypothesis and my purely ethical one. *Flatland* tells the story of a two-dimensional square who lives in the nation of Flatland. The square one day encounters a sphere, who lives in Spaceland, and who is merely passing through Flatland on his journey. The square at first cannot understand how the sphere can seemingly minimize and enlarge himself at will (as he passes in and out of the two-dimensional plane as a circle). To explain to the square how this is possible, the sphere pulls the square up out of Flatland and into Spaceland, thus making him a cube. Upon the discovery of his new third dimension the square (now cube) is amazed at the entire world that existed outside of his own. As Haidt associates this story:

> We are all, in some way, the square before his enlightenment. We have all encountered something we failed to understand, yet smugly

> believed we understood because we couldn't conceive of the dimension to which we were blind. Then one day something happens that makes no sense in our two-dimensional world, and we catch our first glimpse of another dimension. (Haidt 183)

The moment of enlightenment, as experienced by the square, is exactly what seems to have happened to the field of ethics as it was faced with the dilemmas of the 1960's. Issues like civil rights were something that the field of meta-ethics simply could not explain, and so we had to make the move from Hart and Dworkin to the practical ethics of Nozick, Rawls, and Nussbaum.

What if, however, what the world of ethics did in this move was not actually pop up into a third dimension, as the square did in *Flatland*, but instead only shift to the right or the left into a new and different two dimensional field? While the move to practical ethics did seem to add in a third dimension, per say, of practical justice, it did not create for us (as Nussbaum duly notes) a truly holistic picture of the ethical world. Thus, rather than adding in an entirely new plane of thinking, practical ethics simply changed the parameters of the two dimensional plane and built upon it another branch of philosophical thinking. But if the experience of the square is one we all experience, as I believe it is, then there is still a kind of third dimension that we must discover. If practical ethics did not satisfy the drive for an ethical "theory of everything", then perhaps we are not truly popping up and seeing the third dimension as the square did. Perhaps what we need is something like the

sphere to help ethics out of the two dimensions, another branch of philosophy to pull ethics in the proper direction—aesthetics.

Human experience, as it is portrayed in all genres of art, has always been a source of both expression and illumination. Human beings have used art to communicate ideas, understand emotions, and perhaps soothe this dichotomy we feel between our rider and our elephant. As we all participate in this artistic activity, either as the artist or the audience, we are drawn into a kind of new experience and even a new world, much like the square of Flatland. Haidt sees a similar connection: "Virtue is not the only cause of movement on the third dimension. The vastness and beauty of nature similarly stirs the soul," (Haidt 200). Arguably, this "vastness and beauty of nature" is exactly what much of art is attempting to harness and understand. Haidt goes on to add that, "There are many other ways of getting such a foretaste [to spiritual experience]. People often refer to viewing great art, hearing a symphony, or listening to an inspiring speaker as (crypto) religious experience" (Haidt 201). The philosophical field of aesthetics has long been harboring this idea that art is a way to move along the vertical plane of the human mind, so the field of ethics could greatly benefit in a full lesson of true beauty.

Richard Wagner, one of the great philosophers and composers of the 19th century, was a subscriber to the idea of art as a means to experience something larger than oneself. In 1949 in his work *The Art-Work of the Future*, Wager seems to insert himself directly into the conversation at hand: "As Science melts away into the recognition of the ultimate and self-determinate reality, of actual Life itself: so

does this avowal to win its frankest most direct expression in Art, or rather in the *Work of Art"* (Wagner 73). Thus, long before the issues of the 1960's fully brought about the rise of practical ethics, and before the field of moral psychology (and even psychology in general) was invented, Wagner deeply understood and preached how man must connect to something larger than himself, to Life itself, and that the tool for doing so is art. Possibly because he was a great artist himself, Wagner hit the nail directly on the head as to why ethics, and even science, must look to art as the next step to connecting to truth. He later expounds, "But as dancer, tone-artist, and poet, he still is one and the same thing: nothing other than *executant, artistic Man, who, in the fullest measure of his faculties, imparts himself to the highest expression of receptive power"* (Wagner 189). This "receptive power" that Wagner describes seems to be a kind of artistic connection to the ability to move along a third dimension within the mind. The receptive power of the artist combined with the idea of art as the most direct expression of Life in the previous statement, speak to an ability of art, and the process of creating works of art, to be the vessel toward a possible "divinity" or "moral truth".

In more concrete terms, and in another work of Wagner, *Art and Revolution*, we find a direct discussion of a journey along a third dimension. He directly states: "For it is sure that where honour and truth are really present, there is also true Art at hand," (Wagner 45), thus confirming that if one is in the presence of the true virtues of "honour and truth" then Art must be far away. If we can connect art to the realm of the virtues, then it seems that is a perfect vehicle to travel along a vertical

dimension of ethics. Wagner later waxes poetic that, "Only the *Strong* know *Love;* only Love can fathom *Beauty*; only Beauty can fashion *Art*" (Wagner 57). While "love" and "beauty" escaped the discussion of the practical ethics of Nozick and Rawls, the field of ethics as begun in Socrates and Plato has always considered such qualities as ethical perfections, or Forms. After writing these words, however, Wagner encountered his largest philosophical influence—Arthur Schopenhauer. While Wagner wrote *Art and Revolution* and *The Art-Work of the Future* before he read Schopenhauer's *The World as Will and Representation,* he would be pleasantly surprised to find extremely similar ideas about art, specifically music, residing in Schopenhauer's work. In the third book of *The World as Will and Representation*, Schopenhauer asserts, "Music, on the other hand, gives the innermost kernel preceding all form, or the heart of things," (Schopenhauer 263). Schopenhauer agreed with Wagner's assessment of art being able to connect the individual to higher ideals, to be able to move along the "vertical".

The world of Schopenheur, however, was a different picture than anything previously encountered in this project. Schopenhauer, as he explains in *The World as Will and Representation*, views the world as being controlled and masterminded, in a way, by the will. This will, via willing, creates everything we experience in the world, including our own human impulses. To put it simply, "The world is representation," (Schopenhauer 3). While I do not intend to explain all of the inter-workings of Schopenhauer's theories as a part of this discussion, I do believe it is important to understand that Schopenhauer had an even more vested interest in

"vertical" movement. Given his theory of the world as "representation", any sort of "horizontal" movement in a Schopenhauerian world is merely moving through the fabrications of the will, and even affirming the will. Needless to say, a world that is entirely representation is not truly a world worth living in at all; thus, "vertical" movement was something essential for Schopenhauer. He could see, as Wagner did, that music had the capacity to move an individual out of the world of representation and allow one to see through the will's façade:

> For, as we have said, music differs from all the other arts by the fact that it is not a copy of the phenomenon, or, more exactly, of the will's adequate objectivity, but is directly a copy of the will itself, and therefore expresses the metaphysical to everything physical in the world, the thing-in-itself to every phenomenon. (Schopenhauer 262).

Thus, while Schopenhauer may have seen the need for enlightenment in a different light than any of the philosophers discussed thus far, his musings on music remain highly significant. He discusses a very literal jump upward, or through, to another realm altogether. For him this other realm is not merely an interesting hypothesis, but is a necessarily real location. In addition, the ability to see through the world of representation to this will-less utopia, per say, was a philosophical necessity.

While Schopenhauer here adds a level of urgency to the task at hand, Wagner again adds another element—emotion. Up until this point, we have discussed the transcendent powers of music in terms of a connection to a truer kind of Life, or to nature itself. Wagner also sees, however, room for music to connect the individual to

a kind of transcendent emotional experience. While music can often be described as "moving", what Wagner describes is far beyond any kind of expression of poignancy. What Wagner sees is the ability for music to stir us to such a level that we are actually able to experience premonitions of a sort. He argues, "We have already gained from the Orchestra the capability of awaking forebodings and remembrances" (Wagner 335), and later continues, "Evolved and vindicated, before our eyes, by the recollection of an earlier emotion; directly moving, and surely influencing the sympathetic Feeling, by its sound (Wagner 328). This aspect of music as a way of "awakening forebodings and remembrances" is particularly interesting as it seems to directly echo the initial utopian that we have seen connecting to the argument throughout—Plato.

As previously discussed in Section 2, Plato believed that it was through a process of recollection that one initially connects to the Forms. The recollection that Socrates describes in the *Phaedo* is even one that he believes takes place from birth. When we go back to our original beginnings, Socrates finds that:

> Then before we began to see of hear or otherwise perceive, we must have possessed the knowledge of the Equal itself if we were about to refer our sense perceptions of equal objects to it, and realized that all of them were eager to be like it, but were inferior. (Pheado 75b)

The knowledge of the Equal is then the knowledge of the Form of Equal, meaning that we judge all other objects as wanting to be like the Form, but they inherently fail since the Forms are the essence of perfection. The Forms, in short, are the

perfected version of every value, such as justice, moderation, beauty, etc. In fact, the Forms, as pure entities, are also immune to change. As Socrates describes, "each of them that really is, being uniform by itself, remain[s] the same and never in any way tolerate[s] any change whatever" (Pheado 78d). The Forms, therefore, are the epitome of objectivity, meaning that they are the purest and most universal standard to which anything could be held.

The Forms also exist in a pure realm, which souls also exist in before they are born, hence the ability to recollect from birth. The recollection that takes place later in life is then an attempt to reconnect with the Forms as we knew them before birth:

> …when the soul investigates itself it passes into the realm of what is pure, ever existing, immortal and unchanging, and being akin to this, it always stays with it whenever it is by itself and can do so; it ceases to stray and remains in the same state as it is in touch with things of the same kind, and its experience then is what is called wisdom… (Phaedo 79d)

This pure realm of the Forms seems to be, in essence, the very utopia that this project has been striving toward. It is then through this journey to wisdom, the soul finds connection to this utopia, and thus possibly to the principles to which Dworkin was referring, or the "thin theory of the good" that Rawls was describing.

Perhaps it is this pure realm, therefore, that creates the warp in our fabric of ethics. Given that Plato has the foundational thoughts that have been working throughout this exercise, he seems to be our most promising clue as to how each

philosopher sits and is affected by this hypothetical "fabric". To continue the analogy to physics, what Einstein realized was missing was the 4th element of time within the calculations of the movements of objects in space. For philosophy, we have explored up until this point how the aspect of utopia could be a useful "4th dimension" of sorts to view the field clearly. To review: we have seen how Hart's complete lack of utopic vision rendered his exercise nearly meaningless. We then saw how Dworkin's insertion of morality improved the work of Hart, but yet he still struggled without a solid vision on which to attach his theories. We then moved into the realm of practical ethics, and in doing so examined the greatly differing utopic ideals of Nozick and Rawls. While they each were clearly working with higher ideals in mind, both fell short of their goals. Rawls in particular, given that he simply could not give an account of the forces that were making this utopia possible. We then saw how even practical ethicists with similar opinions on utopia, given their notions of freedom and justice, were still unable to effectively communicate and work toward a productive utopic end. Thus, even with this "4th dimension" added, we still need an ethical "theory of everything" that creates an ability to move between the worlds of the micro and the macro. Nussbuam and Rawls demonstrate the breakdown that occurs when attempting to move between these two worlds, and thus the need for an even better understanding of the arena in which ethics exists.

In this section, we have now examined several possibilities for how we could better connect to and understand the utopia that seems to be missing—psychology and art—and how, yet again, Plato is perhaps describing the world in which the

utopia itself exists. I will posit here again, after we have now gone through this exercise, the chart from the introduction (Figure 1). We can now see why the meta-ethicists sit on the outer edge, and why the utopic theorists described in this section sit much closer to the middle. The question remains as to what exactly sits in the middle of the diagram creating the force that we feel as a kind of "ethical gravity". Each of the philosophers discussed here are clearly being pulled in a specific direction, and we have seen different methods as to how to get closer to connecting to the "celestial body" creating this gravity, but I can only propose here that more investigation, via any and all of the avenues here discussed, must be done. The best theory this project can produce for what warps the ethical fabric is something close to the realm of the Forms proposed by Plato. Plato's theories seem to not only compliment and better each of the philosophies discussed, but they also do the best job of describing the kind of object that could create this kind of intense gravitational sensation—the perfected virtues of an otherworldly realm that we can only aspire to fully understand. Given that this notion gives us both utopic ideals and virtues, and an explanation for why we cannot fully articulate them, it seems to be the most accurate theory we have hit upon yet. Thus, it is Plato's theory of morality that seems to not only weave the fabric of ethics from its start to its current state, but also give us the picture that I am proposing (Figure 1), of how we are gravitationally pulled to discover utopic ideals.

Here, I must defer to the words of Einstein himself. At the end of 1944, Robert Thornton, a beginning professor at the University of Puerto Rico, wrote to

Einstein to ask for his thoughts on introducing "as much of the philosophy of science as possible" into his physics teachings (Thornton to Einstein, 28 November 1944, EA 61-573). Einstein replied:

> So many people today -- and even professional scientists -- seem to me like somebody who has seen thousands of trees but has never seen a forest. …[The] independence created by philosophical insight is -- in my opinion -- the mark of distinction between a mere artisan or specialist and a real seeker after truth. (Einstein to Thornton, 7 December 1944, EA 61-574)

If I could close on any remark, it would be to echo this sentiment: that in order to not be mere artisans or clever thinkers, and to be true seekers of wisdom, we must acknowledge the ethical forces affecting the world and work tirelessly toward elucidating the utopia to which we are being gravitationally drawn. In short—we must work to discern our philosophical forest.

WORKS CITED

Arden, John Boghosian. *America's Meltdown: The Lowest-Common-Denominator Society.* Santa Barbara: Greenwood Publishing Group, 2003.

Brewster, Sir David. *Memoirs of the Life, Writings, and Discoveries of Sir Isaac Newton, Volume 2.* Boston: Adamant Media Corporation, 2001.

Dworkin, Ronald. *Taking Rights Seriously.* Cambridge: Harvard University Press, 1978.

Epicurus. *The Essential Epicurus: Letters, Principal Doctrines, Vatican Sayings, and Fragments.* Amherst: Prometheus Books, 1993.

Green, Brian. *The Elegant Universe* http://www.pbs.org/wgbh/nova/elegant/everything.html

Haidt, Jonathan. *The Happiness Hypothesis*. New York: Perseus Books, 2006.

Hart, H.L.A. *The Concept of Law,* Second Edition. Oxford: Oxford University Press, 1994.

Newton, Sir Issac. *The Mathematical Principles of Natural Philosophy,* Trans. by Andrew Motte. New York: Daniel Adee, 1846.

Nozick, Robert. *Anarchy, State, and Utopia.* New York: Basic Books, 1974.

Nussbaum, Martha. *Frontiers of Justice.* Cambridge: The Belknap Press of Harvard University, 2006.

Plato. *Complete Works.* Ed. John M. Cooper. Indianapolis: Hackett Publishing, 1997.

Plato. Five Dialogues: *Euthyphro, Apology, Crito, Meno, Phaedo*. Trans. by G.M.A. Grube. Indianapolis: Hackett Publishing, 2002.

Plato. *Gorgias*. Trans. by James Nichols Jr. Ithaca: Cornell University Press, 1998.

Plato. *The Laws.* Trans. by Alfred Edward Taylor. Charleston: Forgotten Books, 1960.

Plato. *The Republic.* Trans. by Allan Bloom. New York: Basic Books, 1968.

Rawls, John. *A Theory of Justice*, Revised Edition. Cambridge: Harvard University Press, 1999.

Schopenhauer, Arthur. *The World as Will and Representation*, *Volume 1*. Trans. by E. F. J. Payne. New York: Dover Publications, 1969.

Schweitzer, Albert. *Out of My Life and Thought, An Autobiography*. Baltimore: The Johns Hopkins University Press, 1998.

Shermer, Michael. *The Science of Good and Evil.* New York: Times Books, 2004.

Stanford Encyclopedia of Philosophy. "Einstein's Philosophy of Science", 2004. http://plato.stanford.edu/entries/einstein-philscience/

Stanford Encyclopedia of Philosophy. "Metaethics", 2007. http://plato.stanford.edu/entries/metaethics/

Stanford Encyclopedia of Philosophy. "The Principle of Beneficence in Applied Ethics", 2008. http://plato.stanford.edu/entries/principle-beneficence/

Terrell, Timothy. Class Lecture. Jurisprudence. Emory Law School, Atlanta, GA. Fall 2008.

Wagner, Richard. *Opera and Drama*, Trans. by William Ashton Ellis. The Wagner Library, 1852. http://users.belgacom.net/wagnerlibrary/prose/

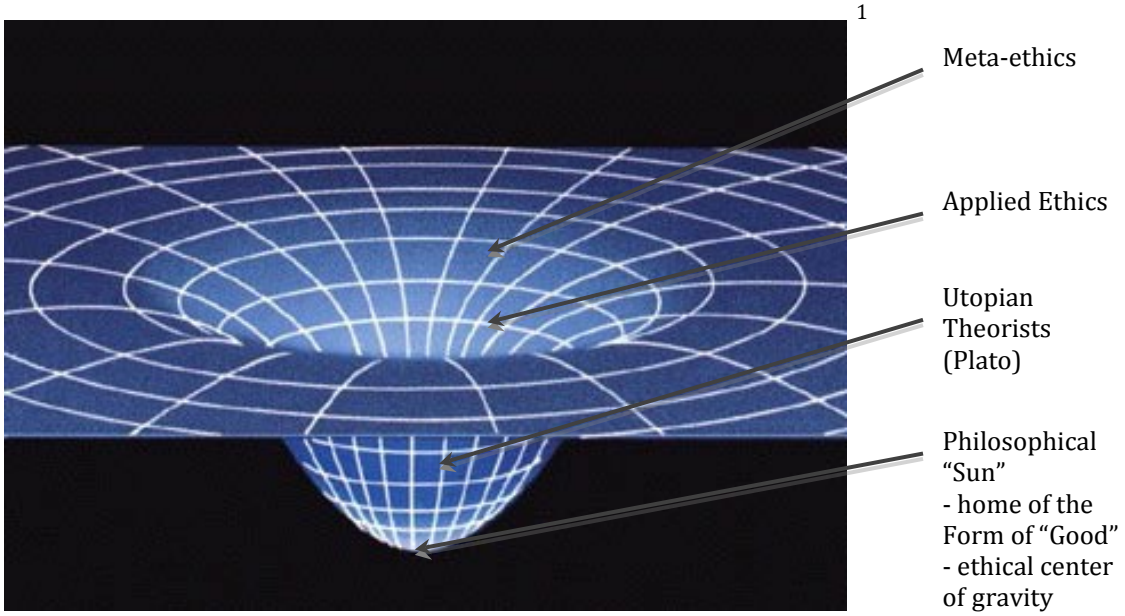
Wagner, Richard. *The Art-Work of the Future and Other Works*. Trans. by W. Ashton Ellis. Lincoln: University of Nebraska Press, 1993.

Wilde, Oscar. "The Soul of Man Under Socialism." Whitefish: Kessinger Publishing, 2004.

APPENDIX

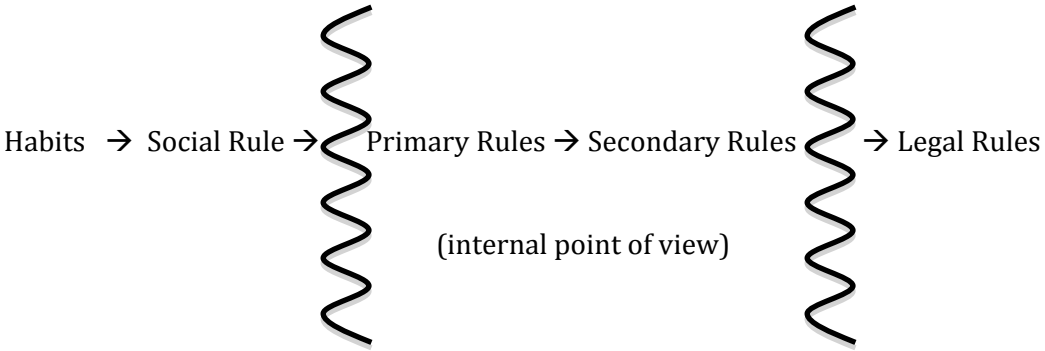
FIGURE 1

THE FABRIC OF ETHICS



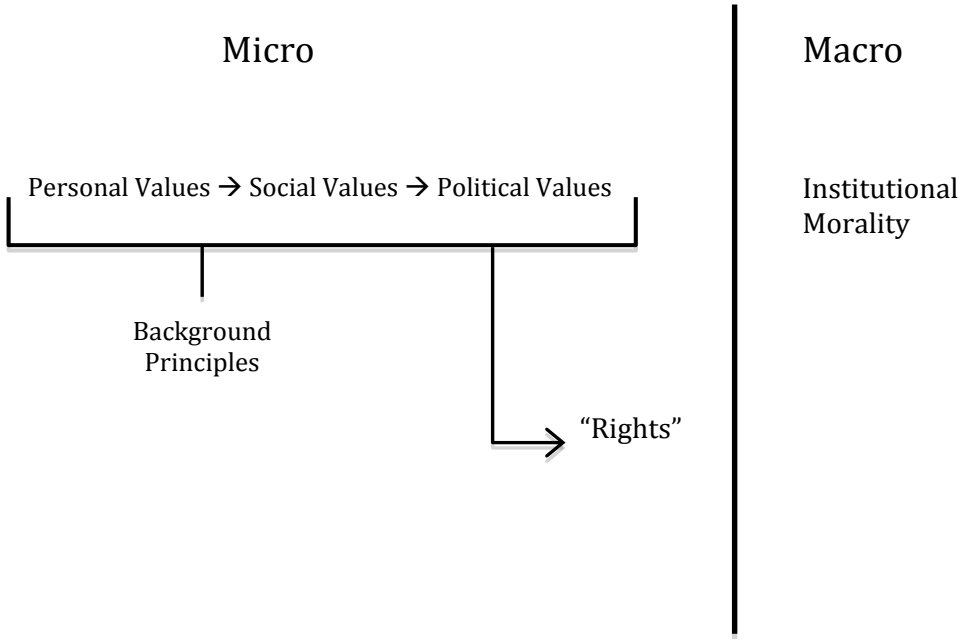
[1] Image found at: http://realityshifters.com/pages/articles/timeshifting.html

Figure 2.1
Creation of Law
According to Hart[1]



1. Terrell, Class Notes

Figure 2.2
Creation of Law According to
Dworkin[2]



2. Terrell, Class Notes

FIGURE 3.1

THE LINE OF RIGHTS FOR NOZICK

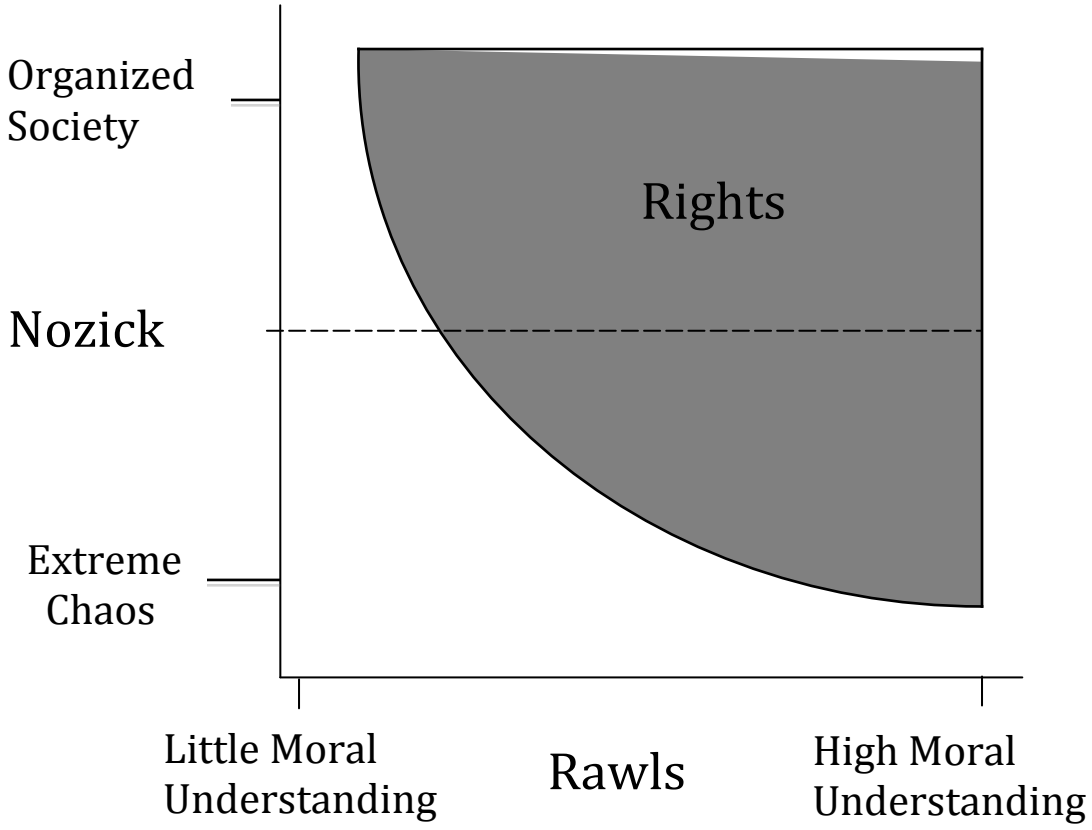


FIGURE 3.2

THE LINE OF RIGHTS FOR RAWLS

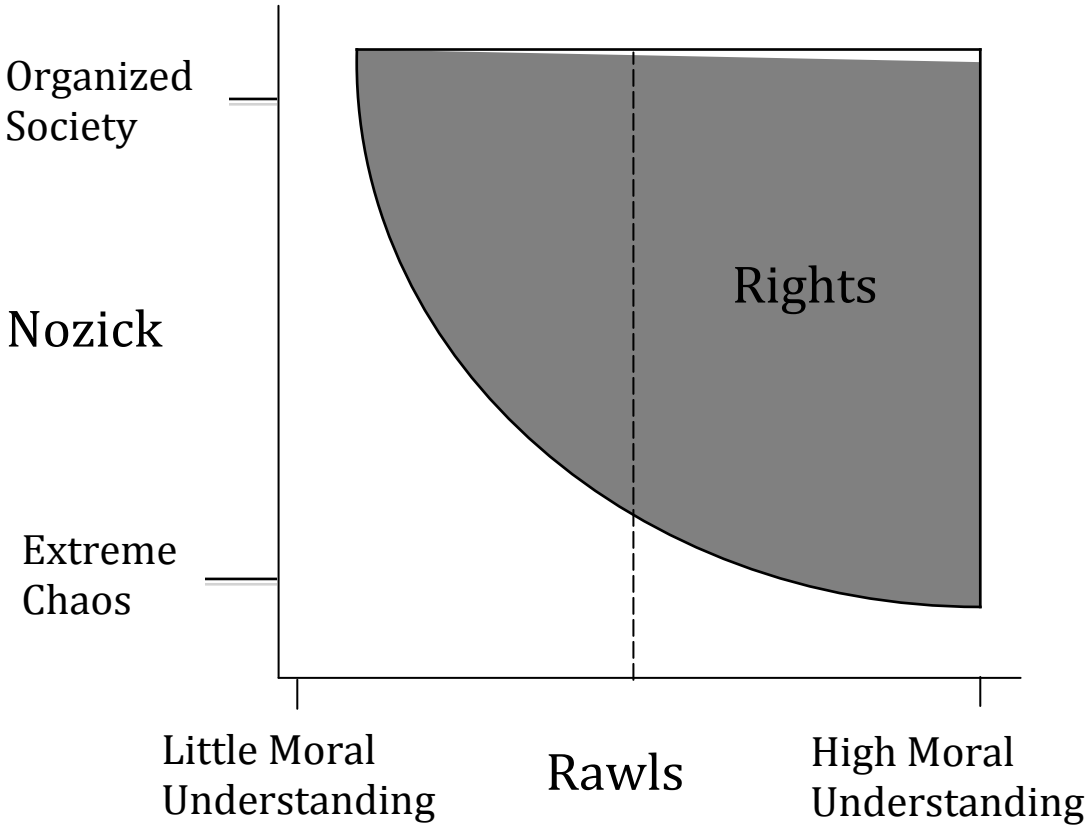


FIGURE 3.3

THE PERFECTED VERSION OF BOTH