

Sacrifice and Sacred Honor: Why the Constitution is a "Suicide Pact"

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SACRIFICE AND SACRED HONOR: WHY THE CONSTITUTION IS A “SUICIDE PACT”

Peter Brandon Bayer*

ABSTRACT

Most legal scholars and elected officials embrace the popular cliché that “the Constitution is not a suicide pact.” Typically, those commentators extol the “Constitution of necessity,” the supposition that Government, essentially the Executive, may take any action—may abridge or deny any fundamental right—to alleviate a sufficiently serious national security threat. The “Constitution of necessity” is wrong. This Article explains that strict devotion to the “fundamental fairness” principles of the Constitution’s Due Process Clauses is America’s utmost legal and moral duty, surpassing all other considerations, even safety, security and survival.

The analysis begins with the most basic premises: the definition of morality and why nations must be moral. This Article defends deontology: the philosophy that because moral principles are *a priori*, they must be obeyed regardless of terrible outcomes. Such is the sacrifice demanded by morality. As most theorists and politicians favor some form of consequentialism (the theory that the moral answer is the one that

* Lawyering Process Professor, William S. Boyd School of Law, University of Nevada, Las Vegas. Ever since I first heard the adage, “The Constitution is not a suicide pact,” nearly forty-five years ago, I have wanted to write a thoroughgoing, plausible defense of the counter-intuitive proposition that, in fact, it would be better for the Nation to perish than to betray the fundamental principles of decency that the Constitution commands not simply as a national aspiration, but at the Nation’s highest law. Feeling at last ready to try, I hope this work fulfills that ambition.

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produces the most happiness), the defense of pure deontology is thorough. Next, this Article links deontology directly with the American Revolution by demonstrating that the Founders were deontologists who asserted in the Declaration of Independence that government is legitimate only if it governs according to eternal moral precepts. They pledged the new nation’s “sacred honor” to uphold steadfastly the principles of moral government.

Aware of their imperfections, the Founders instructed their successors to improve the moral philosophy underlying the Declaration. The deontology of Immanuel Kant expresses the best general paradigm of morality. Kant famously explained that all persons and societies share an overarching moral duty to respect the innate dignity of every human being no matter what sacrifice that duty may entail. Kantian ethics clarify why moral abidance is more important than life itself. Because it is the superior moral theory that the Founders sought, Kant’s “dignity principle” must delimit the Constitution which, as explicated herein, is the legal iteration of the Declaration. This Article’s concluding discussion of the Constitution, particularly its due process precedents, explains why the Kantian approach—sacrifice and honor—debunks the Constitution of necessity, proving that the Constitution *is* a “suicide pact.”

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INTRODUCTION

To be a *true constitution*, that which a society calls its constitution must enforce values so imperative, so fundamental, that the constitution comprises not only a way to live but more profoundly, a reason to die. Customarily through, for example, military service, individual citizens or groups of citizens may be required to risk their lives to preserve their constitution and the nation over which it presides. *However, a true constitution rightfully demands that the entire constitutional order—the whole society regulated by that constitution—risk its own demise rather than betray the essential precepts that the constitution embodies.* Only principles of such magnitude warrant inclusion in the supreme document of a particular people.¹

¹ See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that the U.S. Constitution is the supreme law of the United States); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–79 (1803). Certainly, it may please drafters to include some particulars not essential to

Simply believing that a particular constitution is worth dying for, however, is not enough. To be a *legitimate constitution*—to actually be worthy of such communal sacrifice—the given constitution must be moral; that is, both designed to enforce and actually capable of enforcing the abiding moral duties that demarcate legitimate from illegitimate governments.

Pursuant to the character of true and legitimate constitutions, the Constitution of the United States defines who we are, what we are and, most importantly, why we are. Our Constitution purports to set the governing *minima* without which no society may be legitimate. Accordingly, and quite deliberately, while a legal document, the Constitution is a profoundly moral thesis as well. It could not be otherwise because the Constitution's overarching endeavor is enforced morality, specifically “fundamental fairness” via due process of law² which, as Justice Felix Frankfurter aptly enthused, is “ultimate decency in a civilized society”³ America's validation stems from the morality of the Constitution and how steadfastly we maintain it.⁴

In contravention of our constitutional duty is the long-standing chestnut: *the Constitution is not a suicide pact*.⁵ Of course, no one would argue that the Constitution is literally a “suicide pact,” meaning the Constitution requires those governed thereunder to kill themselves.⁶ Nor would reasonable theorists claim it to be a suicide pact

the very definition of their given society. But, a constitution by “[i]ts nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *see also, e.g., Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

² *See infra* Part IV.

³ *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring) (arguing that the Fifth Amendment's privilege against self-incrimination is not applicable via the Fourteenth Amendment to state prosecutions), *overruled by Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

⁴ Of course, within a domain of moral society administered by a moral government, individuals may indulge their selfish interests and personal preferences. This idea was, as accented shortly, immortalized in the Declaration of Independence as “the pursuit of Happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). However, specific pursuits of happiness do not legitimize a government. Instead, legitimacy stems from the moral framework in which persons pursue their selected happiness.

⁵ *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”); *see also Haig v. Agee*, 453 U.S. 280, 309–10 (1981); *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”); *Doe v. Boland*, 630 F.3d 491, 496 (6th Cir. 2011) (“If the Constitution is not a ‘suicide pact’ . . . it is not an instrument of crime either.”) (citations omitted); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002).

⁶ A “suicide pact” is “an agreement between two or more *people* to commit suicide together.” THE SHORTER OXFORD ENGLISH DICTIONARY 3099 (6th ed. 2007).

“in the sense that the Constitution was meant to fail.”⁷ Rather, commentators apply the *not a suicide pact* metaphor to support the Constitution of necessity, the premise that if circumstances raise significant jeopardy and lesser measures appear unavailing, government may do virtually anything—abridge or suspend any liberty—both to preserve the nation and to ensure the well-being of its institutions.⁸

Several critics challenge that theory’s empirical bases arguing, for example, that the definition of “necessity” is overinclusive.⁹ Critics further argue that the Constitution of necessity betrays pivotal American principles of law, rights, dignity and separation of powers.¹⁰ However, criticism usually stops well short of accepting the Constitution as a metaphorical “suicide pact,” averring instead that necessity is the ultimate “compelling state interest,” overpowering liberty *if* the exigency is dire enough.¹¹

I join the very few¹² who respond that, even if limited to situations of actual imminent danger to the very continuation of American society, *necessity* as the Constitution’s “first principle” defies the Constitution’s true moral nucleus that explains and justifies our nation: due process of law. While many articles challenge the Constitution of necessity as anathema to the inherent nature of American government,¹³ such arguments alone cannot explain why, under sufficiently urgent circumstances, we ought not to abandon *all* constitutional liberty if that is what it takes, for however long it takes, with the earnest intent to restore liberty the very moment the danger has passed.¹⁴

⁷ Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299, 1319 (2004).

⁸ See *infra* notes 478–83 and accompanying text.

⁹ See *infra* notes 509–16 and accompanying text.

¹⁰ See, e.g., Rosa Ehrenreich Brooks, *Conceiving A Just World Under Law: Panel Summary, Remarks at the Ninety-Eighth Annual Meeting of the American Society of International Law* (Apr. 1, 2004), in 98 AM. SOC’Y INT’L L. PROC. 126, 128 (2004).

¹¹ See, e.g., David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1333 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* (2007)) (“Few constitutional rights are absolute, and civil libertarians widely accept that as the government’s interests grow more compelling, it has broader leeway to infringe on liberties.”).

¹² See, e.g., Brooks, *supra* note 10, at 128 (“[I]f that phrase is used to suggest that we should jettison the idea of the rule of law in exchange for a possibly illusory security, then I would suggest that perhaps the Constitution *was* in fact a ‘suicide pact’ of sorts—and so it should be.”); Prakash, *supra* note 7, at 1319.

¹³ See, e.g., Brooks, *supra* note 10, at 128.

¹⁴ Thomas Jefferson, for instance, opined, “[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.” Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 11 THE WORKS OF THOMAS JEFFERSON, 146 (Paul Leicester Ford ed., Fed. ed. 1905).

Accordingly, this Article proposes a deeper grounding to explain why the Constitution is a suicide pact. Specifically, *morality*, the very fabric of the Constitution, forbids us from abandoning our basic moral-societal precept of due process, even when faithful abidance is extraordinarily dangerous. We must understand that more than simple liberty is essential to our constitutional government. *Rather, we must appreciate that government ensures liberty as integral to its unalterable duty to be moral.* Liberty is not an end in itself, but a means; preserving morality is the end, the absolute goal of government. Thus, in a unique figurative sense, the Constitution *must be* a suicide pact, for as the prominent ethicist Immanuel Kant nobly appreciated regarding morality's overarching context, "Let justice be done even if the world should perish."¹⁵

The proof takes several steps. Part I undertakes a thorough review of deontology, the philosophy arguing—correctly, I believe—that morality is transcendent, a set of *a priori* principles discernable through reason. Morality, then, does not care what the possible outcomes of a particular moral problem may be.¹⁶ Pursuant to deontological philosophy, the "sacrifice," to which the title of this Article refers, is the duty to abide by morality no matter what the cost.¹⁷

Thereafter, Part II argues that this Nation's originators were deontologists who declared in the Nation's founding document that government is legitimate only insofar as it safeguards morality derived from "the Laws of Nature and Nature's God," manifested as "unalienable Rights that among these are Life, Liberty and the pursuit of Happiness."¹⁸ For the preservation of those moral principles, the Founders pledged their "Lives," "Fortunes," and "sacred Honor,"¹⁹ meaning that it is the duty of *all* Americans—their "sacred Honor"—to sacrifice, if necessary, their lives and property to defend legitimate government. We thus discover an interesting, informative and useful provenance linking the sacrifices attendant to deontological morality with the birth of the United States.²⁰

The Founders understood that their appreciation of, and dedication to, morality was incomplete—a confession analysts find apt as evinced by the presence of slavery,

¹⁵ IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY, 102 n.16 (Pauline Kleingeld ed., David L. Colclasure trans., Yale Univ. Press 2006). Because due process is the core of American justice, of equal relevance is Kant's similar warning, "if justice goes, there is no longer any value in men's living on the earth." Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1540 (1996) (quoting IMMANUEL KANT, *Metaphysical First Principles of the Doctrine of Right*, in THE METAPHYSICS OF MORALS 33, 141 (Mary Gregor trans., 1991) (1797)).

¹⁶ See *infra* Part I.

¹⁷ Because most ostensible deontologists believe in a Constitution of necessity if the emergency is sufficiently grave and because arguing that outcomes ultimately are irrelevant sounds peculiar at the very least, the deontology section is methodical and detailed. See *infra* Part I.

¹⁸ THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

¹⁹ *Id.* at para. 32.

²⁰ Additionally, for fuller understanding, Part II opens with the abstract idea of *honor* to preface the meaning of "sacred Honor" under the Declaration. See *infra* Parts II.A–C.

along with several other strikingly unethical political and pragmatic arrangements surrounding both the Declaration and its later legal iteration, the Constitution. Indeed, the Founders expected future generations to enrich the moral bases of America, including repudiating ideas and practices that the Founders themselves accepted.²¹ Part III asserts that the ethical theory of Immanuel Kant, as contemporarily understood, presents the improved moral philosophy hoped for by the Founders. Written shortly after the American Revolution, Kant's theory of dignity explains why obeying morality is more important than life itself;²² a principle applicable not only to persons and groups, but also to nations and societies. Kantian ethics, therefore, explicate that the highest principle is not survival but, rather, moral rectitude.

Kant's ideas should control the understanding of the Constitution, most particularly the commands of due process of law, as Part IV explains. Although never explicitly cited as authority, Kant's dignity principle informs modern due process jurisprudence, which is sensible because the Constitution was drafted to enforce the moral quest commemorated in the Declaration. The comfortable application of Kantian ethics to constitutional due process demonstrates that, in the singular sense described above, the Constitution should be, must be and is a suicide pact.

I. THE DISPUTE BETWEEN DEONTOLOGY AND CONSEQUENTIALISM

It may seem counterintuitive, indeed strange, to argue that abstract principles matter but, ultimately, consequences do not. Yet, as explained next, deontology is the correct approach to understanding both the nature and the functions of morals. Therefore, consequentialism, the philosophy that morality and its applications depend on and may be comprehended entirely by the consequences they produce, is incorrect. In fact, as I attempt to show, the initial oddness and discomfort with discarding consequences as the paradigm for moral decision-making becomes pleasing, even liberating.²³

Doubtless, “[t]he referents of both labels [deontology and consequentialism] . . . are usually caricatures, used to oversimplify philosophical positions for the sake of convenience and less innocently to provide people with a plausible pretext for rejecting ideas they do not understand.”²⁴ Nonetheless, the fundamental dispute of whether principles must dominate, or are dominated by, consequences continues to fume among professed deontologists, avowed consequentialists²⁵ and those who espouse hybrid approaches.²⁶ To prove that the Constitution is a suicide pact, I must begin by verifying the jarring proposition that ultimately consequences do not matter.

²¹ See *infra* notes 303–14 and accompanying text.

²² See *infra* Part III.A.

²³ For simplicity's sake I use as synonymous *ethics* and *morals*, and *ethical* and *moral*.

²⁴ ALLEN W. WOOD, *KANTIAN ETHICS* 259 (2008).

²⁵ See, e.g., *id.* at 259–73 (describing the dispute between consequentialists and deontologists).

²⁶ See, e.g., SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS* (1982).

The pivotal disagreement between deontology and consequentialism concerns whether morality comprises *the right*—transcendent, compulsory principles applicable come what may—or *the good*—the result that produces the most pleasing outcome.²⁷ Deontologists believe in “the rights of rational beings as ends in themselves,”²⁸ while consequentialists urge that *the good is the right*.²⁹ Consequentialism, therefore, avers moral norms are knowable only by assessing and contrasting the consequences—the effects—of possible actions in a given situation.³⁰ As Professor Blum summarizes, “Consequentialists maintain that choices are not morally ‘good’ or ‘bad’ in themselves, but should instead be assessed solely by virtue of the outcomes they bring about, that is, by their consequences.”³¹ Accordingly, consequentialists aver that the proper consequence—outcome—of any morally uncertain instance is the one that promotes the greatest *good*, meaning the greatest *happiness*.³² “[O]f all the acts that a person can perform, the [morally] right act is the one that produces the greatest amount of happiness among human beings, counting everyone equally, and taking into account long-range as well as short-range consequences of actions.”³³

Certainly, the quest for happiness animates utilitarianism, “[t]he paradigmatic strand of consequentialism”³⁴ The renowned utilitarian John Stuart Mill notably avowed that the “fundamental value is the general happiness, pleasure, and the absence of pain, or what Mill also calls the ‘theory of life’ on which the ‘utilitarian theory of morality’ rests.”³⁵ Consequentialism, as exemplified by classic utilitarianism, then, “view[s] people as subjects of desires and inclinations and assign[s] value to their satisfaction as such”³⁶ It follows that, pursuant to consequentialism,

²⁷ See WOOD, *supra* note 24, at 261–62.

²⁸ *Id.* at 265.

²⁹ *Id.* at 262.

³⁰ In particular, consequentialists generally believe (as do many deontologists) that “purposiveness, the setting of ends to be produced, is the most fundamental feature of all action, but [consequentialists] differ . . . in taking this feature also to determine the nature of the values grounding ethical theory.” *Id.* at 259 (emphasis added).

³¹ Gabriella Blum, *The Laws of War and the “Lesser Evil,”* 35 YALE J. INT’L L. 1, 38 n.166 (2010).

³² See, e.g., WOOD, *supra* note 24, at 262.

³³ William Powers, *On the Priority of Justice*, 63 TEX. L. REV. 1569, 1569 (1985) (reviewing MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982)) (footnote omitted).

³⁴ Blum, *supra* note 31, at 38 n.166. Indeed, commentators usually identify utilitarianism as the most prevalent type of consequentialism. See, e.g., JEFFRIE G. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 23 (1994); Bailey Kuklin, *The Morality of Evolutionarily Self-Interested Rescues*, 40 ARIZ. ST. L.J. 453, 477 (2008); Powers, *supra* note 33, at 1569–70.

³⁵ WOOD, *supra* note 24, at 55 (quoting JOHN STUART MILL, *UTILITARIANISM* 7 (George Sher ed., 2001)).

³⁶ R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 284–85 (2002) (quoting JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* 198 (Barbara Herman ed., 2000)).

identifying moral duties is empirical, determined by some measurement of individual or aggregate happiness.³⁷

Not without aptness, critics aver that rebukes are almost a waste of ink because consequentialism is facially implausible.³⁸ Nonetheless, many profound theorists earnestly tether their deeply held conceptions of what society should be and how people should interact to the precept that promoting the “good” engenders not only in what is best, but also what is moral.³⁹ In fact, the current theory of a “Constitution of necessity,” criticized in the closing portions of this Article,⁴⁰ espouses the claimed *obligation* of the government to take any measures to prevent not only annihilation, but also significant harm, such as terrorist attacks.⁴¹ Citing revered sources such as Thomas Jefferson and Abraham Lincoln, these proponents argue either that “necessity” renders actions moral, or that morality is superfluous during periods of necessity.⁴² When minds as profound as Jefferson and Lincoln counsel violating due process of law in the face of arguably grave emergencies and when contemporary American leaders and commentators brashly rebuff constitutional morality in favor of security, a thorough repudiation of consequentialism is necessary.⁴³

Deontology avows what consequentialism denies: that morality exists outside of a humanly created social context of adopted preferred outcomes. “Accordingly, from a deontological perspective, certain choices are inherently evil and can never be justified, even if they would bring about a good outcome.”⁴⁴ Indeed, deontology’s remarkably terse yet seemingly unassailable rejoinder is that consequentialism, in whatever form it takes, strips morality of its moral force because no matter how outwardly sensible they seem, personal preferences, predilections and desires cannot prove anything except that such are what the actor believes will bring aggregate

³⁷ “The task of philosophical ethics then becomes the quasi-scientific examination of effective *techniques* for maximizing this value.” MURPHY, *supra* note 34, at 24.

³⁸ See, e.g., Mark Sagoff, *The Limits of Justice*, 92 YALE L.J. 1065, 1079 (1983) (reviewing MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982)) (arguing that deontologists “cannot demonstrate the priority of right simply by debunking a notion of the good based on sheer preference or inclination, a conception so shallow, arbitrary, heteronomous, and mired in contingency that no one could defend it in the first place.”).

³⁹ See, e.g., *id.* at 1066.

⁴⁰ See *infra* Part IV.

⁴¹ See *infra* Part IV.A; see also Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

⁴² See *infra* notes 167–82, 483–503 and accompanying text.

⁴³ True, most modern theorists eschew pure utilitarianism for more nuanced, refined concepts of the good. This is predicated on societal rather than personal predilection, purportedly constrained by some communal acknowledgement of obligatory moral directives—a diluted deontology, if you will. See *infra* notes 185–205 and accompanying text. But whatever its form, consequentialism’s paradigmatic insistence that the good dominates the right remains timely, significantly seductive and fundamentally mistaken.

⁴⁴ Blum, *supra* note 31, at 38 n.165.

happiness, or at least more pleasure than pain.⁴⁵ Human desire alone may demonstrate *the good* but is insufficient to prove *the right* unless one simply wishes to define morality as a state of nature—pursuing whatever one wants by whatever means one wishes.⁴⁶ Thus, a consequentialist definition of morality is both unremittingly circular and distressingly self-indulgent.

If it is not a creature of human partiality, then morality must be transcendent: that is, based on immutable, timeless, universally applicable principles, *derivable through impartial reason*, greater than the wants and desires of any given persons, groups, organizations, or social orders.⁴⁷ A moral code and attendant applications to particular situations can be proved or disproved only by unfastening them from the societal forces of preferences and predilections that might distort the very reasoning process needed to discern and verify that moral code. Deontology, therefore, is liberating in two vital ways. First, it frees us from the methodological distortions that socialization may instill. Second, even if socialization fortuitously inculcates proper moral principles, deontology provides an impartial process through which adherents can strive to prove that their morality is true and not merely the product of even profound and momentous happenstance. Deontology frees us from the enslavement of our life experience.

Consequentialists are correct that deontology's "damn the consequences" approach sometimes requires persons to do things that can cause tremendous harm, particularly to innocents. Perhaps sadly, or perhaps not, keeping faith with morality does not promise freedom from sorrow. Indeed, only the mentally infirm, incorrigibly villainous and woefully uninformed would act immorally if morality engendered no serious costs. Morality's sole promise is that the moral are upright and steadfast, faithfully fulfilling morality's imperatives while resisting consequentialist temptations even when the morality of the moral enables the immorality of the immoral. Accordingly, the only acceptable reason to be moral is to promote morality itself.⁴⁸ Consequentialism's alternative is an often understandable, but nonetheless outright, defiance of morality by either shunning morality in favor of a popular, albeit immoral, outcome or speciously conflating morality with whatever promotes self-interest, labeled as the greater good.⁴⁹

⁴⁵ See Sagoff, *supra* note 38, at 1068–69.

⁴⁶ See *id.* at 1070–71.

⁴⁷ See, e.g., WOOD, *supra* note 24, at 37; Thomas L. Pangle, *The Philosophic Understandings of Human Nature Informing the Constitution in CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, HISTORICISM, MARXISM, FREUDIANISM, PRAGMATISM, EXISTENTIALISM . . .* 52–53 (Allan Bloom ed., 1990) (discussing Locke and Montesquieu).

⁴⁸ See, e.g., David Gray Carlson, *Hart avec Kant: On the Inseparability of Law and Morality*, 1 WASH. U. JUR. REV. 21, 39–40 (2009).

⁴⁹ This is an apt point to note a companion denunciation that deontologists are unyielding, obstinately imposing *their* moral values on others while consequentialists are reasonable. This assertion may flow from the mistaken belief that consequentialists are more apt than are deontologists to compromise. Actually, if the consequences are crucial, substantially affecting thousands of lives and millions of dollars, consequentialists are as likely to cling tenaciously to their

A. Deontology, the Individual, the Group and the Society

Because this Article avers that constitutional due process is deontological, those principles must pertain not only to individual human actors, but also to humanly created entities such as groups, organizations, corporations and, in the case of due process, governments. At first, this proposition seems uncontroversial as we customarily attribute the moral standards of personhood to both official and private associations via concepts such as professional ethics, national honor or a state's moral duty.⁵⁰

Yet, as Professor Blum observed,

Deontology is premised on the notion of individuals as rational actors. But the degree to which a state can be personified is questionable, and so is the degree to which we can or should assign to a state moral prescriptions. If this is so, one could hold that even though deontology is a sound moral theory for individuals, government morality should be nonetheless outcome-based.⁵¹

The supposition that one cannot properly attribute morally relevant qualities of personhood to complex associations surely is flawed.⁵² Furthermore, even if attributing

chosen outcomes as deontologists are to clasp their chosen moral precepts. Correspondingly, no less than deontologists, consequentialists are happy to compel their preferred outcomes, in effect imposing their moral principles onto unwilling others.

Similarly, some claim that deontologists tend to be somber and stubborn, deficient in both humility and a healthy sense of irony. Doubtless, some deontologists are just that and worse. However, consequentialists too may lack those useful refinements. Adamancy, a common characteristic of believing oneself to be right, can lead to humorlessness and exaggerated self-importance—if one does not maintain perspective. Especially when the cause is cherished, surely there are as many consequentialists as deontologists who could win gold medals at any Olympics where sanctimony is a competitive sport.

⁵⁰ See Elizabeth S. Anderson & Richard S. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1514 (2000) (“In conventional discourse, we speak without puzzlement about social groups or collective actors having beliefs, emotions, attitudes, goals, and even characters.”); see also *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010) (finding that corporations have full First Amendment political speech rights); Liam Seamus O’Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 203 (2006).

⁵¹ Blum, *supra* note 31, at 40–41. Along these lines, Professor Elster opined that although torn by conflicting motivations, it is possible to understand how a given individual accommodated or harmonized those conflicts in a particular situation. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 168 (2000). By contrast, “[t]he reason why societies are non-unitary is very different. They are made up of many individuals, none of whom or no subset of whom is ‘in charge’ . . . Society has neither an ego nor an id.” *Id.*

⁵² Scholars lucidly explain how “[g]roups . . . have all of the mental capacities needed to have attitudes toward people.” Anderson & Pildes, *supra* note 50, at 1519. “Margaret Gilbert

personhood to organizations is problematic, the improbably short rejoinder is: if human societies are exempt from equivalent deontological restraints, then individuals can escape their moral duties simply by forming groups authorized to execute, on their constituents' behalf, the unethical acts that the constituents as individuals may not perform. That simply cannot be right.⁵³ Designating human organizations to be unaffected by deontological mandates renders morality essentially empty, a nullity. Especially in our industrialized, mass communications, high-technology world, few individual acts occur without the assistance of numerous human associations, particularly corporate and governmental.⁵⁴ These indispensable associations have become

provides a key insight . . . by arguing that certain collectives should be viewed as 'plural subjects.' A group is a plural subject if its members (1) can properly refer to themselves as 'we,' and (2) make normative claims upon one another in virtue of their belonging to that 'we.'" *Id.* at 1515 (quoting MARGARET GILBERT, *ON SOCIAL FACTS* 204–05, 380–81 (1989)). It is not enough that persons happen to be doing something alike or even that they have agreed to work together, in concert, on one or more given projects to achieve one or more shared goals. "To count as a 'we' . . . each member of the group must further acknowledge a commitment or obligation to the others to act in concert with them to achieve that goal." *Id.* at 1516. Therefore, all participants must adopt a generally shared group identity that might place the legitimate aims and means of the group ahead of any given constituent's preferences. *Id.* at 1517–18.

This is not to discount the difficulties of identifying the mix of motives, internal and external influences, and political compromises underlying why a group took one action in lieu of alternatives. *See, e.g.*, Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W.L. REV. 128, 128 (1972) (arguing that legislative intent is an arguably necessary legal fiction). Still, the given action itself and the accounts of relevant actors and witnesses can provide sufficiently reliable explanations. A popular example is legislation. While their perceptions and intent may differ somewhat, each legislator shares with her colleagues at least a general understanding of what proposed legislation means, what it is intended to do, and why a reasonable legislature would pass such a law. *Id.* at 132–33. As the Supreme Court recently reiterated, "[l]egislative history' . . . is considered persuasive by some, not because [it] reflect[s] the general understanding of [any] disputed [statutory] terms, but because the legislators who heard or read those statements presumably voted with that understanding." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

Accordingly, we understand the meaning and purposes of enacted law by reviewing the legislation's plain language, legislative history and other sources generally accepted as at least somewhat authoritatively informative. *See, e.g.*, *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011); *Exxon Mobile Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); Anderson & Pildes, *supra* note 50, at 1520–23.

⁵³ *See, e.g.*, Anderson & Pildes, *supra* note 50, at 1519 ("There is no reason to think that, in acting together, we become subject to a fundamentally different *kind* of moral or rational demand than applies to us when we act independently."); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 64 (1992) ("[T]he constitution of the state, an artificial creation to serve human needs, must embody and incorporate [human morality] . . .").

⁵⁴ As philosopher David Hume noted, "with his characteristic verve, 'We can form no wish, which has not a reference to society.'" Peter Brandon Bayer, *Not Interaction but Melding—The "Russian Dressing" Theory of Emotions: An Explanation of the Phenomenology of Emotions*

essential to enforcing moral norms, which means the associations themselves must derive from moral norms.⁵⁵ If human associations are not constrained by moral norms, there is no meaningful role for morality in human society.⁵⁶

The same, then, must be true for that grandest of associations, the State. As Professor Fernando Tesón summarized, “[t]he contingent division of the world into discrete nation-states does not transform political freedom from an ethical imperative into a mere accident of history.”⁵⁷ Of course, in certain ways, the state necessarily is greater than the sum of its members, particularly given that only the state may construct law and enforce that law through reasonable coercive violence.⁵⁸ But, that singular authority must be subject to the same *a priori* principles of morality that constrain human beings if we wish to legitimize the state.⁵⁹ If the only basis to judge government and corporate actions is consequentialist, then individuals can construct a social order as they would a nightclub—for their revelry and entertainment; and, as they would their coats, check their moral duties at the front door as unnecessary in that context and circumstance. Thus, the State’s “moral standing” must be that of a social actor, not a “community . . . hold[ing] a preeminent position at the expense of the individual.”⁶⁰ Consequently, no government is legitimate that fails to conform to the moral imperatives required of persons when interacting with others.⁶¹

B. Morality’s Nature and Purpose Is to Oppose Evil

Understanding that morality is both *a priori* and applicable to all endeavors pursued by individuals and the groups of which they are a part, we next must discern: What is

and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers, 52 MERCER L. REV. 1033, 1053 (2001) (quoting DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK II 112 (Pall S. Ardal ed., 1972)).

⁵⁵ LESLIE ARTHUR MULHOLLAND, KANT’S SYSTEM OF RIGHTS 304–05 (1990); *see also* Tesón, *supra* note 53, at 64.

⁵⁶ As Jefferson aptly summarized, “[w]hat is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of the individuals.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776–1826, at 632 (James Morton Smith ed., 1995).

⁵⁷ Tesón, *supra* note 53, at 82–83.

⁵⁸ *See infra* notes 431–40 and accompanying text.

⁵⁹ Tesón, *supra* note 53, at 70–71 (discussing how Immanuel Kant did not “conceive of the state in a holistic way as a moral person, with rights and duties above and beyond the individuals who make up the state.”); *see also* DAVID RODIN, WAR AND SELF DEFENSE 184–85 (2002). In his fascinating, intricate book, Professor Rodin argues that nations are constrained by Kantian morality, which includes the right of national self-defense that substantially mirrors individual self-defense. *Id.* at 107–18.

⁶⁰ Tesón, *supra* note 53, at 71.

⁶¹ *See* THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY 61–62 (1992); *see also infra* Parts II.D–F.

morality? As often occurs, defining primary concepts is as hard, or harder, than explaining how those basic ideas apply in complex situations. Indeed, the noted moral theorist Professor Bernard Gert lamented, “What is morality? This question seems as if it could be answered by any intelligent person until he actually tries to answer it. Then a funny thing happens. If you start by saying, ‘Morality is . . .’ nothing you say afterwards seems quite right.”⁶² But in summary: purposeful human action promotes either evil or morality, the former being inherently wicked and unjust, the latter being inherently decent and right. Evil is the concept of all things that are wrongful to inflict on others, no matter whom, no matter where, no matter why we wish to do so. Morality is the set of principles that alert us to what acts are or are not wicked; that is, evil either immutably or, to borrow a legal term, “as applied”⁶³ in given circumstances.⁶⁴

Morality, therefore, is exemplified by an anti-consequentialist imperative.⁶⁵ As Kant stated bluntly, “The concept of an external right is derived from the concept of freedom in the external relation of human beings to each other. This concept has nothing at all to do with . . . a desire for happiness, nor has it anything to do with the means of achieving such happiness.”⁶⁶ Rather, morality is the claim one person may demand of others, based not on that person’s actual goodness, but solely on her status as a human being regardless of whether her behavior makes her worthy or unworthy of admiration.⁶⁷ Professor Korsgaard astutely expressed morality’s anti-consequentialist confrontation of evil in terms of the subject: “Deontological reasons are reasons for an agent to do or avoid certain actions. They do not spring from the consequences of those actions, but rather from the claims of those with whom we interact to be treated by us in certain ways.”⁶⁸

Therefore, as the category of principles understood to identify and, we hope, to prevent “evil,” morality does not maximize or even per se promote the “good” in the

⁶² BERNARD GERT, *MORALITY: ITS NATURE AND JUSTIFICATION* 3 (2005).

⁶³ *See, e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876, 893–94 (2010); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) (explaining that “as applied” means the law is reviewed not for its general meaning, but how it applies to the specific facts of the particular litigation).

⁶⁴ Morality’s singular role in human existence is to “prohibit acting in those ways that cause or increase the likelihood of someone suffering an evil.” GERT, *supra* note 62, at 344. “Morality has the goal of lessening the amount of evil or harm suffered.” *Id.* at 13; *see also id.* at 8–14 (discussing morality’s role).

⁶⁵ *Id.* at 9 (criticizing the “widespread but mistaken philosophical view that morality is primarily about what is the best state of affairs.”); *see also id.* at 17; Blum, *supra* note 31, at 38 n.165.

⁶⁶ MURPHY, *supra* note 34, at 106. (quoting IMMANUEL KANT, *CONCERNING THE SAYING: THAT MAY BE TRUE IN THEORY BUT NOT IN PRACTICE* 289 (Berlin, Royal Prussian Academy, 1793)).

⁶⁷ Brad Hooker, *Griffin on Human Rights*, 30 OXFORD J. LEGAL STUD. 193, 194 (2010) (reviewing JAMES GRIFFIN, *ON HUMAN RIGHTS* (2008)).

⁶⁸ CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 291 (1996).

sense that “good” means what people want, what makes them happy, what makes them comfortable or even what precludes their pain. Rather, at its core, morality claims that in their many and varied social interactions, persons may expect and, correspondingly, must behave in ways that do not inflict the suffering of evil. Morality, then, does not promise freedom from harm, but pursues freedom from evil.⁶⁹

The foregoing definition is deontological in its basic idea that morality must exist transcending the beliefs or preferences that one or another individual or group would pronounce as its particular ethics.⁷⁰ Rather, there is an inevitable eternity attributable to correct moral norms:⁷¹ “Since moral judgments can be made about all rational persons, it follows that morality is universal and that what seem to be different moral systems are simply specifications or variations of a universal morality or moral system.”⁷² As Kant similarly explained, there is “truth in all possible worlds [The knowledge of this truth] does not come solely from experience. We do not discover what is true for all possible worlds merely by observing what is true in one actual world.”⁷³

Because transcendent ethical precepts cannot be gleaned solely through experience, morality is comprehensible only through reason, specifically, sensible persons employing an accurate reasoning process to discern applicable moral norms.⁷⁴ Furthermore, because reason demands that individual preferences ultimately be disentangled from the

⁶⁹ The reader understandably may now be wondering whether there is a definition of, or some explicating act, which encapsulates or frames the concept of *evil* so that we might know what specific acts are or are not evil. As earlier noted, at this juncture I seek to explain the concept of deontology in the hope that the reader will accept that approach as correct over consequentialism. Nonetheless, as a very brief preface, I join many others who accept as the primary moral command, Immanuel Kant’s “dignity theory,” which requires always respecting the inherent dignity of human beings, whatever the costs. *See infra* Parts III.A–B.

⁷⁰ *E.g.*, WOOD, *supra* note 24, at 5 (discussing Kant).

⁷¹ Professor Powers expressed the indispensability of immutability for *any* theory:

Every theory must presuppose something to get off the ground; no convention or practice can justify itself. . . . All practices, conventions, and theories require grounding on a distinct, external convention or practice, which in turn requires its own justification or presupposition. Moral discourse is not unique here; all intellectual disciplines are ungrounded in this sense.

Powers, *supra* note 33, at 1583.

⁷² GERT, *supra* note 62, at 4.

⁷³ MURPHY, *supra* note 34, at 14 (citing IMMANUEL KANT, *CRITIQUE OF PURE REASON* 1 (Berlin, Royal Prussian Academy 1793)).

⁷⁴ *E.g.*, GERT, *supra* note 62, at 3–6, 344; *see also infra* notes 331–36 and accompanying text. That is the reason why *morality is not religion*: “[E]very feature of morality must be known to, and [can] be chosen by, all rational persons. No religion is known to all rational persons, and all religions have some feature that could not be chosen by all rational persons.” GERT, *supra* note 62, at 6. Commonly, religions espouse that no person can understand God fully for to do so would make that person as able as God. By contrast, theoretically at least, one could understand morality completely through reason.

reasoning process, impartiality—the absence of personal prejudice supporting or opposing particular outcomes—is essential for resolving moral issues.⁷⁵ If the moral outcome coincidentally comports with the actor’s accumulated prejudices and preferences, so much the better; but, the actor cannot allow her biases to skew the analysis thereby attaining her preferred result. Thus, the core of consequentialism—choosing among outcomes based on whatever makes us happiest—cannot validate a purported moral code because the appeal to “happiness” implies that self-interest, not neutrality, dominates the analytical process.

The foregoing analysis confirms our earlier assertion: while socialization fortuitously may indoctrinate pristine morality, proof that such espoused morality is correct requires eschewing the goals, purposes, and preferences of the individuals, groups, and organizations that collectively supply the bits and pieces from which consequentialists select and apply their moral norms.⁷⁶ Consequentialist explanations are not justifiable on any basis other than preference and convenience.⁷⁷ In fact, consequentialism condones, indeed arguably requires, malevolent behavior if evil best fosters happiness.⁷⁸

To offer, perhaps, too easy examples, if killing Jews because they are Jews is immoral, such killing is not evil exclusively within liberal cultures accepting that moral precept. It simply is evil. If husbands act immorally by violently forcing sex on unwilling spouses, such rape is not wicked only for societies that recognize the personhood of wives. Rather, spousal sexual assault is morally wrong even if a particular society

⁷⁵ *Id.* at 6–7, 130–36. Although partiality will taint analysis whether given acts are moral, the morally appropriate answer to a particular problem might permit the actor to act partially. For instance, we generally agree that when grading papers teachers ought not to favor or disfavor individual students based on attractiveness or other matters that are extraneous to the quality of the graded papers. But, we generally approve if teachers spend more of their limited time counseling weaker rather than stronger students. That form of arguable partiality is consistent with morally acceptable, although not morally obligatory, pedagogy that the weaker students are in greater need of the teacher’s professional help. *Id.* at 131.

⁷⁶ *E.g.*, WOOD, *supra* note 24, at 48–49 (describing how individuals and groups must weigh competing principles, values, and considerations of which there is no priority). Certainly, the case for deontology does not imply that any given individual is preordained to embrace certain teachings based on that person’s unique confluence of social interactions. Socialization is neither a unilateral, nor a uniform, nor a harmonious process. Faced with incomplete and contradictory information from different individuals, groups and organizations, persons weigh and sift, consider and analyze, to discern for themselves which meanings and teachings they wish to accept. *See, e.g.*, Bayer, *supra* note 54, at 1053–57.

⁷⁷ Of course, *and of great consequence*, preferences and biases are perfectly legitimate considerations in societal projects and pursuits, so long as they raise no moral predicaments. Societal accommodation of conflicting but morally acceptable proclivities is one useful understanding of the rightly cherished concept “pursuit of happiness,” which is part of the definition of Americanism. *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570 (1972). Indeed, a common deontological tenet is “an individual is free, within the constraints of justice, to determine for himself what is good and to act in what he perceives to be his own self-interest.” Powers, *supra* note 33, at 1570; *see also infra* notes 438–39 and accompanying text.

⁷⁸ GERT, *supra* note 62, at 9–10; WOOD, *supra* note 24, at 5, 48–49.

believes that a husband has a societal or religious right to ravage his wife. And, if torturing a terrorist suspect is immoral, then no noble motive, such as saving thousands of lives, renders torture ethical. In sum, if X is immoral, it is always immoral, no matter how much a given person or group believes, teaches and wants it to be otherwise.⁷⁹ For the forgoing reasons, consequentialism is incorrect; morality is deontological.

C. Maxims and Morality's "Value Monism"

Of utmost importance within any deontological system are discrete maxims, principles, standards, or edicts *that form a harmonious interrelationship*.⁸⁰ "Qualified moral maxims . . . must satisfy the coherence requirement. That is, the set of adopted moral maxims must be consistent with one another, so that a person is able to satisfy them all simultaneously."⁸¹ Thus, morality is a schema or system comprised substantially of distinct yet interrelated and congruous precepts appropriate alone or in combination to discrete situations.⁸²

That morality entails interplay among distinct, specific moral precepts is hardly contentious. The pragmatic task of ethical norms is to guide personal conduct—to instruct not whether possible actions in a given situation are particularly wise, clever, helpful, or efficient, but, rather, whether they are right, that is whether they are moral. As Kant prudently explained,

The moral world 'is a mere idea, though at the same time a practical idea, which really can have, as it also ought to have, an influence upon the sensible world, to bring that world, so far as may be possible, into conformity with the idea. The idea of a moral world has, therefore, objective reality'⁸³

That morality as "a mere idea," the precepts and duties of which are conditional—depending on given facts one precept may supersede another—neither evinces intrinsic indeterminacy, nor undermines morality's transcendence, nor invites consequentialist solutions. It is perfectly plain that different situations support different moral conclusions. Indeed, as little as one altered fact can change a possible action from moral to

⁷⁹ *E.g.*, Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFF. 322, 328–30 (1986) (describing universalization of immoral maxims).

⁸⁰ Kuklin, *supra* note 34, at 501–02.

⁸¹ *Id.* (footnote omitted); *see also*, WOOD, *supra* note 24, at 165 (discussing argument that certain moral duties are conditional and may be trumped by other moral duties depending on the situation).

⁸² Kuklin, *supra* note 34, at 501–02.

⁸³ *E.g.*, Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 487 n.49 (1987) (quoting IMMANUEL KANT, *CRITIQUE OF PURE REASON* *A808/B836 (N. Smith trans., 1965) (1797)).

immoral or vice versa.⁸⁴ Morality nicely understands the difference between homicide and self-defense, the difference between denying full contract rights to minors and denying full contract rights to African American adults, and the difference between X and Y. That the moral resolution of a particular dilemma depends on unique facts accords with, rather than negates, the reality that for every moral inquiry there is a correct answer, which must be based on eternal principles of right and wrong.

Crucially, any “correct answer” depends on the “harmony” that must exist among moral maxims.⁸⁵ Accordingly, there must be some source of harmony; that is, *all* separate ethical norms must cohere through one overarching, unifying concept that serves as the pivot for resolving *any* moral quandary. Absent such unification, we have no basis to know whether, or how, moral precepts apply in any given situation. For example, understanding why murder, but not self-defense, is immoral requires some paradigmatic idea explaining when taking a life is not evil.⁸⁶ Thus, managing discrete moral rules and their functions requires a foundational conception—a paradigmatic idea, morality’s elementary particle that enables, delineates, invigorates and clarifies the entire moral philosophy.⁸⁷ Professor Wood calls this “value monism,” the proposition that morality ultimately is premised on a *single* basic value:

An ultimate plurality of values leaves us not only with incommensurable values but also with a plurality of values between which there is in principle no way of establishing any priorities . . . Value monism is necessary to provide even a context for making comparisons between different values, however the comparisons may come out.⁸⁸

⁸⁴ WOOD, *supra* note 24, at 67–68, 162–65. Kant illustrated by identifying [w]ide or imperfect duties [that] succumb to strict or perfect duties; for example, the wide duty to aid a stranger is overridden by the duty not to let my parents starve . . . and you must testify truthfully in court even if a lie would help your benefactor (and thus fulfill a wide duty of gratitude). *Id.* at 164 (discussing Kantian morality); *see also* Kuklin, *supra* note 34, at 501–02.

⁸⁵ *See* Kuklin, *supra* note 34, at 501–02.

⁸⁶ *See* RODIN, *supra* note 59, at 70–99 (describing the story of the Tutsi brothers—one kills the other with the consent of the killed brother. Rodin uses this story to demonstrate when taking a life is not evil.). That same overarching concept would elucidate as well, for example, why abridging contract rights on the basis of race but not on the basis of childhood is unethical.

⁸⁷ Exactly what *is* the primary moral principle—the elementary particle—from which other moral precepts spring is discussed in Part III regarding Kantian honor safeguarding innate human dignity. Furthermore, we shall see in Part IV that due process is the Constitution’s primary particle that is becoming, and should be, understood in terms of Kantian morality.

⁸⁸ WOOD, *supra* note 24, at 59 (discussing that Kant and Mill agreed that moral theory requires value monism). Wood explicated, “A moral rule or principle may very well be conditional in other ways without affecting its categorical status. The supreme principle of morality admits of no conditions or exceptions, of course, because there is nothing higher by reference to which conditions or exceptions could be justified.” *Id.* at 67–68.

D. The Indisputable Value of Experience and of Evaluating Anticipated Consequences

Contrary to a frequent criticism by consequentialists, deontologists fully appreciate that contemplating the experience of one's life is a formative step in the process of discovering and applying moral precepts.⁸⁹ The pursuit of timeless morality does not require deontology to ignore "all empirical facts about the world, including all facts about human beings, as irrelevant to explaining the nature of morality."⁹⁰ Certainly, deontologists can, and often do, acknowledge that reflecting on experiences—pondering the lessons taught through socialization—arouses the search for understanding.⁹¹ Kant likewise recognized that, "Though all of our knowledge begins with experience, it does not follow that it all arises out of experience."⁹² Kant knew that moral imperatives may be pointless absent choosing goals and means that require moral validation but are influenced by socialization.⁹³ Professor Murphy put it drolly, "Kant sees that both rationalism and empiricism have an important story to tell, but that each exaggerates."⁹⁴

Accordingly, we may challenge the common critique, directed especially at Kant, that *a priori* morality "speaks only abstractly about human conduct. It fails to lay down determinate principles of moral behavior."⁹⁵ Certainly, overarching deontological principles are abstract and necessarily so; otherwise, they would supply no basis upon

⁸⁹ See *id.* at 261.

⁹⁰ GERT, *supra* note 62, at 241.

⁹¹ See, e.g., WOOD, *supra* note 24, at 261 (explaining that "locating basic values in states of affairs to be brought about does not preclude a method of moral reasoning that places emphasis on conformity to the right moral rules").

⁹² MURPHY, *supra* note 34, at 14 (quoting IMMANUEL KANT, *CRITIQUE OF PURE REASON* 1 (2d ed. 1787)); see WOOD, *supra* note 24, at 58 (comparing Kant's and Mill's perspectives on the role of knowledge).

⁹³ WOOD, *supra* note 24, at 68. "Kant sensibly recognizes that the duty of [morality] . . . cannot be determined by a precise universal rule, because context and circumstance play important roles. The exercise of judgment is necessary to decide particular cases." Wright, *supra* note 36, at 278 (discussing IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 156 (Mary Gregor ed. & trans., 1996) (1797)).

⁹⁴ MURPHY, *supra* note 34, at 9.

⁹⁵ Powers, *supra* note 33, at 1573; see also RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 6–7, 19 (1999); Jason Brennan, *Beyond the Bottom Line: the Theoretical Aims of Moral Theorizing*, 28 *OXFORD J. LEGAL STUD.* 277, 278 (2008) (discussing Posner's arguments). Deontologists do not dispute that our chosen preferences and beliefs "give individuals identity and character; they reflect what they are, not just what they want." Sagoff, *supra* note 38, at 1070 (questioning the humanity of deontology) (emphasis added). Kant and other deontologists understand, indeed celebrate, that selecting "personal ends," is integral to attaining personal identity, uniqueness and satisfaction. See, e.g., HILL, *supra* note 61, at 47; Wright, *supra* note 36, at 280–81. Indeed, Kant never denied that, "purposiveness, the setting of ends to be produced, is the most fundamental feature of all action . . ." WOOD, *supra* note 24, at 259. But, goals and means must be moral; and, morality *is* prior to the good.

which to discern specific applications. That one may espouse a paradigm that is both conceptual and indecipherable is not a condemnation of deontology, but an indictment of the philosopher. We seek, therefore, common, *comprehensible* principles to provide the structure of moral meaning while understanding that only through the intercession of personal experiences and human conditions can we discern the application of distinct, abstract moral norms and duties.⁹⁶

E. Can We Reason and If So, Can We Reason Impartially?

We now understand that morality must be discerned, if at all, by a reasoning process that eschews personal biases and prejudices. Such reasoning requires self-consciousness coupled with the facility for critical analysis of oneself, of others and of ideas.⁹⁷ Accordingly, at this juncture we should confront the apparently limited capacity of human beings both to reason and to act impartially.⁹⁸ Of course, deontologists are not blind to human reality. Immanuel Kant, perhaps the most celebrated of the deontological rationalists, understood that “human beings are not fully rational beings; they are, rather, creatures of limited knowledge and self-restraint.”⁹⁹ Therefore, while morality exists *a priori*, many philosophers accept that individuals’ perceptions and understanding of *a priori* subjects tend to be distorted by the physical and interpretive

⁹⁶ Weinrib, *supra* note 83, at 505–06.

Any conceptual system is necessarily indeterminate. A concept is a universal, that is, something general that applies to the many particular instances falling under it. One invokes a concept not to produce a full enumeration of its instances but to clarify them by reference to the common category to which they belong. Particulars are what they are because they present themselves to our understanding in a variety of forms; they always contain something contingent with respect to their universal.

Id. In this regard, Professor Carlson’s *précis* is exactly right: if the universal is only realized in discrete acts, “[t]he particular is never actualized separate and apart from the universal.” Carlson, *supra* note 48, at 40.

⁹⁷ One author succinctly defined that essential capacity as “having the ability and unremitting drive to reflect upon one’s own existence and place in the world.” Daniel R. Williams, *After the Gold Rush Part II: Hamdi, the Jury Trial, and Our Degraded Public Sphere*, 113 PENN ST. L. REV. 55, 57 n.7 (2008); see also Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 269 (2008) (presenting the view of humans as autonomous individuals possessing free choice).

⁹⁸ GERT, *supra* note 62, at 136–37 (describing moral impartiality). I address these concerns as part of the overall discussion of deontology; however, they are applicable equally to this work’s specific review of Immanuel Kant’s moral theories. See *infra* Part III. Therefore, the resolutions offered here likewise pertain to the upcoming discussion of Kantian ethics and will not be repeated therein.

⁹⁹ MURPHY, *supra* note 34, at 104; see Carlson, *supra* note 48, at 36 n.64 (“Kant concedes that neither the actor nor an observer can be sure if the action proceeds out of [rational, unbiased] duty alone.”) (quoting George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 538 (1987)).

facets of human understanding.¹⁰⁰ The potential for mishap always exists when “[t]he subject adds time and space to . . . [that] which itself is neither temporal nor spatial.”¹⁰¹

In particular, inclinations are the culprits regarding one of the most notorious claims asserted by many philosophers, a position firmly associated with Kant: human emotions impede reason.¹⁰² The argument goes that regarding things transcendent, emotions threaten disorder because they stimulate personal inclinations, enticing individuals to satisfy their purely internal, selfish desires regardless of whether doing so promotes or confounds their moral duties to others.¹⁰³ Worse yet, emotions can make us delusional, mistakenly believing that our choices were grounded in rational morality rather than sentiment.¹⁰⁴ As Professor Carlson summarized, “The problem is that I never know whether my acts are from the moral law or from some pathological inclination.”¹⁰⁵

The issue of whether emotions distort the reasoning process is quite academic, however, because understanding ideas and ascribing meaning or value to any object, concept or event is impossible outside of a realm of emotions. That is how human beings operate. Science and much philosophy establish that persons understand the worth of things—assign meaning—not by emotions alone, not by reason alone, but by an immutable interplay of emotions and reason—what we might call an emotional-rational process.¹⁰⁶ Only the tweak of emotions can inform us whether we have properly employed our rational capacities. Conversely, only reason allows us to construe our emotions—that is, appreciate why we feel what we are feeling.¹⁰⁷ Accordingly,

¹⁰⁰ “There is always the danger that some natural defect in the perspectival mechanism—eyes, ears, etc.—have presented a distorted view of the thing.” Carlson, *supra* note 48, at 35.

¹⁰¹ *Id.*

¹⁰² *Id.* at 38–39; *see also, e.g.*, John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 674–75 (1994). In this regard, no person can ever truly know whether she acted from pure moral duty or whether she allowed her preferences and predilections to distort, to some degree, her true moral obligation. *See, e.g.*, Carlson, *supra* note 48, at 61–62.

Certainly, emotions are not invariably inappropriate to the entire domain of human interactions. Deontologists, including Kant, believe that emotions play a significant and legitimate role in the many aspects of human behavior where morality is not problematic. Within the huge realm of morally satisfactory choices, what in subsequent discussion we will equate with the Founders’ designation in the Declaration of Independence as “the pursuit of Happiness,” emotions and the inclinations they inspire suitably influence persons to choose among competing goals and actions. *See* WOOD, *supra* note 24, at 35; Bayer, *supra* note 54, at 1058–76.

¹⁰³ Kant argued that, “an action from [moral] duty is to put aside entirely the influence of inclination and with it every object of the will; hence there is left for the will nothing that could determine it except objectively the law . . .” Carlson, *supra* note 48, at 38 (quoting IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 4:400 (Mary Gregor ed. & trans., 1997) (1797)).

¹⁰⁴ *Id.* at 35–39.

¹⁰⁵ *Id.* at 81.

¹⁰⁶ *See generally*, Bayer, *supra* note 54 (discussing interpretation through emotions and rationality).

¹⁰⁷ *Id.* at 1046, 1058–76.

perhaps most famously among others, the philosopher David Hume essentially was right that absent the interplay of an emotional-rational process human beings cannot attain understanding.¹⁰⁸ Therefore, persons are incapable of pure rationality while remaining human.¹⁰⁹

Indeed, although he rebuffed Hume's delight over the indispensability of human emotion, Kant acknowledged that people are not capable of strict rationality.¹¹⁰ Deontologists should understand that passions—emotions—are both essential and inevitable for the generation of conscious human action.¹¹¹ This leads some theorists mordantly to deduce, “We can only hope and flatter ourselves that our narrative about rule-following is true.”¹¹²

¹⁰⁸ *Id.* at 1046, 1058–59 (discussing DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK II 155–56 (Pall S. Ardal, ed., Fontana/Collins 1972)); *see also* MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 68 (1995) (“Intellect without emotion is, we might say, value-blind . . .”). For example, Hume argued that although a problem in mathematics may be solvable purely through mathematical reason, neither “the act of solving [nor] the solution itself could be meaningful to the actor without appeal to passion.” Bayer, *supra* note 54, at 1059 (citing DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK II 155 (Pall S. Ardal, ed., Fontana/Collins 1972)).

A merchant might accurately balance her financial books, but the meaning of such an act requires the interplay of reason and emotion. She may feel numerous emotions that she understands by reasoning and then tests the validity of her reasoning by her emotional responses and the meaning she derives therefrom.

Suppose, for instance, the merchant is both happy and sad after balancing her books. She proceeds to reason why she so feels and concludes that she is happy because (1) she properly balanced her books, thus she accomplished her task, and (2) she made a profit. She further deduces that she feels sad, perhaps angry, because, although she made more money than she spent, her profit margin was less than she expected; therefore, she feels she failed somewhat as a merchant. Next, she tests her conclusions by her emotional response. If she feels happy, she may reason that she correctly analyzed her emotions regarding balancing her books. If she feels angry, depressed or otherwise unhappy, she may conclude that her first assessment of her emotions was flawed and needs to be revamped.

¹⁰⁹ For a discussion of how emotions are physiologically necessary to the thinking process of the human brain, see ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTIONS IN THE MAKING OF CONSCIOUSNESS (1999) and ANTONIO R. DAMASIO, DESCARTES' ERROR (1994).

¹¹⁰ MURPHY, *supra* note 34, at 104. In fact, much of Kant's writing was greatly inspired by and is a rejoinder to Hume. WOOD, *supra* note 24, at 39, 55–57 (comparing the moral theories of Kant and Hume). Kant famously stated that Hume woke him from his “dogmatic slumbers.” Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DEPAUL L. REV. 1077, 1125–26 n.236 (2005) (citing Immanuel Kant, *Prolegomena to Any Future Metaphysics*, in THE PHILOSOPHER'S HANDBOOK 389 (Stanley Rosen ed., 2000)).

¹¹¹ *See, e.g.*, Bayer, *supra* note 54, at 1058–76 (discussing the connection between emotions and reason); Carlson, *supra* note 48, at 39–40.

¹¹² Carlson, *supra* note 48, at 61. Professor Carlson continued his lamentation, “reason cannot logically rule out *freedom from reason*. Accordingly, the rationality of our acts is ultimately a fantasy, a story we tell ourselves that can never [be] verified empirically.” *Id.* at 61–62.

One may respond forcefully that such theory simply presumes that emotions are hostile to reason. We might as well similarly argue that the respiratory system is infirm because breathing properly relies on other bodily functions, such as blood circulation. Breathing does not exist only as an abstract idea; people breathe because of, not despite, the reality that breathing requires other physiological systems (just as those other functions likewise depend upon breathing). Similarly, if as part of the emotional-rational process, emotions can sway us to eschew morality, so too can they press us to spurn impure desires that otherwise would influence our judgment. The same domain of emotions telling us that we want something can stoutly alert us not to pursue that particular thing, should either the thing itself or the means to attain that thing be immoral.¹¹³ The trick is using our emotional-rational process to recognize and to suppress our prejudices—our hope for the particular outcome we favor—and to compel us, rather, to seek only the moral course, no matter how unpleasant we deem that course to be.

Furthermore, even if emotions always initially skew reasoning to at least some extent, a plausible interpretation holds that persons nonetheless retain a significant and sufficient “capacity” to reason—a familiar, comfortable idea that experience teaches rings true.¹¹⁴ The celebrated theorist Ernest J. Weinrib explained, “[T]he purposive being—*although affected by inclination . . .* is not determined by inclination and is therefore not in the coercive grip of any particular representation or object of desire. . . . [Persons can] *determine choice by virtue of the ability to universalize and not by virtue of the particular content of choice.*”¹¹⁵

If so stirred, we attain our chosen goals through such means as are permissible within the bounds of morality. This “characteristically Enlightenment . . . conception of human nature and human psychology,”¹¹⁶ explains why deontology is both workable and, contrary to some criticism, highly reverential towards human beings. It fully embraces liberalism’s prime directives—that one must think for oneself, one is responsible for one’s “actions and convictions,” and that, while one must consider advice and counsel, one cannot place the fault of one’s own action on others.¹¹⁷ By demanding and expecting integrity, deontology accords human beings considerably more respect than does consequentialism, which in the last analysis encourages persons simply to do as they like, no matter how ostensibly cloaked in ethics particular consequences may be.¹¹⁸

Liberal deontology’s view of human capacity is completely satisfactory, conventional and roundly accepted, as it should be. Professor Carlson condensed the practical

¹¹³ For example, emotions such as anger, unhappiness and desperation might be part of the reasoning sequence leading a person to consider crime. Yet those or other emotions—possibly shame and guilt—as part of the same internal emotional-reasoning course might sound a sharp alarm to warn against trading moral uprightness for some immoral immediate gratification. *See generally* Bayer, *supra* note 54.

¹¹⁴ *See, e.g.*, Weinrib, *supra* note 83, at 483–84.

¹¹⁵ *Id.* at 483 (emphasis added).

¹¹⁶ WOOD, *supra* note 24, at 4.

¹¹⁷ *Id.* at 3.

¹¹⁸ This Article addresses various types of consequentialism. *See infra* Part I.I.

competence of deontology—deontology’s constructive applicability to our daily lives—with fitting humor: “Every human act is smeared with [emotion induced] pathology. But it is likewise true that every human act is smeared with morality.”¹¹⁹

Of equal importance, whether or not emotions prevent us from reasoning perfectly is completely irrelevant to whether transcendent morality exists because our inability to find something does not mean that thing is nonexistent.¹²⁰ Professor Waldron offered as a “plausible interpretation” that, “[t]he trouble with the application of . . . principles is not that, in theory, no right answers exist, but that there [may be] no basis common to the parties for determining which answers are right.”¹²¹ Even accepting that the human enterprise to understand enduring morality inevitably is flawed, the alternative of denying morality’s transcendence panders to pure self-indulgence, very possibly well intended, but informed solely by the happenstance of one’s socialization and genetic tendencies. Human imperfection neither disproves the everlastingness of morality nor absolves us from understanding as fully as possible what morality requires.¹²²

¹¹⁹ Carlson, *supra* note 48, at 40.

¹²⁰ See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 312 (1985) (distinguishing the realist from the skeptic); Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1109 (1982) (discussing factual and moral belief). Discussing the possible legitimacy of torture, Professor Moore noted by analogy “the medieval worry of how many stones make a heap. Our uncertainty whether it takes three, or four, or five, etc., does not justify us in thinking that there are no such things as heaps.” Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 896 (2000) (quoting MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 724 (1997)).

¹²¹ Waldron, *supra* note 15, at 1550 (emphasis added). As Cassius explained to his brother, “The fault, dear Brutus, is not in our stars, But in ourselves . . .” WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* act I, sc. 2, ll. 140–49 (Arthur D. Innes ed., 1915).

¹²² See HILL, *supra* note 61, at 40–41, 207–08; WOOD, *supra* note 24, at 67; Tesón, *supra* note 53, at 75–76.

It is worth adding briefly that inevitable imperfection haunts consequentialism as well as deontology. Consequentialist conclusions must be based on conjecture—quite possibly sincere, informed, thoughtful conjecture, but estimation nonetheless; and, the given conjecture may be wrong. See Blum, *supra* note 31, at 44 n.195, 45.

Utilitarianism, which was supposed to be the most precise and hard-headed of moral arguments, turns out to be the most speculative and arbitrary. For we have to assign values where there is no agreed valuation, no recognized hierarchy of value, no market mechanism for determining the positive or negative worth of different acts and outcomes.

Id. at 44 n.194 (quoting MICHAEL WALZER, *ARGUING ABOUT WAR* 38 (2004)); see also Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?* 60 STAN. L. REV. 155, 181–82 (2007) (discussing how judges’ own beliefs affect their rulings).

Similarly, empirical errors can corrupt a consequentialist resolution. To list just a few: an investigator may have misperceived what would make any given subject truly happy or sad. Or, the subject may have misstated her preferences to the investigator. Or, the subject may be unaware that her own unconscious drives have distorted her conscious understanding of what truly would make her happy. Similarly, the investigator may be unaware that her own unconscious drives have distorted her conscious understanding of what truly would make the subject happy.

The foregoing rejoinder to the contention that our limited rational capacities makes moral analysis fatally flawed applies nicely to our capacity to reason *impartially*. Society and its system of justice accept that persons bring to their social roles accumulated prejudices which, with human effort, they can appreciate and place in proper perspective. To cite a familiar example, during the course of any judicial business, we expect judges adequately to apprehend and ameliorate any improper influence caused by their respective accumulated predispositions.¹²³

True, human imperfection almost certainly precludes absolute confidence, but experience and reason show that we can perceive one another's meanings with sufficient accuracy. Despite infirm or incomplete comprehension, we successfully can fulfill tasks and projects while trying to avoid past errors.¹²⁴ With proper effort, we do well enough.¹²⁵

F. Why Must We Be Moral?

Understanding that morality is deontological and that morality combats evil answers the related vital question: "Why should [we] be moral?"¹²⁶ To ask "why be moral" is reasonable because, as consequentialists correctly stress, moral systems forbid some acts that persons, groups, even societies might otherwise want to perform to make them happy, to promote their immediate benefit or to avert severe sorrow.¹²⁷

Selfishness is an inadequate explanation for moral behavior, especially when acting morally contradicts self-interest. This is aside from the too-generalized argument

¹²³ Indeed, the Supreme Court repeatedly admonishes that a judge or jury must "judge a case, *as due process requires*, impartially, unswayed by outside influences." *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010) (emphasis added); *see also, e.g.*, 28 U.S.C. § 455(a) (2006) (stating that a judge must disqualify him/herself "in any proceeding in which his impartiality might reasonably be questioned."); *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J. dissenting) ("All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise."); *Bridges v. California*, 314 U.S. 252, 273 (1941); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 380 (1821).

Of course, the moral judgments that come packaged as immediately felt solutions to particular problems are not per se incorrect. A "jumped-to" conclusion *may* be the right one; thus, our responsibility is to scrutinize such conclusions with particular skepticism, worrying that they may be more convenient and comfortable than correct. As the Supreme Court explained in a capital case, "It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences." *Barclay v. Florida*, 463 U.S. 939, 950 (1983).

¹²⁴ *See* FREDERICK L. BATES, *SOCIOPOLITICAL ECOLOGY: HUMAN SYSTEMS AND ECOLOGICAL FIELDS* 7–8 (1997); Bayer, *supra* note 54, at 1053–56 (discussing scholarship on the process of learning in various societal contexts).

¹²⁵ In this regard, one is reminded of the Baptist minister who, when asked, "Do you believe in full immersion baptism?" replied, "Believe in it? I've seen it!"

¹²⁶ GERT, *supra* note 62, at 338.

¹²⁷ *Id.* at 339.

that, in comparison with other self-interests that may be in play, it always is in one's overarching self-interest to be moral. That only begs, not answers the question.¹²⁸ Similarly, guilt, or the avoidance of guilt, cannot explain morality's imperative. Not all wicked persons feel guilt; and, even if they did, feelings of guilt may not be sufficient to prompt morality—especially, if the actor calculates that her remorse is out-balanced by the benefits of her immoral behavior.¹²⁹

Rather, the reason morality is essential stems, as it must, from its very nature.¹³⁰

*[M]oral rules prohibit acting in those ways that cause or increase the likelihood of someone suffering an evil. This provides a ready-made answer to the question why a person should be moral, namely that he will cause or increase the likelihood of someone suffering some harm or evil if he is not. . . . [T]his is a moral answer to the question "Why should I be moral?" As such, it should apply in all cases rather than merely generally.*¹³¹

Concurrently, not doing evil "is [the] reason for *actually* being moral rather than only seeming to be so."¹³² Based on understanding morality, rather than on, say, faith or hope, we accept that we may not cause, nor even risk, inappropriate injury by placing others in wrongful harm's way.¹³³

G. *The Essential Aspect of Sacrifice*

I now raise a very disconcerting point. Our definition of morality entails, as it must, minimizing harm through shunning immoral, meaning *evil*, acts.¹³⁴ However, as we now must accept, one may not employ evil to avoid harm either to oneself or to others because acting evilly is immoral. Consequentialists are correct, therefore, that deontological morality may extract great human suffering, perhaps greater than would immoral, but less intimately destructive alternatives.

Many times we feel an outcome—a consequence—should be considered immoral because innocent persons (sometimes even the culpable) suffer in ways seemingly disproportionate to the good engendered by the outcome. The innocent may include

¹²⁸ *Id.* at 341.

¹²⁹ *Id.* at 344.

¹³⁰ Carlson, *supra* note 48, at 40–41.

¹³¹ GERT, *supra* note 62, at 344 (emphasis added).

¹³² *Id.* at 345 (emphasis added); *see also* Carlson, *supra* note 48, at 40–41 (discussing following moral law for its own sake).

¹³³ Again, the specific meaning of wrongfully subjecting an innocent person to the risk of unmerited damage is presented in the discussion of Kantian ethics. *See infra* notes 318–96 and accompanying text.

¹³⁴ *See* Blum, *supra* note 31, at 38 n.165.

those who willingly eschewed a favorable consequence by choosing the right course, thereby suffering due to their devotion to morality. Perhaps even more alarmingly, some of the innocent sufferers may have had no direct choice, or even notice, that they would endure anguish in the name of morality. To cite a very popular example, many consequentialists argue that torturing a suspected terrorist to locate a “ticking time bomb” is preferable to the probable consequences of not doing so: death, pain, injury, panic and destruction of property should the bomb detonate.¹³⁵ These consequentialists aver that avoiding undeniably terrible consequences endured by presumptively innocent people justifies torture, even if torture is immoral.¹³⁶

As a threshold matter, the conclusion that torture is moral in situation X because it likely betters more lives than it harms is based on perhaps logical, but speculative, empiricism. Even when based on evidence, the conclusion that torturing the suspect will create more happiness than sadness is not empirical proof of the “good,” but supposition.¹³⁷ But that is not the basis of my response. Additionally, I will attempt no argument that, under extraordinarily rarified circumstances, torturing a suspect could be moral in a deontological sense, fortuitously engendering the outcome consequentialists want.

Rather, I accept, *arguendo*, that doing what is right may cause considerably more pain than doing what is good. Accordingly, I employ terms such as “untoward,” “inappropriate” and “wrongful”—rather than “undeserved”—to demarcate the harm resulting from evil. I do so because the difficult and heartbreaking, yet ennobling, mandate of morality is sacrifice; even if, no other moral alternative being available, the innocent suffer. Sacrifice is the price of deontology’s great, but necessary, irony: while opposing evil may be a good and right goal, because one always must be moral,

¹³⁵ See, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 81 (2006) (mentioning the ticking time bomb scenario among others).

¹³⁶ *Id.*; see also ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 215 (2007).

¹³⁷ See, e.g., Hooker, *supra* note 67, at 203–05 (discussing the indeterminacy of consequentialism). I mention only in passing that one can envision how successful torture might cause more harm than it prevented. I have not found the following example in the materials I have perused; however, I do not presume to be the only person to envision this scenario and I make no claim of originality. Suppose that because the authorities declined to engage in torture, a bomb exploded causing death, injury and substantial property damage. Yet, there was another consequence: the tragedy stirred society from its complacency. As a result, society improved counter-espionage techniques thereby averting five other planned terrorist attacks that would have caused much greater loss of life, injury and destruction. Had the original disaster been forestalled by torturing the original suspect, then, believing incorrectly that its intelligence gathering methods were adequate, the society would not have implemented improved vigilance. Absent such enhanced police methods, the terrorists would successfully complete their five other, more devastating attacks. Apparently, under a consequentialist paradigm, torture would not be moral in this instance. See Powers, *supra* note 33, at 1569 (discussing consequentialism’s search for the greatest benefit by “taking into account long-range as well as short-range consequences of actions.”).

one cannot exploit immorality—evil—to destroy evil regardless whether the quantity of evil destroyed is greater than the amount of evil employed. By definition, even assuming one could so quantify, one may not exploit evil to avert a larger evil because avoiding the latter does not per se transform the former from wrongful to rightful.¹³⁸ Rather, one must show that what generally is immoral, such as racial discrimination, is moral under a given circumstance such as assigning a Caucasian agent to infiltrate a violent, anti-minority terrorist group.

The mandate of sacrifices is true because, being moral—abidance with morality's *a priori* principles—is the highest endeavor of human beings. Accordingly, being moral is a purpose, a reason, indeed a duty in and of itself, not a means to some other goals such as minimizing injuries of various kinds.¹³⁹ The impetus to be ethical is essential to the special quality that distinguishes humanity. The “rational motive” for moral obedience is attaining that which is *a priori* an “end in itself” rather than a human preference or immediate inclination that may offend the intrinsic and the inviolate.¹⁴⁰ Deontology reminds us we cannot simply live in the “Now.”¹⁴¹

In that regard, Professor Thomas Pangle identified the basis of deontological sacrifice in his criticism of John Locke's liberal theory that survival is paramount among the rights which social orders exist to protect.¹⁴² Invoking an apt religious analogy, Pangle explained that the dilemma of Locke's account is,

the Bible calls us to a life of devotion and sacrifice that lifts us beyond our petty obsession with personal security—and thus exalts us even or precisely through our self-abnegation. *It would seem that any rationalist account of life that is to rival the Bible . . . must do justice to this self-transcending dimension of our humanity.*¹⁴³

Surely, Professor Pangle's quote does not aver that we must act morally to meet an obligation to a creator, although many persons may so believe.¹⁴⁴ Rather, like a divine

¹³⁸ See Blum, *supra* note 31, at 38 n.165 (citing STEPHEN DARWELL, DEONTOLOGY (2003)) (discussing how under deontological theory certain actions are always evil).

¹³⁹ See, e.g., Carlson, *supra* note 48, at 41. It is the understanding, “of an objective end in itself, which is not an end to be produced but something existing that has a value giving us an unconditional ground for acting in accordance with it.” WOOD, *supra* note 24, at 55. Therefore, I join those who disagree with theorists such as Professor Kutz who aver that a theory of moral absolutism renders morality indecipherable. See Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CALIF. L. REV. 235, 255–56 (2007) (criticizing deontology as incoherent due to its absolutism).

¹⁴⁰ WOOD, *supra* note 24, at 86.

¹⁴¹ See *id.* at 55.

¹⁴² Thomas L. Pangle, *The Classical and Modern Liberal Understanding of Honor*, in THE NOBLEST MINDS: FAME, HONOR, AND THE AMERICAN FOUNDING 212–13 (Peter McNamara ed., 1999).

¹⁴³ *Id.* at 213 (emphasis added).

¹⁴⁴ Indeed, it is worth recalling Professor Gert's clarification that morality is not religion because “every feature of morality must be known to, and could be chosen by, all rational

command, deontological morality, based on reason free from personal prejudices and predilections, requires adherence if one is to be moral—that is, to be righteous in a secular sense. If consequentialism is the serpent, morality is the path by which individuals, and the societies to which they belong, bring to human existence a divine-like devotion to what is right, what is just and what truly should be honorable.¹⁴⁵

Indeed, it is doubtful whether civilized society can exist at all absent the willingness to sacrifice—to die, if necessary—for causes greater than society’s own comfort.¹⁴⁶ “[C]ulture and values are only plausible when there is a possibility of dying for them. Although convictions arouse our deepest suspicions and represent a great danger to the human race, we cannot construct worlds of meaning without them.”¹⁴⁷ The Weiners explicated their profound observation, “without convictions we cannot live a life of meaning. Without a dedication to values neither culture nor religion is plausible, and our doubts about the purpose of life go unanswered. Without our convictions, we are less than human.”¹⁴⁸

Accordingly, if we are permitted to respond to immorality with immorality—to respond to evil with evil—we would have no occasion to care, much less inquire, what morality is and why morality matters. Thus, consequentialism’s irony is that consequentialists need not bother themselves with morality at all; and, in so doing, deny their own humanity.¹⁴⁹ After all, consequentialism tells us that regarding morality and evil there is no need to consider transcendence; rather, the solution is to discern what will make us happiest.¹⁵⁰ If we conveniently conflate evil with what will make us unhappy and if it makes us happiest to do “whatever it takes” to avoid such evil—*then “whatever it takes” is moral by fiat* because not doing “whatever it takes” makes us unhappy which, according to consequentialism, is evil. That the morally correct response happens to defeat the particular evil would be a fortuity, not a requirement, because the goal has become eradicating the evil and not being moral.¹⁵¹ Conversely,

persons. No religion is known to all rational persons, and all religions have some features that could not be chosen by all rational persons.” GERT, *supra* note 62, at 6.

¹⁴⁵ See *infra* Parts II.B–C.

¹⁴⁶ EUGENE WEINER & ANITA WEINER, *THE MARTYR’S CONVICTION: A SOCIOLOGICAL ANALYSIS 2* (2002).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 134.

¹⁴⁹ This brings to mind an historical illustration.

The Romans, like the Greeks, believed that a man possessed only what he gave away. Life was a treasure that gained value or power only when expended. The person who preserved his life at any cost was a miser
He was a thing of dirt, his spirit caged and contracted.

Carlin Barton, *Honor and Sacredness in the Roman and Christian Worlds*, in *SACRIFICING THE SELF: PERSPECTIVES ON MARTYRDOM AND RELIGION 26* (Margaret Cormack ed., 2002) (citation omitted).

¹⁵⁰ See, e.g., Blum, *supra* note 31, at 38 n.166 (describing central tenet of consequentialism).

¹⁵¹ An additional aspect of consequentialism’s irony is the “endless loop” that employing evil to fight evil may perpetuate evil, which may be confronted by more evil and so on. The

if it does not defeat evil then, under a “whatever it takes” regime, the morally correct response is inappropriate.

Thus, if fighting evil is the controlling societal goal, morality *vel non* becomes a senseless inquiry; for once we decide that transcendent morality does not matter and embrace exclusively the realm of preferences and predilections, we really have no reason to make moral judgments. Indeed, the danger of compromising morality in favor of outcomes “is not merely a question of consistency; rather, *it is a deeper metaphysical question about what remains if you sacrifice everything*,”¹⁵² which underscores that consequentialism’s concern is not morality but comfort.¹⁵³

In sum, we are not morality’s master, but its servants; and, beyond question, morality is harsh and unsympathetic, demanding that we do what is right whatever the consequence because, by definition, acting immorally is wicked. As proposed in the introductory portion of this discussion, morality’s sole promise is that the moral are upright and honest, fulfilling faithfully their duty to humanity even if others do not—even when the morality of the moral enables the immorality of the immoral. If the, perhaps, sad result of adherence to morality is harm to those who, through no fault of their own, become embroiled in a moral confrontation, then suffering becomes the test of commitment to leading an upright existence. It is not difficult, after all, to follow the moral path when doing so renders only pleasure or at least accords the least anguish.

consequentialist might respond that first she will employ less evil to eradicate more evil, then she will use even less evil to eradicate the originally utilized evil until eventually evil is gone entirely. However, she cannot know what new evil, and of what quantity, might spawn unexpectedly simply because she uses evil as an acceptable method to fight evil. In fact, her very use of evil may inspire greater evil. Moreover, the threat of ever increasing evil stems not only from the perceptive consequentialist’s misuse of evil, but also from well meaning but inept others attempting to emulate her example. Thus, even if our first consequentialist successfully stems greater evil by using less evil, her followers may not be so fortunate. They may blunder, causing more aggregate evil, specifically the new evil added to the original evil that the new evil was meant to eradicate. Furthermore, others might commit a different, but equally harmful error by erroneously concluding that the relevant evil behavior is moral per se, not solely when it is used to fight evil, and thus employ evil conduct even when it does not reduce a greater evil. Either way, the ostensibly logical effort to eradicate evil by using less evil could well create more evil than it cures.

¹⁵² Mary Anne Franks, Book Note, *Guantanamo Forever: United States Sovereignty and the Unending State of Exception*, 1 HARV. L. & POL’Y REV. 259, 263 (2007) (reviewing BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUE THE PRESIDENT—AND WON* (2005)) (emphasis added).

¹⁵³ Even in the case, if such exists, where the violation of the moral rule almost certainly will neither cause nor increase the probability of harm, one still must act morally to maintain “moral virtues,” those attributes which are necessary to make moral behavior immutable. GERT, *supra* note 62, at 346–48. These virtues, according to Professor Gert, include honesty, truthfulness, fairness, dependability, and conscientiousness. *Id.* at 346; *see also id.* at 275–309 (discussing how these basic concepts provide accounts of moral virtue).

While utilitarian rewards often flow from moral acts, morality itself must be its own reward. These are the duties of a noble life.¹⁵⁴

The idea of the noble sacrifice in the name of fostering a moral social order is neither novel nor subversive. Indeed, regarding the founding of our Nation, we instruct our children to believe in both the transcendence of morality and the value of suffering when morality so requires. American students, and likely many others, are taught to revere the following homily attributed to Patrick Henry: “Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? . . . I know not what course others may take; but as for me . . . give me liberty or give me death!”¹⁵⁵ One might construe Henry’s celebrated avowal to infer personal choice; that is, *he* would choose death over tyranny, but would leave others to make their own decisions. A better understanding is that his preface, framed both ironically and rhetorically, declares as a factual matter that *life* and *peace* are not sufficiently *sweet* to justify oppression; and, those who believe otherwise are wrong. Patrick Henry urges the immutable immorality of literal and, presumably, figurative enslavement as the price of life and security.¹⁵⁶

The equally respected patriot Thomas Paine expressed similar views championing death before immorality.¹⁵⁷ Alarmed at the growing despondency after the Continental Army’s terrible loss in New York, Paine drafted an essay of such force that General Washington ordered it read to the troops on Christmas Eve, 1776, just prior to the celebrated crossing of the Delaware River and surprise offensive against the Hessian mercenaries at Trenton, New Jersey.¹⁵⁸ Speaking to the immediate peril with inspiration pertinent to twenty-first century moral challenges, Paine wrote,

These are the times that try men’s souls. . . . I call not upon few,
but upon all Let it be told to the future world, that in the
depth of winter, when nothing but hope and virtue could survive,

¹⁵⁴ Carlson, *supra* note 48, at 41 (“I am moral only if I follow the moral law for its own sake”); Kuklin, *supra* note 34, at 477 (using the example of criminal sentencing to explain that choosing to do the right—the moral—outcome may cause great distress, such as enforcing a term of imprisonment more lenient than the victim and her supporters would like).

¹⁵⁵ OUR SACRED HONOR 35 (William J. Bennett ed., 1997) (quoting WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY (1818)) (internal quotation marks omitted).

¹⁵⁶ The refrain of Patrick Henry was not ‘Give me liberty only if it means I’m secure!’ He said: ‘Give me liberty, or give me death!’ *Americans who risked or gave their lives in the Revolutionary War fought for civil liberties, and they knew that those liberties could never be sacrificed in the name of war.*

Jennifer Van Bergen, *In the Absence of Democracy: The Designation and Material Support Provisions of the Anti-Terrorism Laws*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 107, 109 (2003) (emphasis added).

¹⁵⁷ See BENNETT, *supra* note 155, at 36–38.

¹⁵⁸ *Id.* at 36.

the city and the country, alarmed at one common danger, came forth to meet and repulse it. . . . 'Tis the business of little minds to shrink; *but whose heart is firm, and whose conscience approves his conduct, will pursue his principles unto death.*¹⁵⁹

Turning now to jurisprudential sentiment, although explicating the deontological morality that roots constitutional due process fairness awaits in Part IV, it is appropriate to recognize the Supreme Court's understanding in principle, if not always in practice, that sacrifice is the price of national integrity. Responding to the undeniable threat of terrorism which so greatly has shaped the Constitution of necessity arguments of the George W. Bush and, perhaps, Barack Obama presidencies,¹⁶⁰ the Supreme Court fittingly recognized, "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."¹⁶¹ In support, *Hamdi v. Rumsfeld* quoted the Federal judiciary's unequivocal stance issued four decades earlier:

The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.¹⁶²

These powerful admonitions underscore in constitutional terms the more general irrationality that, in the name of preserving morality, it is moral to destroy morality.¹⁶³

¹⁵⁹ *Id.* at 36–38 (quoting THOMAS PAINE, THE AMERICAN CRISIS (1776), *reprinted in* THE COMPLETE POLITICAL WORKS OF THOMAS PAINE (New York, Peter Eckler, 1891)) (emphasis added).

¹⁶⁰ See *infra* notes 506–41 and accompanying text.

¹⁶¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (holding that a U.S. citizen held by the United States as an "enemy combatant" must have a reasonable opportunity to meaningfully challenge his detention); see also *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1012 (N.D. Cal. 2009) (quoting *Hamdi*, 542 U.S. at 532).

¹⁶² *Hamdi*, 542 U.S. at 532 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963) (invalidating, under due process, provisions of the Nationality Act of 1940 and the Immigration and Nationality Act of 1952 that automatically deprived Americans who departed the United States for the purpose of evading military service of their citizenship without a judicial or administrative hearing)).

¹⁶³ As Professor Prakash asked in the context of American constitutional law, how does one know when, figuratively speaking, one is sacrificing a legal limb to save the Constitution's life rather than slaying the Constitution itself. Prakash, *supra* note 7, at 1305. "Surely self-preservation of the nation at all costs is not the Constitution's end. Nor is Lincolnesque

As the Court concisely put it, “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”¹⁶⁴ We may better appreciate such judicial sentiment by closing this part of the discussion with Professor Bowman’s dynamic summary of morality’s imperative, “Who we are . . . still depends crucially on what we are prepared to stand up for—and on our willingness to stand up for it.”¹⁶⁵ Our morality, or lack thereof, truly is our definition of ourselves.

H. The Inadequacy of “Threshold Deontology”

Not surprisingly, many purported deontologists balk at deontology’s strict mandates.¹⁶⁶ Of course, that some reject orthodoxy is no disproof of that theory’s soundness. Rather, recalcitrance evinces that well-intentioned persons, usually under great stress, are tempted to shun morality when the moral route requires particularly severe sacrifices.¹⁶⁷ As Professor Sunstein observed, “even Kantians typically believe that moral rules can be subject to consequentialist override if the consequences are sufficiently serious. If total catastrophe really would ensue, judges should not rule as they believe that principle requires.”¹⁶⁸ This is known as “threshold deontology,” the assertion

that at some extreme points, one cannot avoid some consequentialist analysis that would require a departure from the absolute prescription. *Threshold deontology responds to the accusation that pure deontology would allow catastrophic outcomes for the sake of moral narcissism.* For this school, the debate is no longer

preservation of the Constitution at all costs a worthy end, for that would suggest that we may suspend or discard *every* constitutional provision to ‘save’ the Constitution.” *Id.*

¹⁶⁴ *Hamdi*, 542 U.S. at 532 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967) (finding that the Subversive Activities Control Act provisions making employment of any registered member of the Communist Party at government defense facilities illegal violated the right of association guaranteed by the First Amendment)). Candor requires acknowledging, however, that the courts certainly have not sung only one refrain on this matter. *See infra* notes 478–81 and accompanying text (discussing when courts have found that security may dominate liberty interests).

¹⁶⁵ JAMES BOWMAN, *HONOR: A HISTORY* 295 (2006).

¹⁶⁶ *See, e.g.*, Alexander, *supra* note 120, at 894; Sunstein, *supra* note 122, at 165.

¹⁶⁷ Professor Brooks, for instance, argued that torture is not rendered morally right simply because many of its opponents, if confronted with an actual crisis, would use torture to save one or more lives. Rather, the recourse to torture evinces that human psychology can trump moral judgment in instances involving “pressures too terrible for most humans to withstand.” Rosa Brooks, *Ticking Bombs & Catastrophes*, 8 GREEN BAG 311, 313 (2005) (reviewing *TORTURE: A COLLECTION* (Sanford Levinson, ed. (2007))).

¹⁶⁸ Sunstein, *supra* note 122, at 165.

about the permissibility of lesser-evil calculations, [it is] only about the terms and conditions for its application¹⁶⁹

Threshold deontology, according to Professor Michael Moore, is like a dam “and the consequentialist considerations [are like] water building up behind it. Eventually, if enough water builds up, it will reach and exceed the dam’s height—which is analogous to the threshold of threshold deontology.”¹⁷⁰ Arguably, the metaphor of a dam is odd because, once the dam fails, the unstoppable torrent of water may devastate virtually everything in its way, leaving ruin behind. In that regard, I agree that the flow of ceaseless consequentialism will devastate morality, but, that is not what threshold deontologists seem to mean. Rather, the predictable justification for threshold deontology is consequentialist practicality. Indeed, expressing a commonly held view that this Article contests,¹⁷¹ Professor Levinson wondered, “What if it is a specific limit on government that is itself viewed as a danger to maintaining the overarching society? Why in the world would we consider ourselves bound by such a limit, ‘whatever the consequences’?”¹⁷² Or, as Professor Bickel famously opined, “No good society can be unprincipled; and no viable society can be principle-ridden.”¹⁷³

True, threshold deontology solves to a degree consequentialism’s irony that morality is meaningless when the goal is *combating evil* rather than *being moral*.¹⁷⁴ By accepting the moral route until doing so causes unquestionably disastrous outcomes, threshold deontologists render morality important in nearly all instances, *although not under the most trying circumstances where morality matters most and moral commitment is most tested*.¹⁷⁵ However, threshold deontology satisfies only if one is content with a partial solution to consequentialism’s dilemma. What is left is embracing evil, or at least discarding as inconvenient any inquiry into morality, when the incentive seems strong enough.¹⁷⁶

¹⁶⁹ Blum, *supra* note 31, at 43 (emphasis added).

¹⁷⁰ Alexander, *supra* note 120, at 895 (discussing Moore’s interpretation of threshold deontology and his metaphor of a dam); *see also, e.g.*, MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 723 (1997).

¹⁷¹ *See infra* Parts IV.C–E.

¹⁷² Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 729–30 (2006).

¹⁷³ Sunstein, *supra* note 122, at 168 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 64 (1962)).

¹⁷⁴ *See supra* notes 148–52 and accompanying text.

¹⁷⁵ *See* Blum, *supra* note 31, at 43. *Contra* Kutz, *supra* note 139, at 275.

¹⁷⁶ My quarrel with threshold deontology, therefore, is not that we can never truly know exactly when the invitation to evil is strong enough to permit consequentialism to overtake deontology. As mentioned above, most useful philosophies, especially involving morality and justice, are based on principles capable of being deeply but not completely understood. They are abstract in both meaning and application. If adequacy mandated that reasonable people could not disagree about their exact substance and boundaries, then most ethical and legal principles,

As quoted above, some threshold deontologists sneeringly posit that unmixed deontology requires “moral narcissism,” apparently a senseless, fetishistic adherence to morality.¹⁷⁷ But, what is “moral narcissism”? It cannot mean acting morally for narcissistic goals; that is, to promote one’s selfishness or vanity because motive does not demonstrate whether the proposed moral resolution is either right or good.¹⁷⁸ Thus, threshold deontologists surely are not concerned with moral behavior motivated by improper goals unless such behavior produces “catastrophic” results in which case, according to threshold deontology, the actor’s motives simply are irrelevant because only the consequences matter.

Similarly, “moral narcissism” cannot mean that due to selfish blindness or smug egotism an actor *mistakenly* concludes that some sort of behavior is morally required despite its calamitous results. In that instance, the actor is wrong because the chosen behavior is inherently immoral (regardless of the intensity of resulting consequences). In such cases, deontology instructs the actor both to recognize her mistake and to refrain from the actually immoral behavior,¹⁷⁹ which by fortuity reaches the very result threshold deontology supports.

The actor, therefore, must be a moral narcissist when threshold deontologists do not like the outcome of the actor’s forthright, steadfast dedication to a correctly discerned moral duty. Threshold deontology is essentially *ad hominem* disguised as philosophy. Unable to demonstrate that the actor’s chosen behavior is immoral, and equally unable to justify their preferred outcomes on an objective moral basis, threshold deontologists castigate the actor for daring to be moral. Such has always been the cry of the “pragmatist” who prefaces her argument with, “How would *you* feel if . . .,” but is unable to proceed beyond such consequentialist preferences to employ compelling moral reasoning.

Even less convincing is an alternate explanation of threshold deontology: “[I]f the positive balance of consequences becomes sufficiently great—especially if it does so by averting horrible consequences as opposed to merely making people quite well off—then one is morally permitted, and perhaps required, to engage in those acts that are otherwise morally prohibited.”¹⁸⁰ That argument is breathtakingly circular because, as we now understand, the transformation of immorality into morality due to consequences would be magic, not philosophy.

including the ones advanced in this Article, would be unenforceable. See Alexander, *supra* note 120, at 895–96 (discussing Moore); see also WOOD, *supra* note 24, at 268; Weinrib, *supra* note 83, at 505–06; *supra* Part I.E (arguing that we are able to analyze sufficiently if imperfectly).

¹⁷⁷ Blum, *supra* note 31, at 43 (discussing the theory of moral narcissism).

¹⁷⁸ See *supra* Parts I.A–B. As noted therein, persons *should* obey moral norms solely for morality’s sake; however, it is possible that an untoward motive might by chance render a morally correct outcome.

¹⁷⁹ See *supra*, Part I.B (explaining how deontology instructs agents to do, or to avoid certain actions).

¹⁸⁰ Alexander, *supra* note 120, at 894.

However one parses it, threshold deontology extols evil when morality tests us most and, as such, is not a theory of morality but an apology for immorality.¹⁸¹ Therefore, despite Professor Moore's protests, threshold deontology "collapse[s] deontology into consequentialism[.]"¹⁸²

I. Refined Consequentialism Is Consequentialism

One might charge that any criticism of consequentialism is wasteful because, as earlier quoted, deontologists "cannot demonstrate the priority of right simply by debunking a notion of the good based on sheer preference or inclination, a conception so shallow, arbitrary, heteronomous, and mired in contingency that no one could defend it in the first place."¹⁸³ For instance, if slavery made a majority of the people in a given society happy, slavery becomes moral under raw consequentialism.¹⁸⁴ Consequentialists who believe there must be moral requisites greater than some aggregation of happiness crave deontology to establish that overriding morality, which surely reaffirms deontology's verity.

Granted, consequentialism has developed into a number of competing, refined theories that purport to account for emergent societal moral certainty, such as condemning

¹⁸¹ Professor Blum evinced threshold deontology's common misapprehension of deontology by asserting that the only appropriate deontological response to war is pacifism:

War is about committing evils and choosing between evils. No war can be fought without causing death, long-term injury, suffering, degradation, and despair. Any war is a violation of numerous human rights . . . [I]f deontologists are willing to endorse any practical system of laws of war other than pacifism, they must resign to some degree of evil, even if they would be loath to accept it in any other setting.

Blum, *supra* note 31, at 39.

We now know the rejoinder. Professor Blum incorrectly conflates undeserved suffering with evil *per se*. Such suffering may be the result of evil, but not inevitably so. Therefore, as with any other human enterprise, war and war tactics require *a priori* moral validation or they are evil. Meaning no insolence toward the magnificent and extensive body of theory and law addressing the distinctive, unique and intricate quandary that is war, and relying on, perhaps, an overly simplified dichotomy, morality precludes offensive wars for treasure, power and the degradation of the conquered. By contrast, sound moral precepts condone engaging in a war of self-defense by responding to an unwarranted attack, usually including eradicating the attacker's willingness or ability to renew its onslaught once the initial assault is repelled and relative safety restored. *See, e.g.,* RODIN, *supra* note 59, at 122–40 (discussing the arguable differences between a moral theory of individual self-defense and a moral theory of collective self-defense in war).

¹⁸² Alexander, *supra* note 120, at 894.

¹⁸³ Sagoff, *supra* note 38, at 1079.

¹⁸⁴ MURPHY, *supra* note 34, at 91 n.1 (discussing how utilitarian arguments that freedom is a good consequence may be challenged by envisioned systems of limited liberty but great personal comfort where most people are contented).

inhumane treatment, proscribing slavery and denouncing race, and similar arbitrary discrimination.¹⁸⁵ Indisputably,

[t]he wiser and more circumspect versions of utilitarianism, for example, ask not merely which actions (considered singly or severally) produce the most pleasure and the least pain but instead about which set of moral rules, which moral code, would (if generally taught and practiced) be most conducive to the general happiness.¹⁸⁶

Yet, without deontology these theories, sophisticated as they are, remain mired in consequentialism's irony, ultimately basing claims of morality on someone's, some group's, or some society's preferences that alone provide no verification that the selected moral precepts are true for all persons and all societies.¹⁸⁷ In a way, then, one might conclude that most consequentialists would like to be deontologists and, based on threshold deontology, most deontologists would like to be consequentialists.

A short review of modified consequentialism tells the tale. One common nuance is differentiating act-consequentialism from rule-consequentialism.¹⁸⁸ "The former assesses the outcomes of every particular act; . . . The latter weighs the effects of having a particular rule in place (and therefore the average outcome of acts that follow the rule)."¹⁸⁹ Concerned that straight rule-consequentialism is too bold, some analysts argue

¹⁸⁵ See, e.g., Powers, *supra* note 33, at 1569.

¹⁸⁶ WOOD, *supra* note 24, at 260 (discussing Mill's use of general moral rules, subject to reform based on utilitarian values).

¹⁸⁷ Accordingly, the argument that assigning "large enough" values to abstract moral ideas will harmonize deontology and consequentialism must fail because such conflating eschews exactly what deontology expressly requires: not simply setting and prioritizing the value of "states of affairs," but conceiving "why we assign those values." *Id.* at 265; see also KORSGAARD, *supra* note 68, at 82; *id.* at 309 n.46 (noting that some consequentialists argue "[i]f justice matters, we can include it among the results." But, this would allow persons, "[to] commit injustice if it will bring about more justice.").

¹⁸⁸ See, e.g., Blum, *supra* note 31, at 45.

¹⁸⁹ *Id.* According to Adrian Vermeule:

Rule-consequentialism counsels that ethical agents follow that set of rules whose observance will produce the best consequences over an array of decisions. Act-consequentialism, on the other hand, counsels ethical agents directly to choose whichever action produces the best consequences. The rule-consequentialist acknowledges that the relevant rules may sometimes call for actions that, when viewed in isolation, are locally suboptimal from the consequentialist point of view. The rule-consequentialist, then, will sometimes be placed in the awkward position of defending acts whose immediate effect is, when viewed in isolation, socially detrimental.

Adrian Vermeule, *Three Strategies of Interpretation*, 42 *SAN DIEGO L. REV.* 607, 627 (2005).

for incrementalist rule-consequentialism, which requires “abid[ing] by the policies in the currently *accepted morality* unless and until we can calculate to a reliable degree of probability which changes to this morality would result in a net increase in value in the long run.”¹⁹⁰ Others embrace indirect consequentialism inquiring “which rules and rights are the ones whose establishment would have the best consequences in the long run, *impartially considered?*”¹⁹¹

Proposing a delicate crossbreed, Professor Hooker argued:

The best forms of indirect consequentialism focus neither on the consequences of *one individual's* accepting and following policies nor on the consequences of *one society's* accepting and following policies. The best forms of indirect consequentialism are more ‘cosmopolitan’. What we might call incrementalist cosmopolitan rule-consequentialism assesses possible moral rules and policies in terms of the expected value of their acceptance (not just by one individual or by one society but) by *all societies* simultaneously.¹⁹²

Among many examples, Hooker offered the following:

“[D]o not deliberately kill the innocent, period” has much greater expected value than “do not deliberately kill the innocent except . . . to redistribute body parts from this one person in a way that would save the lives of other innocent people” . . . [P]eople will be much more reluctant to put themselves in the hands of surgeons if they know that surgeons might redistribute their vital organs to others. A rule that results in widespread surgeon-phobia would not have good consequences on the whole and in the long run.¹⁹³

Doubtless, Professor Hooker’s concern about “widespread surgeon-phobia” is appealing—it *sounds* right—but it is hardly self-proving. What if fear of surgeons prompts people to take especially good care of both themselves and their dependents, thereby actually increasing the aggregate good health of their society, even accounting for lives lost due to refusing surgery? Or, what if more bad people than good people die

¹⁹⁰ Hooker, *supra* note 67, at 203 (emphasis added).

¹⁹¹ *Id.* (emphasis added). Indirect consequentialism is purely consequentialist if, as it seems, “impartially considered” means the evaluator determines what would make the relevant person or group happiest regardless of the evaluator’s personal opinion or bias. If, however, “impartially considered” in any regard means assessing morality pursuant to impartial reason, indirect consequentialism is deontological.

¹⁹² *Id.* at 204.

¹⁹³ *Id.*

from avoiding surgery? As improbable as these consequences appear, *if* they occurred it seems unlikely that reasonable people would bestow a *surgeons' prerogative* to distribute patients' organs. We understand that, generally at least, it is immoral to force an unwilling person to donate body parts, even renewable components such as blood or skin.¹⁹⁴ Otherwise, because the bodily components of one healthy person could drastically improve the lives of many others, society routinely would butcher unwilling healthy persons for the sake of such others.

Perhaps Professor Hooker truly means that if “all societies simultaneously” so preferred, a surgeons' prerogative would be moral. One must suspect, however, that Hooker's modifying instruction to “assess[] possible moral rules and policies in terms of the expected value of their acceptance,”¹⁹⁵ is deontologically grounded. *If* empirically the “expected value” turns out not to be what *he* expected—for some reason, most persons in all combined societies support surgeons' discretion to harvest organs—Hooker would think those persons are so ridiculous that their opinions are worthless. In that case, Hooker is doing one of two things. Either he is substituting his personal preferences for those of the greater society (which capsizes consequentialism by defining morality not as the consequence that makes most people happiest, but as the consequence that makes Hooker happiest), or he believes he has found an overarching moral truth that must be obeyed regardless of anyone's preferences, which, of course, is a deontological declaration.

Similarly, Professors Anderson and Pildes contrast so-called “vulgar deontology” with their paradigm of “expressive theories.”¹⁹⁶ They argue any philosophy of morality that

somehow requires us to ignore the consequences of action [is] an absurd position. . . . We cannot adequately express the right attitudes toward people while ignoring the consequences of our actions. We express our respect, love, concern, and other favorable attitudes toward people largely *through* the pursuit of consequences that are good for them. To disregard the consequences of one's actions is one way to fail to care about people in the ways we ought to care about them. . . . Expressive theories, therefore, do not deny that the consequences matter.¹⁹⁷

¹⁹⁴ For example, “Parents cannot be forced to donate organs to their children, even if the child's life is at stake and the parent is the only appropriate donor. One may not be forced to donate bone marrow to a cousin who is dying of bone cancer.” Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 395 (2008) (quoting CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 33 (1993)).

¹⁹⁵ Hooker, *supra* note 67, at 204.

¹⁹⁶ Anderson & Pildes, *supra* note 50, at 1508, 1511.

¹⁹⁷ *Id.* at 1513–14.

However, in the same portion of their article, Anderson and Pildes appropriately explain, “Expressive theories, therefore, tell us to pursue consequences that are good for people, *provided* that pursuing those consequences by the means selected is compatible with caring about people *in the right ways*.”¹⁹⁸ This is because, “*we are all morally required to express the right attitudes toward people . . .*”¹⁹⁹ Anderson’s and Pildes’s unspoken deontological hope is revealed by their perfectly reasonable claim that there are “right ways” to “car[e] about people,” which “we are all morally required to express.”²⁰⁰ That some observers might find *vulgar* Anderson’s and Pildes’s “right ways” to “car[e] about people” does not seem to trouble those authors.

Let me indulge one more example. In an article that is as critical of deontology as it is of consequentialism, Professor Mark Sagoff embraces the appealing theory of idealism.²⁰¹ In brief, “Idealists believe . . . that a person identifies and realizes himself not by satisfying every passing desire or by acting from a universal, abstract moral law, but by forming and pursuing long-term plans that have meaning and value within a cultural community and can therefore be viewed as achievements.”²⁰² Immediately, Professor Sagoff assures us that idealism is not “committed to relativism,” rather, “a person ‘cannot take his morality simply from the moral world he is in’ . . . [but] ‘must thus stand before and above [societal] inconsistencies, and reflect upon them.’”²⁰³ Accordingly, “individual[s] must be self-critical and must maintain what [Professor F.] Bradley calls a ‘cosmopolitan morality’ in his or her loyalties, projects, and plans.”²⁰⁴ This requires defining “cosmopolitan morality”:

A cosmopolitan moral perspective . . . depends upon critical judgment, ethical intuition, and human sympathy, rather than upon a system of philosophical abstractions, such as the one deontological liberalism provides. We can rely to some extent on a general sense

¹⁹⁸ *Id.* (emphasis added).

¹⁹⁹ *Id.* at 1514 (emphasis added). The authors’ deontological desire rises again in their explanation that, “[e]xpressive theories of action evaluate given actions according to how well they express *attitudes that we ought to have* toward people.” *Id.* at 1513 (emphasis added). Presumably the concept “attitudes” referred to in the quote “attitudes that we ought to have” does not mean the mindset of authors themselves but rather signifies some overarching moral norm that should be universally understood and embraced. *Id.*

²⁰⁰ *Id.* at 1514.

²⁰¹ Sagoff, *supra* note 38, at 1065–66 (discussing the merits of Michael J. Sandel’s idealist critique of liberalism).

²⁰² *Id.* at 1067 (citing T.H. Green, *Lectures on the Philosophy of Kant: The Metaphysic of Ethics—The Good Will*, in 2 WORKS OF THOMAS HILL GREEN § 119, at 139 (R.L. Nettleship ed., New York, Cambridge Univ. Press 1886)).

²⁰³ *Id.* at 1067–68 (quoting F. BRADLEY, *ETHICAL STUDIES* 204 (2d ed. 1927)).

²⁰⁴ *Id.* at 1068. As we now see, both Professors Hooker and Sagoff accent cosmopolitanism to premise consequentialism on a firmer ethical basis than pure individual or group happiness. Apparently, higher consequentialism cannot be rustic.

of moral progress . . . [revealing] a notion of goodness not of any particular time and country. Grounding the good in a historical and cultural perspective can save us from both [deontological] over-abstractation and utilitarian reductionism. . . .
*. . . The self has a moral identity only within the political and social world it inhabits. . . . We develop our identities in communities . . . within which we share aspirations and a sense of the meaning or the fitness of things.*²⁰⁵

Despite his elegant expression of what societies and their constituent factions can teach us, idealism is consequentialism, profound, nuanced consequentialism, but still fated to the “utilitarian reductionism,”²⁰⁶ Sagoff aptly denounces. As with Professor Hooker’s “incrementalist cosmopolitan rule-consequentialism”²⁰⁷ and Professors Anderson’s and Pildes’s “expressive theories,”²⁰⁸ Professor Sagoff’s “critical judgment, ethical intuition, and human sympathy,”²⁰⁹ albeit sound, informed and likely humane, crumble into an apology for sincere, but nonetheless selfish, predilections and preferences. Unless one is content to base morality on a tautology, Sagoff’s “critical judgment, ethical intuition and human sympathy” are not self-confirming even if based on “[g]rounding the good in a historical and cultural perspective,” combined with some coherent “sense of the meaning or the fitness of things,” and confirmed by “a general sense of moral progress.”²¹⁰ One must assert an *independent* source to show that the particular “historical and cultural perspective” one senses based on judgment, intuition and sympathy in fact evinces not simply the “fitness of things,” informed by “a general sense of moral progress,” but the *correct* “fitness of things” informed by a *correct* “sense of” *properly* progressing morality.²¹¹ Surely Sagoff eschews embracing purportedly maturing morality that despite its popularity actually fosters selfish, immoral outcomes.

For instance, a growing tolerance, indeed empathy, for the dignity and sensibilities of homosexual individuals surely reflects a changing “historical and cultural perspective,” resulting in “a general sense of moral progress” established on an emerging new “fitness of things.”²¹² Yet, unless we unfasten the moral arguments from both the rejected and preferred consequences, we cannot know that the new “fitness of things” manifests the right change, deserving permanence rather than possibly being exclusively the momentary triumph of political and social pressure.²¹³ While socialization

²⁰⁵ *Id.* at 1068 (emphasis added) (citations and internal quotation marks omitted).

²⁰⁶ *Id.*

²⁰⁷ Hooker, *supra* note 67, at 204.

²⁰⁸ Anderson & Pildes, *supra* note 50, at 1508.

²⁰⁹ Sagoff, *supra* note 38, at 1068.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

may have inspired the moral inquiry, we must disentangle the argument from our socially learned preferences and find timeless principles, the application of which confirms the arguments consequentialism can only *hope* are valid.

II. HONOR, DEONTOLOGY AND DUE PROCESS

Having established that morality—whatever its specifics may be—is deontological, the next step is an explanation of *honor* because the mandates of honor and sacrifice enunciated in the Declaration of Independence *is* the prime American articulation of deontological morality.

As detailed below, the Founders inspired and justified both the Revolution and ensuing fundamental principles of American law, especially due process, on the best applicable precepts of enduring morality they knew.²¹⁴ Specifically, to assure the new nation's commitment to preserving “unalienable Rights,” particularly “Life, Liberty and the pursuit of Happiness,” the Founders concluded their Declaration by “pledg[ing] . . . our Lives, our Fortunes *and our sacred Honor*,”²¹⁵ a vow they intended to obligate not just themselves, but every generation of Americans then and thereafter. For the Founders, the legitimacy of government is not simply positivistic; that is, whatever societal entity is authorized to make and to enforce legal laws is that society's government.²¹⁶ Rather, legitimacy is substantive, measured by government's honor—faithful fulfillment of its affirmative duty to vouchsafe “unalienable Rights.” It is not hyperbole, therefore, to insist that the Founders birthed the United States in deontological theory.

In subsequent sections of this Article I hope to show that, while not denying its Magna Carta antecedents,²¹⁷ American due process of law is a deliberate and inextricable derivative of the national deontology the Declaration implored.²¹⁸ More than that, acutely aware of their own imperfectness, the Founders expected that America's commitment to moral government would be inspired by, but not shackled to, their particular moral perceptions.²¹⁹ Therefore, although informed by standards embraced in

²¹⁴ See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

²¹⁵ *Id.* paras. 2, 32 (emphasis added); see also *infra* Parts II.E–F.

²¹⁶ See, e.g., H.L.A. HART, THE CONCEPT OF LAW 50–78 (2d ed. 1994).

²¹⁷ See, e.g., *McDonald v. Chicago*, 130 S. Ct. 3020, 3090 & n.5 (2010) (Stevens, J., dissenting) (citing additional sources); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) (citing *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)); *Bauer v. Shepard*, 634 F. Supp. 2d 912, 942 (N.D. Ill. 2009); *Evans v. Thompson*, 465 F. Supp. 2d 62, 67 (D. Mass. 2006); *McGill v. Superior Court*, 128 Cal. Rptr. 3d. 120, 147 (Ct. App. 2011).

²¹⁸ See *infra* Part II.D.

²¹⁹ Certainly, one may argue that the Founders' imperfections were glaring and atrocious. The Declaration and the original Constitution permitted slavery, allowed gender and a myriad of other invidious discriminations and failed to guarantee “unalienable Rights” at the state and local levels. Amendments and multiple judicial reinterpretations, often prompted by dramatic social upheavals, including the Civil War, have rendered substantial transformations to better approach the truly just America we have yet to attain.

the late-eighteenth and mid-nineteenth centuries, the principles of the Declaration, and the Constitution it inspired, are intended to be governed by the best understanding of morality currently available.²²⁰

Because the provenance of constitutional due process derives from the Declaration's elegant bonding of "unalienable Rights" with "sacred Honor," we should grasp the meaning of *honor*, both abstractly and as used by the Founders. In that way, we will ultimately understand why due process, in a Kantian sense, is not only the right approach, but indeed best fulfills the very mandate of America's founding.²²¹

A. Honor's Worth

Some may contend that an appeal to honor is like grabbing at the wind, for, as Bertram Wyatt-Brown succinctly observed, "Ever since man first picked up a stone to fling at an enemy, he has justified his thirst for revenge and for popular approval on the grounds of honor."²²² True, at a semantic level anyone can rationalize any act by claiming it was required by, or at least comported with, some theory of honor. Indeed, generic honor often is associated with its most notorious manifestations, specific honor principles now widely and properly held in disrepute.²²³ Honor has become

No reasonable critic, however, believes that the value of abstract ideas is merely as good as the espouser's actual ability or willingness to abide by those concepts. Otherwise, only the words of *bona fide* saints would have any weight. Ideas carry their own verification or refutation which may be explicated by, but are not dependent on, the behavior of their originators and subsequent advocates. Therefore, their imperfection, politicking and pretenses do not negate that the Founders correctly elevated honor as a national mandate and opened a viable path for their successors' better promotion of honor. See David F. Epstein, *The Political Theory of the Constitution*, in *CONFRONTING THE CONSTITUTION* 77 (Allan Bloom ed., 1990). The Founders' undeniable failure, whatever the reasons, to prohibit behavior they knew or should have known to be immoral may render their words arguable accomplices to hypocrisy, but hardly devoid of meaning.

²²⁰ See *Casey*, 505 U.S. at 847–49 (noting that the meaning of "liberty" is not limited to perceptions of the Framers of the Fourteenth Amendment nor to the enumeration of specific protections under the Bill of Rights).

²²¹ This portion of the Article relies on several recent, exciting analyses of honor's meaning and function. It is appropriate to study the Founders' perceptions in light of modern honor theory because current understanding does not distort but, rather, explicates exactly their attitudes.

²²² Cecil J. Hunt II, *No Right to Respect: Dred Scott and the Southern Honor Culture*, 42 *NEW ENG. L. REV.* 79, 86 (2007) (quoting BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* xviii (1982)).

²²³ A particularly prevalent example is antebellum Southern "honor" purporting to justify slavery, racism and sexism as natural, genteel and noble. See generally, RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* (1996); FRANK HENDERSON STEWART, *HONOR* 79 (1994) (noting that Southern honor codes were not so much codified as enforced informally by culture and tradition); WYATT-BROWN, *supra* note 222.

synonymous with conservative elitism, encouraging combative and selfish behavior for the aggrandizement of a select, frequently undeserving, few.²²⁴ One resulting sentiment is, “The ethos of honor is fundamentally opposed to a universal and formal morality . . . the dictates of honor, directly applied to the individual case and varying according to the situation, are in no way capable of being made universal.”²²⁵ Sympathetic to the assertion that, “[w]e have come to think of honor as a largely obsolete virtue,”²²⁶ some social theorists employ terms such as “respect,” “dignity,” “prestige,” and “credibility”—anything to avoid using the word *honor* when describing precisely what honor signifies.²²⁷

Although tarnished by admittedly extensive misuse, it seems peculiar and imprudent to discard such an evocative and useful descriptor, one that nobly inspired the Declaration of Independence.²²⁸ Surely, the Continental Congress would not have closed the Declaration by pledging America’s “sacred Honor” if honor itself is unworthy and disreputable.²²⁹ Indeed, exploitation is a hazard to which any valuable idea or wide-ranging concept is vulnerable, particularly those that define Americanism, such as rights, liberty, freedom, justice, fairness and, yes, honor. One might just as well say *morality* is passé because so many persons and groups have invoked specious moral defenses to rationalize their plainly immoral acts. Indeed, as centuries of philosophy and history remind us, “Honor and dishonor are the matters with which the high-minded man is especially concerned”²³⁰ Accordingly, pivotal honor sub-concepts, such as honesty, integrity, decency, and ‘fair play’ continue to inform modern political and legal morality.²³¹ Indeed, those who would expunge the term “honor” as too closely associated with religious fanaticism, racism and sexism, self-aggrandizement, and self-indulgence (often demanding drastic penalties for trivial, personal affronts), habitually

²²⁴ See DOUGLASS ADAIR, *Fame and the Founding Fathers*, in *FAME AND THE FOUNDING FATHERS* 10 (1974); see also, e.g., BOWMAN, *supra* note 165, at 28, 38–39; SHARON R. KRAUSE, *LIBERALISM WITH HONOR* xi (2002) (“The language of honor smacks of privilege and exclusion, fixed social roles and frivolous duels.”).

²²⁵ Orit Kamir, *Honor and Dignity in the Film Unforgiven: Implications for Sociolegal Theory*, 40 *LAW & SOC’Y REV.* 193, 203 (2006) (quoting Pierre Bourdieu, *The Sentiment of Honor in Kabyle Society*, in *HONOR AND SHAME: THE VALUES OF MEDITERRANEAN SOCIETY* 228 (J. G. Peristiany ed., 1966)).

²²⁶ Paul Horwitz, *Honor’s Constitutional Moment: The Oath and Presidential Transitions*, 103 *NW. U. L. REV.* 1067, 1068 (2009); see also KRAUSE, *supra* note 224, at 1; Hunt, *supra* note 222, at 83.

²²⁷ See, e.g., BOWMAN, *supra* note 165, at 38; Kamir, *supra* note 225, at 202–03.

²²⁸ See *infra* Parts II.E–F.

²²⁹ KRAUSE, *supra* note 224, at 104 (noting that the Founders’ invocation of “‘our sacred honor,’ in defense of American independence . . . reveals that honor need not be ‘inevitably conservative,’ ‘reactionary,’ or linked to the status quo, as often is thought”).

²³⁰ ADAIR, *supra* note 224, at 12 n.8 (quoting Aristotle, *Ethics* iv (c. 340 B.C.), and Cicero, *De Officiis*, Book II, 30ff) (internal quotation marks omitted).

²³¹ See, e.g., BOWMAN, *supra* note 165, at 102–03 (discussing the modern laws and conventions of warfare).

invoke honor-like attributes to explain why some act, particularly some communal behavior, is rightful or wrongful.²³²

As the Founders realized, we need the idea of “honor,” which encompasses the blend of noble impulses and moral precepts about which other terms-of-art fail to suffice. If we did not have the watchword “honor,” we would need to invent a new term as no other existing noun quite fits.

B. How Honor Works

A brief description explaining the mechanics of honor provides a useful framework to understand both honor itself and the inextricable connection between honor, legitimate revolution and the basic precepts of Americanism. At one level, honor is a social process—a social dynamic.²³³ Therefore, its prominence in the realm of psychological, sociological and historical theory is appropriate because, properly understood, honor “control[s] and animate[s] virtually every aspect of [the adherent’s] public life and his private concerns.”²³⁴ In fact, honor is the “centerpiece of societies that evaluate their members and rank them according to adherence to rigid conduct codes”²³⁵ Understanding the relevant conception of honor, then, is essential to understanding a particular person, group or society.²³⁶

²³² They will appeal to “national honor” or the “honorable” acts of keeping promises, respecting individual rights and safeguarding personal liberty. “A nation, the United States in particular, also possessed honor and its actions needed to be shaped so as to protect and enhance that honor. . . . It was, after all, for the United States that the founders pledged ‘our Lives, our Fortunes and our sacred Honor.’” Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT’L L. 313, 325 (2001) (citing Anne-Marie [Slaughter] Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989)).

²³³ See, e.g., CAROLINE COX, A PROPER SENSE OF HONOR: SERVICE AND SACRIFICE IN GEORGE WASHINGTON’S ARMY 38 (2004) (describing honor as an inducement to serve the cause of the American Revolution); Kamir, *supra* note 225, at 196–98 (describing the attributes and implications of honor cultures generally).

²³⁴ Hunt, *supra* note 222, at 91; see also *id.* at 85–86 (explaining that every group has some sort of honor system, even if not codified, nor well articulated, nor detailed).

²³⁵ Kamir, *supra* note 225, at 196. Along these lines, Professor Hunt daringly asserted that honor “is not a social extravagance or personal indulgence, but rather can be accurately characterized as a fundamental human need and therefore a basic human right.” Hunt, *supra* note 222, at 86.

²³⁶ Professor Bowman noted, for instance, that contemporary America’s view of radical Muslim *jihadists* in terms of psychology, poverty, evil inclinations or post-colonialism, renders incomplete any understanding until and unless we comprehend their culture’s honor principles. BOWMAN, *supra* note 165, at 22, 296–303.

[I]f you look very closely into what the *jihadists*, or the various radical groups who support them, have to say about what they do, you will rarely see any reference to poverty. Even religion as such seems of less

Not surprisingly, honor theorists accept the classically liberal concept of the person²³⁷ as “having the ability and unremitting drive to reflect upon one’s own existence and place in the world.”²³⁸ Consistent with the liberal thesis of socialization, within the relevant society, individuals of varying degrees of susceptibility encounter one or more “honor cultures,” each hoping to indoctrinate those individuals into loyal allegiance to the “honor group.”²³⁹ Significantly, the given honor culture desires devotees loyal, not only to the honor group as a community, but more specifically, to the discrete elucidation of its “honor code,” meaning the unique aggregation of selected moral norms denoting that culture from all others²⁴⁰ by setting specific standards of conduct.²⁴¹ In other words, the honor culture seeks to instill in each adherent a “sense of honor,” which unites the foregoing “two closely related elements: an understanding of what constitutes honorable behavior, and an attachment to such behavior.”²⁴² In this way, “[h]onor cultures develop specific cultural norms” to the degree that “the entire moral order is subsumed under the larger goal of honor.”²⁴³

Logically, understanding honor and honor cultures requires appreciating the systemic interplay²⁴⁴ of the culture with its constituents.²⁴⁵ Honor groups enforce the honor culture’s honor code through a host of formal and informal rewards and punishments, including: regarding the former, prestige, respect, acclaim, influence, power and wealth; and for the latter, shame, shunning, derision, loss of influence, loss of power

interest to them than the idea of Arab or Islamic ‘honor’ and ‘manhood,’
with which honor is always intimately related.

Id. at 22.

²³⁷ See Crocker, *supra* note 97, at 269.

²³⁸ Williams, *supra* note 97, at 57 n.7 (citing ROBERTO UNGER, KNOWLEDGE AND POLITICS 200 (1984) (1975)); see also *supra* notes 74–75 and accompanying text.

²³⁹ The “honor group” is the amalgam of persons within an honor culture “who follow the same code of honor and who recognize each other as doing so.” STEWART, *supra* note 223, at 54.

²⁴⁰ See, e.g., KRAUSE, *supra* note 224, at 2; STEWART, *supra* note 223, at 24; Hunt, *supra* note 222, at 84; Kamir, *supra* note 225, at 198 (noting that the particular honor code may be broad and general while “demanding thorough mastery of the most nuanced specific norms and expectations”) (footnote omitted).

²⁴¹ KRAUSE, *supra* note 224, at 4, 28.

²⁴² STEWART, *supra* note 223, at 47 (emphasis omitted).

²⁴³ Hunt, *supra* note 222, at 93 (quoting WILLIAM IAN MILLER, THE MYSTERY OF COURAGE 179 (2000)).

²⁴⁴ A “system” that promotes interplay or interaction is always ongoing and active, never static or inert. A system is a dynamic, continuous process of actions and reflection based on inputs, reactions and feedback to assess the inputs and reactions which, in turn, inspire successive sets of inputs, reactions and feedback. Under systems theory, unlike pure structural-functional analysis, things and events, because they move in time, cannot be understood simply by scrutinizing them at any given moment. See, e.g., FREDERICK L. BATES, SOCIOPOLITICAL ECOLOGY: HUMAN SYSTEMS AND ECOLOGICAL FIELDS 80 (1997); Bayer, *supra* note 54, at 1063 (describing the systemic interplay between emotion and reason).

²⁴⁵ See Kamir, *supra* note 225, at 198.

and ostracism.²⁴⁶ Honor, approval of the honor group and, often, admiration of observers outside the honor group frequently motivate each individual within the given honor group.²⁴⁷

Moreover, because honor cultures exist to indoctrinate obedience through instilling specific morality, the interesting study becomes not only of the members of that culture, but how the culture itself affects, and is affected by, the greater society's other honor cultures.²⁴⁸

Now familiar with the mechanics of honor, we may proceed first to defining that concept and then to exploring how honor influenced the Founders.

C. Honor: Morality's Elegant Vessel

Like morality, a clear and universally accepted definition of honor eludes.²⁴⁹ Some view it as an amalgam of roughly related personal characteristics and social interactions.²⁵⁰ To try and tame the definition, honor could be described, and usually is understood, at least in part, as the quest for both self-respect²⁵¹ and the respect of

²⁴⁶ See ; STEWART, *supra* note 223, at 54, 111; Hunt, *supra* note 222, at 88–89.

²⁴⁷ See, e.g., KRAUSE, *supra* note 224, at xi (“[H]onor rests on the sense of duty to oneself.”); see also *id.* at 106 (noting public recognition as motivation to abide by an honor code). As Frederick the Great caustically observed, “the one thing that can make men march into the muzzles of the cannon which are trained at them is honor.” BOWMAN, *supra* note 165, at 37. Indeed, “[a] man’s sense of honor was something that patriot and military leaders exploited to enjoin all men to serve the cause of the American Revolution.” COX, *supra* note 233, at 38. However, Professor David Hackett Fischer aptly cautioned that, along with honor, soldiers of the Revolution were moved by a shared deep belief in general principles of liberty, fighting for their property and their families and an abiding sense of moral rightness. DAVID HACKETT FISCHER, *WASHINGTON’S CROSSING* 364, 368 (2004).

²⁴⁸ Indeed, most persons belong to various interrelated and disparate honor groups. Frequently, the loyalties and demands of one honor group conflict with another, or conflict with “absolute principles.” The individual may have to choose which code will predominate, at least in a given situation. BOWMAN, *supra* note 165, at 4. As a consequence,

[t]he dictates of honor can so exhaust the social landscape that they have the power to go beyond mere elements of a culture, and instead dominate and constitute the essential building blocks of an entire culture. When this happens, the analysis shifts from a consideration of the behavior of individuals within a culture who seek simply honor, to what are generally described as entirely ‘honor-based cultures.’

Hunt, *supra* note 222, at 93 (quoting WILLIAM IAN MILLER, *THE MYSTERY OF COURAGE* 179 (2000)).

²⁴⁹ “It may seem even that the search for a theory of honor is misguided—that the word covers a wide variety of concepts, none of which fit together in any clear way.” STEWART, *supra* note 223, at 21.

²⁵⁰ See Kamir, *supra* note 225, at 200.

²⁵¹ See, e.g., ADAIR, *supra* note 224, at 10; Kamir, *supra* note 225, at 197 (discussing Julian Pitt-Rivers, *Honor and Social Status*, in *HONOR AND SHAME: THE VALUES OF*

others.²⁵² Acting dishonorably, then, amounts to failing both oneself and others.²⁵³ Certainly, honor provides an instrumental, utilitarian inducement to certain behavior, which may spawn unselfish integrity or enhance already existing selflessness.²⁵⁴ But, at its worst, persons and groups employ the trappings of honor cynically to inculcate obedience and allegiance, mystifying the susceptible into submission based on honor's form, rather than honor's meaning.²⁵⁵ Professor Wendel undoubtedly is correct that in a rudimentary, unsophisticated sense, "there is nothing intrinsic in the concept of honor that makes it likely that it will be connected with virtue or justice."²⁵⁶

Utilitarian reality notwithstanding, honor can, and should be, appreciated as something more and better than either mere reputation or a device predominately intended for the disdainful manipulation of other persons. Rather, "to pledge one's sacred honor is to affirm, in a most emphatic way, allegiance to one's publicly proclaimed moral principles."²⁵⁷ Therefore, at its best, honor is deontological, the framework encompassing moral commands (correctly discerned, one hopes) that must be obeyed whatever the costs. Specifically, honor is the conceptual vessel emphasizing ethical principles along with those personal characteristics a particular person or group considers of the utmost consequence.²⁵⁸ Although some included values may be important but not essential, the honor vessel invariably contains those values believed to be indispensable to a life properly lived.

Because it comprises the morality that the respective person or group likely deems worth dying for,²⁵⁹ honor is not simply a motivating contrivance. Rather,

MEDITERRANEAN SOCIETY 21–22 (J. G. Peristiany ed., 1966)). See generally THE NOBLEST MINDS (Peter McNamara ed., Rowman & Littlefield Pubs., Inc. 1999).

²⁵² "At its simplest, honor is the good opinion of the people who matter to us, and who matter because we regard them as a society of equals who have the power to judge our behavior." BOWMAN, *supra* note 165, at 4; see also, e.g., Horwitz, *supra* note 226, at 1071; Hunt, *supra* note 222, at 84–85, 90 (noting, *inter alia*, that soldiers often fight "not for [some] great cause, but for the sake of their reputations in the eyes of their comrades and families"); Pangle, *supra* note 142, at 211.

²⁵³ See, e.g., KRAUSE, *supra* note 224, at 5; STEWART, *supra* note 223, at 54–55, 111.

²⁵⁴ See, e.g., KRAUSE, *supra* note 224, at 4; *infra* notes 289–92 and accompanying text.

²⁵⁵ For instance, the noted philosopher Arthur Schopenhauer believed that honor, "is nothing but a crude instrument of social control . . ." BOWMAN, *supra* note 165, at 88 (citing Arthur Schopenhauer, *The Wisdom of Life*, in ESSAYS FROM THE PARERGA AND PARALIPOMENA 63 (T. Bailey Saunders trans., 1951)).

²⁵⁶ W. Bradley Wendel, *Regulation of Lawyers Without the Code, The Rules, or The Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?*, 71 *FORDHAM L. REV.* 1567, 1585 (2003).

²⁵⁷ Joseph C. Cascarelli, *Is Judicial Review Grounded In and Limited by Natural Law?*, 30 *CUMB. L. REV.* 373, 404 n.107 (2000) (quoting PAUL EIDELBERG, *ON THE SILENCE OF THE DECLARATION OF INDEPENDENCE* 22 (1976)).

²⁵⁸ See, e.g., KRAUSE, *supra* note 224, at 7; STEWART, *supra* note 223, at 50–51 (discussing Anne Trowbridge, Letter to the Editor, *N.Y. TIMES*, Feb. 24, 1992, at A18); Hunt, *supra* note 222, at 93–97 (describing the honor culture of the antebellum South).

²⁵⁹ See Ronald R. Garet, "The Last Full Measure of Devotion: Sacrifice and Textual Authority," 28 *CARDOZO L. REV.* 277, 297 (2006) ("We had always thought the principles of

more intrinsically, and consistent with its deontological aspects, honor is an end in itself.²⁶⁰ As one noted author expressed honor's intrinsic anti-consequentialism, "[t]he sense of honor is in certain respects categorical, rather than merely instrumental. There are some things the honorable person simply will not do—or must do—as a matter of principle, whatever the consequences may be."²⁶¹ Therefore, in harmony with the very deontology it embraces, honor mandates the willingness to sacrifice both oneself and, when necessary, others.

Professor Stewart recognized the sensible linking of honor and deontology by explaining why honor is not simply integrity; that is, "[t]o thine own self be true," even when one abides by personal beliefs for seemingly unselfish reasons.²⁶² To use an obvious example, if honor is no more than integrity, a Nazi who fights for her "Fatherland" would be honorable, as would a Nazi who genuinely supports Hitler. Both instances evince honor as integrity. But, "the integrity position . . . has little social significance. In substance, the integrity position reduces honor to a virtue, and there is no obvious reason why one would wish to pick out this particular virtue from among various others."²⁶³ Absent deontology, each actor may form her own idiosyncratic rules and is only to be judged according to her integrity; that is, the actor's strict adherence to her chosen rules.²⁶⁴ In that case, only the actor is able to judge the *merits* of her own honor,²⁶⁵ which is a ridiculous way to govern a society.

D. The Declaration of Independence Embraces Deontological Morality as the Essential Duty of Legitimate Government

The Declaration of Independence's significance regarding history, theory of government and political morality are so well known that citation seems almost superfluous.²⁶⁶ For example, although perhaps not regarded as an epitome of either

equal freedom and equal justice worth dying for."); Scot J. Zentner, *Friends, Enemies and the War in Iraq: A View from the Founding*, 9 NEXUS 27, 35 (2004).

²⁶⁰ See KRAUSE, *supra* note 224, at 82; Pangle, *supra* note 142, at 210 (asking whether we should conceive honor as "above all for itself, [] exhibiting and enacting the fulfillment, the sublime beauty, of the souls of the men of honor, who as such stand out as the most important part of the common good, as the truest or greatest goal of a well-ordered human society?"); see also *supra* notes 139–54 and accompanying text (explaining that deontological precepts must be obeyed for their own sake).

²⁶¹ KRAUSE, *supra* note 224, at 29. "While one always has a certain interest in acting honorably, insofar as doing so brings about the desirable ends of self-respect and public recognition . . . [h]onor is categorical in the sense that it imposes obligations that are not subject to the contingencies of a utility calculus." *Id.* at 82.

²⁶² STEWART, *supra* note 223, at 51.

²⁶³ *Id.*

²⁶⁴ See *id.* (explaining integrity as personal honor).

²⁶⁵ *Id.* Hence the famous claim purportedly from Bismark, "I can do without anyone's respect—except my own." *Id.* at 52 n.69.

²⁶⁶ See, e.g., PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 189–208 (1997) (discussing the reinterpretation of the document during the

eloquence or profundity, Dwight D. Eisenhower expressed movingly and appropriately the Declaration's enormity:

Fellow Americans, we venerate more widely than any other document, except only the Bible, the American Declaration of Independence. That declaration was more than a call to national action. *It is a voice of conscience* establishing clear, enduring values applicable to the lives of all [persons.] *It stands enshrined today as a charter of human liberty and dignity.*²⁶⁷

The foregoing describes the Declaration not only by the familiar term "liberty," but of equal importance and greater insight, as "a voice of conscience" that designed a "charter of human liberty and dignity." President Eisenhower thereby fittingly linked the American Revolution with safeguarding innate human worth, a principle that, as we will see, perseveres as the defining concept of this nation's greatest legal paradigm, due process of law.²⁶⁸

Moreover, Eisenhower's rather spiritual perception, urging that the Declaration "stands enshrined" in American hearts second only to the Bible, is perfectly fitting because the Founders understood that document's indispensable principles to be enduring, immutable and emanating from more than human making.²⁶⁹ Evoking a birthright derived not from humankind but from eternity, and certainly among the most famous enunciations of the inherent human condition, the Founders asserted as "self-evident that all [persons] are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."²⁷⁰

early to mid-1800s from blueprint for legitimate revolution to a basic description of fundamental human rights). Therefore, Professor Larson rightly bemoaned the fact that, "[f]or most legal academics, the Declaration is little more than a political puff piece, or a 'propaganda manifesto,' as Richard Hofstadter described it." Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 706 (2001) (quoting RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS* 269 (1968)). Still, as Professor Maier sagely warned for all commentators who would exploit the text, "[T]he sacralization of the Declaration of Independence after 1815 made it a powerful text to enlist on behalf of any cause that might conceivably claim its authority." MAIER, *supra*, at 197.

²⁶⁷ Dwight David Eisenhower, Report by the President to the American People on His European Trip (Sept. 10, 1959), in WILLIAM J. FEDERER, *TREASURY OF PRESIDENTIAL QUOTATIONS* 322 (2004) (emphasis added).

²⁶⁸ See *infra* Part IV.

²⁶⁹ "[T]he fundamental premise of the American Revolution [was] that there are, in fact, things in the temporal or political realm worth dying for, that political life as such is not altogether inferior to the spiritual life." Zentner, *supra* note 259, at 35. In that regard, evoking a nonsectarian spiritualism from the Declaration comports nicely with deontological morality's similar transcendence. See *supra* notes 139–48 and accompanying text.

²⁷⁰ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). Regarding punctuation that is unfamiliar to modern English, Carl Becker proposed that Thomas Jefferson's use of

In ringing, celebrated prose, the Founders identified the legitimate function of public authority: “That to secure these rights, Governments are instituted . . . deriving their just powers from the consent of the governed.”²⁷¹ Accordingly, the people enjoy an inherent prerogative to revolt for “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government”²⁷²

All this the Founders summarized in the Declaration’s renowned introduction, proclaiming that given “the Course of human events,”²⁷³ the colonies, as a matter of abiding, eternal right, were free to “dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which *the Laws of Nature and of Nature’s God entitle them . . .*”²⁷⁴ In that regard, the Founders legitimized the declaring of independence because England’s unremitting maltreatment of the colonies repudiated that empire’s claim to be a legitimate sovereign.²⁷⁵

Although the initial goal of the Continental Congress might have been to expound a formal argument for America’s legitimate revolution, the earlier quoted commentary of President Eisenhower evinces a fitting larger meaning. The rights that the Founders identified as emanating from “the Laws of Nature and of Nature’s God” are so rudimentary and essential that the moral authority, and thus the legitimacy, of any government depends entirely on that government’s devotion to those indispensable but still, nearly two-and-a-half centuries later, incompletely comprehended rights.²⁷⁶ As such,

capitalization and italicization in the Declaration was designed to emphasize words he considered to be the most important. See CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 220–21 (Vintage Books ed., 1958) (1922).

²⁷¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁷² *Id.*; see, e.g., Epstein, *supra* note 219, at 79 (explaining that the Framers of the Constitution as well as the Declaration’s drafters believed any government failing properly to promote life, liberty and pursuit of happiness should be replaced).

²⁷³ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). Later in the text, the Founders delineated the particular “Course of human events” as incessant, significant and destructive abuses under the rule of Great Britain. *Id.* paras. 2–31.

²⁷⁴ *Id.* para. 1 (emphasis added). As the Founders correspondingly accented later therein, when shackled by, “absolute Despotism, it is their right, it is their duty, to throw off such Government” *Id.* para. 2.

²⁷⁵ See, e.g., Phillip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1842–43 (2009).

²⁷⁶ The Founders’ strict standards for legitimacy sprang in part from their legendary mistrust of the very government they knew was necessary. See Paul A. Rahe, *Fame, Founders, and the Idea of Founding in the Eighteenth Century*, in THE NOBLEST MINDS, *supra* note 251, at 25. Thomas Paine famously stated, “Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. . . . Society in every state is a blessing, but government, even in its best state, is but a necessary evil.” *Id.* at 29 (quoting THOMAS PAINE, *Common Sense*, in 1 THE WRITINGS OF THOMAS PAINE 69 (Moncure Daniel Conway, ed., AMS Press,

the Founders necessarily relied on deontological principles greater than the exigency of the American Revolution.²⁷⁷

One of the most expressive and stirring explanations of the Declaration's deontological premises came, not surprisingly, from Abraham Lincoln, whose reverence for that document is well established.²⁷⁸ During his celebrated August 21, 1858, debate with Stephen Douglas in Ottawa, Illinois—referencing an 1854 speech he made in Peoria, Illinois—Lincoln explained his opposition to repealing the Missouri Compromise, which would allow slavery in Kansas and Nebraska.²⁷⁹ Therein, the future President presented the necessary connection between transcendent morality, American society and the Declaration: “This . . . covert *real* zeal for the spread of slavery, I cannot but hate . . . especially because it forces . . . an open war with the very fundamental principles of civil liberty—criticizing the Declaration of Independence, and insisting that there is no right principle of action but *self-interest*.”²⁸⁰

Lincoln's splendid sentiments require little explication, particularly considering the proof in Part I of this Article that deontology, not consequentialism, is correct. He properly united the Declaration with both “the very fundamental principles of civil liberty” and the fallacy of the utilitarian assertion “that there is no right principle of action but *self-interest*.”²⁸¹ In this way, Lincoln explained with apt fervor the duty—the

Inc. 1967) (1776)) (emphasis omitted). As we will soon see, although articulate and evocative, Paine erroneously underestimated government as required only to restrain the wicked among us. To the contrary, Kant proved that government is necessary for economic and other community intercourse among moral persons. *See infra* Parts III.E–G.

²⁷⁷ Jefferson, for example, urged “that between society and society, or generation and generation there is no municipal obligation, no umpire but the law of nature.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 56, at 631–36; *see, e.g.*, John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL'Y. 195, 321 (2009) (discussing Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 56). Declaration signer, jurist and future Supreme Court Justice James Wilson similarly believed in the application of eternal principles: “we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects.” *Id.* at 194 n.907 (quoting JAMES WILSON, *Of the Law of Nature*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note , at 525 (Kermit L. Hall & Mark David Hall eds., 2007)).

Accordingly, scholarship confirms that the Founders' phrase “the Laws of Nature and of Nature's God” refers to the Liberal concept of rights emanating from human beings' natural state. *See, e.g.*, *Newdow v. Rio Linda Sch. Dist.*, 597 F.3d 1007, 1030 & n.23 (9th Cir. 2010) (stating that the Declaration embraces natural law theory); *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 453 n.7 (6th Cir. 2003) (citations omitted), *aff'd*, 545 U.S. 844 (2005).

²⁷⁸ *See* MAIER, *supra* note 266, at 205–06.

²⁷⁹ Abraham Lincoln–Stephen Douglas Debates, First Joint Debate at Ottawa, Ill., Lincoln's Reply to Douglas (Aug. 21, 1858), *available at* <http://lincoln.lib.niu.edu/file.php?file=Nh358s.html> [hereinafter Lincoln-Douglas Debates].

²⁸⁰ *Id.* (emphasis added). Quoted more fully in the Conclusion, Lincoln's statement encapsulates the essence of this Article's constitutional thesis.

²⁸¹ *See id.*

sacrifice—attendant to the eternal morality that underlies the Declaration, thereby premising this nation. It is a duty that, as we will next learn, the Founders enunciated through the pledge of American lives, property and sacred honor.

E. To Secure Government's Intrinsic Duty to Protect Transcendent "Life, Liberty and the Pursuit of Happiness," the Declaration Pledges Every American's "Sacred Honor"

With so much at stake, it is hardly surprising that in concluding words as authoritative as any within that document, to achieve and to uphold virtuous independence the Founders promised humankind's most precious possessions as their collateral: "for the support of this Declaration . . . we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."²⁸² While a narrower reading of the literal words is possible, the better interpretation is that the Founders meant the Declaration's concluding line to apply generally, not simply to them. That is, the Declaration is more than a mutual pledge exclusively among the members of the Continental Congress or even among the "people of the individual states as separate political entities. . . ."²⁸³ Rather, "we mutually pledge" comprises "the American people acting as a whole."²⁸⁴ Similarly, conservative social critic William Bennett rightly observed,

[F]ew Americans pay enough attention to the last line of the Declaration of Independence. . . . These are not empty words; they are as important as the opening paragraphs of the Declaration. Rights are important. *But just as we have a fair claim on our rights, so America's honor—our sacred honor—has a fair claim on us.*²⁸⁵

²⁸² THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

²⁸³ Larson, *supra* note 266, at 728–29.

²⁸⁴ *Id.*

²⁸⁵ BENNETT, *supra* note 155, at 25 (emphasis added); see also MAIER, *supra* note 266, at 189–208. As historian Pauline Maier explained, even if not so intended by the Founders, the Declaration has become a pivotal American exemplar of the innate rights of persons *qua* persons. She quoted as emblematic the sentiments Peleg Sprague expressed in Hallowell, Maine in 1826, the Declaration's fiftieth anniversary. Sprague extolled that text as a, "Declaration, by a whole people, of what before existed, and will always exist, the native equality of the human race, as the true foundation of all political, of all human institutions." *Id.* at 191 (emphasis omitted). Such opinion, according to Professor Maier, "contributed to a modern reading of the document that had begun to develop among Jeffersonian Republicans in the 1790s but became increasingly common after the 1820s, and gradually eclipsed altogether the document's assertion of the right of revolution." *Id.* But, of course, that "right of revolution" is predicated on, as Sprague put it, "the native equality of the human race, as the true foundation of . . . all human institutions," particularly government. *Id.* (emphasis omitted).

Thus, to thwart illicit government and consistent with the responsibility of timeless morality, all are obliged, if circumstances require, to *sacrifice*—specifically, to secure liberty with their lives, property and honor.

There is, however, a crucial contrast between “sacred Honor,” on the one hand, and “Lives” and “Fortunes,” on the other. Regarding those three possessions of surely inestimable worth, two are transitory—lives and fortunes—while only “sacred Honor,” imbued with deontological morality, endures beyond time and space. Indeed, although indisputably valued, the Founders did not express as sacrosanct life and property; but, they designated honor to be “sacred.”²⁸⁶ That disjuncture leads to the interesting fact that the preservation of liberty demands the populace’s willingness to sacrifice earthly treasures—life and property—while the enduring treasure *honor* effectively safeguards liberty only if it is *not* sacrificed. One must be, and remain honorable by being, devoting to the honor culture of legitimate government through preserving those honor codes that vouchsafe such government. Therefore, because honor is deontological, upholding the moral requisites of “sacred Honor” may engender attendant sacrifices—pain, loss, distress—that affect oneself, others or both.²⁸⁷ Thus, for the Founders, sacrifice is integral to the letter and spirit of the Declaration: sacrifice measured as the loss of property, the loss of life and the price of honor.

It is no surprise, therefore, that modern analysts posit the pursuit of honor as a prime, if not *the* prime, incentive for the founding of the United States—meaning the Declaration, the Revolution and the Constitution considered together. Indeed, the concept of honor has remained a dominant impetus throughout America’s history. “[H]onor has been a guardian of American democracy from its inception Perhaps honor’s most distinctive contribution has been to set in motion great acts of courage in defense of liberty at defining moments in American history”²⁸⁸

Possibly more than any other historian, Professor Douglass Adair is credited with recognizing the huge influence of honor and the pursuit thereof over the Founders.²⁸⁹

²⁸⁶ See, e.g., Hunt, *supra* note 222, at 90 (“In this construction, the Founders made it clear that in an honor culture one’s honor was more important than either his life or his fortune.”).

²⁸⁷ See *supra* notes 257–62 and accompanying text.

²⁸⁸ KRAUSE, *supra* note 224, at 97; see also Burley, *supra* note 232, at 484–87 (discussing the Founders’ views on honor and morality in government); Horwitz, *supra* note 226, at 1068 (arguing that the president’s oath of office set forth in the Constitution in effect requires the office holder to pledge his personal honor to protect, as president, the nation’s honor).

²⁸⁹ ADAIR, *supra* note 224. Indeed, Adair’s argument “constituted a challenge to the reigning interpretation of the founding period, which stressed the role of economic forces. The economic interpretation of the founding is now widely regarded as inadequate.” Peter McNamara, *Preface to THE NOBLEST MINDS*, *supra* note 251, at vii; see also, e.g., KRAUSE, *supra* note 224, at 101–03 (Adair tried to reconcile the conflicting theories of Charles Beard’s *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES*, (The Free Press 1986) (1913), arguing that economic motivations explain the Revolution and responses to Beard that the Founders were motivated by grand ideas, inspired visions and self-sacrifice).

I am particularly indebted to my colleague Professor David Tanenhaus for suggesting that I research Professor Adair’s theories and responses thereto.

Recognizing them as complex personalities, susceptible, as are we all, to various complementary and conflicting inducements, Professor Adair explained that the Founders embraced honor substantially, but hardly entirely, to pursue noble altruism.²⁹⁰ Rather, the Founders candidly admitted their quite-human longing for fame, honor, glory²⁹¹ and posterity's favor which, along with patriotism, and a calling to serve the best interests of their community, "urge[d] some of them to act with a nobleness and greatness that their earlier careers had hardly hinted at."²⁹² Impelled by their passion for honor, the Founders matured to respect public service inherently, not solely for its utilitarian recompense.²⁹³

Moreover, the Founders relied on honor to motivate honest, conscientious, able individuals to accept not very lucrative public service.²⁹⁴ Despairing that disinterested virtue and selflessness could not sufficiently motivate public service, John Adams reluctantly joined Hamilton's, Morris's and Madison's opinion that "'pride and vanity' of America's leading [citizens] could be deployed in defense of justice and good government."²⁹⁵ Specifically, constitutional checks and balances, designed to prevent usurpation, despotism and the collapse of the nation into a loose confederation of states, would succeed by attracting persons of "pride and vanity" who sought power, prestige, and self-aggrandizement.²⁹⁶ Yet, by virtue of the offices and the public trust

²⁹⁰ ADAIR, *supra* note 224, at 8, 24–25.

²⁹¹ See Rahe, *supra* note 276, at 5. The Founders frankly acknowledged that, in the words of Gouverneur Morris, "the love of fame" is "the great spring to noble & illustrious actions." *Id.* In *The Federalist*, Hamilton notably observed that the quest for fame is "the ruling passion of the noblest minds." *Id.*

²⁹² ADAIR, *supra* note 224, at 8. As Adair gracefully summarized regarding the drafting of the Constitution,

[T]he greatest and the most effective leaders of 1787—no angels they, but passionately selfish and self-interested men—were giants in part because the Revolution had led them to redefine their notions of interest and had given them, through the concept of fame, a personal stake in creating a national system dedicated to liberty, to justice, and to the general welfare.

Id. at 24.

²⁹³ *Id.*

²⁹⁴ For instance, "Washington saw clearly that honor alone could not be counted on to make Americans serve the republic against their interests, but he saw equally clearly that without it the cause was lost." Lorraine Smith Pangle & Thomas L. Pangle, *George Washington and the Life of Honor*, in *THE NOBLEST MINDS*, *supra* note 251, at 69.

²⁹⁵ Rahe, *supra* note 276, at 5–6.

²⁹⁶ *Id.* As Vice President, John Adams campaigned unsuccessfully, to have grand titles conferred on the leading magistrates and legislators of the new republic. . . . Even when that campaign failed and he found himself dubbed 'His Rotundity' and treated with mockery in circles which had once inspired affection, consideration, and respect, Adams persisted in making the case for pomp and circumstance.

Id. at 6–7.

they engender, selfish motives would be, if not replaced, at least calmed by honor.²⁹⁷ Thus, the Constitution and the Declaration were not ‘miracles,’ as sometimes claimed, nor *dei ex machinae*, but the extraordinary creations of leaders spurred to greatness largely by the yearning to be well and fondly remembered as the creators of a great society. Perhaps paradoxically, the spur for fame helped them to cherish much more fully the intrinsic rewards of public service in particular and of honor in general.²⁹⁸

F. The Declaration Did Not Conclude, but Rather Began the New Nation’s Mission to Understand and to Attain “Sacred Honor”

As the Declaration’s plain text accents, honor, the morality honor denotes, and the legitimacy of government predicated on honor, were deeply rooted in the hearts of those who envisioned and created the United States.²⁹⁹ Indeed, as Professor Krause stressed, “[t]he connection between honor and natural rights in the founding generation marks an important departure from traditional forms of honor. Democratic honor frequently (although not always) is tied to universal principles of right rather than to concrete codes of conduct applicable only to a particular group.”³⁰⁰

It is here that we move to a most important realization emanating from the Declaration as an expression of the Founders’ shared concept of “sacred Honor,” broadly defined. The Founders knew that their noble motives were entwined with their “love of fame,” personal ambition and vanity.³⁰¹ They also recognized that, due to their frailty and imperfect wisdom, their political-moral philosophy was neither complete nor correct in all regards.³⁰² Consequently, as with understanding the Constitution, we must take the Founders’ expression of “sacred Honor” not to be the last word, but instead as part of ongoing deliberation of that subject. Like the Constitution,³⁰³ we may

²⁹⁷ As Madison explained, “[B]ecause this office holder and his colleagues represented ‘the dignity of their country in the eyes of other nations,’ they would ‘be particularly sensible to every prospect of public danger, or of a dishonorable stagnation in public affairs.’” *Id.* at 6 (quoting THE FEDERALIST NO. 57 at 386 and NO. 58, at 395 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press, 1961)).

²⁹⁸ See ADAIR, *supra* note 224, at 24. “In light of the role that the ‘laws of honor’ played in the personal and political values of America’s Founding Fathers, it is no surprise that the . . . Declaration of Independence closes with an exhortation to the signer’s sense of honor.” Hunt, *supra* note 222, at 89 (quoting JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 170–71 (2001)).

²⁹⁹ See, e.g., KRAUSE, *supra* note 224, at 113–16; Hunt, *supra* note 222, at 83–84 (citing KRAUSE, *supra* note 224, at 2–3).

³⁰⁰ KRAUSE, *supra* note 224, at 107 (emphasis added).

³⁰¹ Rahe, *supra* note 276, at 5–6; see also ADAIR, *supra* note 224, at 8, 24–25.

³⁰² See Sanford Levinson, *Our Schizoid Approach to the U.S. Constitution: Competing Narratives of Constitutional Dynamism and Stasis*, 84 IND. L. J. 1337, 1355 (2009).

³⁰³ E.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847–48 (1992); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); *United States v. Classic*, 313 U.S. 299, 316 (1941); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–43 (1934); *Village of Euclid v.*

appreciate the Declaration not only in its own context, but as the wellspring of principles, understood profoundly, yet only partially by the Founders. Indeed, they hoped that subsequent generations would attain an ever fuller understanding, even if elucidation invalidated customs and beliefs that they either did not recognize as immoral or so recognized but nonetheless, for political, pragmatic or other purportedly appropriate reasons, refused to abandon.

Addressing the question “Whether one generation of men has the right to bind another . . . [which is] among the fundamental principles of every government,”³⁰⁴ Thomas Jefferson, the Declaration’s primary author, cited the deontology of morality: “[B]ut that between society and society, or generation and generation there is no municipal obligation, no umpire but the law of nature.”³⁰⁵ Similarly, and of extraordinary significance, James Madison unequivocally emphasized in *The Federalist No. 14*, “the leaders of the revolution . . . pursued a new and . . . noble course. . . . They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great Confederacy, *which it is incumbent on their successors to improve and perpetuate.*”³⁰⁶ The “Father of the Bill of Rights” supported his assertion with a rhetorical question he had raised earlier in that essay:

Is it not the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?³⁰⁷

Reiterating that sentiment shortly before the fiftieth anniversary of the Declaration, Madison wrote to Jefferson, “And I indulge a confidence that sufficient evidence will find its way to another generation, to ensure, after we are gone, whatever of justice may be withheld whilst we are here.”³⁰⁸ Madison certainly implored that future Americans find inspiration and guidance from, but not be shackled by, the words, acts, and beliefs of the Founders.³⁰⁹

Ambler Realty Co., 272 U.S. 365, 387 (1926). *But see* *Washington v. Glucksberg*, 521 U.S. 702, 721 & n.17 (1997).

³⁰⁴ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 299, at 631–32.

³⁰⁵ *Id.* As one commentator concluded, Jefferson believed that “to lock in future generations to the eighteenth-century mores and ethics would be absurd.” Bessler, *supra* note 277, at 321 (discussing Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *supra* note 56).

³⁰⁶ THE FEDERALIST NO. 14, at 88–89 (James Madison) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (emphasis added).

³⁰⁷ *Id.* at 88.

³⁰⁸ Bessler, *supra* note 277, at 321, n.906 (quoting Letter from James Madison to Thomas Jefferson (Feb. 24, 1826)).

³⁰⁹ *See, e.g.*, Levinson, *supra* note 302, at 1355. Professor Levinson argued that Madison’s “eloquent” words reflect the “central question” confronting both the Founders and arguably

James Wilson, another renowned signer, similarly linked the moral foundations expressed in the Declaration to future, better comprehension beyond that of the Founders themselves:

Morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are. Hence we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects. . . . In every period of his existence, the law, which the divine wisdom has approved for man, will not only be fitted, to the contemporary degree, but will be calculated to produce, in future, a still higher degree of perfection.³¹⁰

The crucial tenet that the Founders themselves directed their successors to continue the quest for moral perfection has not been lost on subsequent American leaders. Abraham Lincoln, for instance, rejected as unsound the argument that we can only understand and advance the general principles of the Founders by accepting without question their every precept, nuance and discrete belief.³¹¹ As noted scholars have urged, Lincoln offered that the Founders were not actually ready to accord the universal principle of equality they venerated in the document.³¹² Therefore, “[t]he Declaration was intrinsically reformist insofar as it would push the nation forward and upward by promising universal liberty and equality for all, thereby inviting the reforms required to fulfill its promise.”³¹³

Not a decade ago, discussing the Constitution’s Due Process Clauses, the Supreme Court expressed the principle in persuasive words fully applicable to the authors of the Declaration:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight.

successive generations of Americans, “Are we capable of exercising our own reflection and to make our own well-reasoned choices about how we wish to govern ourselves, or are we, on the contrary, trapped within a static constitutional structure . . . ?” *Id.*

³¹⁰ Bessler, *supra* note 277, at 321, n.907 (quoting WILSON, *supra* note 277, at 525).

³¹¹ MAIER, *supra* note 266, at 205–06.

³¹² KRAUSE, *supra* note 224, at 138.

³¹³ *Id.* at 138–39 (citing HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 315–21 (Doubleday, 1959)); *see also, e.g.*, MAIER, *supra* note 266, at 205–06. Lincoln “saw the Declaration of Independence’s statements on equality and rights as setting a standard for the future, one that demanded the gradual extinction of conflicting practices [particularly slavery] as that became possible” *Id.* at 205.

They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.³¹⁴

Conservative analyst William Bennett expressed concisely and unromantically why the creators of the Revolution cannot have the last word: “The Founders certainly were no angels—often they did not live by their own advice.”³¹⁵

Accordingly, in faith with the Declaration, we must understand even better than did the Founders the contours of transcendent morality—“the Laws of Nature and of Nature’s God,” if you will—that keeps legitimate government in check. Surely, as would any good parents, the Founders expected from us sufficient fortitude—“sacred Honor”—to discover the depths of morality they did not know, to vouchsafe through government the moral duties they could not or would not endure and to accept the sacrifices our greater appreciation of morality requires.

While it is doubtful that the Founders would have agreed that the “Constitution is a suicide pact,”³¹⁶ their basic expression of “unalienable Rights” incited and continues to elucidate our increasing understanding of honor’s bequest, particularly due process of law.³¹⁷ Consistent with our duty to learn more about the profundity and meaning of their principles than did the Founders themselves, we turn to arguably the greatest expression of morality’s value monism, Kantian honor.

³¹⁴ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003); *see also* *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010) (“The Federal Government undertakes activities today that would have been unimaginable to the Framers . . . Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.”) (quoting *New York v. United States*, 505 U.S. 144, 157 (1992)); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847–49 (1992) (holding that the meaning of “liberty” is not limited to perceptions of the framers of the Fourteenth Amendment nor to the enumeration of specific protections under the Bill of Rights); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 226 (1986); *United States v. Classic*, 313 U.S. 299, 316 (1941) (“[I]n setting up an enduring framework of government [the Framers] undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.”).

Speaking for the Court, seventy years before *Lawrence*, Chief Justice Hughes expressed the concept as virtually self-evident: “It is no answer . . . to insist that what the provision of the Constitution meant to the vision of [the Framers]’ day it must mean to the vision of our time . . . that what the Constitution meant at the time of its adoption it means to-day . . . carries its own refutation.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 442–43 (1934).

³¹⁵ BENNETT, *supra* note 155, at 18.

³¹⁶ *See, e.g., infra* notes 488–90 and accompanying text.

³¹⁷ *See infra* notes 539–59 and accompanying text.

III. THE KANTIAN OVERVIEW

I turn to the profound ideas inspired by the writings of Immanuel Kant to elucidate the value monism evoked by the Founders. I agree with the many theorists arguing that Kant's moral philosophy best captures the spirit, if not the letter, of pledging one's honor to fulfill the fundamental task of good government: securing "Life, Liberty and the pursuit of Happiness."

Few philosophers have provoked the imagination and engendered the respect of modern legal theorists as has Immanuel Kant. Perhaps more than any other post-Hellenistic thinker before him, Kant provided a workable articulation of the abstract moral base below which human behavior and the laws regulating human behavior cannot go.³¹⁸ In particular, Kant's ideas premise much contemporary deontology, especially for theorists who espouse the inevitable intersection of law and morality³¹⁹ to defend the robust assertion of justice as "fairness."³²⁰ Accordingly, my argument is that Kantian Ethics—also appropriately known as Kantian Honor—best expresses the flowering of the moral precepts that the Founders vouchsafed in the Declaration with America's "sacred Honor."³²¹ Because "sacred Honor" is elaborated, explicated and enforced *via* the Constitution's Due Process Clauses,³²² due process should be understood as the American idiom of Kantian Honor.

Any writer must approach Kantian analysis with great caution and modesty. Commentators often disagree about particular meanings of Kantian theory or whether he had a fully coherent theory at all.³²³ Of course, such debates do not limit commentators' prerogative to find inspiration from ambiguous or incomplete philosophies. Consequently, even if one can "make[] no claim to have arrived at the understanding that Kant intended . . . [a justifiable] goal is to construct a useful understanding of Kant's formula . . . rather than one that would have met with Kant's approval."³²⁴ Nonetheless, there appears to be sufficient agreement that Kant's philosophy, especially his moral

³¹⁸ See Carlson, *supra* note 48, at 33 ("Kant's project was to render morality undogmatic—to ground it in the fact of reason.").

³¹⁹ If Kant is right, "the condition for the existence of a legal system is morality as such." *Id.* at 23. Thus, Positivism is wrong to conclude that there is no inevitable connection between law and morals. *Id.*

³²⁰ See, e.g., MURPHY, *supra* note 34, at 106 (to speak of "rights" requires a context of "justice or fairness," which, in turn, "can be operative only in a context of institutionalized procedures guaranteeing due process . . .") (citing Immanuel Kant, *Concerning the Common Saying: This May Be True in Theory but does not Apply in Practice*, in *THE PHILOSOPHY OF KANT* 289 (Carl J. Friedrich trans., 1949) (1793)); see also John Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958).

³²¹ See *infra* notes 363–65 and accompanying text.

³²² See *infra* Part IV.F.

³²³ E.g., WOOD, *supra* note 24, at 206.

³²⁴ Wright, *supra* note 36, at 274.

theory, provides a dependable grounding to assess individual and societal behavior in general and legal principles in particular. Intellectuals, such as the properly celebrated John Rawls, have restored Kant's proper place at the heart of the debate on both theoretical and functional morality, especially the morals of law.³²⁵

A final preliminary matter merits brief mention: the emphatic distinction between "Kantian ethics" and "Kant's ethics," with most commentators accepting the former and rebuking the latter—in a manner similar to embracing the paradigms of the Founders but not necessarily their actual applications of their own moral theory.³²⁶ Kant's ethics are his specific moral applications and discrete moral conclusions.³²⁷ "*Kantian ethics*, on the other hand, is an ethical theory formulated in the basic spirit of Kant"³²⁸ A proponent of Kantian ethics enthusiastically adapts Kant's broad principles to form what she believes is either a more accurate, pertinent meta-theory or a better application of such to precise circumstances. By contrast, most modern critics find Kant's ethics steeped in untoward prejudices and senseless fanaticism.³²⁹

³²⁵ See WOOD, *supra* note 24, at x. Until the mid-twentieth century, the idea that ethics could be subject to rational discourse was in some disrepute, with critics arguing morality was, at best, a set of abstract principles not readily applicable to discrete social and personal dilemmas. Many of those who still pursued a reasoned analysis of morality "took it for granted that utilitarianism was the only possible basis for rational discussion . . ." *Id.* This changed with Rawls and his commentators, who "showed not only that ethical theory could be treated with analytical sophistication and applied to issues of vital social concern, but also that Kantian ideas were indispensable to doing this in the right way." *Id.* (emphasis added); see also Powers, *supra* note 33, at 1575–88 (discussing Rawls's adaptation of Kantian morality).

³²⁶ See, e.g., WOOD, *supra* note 24, at xii.

³²⁷ *Id.* at 1.

³²⁸ *Id.*

³²⁹ Some scholars maintain that modern "fashionable assumptions" misconceive much of Kant's ethics. See, e.g., *id.* at 2. Still, the prevailing sentiment castigates Kant for believing, to cite three examples, (1) that one must keep a trivial promise, such as guaranteeing to be somewhere by noon, even when breaking that promise might save a life, (2) that one may never take an innocent life regardless of the consequences, and (3) that lying is immoral under any circumstance even if speaking truthfully reveals to a potential murderer the location of her intended victim. See, e.g., Kuklin, *supra* note 34, at 499–500; Waldron, *supra* note 15, at 1536. Of course, one could imagine and defend a moral system that absolutely forbade breaking promises, telling lies and killing the innocent. Conceivably, if everyone actually abided by such principles the world would be better, even happier, as war would be unpalatable, homicide would be unknown, and honesty in interpersonal relations would prevail over rationalizations, obsequiousness and duplicity.

Regarding prejudice, Kant considered non-Caucasians intellectually limited, which he attributed in large measure to those races having developed in unsuitable climates and environments. In later writings, Kant appeared to have modified, but not fully repudiated, his racial theories which may have had a substantial influence on racist models of the 18th and 19th Centuries. See WOOD, *supra* note 24, at 8, 10–11. Similarly, Kant thought women inferior to men both intellectually and physically. *Id.* at 7.

In these regards, much of the philosophical world scorns, “the stiff, inhuman, moralistic Prussian ogre everyone knows by the name Immanuel Kant.”³³⁰

Yet, Kant espoused profound respect for the individual, particularly that each of us may be self-motivating, self-reflecting, cognizant of moral duties and willing to accept responsibility for our actions.³³¹ Correspondingly, Kant’s argument that morality is more precious than life³³² evinces an abiding faith in the nobility of humankind that many arguably non-bigoted consequentialists lack.

A. Kant’s Dignity Principle

The Kantian philosophy of moral honor might be encapsulated within the proposition that “[b]ecause the worth of every human being is absolute, the worth of all persons is fundamentally *equal*.”³³³ This parity of worth stems from the unique *rational capacity* inherent in each human being. Accepting the liberal premise that persons are educable in reason, Kant argued that the compelling attribute of humankind is the “rational capacities [of individuals], including their ability to make rational choices regarding what is deeply valuable or worthy.”³³⁴ Rational capacity is special because it allows persons to be more than the effects of their environments. Rather, consistent with our general perception of deontology, persons may rationally discern deontological

³³⁰ WOOD, *supra* note 24, at xii.

³³¹ *Id.* at 3. Indeed, Kant argued that respecting others may require not simply refraining from acting immorally, but also taking affirmative steps to render assistance. See HILL, *supra* note 61, at 202; Wright, *supra* note 36, at 277. Going further, Professor Wood explained that according to Kantian philosophy, we all have a duty of “sympathetic participation,” that is to develop an understanding and appreciation of that which may foster the happiness of others. WOOD, *supra* note 24, at 176–77. Thus, contrary to some cursory critiques, Kantian ethics requires persons to be compassionate and humane. See, e.g., *id.* at 171.

³³² See *infra* notes 351–57 and accompanying text.

³³³ WOOD, *supra* note 24, at 3.

³³⁴ Wright, *supra* note 36, at 274. Similarly, Professor Wood explained, Kant’s theory of the will takes us to be agents who are self-directing in the sense that we have the capacity to step back from our natural desires, reflect on them, consider whether and how we should satisfy them, and to be moved by them only on the basis of such reflections.

WOOD, *supra* note 24, at 67. If so moved, we select means to attain our chosen goals.

The origins of Kant’s philosophy stretch back over two millennia, particularly to Cicero who argued that:

[T]he ability to reason turned man into an autonomous being, able to choose his fate and act upon that choice. This conception of dignity, as being based in man’s ability to reason, has been described as “the central claim of modernity—man’s autonomy, his capacity to be lord of his fate and the shaper of his future.”

John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 677 (2008) (quoting Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 1, 12 (David Kretzmer & Eckart Klein eds., 2002)).

morality, or at least make serious, arguably useful attempts to do so.³³⁵ To that effect, Kant proposed the idea of “practical freedom,”

namely, a capacity to follow determinate laws given by the faculty
of reason . . . the capacity to recognize rational nature as an end

³³⁵ See *supra* notes 115–17 and accompanying text. This Article has already addressed under deontology, and need not repeat, the well-known objections that persons are capable neither of making rational decisions nor of understanding *a priori* principles. See *supra* notes 97–117 and accompanying text.

Given its crucial importance, a very brief explication of Kant’s “idea of reason” is apt. Kant “formulated reason as the ability of humans to appreciate the implications or ‘universality’ of their actions.” Castiglione, *supra* note 334, at 678 (citations omitted); see also, e.g., HILL, *supra* note 61, at 40–41, 207–08 (noting that humans’ rationality enables them to plan for and consider future consequences); Tesón, *supra* note 53, at 75–76 (asserting that Kant believed republics’ constitutions should apply cosmopolitan moral theory). Reason enables universality by “order[ing] concepts so as to give them the greatest possible unity combined with the widest possible application.” Weinrib, *supra* note 83, at 479 (citing KANT, *supra* note 83, at *A644/B672). Thus, reason performs the “systematizing function” by which persons both understand discrete concepts and form ever larger amalgams of ideas, culminating in an “articulated unity . . . upon which all the conceptual lines converge,” which certainly accords with our earlier discussion of *value monism* in morality. *Id.* at 480.

Within the realm of *reason*, Kant emphasized “practical reason,” which is “[a] will which can be determined independently of sensuous impulses [passion and emotion], and therefore through motives which are represented only by reason . . .” *Id.* at 481 (citing KANT, *supra* note 83, at *A800/B828–A802/B830). The facility for practical reason is essential because people must think as deontologists, not as consequentialists, so that they may embrace standards applicable to all and not simply to the self to promote the self’s own well being. See *id.* at 483.

The capacity for practical reason allows for “practical judgment,” meaning “the capacity to descend correctly from a universal principle to particular instances that conform to it.” WOOD, *supra* note 24, at 152; see also, e.g., Wright, *supra* note 36, at 278 (discussing KANT, *supra* note 93, at 156). Through “practical judgment” individuals can both derive lower level moral precepts from morality’s value monism—the dignity principle—and discern how to apply such precepts to discrete scenarios. Such is not, however, merely

a rigorous deductive procedure. Instead, we should think of the
[process] . . . more as interpretive or hermeneutical in character. Rules
or duties [and proper applications] result when the basic value and
fundamental principle are *interpreted* in light of a set of general em-
pirical facts about the human condition and human nature, perhaps also
as modified by cultural or historical conditions.

WOOD, *supra* note 24, at 60; see also, e.g., Carlson, *supra* note 48, at 37–38. Thus, judgment may be learned but cannot be appreciated merely by understanding rules uninformed by experience. WOOD, *supra* note 24, at 64. That would be like trying to understand chess simply by reading a rule book without ever playing the game. This is consistent with the previously explained beneficial effects of experience on generating and informing deontological inquiry. See *supra* Part I.D.

Practical judgment can, but certainly does not inevitably, render *wisdom* “a comprehensive knowledge of which ends to pursue, how to combine them, and how to pursue them under contingent conditions.” WOOD, *supra* note 24, at 153; Carlson, *supra* note 48, at 37–38 (stating that practical reason cannot impart whether freedom or nature generate human action).

in itself as a reason for acting in certain ways, and to act in those ways on the basis of that reason . . . the capacity to act *for reasons*, rather than only on the basis of feelings, impulses, or desires that might occur independently of reasons.³³⁶

The extraordinary potential human competence inherent in *practical freedom*—the aptitude to discern meaningfully, if not perfectly, *a priori* rules and to understand that the moral duty of obedience stems from those rules' *a priori* nature—comprises nothing less than “the fundamental condition of being a *person*—in the sense of a being that can be held morally and legally responsible for its actions”³³⁷

Persons' capacity for rational thought—allowing intentionally moral behavior—in turn, accords every person an intrinsic or native dignity that every other person must respect.³³⁸ Indeed, and of supreme consequence, these unique and sublime attributes oblige that “to the extent that they are capable of free and autonomous thinking and of genuine moral deliberation, people possess dignity, or worth, *as ends in themselves*.”³³⁹ Certainly, Kant did not assert that the capacity to reason assures the correct “solution to every controversy.”³⁴⁰ Many scholars purport an inevitable indeterminacy of concepts that precludes complete certainty;³⁴¹ although as argued in the deontology portion of this Article, indeterminacy must derive from humankind's present inability to reason flawlessly and not from the concepts themselves. Were we capable of perfect understanding arising from perfect reasoning capacity, we would discover perfect resolutions to moral dilemmas. Nonetheless, *the potential* to contemplate by escaping environmental influences in the conscientious quest for truth allows persons not only to expect, but to demand that their dignity be respected.³⁴²

As important as the right to demand dignity is the concomitant duty to respect dignity. Because all persons are “ends in themselves,” each person enjoys the primary right that his or her dignity be respected by all others as he or she must respect the dignity of

³³⁶ WOOD, *supra* note 24, at 127.

³³⁷ *Id.* at 129.

³³⁸ *See id.* at 94.

³³⁹ Wright, *supra* note 36, at 275 (emphasis added) (citations omitted). “Kantian ethics rests on a single fundamental value—the dignity or absolute worth of rational nature, as giving moral laws and as setting rational ends.” WOOD, *supra* note 24, at 94.

³⁴⁰ Weinrib, *supra* note 83, at 506. “[T]he inability of the concept of right to predetermine hard cases is merely the unavoidable concomitant of . . . being an idea of reason.” *Id.* at 507.

³⁴¹ A concept is a universal, that is, something general that applies to the many particular instances falling under it. One invokes a concept not to produce a full enumeration of its instances but to clarify them by reference to the common category to which they belong. Particulars . . . always contain something contingent with respect to their universal. Because of this contingency, they *cannot* be derived from any definition of the concept.

Id. at 505–06.

³⁴² Wright, *supra* note 36, at 274–75.

all others.³⁴³ Accordingly, innate dignity allows individuals to demand moral treatment from others while simultaneously requiring those individuals to treat others morally.³⁴⁴ This is the core of Kantian moral honor—and, in legal realms, of Kantian justice—for to act in ways that offend this right is to be immoral,³⁴⁵ and thus dishonorable.

Because the capacity for rational thought is presumed among all persons, the dignity owed to each person is not a function of whether she has actually acted in a dignified manner—rationally, humanely and morally.³⁴⁶ That someone acts immorally does not free others from their moral duties, even if they are victimized by those immoral acts. The core of Kantian honor, then, is an individual's, a group's or a society's faithful respect for the dignity of all other persons, groups and societies.³⁴⁷ Accordingly, as we discovered within deontology, the immoral conduct of others cannot justify responding in kind; we may not use immorality to fight immorality.³⁴⁸ Nor is destroying dignity justified on the utilitarian theory that doing so preserves more dignity than was destroyed.³⁴⁹ One human being is never inherently more valuable than another human being; therefore, and most profoundly, human beings are not fungible.³⁵⁰

B. Each Person's Innate Dignity Is More Precious than Life

Given its singular importance, Kant posited logically but notoriously that the value of humankind's innate dignity is priceless, indeed greater than life itself because "[t]he value of the end . . . must have existed already prior to [one's] rational choice."³⁵¹ That is, both the moral law and individuals' abilities to rationally discern morality exist before one actually makes any moral choices, which underscores

³⁴³ WOOD, *supra* note 24, at 215 (quoting Immanuel Kant, *Metaphysics of Morals*, in CAMBRIDGE EDITION OF THE WRITINGS OF IMMANUEL KANT 6:237 (1992)).

³⁴⁴ *See id.*

³⁴⁵ *See id.*

³⁴⁶ *See, e.g.*, MULHOLLAND, *supra* note 55, at 94, 314; Wright, *supra* note 36, at 275.

³⁴⁷ *See supra* notes 339–43 and accompanying text (explaining that moral duties inure to and are born by human associations as well as individual persons). Accordingly, dignity is *not* a comparable entity. That Jones's behavior respects the dignity of fellow individuals while Smith's conduct does not, neither lessens Smith's innate dignity nor enhances Jones's, although we may pronounce Jones more praiseworthy than Smith (and Smith may warrant societal chastisement including, if her disregard of others' dignity constitutes a crime, criminal penalties).

³⁴⁸ *See supra* notes 149–53 and accompanying text.

³⁴⁹ *See, e.g.*, Tom Stacy, *Acts, Omissions, and the Necessity of Killing Innocents*, 29 AM. J. CRIM. L. 481, 501–12 (2002); *see also* WOOD, *supra* note 24, at 331 n.1.

³⁵⁰ "The assignment of dignity to each rational agent [even those who choose not to act rationally], then, functions not to introduce a new kind of value calculation, but rather to block our tendency to treat rational agents as interchangeable commodities." HILL, *supra* note 61, at 205; *see also, e.g.*, KORSGAARD, *supra* note 68, at 309–10 n.46; Wright, *supra* note 36, at 275–76 (asserting that dignity in all persons is equal and incomparable).

³⁵¹ WOOD, *supra* note 24, at 92.

why, as noted, rational “capacity . . . is not represented merely as the object of a contingent inclination *It must be esteemed as unconditionally good, as an end in itself.*”³⁵² Because morality and dignity are interrelated ends in and of themselves, human beings—the repositories of morality and dignity—likewise must be regarded and treated as ends in themselves.³⁵³

“The duty to respect others is grounded in the value of their humanity, not in their achievements or their moral conduct To preserve human life per se is not among the principles.”³⁵⁴ It could not be otherwise because the compulsory duty to regard each person’s innate dignity as more important than the preservation of anything else, even life and security, is deontological. Logically then, Kant avowed that the essence of immorality, thus the essence of evil, is to offend dignity. As we know, deontological morality, which precedes any actual moral decision, prohibits us from doing evil regardless of outcome.³⁵⁵ *If* it is evil to defy other persons’ dignity, we must suffer the consequences of refraining from our evil preferences no matter how terrible those consequences may be.³⁵⁶ The dignity principle, then, is Kantian ethics’ value monism, that is, morality’s elementary requirement—its foundational command,³⁵⁷ a central corollary to “Let justice be done even if the world should perish.”³⁵⁸

We now may also appreciate that Kant’s philosophy valuing the innate potential for nobility above human life is not premised on an unthinkingly literal, fetishistic ardor for human beings’ rational abilities. Rather, Kant argued that only the value monism of respecting each person’s rational capacity enables us to discern the fabric of ethics that clothes us against the allure of doing evil that is endemic to social order itself.³⁵⁹ Kant’s theories are informed by Rousseau’s lament “of the way our natural desires have been influenced by the loss of innocence—the restless competitiveness—characteristic of human beings in the social condition”³⁶⁰ Kant believed that the “only resource in combating the radical evil of our social condition is the faculty of reason”³⁶¹

Accordingly, as we will soon confirm but may intuit now, Kant’s “dignity principle” forms the core of his theory of legal justice pursuant to which, consistent

³⁵² *Id.* at 91 (emphasis added); see also HILL, *supra* note 61, at 202 (arguing that the rational capacity of even those who act unethically is an end of itself). Such, of course, is consistent with the earlier-explained obligation that obeying deontological morality is an end in itself.

³⁵³ See *supra* note 342 and accompanying text.

³⁵⁴ HILL, *supra* note 61, at 204.

³⁵⁵ See *supra* notes 131–32 and accompanying text.

³⁵⁶ See *supra* notes 135–43 and accompanying text.

³⁵⁷ This is Kant’s “radical,” “defiant and paradoxical[]” egalitarianism, the “most fundamental idea in Kantian ethics.” WOOD, *supra* note 24, at 94.

³⁵⁸ KANT, *supra* note 15, at 102 n.16.

³⁵⁹ See WOOD, *supra* note 24, at 178–80.

³⁶⁰ *Id.* at 4.

³⁶¹ *Id.* at 5. Professor Wood explicated that even when moral commands are relatively clear, their “flagrant violation is extremely common, even built systematically into the basic familial, economic, criminal justice, military, political and other institutions of many societies.” *Id.* at 57.

with morality's and dignity's worth above even life, Kant urged "'if justice goes, there is no longer any value in men's living on the earth[.]'"³⁶²

In light of the foregoing, Professor Pangle appropriately offered that the dignity principle—the bedrock of Kantian justice—is best understood as a form of *honor*.³⁶³ Pangle's logic certainly supports this Article's attempt to link to the Founders' quest for a better conception of "sacred Honor" to Kant. In response to Locke's arguments that persons should pursue utilitarian happiness with security and property interests as paramount goals, Kant proposed "a new and nobler account of liberalism and the liberal meaning of honor."³⁶⁴ The dignity principle requires us to "discover in ourselves a higher call—the reverence for a life of principle . . . a life lived according to a moral code or law, for its own sake, as the supreme end in itself to which all other ends or interests must be subordinated and if necessary sacrificed."³⁶⁵ Such is honor—the principled life.³⁶⁶

C. Kant's Categorical Imperative—Formulation One, Universal Maxims

As explained above, Kant embraced liberalism's conception of actors in society: people and groups act purposefully to maximize their individual happiness. To attain their personal goals, individuals must interact in a social milieu, unavoidably contacting, involving and affecting others often against their inclinations or preferences.³⁶⁷ The fundamental question of individual personhood *vis-à-vis* social interaction is: How are actors to know whether their choice of goals and the means to attain their goals comport with the innate dignity of those who, wittingly or unwittingly, are thereby affected? Put a bit differently, how do actors know that they are abiding by the *dignity principle*?

For Kant, the expedient to abide by the dignity principle is the hugely important Categorical Imperative (CI),³⁶⁸ Kant's "supreme principle of morality"³⁶⁹ deduced from "pure practical reason"³⁷⁰ and expressed as "a universal law that all rational

³⁶² Waldron, *supra* note 15, at 1540 (quoting KANT, *supra* note 15, at 141). Professor Sunstein likewise observed in the American context, Kantian adjudication means "even if the heavens will fall, the Constitution must be interpreted properly." Sunstein, *supra* note 122, at 164.

³⁶³ Pangle, *supra* note 142, at 212–15.

³⁶⁴ *Id.* at 213.

³⁶⁵ *Id.* at 214.

³⁶⁶ *Id.* at 215.

³⁶⁷ See Wright, *supra* note 36, at 277.

³⁶⁸ "[T]he importance of Kant's 'formula of ends' in modern moral philosophy is impossible to deny." *Id.* at 271 (citing, *inter alia*, David Morris Phillips, *The Commercial Culpability Scale*, 92 YALE L.J. 228, 254 n.110 (1982) (describing the Categorical Imperative as "the fundamental principle of common morality")).

³⁶⁹ Tesón, *supra* note 53, at 63 (internal quotation marks omitted); see also WOOD, *supra* note 24, at 68 ("The supreme principle of morality admits of no conditions or exceptions, of course, because there is nothing higher by reference to which conditions or exceptions could be justified.").

³⁷⁰ Tesón, *supra* note 53, at 63 n.49.

beings can make and act upon for themselves as free, self-determining agents whose actions are morally good.”³⁷¹ Kant’s CI is his understanding of honor, meaning how people should live in a world of others.³⁷²

Kant formulated three related variants of the CI, the first of which expresses: “Act only on that maxim through which you can at the same time will that it should become a universal law.”³⁷³ Put perhaps too easily, formulation one appears to be Kant’s restatement of the Golden Rule, do unto others as you would have them do unto you.³⁷⁴ “[T]he test is whether you could will it to be *permissible* (under the moral law) for everyone to act on the maxim.”³⁷⁵ Thus, one ought not do X unless one believes that all other persons under like circumstances may morally do X.³⁷⁶

Professor Weinrib offered that the first formulation explains how one may act freely and purposefully but without illicit reliance on consequentialist justifications.³⁷⁷ If the moral sufficiency of behavior cannot be gleaned by inclinations—that which will maximize happiness or minimize unhappiness—then one must act on principles “valid for all purposive beings whatever their particular inclinations. *Such a principle would determine choice by virtue of the ability to universalize and not by virtue of the particular content of choice.*”³⁷⁸

D. Kant’s Categorical Imperative—Formulation Two, Treating Persons as Ends in Themselves

Although essential, formulation one is insufficient to fulfill the dignity principle. That persons might, in perfect conscience, will some behavior as a “universal maxim,” and be prepared not only to apply that maxim to others but also to themselves does not necessarily prevent individuals from mistaking their personal preferences for moral principles. Formulation one certainly constrains hypocrites who would allow themselves benefits or advantages they would deny others who are similarly situated. But

³⁷¹ *Id.* at 63 (citing IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 98–103 (Harper Torchbooks ed., H.J. Paton trans. 1964)).

³⁷² “Honor [is] the principled life guided by the categorical imperative . . .” Pangle, *supra* note 142, at 215.

³⁷³ Tesón, *supra* note 53, at 63 (quoting KANT, *supra* note 371, at 88).

³⁷⁴ Kuklin, *supra* note 34, at 498.

³⁷⁵ WOOD, *supra* note 24, at 70.

³⁷⁶ For example, Jones might punch Smith in the mouth because Smith made insulting, inappropriate and untrue remarks about Jones’s spouse. Faithful fulfillment of CI Formulation One requires Jones’s justification to be more than hitting Smith made Jones happy, a purely consequentialist, and thus inadequate moral justification. Instead, Jones must explain why under like circumstances, any offended spouse justifiably may punch the offender (therefore, Jones must acknowledge that Smith could hit Jones if Jones insulted Smith’s spouse).

³⁷⁷ Weinrib, *supra* note 83, at 482–84.

³⁷⁸ *Id.* at 483 (emphasis added). This is the “positive aspect of freedom,” or what could be called the “practical idea of reason,” that is, free choice guided by practical reason. *Id.* at 484 (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 213, 226 (J. Ladd trans., 1965)); see also *supra* note 335 (defining “practical reason”).

in genuine sincerity, under formulation one, some might be willing both to espouse and to abide by a certain universal principle, such as violent retaliation for perceived insults, which, in fact, immorally intrudes upon the dignity of other persons.

The first formulation lacks a common neutral basis to judge whether the proposed universal maxim *is* moral. To resolve that problem, Kant gave us perhaps his most celebrated precept, the CI's second formulation, which states, "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."³⁷⁹

Commentators agree that, pursuant to Kant's somewhat esoteric expression, actors meet their moral obligation under the dignity principle by obeying universal maxims that, as we now know dignity requires, treat persons as "ends in themselves."³⁸⁰ As his formulation makes clear, Kant certainly did not assert that one may not use others as means to achieve one's chosen goals. Such a proposition would be patently ridiculous because attaining virtually all aspirations from babyhood to our dying breath typically requires the assistance of others.³⁸¹ Rather, Kant's second Formulation sensibly admonishes that one cannot treat others *solely or merely* as means. Instead, one must use other persons in ways that respect their individual dignity—their rational capacities,³⁸² indeed, in ways that treat those whom one uses with honor.³⁸³

Therefore, "[a]ccording to Kant, you treat someone as a mere means whenever you treat him in a way to which he could not possibly [rationally] consent."³⁸⁴ To avoid such immoral conduct, actors must always remember that persons are not inanimate objects, meaning *things* that may be used purely at the whim of and for the benefit of the user. Because things have neither consciousness nor soul, no one need obtain their leave or worry that they might rationally complain about their misuse or abuse. "Things are instrumental and have only extrinsic value. Human beings, on the other hand, have *intrinsic* value."³⁸⁵ As Professor Kutz compellingly invoked, "[Using] a

³⁷⁹ Tesón, *supra* note 53, at 64 (quoting KANT, *supra* note 371, at 96).

³⁸⁰ *Id.* at 64.

³⁸¹ Kant has no general objection to using people, or to using them as a means. Life could hardly be possible otherwise. The Kant scholar H. J. Paton points out that "[e]very time we post a letter, we use post-office officials as a means, but we do not use them simply as a means."

Wright, *supra* note 36, at 277 (quoting H. J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* 165 (4th ed. 1963)).

³⁸² "[I]t is possible to treat persons as ends in themselves and also as means, as long as you respect their rights and dignity." WOOD, *supra* note 24, at 87; *see also* Wright, *supra* note 36, at 277.

³⁸³ As earlier noted, but worth quoting again, "Honor [is] the principled life guided by the categorical imperative . . ." Pangle, *supra* note 142, at 215.

³⁸⁴ KORSGAARD, *supra* note 68, at 295 (citations omitted). As Professor Hill similarly expressed, "the test of whether we are treating someone as an end in himself is whether that person does, or can, 'share the end' of our action." HILL, *supra* note 61, at 73 (footnote omitted).

³⁸⁵ Tesón, *supra* note 53, at 64.

person [solely] [for another's gain] does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has."³⁸⁶

Logically, violations of the CI do not require the complete objectification of a human being at all times, in all situations. Rather, and much more likely, a violation of the CI, particularly the Second Formulation, arises by objectifying a person in a particular setting, under specific circumstances, in a singular manner.³⁸⁷

Granted, one might complain that the premises for the CI are problematic because Kant never fully proves that "rational beings *are* ends in themselves but only [explains] that in setting ends according to reason, *we must presuppose* that they are."³⁸⁸ To the contrary, Kant presented a remarkably elegant, indeed beautiful, depiction of humanness through which to attain a workable deontology for the everyday world. To coerce, deceive, intimidate, confound, abuse or otherwise objectify a person seems the very definition of degrading that which is the most noble: a being capable of understanding morality and of acting morally through critical self-reflection. To so treat a rational being must be immoral per se. It is hardly surprising, therefore, that analysts understand the CI, particularly its second formulation, as the cornerstone, in Kant's chosen term the "groundwork," that "is unconditionally binding on all human beings, whatever their circumstances and regardless of what (contingent) ends must be sacrificed to satisfy it."³⁸⁹

We now can understand why, contrary to some commentary,³⁹⁰ but fully consistent with deontological theory,³⁹¹ Kantian ethics can explain regimes of self-defense and

³⁸⁶ Kutz, *supra* note 139, at 256 (quoting ROBERT NOZICK, *ANARCHY, STATE & UTOPIA* 33 (1977)) (alterations in original).

³⁸⁷ For example, anticipating our later discussion a criminal trial absolutely devoid of due process offends the Second Formulation because the defendant is denied any meaningful opportunity to affect the process by which the Government seeks to take her life, liberty or property; thereby, the defendant is dehumanized into an object subject to the remorseless whim of the State. *See infra* notes 457–61 and accompanying text. Less quantitatively wrongful, but no less qualitatively immoral and dishonorable, is one non-harmless due process violation in an otherwise scrupulously constitutionally fair trial. A single depravation, such as not according the accused minimally competent legal counsel, treats the accused solely as an object by impeding her ability to participate in the criminal trial that might lead to her conviction and punishment. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 417–18 (2004) (discussing the right to counsel as "fundamental and essential to fair trials").

³⁸⁸ WOOD, *supra* note 24, at 93.

³⁸⁹ HILL, *supra* note 61, at 201; *see also* WOOD, *supra* note 24, at 163 (explaining that Kant's rejection of "conflict of duties" means that one duty may not "come into conflict with another as to 'cancel' it . . .").

³⁹⁰ *See, e.g.*, George C. Christie, *The Defense of Necessity Considered From the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1042 (1999) (noting that intentional killing of an innocent person to save a larger number of other people violates "Kant's injunction that one must treat people as ends in themselves and never as means"); Cass Sunstein, *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 HARV. L. REV. 1883, 1888 (1999) (positing that Kantians could condemn defendants who took the life of a non-consenting wholly innocent person to save their own lives). Both articles are discussed in Stacy, *supra* note 349, at 482 n.4.

³⁹¹ *See supra* notes 135–41 and accompanying text.

sacrificing the innocent in the defense of others.³⁹² For instance, if a parent of three children could save one from drowning or save two, but not all three, “[s]urely she is justified in saving the two, but it is hard to conceive that she would accept that the rationale was that two are worth twice as much as one.”³⁹³ Rather, given the inevitability of three deaths absent intervention but the impossibility of saving three lives even with intervention, Kantian dignity theory can justify saving as many lives as possible.³⁹⁴

The moral principle, of course, is not based on a consequentialist maxim, but rather that the number of lives at stake may be “pertinent information” for the implementation of the general moral-legal standard in a discrete situation.³⁹⁵ Two theories support that conclusion. First, because surely it is moral to rescue rational beings, then, one could will as a moral maxim saving as many equally priceless lives as possible in a given crisis. Alternatively, if saving either one child or two children are equally moral outcomes, then the parent has two moral options but is only physically able to exercise one. At that point, the parent’s decision is no longer deontological but consequentialist because, as we learned, within the realm of moral choices, individuals may choose the options that maximize their respective pursuits of happiness. Therefore, the parent may choose to save two children rather than one.³⁹⁶

As the drowning children example shows, arguing that “numbers count” does not per se transform a precept from deontological to consequentialist because “[i]t matters how, for what reasons, and under what constraints a theory allows the numbers to count.”³⁹⁷ When every available moral solution to a particular problem engenders loss of innocent lives, opting for the moral resolution that sacrifices the least number comports with respecting the dignity of others.³⁹⁸

³⁹² See, e.g., Stacy, *supra* note 349 (advancing a new Kantian justification for necessity killing, which does not depend on actual or hypothesized consent).

³⁹³ HILL, *supra* note 61, at 206.

³⁹⁴ *Id.* at 215.

³⁹⁵ *Id.* As Professor Stacy aptly concluded, “The overriding value Kantian moral philosophy places on the rational autonomy of individuals does not support indifference to how many individuals survive. That would not be in harmony with the value of the individual human beings whose personhood rational autonomy defines.” Stacy, *supra* note 349, at 508.

³⁹⁶ The foregoing posits the *possibility* that the parent morally might choose to save one rather than two children. Of course, the reasons why a parent might so choose could invalidate the decision. For instance, choosing to save the handsomest or nicest child arguably would offend the dignity of the two other children unless one could will a universal maxim that attractiveness or pleasantness dominates other characteristics (a doubtful proposition indeed). Accordingly, there may in fact be no qualities or characteristics that morally could justify saving one rather than two children.

³⁹⁷ HILL, *supra* note 61, at 215 n.12.

³⁹⁸ Stacy, *supra* note 349, at 510–11; see also, e.g., WOOD, *supra* note 24, at 331 n.1. Similar arguments explain a Kantian justification for self-defense. See, e.g., MURPHY, *supra* note 34, at 108–09 (explaining that wrong acts under extreme circumstances can be excusable moral wrongs); RODIN, *supra* note 59 (arguing that nations are constrained by Kantian morality, which includes the right of national self-defense).

E. Kant's Categorical Imperative—Formulation Three, The Categorical Imperative and the State

Experience, if not logic, tells us that violations of the CI's Second Formulation commonly involve coercive force and deception because under the former, "I have no chance to consent" and under the latter, "I don't know what I am consenting to."³⁹⁹ Immediately, one might respond: although we know that groups and governments must obey moral duties,⁴⁰⁰ is it not the very definition of society via its governmental offices to coerce certain behaviors and forbid other behaviors, all under penalty of law regardless of the willingness of those who do not wish to be so controlled? If coercion is suspect under the CI's second formulation, we must understand how and why governments may operate without violating the dignity of those who would not comply voluntarily.

Aware of this issue, Kant argued that although the moral duties required of human beings inure to the social structures they create, especially government, properly designed governmental compulsion is not only apt, but essential.⁴⁰¹ His resolution is typically liberal and compellingly consistent with the legal-governmental framework created by the Founders. First, we must recall a key concept quoted just a few paragraphs above: "According to Kant, you treat someone as a mere means whenever you treat him *in a way to which he could not possibly consent*."⁴⁰² Similarly, Professor Hill explained that Kant certainly does not mean that per se one cannot do to another

The situation that troubles many commentators is that deontology, including Kantian ethics, will not per se allow saving two or more imperiled innocents by sacrificing one innocent who is not in danger. The classic example is grabbing bystander Smith and throwing her into the line of fire when Jones is trying to shoot two or more blameless persons. The immorality is that Smith is used purely as a means and not as an end in herself because we do not have Smith's knowing consent to be sacrificed so that others may survive. As my earlier discussion of deontology explained, Smith has no duty to let herself be sacrificed without her voluntary permission. Otherwise, whenever it could be done, society would be obliged to exterminate some to save a greater number of others, a morally untenable practice unless those exterminated freely agree to that fate. For instance, any society that per se condones taking some innocent lives to save a greater number of innocent lives would be duty-bound to randomly snatch healthy individuals, euthanize them, and harvest their various body parts so that numerous terminally ill others may live. *See supra* notes 193–94 and accompanying text. While it is undeniably uncomfortable and sometimes seemingly contrary to "common sense," Kantian ethics rightly refutes the claim that sacrificing some innocent persons to save other innocent persons is moral per se.

³⁹⁹ KORSGAARD, *supra* note 68, at 295.

⁴⁰⁰ *See infra* text accompanying notes 411–23.

⁴⁰¹ *See, e.g.,* HILL, *supra* note 61, at 208–09 (noting that there are moral and prudential reasons to form and support civil authorities with coercive powers); MULHOLLAND, *supra* note 55, at 291 (explaining that for Kant submission to civil authority is not "wrongful imposition" on freedom); Tesón, *supra* note 53, at 64–66 (arguing that mechanics for guaranteeing civil and political rights implement respect for autonomy and dignity of persons and form the basis of a republican constitution).

⁴⁰² KORSGAARD, *supra* note 68, at 295 (emphasis added).

something that other would not want.⁴⁰³ Rather, “insofar as [others] are used as means, they must *be able* to adopt the agent’s end, under some appropriate description, without irrational conflict of will.”⁴⁰⁴

Therefore, even if personal preferences and inclinations impel otherwise, a person must be guided instead by her unbiased rationality. If her rational capacity understands that a particular action or standard rightfully may be willed as a universal maxim and does not objectify persons, but instead treats persons as ends in themselves, then she must accept the action or standard as moral no matter how much she might like it to be otherwise. Such moral behavior, then, may become a rational imposition; that is, imposed against all unwilling others. So long as the actor’s challenged behavior or standard does not offend dignity, unwilling others must accept the impositions imposed by that moral, albeit disliked, conduct, even if they have been used for the advantage of the actor.⁴⁰⁵

To understand how the two formulations must operate, Kant proposed his third formulation of the CI: “Not to choose otherwise than so that the maxims of one’s choice are at the same time comprehended with it in the same volition as universal law.”⁴⁰⁶ The third formulation unites the first two formulations to buttress how a law or maxim can be “valid universally for all rational beings . . . with the conception of every rational nature as having absolute worth as an end in itself . . . , *to get the idea of the will of every rational being as the source of a universally valid legislation . . .*”⁴⁰⁷ Kant sought to explain by this third formulation how any given person might consider herself subject to universal laws and simultaneously to have willed those laws, meaning “every rational will, equally our own and that of other rational beings, . . . in obeying the objectively valid moral law, [may] regard[] itself as at the same time giving that law.”⁴⁰⁸ Formulation three assures that any maxim that might fulfill the first two formulations belongs in a “system of moral laws.”⁴⁰⁹

⁴⁰³ HILL, *supra* note 61, at 45.

⁴⁰⁴ *Id.*

⁴⁰⁵ The hundreds of impositions, minor and occasionally major, with which we deal daily illustrate Kant’s theory. Obeying traffic signals when we are in a hurry, keeping our voices politely low in restaurants and being silent in theaters even if we wish to make witty comments about the show evince lesser, but understandable, examples of respecting the dignity of those around us, including strangers, for the sake of universal maxims of decent social behavior. We forego behavior that we would prefer because we recognize how such behavior would be inappropriately intrusive into the lives and comfort of others who would wrongfully be obstructed from pursuing lawful, moral projects.

⁴⁰⁶ WOOD, *supra* note 24, at 66–67 (quoting Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in CAMBRIDGE EDITION OF THE WRITINGS OF IMMANUEL KANT 4:400 (1992)). Alternatively, the third formulation holds that one must accept “the idea of the will of every rational being as a will giving universal law.” *Id.* at 66 (quoting Kant, *supra* note 406, at 4:431).

⁴⁰⁷ *Id.* at 75 (emphasis added).

⁴⁰⁸ *Id.* at 76 (citing Kant, *supra* note 406, at 4:434–35).

⁴⁰⁹ *Id.* at 77. Professor Wood attempted an easily accessible explanation of formulation three, “to think of ourselves as members of an ideal community of rational beings, in which each of

This leads to the next logical, indeed obvious stage: how to protect the pursuit of happiness; that is, freedom to seek one's chosen goals. In Kant's words the essence of freedom is when:

No one can compel me (in accordance with his belief about the welfare of others) to be happy after his fashion; instead, every person may seek happiness in the way that seems best to him, if only he does not violate the freedom of others to strive toward such similar ends as are compatible with everyone's freedom under a possible universal law⁴¹⁰

To reconcile the impositions that various persons' morally legitimate projects might impose against unwilling others—that is, to establish a process by which all persons can *peacefully* pursue happiness by using others as means consistent with the dignity principle—people must form societies that include government, the entity authorized to make and enforce law by coercive means.⁴¹¹ For Kant, society cohered through governmental authority is more than a convenience.⁴¹² In fact, people do not form societies out of mutual consent—Kant was not a consent theorist.⁴¹³ Rather, Kant was a natural rights theorist who believed the “natural will” *compels* forming and perpetuating society as the basis to discern whether proposed standards may be willed as universal

us should strive to obey the moral principles by which we would choose that members of the community should ideally govern their conduct.” *Id.* at 78. Similarly, effectuating the Third Formulation is part of the famous project of John Rawls's “original position” by which he posited disembodied spirits planning a new social order, but unaware of what their respective statuses will be once they inhabit the society they created. Rawls argued that through a bargaining process based on reason, the spirits would agree to maximize the opportunities of all and, correspondingly, minimize restrictions on legitimate pursuits of happiness due to irrelevant prejudices. The spirits would devise a system steeped in fundamental rights and certain shared economic opportunities. JOHN RAWLS, *A THEORY OF JUSTICE* 10–11 (1999); *accord, e.g.,* HILL, *supra* note 61, at 208 n.7 (discussing Rawls).

⁴¹⁰ Tesón, *supra* note 53, at 62 (quoting Immanuel Kant, *On the Proverb: That May be True in Theory, But Is of No Practical Use*, in *PERPETUAL PEACE AND OTHER ESSAYS* 72 (Ted Humphrey trans., 1983)) [hereinafter Kant, *On the Proverb*].

⁴¹¹ In fact, Kant's entire project in his *The Metaphysical Elements of Justice* is explaining “the nature and justice of coercion.” MURPHY, *supra* note 34, at 91. Freedom is an inherent “good,” which needs no justifying while coercion is inherently opposed to freedom and, therefore, warrants justification. Accordingly, “coercion is justified only in so far as it is used to prevent invasions against freedom. . . . So Kant has to establish the paradoxical claim that some forms of coercion (as opposed to violence) are morally permissible because, contrary to appearance, they really *expand* rational freedom.” *Id.* at 92. This is, according to Kant, the “best justification for civil government.” *Id.* at 104.

⁴¹² See *supra* notes 372–73 and accompanying text.

⁴¹³ MULHOLLAND, *supra* note 55, at 278–81 (discussing specifically Kant's view of property); see also *id.* at 289–90 (discussing why Kant was not a “social contractualist”).

maxims.⁴¹⁴ A coercive government arises “not to maximize welfare or to give the morally vicious their just deserts but rather to create the conditions in which each has, so far as possible, a fair chance to live out a life as a rational autonomous agent.”⁴¹⁵

Kant’s pivotal enrichment of the prevailing metaphor is that the “social contract” does not symbolize a discretionary arrangement of expediency, *but rather a moral requisite without which the dignity principle cannot be achieved*. Suggesting the title “kingdom of ends,”⁴¹⁶ Kant asserted that governmental society is indispensable because, when properly formed and operated, it assures maximum protection and enjoyment of the dignity principle, while absent a legitimate state there is no formal and proper enforcement of the CI.⁴¹⁷

Kant’s overarching emphasis on the pursuit of moral decency accords the social contract nobility and virtue exceeding Lockean concepts of pure security and the protection of possessions (although those latter considerations surely are relevant to liberty). Kant accepted that persons *must* leave the state of nature where generally behavior is unconstrained⁴¹⁸ to form societies “that assign to each rights and responsibilities . . . [thereby] secur[ing] to each person a reasonable opportunity for life and

⁴¹⁴ True, Kant described the transfer from the state of nature as “an original contract, in which people give up their inborn external freedom in order immediately to receive it back secure and undiminished as members of a lawful commonwealth.” Weinrib, *supra* note 83, at 478–79 (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 315–16 (J. Ladd trans., 1965)). This contract arises because in a world of limited resources, all “persons are in practical relation to one another,” a condition Kant believed is “constituted by nature itself.” MULHOLLAND, *supra* note 55, at 280 (internal quotation marks omitted). Therefore, “consent is irrelevant to the justification of political obligation and the conditions for the acquisition of rights.” *Id.* For example, while the particular details may vary from society to society, all persons must will rational restrictions on the use of land, including their own realty, if they are peaceably and effectively to use land at all. Such restrictions via titles and other guarantees are part of the function of states. *Id.* at 280–81. Accordingly, rather than an actual or figurative arm’s length agreement, “the original contract ‘is in fact merely an *idea* of reason” Weinrib, *supra* note 83, at 479 (quoting Immanuel Kant, *On the Common Saying: “This May Be True in Theory, but it Does not Apply in Practice,”* in *KANT’S POLITICAL WRITINGS* 79 (H. Reiss ed. 1979)).

⁴¹⁵ HILL, *supra* note 61, at 209.

⁴¹⁶ *Id.* at 58; see also WOOD, *supra* note 24, at 78 (using the title “realm of ends”).

⁴¹⁷ “[T]he idea of a state” is “derived” from “the universal principle of right.” WOOD, *supra* note 24, at 215; see also, e.g., MULHOLLAND, *supra* note 55, at 285; Waldron, *supra* note 15, at 1546.

⁴¹⁸ In the state of nature, where there is no controlling, official governmental authority, persons may pursue their happiness by any means. “[I]ndividuals fight in the state of nature, and the consequent war of all against all can only cease when people submit to a unitary sovereign.” Waldron, *supra* note 15, at 1545 (discussing THOMAS HOBBS, *LEVIATHAN* 86–90, 117–21 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651)); see also Hamburger, *supra* note 275, at 1835–36 (noting that individuals in the state of nature had to form civil governments to preserve the liberty enjoyed under natural law).

liberty as a rational autonomous agent.”⁴¹⁹ Indeed, “in the absence of legal authority, . . . individuals will disagree about right and justice . . . [which likely] will lead to violent conflict. The task of the [legitimate government] is to put an end to this conflict by replacing individual judgments with the authoritative determinations of positive law.”⁴²⁰ It is through the rational edicts of the officers of the state that individuals know the reciprocal laws that bind and manage interpersonal relations.⁴²¹

The state, then, is essential to legitimize rights and accord duties derived from moral laws gleaned through the freedom innate in human beings.⁴²² The state *is* the requisite key to implement the moral law—the moral imperative.⁴²³ Accordingly, a state “has moral standing *qua* the creature of a social contract.”⁴²⁴ It is not a “community . . . hold[ing] a preeminent position at the expense of the individual.”⁴²⁵ Rather, the “fundamental unit” and “fundamental end” of society under government both domestic and international is the “individual human being.”⁴²⁶ That is why Kant believed that remaining in the state of nature under any conditions is wrongful as, by definition, there is no external, coercive state to assure protection of “rightful freedom”—even if people happen voluntarily to employ their “lawless freedom” to “limit their actions to what is right.”⁴²⁷ After all, the very concept of the state of nature encourages, if not outright allows, each person to exercise her predilections without concern about other persons.⁴²⁸

⁴¹⁹ HILL, *supra* note 61, at 208.

⁴²⁰ Waldron, *supra* note 15, at 1545; *see also* MURPHY, *supra* note 34, at 104. True, the obligations of the dignity principle precede the formation of governments, thus, absent government, persons are morally obliged not to act in ways that offend the innate humanity of others. In fact, unlike Hobbes and in agreement with Locke, Kant did not envision the state of nature as per se uncivilized. “But though it may be sociable, the state of nature . . . is a situation in which people have a ‘tendency to attack one another’ and to do so in the name of justice.” Waldron, *supra* note 15, at 1546 (quoting KANT, *supra* note 15, at 123–24); *see also* MULHOLLAND, *supra* note 55, at 285.

⁴²¹ MURPHY, *supra* note 34, at 104; *see also, e.g.*, MULHOLLAND, *supra* note 55, at 304–05. Therefore, accusations made in texts, such as in MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 172–73 (1982), that Kant rejects socialization as essential to the self are arguably misplaced. Indeed, Kant accepted that it is predominately through social contexts that a person chooses among competing preferences, predilections and desires—the pursuit of happiness—which, of course, must conform to the dignity principle. *See, e.g.*, Weinrib, *supra* note 83, at 503. Certainly, society, the state and the government are not merely instrumental, but essential instruments for both personal fulfillment through the pursuit of happiness and obedience of the dignity principle.

⁴²² MULHOLLAND, *supra* note 55, at 304–05.

⁴²³ *See, e.g.*, WOOD, *supra* note 24, at 213–15 (discussing KANT, *supra* note 406, at 6:313–14).

⁴²⁴ Tesón, *supra* note 53, at 71.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ WOOD, *supra* note 24, at 215.

⁴²⁸ Waldron, *supra* note 15, at 1546–47 (discussing KANT, *supra* note 15, at 123–24). Apparently, Kant did not accept Rousseau’s view of “the nobility of natural man.” *Id.* at 1547. “Even if men are angels, they are opinionated angels, and they hold (or there is a strong

In this way, Kant challenged Lockean utilitarian social contract theory by emphasizing a higher calling—a “reverence for a life of principle” that alone validates and legitimizes society and the government that enforces society’s edicts.⁴²⁹ Thus, forming a governmental social order is “obligatory” because the dignity principle is obligatory.⁴³⁰

Of course, the core concept of the state and the government that governs the state is the authority to employ coercion.⁴³¹ That is, individuals relinquish their complete freedom of action in the state of nature in exchange for the security of a formal state that alone is empowered both to establish legal laws and to enforce those laws through coercive means—even violence—if necessary.⁴³² The security engendered is the opportunity to pursue one’s happiness within the confines of the CI while employing the offices of the state to constrain others who would limit one’s legitimate pursuit of happiness by violating the CI.⁴³³ Thus, to express the obvious, coercion is required so that recalcitrant persons will obey rational laws.⁴³⁴

Consistent with the foregoing, Kant identified *juridical duties*, also called “duties of right,” that may be enforced by the legitimate coercion of the State against those who will not obey by self-constraint.⁴³⁵ *Ethical duties*, by contrast, “are to be fulfilled through inner rational constraint.”⁴³⁶ Ethical duties or “duties of virtue” encourage us to maximize “our own perfection and the happiness of others”; but, doing so is not compulsory under Kantian theory.⁴³⁷

probability that they hold) conflicting views about justice for which they are prepared to fight.” *Id.* Indeed, Kant’s prototypically liberal presumption is that, given their druthers, each individual wants to act selfishly and immorally but rationally understands the value of mutual cooperation, under the guise of a State, with obeying rational law as the cost of individual and common security. Thomas C. Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580, 585 (1987) (discussing Immanuel Kant, *Perpetual Peace*, in KANT: ON HISTORY 366 (L. Beck ed. 1975)).

⁴²⁹ Pangle, *supra* note 142, at 214.

⁴³⁰ MURPHY, *supra* note 34, at 104; *accord* Waldron, *supra* note 15, at 1535 (quoting KANT, *supra* note 15, at 124).

⁴³¹ WOOD, *supra* note 24, at 215. “[T]he ideal combination of rights is the one that yields the maximum possible individual autonomy under the coercion presupposed by the social contract.” Tesón, *supra* note 53, at 66.

⁴³² *E.g.*, MULHOLLAND, *supra* note 55, at 281–82; WOOD, *supra* note 24, at 215 (discussing the importance of coercive power).

⁴³³ *E.g.*, Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 516 (1987) (discussing reasons for contracting away a degree of liberty).

⁴³⁴ *See, e.g.*, HILL, *supra* note 61, at 209 (“The coercive power of the state must provide incentives so that even without conscience everyone will have clear and sufficient reason not to violate the liberty of others . . .”); Mulholland, *supra* note 55, at 287

⁴³⁵ MARCIA W. BARON, KANTIAN ETHICS ALMOST WITHOUT APOLOGY 31–32 (1995).

⁴³⁶ WOOD, *supra* note 24, at 220; *see also* BARON, *supra* note 435, at 31–32; WOOD, *supra* note 24, at 161–62.

⁴³⁷ WOOD, *supra* note 24, at 166–67; *see also* KORSGAARD, *supra* note 68, at 20 (contrasting duties of virtue and duties of justice).

In light of these definitions, obeying the law, such as refraining from committing murder, is a juridical duty, the violation of which may be punishable by lawful authority. Ethical duties, however, arguably concern what the Founders regarded as the “pursuit of Happiness,” that is, all projects within the expansive boundaries of moral behavior.⁴³⁸ Certainly, we may pursue happiness by leading selfless lives, giving all our spare time and resources to charities and similarly worthy pursuits. But, there is no broad moral duty to be selfless because preserving each person’s innate dignity does not require a universal maxim that members of society must suffer excessive deprivations for the sake of other members.⁴³⁹ Accordingly, we may live selfish lives, acquiring for ourselves as much as we can with no thought of sharing so long as doing so is not immoral; that is, the pursuit of happiness as selfishness must not denigrate anyone’s innate dignity.⁴⁴⁰

⁴³⁸ This explains Kant’s “universal principle of justice” elucidating the pursuit of happiness which “allow[s] individuals [sic] freedom to form and pursue their own life plans subject only to the constraint that others be allowed a similar freedom.” HILL, *supra* note 61, at 54; *see also, e.g.*, Grey, *supra* note 428, at 582 (noting that the state of external freedom is based on Kant’s universal principle of justice); Pangle, *supra* note 142, at 213–15, 219 n.10 (explaining that according to Kant the pursuit of happiness is an “inescapable substantive end” that is the “expression of honor and principle”).

⁴³⁹ Doubtless, along with refraining from intruding illegitimately into the dignity of others, one might recognize universal maxims imposing positive duties—mandatory affirmative obligations—incumbent upon society’s membership to help those in need. “If, as seems obvious, too much inequality between people . . . is incompatible with their pursuit of common ends, then Kantian ethics implies that limiting human inequality should always take priority over maximizing human welfare.” WOOD, *supra* note 24, at 79; *see also* Wright, *supra* note 36, at 277 (discussing affirmative duties). In such cases, the citizenry in some fashion must dedicate resources to fulfill those affirmative duties. For instance, as a matter of fundamental decency, not discretionary largesse, the Constitution’s Sixth Amendment requires American society to provide competent attorneys to criminal defendants who cannot afford legal representation. *See* *Beard v. Banks*, 542 U.S. 406, 417–18 (2004); *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963). Necessarily, supplying lawyers costs tax dollars, which taxpayers must pay regardless whether they would otherwise voluntarily allocate a portion of the public coffers to criminal defense counsel for the indigent.

⁴⁴⁰ *See, e.g.*, WOOD, *supra* note 24, at 167. That is why, for example, Kantian ethics permits Jones to use clever but honest advertising and creative marketing to drive her competitor Smith out of business but does not allow Jones to succeed by vandalizing Smith’s store.

Of course, legitimate government may regulate to promote policies consistent with, but exceeding the *minima* necessitated by, the dignity principle. For example, assuming *arguendo* that under the dignity principle society has an affirmative duty to provide minimum nutrition, clothing and shelter for the needy, legitimate law may surpass that minimum amount so long as the excess does not unreasonably intrude into the liberty of others.

Although at least one commentator laments that the following is weak, MURPHY, *supra* note 34, at 112 n.16, Kant provides a plausible explanation for why law that exceeds the arguable minimum social moral obligation may be legitimate even if those opposed are compelled to support such policies with taxes or other personal resources. Kant argued that while

In sum, comparable with the Founders' precepts in the Declaration, government is legitimate if it "maintain[s] a system of peace wherein each citizen will enjoy the most extensive liberty compatible with like liberty for others. This is the only reason why rational autonomous persons would contract to give up liberty; and only in terms of this end is state coercion justified."⁴⁴¹

F. How Government Is Constrained Lest Coercive Authority Be Used Illicitly

Along with other theorists, including the Founders, Kantian philosophies understand a correlated core principle: government will almost certainly fail its moral duties absent constraints limiting how government itself employs its singular, breathtaking authority to coercively enforce the laws it creates. Therefore, Kant embraced the fruits of the Framers, describing "[a] republican state as one defined by a constitution based upon three principles: freedom, due process, and equality."⁴⁴²

In particular, Kant believed that, to be a legitimate source of rights, policies and correlative obligations, civil society must be governed by *impartial* persons with "supreme title" to give, apply and execute "laws determining rights."⁴⁴³ Because, to promote the CI, law must be the product of detached rationality, each legislator must view herself and all members of her "kingdom" as "ends in themselves."⁴⁴⁴ This requires, *inter alia*, that "the legislators regard the rationality of each member as *unconditionally and incomparably* worth preserving, developing, and honoring."⁴⁴⁵

Second, to maximize the probability that government will be legitimate and remain so, Kant embraced separation of powers—legislative bodies to make law, a judiciary or similar system to resolve public and private disputes, an executive to enforce law and such other mechanisms as are appropriate to establish and to enforce the rational

individuals form societies to morally pursue their private goals, the state may assume an "external aspect," whereby law "becomes the general or universal will." Weinrib, *supra* note 83, at 490. Therefore, the state may subvert individual preferences in favor of a general will if doing so is consistent with the dignity principle. *Id.* In other words, to pursue their respective goals, persons rationally accept a realm of competitive politics wherein individuals and groups attempt to influence government to adopt policies that other individuals and groups may oppose. The winners in each discrete instance impose their will on the losers, the unwilling others. The imposition placed on such unwilling others to obey laws with which they do not agree is moral so long as governmental process is legitimate. If such is not what the governed want and expect, they may either reform the structure of government or move to someplace where government exists only to realize the CI's *minima*.

⁴⁴¹ Murphy, *supra* note 433, at 516; see also HILL, *supra* note 61, at 209 (noting that the aim of a coercive legal system is to allow individuals to "live out a life as rational autonomous agents").

⁴⁴² Tesón, *supra* note 53, at 62; see also Kant, *On the Proverb*, *supra* note 410, at 71–84.

⁴⁴³ MULHOLLAND, *supra* note 55, at 286.

⁴⁴⁴ HILL, *supra* note 61, at 61.

⁴⁴⁵ *Id.* (emphasis added).

rule of law.⁴⁴⁶ Such dispersed authority helps ensure that the government will not collapse into either despotism or anarchy.⁴⁴⁷ In this regard, which has become accepted elementary American constitutional law,⁴⁴⁸ Kant warned that repression can arise not only from dictatorial leaders, but also from the “tyranny of the majority,” meaning “a system of pure democracy . . . unconstrained by rights.”⁴⁴⁹ Such may occur because “the [tyrannical] majority legislates for everyone, while regarding itself as not subject to any higher universal laws and while it, itself, does not constitute everyone.”⁴⁵⁰

Accordingly, as a third principle of tremendous significance, Kant recognized that government must be restrained by relatively explicit overarching injunctions predicated, of course, on the dignity principle:

If in our everyday behavior we should never consider fellow human beings merely as means, it follows *a fortiori* that the constitution of the state, an artificial creation to serve human needs, must embody and incorporate a formula of respect for persons—a *bill of human rights*. . . . [Such] mechanisms for guaranteeing traditional civil and political rights, which act as barriers against the abuse of state power, form the basis of a republican constitution because such mechanisms implement the respect for autonomy and dignity of persons.⁴⁵¹

Thus, completely consistent with both America’s founding and American constitutional theory, Kant appreciated that government is indispensable to protect each person’s right to liberty—to pursue happiness in moral ways—but also, government must be controlled lest, as any powerful entity is apt to do, it abuses its authority in violation of the very principles it was created to safeguard.⁴⁵²

⁴⁴⁶ See, e.g., MULHOLLAND, *supra* note 55, at 283–85; WOOD, *supra* note 24, at 213 (discussing separation of powers).

⁴⁴⁷ As Madison earlier had famously stated, “The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.” THE FEDERALIST No. 47, at 293 (James Madison) (Gary Wills ed., 1982).

⁴⁴⁸ The Supreme Court “consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *accord Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Loving v. United States*, 517 U.S. 748, 756 (1996).

⁴⁴⁹ Tesón, *supra* note 53, at 62 (citing Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch*, in PERPETUAL PEACE AND OTHER ESSAYS 114 (Ted Humphrey trans., 1983)); see also Kant, *On the Proverb*, *supra* note 410, at 71–84.

⁴⁵⁰ MULHOLLAND, *supra* note 55, at 325.

⁴⁵¹ Tesón, *supra* note 53, at 64 (citing, *inter alia*, Kant, *supra* note 407, at 72) (second emphasis added).

⁴⁵² On this point, many commentators misinterpret Kant’s theory, arguing that he opposed all revolutions against established government. Granted, Kant averred that aside from enacting

In this regard, as previously accented, arguably Kant's most significant contribution is linking liberal political theory not to utilitarian principles of property, contract, and mutual security, but to the incontrovertible moral duties emanating from the dignity principle, incumbent on all persons, mandatory regardless of the consequences and achieved, if at all, through society, the state and government.⁴⁵³ Consistent with his deontology, Kant identified *justice* as the principle indispensable to government's obligation under the CI. He invoked the proposition in terms that we now understand are not hyperbolic, but morally correct: "if justice goes, there is no longer any value in men's living on the earth."⁴⁵⁴

The core of Kantian justice is due process of law⁴⁵⁵ which is unsurprising because

Legality that offers only prudential reasons for compliance with law—follow the law or the state will impose unpleasant consequences upon you— . . . [defies] Enlightenment notions of autonomy and respect. In fact, a state that secures compliance with law purely through threats of sanction—indeed, a state that roots its existence through the power to enforce law—is by definition illegitimate.⁴⁵⁶

The archetypal example, of course, is criminal law and procedure.⁴⁵⁷ Due to her innate rational capacity, the criminal can, and should, accept the principles of reasonable

reforms, the proper means to oppose unjust laws are almost always protest and passive resistance. Accordingly, he disagreed with Locke that revolution is justified in a merely imperfect state. MULHOLLAND, *supra* note 55, at 337–46; *see also* Waldron, *supra* note 15, at 1545 ("The moral requirement of obedience to actually existing law, Kant concluded, is 'absolute.'") (emphasis omitted) (quoting IMMANUEL KANT, *On the Common Saying: "This May Be True in Theory, But It Does Not Apply in Practice,"* reprinted in KANT: POLITICAL WRITINGS 81 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991)).

Nonetheless, a plausible Kantian analysis asserts that any government acting as an irredeemable "despot" may be deposed by revolution, should lesser measures fail. Some right to revolution as a last resort makes seamless Kantian sense as there is no reason to exist under a formal system that is ceaselessly worse than the state of nature from which the government should afford liberation. MULHOLLAND, *supra* note 55, at 342; *see also* Tesón, *supra* note 53, at 68 (discussing Kant's theory of a right to revolution). Such, of course, is precisely the theory of "sacred Honor" the Founders expressed in their Declaration of Independence. *See supra* Part II.

⁴⁵³ *E.g.*, Pangle, *supra* note 142, at 213–18 (discussing moral duties).

⁴⁵⁴ Waldron, *supra* note 15, at 1540 (quoting KANT, *supra* note 15, at 141).

⁴⁵⁵ *See* MURPHY, *supra* note 34, at 106.

⁴⁵⁶ Williams, *supra* note 97, at 86 (citing ROBERT PAUL WOLFE, IN DEFENSE OF ANARCHISM 3–19 (Harper & Row 1970)).

⁴⁵⁷ "[T]he greatest expression of the Enlightenment ideal within the Kantian tradition is the criminal trial. It is where the ideal is most fully vitalized and where it is most forcefully put to the test." *Id.* at 83.

criminal justice, even if the criminal indulges her preference not to obey criminal law.⁴⁵⁸ Although the criminal would have preferred to succeed in her crime, her innate rationality informs her that what society imposed against her could be willed as universal rules for peaceful civil dealings and relations within a social order, so long as such due process never failed to treat her as an end in herself.⁴⁵⁹ Due process succeeds by ensuring that the suspect or defendant meaningfully may participate in the process that seeks to penalize her, thereby treating her as a subject, not an object—as an end in herself, and not merely a means to foster some public or private interest.⁴⁶⁰ Therefore, a criminal cannot properly object to the search of her home pursuant to a properly issued warrant, to her arrest based on probable cause, or to a trial, conviction, and sentence all consistent with due process, including affording her the genuine, adequate opportunity to contest the legality of the governmental actions taken against her.⁴⁶¹

As Professor Williams persuasively explicated,

The real power of [due process] is not, as is often assumed, that [one] is entitled to . . . due process . . . because we ought to be risk averse in our diagnosis of who are [criminals] No, the real power lies in the fact that criminal adjudication . . . is the only way to legitimize the exercise of state power against a [criminal defendant]. *The function of the criminal trial, on this account, is to vindicate what the Enlightenment demands of the state: a justification for its own existence.*⁴⁶²

⁴⁵⁸ See, e.g., HILL, *supra* note 61, at 45, 73 (discussing criminals' rational acceptance of punishment).

⁴⁵⁹ See, e.g., *id.* at 180–84 (discussing punishment for criminal acts); MURPHY, *supra* note 34, at 108.

⁴⁶⁰ HILL, *supra* note 61, at 210 (describing criminals' opportunity to participate in proceedings); MURPHY, *supra* note 34, at 106 (discussing injustice of humans being treated as means to an end); accord Tesón, *supra* note 53, at 67 (explaining that the laws of any state must conform to the CI). Indeed, while certainly distressing but perfectly correct, a convicted yet innocent person can harbor no moral objections so long as the investigation, arrest, trial and sentencing comport with true due process. As perfection is not possible in human endeavors, we can hope for no better treatment than the best humanly possible. Accordingly, the courts have adopted an accurate, if curt, shorthand, “[A person] is entitled to a fair trial but not a perfect one.” *Lutwak v. United States*, 344 U.S. 604, 619 (1953); see also *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *Owens v. United States*, 483 F.3d 48, 54 (1st Cir. 2007); *United States v. Ramirez*, 426 F.3d 1344, 1353 (11th Cir. 2005).

⁴⁶¹ As the Supreme Court prudently underscored, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); see also *City of L.A. v. David*, 538 U.S. 715, 717 (2003) (per curiam) (quoting *Eldridge*); *Tate v. District of Columbia*, 627 F.3d 904, 908 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2886 (2011).

⁴⁶² Williams, *supra* note 97, at 88–89 (emphasis added).

G. Why Law and Morals Functionally Are Inseparable

Pursuant to the foregoing Kantian exposition, *law* is paramount in Kantian society as the device through which the State exercises its rightful coercion and by which government's coercive power rightfully is limited, all for the sake of the Categorical Imperative.⁴⁶³ Accordingly, in a most fundamental sense, Kant teaches us that while law may be identifiable in positive terms—recognizable *via processes* of enactment and enforcement that we understand apply only to law⁴⁶⁴—positivism mistakenly asserts that *process* is enough for law to be law.⁴⁶⁵ “In Kant’s view, all moral laws, even all legitimate laws of the State, must be conceived as (or as falling under) natural laws. In fact, Kant contended that merely statutory or positive legislation does not, properly speaking, give ‘laws’ at all, but only ‘commands.’”⁴⁶⁶ Rather, “the condition for the existence of a legal system is morality as such.”⁴⁶⁷ While Kant did not aver a corresponding legal duty for every ethical duty, “law sets . . . the minimal . . . moral conditions for the interaction of purposive beings.”⁴⁶⁸ As such, there must be some unity—some value monism—to law. Like morality, concepts of law “cannot be understood in isolation from one another,” although they can be described discretely.⁴⁶⁹ The unity for law,⁴⁷⁰ *as accented above, is the dignity principle, particularly as advanced*

⁴⁶³ See, e.g., MURPHY, *supra* note 34, at 94 (explaining that for Kant, law serves as basis for interfering with freedom of those who would use their freedom to oppress others); Pangle, *supra* note 142, at 213–18 (discussing moral duties and noting that honor in itself is goalless unless it receives as content promotion of peace under rule of law). Notably, “Kant almost never gives us the content of this law—only its form.” That form, of course, is the CI. Carlson, *supra* note 48, at 39 (citation omitted).

⁴⁶⁴ For a general explanation of positivism, see H.L.A. HART, *THE CONCEPT OF LAW* 185–212 (2d ed. 1994) (conceptualizing the relationship between law and morals and explaining natural law and legal positivism).

⁴⁶⁵ The separation of law and morals is the pivotal idea of positivism; that is, there is no inevitable connection between law and morals. “Morality, for [positivists such as H.L.A.] Hart, is content. Law is form. The form of the law is sufficiently flexible to encompass *any* content, moral or not.” Carlson, *supra* note 48, at 29 (citation omitted).

⁴⁶⁶ WOOD, *supra* note 24, at 108–09 (quoting Immanuel Kant, *Lectures on Ethics*, in *CAMBRIDGE EDITION OF THE WRITINGS OF IMMANUEL KANT* 27:273 (1992)).

⁴⁶⁷ Carlson, *supra* note 48, at 23. “Both law and ethics are for Kant branches of moral philosophy They differ in the incentive that each holds out: in law the actor responds to the prospect of external coercion, whereas in ethics the idea of duty itself motivates the action.” Weinrib, *supra* note 83, at 501; see also Grey, *supra* note 428, at 581. Professor Grey offered an alternative understanding: “Kant treats Law not as part of morality but rather as a precondition for its realization.” Grey, *supra* note 428, at 586. Yet, under this idea, as well, the function of law must be the vindication of the dignity principle if law is to be legitimate.

⁴⁶⁸ Weinrib, *supra* note 83, at 503.

⁴⁶⁹ *Id.* at 480 n.26 (discussing contract legal concepts such as acceptance and consideration).

⁴⁷⁰ “[E]very aspect of law must bear the traces of [some focusing] idea and . . . these traces are decisive for the systemic connections within law. . . . The idea of reason runs through the

by *due process*. As we will next see, deontological dignity is precisely the grounding of due process under American constitutional law and, thus, pursuant to our “sacred Honor,” should be subject to Kantian honor’s admonition that faithful fulfillment of due process—of justice—is more important than life itself.

IV. DUE PROCESS—AMERICA’S HIGHEST DUTY—AMERICA’S VALUE MONISM

We have discerned that morality is deontological, demanding complete constraint from evil as humanity’s greatest responsibility. All persons and the societies to which they belong must endure any sacrifice, rather than betray humanity through immorality. As Kant intrepidly, if audaciously, stated, the duty of morality is to, “Let justice be done even if the world should perish.”⁴⁷¹

Next, as a principle means to vouchsafe morality, we reviewed *honor*, particularly “sacred Honor” as it relates to that “charter of human liberty and dignity,”⁴⁷² the Declaration of Independence. The Founders declared that government is legitimate only when it obeys the moral imperative to safeguard indispensable, deontological “unalienable Rights” that derive not from the will of human beings but, as the Declaration states, from the “Law of Nature and of Nature’s God.”⁴⁷³ As such, the Declaration set the fundamental rules for, was the precursor of and profoundly inspired the document that constructs American law and American government, the Constitution.⁴⁷⁴ The Founders solemnized their moral-political theory two ways: by pledging to sacrifice, if necessary, the lives and property of persons under the jurisdiction of America, and by dedicating the young Nation’s “sacred Honor” to the overarching principle of preserving legitimate government.⁴⁷⁵ As progeny of the Founders—as inheritors of the Declaration—we adopt those pledges as well if we are to be Americans⁴⁷⁶—such is the sacrifice pledged by America’s “sacred Honor.”

To realize the ever-emerging arc of our duty to the Founders—to develop a firmer, fuller concept of “sacred Honor” faithful to their moral philosophy of “unalienable

whole length of law as a single fiber that connects each part with every other part” *Id.* at 481.

⁴⁷¹ KANT, *supra* note 15, at 102 n.16.

⁴⁷² Eisenhower, *supra* note 267, at 322.

⁴⁷³ “The connection between honor and natural rights in the founding generation marks an important departure from traditional forms of honor. *Democratic honor frequently (although not always) is tied to universal principles of right rather than to concrete codes of conduct applicable only to a particular group.*” KRAUSE, *supra* note 224, at 107 (emphasis added).

⁴⁷⁴ See *infra* notes 539–86 and accompanying text.

⁴⁷⁵ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (“[W]e mutually pledge to each other our Lives, our Fortunes and our sacred Honor.”).

⁴⁷⁶ See, e.g., THE FEDERALIST No. 14, *supra* note 306, at 88–89 (“[T]he leaders of the revolution . . . pursued a new and . . . noble course. . . . They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate.”); see also *supra* notes 304–12 and accompanying text.

Rights,” we identified Kantian honor as a commanding expression of deontological values. Kant’s *dignity principle* explicated by his three formulations of the CI provides the most compelling description of basic morality this author knows. Kant anticipated where American morality should and, in large measure, has progressed: that constitutional due process forbids government from violating the dignity principle no matter what consequences stem from such faithfulness.

Accordingly, as this portion of the Article avers, Kantian morality under the Constitution’s Due Process Clauses is the quintessence of constitutional honor, America’s paradigmatic nondelegable, non-volitional governmental duty. One must reject, therefore, the so-called Constitution of necessity—the proposition that security, particularly as defined by the Executive, is the predominant constitutional duty—because that theory permits *any* governmental conduct no matter how dehumanizing, no matter how degenerate, no matter how atrocious. Therefore, in faith with the Founders’ plan under the Declaration, constitutional law should be understood pursuant to the ennobling principles of Kantian honor, not consequentialism. Because governmental failure to act morally regardless of even the direst consequences is evil per se, the sacrifice and “sacred Honor” of due process surpass any purported duty of “necessity.”⁴⁷⁷ In that basic sense, the Constitution is, must be, and should be a “suicide pact.”

A. The “Not a Suicide Pact” Metaphor and the Constitution of Necessity

Although entirely sensible, the link between Kantian honor and the Constitution butts up against much scholarly sentiment, as well as the arguable letter of prevailing jurisprudence. A quarter of a century ago, the United State Supreme Court stated tersely, “We do not think the [Due Process] Clause lays down any such categorical imperative. We have repeatedly held that the Government’s regulatory interest in community safety can, *in appropriate circumstances*, outweigh an individual’s liberty interest.”⁴⁷⁸ As the italicized portion emphasizes, the Court allows itself a bit of

⁴⁷⁷ For that reason, we should reject the assertion of constitutional meaning noted by Professor Waldron:

[T]o discover the Constitution, we must approach it without the assistance of guides imported from another time and place. . . . We ask not whether . . . the ethics of Kant or Rawls or Bentham or Mill or Hayek or Nozick . . . is adequately grounded—but whether it is the best approach for the contemporary American legal system to follow, given what we know about markets, . . . about American legislatures, about American judges, and about the values of the American people.

Waldron, *supra* note 15, at 1537 n.12 (citations and internal quotation marks omitted).

⁴⁷⁸ *United States v. Salerno*, 481 U.S. 739, 748 (1987) (emphasis added) (holding that the Bail Reform Act of 1984, 18 U.S.C. § 3142(e), permitting certain pretrial detentions without bail is not per se unconstitutional); *see also, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 591 (2004) (Thomas, J., dissenting); *Comm. for Pub. Ed. and Religious Liberty v. Regan*, 444 U.S. 646,

maneuvering leeway, acknowledging the possibility that in “appropriate circumstances” safety and security will not overwhelm liberty. Even so, the best understanding is that in response to at least significant security threats, liberty interests must fall.

Ironically, perhaps, courts so rule pursuant to their own long-standing dogmatic categorical imperative: “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”⁴⁷⁹ This proposition unearths the crucial companion judicial categorical dogma: “[T]he Constitution . . . is not a suicide pact.”⁴⁸⁰ Despite the fervent invocation of the “security of the Nation,” precedent reveals that much less than a national calamity will elicit the “not a suicide pact” argument.⁴⁸¹ Some courts assert that failing to enforce *any* compelling state interest in *any* situation could render the Constitution a “suicide pact,” perhaps on the logic that while one instance is not likely to jeopardize America’s survival, habitual failure to enforce compelling state interests in the aggregate threatens the continued security of the nation. Whatever the prevailing rationale, the “not a suicide pact” doctrine envelops preserving safety in general, not solely avoiding utter catastrophes.⁴⁸²

662 (1980) (discussing the Court’s Establishment Clause jurisprudence and noting that “[O]ur decisions have tended to avoid categorical imperatives and absolutist approaches . . .”); *Mora v. City of Gaithersburg*, 519 F.3d 216, 222 (4th Cir. 2008).

⁴⁷⁹ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)); *see also, e.g., Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889); *United States v. Abu Ali*, 528 F.3d 210, 240 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009). Similarly, Justice Holmes’s renowned legal realism led him to conclude that “there are no nonderogable emergency rights at all. . . . There is nothing that government cannot do in emergencies, if circumstances warrant.” Adrian Vermeule, *Holmes on Emergencies*, 61 STAN. L. REV. 163, 183–84 (2008).

⁴⁸⁰ *E.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”); *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).

⁴⁸¹ *E.g., David J. Barron & Martin S. Lederman, The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 746 (2008) (discussing cases involving and addressing al Qaeda to show that the “not a suicide pact” argument will be used in circumstances that are not national calamities).

⁴⁸² New Jersey, for example, argued that not being a suicide pact, the Constitution “permits courts to consider exigency and public safety when evaluating the reasonableness of police conduct.” *State v. Golotta*, 837 A.2d 359, 368 (N.J. 2003). *Golotta* specifically held that an anonymous “911” call reporting that a vehicle was being driven erratically reasonably supported a police stop of that vehicle. *Id.*; *see also Indomenico v. Brewster*, 848 F. Supp. 1136, 1139 (S.D.N.Y. 1994) (“Were the stop here to be held violative of the Constitution, virtually no arrest for speeding would be permissible, with the result that carnage on the highways might well escalate with few limits.”) Doubtlessly, unsafe drivers pose a significant danger, imperiling life, limb and property. But, I do not think people commonly equate traffic accidents with national security threatening the continuation of American Constitutional society. New Jersey’s invocation of the “not a suicide pact” theory to enforce “rules of the road” evinces how easily that theory can engulf all relationships between individuals and government.

The “not a suicide pact” metaphor (or anti-metaphor) underlies what is popularly known as the “Constitution of necessity.” Professor Paulsen offered a concise summary of the concept:

The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document’s specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements. The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one, where an alternative construction is fairly possible.⁴⁸³

Clearly, the Constitution of necessity is steeped in the pragmatism of survival, safety, and security.⁴⁸⁴ Correspondingly, supporters of the Constitution of necessity are acutely

Somewhat similarly, courts have applied the “not a suicide pact” sentiment to serious situations that raise apparent national security concerns, although hardly portending the ultimate demise of the Nation. *See e.g., Haig*, 453 U.S. at 309 (holding that no pre-revocation hearing is required to revoke passport due to holder’s activities purportedly threatening to national security while in foreign countries); *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (holding that the First Amendment does not require the release of information regarding post-9/11 detainees such as names, location and reasons for detention), *cert. denied*, 124 S. Ct. 1041 (2004); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 754 (7th Cir. 2002) (“The Constitution would indeed be a suicide pact . . . if the only way to curtail enemies’ access to assets were to reveal information that might cost lives.”) (citations omitted), *cert. denied*, 540 U.S. 1003 (2003); *Palestine Info. Office v. Schultz*, 674 F. Supp. 910, 919 (D.D.C. 1987) (upholding the Secretary of State’s decision to close Palestine Information Office of the Palestine Liberation Organization in Washington, D.C. to “further the foreign policy interests of the United States” is a constitutional “compelling governmental interest” because “[t]he Constitution is not a suicide pact as the able former Supreme Court Justice Goldberg once said.”), *aff’d*, 853 F.2d 932 (D.C. Cir. 1988); *Heidbrink v. Swope*, 170 S.W.3d 13, 16 (Mo. Ct. App. 2005) (holding that under the Missouri Constitution, authorities can interrogate a released felon who seeks a firearms permit).

⁴⁸³ Paulsen, *supra*, note 41, at 1257.

⁴⁸⁴ *E.g., id.* (stating that the Constitution “should not . . . be given a . . . self destructive interpretation”); *see Kutz, supra* note 139, at 245 (asserting that the President can use “extra-legal means” “to meet a military objective” because it preserves “the security of the United States”); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 302 (2010) (saying that the Constitution’s interpretation should not lead to “legal outcomes that threaten the very existence of the nation”). Because this Article emphasizes that the Constitution must be both appreciated and confronted on its own terms, it is necessary to mention that some theorists eschew the Constitution of necessity in favor of either extra-constitutionality or unconstitutionality. *See, e.g., POSNER, supra* note 95, at 12 (advocating a moral and political but not legal justification for dealing with emergencies); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1428 (1989) (arguing that the Executive should openly state it is acting extra-constitutionally); Robert J. Pushaw, Jr., *Justifying Wartime Limits on Civil Rights and*

exasperated by those who will not accept the supposedly unassailable logic that the promises of liberty and justice are worthless if the liberty-based system is threatened by enemies who almost certainly do not value and would not implement a similar design.⁴⁸⁵ Judge Posner, for instance, derided with both palpable irritation and incensed disrespect civil libertarians who

deny that civil liberties should wax and wane with changes in the danger level. They believe that the Constitution is about protecting

Liberties, 12 CHAP. L. REV. 675, 696 (2009) (discussing the Nation's history of allowing popular Presidents to make unconstitutional decisions when necessary).

Professor Crocker explicated, “[b]ecause a Constitution of necessity provides no clear guidance as to when the principle of necessity trumps normal principles, *we at least maintain greater conceptual clarity* by placing necessity outside the bounds of the Constitution.” Crocker, *supra* note 97, at 246 (emphasis added). Despite Professor Crocker’s assurance of “greater conceptual clarity,” one must wonder how banishing the Constitution in lieu of enforcing a Constitution of necessity in any manner elucidates “necessity.” Deciding that due to necessity a particular emergency is “outside the bounds of the Constitution” does not explicate either the nature or extent of *necessity* any better than urging that pursuant to the Constitution’s own implied necessity principles, the given emergency negates the application of one or more constitutional liberties. Neither approach inherently defines the point at which a dangerous situation crosses the threshold into applicable, liberty-nullifying *necessity*.

Nor is there any reason to suppose that the definition of *necessity* actually would differ between the two approaches *if* one believes that the Constitution truly includes an implied necessity doctrine. Negating liberty in favor of unfettered governmental discretion pursuant to the Constitution of necessity is functionally equivalent to declaring that due to necessity, the Constitution is inapplicable. Thus, identical exigencies would justify either approach, unless by *fiat* one simply declared that a certain level of emergency invokes the Constitution of necessity while a different level of emergency obviates the Constitution altogether.

Whatever their form, extra-constitutional arguments necessarily discredit the Constitution’s essential character as the supreme *expression of law*, a tenet core to the very identity and meaning of the United States as a nation comprised of, confined by, and devoted to law, rather than anarchy or tyranny. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land . . .”); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“Congress and the President, like the courts, possess no power not derived from the Constitution.”); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934) (“Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.”).

Thus, the answer to difficult issues must be found in the letter, policies, and spirit of the document that defines the nation, not by deceptively asserting that the Constitution is honorable but charmingly naïve; therefore, necessity requires ignoring that document until it is convenient to respect it again. If the Constitution’s purported simplicity is perilous, then either forthrightly amend the document or rename it, as it is no longer a constitution, but rather, a statutory scheme arguably of penultimate rank. If, alternatively, the alleged constitutional naiveté is no such thing, but rather the sacrifice and sacred honor of morality, then we must have the courage to obey it.

⁴⁸⁵ See, e.g., Paulsen, *supra* note 41, at 1282–83. “The alternative is near-absurdity: . . . that adherence to the Constitution might require destruction of the Constitution.” *Id.* at 1258–59.

individual rights rather than about promoting community interests, a belief some civil libertarians ground in a quasi-religious veneration of civil liberties coupled with a profound suspicion of the coercive side of government⁴⁸⁶

It appears inconceivable to these purported realists that morality's dominion exerts the highest duty, the noblest calling, the ascendancy of humanity, which explains the otherwise anomalous requisite that doing the right thing transcends doing the good thing. They deride the courageous idea that the true victory, indeed the definitive conquest, comes from defying iniquity when immorality is most seductive and seemingly sensible. They deny that understanding and undertaking the responsibility of morality defines the singular decency, nobility and worth of humanity. Such is, of course, the courage to accept the sacrifice and sacred honor of morality when every arguably sensible impulse urges otherwise.

True, these consequentialists find more than a modicum of backing not only in the aforementioned judicial precedents, but also in the words and deeds of some of America's greatest patriots. Candor requires citation to illustrative instances. Despite the previously quoted, arguably deontological positions of Revolutionary War patriots Patrick Henry and Thomas Paine,⁴⁸⁷ in an 1810 letter Thomas Jefferson offered:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.⁴⁸⁸

Consequentialists appeal as well to *The Federalist*,⁴⁸⁹ in particular Hamilton's *Federalist No. 23* which addresses the President's "war powers" noting, "circumstances which may affect the public safety are [not] reducible within certain determinate limits; . . . there can be no limitation of that authority, which is to provide for

⁴⁸⁶ POSNER, *supra* note 95, at 41–42. In stark contrast, Judge Posner seems to harbor little if any suspicion "of the coercive side of government." His discussion of police powers does not seriously consider the possibility that law enforcement might make willful or inadvertent mistakes in the course of national security investigations.

⁴⁸⁷ See *supra* notes 155–58 and accompanying text.

⁴⁸⁸ Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *supra* note 14, at 146.

⁴⁸⁹ In this regard, many scholars argue, as did the drafters of the Declaration, that the Framers of the Constitution embraced the Lockean idea, likewise espoused by Montesquieu, that individuals relinquish the freedom but danger of "the state of nature and [accept] the consequent identification of the end of government as individual liberty, understood as individual security." Pangle, *supra* note 47, at 35.

the defence and protection of the community, in any matter essential to its efficacy.”⁴⁹⁰ In Federalist No. 41 Madison arguably accepted Hamilton’s sentiment by posing an eloquent but doctrinaire rhetorical question, “With what colour of propriety could the force necessary for defence be limited by those who cannot limit the force of offence?”⁴⁹¹

The consequentialist recourse to The Federalist, however, is far from flawless. Indeed, within his Federalist No. 41, Madison evinced deliberate ambivalence, noting with deep caution that

Not less true is it . . . that the [civil] liberties of Europe, as far as they ever existed, have with few exceptions been the price of her military establishments. *A standing force therefore is a dangerous, at the same time that it may be a necessary provision. On the smallest scale it has its inconveniences. On an extensive scale, its consequences may be fatal.*⁴⁹²

⁴⁹⁰ THE FEDERALIST No. 23, at 147–48 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (original emphasis omitted). FEDERALIST NO. 23 stated further, “[War] power[] ought to exist without limitation The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.” *Id.* at 147.

⁴⁹¹ THE FEDERALIST No. 41, at 270 (James Madison) (Jacob E. Cooke ed., 1961). Correspondingly, Hamilton contended that “safety” knows no “constitutional shackles . . . [it] is one of those truths, which to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning.” THE FEDERALIST No. 23, *supra* note 490, at 147. FEDERALIST NO. 23 evokes an unacceptable, off-putting, anti-intellectual dogmatism that only fools, dupes, and contrarians would demand an actual justification for *necessity’s* primacy. Such chatter stands in sharp contrast with the detailed logical and historical explanations commonly found in THE FEDERALIST.

⁴⁹² THE FEDERALIST No. 41, *supra* note 491 at 271 (emphasis added). Interestingly, Hamilton broached a comparable argument as part of his admonition that all states must embrace the Constitution lest, as often happens with unaligned neighbors who compete for land, wealth and power, some states be in continuous war with other states. Hamilton recognized the terrible threat to liberty inherent in perpetual military mobilization.

Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war—the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe they, at length, become willing to run the risk of being less free.

. . . .

. . . The military state becomes elevated above the civil. The inhabitants of territories, often the theatre of war, are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees, the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them as masters, is neither

Furthermore, Madison proclaimed in *Federalist No. 51*, “Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.”⁴⁹³ Thus, even if he believed that necessity might trump liberty,⁴⁹⁴ Madison emphasized as strongly that “justice” is the paradigmatic reason for government, therefore “extensive” loss of liberty—of justice—for the sake of safety is “fatal.”

Madison’s embrace of essential justice demonstrates his crucial agreement with the Founders that a nation lacking liberty is no legitimate governor. We must remember that it was Madison who unequivocally instructed future Americans to improve and better the Founders’ precepts of government: “[T]he leaders of the revolution . . . pursued a new and . . . noble course. . . . They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great confederacy, which it is incumbent on their successors to improve and perpetuate.”⁴⁹⁵ Perhaps for that reason, Madison ended *Federalist No. 41* with a detailed expression of confidence that the proposed Constitution coupled with America’s dynamic spirit would accommodate both military necessity and liberty.⁴⁹⁶

Proponents of the Constitution of necessity fondly invoke another icon, President Abraham Lincoln, who temporarily, but likely unlawfully, suspended *habeas corpus* during the Civil War.⁴⁹⁷ Additionally, in violation of acts of Congress, Lincoln subjected civilians far from actual combat to military trials and punishments for violating

remote, nor difficult: But it is very difficult to prevail upon a people under such impressions, to make a bold, or effectual resistance, to usurpations, supported by the military power.

THE FEDERALIST NO. 8, at 45, 48 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Certainly, life under the relentlessly militaristic government Hamilton described in FEDERALIST NO. 8 would generate the very consequences that led to both the American Revolution and the propounding of the Declaration of Independence. Just as it was in 1776, it is the People’s duty to “throw off” such government and to restore liberty no matter what the cost. Perhaps Hamilton sensed that even a Constitution in a time of necessity cannot forsake what is right.

⁴⁹³ THE FEDERALIST No. 51, at 352 (James Madison) (Jacob E. Cooke ed., 1961).

⁴⁹⁴ “A wise nation will . . . not rashly preclude itself from any resource which may become essential to its safety” THE FEDERALIST No. 41, *supra* note 491, at 271.

⁴⁹⁵ THE FEDERALIST No. 14, *supra* note 306, at 88–89.

⁴⁹⁶ With regard to the adoption of the Constitution, as strongly urged by THE FEDERALIST, possibly the greatest irony is that the Constitution is arguably the product of necessity theory. The Framers’ mandate from Congress was to repair the Articles of Confederation, not to annul that document and replace it with an entirely new framework for American government. In fact, the Framers “ignored . . . the requirements of Article XIII of the Articles of Confederation that any amendments be approved by the state legislature of every one of the thirteen states within the Confederation.” Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 727 (2009).

⁴⁹⁷ See Michael Kent Curtis, *Lincoln, The Constitution of Necessity, and the Necessity of Constitutions: A Reply to Professor Paulsen*, 59 ME. L. REV. 1, 12 (2007).

military orders.⁴⁹⁸ For what it is worth, Lincoln viewed his constitutional trespass as very limited in both duration and reach,⁴⁹⁹ unlike the present “war on terror,” which is worldwide in scope and of unlimited duration, potentially abridging, if not perpetually undoing, constitutional liberties. Without a doubt, however, the proponents of the Constitution of necessity enjoy considerable support from a range of respected sources.

B. The Constitution of Necessity’s Methodology

A word or two is appropriate regarding how this purported Constitution of necessity actually works. Although proponents do not agree on every aspect of its application and may differ on the precise philosophical-jurisprudential roots of its justification,⁵⁰⁰

⁴⁹⁸ See *id.* at 11–16. In his July 4, 1861 Special Address to Congress, Lincoln stated that the President would violate his oath, “if the government should be overthrown, when it was believed that disregarding the single [instance of constitutional] law, would tend to preserve it[.]” Paulsen, *supra* note 41, at 1265; see also, e.g., Crocker, *supra* note 97, at 234 (stating that Lincoln’s wartime precedent exemplified allowing extra-constitutional action when necessary to preserve the state); Levinson & Balkin, *supra* note 496, at 724 (noting that Lincoln recognized that to preserve the government political actors may sometimes ignore the Constitution).

⁴⁹⁹ E.g., Curtis, *supra* note 497, at 11. Interestingly, in one highly debatable, but fascinating, regard some maintain that President Lincoln treated the Constitution as a suicide pact (although for purposes starkly different than assuring due process). He could have sacrificed the extant Union—let the South secede—rather than risk the Constitution by fighting a war which the North might well have lost. After all, the presidential oath requires the Executive to preserve the Constitution, not preserve the Union. Prakash, *supra* note 7, at 1305–06. Therefore, one could argue that although he did not believe liberty was vital enough, Lincoln accepted that at least one idea—specifically, to borrow *post-bellum* phrasing, “one nation indivisible”—is so intrinsic to the Constitution that its preservation is worth risking the nation itself.

⁵⁰⁰ Scholars have noted four paradigmatic theories regarding constitutional emergency powers, of which aspects, one, three, and four could support a Constitution of necessity:

- (1) “Constitutional relativists []” . . . believe that executive discretion during emergencies is largely unbounded . . . ([although some proponents] concede that the appropriations power and other legislative powers can be used to check executive abuse. . . .)
- (2) Theorists of “extralegal emergency powers[]” . . . believe that . . . [i]f executives or other officials desire to take extraordinary measures, they must deliberately step outside the legal system to do so, hoping for some sort of ex post political ratification. . . .
- (3) Theorists who praise “common law emergency oversight” hold that ex post judicial review, under constitutions or statutes, can provide government with needed flexibility during emergencies while ensuring that expanded powers are contracted again once the emergency has passed. . . .
- (4) Finally, “emergency legal formalists []” . . . propose ex ante statutory and constitutional regulation of emergencies, rather than ex post judicial regulation in the common law mode. Their main mechanisms involve constitutional provisions and framework statutes that are supposed to provide clear and specific limitations on governmental powers before an emergency event occurs.

the argument is usually expressed somewhat disingenuously as *balancing* costs and values when security purportedly conflicts with liberty.

Understandably, proponents of the Constitution of necessity insist that striking the proper balance is not based on empowering government for its own sake.⁵⁰¹ Rather, the ostensible balance is a means to protect the safety of the greater society (not necessarily the safety of society's citizenry as individuals),⁵⁰² even if the price is allowing the government to abate or abolish liberty interests, possibly for an indeterminate duration.⁵⁰³

While its proponents employ soothingly reasonable rhetoric, *balancing* is not truly the method. Rather, the imagery of balancing helps distract and distort the reality that in the last analysis, as it must be, the Constitution of necessity is uncompromising. Although coming to the opposite resolution, no less than Kantian honor, the Constitution of necessity seeks the elementary unit, the value monism, the bedrock premise of the Constitution that answers the ultimate question: Which takes precedence if you can have only one, safety or liberty? The Constitution of necessity puts security above all.

To this end, most proponents predictably allow the Executive substantially unreviewable, if not absolute, authority to curtail or eliminate liberties during those emergencies deemed sufficient to trigger the Constitution of necessity.⁵⁰⁴ Typical is the proposition of Professors Adrian Vermeule and Eric Posner that:

executive officials [should take] aggressive action in response to perceived security threats, and courts and Congress [should] defer[] to or approve[] of the executive's initiatives. . . . [I]t is therefore desirable and indeed inevitable that liberties will be sacrificed when security threats arise. . . . Because those of us outside

Vermeule, *supra* note 479, at 195–96 (quoting William E. Scheuerman, *Emergency Powers*, 2 ANN. REV. L. & SOC. SCI. 257, 258, 259–62, 270–73 (2006) (footnotes and citations omitted)).

⁵⁰¹ “When it is said that liberty must be traded off for the sake of security, what is meant by ‘security’ is people being more secure rather than governmental institutions being more powerful.” Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 460 (2006) (emphasis omitted).

⁵⁰² “As Hobbes reminded us, governments have to design their security strategies in broad terms, taking account of the overall impact of what they do. They cannot be expected to undertake the detailed evaluations that this account requires, when they are addressing the safety of a quarter billion people.” *Id.* at 492.

⁵⁰³ It is no answer to bootstrap by arguing that security is not an end in and of itself, but rather a means to attain diverse goals such as liberty concurrent with safety from terrorism. *Id.* at 462–63, 471–72. Of course, a society that holds liberty as the ultimate trump over life, bodily safety, and property does not advocate a Constitution of necessity in the terms criticized in this Article. By contrast, if we confess that we are not secure without liberty, yet are willing to render liberty subject to necessity's domination, then we live under a Constitution of necessity with liberty, at best, winning only the silver medal in the competition for importance. *See, e.g.*, Brooks, *supra* note 10, at 128.

⁵⁰⁴ *See, e.g.*, Paulsen, *supra* note 41, at 1259–63.

the executive branch are unqualified to assess the balance struck, our position must be one of outright deference.⁵⁰⁵

Similarly, an untouchable Executive is the pivot of the notorious memoranda published by high ranking officers of the Department of Justice's Office of Legal Counsel during the presidency of George W. Bush.⁵⁰⁶ Advocates urge that there is no reason to doubt the Executive's pragmatic assessment of danger, suspect its good faith, or presume that it will overreach.⁵⁰⁷ Moreover, according to the argument, not entrusted with the daily operation of the nation's foreign affairs, the other branches of government are prone to more and greater mistakes regarding the rarified realm of international relations and national security than is America's constitutionally designated expert, the President.⁵⁰⁸

C. *The Constitution of Necessity—Consequentialist Rejoinders*

Not surprisingly, opponents of the Constitution of necessity challenge that theory's empirical premises. For instance, Judge Posner expressed the typical consequentialist

⁵⁰⁵ Cole, *supra* note 11, at 1330 (discussing POSNER & VERMEULE, *supra* note 136, at 12, 16). Indeed, according to Posner and Vermeule, the Executive may respond to security threats by imposing torture, suppression of dissent, and other curtailments of due process. *Id.* at 1330–31; *see also* Crocker, *supra* note 97, at 238–40 (discussing the theory of the un-reviewable Executive).

⁵⁰⁶ *See, e.g.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen. To Alberto R. Gonzalez, Counsel to the President & William J. Haynes II, Gen. Counsel of the Dep't of Def., RE: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), available at <http://news.lp.findlaw.com/hdocs/docs/torture/powtorturememos.html> [hereinafter Bybee Memo] (discussed in David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 GOLDEN GATE U. L. REV. 195, 212–19 (2008)); Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to Timothy Flanagan, Deputy Counsel to the President, RE: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>; *see also* Kutz, *supra* note 139, at 240–41 (noting that the Bybee Memo argued, *inter alia*, that no law binds the Executive when exercising his war powers under the Constitution as Commander in Chief).

A subsequent memorandum from Assistant Attorney General Daniel Levin to Deputy Attorney General James B. Comey repudiates the Bybee Memo regarding the definition of torture, but declines to address the Memo's micro- and macro-necessity theory of the Executive because the George W. Bush Administration issued orders against torture and other forms of inhumane treatment). Kutz, *supra* note 139, at 248.

⁵⁰⁷ *See, e.g.*, Cole, *supra* note 11, at 1330. While some proponents would not fully exclude legislative or judicial review, such oversight would be extraordinarily deferential, and thus prone to uphold executive prerogative except in the unlikely event that the Executive acted wholly irrationally.

⁵⁰⁸ *Id.*

rationalization for torture-like interrogation, if not actual torture: if the situation “is dire enough and the value of the information great enough, only a diehard civil libertarian will deny the propriety of using a high degree of coercion to elicit the information.”⁵⁰⁹ The problem with the Posnerian approach is *not* that we can *never* know when the situation “is dire enough.”⁵¹⁰ Rather, the problem is we cannot *always* know when it “is dire enough.” One empirical deficiency of the Constitution of necessity, then, stems from “slippage”; that is, “the [necessity] defense must apply to conduct undertaken before the threat materializes. It is nearly always impossible to know whether the threat really would have been realized”⁵¹¹

Thus, while supporters of the Constitution of necessity earnestly contend that the Executive would employ extreme measures rarely and prudently, if for no other reason, to avoid a public backlash (should governmental efforts at maintaining secrecy fail),⁵¹² theory and experience reveal that relativism, fear, and poor judgment encourage officials to err on the side of necessity, rather than liberty.⁵¹³ Given the political realities of a society esteeming justice, but nonetheless inclined to anxiety, edginess, and bigotry, any official investigating a credible terrorist suspect will be tempted to take severe steps lest some terrible event occur and an angered public demands to know why the suspect who might have had crucial information was not subjected to every form of intensive interrogation.⁵¹⁴ Torture, torture-like conduct, and similar immoderate measures would not likely be limited to the most certain instances under the “ticking time bomb” scenario.⁵¹⁵ Instead, society could learn to tolerate, even become comfortable

⁵⁰⁹ POSNER, *supra* note 95, at 81.

⁵¹⁰ *Id.* Reasonable people could agree that certain situations *unreservedly* are “dire enough” even if out of caution, the chosen demarcation excludes less egregious circumstances that almost certainly are sufficiently “dire.” For instance, from a reasonable consequentialist perspective, the situation is surely sufficiently “dire” if, beyond reasonable doubt, a captured suspect knows, but will not reveal, the location of five “ticking” nuclear bombs, scattered among five different major American cities. *Id.* The carnage wrought by fewer, even one, ignited nuclear weapon may be calamitous enough, but surely the detonation of five nuclear bombs in five key cities would decimate American society.

⁵¹¹ Kutz, *supra* note 139, at 243–44; *see also, e.g.*, Crocker, *supra* note 97, at 255; Henry Shue, *Torture*, in *TORTURE: A COLLECTION* 47, 56–57 (Sanford Levinson ed., 2004).

⁵¹² *E.g.*, POSNER, *supra* note 95, at 83–84 (arguing that the government would not authorize torture, except in extreme circumstances, because public knowledge of such techniques would produce “political costs”).

⁵¹³ “Indeed, most of human history teaches us that reliance on executive good intentions is an insufficient safeguard against abuse of power.” Brooks, *supra* note 10, at 128.

⁵¹⁴ Crocker, *supra* note 97, at 260. This is not to say that investigators will always succumb to such temptations. Rather, the argument is that they will do so with sufficient regularity until that regularity becomes customary, at which point, investigators might attempt increased incursions into liberty to revise norms yet again. Each time, the chance of returning to pre-exigency normalcy becomes less probable. *See, e.g.*, Cole, *supra* note 11, at 1334.

⁵¹⁵ POSNER, *supra* note 95, at 81.

with, excessive measures in response to less than highly credible threats of significant danger.⁵¹⁶ Thus, arguments “that there is no reason to fear executive overreaching . . . during emergencies and no reason to worry that emergency measures will outlast the emergency . . . are blind to history, the social psychology of fear, and the extraordinary pressures to safeguard security at all costs that executives inevitably experience during emergency periods.”⁵¹⁷

Another consequentialist critique warns that if security is the core principle overwhelming all others, then the most depraved, horrific practices may be inflicted on unlimited numbers of suspects—indeed upon unlimited numbers of entirely innocent others—if those practices are what the restoration of national safety requires.⁵¹⁸ Professor Crocker expressed that potential through horrific logic:

Then the loathsome idea arises—after failing to respond to the usual methods, would the suspect respond to the threatened or actual torture of one or both of his daughters? Would officials be justified in perpetrating such harm? Under the standard justification relying on necessity arguments, the answer must be “yes.”⁵¹⁹

For similar reasons, society may well become more tolerant of less extreme, but nonetheless inappropriate, liberty incursions for situations of ever decreasing exigency.⁵²⁰ Thus, deprivations “quickly become routinized.”⁵²¹ Rosa Brooks’s warning, therefore, carries the ring of likelihood that “[w]ithout a clear and constantly reaffirmed prohibition on torture, we will quickly become a society that accepts far worse.”⁵²²

Correspondingly, in theory at least, the Constitution of necessity could justify invalidating *every* liberty, express or implied in that document. The appeal to Lincoln avers that sometimes one must “sacrifice the limb to save the [tree]”;⁵²³ but, of course, there comes a point where so many parts are removed or suspended that the tree dies. “Nor is Lincolnesque preservation of the Constitution at all costs a worthy end, for

⁵¹⁶ In fact, even if less oppressive interrogation yields reliable information, investigators might indulge in torturous interrogation both to test whether the suspect retains any additional guilty knowledge and to assure the public that nothing was left untried to safeguard lives, health and property. The prospect of torture then becomes not a theory, but “an omnipresent, pressing question.” Crocker, *supra* note 97, at 260.

⁵¹⁷ Cole, *supra* note 11, at 1334.

⁵¹⁸ See, e.g., Crocker, *supra* note 97, at 255–56.

⁵¹⁹ *Id.* at 256–57; see also, e.g., Kutz, *supra* note 139, at 244.

⁵²⁰ See, e.g., Schultz, *supra* note 506, at 206–08 (discussing detention of suspects, warrant-less review of bank records, and similar procedures).

⁵²¹ Brooks, *supra* note 10, at 318.

⁵²² *Id.* at 319; see also, e.g., Crocker, *supra* note 97, at 255.

⁵²³ Prakash, *supra* note 7, at 1304.

that would suggest that we may suspend or discard *every* constitutional provision to ‘save’ the Constitution.”⁵²⁴

One other general retort merits very brief reference. Many commentators vigorously dispute not only the legality, but the wisdom of President Lincoln’s extra-constitutional tactics.⁵²⁵ Should those analysts be correct, one might well conclude: if America’s most revered president mistakenly assumed executive license to contravene the Constitution, we cannot concede comparable authority to others who, even if admirable, will almost certainly lack the sagacity of a Lincoln. If Lincoln was wrong, others using the same power will likely be worse.⁵²⁶

D. The Constitution Must Be a Suicide Pact

The foregoing Section reveals that the Constitution of necessity is vulnerable to many pragmatic criticisms.⁵²⁷ Nonetheless, let us assume that every practical critique fails. Let us assume further that under the Constitution of necessity, all officials act with perfect judgment and never make errors. Such results assuage only outcome-based challenges. The foundational argument against the Constitution of necessity is that it is consequentialist, not deontological, or if it elevates survival as a moral apex, the Constitution of necessity does so erroneously.

Here is the deontological rejoinder to the Constitution of necessity. The Constitution is the flowering of the Declaration of Independence’s pronouncement that legitimate government must “secure” the deontological principles that the Founders entitled “unalienable Rights”;⁵²⁸ thus, government exists to fulfill humanity’s prime responsibility: to always be moral in the pursuit of happiness. Pursuant to the unparalleled magnitude of that moral imperative, the Founders pledged their “Lives, . . . Fortunes and . . . sacred Honor,”⁵²⁹ and expected all Americans then and thereafter to do likewise for the sake of attaining and maintaining legitimate government under law.⁵³⁰ As such, the Constitution is the legal component of our responsibility both as a nation, and as individuals, to hone the Founders’ deep but imperfect understanding

⁵²⁴ *Id.* at 1305; *see also, e.g.*, Brooks, *supra* note 10, at 128 (“Our security depends on our liberty. In an open society we can separate good policies from bad, and correct our errors . . .”).

⁵²⁵ *See, e.g.*, Curtis, *supra* note 497, at 18–28.

⁵²⁶ *Id.* at 28.

⁵²⁷ Arguably, such pragmatic objections address only the matter of policy—that is, whether the Constitution of necessity is a good idea, not whether it is an infirm legal theory. That is because potential or actual misuse neither negates constitutional authority nor proves that such authority does not exist, although the potential that abuses will overwhelm legitimate implementations may provide vital clues that the particular constitutional theory itself is fatally flawed. *See, e.g.*, Paulsen, *supra* note 41, at 1259. Disproving the *bona fides* of the Constitution of necessity thus requires disproving its premises, not anticipating its possible abuse.

⁵²⁸ *See infra* notes 539–58 and accompanying text.

⁵²⁹ THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

⁵³⁰ *See supra* notes 266–76 and accompanying text.

of those moral principles that, borrowing a term from the presidential oath, government must “preserve, protect and defend.”⁵³¹ Indeed, that is precisely what the Founders hoped and expected.⁵³²

This leads us back to the core of deontology. As earlier noted, within any system of morality there must be a singular, controlling precept—the value monism—that defines the moral paradigm, providing the point of departure from which all other ethical maxims and applications are understood.⁵³³ Writing shortly after the Revolution, Immanuel Kant explained why Lockean survival theory cannot be human society’s highest moral value. Rather, dignity comprehended by the CI is the value monism of any moral system and regime of rights enforced by law.⁵³⁴ Kant explained why morality requires, as the old adage goes, death before dishonor.⁵³⁵ Abiding by the dignity principle is more valuable than life itself because such abidance is morality’s paramount duty.

Therefore, despite its pre-Kantian origin, the Constitution must advance Kantian ethics to be true to “sacred Honor’s” task that successive generations improve the Founders’ principles through a deepening appreciation of what morality is. Anything less fosters governmental immorality which, as explained above, is contrary to the Declaration of Independence’s justification for the American Revolution.⁵³⁶ Kant reveals what the Founders did not fully comprehend: that morality requires the Government to risk even the greatest sacrifice, to jeopardize its own existence rather than betray what is right. In that essential regard, the Constitution is a suicide pact.

The concluding discussion of this Section shows that, exactly as Kant recognized it should be,⁵³⁷ constitutional due process is the moral core, soul, and psyche of American law that was promised by the Declaration. Indeed, as Felix Frankfurter exclaimed over sixty years ago, due process is “ultimate decency in a civilized society.”⁵³⁸

⁵³¹ U.S. CONST. art. II, § 1, cl. 8.

Before he enter[s] on the execution of his Office, he shall take the following Oath or Affirmation:—“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

⁵³² *Id.*; see *supra* notes 304–12 and accompanying text.

⁵³³ See *supra* notes 81–86 and accompanying text.

⁵³⁴ See *supra* notes 416–37 and accompanying text.

⁵³⁵ See *supra* Part III.C.

⁵³⁶ See *supra* notes 434–35 and accompanying text.

⁵³⁷ See *supra* notes 437–60 and accompanying text.

⁵³⁸ *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring) (holding that the Fifth Amendment’s privilege against self-incrimination is not applicable *via* the Fourteenth Amendment to state prosecutions), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964). I should note that although Justice Frankfurter was an outspoken proponent of the overarching moral core of due process, he did state that “[t]he right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty.” *Dennis v. United States*, 341

E. Consistent with Its Roots in the Declaration of Independence, the Constitution Embraces the Transcendence of Rights

It is long and well established that the Constitution's concept of legitimate government is derived from and loyal to the Declaration of Independence.⁵³⁹ The Framers of the Constitution asked the fundamental question addressed by the very text of the Declaration: What is good and proper government? They based their answer in significant part on "self-evident truths concerning man's natural rights and the origins and purposes of government."⁵⁴⁰ It is no surprise, therefore, that the judiciary steadfastly has emphasized the logical, inextricable connection between the Declaration and the Constitution.⁵⁴¹ Nearly 140 years ago the Supreme Court in *Yick Wo v. Hopkins* wrote, "But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress . . . in securing . . . the blessings of civilization under the reign of just and equal laws . . ."⁵⁴² Identically, four decades after *Yick Wo*, Justice Louis Brandeis famously summarized this idea, "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness."⁵⁴³

Justice Brandeis's conclusion, adopted by subsequent decisions,⁵⁴⁴ verifies the Court's turn-of-the-twentieth-century observation that, "[t]he first official action of this nation declared the foundation of government" as the Declaration's enumeration

U.S. 494, 519 (1951) (Frankfurter, J., concurring). Therefore, I make no claim that Justice Frankfurter would embrace the thesis of this Article; in fact, he likely would not.

⁵³⁹ Congress has so noted. Indeed, "the admission of territories as States into the United States was often predicated on an assurance by the State that its constitution would violate neither the Constitution nor the Declaration." David Barton, *The Image and the Reality, Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 451 (2003) (citations omitted). For instance, "The Alaska Constitution was ratified by Alaska's voters and approved by Congress, which found it to be 'republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence.'" *Kirk v. Carpeneti*, 623 F.3d 889, 892 (9th Cir. 2010) (quoting Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339 (1958)); *see also, e.g., Larson v. Seattle Popular Monorail Auth.*, 131 P.3d 892, 900–01 (Wash. 2006) (en banc) (Johnson, J. M., dissenting) (discussing Enabling Act, ch. 180, sec. 4, 25 Stat. 676 (1889), which admitted the State of Washington to the United States).

⁵⁴⁰ Epstein, *supra* note 219, at 77.

⁵⁴¹ Recently, the Ninth Circuit noted, "The Declaration of Independence was the promise; the Constitution was the fulfillment." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1031 (2010) (quoting Chief Justice Warren Burger as quoted by Charles Alan Wright, *Warren Burger: A Young Friend Remembers*, 74 TEX. L. REV. 213, 219 (1995)).

⁵⁴² *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁵⁴³ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (discussing the right of individual privacy), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

⁵⁴⁴ *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 n.10 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

of “unalienable rights.”⁵⁴⁵ Indeed, the Court frequently has reminded us of the Constitution’s linkage with the Declaration.⁵⁴⁶ *Cotting v. Godard* elegantly explicated:

While [the Declaration’s] . . . principles may not have the force of organic law, or be made the basis of judicial decision[s] as to the limits of right[s] and dut[ies], and while in all cases reference must be had to the organic law of the nation for such limits, *yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.*⁵⁴⁷

Contemporary justices as diverse as John Paul Stevens and Clarence Thomas embrace the longstanding judicial recognition that the Declaration substantially informs the meaning and scope of the Constitution,⁵⁴⁸ a perspective steadfast with the understanding of America’s earliest patriots and leaders.⁵⁴⁹ For instance, *The Federalist No. 39* explained:

The first question [regarding the proposed Constitution] . . . is, whether the general form and aspect of the government be strictly republican[.] It is evident that no other form would be reconcilable

⁵⁴⁵ *Cotting v. Godard*, 183 U.S. 79, 107 (1901).

⁵⁴⁶ *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 94–95 n.1 (1979) (noting that “all of [Section] 1 of the Fourteenth Amendment is already within the spirit of the Declaration of Independence” (citation omitted)); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (“The liberty preserved from deprivation without due process included the right ‘generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.’”) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972)); *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (“[T]he conception of political equality from the Declaration of Independence,” as evinced in the Constitution’s Fifteenth, Seventeenth and Nineteenth Amendments prescribes “one person, one vote.”) (quoting *Gray v. Sanders*, 372 U.S. 368 (1963)); *Bute v. Illinois*, 333 U.S. 640, 651 (1948) (“The Constitution was conceived in large part in the spirit of the Declaration of Independence . . .”).

⁵⁴⁷ *Cotting*, 183 U.S. at 107 (emphasis added) (discussing *Yick Wo*, 118 U.S. 356, 369–70).

⁵⁴⁸ *See, e.g.*, *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2334 (2009) (Stevens, J., with Ginsburg and Breyer, JJ., dissenting) (“The liberty protected by the Due Process Clause is not a creation of the Bill of Rights. Indeed, our Nation has long recognized that the liberty safeguarded by the Constitution has far deeper roots.”) (citing *THE DECLARATION OF INDEPENDENCE*, para. 2 (U.S. 1776)); *Adarand Constructors Inc., v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (“[T]he principle of inherent equality that underlies and infuses our Constitution” is linked to the unalienable rights recognized in the Declaration); *Washington v. Harper*, 494 U.S. 210, 238 (1990) (Stevens, J., with Brennan and Marshall, JJ., concurring in part and dissenting in part); *Bowers v. Hardwick*, 478 U.S. 186, 207 (1986) (Blackmun, J., with Brennan, Marshall and Stevens, JJ., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁴⁹ *See, e.g.*, *Larson, supra* note 266, at 747–48 (noting that the Framers of the Constitution referred to the Declaration as having established the American Government).

with the genius of the people of America; *with the fundamental principles of the Revolution*; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.⁵⁵⁰

John Quincy Adams likewise noted, “The Declaration of Independence and the Constitution of the United States are parts of one consistent whole, *founded upon one and the same theory of government*”⁵⁵¹ Samuel Adams agreed, writing *after* the ratification of both the Constitution and the Bill of Rights, that “[t]his declaration of Independence was received and ratified by all the States in the Union and has never been disannulled.”⁵⁵²

Surely, for all the *realpolitik* and compromises of principle confirmed by historians that explain the final document, the Constitutional Convention nonetheless hoped to create the foundation that could not immediately, but ultimately would, kindle full faith with the Declaration’s philosophy.⁵⁵³ In light of these precedents, Professor Larson correctly concluded, “the Declaration was . . . the declaration of one American people declaring the existence of one American nation. It is therefore entirely appropriate to date the legal existence of the American nation from July 4, 1776 The American nation preceded . . . the Constitution, which ‘perfected’ that nation.”⁵⁵⁴

Accordingly, the Framers intended the Constitution to form not simply a positive governmental system, but also a moral basis for governing American society as directed by the Declaration’s deontology that legitimate government must preserve and protect the “unalienable Rights” derived from “Nature and Nature’s God.”⁵⁵⁵ They fostered a political philosophy imbued deeply with “moral goals.”⁵⁵⁶ The Framers believed the very nature of their Constitution would establish “a profound and lucid consensus on the nature of ‘justice,’ the ‘general welfare,’ and, preeminently, the ‘blessings of liberty.’”⁵⁵⁷ Indeed, urging the ratification of the Constitution, *Federalist No. 43* applied the very reasoning of the Declaration, underscoring “the transcendent law of

⁵⁵⁰ THE FEDERALIST No. 39, at 181–82 (James Madison) (Terrence Ball ed., 2003) (emphasis added).

⁵⁵¹ JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION: A DISCOURSE 40 (1839) (emphasis added).

⁵⁵² Samuel Adams, *Address to the Legislature of Massachusetts* (Jan. 17, 1794), in 4 THE WRITINGS OF SAMUEL ADAMS 357 (Harry Alonzo Cushing ed., 1968) (1908).

⁵⁵³ “The variety of opinions and disagreements of 1787–1788 did not call into question the fundamental political principles asserted in the Declaration of Independence.” Epstein, *supra* note 219, at 78.

⁵⁵⁴ Larson, *supra* note 266, at 702; *see also id.* at 736–37.

⁵⁵⁵ THE DECLARATION OF INDEPENDENCE, paras. 1–2 (U.S. 1776).

⁵⁵⁶ For instance, Thomas Paine succinctly stated that the Revolution instituted “Government founded on a moral theory” Pangle, *supra* note 47, at 10 (quoting Thomas Paine, *Rights of Man*, in THE BASIC WRITINGS OF THOMAS PAINE 148 (Willey Book Co., 1942)).

⁵⁵⁷ Pangle, *supra* note 47, at 9.

nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed."⁵⁵⁸

In sum, though one may find some support for the Constitution of necessity in their writings, the early Patriots embraced the Declaration's affirmation of both the transcendence of morality and the moral duty of government to be just above all else. The earlier quoted *Federalist No. 51* encapsulated the precept boldly, "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."⁵⁵⁹ Indeed, the District of Columbia Circuit Court of Appeals verified that Madison's philosophy expresses "truths [that] are immutable—they live—they govern us—and they compel our course of action . . ."⁵⁶⁰

Indisputably, the belief in and quest for governance secured in deontological morality is a crucial, if not *the* fundamental basis for the Revolution and the Constitution. Nonetheless, "the twentieth century has seen a decline in the faith in natural justice that sparked the Declaration,"⁵⁶¹ in favor of law unapologetically based on the partiality of the American people arguably without regard to whether such preferences conform with deontological moral principles.⁵⁶² This newer judicial trend opines that to be "fundamental," a right must be "fundamental to *our* scheme of ordered liberty . . . or

⁵⁵⁸ THE FEDERALIST No. 43 (James Madison) (Terrence Ball ed., 2003). Referring as well to transcendent principles, John Jay reminded that although government is necessary to protect liberty, "the people must cede to it some of their natural rights in order to vest it with requisite powers." THE FEDERALIST No. 2 (John Jay) (Terrence Ball ed., 2003). James Wilson, signer of both the Declaration and the Constitution, likewise believed in the application of eternal principles: "we may infer, that the law of nature, though immutable in its principles, will be progressive in its operations and effects." Bessler, *supra* note 277, at 321 n.907 (quoting WILSON, *supra* note 224, at ch. III).

⁵⁵⁹ THE FEDERALIST No. 51, *supra* note 493.

⁵⁶⁰ Nat'l Treasury Emps. Union v. Nixon, 492 F.2d 587, 616 (D.C. Cir. 1974) (quoting THE FEDERALIST No. 51, *supra* note 493); *see also, e.g.*, Missouri v. Jenkins, 495 U.S. 33, 81 (1990) (Kennedy, J., with Rehnquist, C.J., and O'Connor and Scalia, JJ., concurring in part and concurring in the judgment); Haney v. Cnty. Bd. of Educ., 410 F.2d 920, 926 n.3 (8th Cir. 1969); United States v. Hamilton, 428 F. Supp. 2d 1253, 1259 & n.20 (M.D. Fla. 2006) (quoting THE FEDERALIST No. 51 to support the proposition that "[i]t is the Court that is called upon to make the hard decisions necessary to integrate Congressional mandates with the requirements of justice . . .").

⁵⁶¹ Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 524 (1986) (citations omitted).

⁵⁶² *Id.* ("In *Duncan v. Louisiana*, the Court recognized that its incorporation of Bill of Rights provisions had reflected the partial abandonment of an earlier search for transcendent principles of ordered liberty.") (citing 391 U.S. 145, 149 n.14 (1968)). The *Duncan* Court offered that the concept of "fundamental fairness" animating due process relates to American values, conceptions and principles. *Id.* The Supreme Court recently stated that *Duncan's* approach is preferable to imagining whether particular procedures are essential to the very definition of civilized society. McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010).

as we have said in a related context, whether this right is ‘deeply rooted in this Nation’s history and tradition.’”⁵⁶³

⁵⁶³ *McDonald*, 130 S. Ct. at 3036 (holding that the Fourteenth Amendment’s Due Process Clause requires the States to abide by the Second Amendment) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted)).

Frankness requires the acknowledgment that the *Duncan-McDonald* stance finds some *gravitas* in the celebrated estimation by the esteemed jurists Felix Frankfurter and the second John Marshall Harlan that constitutional principles are informed by extant American traditions and deeply rooted customs rather than immutable values. *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Rochin v. California*, 342 U.S. 165, 169 (1952) (Frankfurter, J.). Nonetheless, the logic, if not the letter, of Frankfurter’s and Harlan’s writings, evinces at least cautious appreciation of deontology that undercuts any anti-deontological posturing by the Supreme Court.

Consider Harlan’s statement that due process addresses “those rights ‘which are . . . fundamental; which belong . . . to the citizens of all free governments’ . . .” *Poe*, 367 U.S. at 541 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230)). Surely, customs and traditions cannot change what Harlan lauded as rights so “fundamental” that they “belong to the citizens of *all* free governments,” not just to Americans. Similarly, Frankfurter observed that, “the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people *as to be deemed fundamental to a civilized society* as conceived by our whole history.” *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasis added), *abrogated by Ford v. Wainwright*, 477 U.S. 399 (1986). It is unlikely that, even if consistent with “traditions and feelings,” any such “fundamental” rights demanded by morality are ripe for repeal simply because the accompanying “traditions and feelings” might change. *Id.* The more plausible understanding of Justice Frankfurter’s *Solesbee* quote is that happily, “the traditions and feelings of our people” (1) have correctly recognized the basic “rights” demanded by the “moral principles” encapsulated as “due process” and (2) have fittingly understood such rights as “fundamental to a civilized society.” *Id.*

To illustrate via an example, surely Frankfurter and Harlan would not accept that a prevalent and extensive alteration of sentiment alone could metamorphose invidious racial prejudice from immoral to moral. Likewise, such an unexpected but manifest change of preferences would not be a legitimate basis to permit mandatory racial segregation of public schools, to prohibit African Americans from serving on juries, to limit voting rights on the basis of race or otherwise to resurrect any of the myriad appalling forms of race-based treatment rightly prohibited by the Constitution. The alternative is that Frankfurter meant morality and rights are proved not by their intrinsic nature, but rather because they have been embraced by sufficiently broad and deep “traditions and feelings of our people.” *Id.* It is difficult to believe that intellects as profound as Frankfurter’s and Harlan’s could accept that morality is defined by politics and preferences alone.

As further support that they recognized, if not outright accepted, constitutional enforcement of deontological moral-legal theory, Justice Harlan stated that understanding liberty is a “rational process,” specifically, appreciating that due process is “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . .” *Poe*, 367 U.S. at 542–43 (citations omitted). Although offering that “[d]ue process of law . . . is not to be derided as a resort to a revival of ‘natural law,’” Justice Frankfurter similarly explicated that the process of comprehending liberty is “*deeply rooted*

Regardless of some judicial timorousness to evoke eternal principles, modern “substantive due process” decisions have not forsaken natural law, such as extolling the enduring institution of marriage.⁵⁶⁴ Indeed, not ten years ago, the Supreme Court reiterated that moral transcendence premises the Constitution. Invalidating state laws criminalizing privately performed homosexual conduct between consenting adults, *Lawrence v. Texas* identified the constitutional issue as “involv[ing] liberty of the person both in its spatial *and in its more transcendent dimensions*.”⁵⁶⁵ The Court properly accepted that more is at play regarding liberty interests than simple judicial consequentialism, albeit consequentialism based on American tradition rather than unexpurgated fiat. Abiding by its roots in the Declaration, *Lawrence* correctly identified the constitutional principle that “liberty” is “transcendent”; that is, beyond human preferences.⁵⁶⁶

To the extent that it is incompatible with a deontological theory of the Constitution, the *Duncan-McDonald* line of precedent is incorrect,⁵⁶⁷ as everything heretofore in this Article attempts to prove. Accepting American traditions and applying concepts of “ordered liberty” with no consideration of whether such are inherently decent in a non-utilitarian sense betrays the sound and worthy principles of both the Revolution and the Constitution. Whatever politically motivated unfaithfulness mars the birth of this nation, the Founders’ invocation of deontological morality was neither a gloss, nor hyperbole, nor a frivolous, cynical distraction. Rather, by pledging life, property and “sacred Honor,” they established what would later be incorporated into the Constitution,

in reason and in the compelling traditions of the legal profession.” *Rochin*, 342 U.S. at 171 (emphasis added) (citations omitted). The distinction Frankfurter drew means that reason—what Harlan called the “rational process”—is markedly different from “compelling traditions of the legal profession.” *Id.* The philosophy discussed in earlier portions of this Article discloses that difference: traditions may be based on consequentialist preferences but reason seeks transcendent principles. We plausibly may inquire whether a tradition comports with reason, but we do not validate a precept of reason simply by noting that it comports with tradition; such significance would not escape the incisive minds of Harlan and Frankfurter.

Indeed, Justice Frankfurter explicated that to avoid judicial consequentialism, judges must perform “an evaluation based on disinterested inquiry pursued in the spirit of science . . .” *Id.* at 172; *see also, e.g.,* *Harrington v. Almy*, 977 F.2d 37, 46 (1st Cir. 1992) (per curiam denial of rehearing en banc) (discussing *Rochin*); *Martinez-Aguero v. Gonzalez*, No. EP-03-CA-411 (KC), 2005 WL 388589, at *22 (W.D. Tx. Feb. 2, 2005) (quoting *Rochin*). Certainly, the “spirit of science” evokes impartial reason which cannot simply accept American custom as self-proving due to its persistence. Rather, the scientific method seeks truth and surely is no apologist for either consequentialist preferences or tradition *qua* tradition.

⁵⁶⁴ *Alschuler, supra* note 561, at 524–27 (discussing, *inter alia*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), which invalidated, as applied to married couples, laws prohibiting the dissemination of and information regarding contraceptives). As Professor Alschuler aptly concluded, “Old due process standards never die.” *Id.* at 526.

⁵⁶⁵ *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (emphasis added).

⁵⁶⁶ *Id.*

⁵⁶⁷ *See supra* notes 524–25 and accompanying text.

a “precommitment” to moral rectitude as a substantive command of the law, the very formality of which would better induce compliance.⁵⁶⁸

Consequently, the *Duncan-McDonald* rationale either wrongly denies that deontological morality must premise legitimate governmental action or espouses the uncomfortable proposition that morality be damned, due process is no more than a political device to serve consequentialist ends.⁵⁶⁹ It simply makes neither logical nor jurisprudential sense to envision a liberty interest that is fundamental to the United States but nonetheless is immoral in either form or application.

F. Due Process Is the Constitution’s Value Monism, Thus Due Process Is the Controlling Concept that Should Afford No Exceptions

It comes as no surprise that, although often expressed in terms of mores and beliefs, due process is the abiding morality of our society and, accordingly, the bedrock of American law. As earlier quoted:

It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people *as to be deemed fundamental to a civilized society* as conceived by our whole history. *Due process is that which comports with the deepest notions of what is fair and right and just.*⁵⁷⁰

Three years earlier, Justice Frankfurter stated the idea in another earlier quoted powerful line worth repeating: the Due Process Clause evinces “ultimate decency in a civilized society.”⁵⁷¹ Frankfurter’s references to *fundamentals* of “a civilized society,”

⁵⁶⁸ Under the theory of “precommitments,” the Constitution vouchsafes the nondelegable duty to protect “unalienable Rights” as the dominant responsibility of Government. By so doing, the Nation accepts as incontrovertible its precommitment so that it will not forsake its duty in situations where faithful abidance is particularly painful—when “we will be tempted, especially in times of stress, to fall short of those ideals.” Cole, *supra* note 11, at 1332 (discussing precommitment theory); see also David Cole, *The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11*, 59 STAN. L. REV. 1735, 1746 (2007).

⁵⁶⁹ Of course, there may be many different ethical ways to enforce substantive and procedural due process. For example, perhaps a trial by a jury of one’s peers is not indispensable to due process in civil cases, or, in certain instances might actually be counter-productive. Trial-like administrative hearings with simple evidence rules may promote the dignity of claimants who would otherwise be unable to afford costly, formal litigation. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

⁵⁷⁰ *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasis added), *abrogated by* *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁵⁷¹ *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

reflecting “ultimate decency” and “the deepest notions of what is fair and right and just” stem from the Supreme Court’s perspective that, consistent with its Declaration of Independence origins, constitutional law, particularly *liberty*, is “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice”⁵⁷²

Therefore, as the judiciary tells us, the Due Process Clauses of the Fifth and Fourteenth Amendments are the repository of America’s “deepest notions of what is fair and right and just.”⁵⁷³ Indeed, although the Constitution, particularly its Bill of Rights, contains many “enumerated rights” of somewhat greater specificity than the Due Process Clauses themselves, constitutional law properly and wisely informs: (1) such explicit rights emanate from the overarching idea of due process, and (2) absent their explicit enumeration within the Constitution, due process alone would be sufficient to derive those rights. Due process is America’s value monism from which free speech, freedom from unreasonable police conduct, the right to defense counsel in a criminal prosecution, equal protection and every other fundamental specific constitutional right derives.⁵⁷⁴

⁵⁷² *Chi. B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 238 (1897) (holding that due process prevents States from taking private property without just compensation). A century later, modern jurisprudes likewise have noted “due process or equal protection contexts . . . embody deontological concepts of fairness and morality.” Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93, 119 (2007); see also, e.g., Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 *BUFF. L. REV.* 433, 457 (2004) (noting that fairness and due process are deontological ideas); Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2087, 2093 (2001); Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the “Metaethics” of Legal Ethics*, 49 *EMORY L.J.* 87, 105 (2000) (explaining that due process is deontological in that it evinces “structural values that must be respected in and of themselves, . . . regardless of the social results any particular instance might produce . . .”).

⁵⁷³ *Solesbee*, 339 U.S. at 16. The Fifth Amendment applies to the federal government while the Fourteenth Amendment applies to state government and localities. See, e.g., *S.F. Arts & Athletics, Inc. v. U.S. Olympics Comm.*, 483 U.S. 522, 542 n.21 (1987); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985). Understandably, however, the definition of due process is the same for both amendments. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (noting that implied equal protection component of due process under the Fifth Amendment is identical to express equal protection and due process components under the Fourteenth Amendment); *United States v. Martinez*, 621 F.3d 101, 107 n.3 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1622 (2011); *United States v. Nagel*, 559 F.3d 756, 760 (7th Cir. 2009).

⁵⁷⁴ In this regard, we again see that, within the realm of moral precepts, the metaphor of balancing is inapt. Which right prevails does not depend on whether it somehow is more important than some other right regarding the particular legal dispute. Indeed, rights are not amenable to that type of comparison. Rather, depending on the particular situation under review, one or more rights might apply while others simply do not.

The value monism of due process is proved by *Bolling v. Sharpe*.⁵⁷⁵ Although the Fourteenth Amendment contains both a Due Process and an Equal Protection Clause, the Fifth Amendment enumerates only the former.⁵⁷⁶ Nonetheless, the Supreme Court ruled in *Bolling*, a companion case to *Brown v. Board of Education*,⁵⁷⁷ that mandatory racial segregation of public school students in the District of Columbia—a federal jurisdiction—violates the Fifth Amendment’s Due Process Clause, which subsumes an implied guarantee of equal protection under law.⁵⁷⁸ Within a remarkably short three page opinion, the Court pithily stated its rationale in terms of overarching morality, “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.”⁵⁷⁹ Understandably, the Court has not deviated from *Bolling*’s holding and rationale.⁵⁸⁰ Nor is *Bolling* the only instance of “substantive

For instance, regarding free speech, the Supreme Court recently opined that the judiciary does not employ plain cost-benefit analyses to support holdings that certain utterances, writings and portrayals fall outside the First Amendment’s ambit due to their purported lack of speech value. Rather, such determinations occur when a right other than the First Amendment better applies to the particular case. *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (holding that a statute criminalizing creation, sale or possession of materials depicting animal cruelty is facially overbroad under the First Amendment). Specifically, access to and possession of child pornography are outside the First Amendment because the pornographic materials themselves are “an integral part” of the crime of producing child pornography. *New York v. Ferber*, 458 U.S. 747, 761–62 (1982) (discussed in *Stevens*, 130 S. Ct. at 1586).

Similarly, we may understand that physical gestures constitute First Amendment protected symbolic speech; however, that right does not control when the gesture is a battery. As the famous adage goes, “Your right to swing your arms ends just where the other man’s nose begins.” See, e.g., J. Harvey Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 319 (2010) (quoting Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

It is not that bodily integrity is balanced against speech or that the expressive value of child pornography is balanced against the harm such pornography engenders. Rather, the issue is which right applies in the given case. As we will see from the text below, the answer derives from applying the value monistic principle—herein due process—which reveals which sub-, or more particular, right is applicable. Accordingly, and consistent with greater deontological theory, when properly appreciated, rights *never* conflict; they *always* harmonize through the primacy of the value monistic precept, herein due process.

⁵⁷⁵ 347 U.S. 497 (1954).

⁵⁷⁶ *Id.* at 499.

⁵⁷⁷ 347 U.S. 483 (1954) (holding that mandatory racial segregation of state public school students violates the Equal Protection Clause of the Fourteenth Amendment).

⁵⁷⁸ *Bolling*, 347 U.S. at 500.

⁵⁷⁹ *Id.* at 499. Thus, a violation of equal protection may state an identical claim of due process, because “discrimination may be so unjustifiable as to be violative of due process.” *Id.*

⁵⁸⁰ See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009); *Davis v. Passman*, 442 U.S. 228, 234 (1979) (noting that Due Process Clause of the Fifth Amendment “forbids the Federal Government to deny equal protection of the laws” (internal quotation marks and citations omitted)).

due process,”⁵⁸¹ involving rights not expressly found in the constitutional text, yet derivative of the “liberty” encompassed within both Due Process Clauses.⁵⁸²

Similarly, it is axiomatic constitutional law that the Due Process Clause of the Fourteenth Amendment does not fully incorporate—that is, it does not per se mandate onto the states—the rights set forth in the Bill of Rights.⁵⁸³ Rather, through a right-by-right review, the judiciary has applied to the States pursuant to the Fourteenth Amendment those provisions of the Bill of Rights that derive from the American “scheme of ordered liberty and system of justice.”⁵⁸⁴ In other words, due process requires states and localities to respect those rights essential to the very legitimacy of governmental conduct. As a result of this right-by-right evaluation known as “selective incorporation,”⁵⁸⁵ every discrete liberty under the Bill of Rights has been applied to the States through the Fourteenth Amendment’s Due Process Clause except the Sixth Amendment’s right to a unanimous jury verdict, the Fifth Amendment’s requirement of indictment by a grand jury and the right to a jury trial under the Seventh Amendment.⁵⁸⁶

Together, the implied equal protection aspect of the Fifth Amendment’s Due Process Clause, due process engendered rights unwritten in the Constitution’s text and the “selective incorporation” doctrine evince the singular quality of due process among all rights: fundamental constitutional rights need not be itemized within the

⁵⁸¹ “It has been ‘settled’ for well over a century that the Due Process Clause[s] ‘appl[y] to matters of substantive law as well as matters of procedure.’” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3091 (2010) (Stevens, J., dissenting) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

⁵⁸² “Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper government objective.” *Bolling*, 347 U.S. at 499–500. Unenumerated rights originating from the concept of “Liberty,” often understood in terms of a general right to privacy, include: sexual conduct privately performed between consenting adults, *Lawrence v. Texas*, 539 U.S. 558 (2003); access to contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to choose abortion subject to appropriate restrictions, *Gonzales v. Carhart*, 550 U.S. 124 (2007); the right of single adults to marry regardless of race, *Loving v. Virginia*, 388 U.S. 1 (1967); and the general right of parents to raise and educate their children, *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

⁵⁸³ Justice Black is perhaps the most renowned proponent of the judicially discredited theory that the Due Process Clause of the Fourteenth Amendment incorporates every enumerated right in the Bill of Rights, but has no other meaning—covers no other conceivable rights—other than those expressed in the text. *Adamson v. California*, 332 U.S. 46, 71–72 (1947) (Black, J., dissenting) (holding that the Fifth Amendment’s privilege against self-incrimination is not applicable *via* the Fourteenth Amendment to state prosecutions), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964); *see also* *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

⁵⁸⁴ *McDonald*, 130 S. Ct. at 3034 (citations omitted).

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at 3034–35 nn.12–13. In addition, the Supreme Court has yet to adjudicate whether due process includes the Third Amendment (prohibiting mandatory quartering of soldiers in peacetime) and the Eighth Amendment’s provision banning excessive fines. *Id.* at n.13.

constitutional text because due process is applicable to American government on any level. Consequently, adept jurists and other officials *would have discerned* as specific constituents of due process discrete rights such as equal protection, free speech, religious liberty, criminal defense counsel, freedom from self-incrimination and freedom from unreasonable police conduct, even if such rights were not set forth explicitly in specific portions of our Constitution. If the sole fundamental right in the text was simply a Due Process Clause, study and reflection would generate a rich due process jurisprudence spawning the very rights actually extant in the Constitution along with those unenumerated rights derived from the meaning of the phrase “due process” itself.⁵⁸⁷

Indeed, when originally interpreted under the Fourteenth Amendment’s Liberty Clause, principles such as free speech were applied to restrict state action not through an incorporation doctrine, but as derivations of the very notion of liberty itself.⁵⁸⁸ Due process stands on its own as sufficient to reveal those fundamental principles.⁵⁸⁹ As the Court unequivocally concluded, “Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”⁵⁹⁰ Thus, due process manifests what Justice Frankfurter called an “independent function”⁵⁹¹ that encompasses every enumerated and unenumerated fundamental right. As such, due process is the Constitution’s elementary particle, the value monism from which all other constitutional rights flow. Thus, a century ago

⁵⁸⁷ As Justice Harlan elucidated, “due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions [in the Bill of Rights].” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

One might additionally argue that, even absent a Due Process Clause, the understanding that the Constitution is the legal enforcement of the Declaration of Independence’s recognition of “unalienable Rights” should be sufficient to imply that what we understand as due process is the Constitution’s pivotal function.

⁵⁸⁸ See, e.g., *McDonald*, 130 S. Ct. at 3092 & n.9 (2010) (Stevens, J., dissenting) (citing, *inter alia*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *id.* at 672 (Holmes, J., dissenting)); see also *Malloy v. Hogan*, 378 U.S. 1, 24–25 (1964) (Harlan, J., dissenting).

⁵⁸⁹ The presence of an enumerated right may itself be a strong indicator of that right’s fundamental nature. However, as just noted, enumeration is not per se proof of fundamentalism, nor does a theory of enumeration limit the meaning of due process solely to those specific rights that are set forth expressly in the Constitution. Rather, full due process analysis is required.

⁵⁹⁰ *In re Gault*, 387 U.S. 1, 20 (1967) (footnote omitted). Similarly, a general source deduced, “It has been stated that no other phrase known to the American and English law comprehends so much that which is basically vital in the protection of human rights and the redress of human wrongs as the phrase ‘due process of law.’” 16B AM. JUR. 2D CONSTITUTIONAL LAW § 947 (2011) (citation omitted).

⁵⁹¹ *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring), *overruled by Malloy*, 378 U.S. 1.

the Court correctly understood the categorical imperative of due process: “The fundamental guarantee of due process is absolute and not merely relative. . . . [T]he constitutional safeguard as to due process [is] at all times dominant and controlling where the Constitution is applicable.”⁵⁹²

G. The Controlling Principle of Due Process Is a Kantian-Like Perception of Individual Dignity

Because it is America’s essential tenet of unalienable rights, it is neither a shock nor a mystery that the courts understand due process to protect the inherent dignity of individuals against even well-intentioned governmental excess. Certainly, there is no doubt that “the Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’”⁵⁹³ Such protection from “oppression,” of course, is the very definition of *liberty* memorialized in the Declaration and put into legal effect by the Constitution. Chief Justice Harlan Fiske Stone was correct, therefore, when he wrote for the Court in remarkably prescient prose that “the duty which rests on the courts, in time of war as well as in time of peace, [is] to preserve unimpaired the constitutional safeguards of civil liberty”⁵⁹⁴

Given that due process is not only government’s legal duty, but is also its moral duty,⁵⁹⁵ we appreciate why the courts emphasize due process’s ethical breadth when determining whether officials have abused their authority. The judiciary has named that ethical breadth “fundamental fairness.”⁵⁹⁶ To be constitutional, challenged governmental conduct must at the very least comport with fundamental fairness.⁵⁹⁷ Official acts failing to meet this minimum are beyond government’s constitutional competence.⁵⁹⁸

⁵⁹² *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350 (1909); *see also*, *United States v. Smith*, 480 F.2d 664, 668–69 n.9 (5th Cir. 1973). Consequently, the judiciary has recognized due process’s dominance over other portions of the Constitution. *E.g.*, *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (“[N]ot even resort to the Commerce Clause can defy the standards of due process.”); *accord, e.g.*, *United States v. Clark*, 435 F.3d 1100, 1108 (9th Cir. 2006) (holding that due process applies to extraterritorial application of U.S. law), *cert. denied*, 549 U.S. 1343 (2007); *United States v. Hawes*, 529 F.2d 472, 477 (5th Cir. 1976).

⁵⁹³ *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (alterations in original) (quoting *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989)); *see also, e.g.*, *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998).

⁵⁹⁴ *Ex parte Quirin*, 317 U.S. 1, 19 (1942) (Stone, C.J.); *see also, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006) (quoting *Quirin*, 317 U.S. at 19).

⁵⁹⁵ *See supra* notes 554–58 and accompanying text.

⁵⁹⁶ *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 177 (1967) (Harlan, J., dissenting); *Rochin v. California*, 342 U.S. 165, 169 (1952).

⁵⁹⁷ *See, e.g.*, *Rochin*, 342 U.S. at 169.

⁵⁹⁸ *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (explaining that a prisoner seeking a stay of execution is entitled to a fair hearing once he has made “a substantial

The earlier discussed pivotal *Bolling v. Sharpe* confirmed that fairness is due process's integral quality: "[T]he concepts of equal protection and due process, *both stemming from our American ideal of fairness*, are not mutually exclusive."⁵⁹⁹ Accordingly, while the courts insist that due process and equal protection challenges must fail if the reviewing court discerns *any* rational basis to support the specific governmental action,⁶⁰⁰ in fact the contested action is unconstitutional only if it offends integral perceptions of fairness—that is, if it is immoral.⁶⁰¹ It could not be otherwise because

threshold showing of insanity") (quoting *Ford v. Wainwright*, 477 U.S. 399, 426 (1986)); *Clark v. Arizona*, 548 U.S. 735, 770–71 (2006) (holding that exclusion of evidence regarding mental disease and incapacity to insanity defense, if supported by good reasons, satisfies fairness); *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001) (noting that the Due Process and Ex Post Facto Clauses safeguard fairness); *United States v. Salerno*, 481 U.S. 739, 746–48 (1987) (holding that pretrial detention pursuant to Bail Reform Act does not violate due process). As noted in the discussion of Kantian honor, see *supra* Part III, even persons ultimately wrongfully convicted because of their actual innocence are not treated immorally if their arrests, convictions and sentences comport with the "fundamental fairness" intrinsic in due process of law. See, e.g., *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (discussing the harmless error rules); *Lutwak v. United States*, 344 U.S. 604, 618–20 (1953) (upholding restriction of admissibility of admission in conspiracy cases); *Owens v. United States*, 483 F.3d 48, 56–57 (1st Cir. 2007) (discussing bars on habeas corpus relief); *United States v. Ramirez*, 426 F.3d 1344, 1352–53 (11th Cir. 2005) (discussing nonreversible errors for motions for mistrial).

⁵⁹⁹ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (emphasis added).

⁶⁰⁰ See, e.g., *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191–92 (1992) (holding retroactive legislation constitutional because the purpose had a rational basis); *Chapman v. United States*, 500 U.S. 453, 464–65 (1991) (noting that the due process and equal protection standards are "essentially duplicates"). See *generally*, Bayer, *supra* note 54, at 1034–40.

⁶⁰¹ That is why, although purporting to apply "levels of scrutiny" to judge the constitutional merits of different types of governmental actions, ultimately the courts engage in a general "rationality" analysis informed by concepts of fairness. Bayer, *supra* note 54, at 1036–40. Justice John Paul Stevens aptly observed that "[t]here is only one Equal Protection Clause. It requires every [official office] to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." *Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 551–53 nn.1–4 (1985) (Stevens, J., concurring) (rejecting the "tiered" analysis method); *Montgomery v. Carr*, 101 F.3d 1117, 1122–24 (6th Cir. 1996) (noting some judicial discontent with "tiered" analysis).

Classically, the courts purport three general "levels of scrutiny." See, e.g., *Northville Downs v. Granholm*, 622 F.3d 579, 586–87 (6th Cir. 2010); *Leib v. Hillsborough Cnty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009). The first level of analysis, "strict scrutiny," applies to governmental conduct regulating fundamental rights and to official standards or conduct predicated on the "suspect classifications" of race and national origin. *Leib*, 558 F.3d at 1306. Under strict scrutiny, the Government bears the burden to prove that a "compelling state interest" justifies such presumptively unconstitutional governmental conduct. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 105 (2001) (per curiam).

every official act, no matter how offensive, promotes *some* reasonable goal or may be shown to serve *some* rational purpose albeit a goal or purpose minor in nature and overwhelmed by its resulting unfairness.⁶⁰²

The only remaining matter for resolution is identifying the moral element or elements that inform due process's "fundamental fairness." Even a cursory survey of due process decisions confirms that the crucial moral constituent—the pivotal ethical consideration—to determine constitutional sufficiency is whether the disputed official conduct unduly offends the *dignity* of an individual, a group of individuals or an entity, to which we ascribe the respect accorded to persons.⁶⁰³ Explaining the constitutional

Courts apply the claimed less exacting "middle level" or "intermediate" scrutiny standard for, *inter alia*, regulation and conduct based on gender or illegitimacy. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531–33 (1996); *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The third level, "rational basis" often referred to disparagingly as "mere rationality," applies to all other governmental acts and legislative classifications. Thereunder, the challenger must prove that the presumptively constitutional government act lacks any rational basis. *See, e.g., Romein*, 503 U.S. at 191; *Chapman*, 500 U.S. at 464–65.

Yet regardless of the alleged level of analysis, a reviewing court's decision that the challenged action or conduct violates due process or equal protection invariably pivots on arguments that the government acted *irrationally*, that is, unreasonably, arbitrarily or otherwise unfairly. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 208 n.10 (1992) (distinguishing the present case from other cases, which held that poll tax bore "no rational connection" to the exercise of the fundamental right to vote); *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) ("[S]uspect" classes "are more likely than others to reflect deep-seated prejudice *rather than legislative rationality* in pursuit of some legitimate objective.") (emphasis added).

Based on logic and experience, the three levels of scrutiny may provide a nice framework to begin analysis. But, as Justice Stevens wisely told us, tiered analysis is a means to help discern constitutionality *vel non*; it is not an end in itself. *Craig*, 429 U.S. at 211–12 (Stevens, J., concurring). Rather, the outcome depends on an overall assessment of the challenged standard's rationality, meaning whether it is at a minimum fundamentally fair.

⁶⁰² *See, e.g., Cleburne*, 473 U.S. at 446–47 (stating that any legitimate governmental interests that are too "attenuated" from the means and impact of the challenged conduct cannot render the conduct constitutional).

⁶⁰³ *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847–48, 851 (1992). The Supreme Court recently reaffirmed, "Convictions based on evidence obtained by methods that are 'so brutal *and so offensive to human dignity*' that they 'shoc[k] the conscience' violate the Due Process Clause." *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (emphasis added) (alteration in original) (quoting *Rochin v. California*, 342 U.S. 165, 172–74 (1952)); *accord United States v. Brantley*, 342 Fed. Appx. 762, 769 (3d Cir. 2009) (shackling criminal defendant in courtroom before a jury absent "a documented need . . . is hardly consistent with the court's solemn obligation of ensuring that those who come before it are treated with appropriate dignity and afforded due process."), *cert. denied*, 130 S. Ct. 1106 (2010); *Kennedy v. Town of Billerica*, 617 F.3d 520, 540 (1st Cir. 2010); *Lombardi v. Whitman*, 485 F.3d 73, 81 (2d Cir. 2007).

Indeed, in one of the most significant dissents in Supreme Court annals, the first Justice John Marshall Harlan enthused that the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to the security of personal liberty . . ." *Plessy v.*

basis for the general right of women to choose to terminate pregnancies, the Supreme Court clarified the inevitable relationship between due process and human dignity:

[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁶⁰⁴

Thus, as Justice Stevens correctly summarized: "It is the liberty clause that enacts the Constitution's 'promise' that a measure of dignity and self-rule will be afforded to all persons."⁶⁰⁵

Reviewing precedents from the late-nineteenth and early-to-middle twentieth centuries, Professor Alschuler explained that "[t]he Court's view was tolerant of diversity and experimentation but insisted that law must adhere at its core to immutable principles of human dignity."⁶⁰⁶ Similarly, in her thoughtful review of decisions involving fundamental constitutional rights, Professor Maxine Goodman demonstrated that especially in contemporary constitutional jurisprudence, the Supreme Court appropriately "has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees."⁶⁰⁷

As with the recognition of the deontological moral basis of due process, we cannot be surprised that an astute, forthright judiciary realizes that *dignity* explains when governmental conduct crosses an admittedly often indistinct boundary from rightful to wrongful imposition upon one or more persons. Professor Castiglione correctly noticed,

Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (quoting Justice Harlan's *Plessy* dissent). Of course we now understand that the Fourteenth Amendment could not *add* dignity, but rather, memorialized and vouchsafed Government's duty to protect the inherent dignity of persons under the jurisdiction and control of the United States. Nonetheless, Justice Harlan was correct to link fundamental constitutional rights with the dignity of both America and those under its jurisdiction.

⁶⁰⁴ *Casey*, 505 U.S. at 851 (emphasis added).

⁶⁰⁵ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3092 (2010) (Stevens, J., dissenting) (citing *Casey*, 505 U.S. at 847). Over a decade earlier, Justice Stevens similarly concluded, "Whatever the outer limits of the concept may be, it definitely includes protection for matters 'central to personal dignity and autonomy.'" *Washington v. Glucksburg*, 521 U.S. 702, 744 (1997) (Stevens, J., concurring) (quoting *Casey*, 505 U.S. at 851).

⁶⁰⁶ Alschuler, *supra* note 561, at 522.

⁶⁰⁷ Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2006); *see also, e.g.*, Edwin Baker, *Outcome Equality and Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 938 (1983).

“Indeed, of all core constitutional values, dignity is perhaps the only one that cannot be legitimately stripped entirely by the state under any circumstance.”⁶⁰⁸

With thorough analytical surveys, such as Professor Goodman’s, readily available for perusal, just a very few examples are required to illustrate herein that the dignity which properly dominates constitutional rights jurisprudence is Kantian dignity—Kantian honor. As earlier noted, *Lawrence v. Texas* ruled that government may not criminalize per se homosexual sodomy performed in private between consenting adults.⁶⁰⁹ The Court carefully stressed that *Lawrence*’s due process issue concerned consenting adults’ common right to enjoy non-injurious private relations of which sexual acts may be an important part.⁶¹⁰ “It suffices for us to acknowledge that adults may choose to enter upon [an intimate personal] relationship in the confines of their homes and their own private lives and still retain their *dignity as free persons*.”⁶¹¹ To be sure the point was not missed, the Court reiterated that “[t]he petitioners are entitled to respect for their private lives. *The State cannot demean their existence or control their destiny* by making their private sexual conduct a crime.”⁶¹²

In a similar manner, the Court has repeatedly and vehemently admonished that due process and equal protection “must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁶¹³ Applying equal protection implied from the Fifth Amendment’s Due Process Clause, *Department of Agriculture v. Moreno* struck 1971 amendments to the Food Stamp Act of 1964 that limited eligibility to “households” consisting only of members of the same family.⁶¹⁴ The Court concluded that Congress unlawfully adopted the amendments to prohibit “hippie communes” from receiving food stamps,⁶¹⁵ a vindictive, callous enactment to disadvantage a lawful faction that Congress happened to find repugnant.

Cleburne Living Center invalidated the City of Cleburne, Texas’s uniquely burdensome zoning requisites regarding group homes for non-violent mentally retarded individuals.⁶¹⁶ Despite the arguable rational basis that such group homes might depress the property values, the Court held constitutionally irrational the ordinance’s overriding basis: “the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as . . . the fears of elderly residents of the neighborhood.”⁶¹⁷

⁶⁰⁸ Castiglione, *supra* note 334, at 703.

⁶⁰⁹ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶¹⁰ *Id.* at 578.

⁶¹¹ *Id.* at 567 (emphasis added).

⁶¹² *Id.* at 578 (emphasis added).

⁶¹³ *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

⁶¹⁴ *Moreno*, 413 U.S. at 534–35.

⁶¹⁵ *Id.* at 534.

⁶¹⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

⁶¹⁷ *Id.* at 448.

Romer v. Evans overturned a provision of the Colorado Constitution adopted by popular referendum that: (1) required any law specifically protecting homosexuals to be adopted solely through state constitutional amendment, and (2) repealed all statutes, ordinances and state precedents specifically prohibiting discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”⁶¹⁸ The Court discerned that homosexuals and bisexuals were not singled out for such adverse status due to any actual threat they posed to others.⁶¹⁹ Rather, the referendum unconstitutionally promoted the “animosity” of a significant portion of the citizenry who found homosexuality distasteful, unnatural or decadent.⁶²⁰

Perhaps the most well-known example of the judiciary’s ban of “a bare . . . desire to harm a politically unpopular group”⁶²¹ is *Brown v. Board of Education*, ruling unconstitutional mandatory racial segregation of public school students.⁶²² Recognizing that children of minority races cause no inherent harm, the *Brown* Court famously stated that “[t]o separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁶²³ Nearly a quarter century later, Judge Goldberg of the Fifth Circuit properly noted the general societal applicability of the *Brown* Court’s sociology: “The racial stigma which prevents segregated schools from offering equal educational opportunities is not felt exclusively by children, nor is it felt exclusively in the educational context.”⁶²⁴

⁶¹⁸ *Romer*, 517 U.S. at 624.

⁶¹⁹ *Id.* at 633–34.

⁶²⁰ *Id.* at 634–36.

⁶²¹ *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534).

⁶²² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁶²³ *Id.* at 494; *see also, e.g.*, *Freeman v. Pitts*, 503 U.S. 467, 485–87 (1992) (requiring that a desegregated school “take all steps necessary to eliminate the vestiges of unconstitutional *de jure* system”); *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 814 (7th Cir. 2001) (holding a teacher’s seating arrangement process requiring African American and Hispanic students to sit in pairs unconstitutionally discriminatory).

⁶²⁴ *EEOC v. Int’l Longshoremen’s Ass’n*, 511 F.2d 273, 278 (5th Cir. 1975) (noting cases desegregating public parks, public buses and public benches), *cert. denied*, 423 U.S. 994 (1975). Indeed, outside of the racial context, courts have recognized that imposition of undue stigma is a violation of due process because it is an offense to personal dignity. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (noting that stigma of involuntary confinements for psychiatric treatment may “constitute the kind of deprivations of liberty that requires procedural protections”); *see also, e.g.*, *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (explaining that a law allowing a governmental entity to forbid the sale or gifting of alcoholic beverages to particular persons due to purported alcoholism must provide “notice and an opportunity to be heard” because of the resultant “stigma or badge of disgrace”); *Coleman v. Dretke*, 409 F.3d 665, 668 (5th Cir. 2005) (noting that requiring a defendant convicted of a misdemeanor to attend “sex offender therapy” violates due process by stigmatizing the defendant with the apparent legal “status” of a felonious sex offender), *cert. denied*, 546 U.S. 938 (2005).

Of course, stigma *per se* does not violate due process because the results of procedures that comport fully with due process might result in legitimate stigma (“stigma plus”) such as proving the defendant is a criminal. *See, e.g.*, *Wenger v. Moore*, 282 F.3d 1068, 1074 (9th Cir. 2002).

Some may argue that courts mention dignity a bit offhandedly, rather than developing a vivid exposition of that concept and its inextricable link to the Constitution.⁶²⁵ Yet, even if it never provides a thoroughgoing *abstract* definition, one need not have the passion of a Felix Frankfurter, or the sagacity of a James Madison or the learned inspiration of an Immanuel Kant to realize how in each instance the judiciary applied Kantian honor—Kantian dignity theory—although nowhere is that philosopher cited (nor would one expect to find such citations in past or future judicial opinions).

The core due process deficiency in each of the discussed cases is evident despite the many and varied fact scenarios. In each instance, to promote its own discriminatory purposes, some organ of government unfairly—immorally—infringed on liberty by failing to regard the adversely affected persons as ends in themselves—as individual human beings worthy of respect and dignity. The adversely affected persons posed no actual harm—inflicted no true danger—rather than offending the immoral sensibilities of intolerant others. Government treated these individuals merely as means for some goal, usually illegitimately, such as by inflicting untoward discrimination or enforcing undeserved domination. Each time, government objectified the disadvantaged individuals, treated them solely as instruments for the gratification of others, nullified to some meaningful extent their humanity and deprived them, in some meaningful degree, of their rightful pursuit of happiness.

In *Brown*,⁶²⁶ the racially segregated students were told that, due to their race, they intrinsically were inferior and lacked dignity, not because somehow that is true, but to convert them from persons into things to promote a racist social order. No rational person would will as a general maxim that her value be assessed on race, a factor that carries no inherent index of what one can do, what one will do nor what one is worth. One's race is not an immorality and to regard it as such violates dignity.

In *Lawrence*⁶²⁷ and *Romer*,⁶²⁸ Government criminalized the sexual behavior of homosexuals and denied them the full opportunity to protect their dignity through civil rights laws, not because gays, lesbians, transsexuals and bisexuals truly threaten the health and safety of others, but because they were disliked by persons powerful enough to turn their disdain into purported law. Distaste for the so-called homosexual

It is worth noting that the preeminence of dignity theory understandably covers as well *express* fundamental rights in the Bill of Rights applicable to the States pursuant to the liberty provision of the Fourteenth Amendment's Due Process Clause. For example, regarding unreasonable searches and seizures, the Court accented that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966); *see also, e.g., United States v. Flores-Montano*, 541 U.S. 149, 152 (2004) (noting that threats to dignity are not as acute in searches of automobiles). Similarly, explicating the protection against cruel and unusual punishments, the Court stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

⁶²⁵ *See, e.g., Castiglione, supra* note 334, at 660–61.

⁶²⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁶²⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶²⁸ *Romer v. Evans*, 517 U.S. 620 (1996).

lifestyle is not proof that homosexual conduct is immoral. Indeed, one would not will a general maxim to lessen one's social status based on one's sexual practices so long as such behavior does not offend the dignity of others as would, for example, rape. Absent such proof, government cannot limit the pursuit of sexual happiness or reduce homosexual individuals into nothing more than means to realize the discriminatory predilections of others.

The City of Cleburne imposed special, difficult zoning criteria on group homes for mentally retarded persons not because the occupants were a danger to themselves and others, but because neighborhood residents found them unsightly and distressing.⁶²⁹ The mentally retarded were objectified and discarded because they were deemed ugly, not because they were immoral. The same is true for the "hippies" in *Moreno*, whom Congress attempted to disadvantage by rescinding their eligibility for food stamps.⁶³⁰ Smug disapproval of a given lifestyle cannot be the basis to degrade the humanity of counter-culturalists by denying them largesse available to similarly situated others. The hippie style pursuit of happiness is neither criminal nor otherwise dangerous. Thus, legislators used hippies purely as means either for political gain, or to indulge their misplaced hostile sanctimony, or likely both.

Granted, government might respond that minority children, gays and lesbians, the mentally impaired and hippies each caused hurt by offending the sensibilities of some powerful segment of society. Offended sensibilities, however, cannot be a legitimate basis to exercise governmental authority, lest consequentialism prevail. Equating some powerful person's or group's hurt sensibilities with compensable injury simply justifies the raw consequentialist exercise of power or coercion for the sake of pleasing the powerful. Rather, the question must be whether the hurt sensibilities at issue are responses to objectively immoral conduct and, if so, governmental intervention may be constitutional.⁶³¹

This review demonstrates that due process is deontological, and thus must be enforced according to the best available moral understanding: Kantian honor. Indeed, Kantian dignity principles guide actual constitutional litigation, although courts are unwilling to accord Kant his due regard. Consistent with the deontological imperatives attendant to Kantian ethics, the United States cannot abandon the immutable duty of due process even to forestall cataclysmic results. Because deontology cannot tolerate consequentialist application, justice must be done under the Constitution even if the heavens fall.

CONCLUSION

A compelling summation of this Article's proposition comes from Abraham Lincoln; not Lincoln the pragmatist, rather the Lincoln most worthy of admiration—the theorist, the visionary, the idealist. During his August 21, 1858, debate with

⁶²⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1984).

⁶³⁰ *Dep't of Agric. v. Moreno*, 413 U.S. 528 (1972).

⁶³¹ *E.g.*, Wright, *supra* note 36, at 280–81.

Stephen Douglas, addressing the extraordinarily contentious issue of slavery, Lincoln announced with characteristic intensity and passion:

[Z]eal for the spread of slavery, I cannot but hate. I hate it because of the monstrous injustice of slavery itself. I hate it because it deprives our republican example of its just influence in the world—enables the enemies of free institutions, with plausibility, to taunt us as hypocrites—causes the real friends of freedom to doubt our sincerity, *and especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticizing the Declaration of Independence, and insisting that there is no right principle of action but self-interest.*⁶³²

Lincoln was impeccably correct. The core iniquity of slavery and indeed any other practice in “an open war with the very fundamental principles of civil liberty” is not its consequences such as “enabl[ing] the enemies of free institutions, with plausibility, to taunt us as hypocrites,” as momentous as those consequences doubtless are.⁶³³ Nor is it even the undeniably “monstrous injustice of slavery itself.”⁶³⁴ Rather the fundamental treachery is “insisting that there is no right principle of action but self-interest,”⁶³⁵ which betrays the foundational tent of legitimate society set forth in the Declaration, enforced through the Constitution; for, it is through the negation of *a priori* morality that *every* unjust and wrongful act flows.

Nearly a century and a half later, social critic William Bennett poignantly encapsulated that

in America, what brings forth our patriotism—*our greatest sacrifices*—is our steadfast devotion to the ideals of freedom and equality. American patriotism . . . is not based on tribe or family, but on principle, law, and liberty. . . . [The Founders] had a new idea—a country tied together in loyalty to a principle.⁶³⁶

Bennett’s words aptly recognize the vital American linkage of morality, honor and sacrifice. However much some may fear it, resent it, lament it or wish it were otherwise, the Constitution *is* a suicide pact.

⁶³² Lincoln-Douglas Debates, *supra* note 279 (emphasis added).

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ BENNETT, *supra* note 155, at 26 (emphasis added).