

Dancing to Music: An Interpretation of Mutuality

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I. MUTUALITY AND MORTALITY

BARBARA MYERHOFF:¹ The Israel Levin Senior Adult Center is the focus of life in this community: dues \$6.00 a year, membership \$300. It is a world unto itself. A simple hall where time, death, and the outside world are transcended.

ELDERLY WOMAN, A MEMBER OF THE CENTER, SPEAKING TO THE COMMUNITY IN THE HALL; HER ARM IS AROUND A SMALL, HUDDLED WOMAN WHOSE EYES ARE LIKE WOUNDS: In behalf of Doris, I want to tell you, in reference what this Center means to people. Doris doesn't have anyone here at all. All of you here in this Center today is her family. She asks me to tell you this. You should know that all of you here feel for you. Especially I do because I just went through the same thing, the loss of my beloved husband. And time is a healer, and we will all be with you, and we all love you, Doris. God takes and he gives, and we have to learn to live with this.

BARBARA MYERHOFF: Dignity they have, irony they have. A life lived not only every day, but every hour, every minute, because these people are in their eighties and nineties and death is *there*, it is the invisible protagonist in every little scene you see played out. And death can be a great consciousness raiser.

Mutuality is a good that can be shown and known, but of which it is difficult to speak. I hope that the seriousness of this difficulty will excuse the method that I will follow at the outset and again in the central Part of this Article:² the method of commenting on the words of others who are wiser than myself and who have shared with us their understanding of supportive union. My own theoretical constructs are belated applications of their insights.

Professor Myerhoff's opening lines express the paradox of incommensurability that is situated at the heart of groups and of the claims that they make, both upon their members and upon "us," the wider society. On the one hand, there is a small and unassuming space: something called the Israel Levin Senior Adult

¹ Late Professor of Anthropology, University of Southern California. The dialogue quoted here is from the documentary film, *NUMBER OUR DAYS* (1977), produced and directed by Lynne Littman and written by Dr. Barbara Myerhoff and Lynne Littman. The film is based on fieldwork of Dr. Myerhoff that was conducted as part of the University of Southern California project on the Social Contexts of Aging (1977). See also Dr. Myerhoff's book-length presentation of her fieldwork, *Number Our Days* (1978).

² See *infra* part III.

Center. A modest hall is a visible marker for this space; another tangible manifestation is the dues and membership fees. On the other hand, there is the work and life of the community: "A simple hall where time, death, and the outside world are transcended."³ In the joinder of these two things, a mere human institution and a kind of transcendence, consists the paradox; for the Center is just "[a] simple hall," but its communal life addresses the perennial concerns of human existence, above all the looming presence of death.

In this simple hall, people that might otherwise be strangers to one another give what they can to support one another through the most intense anguish that life deals out. Doris is not rescued by this love; it does not restore her husband to her, it does not make her feel better in any visible way. "All of you here in this Center today is her family."⁴ This is false in a literal sense. Doris's family and all that it has meant and been in her life are now gone, and instead of husband or children, Doris now lives each day with death. Yet, the Israel Levin Senior Adult Center has spoken to her what few words can be spoken, and it has offered her whatever support for human existence can be offered.

In this hall, death is transcended; but death is not left behind. On the contrary, as Professor Myerhoff observes, "death is *there*, it is the invisible protagonist in every little scene you see played out."⁵ In addressing death, the community takes on its characteristic dignity and irony. Dignity, in that human existence is in one sense, but not in every sense, terminated by death. The community gives this dignity its special meaning and value. Irony, in that there are no pretenses here; it is understood that death relativizes all of one's trite expressions of sympathy and best wishes. The community makes it possible for these survivors to live honestly in the gulf between their words and the reality that faces them all.

The Israel Levin Senior Adult Center is an institution that enables supportive union to be realized in a difficult and dangerous world. I want the law to understand this, if I may be allowed to speak in this simplifying way. I want the law to recognize what mutuality is at its depths, so that law can respond, even if the response is necessarily shallow. And I do think that the response must be, in comparative terms, shallow. The law cannot reach into

³ NUMBER OUR DAYS; *supra* note 1.

⁴ *Id.*

⁵ *Id.*

the vitality, tradition, and character through which being-supported becomes a human achievement in the face of being-towards-death.⁶ But the law can do the shallow things that relate to the incommensurability of which I spoke at the outset: for the community is both an ontological achievement and an institution, an organization, a building, a budget dependent on outside support as well as on the payment of dues. The members of the community are long-since retired and live on small fixed incomes. While rents in their modest apartments rise, the incomes of these old people do not. Will the law find a way to keep these people near the physical space in which they do their work as a community? Surely this group cannot survive one more Diaspora.

In the Venice beach neighborhood surrounding the Center, developers are buying up the old apartment buildings and, in some cases, tearing them down to make way for more profitable investments. The law cannot help the Center put its arms around Doris, but can it preserve these old apartment units from the wrecking ball?

Just in front of the simple hall that is the physical site of the Center, bicyclists and (later) roller skaters circulate up and down the boardwalk. The boardwalk is meant for them, as well as for these old people, who take daily walks, alone and in pairs, to recall distant days or to feed the pigeons and sea gulls. These are, not surprisingly, "incompatible uses," and some members of the Center have been struck and injured by bicyclists. Can the law intervene here, to make the neighborhood safer?

Beneath these very visible zones for legal intervention there are others of equal or greater importance. How did the site become zoned for use as a community center? What tax rules make it attractive for wealthier and younger people to donate funds to the Center, and to contribute food that is distributed at the Center every Sabbath day? How does Maury Rosen, the director of the Center, who fights its battles and who tries (often, seemingly, in vain) to give form to the community's crazy-quilt life, get paid? Does he have any legal counsel? If not, why not?

The cannons of constitutional law now make their muffled, barely-heard boom in the great distance. Even during the years in which *Wisconsin v. Yoder*⁷ was understood to provide protections

⁶ I take the concept of being-towards-death from MARTIN HEIDEGGER, *BEING AND TIME* 229-311 (1962).

⁷ 406 U.S. 205 (1972).

for at least some religious ways of life,⁸ that protection was limited to partial exemptions from legislative requirements that might otherwise have had the effect of damaging those ways of life, or harming the mechanisms by which they were transmitted.⁹ But, as is typical perhaps of many community-threatening dynamics, the dangers to the Israel Levin Senior Adult Center do not stem in large measure from the impact of governmental requirements. The Center cannot live by exemptions alone.¹⁰

If the city should enact comprehensive zoning laws that rule out community centers or should refuse to grant conditional use permits to them, the principles of *City of Cleburne v. Cleburne Living Center*¹¹ might be applicable. In *Cleburne*, the Court, purporting to apply rational basis review, decided that the City lacked adequate justification for withholding a special use permit from the Center, when other uses of equal or greater impact were approved. In his separate opinion, concurring in the judgment in part and dissenting in part, Justice Marshall, joined by Justices Brennan and Blackmun, declared that “the interest of the retarded in establishing group homes is substantial. . . . Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community.”¹² My discussion of mutuality in this Article

⁸ Compare Justice Scalia’s interpretation of *Yoder* in his opinion for the Court in *Employment Division v. Smith*, 494 U.S. 872, 882 (1990), which explains that the result in *Yoder* depended on the fact that that case presented a “hybrid” claim, joining both free exercise interests and parental substantive due process rights. Also compare Justice O’Connor’s opinion for the Court in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 457 (1988), which denied that, in *Yoder*, “the ‘impact’ on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature.” Under these interpretations of *Yoder*, a court would not strictly scrutinize governmental action with the effect (but not goal) of harming or even destroying a religious way of life.

⁹ See Ronald R. Garet, *Communitality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1029-65 (1983).

¹⁰ Ethnic and other communities characteristic of urban neighborhoods may be damaged or even destroyed by urban renewal projects, by the use of the eminent domain power for other purposes, and by government-directed mortgage lending policies. See HILLEL LEVINE & LAWRENCE HARMON, *THE DEATH OF AN AMERICAN JEWISH COMMUNITY: A TRAGEDY OF GOOD INTENTIONS* (1992); Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251 (1990). Or the effects may be less visible or direct, as when a host of economic policies hasten or retard plant closings, with their sometimes catastrophic impacts on community life.

¹¹ 473 U.S. 432 (1985).

¹² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461 (1985). Interestingly, later in his opinion, in the course of arguing that the mentally retarded form a group that

might be construed in part as a gloss on the "fulfillment" that communal life enables.¹³

The Israel Levin Senior Adult Center teaches us to understand that fulfillment in relation to the reality that life passes away. This is not, perhaps, precisely what Justice Marshall had in mind.¹⁴ It

merits heightened judicial protection under the Equal Protection Clause, Justice Marshall declared that "what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom." *Id.* at 466. Apparently, Justice Marshall did not perceive any inconsistency between this critique of the "natural" and his earlier claim that community life is essential for human flourishing. Yet the latter claim might well be understood as a contention about human nature: that (to use this Article's terms) mutuality is a good. Contrast a recent writer's expression of what he calls an "agnostic" position: "My own rhetoric of community is not essentialist. To the contrary, it is altogether pragmatic, as my focus on the *rhetoric* of community suggests. Agnostic (or better, uninterested) in metaphysical questions as I am, I do not mean to claim that there is some irreducible core to human nature that must include community." Gregory Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 4 n.11 (1989).

¹³ On the idea that the Constitution embodies values that require the preservation and nurturing of groupness, as well as of personhood, see Garet, *supra* note 9, at 1006-75. Compare *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down an ordinance restricting occupancy of a dwelling unit to narrowly defined "family" members) with *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding a comparable restriction on coresidency by unrelated persons). Justice Marshall's analysis in *Cleburne Living Center* is designed to apply to challenged regulations that, intentionally or otherwise, rob people of opportunities for communal life. Whether the idea that communal bonds are necessary for human flourishing would also tend to support state action *reinforcing* those bonds seems less clear. See *Hodgson v. Minnesota*, ____ U.S. ____, 110 S. Ct. 2926 (1990) (The Court invalidated a law prohibiting the performance of abortions on minors until two days after notification of both parents but upheld a two-parent notification fall-back provision with a judicial bypass in place. Justice Marshall, concurring in part, and dissenting in part, *see id.* at ____, 110 S. Ct. at 2951, suggested that he believes that the "human freedom and fulfillment" enabled by formed bonds and communal participation are not furthered by parental notification requirements.). Requirements that adopted children be told of their natural parents' identity, or that grandparents or other relatives be given a preference in adoption, raise similar questions about the nature and weight of state interests in the reinforcement of existing communal ties. See Beverly Beyette, *Grandparents vs. Parents in Court*, L.A. TIMES, Sept. 29, 1991, at E1. So do regulations that have the purpose or effect of strengthening the incentives for union membership, and many other laws that operate in domains of communality other than the family.

¹⁴ Groups of every kind and description, including clubs, civic associations, choirs, unions, political parties, and advocacy organizations, enable people to "form bonds and take part in the life of the community," and to that extent foster "human freedom and fulfillment." Hence it is good policy to make group life broadly available to people: a policy followed in most schools and universities, for example, in facilitating the formation of various student groups and clubs, and given constitutional stature by the First Amendment's protection of freedom of association. Such a policy should, and typically does, take into account the overall social benefits or costs stemming from a given group. For example, although urban youth gangs enable their members "to form bonds and take part in the life of a community," and perhaps even nourish a certain kind of human fulfillment, if not of

is closer in some respects to the moving dissent by Justice Stevens in *Cruzan v. Director, Missouri Department of Health*.¹⁵ In that dissent, in the course of challenging a state's right to require that an irrecoverable human life be sustained against the contrary wishes of parents, Justice Stevens contended: "Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' and indeed are essential incidents of the unalienable right to life and liberty endowed us by our Creator."¹⁶ This paired duty and freedom is as

freedom, this does not mean that the right stance toward these gangs is to protect or encourage them to the same extent that we protect or encourage, say, a charity. (For a helpful account of associations and of the justification for legal intervention in one characteristic site of group hurtfulness, the exclusion of those seen by the group to be "not the right kind," see Lon Fuller, *Two Principles of Human Association*, in *VOLUNTARY ASSOCIATIONS: NOMOS XI* 3-23 (J. Roland Pennock & John W. Chapman eds., 1969).

Clearly, then, not all groups are oriented toward or respond to the temporal condition of the personal life, its destiny in death. Equally clearly, the interpretation of mutuality that I offer here is not intended as a description of all groupness, or a normative least common denominator of all groups. Indeed, any account, such as Marshall's, of what makes groupness in general worthwhile is bound to be rather thin or weak, and to be couched largely in platitudes.

There are many ways that the individual spends his or her time. Yet, each of us is likely to say that only a few of these activities, plans, hopes, etc., come close to the heart of what it means to be a person. Similarly, there are many ways that groups spend their time. We can value a groupness that enables a communion responsive to the anguish of loneliness, coldness, and presentiments of mortality and unreality more highly than a groupness that supplies only divertissement and bonhomie, even if we are bound to face difficulties and disagreements in deciding which groups should be described in which terms.

¹⁵ ____ U.S. ____, 110 S. Ct. 2841 (1990).

¹⁶ *Cruzan v. Director, Mo. Dept. of Health*, ____ U.S. ____, 110 S. Ct. 2841, 2885 (1990) (citation omitted). Compare the first sentence and first footnote of Stevens's dissent, which associate the Constitution with the rights proclaimed in the Declaration of Independence. See *id.* at ____ & n. ____, 110 S. Ct. at 2878 & n.1. Stevens goes on to say:

The more precise constitutional significance of death is difficult to describe; not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience. We may also, however, justly assume that death is not life's simple opposite, or its necessary terminus, but rather its completion.

Id. at ____, 110 S. Ct. at 2885. I believe that Stevens is correct in affirming a right and duty to address mortality as a defining part of the human condition. Yet his appeal to "individual conscience" understates the role of the parents as decision makers under the tragic circumstances of the case. Perhaps one could say that Nancy Cruzan's parents were a more appropriate community than the state to make decisions on behalf of Nancy and of her posture toward life and death, or that it was more fitting for them to let Nancy go than for the state to set its face against this. But any such conclusion would have to be grounded in some view not only of personal accountability for the contemplation of death but also of the role of communities in that process.

paradoxical as it is deep; surely a philosophical space opens up between a person's right to his or her own life and a community's proper part in turning that life toward death.

BARBARA MYERHOFF: One year after Harry Asimow's death, his stone is being unveiled according to Jewish tradition. Harry was a tough, independent man. He knew he was about to die, but he willed himself to stay alive until the day of his 95th birthday party. This film footage was taken during the party. Harry made his speech to family and friends at the Israel Levin Center. Then he folded his hands, lowered his head and died. The paramedics tried to revive him but Harry had chosen the moment of his death. It was an astonishing moment when Harry and the angel of death were collaborators.

MAURY ROSEN, DIRECTOR OF THE CENTER, SPEAKING TO THE MEMBERS IN THE HALL: I would like to read a sentence or two from the last speech made here a year ago. From Harry's message to us. "My wish that during the next five years until my 100th birthday, whether I am still here or not, that you continue to celebrate my birthday." SCENE OF THE COMMUNITY, DANCING TO MUSIC.

BARBARA MYERHOFF: People felt Harry's ceremonial death was his gift to them. Such a death should only happen to me, they said. According to his will, they are reassembling this year, they are celebrating, they will continue beyond his death.¹⁷

Supportive union, bearing us up in the face of mortality, is a structural possibility for human existence. If the whole may be described by an internal image, then it can be said that mutuality is like dancing to music. The partners are visible, and so is the way they move together, holding one another close or perhaps hardly touching one another. But they move together because there is music that moves them. And so it is with mutuality. We can bear one another up even as we are passing away, and we are called to do this by the music of our possible being.

II. A THEORY OF GROUP RIGHTS BASED ON COMMUNALITY

A. *Ideas Central to the Theory*

What are group rights? What is a theory of group rights? What issues of law and morality might be addressed by such a theory?

¹⁷ NUMBER OUR DAYS, *supra* note 1.

These are questions as sweeping as they are difficult. So are corresponding questions about groups: What are groups? Are they anything more than collections of persons? Can they be said to act, or choose, or claim? Do they have a character, virtuous or evil? Are groups the kinds of things that can be good or bad? To try to respond to all of these hard questions at once is to dissipate one's intellectual energies. So I have chosen to begin my thinking about groups and group rights with an inquiry into one theme or topic: the good that inheres in what might, noncommittally, be called "groupness." Such an inquiry will not supply answers to all of the questions that I have identified. It will not produce a "theory" of group rights, in the strong sense: an apparatus that identifies a well-formed domain of problems and that proposes corresponding solutions.

It would take a more sanguine scholar than I to propose measures intended to apply to the full range of problems posed by contemporary governmental treatment or mistreatment of ethnic, religious, or "national" minorities. Consider, as an example, the claims and counterclaims being made today in Europe and Asia by many groups that previously were subject to direct or indirect rule by the Soviet Union. Without a deep familiarity with the history and culture of these peoples or societies, one would find it impossible even to interpret their communal ways of life; surely it would be otiose to offer proposals in ignorance of these ways and the frictions between them. Needless to say, such frictions, claims, and counterclaims surface nearly everywhere.¹⁸ The list of comparable domestic issues is very long indeed, and each item on the list resists straightforward solution by a comprehensive theory.¹⁹

¹⁸ Among the problems and claims that demand attention are the national aspirations of the Croats and the rights of the Serbs that live in Croatian-majority territory; the merits of independence claims by Quebecois or Lithuanians; the claims to statehood by long-divided Armenia; the resolution of land and border disputes around the world; the needs and rights of Roma (Gypsies) and other dispersed or migrant people; and the claims of warring religious communities in Sri Lanka or Northern Ireland.

¹⁹ Troublesome issues abound: Which groups, if any, deserve reparations for past wrongs committed in the name of the law, or with its assistance? Which communities, if any, should be free to exclude those who are unwanted or different? And in what way, and with what right to call upon the assistance of the state? Should we act to reinforce the institution of the family? If so, what kind of family (nuclear or extended, heterosexual or homosexual, or both)? And with what kinds of protections (tax incentives, boundaries designed to respect family privacy, parental accountability for the misdeeds of children, parental notification or consent requirements that must be met before a minor can have an abortion)? Should residential neighborhoods be called on to do more or less of the work

Such an immense universe of international and domestic issues is simply too broad to respond sharply and cleanly to any theory of group rights. But it is possible to entertain more modest hopes than this. One can bring to the investigation of these issues a concern for what is valuable about groupness, as well as an appreciation for the ways in which that value and many other human values tend to go unmet. One can try to develop an understanding of the work that an appreciation of groupness can do in the course of normative and legal thought about such issues, and the kind of work that other lines of thought, for example about justice and social welfare, must be expected to perform.

These are the goals of my theory of group rights.²⁰ The theory begins with these four propositions:

First, supportive union or mutuality is a good in which our lives should participate and an end that we should include in the choices that we make, including decisions about the design of institutions.²¹

of crime-prevention and the delivery of justice? Should separatism replace integration as a goal or as a means to an end in such contexts as public schooling or public housing projects? Does an industrial plant or a farm or a school count as a human community that deserves to be shielded from the forces of the market, or from the group-destructive consequences of countless individual choices? Which groups, if any, deserve recognition in reapportionment? Which groups merit special judicial solicitude when targeted or affected by legislation?

²⁰ See Garet, *supra* note 9.

²¹ From many angles of view, structuring a theory of group rights around the proposition that mutuality (or anything else for that matter) is a good in these senses appears to be precisely the wrong way of conceiving the normative or constitutional significance of human community. For those who believe that knowledge of what is good is largely unavailable, or that any claim about what is good is simply too controversial to be of service in normative or constitutional theory, talk of mutuality is futile in much the same way as talk of personhood or human flourishing. I will not try in the present Article to develop or answer such criticisms. Nor will I address the somewhat narrower contention that an account of a human good is an especially inappropriate vehicle for community protections: that the better course is to show how values and moral language send their roots deeply into the ways and histories of the several human communities, how idioms expressing what is good or right have meaning and applicability only within such communities. For it seems to me that in framing such arguments and in trying to settle them, everything depends upon achieving a sensitivity to nuance and a level of detail that far exceed what might be accomplished incidentally to the development of an interpretation of mutuality.

Much of what I will have to say about communion and mutual support is informed by a belief in the human significance of what might loosely be called relationality. It may be helpful to draw a distinction between two ways of working out this significance. One way, and the route that I have followed, interprets relationality as a good, numbered among the human goods and made to play its limited part in a moral theory in which justice governs the pursuit of all goods. The other path interprets relationality not as a good but instead as an orientation of moral thought: as care, concern, or love. This idea is as ancient as Augustine's

Second, although aloneness, loneliness, meaninglessness, alienation, and so on are all aspects of the burden of individuality that we bear, mutuality is finally addressed to being-towards-death.²²

Third, in addressing being-towards-death, supportive union bears us up against the reality of our passing away. The existence of groups means, on this account, that "groups exist us"; they make possible a kind of being-supported or being-sustained.²³

well-known counsel: "Therefore once and for all this short command is given to you: Love and do what you will. [*Dilige et quod vis, fac.*] If you keep silent, keep silent by love, if you speak, speak by love; if you correct, correct by love; if you pardon, pardon by love: let love be rooted in you, and from this root nothing but good can grow." Augustine of Hippo, *Homily on the First Epistle of St. John*, in AUGUSTINE OF HIPPO SELECTED WRITINGS 299, 305 (treatise 7, ch. 8) (Mary T. Clark trans., 1984). The interpretation of relationality as a general posture toward morality or moral reasoning has been developed more recently as a central concern of what has been called "relational" or "different voice" feminism. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987); Pamela Karlan & Daniel Ortiz, *The Oppression of Care: Relational Feminism and the Feminist Legal Agenda* (paper delivered at the legal theory workshop, University of Southern California Law Center (Dec. 5, 1991)). Here again I must confess that exploring the differences between my own view of mutuality as a good, whose pursuit is regulated by justice and which serves to establish group rights, and a view of relationality as a mode of moral thinking that displaces concepts of justice and rights, lies beyond my project in this Article.

²² There are a great many ways of being lonely, alienated, oppressed by a sense of meaninglessness, and so on. Often these modes of being are tinged with an anguished presentiment of one's own insignificance and impermanence. Aloneness that has this tonal quality is a form of being-towards-death, even though one may not be thinking about death or dwelling morbidly upon one's own death, or grieving for a loved one who has gone. Compare "The nightmare Life-in-Death," who "thicks a man's blood with cold," and wins the soul of the Ancient Mariner. Samuel Taylor Coleridge, *The Rime of the Ancient Mariner*, in THE POEMS OF SAMUEL TAYLOR COLERIDGE 194, ll. 193-4 (Earnest Hartley Coleridge ed., 1924).

²³ The existence of persons, comparably, could be described as that which makes possible the temporal ontology of human being: memory that casts a net of continuity over past and present, identity of the person over time, freedom to shape life through the making of commitments, the distancing and progressivity that stem from self-consciousness, anxiety and dread over sinfulness and unreality, presentiments of one's own death. I pose the question of the existence of persons and of groups not in terms of whether a complete inventory of all of the things in the world would include persons and/or groups—a question that in many respects recedes like a mirage as one tries to answer it—but instead in terms of whether characteristic modes of human being are structured or thematized by the existence of persons and groups.

My third proposition, that groups exist in the sense that they structure our existence, giving it an orientation that it would not have if the whole truth were that we are persons, leaves unanswered a whole range of questions about the meaning of various act-descriptions or causal statements about groups, as well as about the intelligibility or advisability of regarding groups as right-holders in specific contexts. For example, should a corporation have a right, under the Fifth Amendment's Self-Incrimination Clause, not to be compelled

Fourth, the existence of groups, like the existence of persons, is subject to the reality of evil.

To these four propositions, two other structural principles must be added.

First, the logic of the good, of inherent worth, and of the justification of rights, is generally the same for persons and for groups. This is essentially a methodological principle, and it is subject to qualifications. The basis for this "principle of symmetry," as I call it, is the idea (visible in all four propositions) that groupness, like individuality or personhood, is a structuring element of human existence. Because both personhood and groupness structure human existence, they play symmetrical roles in moral reasoning. But the principle of symmetry is, as I say, chiefly of methodological value; it steers one away from certain errors, but it is not the whole of the truth.²⁴

Second, the four propositions taken together, in a design that generally satisfies the principle of symmetry, seldom suffice as a platform for proposals about the rights of groups. This is so because the making of such proposals, or their final defense, normally depends not only on moral truths about groups and their place in life but also on claims about what is just—distributively, correctively, or both. Views of the proper moral balance to strike between group and individual claims, when the two are in conflict, are bound to be decisive in many contexts. And it will almost always be necessary to decide whether a rule or practice that enables the pursuit of mutuality for some can be justified in the face of

to be a witness against itself? (See *Hale v. Henkel*, 201 U.S. 43, 69 (1905) (holding that the right is "purely a personal privilege of the witness" and cannot be used by a corporation). In grappling with that issue, one might pose a host of linguistic, moral, and metaphysical questions. Does saying that a corporation has (or has not) incriminated itself mean anything different from saying that the corporation, or its officers, have (or have not) been incriminated by testimony of its officers? If the officer sought to be compelled to testify is given a grant of immunity from prosecution, would shielding the officer from contempt sanctions in effect protect a third party, in contravention of the principle that the right against self-incrimination is a personal right, not a power to protect third parties? To what would a criminal sanction against the corporation actually amount? If no immunity to the officers were granted, would they suffer setbacks to their interests comparable to those imposed by criminal sanctions if the corporation were convicted? Does a corporation have an interest in privacy that is comparable to the privacy honored by the Self-Incrimination Clause's application to persons?

²⁴ Thus, I now regard the principle of symmetry as playing a lesser part in the theory of the rights of groups than I did when I wrote my earlier article on the subject. See *Garet, supra* note 9, at 1001-05.

social welfare losses or of some debit against the public account.²⁵

All of these notions—the four main elements of the theory, the method that typically guides it, the sense of its place within a larger normative context—must be developed in some detail, not only as ideas but also as parts of a response to the kinds of issues that commonly arise when group claims are considered. For example, it will almost always be necessary to determine the scope of a group's powers of control over its own members, or to decide whether, in setting and enforcing their membership policies or customs, groups may exclude or reject certain "outsiders." If a group is seen to merit protection or social support, the question is bound to arise of just how large a price the larger community can be called on to pay to protect or nurture a group. When so-called national minorities press their claims, as they are doing around the world today,²⁶ it must be decided (supposing that the claims have some force) whether the better course is to guaranty some set of group rights, or package of group rights and individual liberties,²⁷

²⁵ A well-developed account of mutuality as a good provides much of what is needed to justify opening the institution of marriage, conceived as a socially approved and legally recognized form of family life or of partnership, to homosexual couples. Supposing that one has in hand an account of why mutuality is a special kind of good, and of how a fuller participation in that good might be facilitated by opening the institution of marriage to homosexuals, the remaining question would be whether this participation is the kind of "fundamental right" that deserves protection against a majority that objects on moral or other grounds. See generally Thomas B. Stoddard, *Gay Marriage: A Must or a Bust?*, OUTLOOK: NATIONAL GAY AND LESBIAN QUARTERLY, Fall 1989, at 8-17. By contrast, an account of mutuality provides less of what one needs to know—although still, I think, something of value—if the issue is whether an historically African-American community in a major American city should be permitted (or perhaps even encouraged) to secede from city government and incorporate. See Ankur J. Goel et al., Note, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control, and the Implications of Being Darker than Brown*, 23 HARV. C.R.-C.L. L. REV. 415 (1988). The latter issue raises questions not only about the kinds of mutuality available in the African-American neighborhoods both before and after incorporation, but also questions about the share of social services or tax dollars that would go to the community in both cases. Similarly, the question of fair voting rules looms large in the context of the the secession/incorporation issue.

²⁶ See Conor Cruise O'Brien, *Nationalists and Democrats*, N.Y. REV. OF BOOKS, Aug. 15, 1991, at 29.

²⁷ See Council for Security and Cooperation in Europe, Report of the CSCE Meeting of Experts on National Minorities (Geneva, July 19, 1991) (unpublished manuscript, on file with the author). The signatories to the report "reconfirm that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will," *id.* at 5, pledge to "take the necessary measures to prevent discrimination against individuals, particularly in respect of employment, housing and education, on the grounds of belonging or not belonging to a national minority," *id.* at 6, "recall the need to take the necessary measures to protect the

that will render continued cooperation of the group within the larger state both fair and attractive, or to open up new opportunities for secession and state-formation. The devices of federalism, and of jurisdictional division, offer a kind of intermediate path toward group protection. Thus we face recurring questions, for example in the design of voting rules or in the drawing of electoral district lines,²⁸ about whether some form of group representation is in order, and, if so, which kind of representation is best.

These questions are of enormous difficulty; I think that it is worth stressing this fact at the outset and recognizing how unlikely it is that anything deserving to be called a "theory of group rights" can answer these questions. As I have suggested, any answer must rest on many pillars, including views of what is just. So long as these difficulties are appreciated, it is appropriate, I think, to commence one's thinking with the first of my four propositions: the idea that mutuality is a certain sort of good. This idea is developed a bit further in the following Section, leaving its deeper investigation, which leads to the remaining and perhaps less intuitive propositions, to the later sections of this Part of the Article and especially to Part III.

B. A Preliminary Sketch of Mutuality

Life offers, or should offer, possibilities for participating in supportive union. This participation is active and takes the form of actions. Women facing common challenges form a support group, offering to one another not only a more concrete and affirming manifestation of sisterhood, but also the support that one caring person can give to another. A father offers guidance and love to his daughter; in his old age, perhaps, he receives care

ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity," *id.*, and "note with interest that positive results have been obtained" from institutions such as special-purpose legislatures to which ethnic minorities elect representatives, local self-administration, decentralization of government, funding the teaching of minority languages to the public in general, and "provision of financial and technical assistance to persons belonging to national minorities who so wish to exercise their right to establish and maintain their own educational, cultural and religious institutions, organizations and associations." *Id.* at 7-8.

²⁸ See *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977); *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd in part and vacated in part*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 681 (1991); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution*, 24 HARV. C.R.-C.L. L. REV. 173 (1989).

from her, now fully-grown and with a family of her own. Both the giving of supportive love that builds up the life and character of a child, and the receiving of such love in childhood, old age, or sickness, are activities: things done in mutual relations. These activities are worthy of respect in a special way, touching as they do on the deepest mysteries of who we are and why we are here for one another. The states of supportive union in which we participate are diffuse sacraments of meaning, loving, and being.

What we do, in states of mutuality (as I will sometimes call supportive union), is closely bound up with what we feel and know. There are times, perhaps in a family setting, in which it is difficult to draw a clear distinction between the love that is given, the love that is felt, and the love that one knows and trusts is there. Sometimes, when supportive union takes the form of acceptance of life and cosmos, as it does when lovers rest in one another's arms, or when a person lies outdoors under a dark heaven and joins the earth in its minute rotations within the endless starry night, the dimension of action recedes into a special kind of passivity. At these times, what is felt and what is known are especially salient in the act of participation in supportive union. But at other times, as when one tends to a sick person in the family, or in other contexts, as when caretaking is regarded as one's work (whether paid or otherwise), the deeds of love take pride of place, and what is known or felt seems of lesser importance. In either case, it deserves to be stressed that supportive union is not collapsible into "feelings of supportive union," any more than play is reducible to feelings of play, or religion to religious feelings.

Participation in supportive union is one of the valuable or worthwhile things in life. Each of us, at times, finds the burden of individuality to be hard to bear. Loneliness, living as a stranger or a wanderer, experiencing a sense of being different or even deviant, a sense of being unloved or even unlovable—these are always possibilities in any life. Becoming aware of these possibilities may be painful but necessary. The situations that make us feel most isolated or separate from cosmos, nature, or other people, sometimes mislead us into overstating our separation; but individuality as a fact of human life is not a falsehood. Nor are the conditions of life that make us feel the sting of separation always evils. There are respects in which each of us is, finally, wayfaring and alone. But participation in supportive union helps us to bear the burden of individuality, in part by revising the meaning and easing the weight of that burden. We come to see that there is a

dignity or worth in bearing the measure of separateness necessary to be addressed by another separate one, to be borne up and built up by being addressed in this way, and to respond with mutually constructive support.

Thus the intrinsic worth of participation in supportive union may be expressed in terms of a value that balances, even enriches, but certainly does not annul, the intrinsic worth of human personhood. Both as an account of what is good in life and as an account of certain actions, feelings, experiences, and understandings, the idea of participating in supportive union is thus to be distinguished from certain psychological notions, such as Freud's description of the "oceanic feeling,"²⁹ and certain religious ideals, such as those of acosmic union.³⁰ I need hardly point out, however, that in interpreting one's own experiences or aspirations, to say nothing of those of others, especially those in remote cultures, this distinction may be almost impossible to draw in practice, resting as it does on interpretations, not easily confirmed or validated, of the turnings of the spirit. As a methodological principle, then, it seems wise to refrain from facile classification of, say, world religions, into those that seek the dissolution of individuality and those that want to bring forward, in consciousness and in action, a love in whose medium the individuals bear one another through life and in death.

This caution is all the more appropriate given the many worthwhile features that supportive union shares with the "oceanic feeling." For when the burden of individuality takes on the coloring of being-towards-death, what is sought in response is not so much relief for aloneness (through merger or mutual address), but a support in being for an existence that is otherwise passing away.

Meaninglessness, loneliness, a sense of oneself as unloved, unlovable, or deviant, all of these life situations cluster about the temporal condition of existence. So, in their different ways, do a sense of being lost, of lacking fundamental understanding, and of being cold and unfeeling. I do not want to say that these orientations toward life are falsehoods. They are true to the temporal condition of the human person. I do say that these stances toward life or modes of living are addressed by a human possibility that

²⁹ SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 11-12 (James Strachey ed., 1961). Freud describes this feeling as a sense "of an indissoluble bond, of being one with the external world as a whole." *Id.* at 12.

³⁰ MAX WEBER, THE SOCIOLOGY OF RELIGION 176 (1963).

is carried along by a different orientation toward time and death: by the joy that, as Schiller said, wants eternity.³¹

This is the joy of those that share in the Seder meal, reenacting old histories so as to make them more than old histories, handing down both celebrations and commitments to children, who someday will preside at a different table at a different home, which yet will be the same home. This is the joy of those who together celebrate communion, whose very name reveals both the vertical and the horizontal dimensions of being-supported.³² And this is the mood that is preserved when elderly Jews, through the interventions of the law, can come each day to a community center, to laugh and cry, to dance, and to sing the songs that they first heard as children in the shtetls;³³ or when a young man born with Down's syndrome, having lived his whole life in institutions, having been barred on order of his own parents from forming all close attachments to anyone, and through the portal of mortal illness entering "the dark time of his life," is judicially granted a chance to form a filial bond with caring "psychological parents";³⁴ or when a group home for the mentally retarded is finally built in a residential area, despite efforts to zone it out, and people are able to share life with one another, and experience its hopes and disappointments within the frame of home;³⁵ or when adopted children, otherwise cut off from their ancestry, are given the right to know from where they came, and to be borne up in the way that a tree is, by its roots.

C. *Mutuality as an Inherent Good and a Claiming Good*

I will say that mutuality is an *inherent good*. The phrase "intrinsic good" also captures this aspect of mutuality as a good. The basic idea is that mutuality is worth pursuing or participating in for its own sake. Life is better, more complete, when it is lived

³¹ "Kurz ist der Schmerz und ewig ist die Freude!" Friedrich Schiller, *Die Jungfrau von Orleans*, act V, sc. 14, line 3544, in 2 SAMTLICHE WERKE 687, 812 (1962) ("Pain/sorrow is brief, but joy is eternal/endless.").

³² "Religion, we shall say, is the reflective activity which expresses the consciousness of community; or more tersely, religion is the celebration of communion." JOHN MACMURRAY, *PERSONS IN RELATION* 162 (1961); see *infra* part II.F.

³³ See *NUMBER OUR DAYS*, *supra* note 1.

³⁴ See *Guardianship of Phillip Becker*, No. 101981 (Super. Ct. Santa Clara County, Aug. 7, 1981); see also Robert H. Mnookin, *The Guardianship of Phillip B.: Jay Spears' Achievement*, 40 STAN. L. REV. 841 (1988).

³⁵ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

in such a way as to include mutuality in its overall scope. For present purposes, it is not necessary to decide whether "better" and "more complete" are meant in moral or non-moral ways, and, correspondingly, whether mutuality as an inherent good is a moral good or a non-moral good. As a course of supportive, helpful action, and as a readiness to engage in such acts with others, mutuality is inherently good in a moral sense. As an enjoyment, a grasp of one of the things that make life worth living, or as a "feeling of union," mutuality might be described as a non-moral good: something that enriches life, in the way that resting, or the appreciation of beauty, enriches life.

The idea that mutuality is an inherent good might correspond to values commonly placed on special relationships. Grandparents, for example, often treasure opportunities to be with their grandchildren: to play with them, help take care of them, share in their time of growth. Grandchildren treasure the special support and depth they associate with visits to or from their grandparents. Such a valuation no doubt reflects many things, some unique, some not. Mutuality is a part of the valuation; the goodness of relationships in which people care for one another and support one another is intelligible to us, and this accessibility helps make the grandparent/grandchild relationship known to us as something worth having. Ordinarily, it is not important to sift out the happinesses and enjoyments in such a relationship from the acts of giving, of providing; and it is for that reason that mutuality as an inherent good is not specifically non-moral or moral. The enjoyments are so closely bonded to the giving of support and care that it would be more distorting than clarifying to say that, in the relationship, the moral good is pursued or participated in just here, while the non-moral good is being enjoyed just there.

I characterize mutuality as an inherent good in order to describe life, to bring out features or qualities of life that are part of a common fund of experience.³⁶ The characterization is meant to

³⁶ The point of interpreting experience or action in terms of intrinsic goods may be illustrated by a non-moral good, such as the eating or drinking of something that is satisfying or nourishing. The drinking of orange juice may serve as an example. To say that drinking orange juice is good is to adopt a descriptive angle that seems to bring out some worthwhile features of the phenomenon. If one were to select a lower-powered objective lens, as it were, in the descriptive microscope, one might say that "drinking is good," but such a low-resolution description seems unhelpful; after all, drinking alcohol (or at least too much of it) is not good, and drinking ice-cold drinks immediately after exercising is not good, and so on. A very high-powered objective lens, looking into the effect of the acidic orange

enable us to look into our lives and to identify, perhaps with a sense of wonder or deep appreciation, relations and structures that mean a great deal to us. For some, mutuality may seem instantiated in one special loving relationship, or in family life generally. For others, it is religious fellowship, or sisterhood, or the work one does as a teacher, or the relationships one builds with roommates. Some might be ready to provide supportive relationality to and with strangers, while others might be more restrictive in setting out to give aid and care. Some might require reciprocation in this way or that, while others might be more prepared to give without expectation of response. Such differences matter, but investigating just how they matter would take us into deep and murky waters.

The characterization of mutuality as an inherent good is not meant to assign any particular weight to mutuality. I do not mean that because mutuality is an inherent good, it is somehow weightier than many other goods that are good not inherently but instrumentally, in relation to extrinsic ends. Indeed, I do not mean that mutuality, as an intrinsic good, cannot also be good as a means to other ends, or that these instrumentalities might not matter a great deal when choices are to be made.³⁷ Furthermore, I do not

juice on the taste buds, and on the messages that the taste buds communicate to the brain, would fail to bring out the satisfaction and refreshment that the drinking of orange juice ordinarily affords. But of course, even once one has chosen the kind of lens or the angle of view that brings out the refreshing quality of the drinking of orange juice, the quality that expresses what it is about drinking orange juice that is worth doing for its own sake, other possibilities remain. For example, it may also be true that drinking orange juice is an instrumental good: it helps prevent colds. Indeed, it may be that drinking orange juice affords a different satisfaction to the person that knows that orange juice contains Vitamin C and that this helps the body resist colds, than it does to the person that just likes the taste. That is, the instrumental benefit in the act may come to flavor the inherent enjoyment.

³⁷ Two instrumental ideas should be distinguished.

First, it may be that the preservation or even the promotion of a wide range of *groups* would serve social welfare, for example by providing a vast array of cultures that everyone could "sample" or just learn about, thereby enriching everything from dining at restaurants to studying literature and art and music. Or it may be that protecting or promoting some other set of groups would be productive for other reasons; for example, some social groups might provide their members with a buffer against otherwise tyrannical central authority, or help them to represent their interests before legislatures or administrative agencies, or enable them efficiently to deliver needed social services. Clearly, these instrumental justifications can be structured at lower or higher levels of generality, to accommodate worries about social groups that do more harm than good. For example, one might nurture most cultures for the multiculturalist reasons stated above but draw the line at a culture whose central celebrations involve human sacrifice or cannibalism.

The second and distinct instrumentalist idea is that mutuality or supportive union is worth having or pursuing not only for its own sake but also because it "enables one to get more out of life" in general. For example, a person who is freed to some extent from the

mean that relationships characterized by the good of mutuality may not also be bad in any number of respects. People are unlikely to be mutually supportive all of the time, of course, so any relationship, for example any relationship of friendship, is apt to encompass both mutuality and other features, such as envy, jealousy, aggression, or exploitation, that are not good. Further, any institution that structures such relationships in such a way as to enable people to support and care for one another may well push in other directions as well, some of them evil. The family, for example, as a specific institution comprised of role expectations and definitions and shaped by both politics and markets, enables people not only to bring mutuality into their lives but also to abuse one another both physically and emotionally. Thus, although mutuality is inherently good, no institution now available to us either gives us a perfect enjoyment of that good or gives us nothing but that good. We are bound to make choices about the realization of mutuality in our lives: where we will seek it, how we will recognize it, and what we will endure for the sake of it. Surely it would be a mistake to exalt mutuality over other goods, so that privacy or self-knowledge or some other good of the personal life is abandoned. Because life affords so many good things that are worth pursuing for their own sake, the pursuit of any of these goods requires moderation.

I hope that it is clear that the function of the notion of inherent good is to bring out features of enjoyments and understandings of worthwhile actions that might otherwise be clouded or obscured by a different depth of focus or angle of view. Viewing the grandparental relationship up close might not bring out features shared by sisterhood, fellowship, or labor in a calling. Valuing a relationship in the light of its contributions to an exogenously conceived end, such as "happiness" or "pleasure," might prove not so much false as incomplete, ineffectual in communicating more particular good things that can be made intelligible. Further, the project of highlighting intrinsic goods does not mandate or foreclose any sensible way of ranking goods or choosing between them, or relating goods to rights. An inherent good does not, just in virtue of being inherent, "trump" other goods. If balancing is an appropriate mode of decision or justification in ethics or in law, then the project of highlighting intrinsic goods such as mutuality can be

anguish of loneliness may enjoy reading more than before, or listening to music, or gardening.

interpreted as supplying goods, or at least an idiom for articulating goods, for the normative balance. That is, a course of action that would seem to harm or destroy an opportunity for mutuality to that extent diminishes a good, and that diminution would have to be taken into account. For example, suppose that the state were to use its power of eminent domain to condemn a church, along with other property, for the purpose of widening a road or creating a freeway. The loss would have to be measured in terms of mutuality, and so, perhaps, would the gain.

I want to say not only that mutuality is an inherent good but also that it is a *claiming good*, or claiming value. By this I mean that mutuality is the kind of good that calls to be followed or shared. Although pursuing or partaking in any inherent good makes life fuller to that extent, ordinarily there are so many inherent goods that one must choose which ones are most appealing, and give them priority.³⁸ But there are some goods that do lay claim to be followed or shared. These are the goods that make life most worth living. Mutuality is such a good.

This claim is borne out, I think, by common beliefs about the cycle of life. In infancy, we are dependent on others' love and care, but to the extent that we are capable of valuing this dependency, we do so only egoistically; or the relationship so colors all of life that it cannot be singled out and perceived and named as a special good. In the years of childhood and young adulthood, we struggle with the burden of our individuality, learning to bear it responsibly and to involve the self in the wider world. Maturity brings an understanding of the brevity and fragility of life, and an appreciation of interdependency as a pervasive fact of life. Commitment comes into view as a relational good. The independence for which one struggled in youth appears in a new light. Valuable still, it now seems one value among others. Sustained relationships, new dependencies and responsibilities, and a growing recognition of death as a constant theme in life's dialogue bring an appreciation of supportive union, an understanding of how relationality responds to the reality that one's own cherished selfhood is bound to pass away.

Such an account of the cycle of life is necessarily too brief to give much content to mutuality as a good. Later portions of this Article will try to fill out the account. But the basic idea seems

³⁸ There is nothing wrongful or even "incoherent" in choosing grape juice over orange juice, or in disliking orange juice altogether.

sound enough: that some goods lay a claim upon us, calling to us in virtue of the condition of our lives. By participating in these goods, we are being heedful, faithful, and mature. Mutuality is such a claiming good or claiming value.

This idea depends on yet another choice of objective lens and angle of view. A higher-powered lens shows the universe of social relations in greater detail; there are such institutions as marriage, the professions, political parties, the workplace, and churches. It would be wrong to say that everyone ought to be married, or that everyone ought to be a member of a church. I would not say that marriage or religious fellowship is a claiming good. So the idea of the claiming good depends upon acceptance of a certain level of generality. And that acceptance should be given or withheld on the basis of interpretive questions. Does the idea of mutuality as a claiming good bring out features of one's most valued relationships? Does it illuminate the effort to discern what is most worthwhile in life?

To say that mutuality is a claiming value is to say that it calls to us in a certain distinctive way, that we are tugged along by this call toward a more full and complete life. But we respond to the call by making commitments, and it is the obligations and loyalties formed by these responses that claim us most concretely. And those obligations and loyalties are addressed to specific persons or groups: to a given person that is a friend, a marital partner, a coworker or colleague; to family, church, neighborhood, or political movement. It is in these actual relationships and communities that supportive unions are formed, and that the claiming value of mutuality is felt as a call to fidelity. In these communities, the possibility of abandonment, infidelity, or betrayal always arises.³⁹ Part of what it means to single out mutuality as a claiming good is to affirm that in their deepest and most actualized forms, supportive unions are not fungible. A friendship or a marital partner is not to be abandoned because one has found a new person with whom, one thinks, one could form a more rewarding relationship.⁴⁰

³⁹ For a discussion of the ethics of abandonment, identifying forms of abandonment and attempting to identify changes and choices in personal life that might be described as betrayals of trust or repudiations of claiming values, see Ronald R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121, 140-70 (1991).

⁴⁰ Supportive unions are richly heterogeneous; an aspiration toward permanence might honor some unions and dishonor or distort others. The formal vows of marriage, and the less formal but sometimes equally openhearted pledges of friendship, dignify our lives by affording us opportunities to aspire to permanence within the unsettled conditions of

The call of mutuality is general, but the response cannot be comparably general.

D. The Principle of Symmetry

The perspective that underlies the whole analysis of groups and persons is a humanism chastened by the defining presence of death and by the reality of evil. From this perspective, the whole realm of the human, of human existence, is called to worth but always subject to extinguishment by death and to corruption by evil. Groups and persons share these characteristics. Although they may appear to lie on different metaphysical or moral planes when viewed from other angles, groups and persons share the same decisive condition as seen from a challenged humanism.

Neither groups nor persons are good; neither are they bad. While an individual group, like an individual person, may be judged under the whole array of moral standards, it would not make sense to say that the whole class of persons or groups is either good or bad. Good and bad lose their intelligibility or utility as comparative, evaluative concepts when applied to the whole human class.

In the realm of the personal, the individual character may be evaluated as good or bad. Choices and courses of action likewise may be evaluated in these terms. And so it is with groups. The proposition that "groups are good" is neither true nor false; it involves a category mistake. What a group does is subject to moral evaluation, as is the overall tenor of a group's life. But the whole class of groups cannot be appraised by the standards applicable to any single group. It might be said that the whole class of groups has at least one value, namely a social utility. Needless to say, groups have their uses, both for individuals and for societies; these instrumentalities might lead us in a reckless moment to adjudge groups good. But groups frustrate as well as further goal-oriented action. In this respect they are like persons.

Whether an individual person, in her character and conduct, merits moral admiration or condemnation, her personal existence has worth or dignity. This personal worth is conceived differently

existence. Facile substitution on too broad a front depletes this dignity.

Fidelity to one's partners in supportive union, then, owes its special moral gravity to many things, including respect for the individuality and worth of the partner as person, hope for relations of enduring value, and appreciation of the seriousness of one's commitments.

by different ethical theories. From a utilitarian perspective, the worth of the person is just the fact that he or she counts as much as any other person in the overall calculus of satisfactions. Of course, various protections might serve to maximize these satisfactions, so the scheme of protections itself might be described as a recognition of human dignity. But this is not a recognition of human dignity in the humanist sense. The centerpiece of any humanist account of human worth is a sense of due deference, of inviolability. For example, a certain religious view of human worth finds expression in the idea, whose foundation is in the book of Genesis, that humankind is made in the image and likeness of God.⁴¹ Because God is worthy, humankind, made in the image and likeness of God, must bear the imprint of that worth. Such a worth lays a claim to respect or deference. The Midrash Rabbah on Deuteronomy expresses this idea vividly: "R. Joshua b. Levi said: A procession of angels pass before man and the heralds proclaim before him saying: 'Make room for the image of God.'"⁴² The worth of humankind, understood in this way, demands a certain kind of "making room."

Notice that what is created in the image and likeness of God, that for which one must "make way," is not just the human person but humankind in all of its manifestations and structures. Humankind's gender diversity reflects God's own; in that sense it is humankind, more than the individual person (except perhaps the androgyne), that bears the divine image and worth. If God is a community of three persons, as understood in traditional Trinitarian Christianity, then humankind, made in the image of God, is also both community and persons. Indeed, we might find that inquiring into God's being and worth illuminates the cloudy question of just what it is to be a person, to be a community, and to be both at once.

A specifically nonreligious but still humanist account of human worth can arrive at a comparable destination from a quite different starting point. Sartre's basic claim in his "Existentialism is a Hu-

⁴¹ "Then God said, 'Let us make man in our image, after our likeness. . . .' So God created man in his own image, in the image of God he created him, male and female he created them." Genesis 1:26-27.

⁴² MIDRASH RABBAH: DEUTERONOMY 92 (Dr. H. Freeman & Maurice Simon eds., & Dr. J. Rabinowitz trans. 1939) (citations omitted). For a more extensive discussion of human nature as a created endowment of dignity, conceived as a capacity for creativity, see Ronald R. Garet, *Natural Law and Creation Stories*, in RELIGION, MORALITY, AND THE LAW: NOMOS XXX 218 (J. Roland Pennock & John Chapman eds., 1988).

manism'' is precisely that humankind does not possess a human nature in the Genesis sense; there is no concept of humankind, for example in the mind of a humankind-creating God, prior to humankind's actuality:

What do we mean by saying that existence precedes essence? We mean that man first of all exists, encounters himself, surges up in the world—and defines himself afterwards. If man as the existentialist sees him is not definable, it is because to begin with he is nothing. He will not be anything until later, and then he will be what he makes of himself. Thus, there is no human nature, because there is no God to have a conception of it. Man simply is. Not that he is simply what he conceives himself to be, but he is what he wills, and as he conceives himself after already existing—as he wills to be after that leap toward existence. Man is nothing else but that which he makes of himself. That is the first principle of existentialism. And this is what people call its 'subjectivity,' using the word as a reproach against us. But what do we mean to say by this, but that man is of a greater dignity than a stone or a table?⁴³

I believe that what Sartre describes here is not existence *per se* but instead one view of personhood as a structure of existence. Personhood, seen in this way, is self-creation in the face of one's prior self, that is, willing oneself into existence in every moment rather than accepting an identity laid down in any prior mind or concept (including one's own). So Sartre's account of existence would need to be amplified or corrected in order to embrace being-supported or mutuality, which Sartre specifically rejected. Still, what Sartre describes as the "surge" or "leap" toward existence, the "greater dignity" of this vaulting kind of being over the fixed being of the stone, is a worth that is comparable to the worth described in the theological account. Surely the ethical payoff of all of this upsurging and leaping is that we are to "make way" for it, both in ourselves and in others.

Perhaps the idea common to both a religious and an anti-religious humanism is the normative injunction to let being be, to make room for existence. This is the rough and preliminary modeling of a body of rights. Rights are relations of mandated deference to the leap toward existence. Making way for personal existence

⁴³ Jean-Paul Sartre, *Existentialism is a Humanism*, reprinted in *EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE* 287, 290-91 (Walter Kaufman ed., 1956).

requires a certain elbow room for moving on from what one once was, or for recognizing one's freedom and responsibility for who one is and what one becomes. Making way for communion or for communal existence requires the clearing of space for love, support, friendship, trust, care, and mutual aid. At times, perhaps, either in a life or in the bearing of lives upon one another, it may be impossible to assume a posture that accepts both independence and communion as possibilities. Yet there are surely other times, for example in the making and honoring of interpersonal commitments—in marriage, in professional life, in political action—when the humanizing trajectories converge.

Rights to exist in personhood and in supportive union would be largely formal if there were no goods to claim us. The right to exist as person takes much of its content from the good things in life, which are there to be pursued and in which one ought to participate. The freedoms most worth protecting and subsidizing are those that enable people to turn toward these good things and to grow in their pursuit and enjoyment. To be sure, the fact that every person has an irreducible worth means at a minimum that one does not forfeit a right to certain decencies, no matter what character one has formed or what bad actions one has performed. But it is one thing to say that one has at least these rights; it would be another to say that these are the only rights. A right to exercise religion freely, to participate in dialogue about matters of common concern, to pursue education, and to form relations of various kinds—these have their basis in the good things to which a life can be oriented, as well as in norms of fairness and justice that regulate their distribution.

The principle of symmetry, then, offers a reminder that although humankind has worth, in all its structures (including the personal and the communal), and although this worth takes rough shape as the generic right (let being be), most of the hard ethical and institutional work in the shaping of personal and communal life involves the definition and pursuit of the goods that call to us in the name of our worth. In the personal life, a bad character is one disposed toward that which is not good or disposed toward the taking of what is good in unjust shares. In the communal life, it hardly needs to be stressed that groups may have both kinds of disposition, even if they cannot be said to have a bad "character" in a strict sense. If we intervene in the personal life, to turn people toward what is good, to mold their character, and to punish them and make them accountable for the wrong that they do, then we do so as well by intervening in the communal life. Neither respect

for persons nor respect for groups has anything to do with the signing of blank checks.

Although the principle of symmetry might be accepted to this point, there are those who insist upon an asymmetry on the plane of evil. It has been said that groups are more subject to evil than are persons because the group form distracts us from reflecting reasonably about what ought to be done and from accepting personal responsibility for our choices, actions, and character.⁴⁴ And there is a certain truth to this contention; many of us surely regret deeds that we have done and that we might not have done but for the matrix of some group or other that pressured us or distorted our perspective. Yet it is still important to see that when we do evil, we do it with the full force of our humanity. Whether we choose to assign a bad act to a group, a member, or both, our tendency to overestimate the value of group validation of our conduct or character and to underestimate our capacity for self-deception and self-seeking are simply and finally human failings.

The argument that personal and communal life are morally asymmetrical because the latter is more prone to evil than the former also overlooks the fact that some of the same human weaknesses that make persons vulnerable to group suasion for bad ends also make us open to group influence for the sake of good. Recognition of and response to the possibilities for good and for full participation in human being are furthered by the communities that teach us to love one another and that give us incentives to do so. There are meals that would not be served in soup kitchens and homeless shelters if there were no groups to raise funds, to organize efforts, to call upon a person to volunteer, to hold that volunteer to promises made and to a vision of what one is called to do in life. Yet some of the homeless people needing those meals are in their state of need because of the coldness and cruelty of groups that have branded and scarred them. But our very power to grasp homelessness as a need attests to home as a good, just as our power to make and destroy homes, to bring people home, and to drive them from home, attests to the possibilities of good and evil.

E. Communalism

It is clearly possible to believe that mutuality is a good, an end worth pursuing, without accepting the interpretation of mutuality

⁴⁴ For more on these views, see Garet, *supra* note 9, at 1009-14 (discussing James Madison's views of group value).

that I have offered here. For that reason I will sum up certain distinctions that provide natural joints, as it were, in the argument. Cutting the argument at any of these points leaves the whole disjointed, or so it seems to me; but others are bound to balk at my more metaphysical claims.

The first of these joints comes at the point at which I interpret mutuality as addressed to life's dialogue between being and non-being, with the latter represented above all by the inevitability of death. I see mutuality as a bearing-up of existence in the face of death: not a victory over death, but a kind of joy that balances death. But it is surely possible to interpret this joy in more psychological and less existential terms, while yet preserving the intuition that the give-and-take of committed relationships is worth making a part of human life.

The second joint is located in the interpretation of the idea of the worth of the human entity. I want to reserve the concept of good for two related aspects of moral life: good things (ends of action, worthwhile activities in which to participate), and the goodness of the choices to pursue these ends, or of the actions taken in their pursuit, or of a disposition to value them. Humankind, the human entity—as persons and groups, as societies, as all that falls within the universe of humankind—is not “good” in this twin sense (though neither is it bad). Now, as a resource for the delineation and justification of rights, we could make do with an account of what is good, together with a concept of justice (perhaps in its wide sense) to regulate how shares in what is good are to be distributed, or to set limits on what may be done in the pursuit of what is good. But, to me, such a view of rights would leave out their underlying theme, namely, the mandate to create a space for that which is of worth. So I want to say that humankind, the human entity, has worth or dignity that communicates this mandate, and that humankind so understood embraces persons, groups, the full domain of the human. And I want to say that, in the realm of the human, being is worth. I believe that this equation helps reveal mutuality for what it is: not just an inherent good, but a claiming value, one that sings to us in the voice of being.

It is possible that such an existential conception of rights will do much less real work in the inspection or justification of any claim, or of any institution that shapes our participation in mutuality, than the specific description of mutuality and personhood as goods together with whatever norms of justice or right action regulate their pursuit. But there is another possibility: that, whether

or not the existential conception of rights actually bears any justificatory load, it is just false in an anthropological sense. So here the joint is located at a juncture between worldviews. In one worldview, the absence of human worth is the real truth about evil or at least about sinfulness, a truth that then becomes the foundation for ethics. The obligation to love is unrelated to any worth in the "object," and is categorical. In another worldview, the obligation to love rests on and, once grasped, reveals a worth in the "other," who can now be recognized as "neighbor." Mutuality as reciprocal responses to the call of worth is a part of the conceptual universe of the latter worldview, but not of the former.

I have adopted the term "communality" to signify these special interpretations of mutuality, and to convey the role these interpretations play within a theory of group rights. Thus, when I speak of mutuality, I have in mind the general intuition that supportive relationships are worth pursuing. Actual relationships that participate in that good I will generally call supportive unions. But when I want to stress both the ontological interpretation of mutuality, namely the interpretation that sees being-supported as coplanar with being-towards-death, and the deference-commanding worth of humankind—both of these ideas joined together in an account of rights—I will speak of communality. Communality is an intelligible end (mutuality) reconceived metaphysically and regarded with an attitude of wonder and deference toward the worth of human being.

F: The Horizontal and the Vertical

The care and supportive work that persons provide for one another within a group can be regarded as "horizontal communality." In such a union, communality consists in mutual address by persons. But there is a second and complementary communality that often intersects the first: a "vertical communality" that binds the mutually addressing persons to a tradition, to nature, to the land, or to a place called "home." Commensals at the Passover Seder may enjoy horizontal communality with one another and vertical communality with the Israelites who were emancipated from their bondage in Egypt, with Jewish tradition, with parents or grandparents who presided at comparable Seder meals in generations past, with Israel, and with God.

Communality is being-supported; and so the relation between horizontal and vertical communality is itself a kind of support. For worshippers who come together to pray, to read scripture, to

study, or to participate in the ritual life of a church, the presence of God at the gathering deepens the mutual support that is already there in the congregation. A farming family may have a similar relationship with the land. The ability of family members to stand by one another and to bear each other through the anguish of life may be furthered by the continuing presence of the land that they have worked and on which they have lived.

The joining or mutual reinforcement of horizontal and vertical communality is but a particular instance of a wider phenomenon, well-illustrated by music. Musicians playing in an orchestra can congratulate themselves not only on the marvelous integration of their separate performances into a single presentation that conveys its own beauty and feeling but also on the fact that the existence of the music (the Mozart symphony, let us say) makes possible for them an otherwise unavailable participation in something splendid and deathless. Singers in a choir, as do dancers to music,⁴⁵ share the same sort of relationship between the horizontal and the vertical.

This relationship gives rise to possibilities of central concern to this Article. First, wherever the presence of vertical communality is closely bound up with a horizontal, interpersonal communality, a blow to the former may well prove a blow to the latter. For example, the family that has dwelt on the same land for many years, perhaps for generations, and has coaxed it into fertility and has responded to every crisis of drought or disease in the land, may lose some part of its horizontal communality if it loses the land.⁴⁶

Second, a community of persons sharing horizontal communality may become so caught up in or dependent upon its transpersonal partner in vertical communality that the latter relationship becomes destructive rather than supportive. For example, two per-

⁴⁵ In each of these musical analogies, it is possible to achieve a satisfying musical communion without the presence or cooperation of other people. One can dance alone, sing alone, or play a solo. The same holds true for communion with nature. Whether the call of communality comes to some of us in a way that pursues exclusively the vertical dimension, so that communion is sought and achieved without the involvement of other persons, I will not attempt to decide here. For discussion of William Cullen Bryant's *Thanatopsis*, and Emily Dickinson's *In Vain*, see *infra* notes 69-87 and accompanying text.

⁴⁶ See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362-363 (1986) (stressing "the central importance of certain object relations in maintaining the kinds of continuity related to personhood"). Investment in home and property builds up the humanity not only of persons but also of communities. See *id.* at 368-71.

sons joined in marriage may find that the institution of marriage, and its status as a sacrament, reifies rather than nourishes their supportive union. The existence of a particular house, or of land on which the family has lived for generations, may cease to sustain the family members and may instead come to dominate them or to conceal challenges and opportunities for creativity.⁴⁷ The non-negotiable demand by members of an ethnic "national minority" for secession and sovereignty over a specific territory may reflect not only the supportive relationship between the traditional homeland and the people's communal way of life (together with the land's utility: defensibility, access to ports, etc.) but also an overestimation of the significance of land and an underestimation of the extent to which mutual relationships among persons require the investment of institution-building labor.

In Parts III, IV, and V of this Article, I consider these relationships between horizontal and vertical communality, with special attention to bonds between groupness, nature and land, and God. Ancient problems that still go begging for solutions, such as the status of Jerusalem and access to (and management of) its holy places, together with more recent controversies, such as the violent attempts by certain Hindus to seize a Moslem mosque in India,⁴⁸ both illustrate these issues and suggest their great difficulty, perhaps their intractability. I have no proposals responsive to such issues. My more modest goal will be to trace some interconnections between groupness, nature and land, and God (Part III), with a view toward the analysis in Part IV of a recent free exercise case, *Lyng v. Northwest Indian Cemetery Protective Ass'n*.⁴⁹

The guiding idea of Parts III, IV, and V is that although a relation to land, nature, or a network of trans-personal realities is typical of communality, supplying a vertical support for horizontal mutuality, it would be advisable, especially given the evils that incline us to hatred of and violence against "outsiders," to discourage close interdependencies between communality and territoriality. Although Part V offers an example of a policy proposal designed to protect communality while lessening the influence of territorial factors, much further work will be needed to develop

⁴⁷ For example, see Professor Radin's discussion of "The Problem of Fetishism," in *Property and Personhood*, *supra* note 46, at 968-70.

⁴⁸ See Barbara Crossette, *Assassination in India*, N.Y. TIMES, May 22, 1991, at A1, A10.

⁴⁹ 485 U.S. 439 (1988).

such a proposal adequately and to evaluate it in relation to communality, other goods, and other moral norms.

III. THE PASTORAL HYMN TO COMMUNALITY

A. *Coming Home*

The appeal that supportive union makes to us can be heard clearly in song. Singing, like dancing, is especially well-suited to the expression of supportive union as a good. Whether singing or dancing do express or can express the deepest, most structuring aspects of supportive union as a possibility for human life is a question that I will not pursue here. I am content at present to exhibit some recurrent aspects of supportive union, and these are visible in songs both old and new. Of these recurring themes, the idea that nature or the land stimulate or support mutuality is especially striking. This idea is expressed in the kind of song that might be called the "pastoral hymn to communality." The pastoral hymn to communality embraces a wide variety of song and poetry, and crosses all the dimensions of culture, from "popular" or mass culture to the canon of scripture or literature. I will begin with the popular culture, or at least with a kind of moral drama, the musical comedy or light opera, that heartened American audiences a generation ago. Songs such as "Somewhere," from *West Side Story*,⁵⁰ expressed in a very powerful way the idea that there must be a space in which that which is "us" can be brought into being, in spite of the "us against them" that dooms such actualizations or at least constantly threatens them with death. Many other songs of this sort, if not of this degree of emotional power, could be considered. I will discuss one such song, of special meaning to me: "Come Home," from the musical *Allegro*, by Richard Rodgers and Oscar Hammerstein II.⁵¹

Three themes of importance here are presented clearly by "Come Home." First, the relationality that is held up as desirable or appropriate is a supportive relationality: its essence is not "feelings" *per se* but a kind of work, a mutual building-up of human life. Second, that relationality is presented as a "claiming value," a good that calls to us as human persons, a good whose call we

⁵⁰ LEONARD BERNSTEIN & STEPHEN SONDHEIM, *Somewhere, on WEST SIDE STORY* (Columbia Records 1961).

⁵¹ RICHARD RODGERS & OSCAR HAMMERSTEIN II, *Allegro* 146 (1948).

ought to heed. Third, the call of this special kind of relationality is associated with a certain kind of space or place, namely, "home."

The first stanzas of the song are framed by the summons that gives the song its name and theme.

Come home, come home,
Where the brown birds fly
Through a pale, blue sky
To a tall green tree,
There is no finer sight for a man to see—
Come home, Joe, come home!
Come home and lie
By a laughing spring,
Where the breezes sing
And caress your ear.
There is no sweeter sound for a man to hear—
Come home, Joe, come home.⁵²

The words of summoning or beckoning, "come home," which begin and end the song, and tie its images together, express a claiming value. The good of home is the kind of good that calls; coming home is heeding a call. Such a good does not present itself as an optional thing, to be pursued or not, as one chooses. Nonetheless, the pastoral imagery of the first two stanzas constructs a traditional bridge between the summons or call, with its elements of duty or externality, and the good, understood as that which is truly appealing. Thus home is first presented in these stanzas in images that delight the senses: the birds, a tree, and the sky, which delight the sense of sight (first stanza), and the spring and breezes, which "caress your ear" (second stanza). These sensory appeals bring us along toward the deeper truth about home, the truth expressed in the song's second half.

The deeper truth is that home is a site for reciprocal work among persons who look to one another for the building up of their lives.

You will find a world of honest friends who miss you,
You will shake the hands of men whose hands are strong,. . . .
You'll know you're back
Where there's work to do,
Where there's love for you
For the love you give.
There is no better life for a man to live.⁵³

⁵² *Id.*

⁵³ *Id.* Some might hear in Hammerstein's song a summons to the private life and to

The idea of home conveyed in these lines is not so much spatial as moral, defined by the ties of honest friendship, and imaged in the clasping of strong hands. Home is the space in which these strong hands find their life work, in mutual or reciprocal love; home is "Where there's love for you / For the love you give."⁵⁴ Home, then, is the site for living according to the good that claims us. The song's last line, before the closing refrain that binds the pastoral and moral stanzas through a final summons to "come home," declares that "There is no better life" to be lived.⁵⁵

The summons to give love for love, to do so with work-strengthened hands, comes to all people, or so I believe. But what the summons means, and where it stands among all the claims upon life, surely differs from person to person. For example, there are some for whom the Gospel norm of *agape* or neighbor-love⁵⁶ demands a selfless love that gives itself sacrificially, without hope of a loving response.⁵⁷ Those who understand this to be the deepest moral or even trans-moral truth about love might steel themselves to abandon supportive union for the sake of the neighbor or, indeed, the stranger. Many Bible stories stress that home must be left behind for the sake of God.⁵⁸ Perhaps these stories teach or

domestic virtues and enjoyments, and reject such a summons in the name of an ampler ethic of public service or professional development. "Home" certainly carries these meanings, especially when contrasted with "Work." But I understand Hammerstein to be linking home and work (home is "Where there's work to do"), rather than setting them against one another. The ideal, then, is to heed the call of a life lived in supportive union, in which people build one another up through the strength of their hands in work, as well as in friendship and in reciprocal love.

Needless to say, we face choices in deciding how and when to commit our energies and loving concern; the call of supportive union as a claiming value addresses those choices without, perhaps, offering a clear metric or principle responsive to the need to make such choices.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ "And one of them, a lawyer, asked him a question, to test him. 'Teacher, which is the great commandment in the law?' And he said to him, 'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it, You shall love your neighbor as yourself. On these two commandments depend all the law and the prophets.'" Matthew 22:35-40 (RSV); cf. Leviticus 19:18 (RSV) ("You shall not take vengeance or bear any grudge against the sons of your own people, but you shall love your neighbor as yourself: I am the Lord.").

⁵⁷ GENE OUTKA, *AGAPE: AN ETHICAL ANALYSIS* 22-43 (1972) (comparing views of *agape* as mutuality and self-sacrifice).

⁵⁸ For example, consider Yahweh's call to Abram, to leave his homeland and his father's house, see Genesis 12:1-4; Jesus' call to disciples James and John, who had to abandon their fishing nets and their father, see Matthew 4:18. For a discussion of these

remind us that even though the summons to share in a supportive union of persons is a truth in life, it may not be the highest truth; or it may be that we should not confuse our mutual aid "here below" with our final obligation to love and to accept love.

Perhaps the point should be sharpened. There have been those, both within and without specifically theological traditions, who have insisted that even if we are called to be home or to come home, the conditions of our existence preclude our ever being at home. Gabriel Marcel spoke of our human species as *Homo Viator*, "humankind the traveller," the sojourner.⁵⁹ This is to say that our defining condition, our nature, is that of wayfarer. Marcel's account of sojourning as our human condition is of special relevance here because he understood that condition to have ethical significance. We want to ask, then, how our wayfaring condition addresses us, how it responds to the appeal to "come home."

Perhaps a stable order can only be established if man is acutely aware of his condition as a traveller, that is to say, if he perpetually reminds himself that he is required to cut himself a dangerous path across the unsteady blocks of a universe which has collapsed and seems to be crumbling in every direction. . . . Does not everything happen as though this ruined universe turned relentlessly upon whomever claimed that he could settle down in it to the extent of erecting a permanent dwelling there for himself?⁶⁰

Of course, one might well reply that as for us, we do not want a "stable order," but prefer instead a social world more malleable and responsive to changing needs or desires. It is well to remember, however, that Marcel wrote these lines in 1943, a bombed, cratered, bloodied time, a time when the "ruined universe" indeed "turned relentlessly upon whomever claimed that he could settle down in it."⁶¹ And it must be noted that Hammerstein, writing at about the same time, summons us only to "come home": he uses no word as concrete, material, or fixed as "dwelling" to describe this "home," and of course he does not sing of a *permanent* dwelling.⁶²

passages and their bearing on issues of fidelity and abandonment, see Gare, *supra* note 39, at 159-60.

⁵⁹ See GABRIEL MARCEL, *HOMO VIATOR: INTRODUCTION TO A METAPHYSICS OF HOPE* (Emma Crawford trans., 1951).

⁶⁰ *Id.* at 153-54.

⁶¹ *Id.* at 154.

⁶² RODGERS & HAMMERSTEIN, *supra* note 51.

Still, there is nothing in "Come Home" that conveys the idea that a person is "required to cut himself a dangerous path across the unsteady blocks of a universe which has collapsed and seems to be crumbling in every direction,"⁶³ and indeed, the pastoral imagery in the first two stanzas of Hammerstein's song conveys a quite different sense. Although the natural world in Hammerstein's song is friendly to the enterprise of giving supportive love and provides in fact its own not inconsiderable measure of support, bringing claiming values along in the train of sensory delight, Marcel's nature is not supportive but "unsteady," its crumbling ruins offering impediments at every turn to the would-be settler. Even the traveller must "cut himself a dangerous path across the unsteady blocks": the path must be *cut* (nature does not offer the way through pastoral education), cut *across* the blocks that stand in the way like crumbling marble ruins.

B. Homeland and the Sublime

Although the question of whether the universe is truly unsteady and in ruins is perhaps for the cosmologist to answer, there is surely another sense in which this is a question that can properly be addressed to ourselves. In this latter sense, the question concerns the status of our own hearts and hopes, and the prospects for realizing through social and historical institutions actual relations of supportive union. It is surely ironic that the most intense celebrations or aspirations to at-homeness sometimes foster exclusion and abuse. The matter of evil or of irony surfaces at once if the scene is shifted from "Come Home," a song of ethical exhortation, to an otherwise comparable patriotic song, "America The Beautiful." Both songs depend on pastoral imagery to lift the heart from an initial responsiveness to beauty to a higher or more sublime moral response.

Oh beautiful for spacious skies,
For amber waves of grain.
For purple mountain majesties
Above the fruited plain.
America! America! God shed His grace on thee,
And crown thy good with brotherhood
From sea to shining sea.⁶⁴

⁶³ MARCEL, *supra* note 59, at 153.

⁶⁴ Katherine L. Bates & Samuel A. Ward, *America The Beautiful*, in *OUR LAND OF SONG* 189 (Theresa Armitage et al. eds., 1952).

The skies and plains, their color and expanse, invite us into the American landscape and turn our attention to the more sublime "mountain majesties." The mind's eye rises from plains to mountaintops to God, to whom we come in earnest prayer for grace. As the grain crowns the prairies with fruit, so God's grace is to crown the whole of our good with its high value, brotherhood. The moral good of brotherhood is to complete the fruition of the continent that stretches, in the final sublime angle of view, "From sea to shining sea."

Like "Come Home," "America The Beautiful" both expresses and actualizes the Wordsworthian axiom, "Love of nature leading to love of man."⁶⁵ Yet our joy in this sublime vista of mountain majesty, fraternity, and grace is tempered by an appreciation of the historical facts. The problem is not merely that we have failed to merit God's full grace, and that the prayer that our good be crowned with brotherhood has not been fully answered. The problem goes deeper, into the very trope that maps majesty and brotherhood upon the continent. The march "from sea to shining sea" required conquest, displacement, forced labor, coolie labor. It is perhaps for this reason that we are denied the benediction of brotherhood. The land and landscape that are meant to support our union and bless it with abundance instead bear witness to manifest destiny. Instead of sustaining us, they accuse us.

C. "That Pale Sustenance:" Mutuality, Aloneness, and Being-Towards-Death

To say that supportive union is a response to or remedy for loneliness is to notice something about the meaning of words, perhaps, but the observation does not look very deeply into life. There is a loneliness, or at least an aloneness, that endures in all human unions. Such unions do not erase personal identity, and though they afford a glimpse of what the dissolution of persons in a higher synthesis might be like, they do not realize that synthesis.

Supportive union is addressed not to loneliness in particular but to the whole swarm of ills that trouble us. So the person that suffers from a sense of meaninglessness might come to appreciate

⁶⁵ William Wordsworth, *Retrospect: Love of Nature Leading to Love of Man*, in WILLIAM WORDSWORTH: THE PRELUDE 1799, 1805, 1850, at 269 (book 8 of the 1850 PRELUDE) (Jonathan Wordsworth et al. eds., 1979).

life's meaning through giving supportive love to another, and being borne up by that love in return. Or the person who feels cold, unloving, even unlovable, might find in mutuality a warming toward life. Over against alienation, there is membership; countering deviance and marginality is participation and belonging. But again, this is but to note the meaning of words. In actual networks of social relations, it is difficult to know whether these forms of suffering should be attributed to an overestimation or an underestimation of the value of group life. The deviant, or at least the person that regards himself or herself as such and for that reason suffers, may well be the person who wants not too little but too much reassurance from some social group and from the roles and identities it enables. A person may feel lonely because he or she values mutuality too much, not too little; it may be valued beyond what the available relationships can yield. A person may feel unlovable not because he or she is stuck in an imperfect individualism but because his or her efforts to "come home" have been spurned. And without the intensity of membership and neighborliness that some social groups seem to supply to their members, others might not feel so left out.

Most of the conventional attributes of groupness as a good, then, do not look very deeply into the human condition. We begin to get past mere wordplay when we realize that the reality to which supportive union is addressed is not individuality but death, the fate which all individuals, lonely or not, must meet. Our passing away, or our passing toward our death, calls our being into question, or gives our being its ephemeral and even futile nature. Yet there is in supportive union a joyous encounter with being that addresses death's claim to mark the final truth about us.

That death is the near horizon of human existence, but not its farther horizon, is made clear by the 23rd Psalm. This beloved Psalm follows the same basic plan, of pastoral satisfaction leading toward a higher moral ideal or a deeper understanding of that which brings satisfaction, as "Come Home" and "America The Beautiful." But the Psalm differs from the other songs in addressing being-towards-death.

The Lord is my shepherd, I shall not want;
he makes me to lie down in green pastures.
He leads me beside still waters;
he restores my soul.
He leads me in paths of righteousness
for his name's sake.

Even though I walk through the valley of the shadow of death,
 I fear no evil;
 for thou art with me;
 thy rod and thy staff, they comfort me.
 Thou preparest a table before me in the presence of my enemies;
 thou anointest my head with oil, my cup overflows.
 Surely goodness and mercy shall follow me all the days of my
 life;
 and I shall dwell in the house of the Lord for ever.⁶⁶

Like the first verses of "Come Home" and "America The Beautiful," the Psalm begins with gratifying imagery of a humane natural landscape, and progresses to a moral plane. The shepherd leads onward from still waters to the "paths of righteousness." Yet even before the moral element is introduced, a yet deeper theme is presented: the theme of sustenance. The shepherd not only supplies what is needful ("I shall not want") in the form of rest and refreshment; "he restores my soul." The need for that restoration is described in terms of being-towards-death:⁶⁷ "Even though I walk through the valley of the shadow of death." Addressing being-towards-death is a being-with: "I fear no evil; for thou art with me." This being-with is not only comforting but also sustaining. The sustaining or bearing-up is first presented in terms of nourishment and rest, but then in terms of being borne-up in the presence of death. The faith that declares "I shall not want" at the outset of the Psalm envisions at song's end an eternal at-homeness: "I shall dwell in the house of the Lord for ever."

The 23rd Psalm affirms not only that being is finally sustained but also that the being-with that is sustaining is interpersonal. The shepherd, who is described in the third person in the opening pastoral verses of the song, is addressed for the first time as "thou" from the depths of the valley of the shadow of death. Faced with death as the defining horizon of life, the soul addresses the shepherd as a personal being. Indeed, there are persons at both ends of the relationship: "The Lord is *my* shepherd, *I* shall not want."

⁶⁶ Psalm 23 (RSV).

⁶⁷ "My God, my God, why hast thou forsaken me?", Psalm 22 (RSV), which just precedes "The Lord is my shepherd," strengthens the latter's expression of faith by releasing our heartfelt awareness of the power and pain of death. Thus the final pain of death is not its termination of organic life but instead the forsakenness that it communicates. Being forsaken in the face of death is the final form of aloneness.

So we have here the kind of relationship of direct mutual address that Martin Buber described as the "I/Thou."⁶⁸

But faith in being-supported or being-sustained in the face of death has also been expressed in more impersonal ways. Sometimes this very impersonality is essential to the kind of sustenance or support for being that the poet is trying to express. This is the case in William Cullen Bryant's "Thanatopsis," one of the high achievements of American transcendentalism.⁶⁹ Like "Come Home," "America The Beautiful," and the 23rd Psalm, "Thanatopsis" opens with an appeal to nature, and leads on to a serious moral vision and calling. Like the 23rd Psalm, "Thanatopsis" is concerned finally with being-towards-death. But where the 23rd Psalm locates being-supported, the bearing-up of being in the face of death, in the faithful mutual address of an I and a Thou, "Thanatopsis" situates being-supported within nature itself, albeit a nature spiritualized and viewed with reverence.

The poem opens by observing that "To him who in the love of nature holds / Communion with her visible forms, she speaks / A various language;"⁷⁰ so the themes of love of nature and indeed of communion with its accessible beauty are presented at once. This communion, deepened by reflection into a relationship with nature that goes beyond its surface beauty, adumbrates the being-with, the support for being, whose possibility the poet holds out to us. The "various language" of nature addresses even the soul's presentiment of death.

⁶⁸ MARTIN BUBER, *I AND THOU* 54-55 (1970). "Whoever says You does not have something; he has nothing. But he stands in relation." *Id.* at 55. In the ensuing discussion of three "spheres in which the world of relation arises," Buber draws distinctions especially relevant to the interpretation of *Thanatopsis*, *infra* notes 69-76 and accompanying text.

The first: life with nature. Here the relation vibrates in the dark and remains below language. The creatures stir across from us, but they are unable to come to us, and the You we say to them sticks to the threshold of language.

The second: life with men. Here the relation is manifest and enters language. We can give and receive the You.

The third: life with spiritual beings. Here the relation is wrapped in a cloud but reveals itself, it lacks but creates language. We hear no You and yet feel addressed; we answer—creating, thinking, acting: with our being we speak the basic word, unable to say You with our mouth. . . .

In every sphere, through everything that becomes present to us, we gaze toward the train of the eternal You; in each we perceive a breath of it; in every You we address the eternal You, in every sphere according to its manner.

BUBER, *supra* at 56-57.

⁶⁹ WILLIAM CULLEN BRYANT, *Thanatopsis*, in *THE POETICAL WORKS OF WILLIAM CULLEN BRYANT* 21-23 (1909).

⁷⁰ *Id.* at 21.

When thoughts
 Of the last bitter hour come like a blight
 Over thy spirit, and sad images
 Of the stern agony, and shroud, and pall,
 And breathless darkness, and the narrow house,
 Make thee to shudder, and grow sick at heart;—
 Go forth, under the open sky, and list
 To Nature's teachings, while from all around—
 Earth and her waters, and the depths of air—
 Comes a still voice. Yet a few days, and thee
 The all-beholding sun shall see no more
 In all his course; nor yet in the cold ground,
 Where thy pale form was laid, with many tears,
 Nor in the embrace of ocean, shall exist
 Thy image. Earth, that nourished thee, shall claim
 Thy growth, to be resolved to earth again,
 And, lost each human trace, surrendering up
 Thine individual being, shalt thou go
 To mix forever with the elements,. . .⁷¹

The pastoral lines invoking nature the teacher—"Go forth, under the open sky, and list / To Nature's teachings, while from all around— / Earth and her waters, and the depths of air— / Comes a still voice"—do not take us far from the opening stanzas of "Come Home." But the situation addressed by these teachings is named clearly, indeed with very disturbing clarity, in "Thanatopsis," as being-towards-death. The individual is lost to death; so the issue is not whether individuality is the last word for humanity, or how it can best be preserved for yet a moment longer.

The poem's second stanza commences, "Yet not to thine eternal resting-place / Shalt thou retire alone. . . ."⁷² Not only is individuality lost in being mingled with the elements of earth; the individual is accompanied in death by all of the other souls that have died and that rest in "the great tomb of man."⁷³ Yet, Bryant does not present this legion of dead souls as a "communion;" it is not a being-with.

[L]ose thyself in the continuous woods
 Where rolls the Oregon, and hears no sound,
 Save his own dashings—yet the dead are there:

⁷¹ *Id.* at 21-22.

⁷² *Id.* at 22.

⁷³ *Id.*

And millions in those solitudes, since first
The flight of years began, have laid them down
In their last sleep—the dead reign there alone.⁷⁴

No matter how you “lose yourself,” or remove yourself from the company of humankind and even perhaps from the burdens of individuality and of impending death, you are in the company of the dead. Yet this is no company at all, for the millions sleep in their “solitudes,” and “the dead reign there alone.” No mutuality such as that in which the Psalmist trusts addresses either the solitary individuality of the person or the ultimate dissolution of that individuality in death. And when, as the third stanza promises, those who follow you in death will be “gathered to thy side” and “make their bed with thee,” no saving love will subsist with these latecomers to the grave, any more than with those who preceded to the tomb.⁷⁵

Yet, it is precisely on these stark and comfortless terms that the final stanza of “Thanatopsis” rests its counsel and its vision of human being “sustained and soothed.”

So live, that when thy summons comes to join
The innumerable caravan, which moves
To that mysterious realm, where each shall take
His chamber in the silent halls of death,
Thou go not, like the quarry-slave at night,
Scourged to his dungeon, but, sustained and soothed
By an unfaltering trust, approach thy grave
Like one who wraps the drapery of his couch
About him, and lies down to pleasant dreams.⁷⁶

Finally, then, both “Thanatopsis” and the 23rd Psalm bring us up against the abyss of death “sustained and soothed / By an unfaltering trust.” Yet, the object of the trust, and to that extent the nature of being sustained, differs sharply. In the Psalm, the object of the trust is a personal God who supplies sustenance and comfort, and bears the soul through the valley of the shadow of death. In mutuality, faithfulness met by faithfulness, lies the only answer to being-towards-death. In “Thanatopsis,” the object of the trust is the impersonal joinder of all persons in the very earth whose outward forms present their show of beauty to the living.

⁷⁴ *Id.*

⁷⁵ *See id.* at 23.

⁷⁶ *Id.*

The transformation of being sustained, from the Psalmist's personal assurance to the poet's calm trust, is both deepened and challenged by the more modern intelligence and art of Emily Dickinson. The perhaps unmatched intensity of Dickinson's encounter with both communion and aloneness, with their relation to one another and to death, corresponds to the outward facts of her life, especially her privacy and retirement. Her poetry expresses the ecstasy of natural communion,⁷⁷ yet with rigorous honesty sets aside any possible interest that the cosmos might take in the transports of a mere self.⁷⁸ Dickinson's nature, like Bryant's, teaches of death; but the lesson is more intelligible, if less reassuring. What is given in "a certain slant of light, / On winter afternoons" is a precision of despair and a precognition of death:

Heavenly hurt it gives us;
We can find no scar,
But internal difference,
Where the meanings are—⁷⁹

The "heavenly hurt," whose meanings touch and come close to defining Dickinson's art, takes this form: that although com-

⁷⁷ A fine example of Dickinson's expression of intense communion in a natural setting is "Psalm of the Day," which opens with these verses:

A something in a summer's day,
As slow her flambeaux burn away,
Which solemnizes me.
A something in a summer's noon,—
An azure depth, a wordless tune,
Transcending ecstasy.
And still within a summer's night
A something so transporting bright,
I clap my hands to see;

and closes with the psalmodic affirmation that "The heaven unexpected came." EMILY DICKINSON, *Psalm of the Day*, in *COLLECTED POEMS OF EMILY DICKINSON* 118-19 (1982).

⁷⁸ The aurora borealis "paints my simple spirit / With tints of majesty, / Till I take vaster attitudes," exalting the self, half despite and half because of its "unconcern so sovereign / To universe, or me."

My splendors are menagerie;
But their competeless show
Will entertain the centuries
When I am, long ago,
An island in dishonored grass,
Whom none but daisies know.

EMILY DICKINSON, *Aurora*, in *COLLECTED POEMS OF EMILY DICKINSON*, supra note 77, at 159.

⁷⁹ EMILY DICKINSON, *There's a certain slant of light*, in *COLLECTED POEMS OF EMILY DICKINSON*, supra note 77, at 122.

munality in any straightforward sense is unavailable, there is nonetheless both communion and exaltation in the prayerful encounter with being-towards-death.

So we must keep apart,
You there, I here,
With just the door ajar
That oceans are,
And prayer,
And that pale sustenance,
Despair!⁸⁰

It is surely a long road, almost, one may say, the modernity-defining road, that leads from the Psalmist's comfort, gained in the encounter with a personal being-with that abides even in the valley of the shadow of death, to the "unfaltering trust" that sustains and soothes the transcendentalist, to "that pale sustenance, / Despair!" Yet, what unites these stations on the road is in some respects more important than what separates them. They share an extraordinary sensitivity to the being-with that bears us up, one wants to say, "In spite of all." Such a sensitivity cannot help but be, even for Dickinson—indeed, especially for Dickinson—a kind of faith. For though "we must keep apart," there is that in life and world that leaves the door just open to reunion: open just a crack, a crack as narrow as the oceans, as hopeful as prayer, as real and reliable as hopelessness.

D. Nature and Nation-Building

The first sentence of the Declaration of Independence says that "the laws of nature and of nature's God" entitle the American nation to a "separate and equal" station among the nations of the world.⁸¹ Because international law was understood to embody a kind of natural law, albeit a thoroughly conventional one, reflecting the common practices of states, perhaps the appeal to the "laws of nature" was not meant to carry much metaphysical weight. Yet, the reference to "nature's God," and the ensuing appeals to the divine Creation of humankind in the second sentence, suggest that perhaps a justification for the colonies' inde-

⁸⁰ EMILY DICKINSON, *In Vain*, in COLLECTED POEMS OF EMILY DICKINSON, *supra* note 77, at 80-81.

⁸¹ See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

pendent stance was sought not merely in convention (the “decent respect for the opinion of mankind”) but also in the structure of the cosmos, the order of the divinely created natural world. But where in nature is one to look for norms identifying just which political communities are to be self-governing? Clearly, the norm of “government with the consent of the governed,”⁸² to which the Declaration’s second sentence appeals, is relevant to the issue of independence; but such a norm cannot supply the full justification needed. After all, even if an act of secession carries the consent of the majority of those residing in the seceding territory, it is unlikely to carry the consent of the majority of those residing in the parent territory. Further, if sizeable percentages of the domestic population are opposed to the independent stance, it is difficult to read the “consent of the governed” as clearly standing on either side of the controversy.

A different “law of nature” may have stirred the imaginations of settlers and expansion-minded interests in the next century. Given a vast, well-watered and wooded continent, but thinly populated by native Americans (as well as by diverse European settlements), it seemed “manifest” to many that the land must be occupied by a single industrious people. To the extent that this imperative was understood to spring from the land itself, or from a divine ordinance for its humanization and settlement, “the laws of nature and of nature’s God” took on a new and perhaps more material meaning. But this hardly can be a meaning worth reviving today. Even if the earth’s land masses can be said to have a nature, or to embody nature, to say that they have a destiny to be filled out by a unitary people seems at best a projection of a very human ambition, one that has more in common with nature “red in tooth and claw” than with natural laws in an ethical or metaphysical sense. Nor is it much easier, leaving the nature of nature aside, to compose the attributes of a people, such as a common language or a common history, into an adequate justification for separate national identity.

It is interesting in this connection to compare the Declaration of the Establishment of the State of Israel, issued by the Provisional Council of State in Tel Aviv on May 14, 1948, and signed by David Ben-Gurion and 36 others, to the first sentences of the Declaration of Independence. While the American Declaration, as

⁸² *Id.*

we have seen, appeals to nature and to nature's God to justify the independent stance of the united colonies, the Israeli Declaration appeals to the land itself: Eretz-Israel. The Israeli Declaration commences:

Eretz-Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was shaped. Here they first attained to statehood, created cultural values of national and universal significance and gave to the world the eternal Book of Books.

After being forcibly exiled from their land, the people kept faith with throughout their Dispersion and never ceased to pray and hope for their return to it and for the restoration in it of their political freedom.⁸³

Neither in these passages nor elsewhere in the Declaration do its authors rest the case for the State of Israel on a Biblical argument that God committed that land to the people of ancient Israel and Judah, those whose descendants became the Jewish people. Instead, the argument is historical: it is in this land that a national people emerged and created a world-historical culture. While the American Declaration appeals to the Creator God and to the created human condition—its endowment with rights—the Israeli Declaration looks to the creative activity of the people in and upon the land. For it was in Eretz-Israel that the Jewish people “created cultural values”; and as the Declaration's third paragraph relates, it was to this “ancient homeland” that settlers have returned.⁸⁴ “Pioneers, *ma'pilim*⁸⁵ and defenders, they made deserts bloom, revived the Hebrew language, built villages and towns, and created a thriving community. . . .”⁸⁶ Thus nationhood is not a moral reflection of the shaping or sustaining power of the land, but a product of what human labor and imagination have done in and with that land. And yet, “After being forcibly exiled from their land, the people kept faith with it throughout their Dispersion and never ceased to pray and hope for their return to it and for

⁸³ The full English text of the Israeli Declaration is reproduced in Amos Shapira, *Judicial Review without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 459-62 (1983).

⁸⁴ See *id.* at 459.

⁸⁵ Those who “presumed” to come to Israel, despite official, legal, even military barriers. Compare Numbers 14:44, Habakkuk 2:4. I am indebted to Mordecai Finley for this translation.

⁸⁶ *Id.*

the restoration in it of their political freedom.”⁸⁷ This fidelity is offered as a central feature of national identity that furthers the argument for statehood. In this it bears comparison to the “unfaltering trust” by which we are to be “sustained and soothed” in “Thanatopsis,” and to the avowal of sustaining mutuality in the 23rd Psalm. Yet in the larger argument of the Israeli Declaration, keeping faith with the land is not so much an independent sustainer, bearing up life in the face of death, as a warrant for the creation or recreation of a political institution that will function to preserve the people, especially collectively but also individually, from the death-dealing forces of history, most recently manifested in the Nazi holocaust.⁸⁸

E. Summary

The pastoral hymn to communality encounters us in our loneliness as well as in our exaltation at the hands of natural beauty and leads us toward a conviction that we are finally sustained in the face of being-towards-death. This being-supported is a kind of being-with: restoration and sustenance in green pastures and beside still waters, and dwelling-with the Lord; communion with nature, heedful of its teachings, mindful of its receptivity to all human death; elevation by the presence of nature’s heedless “something,” and strength to receive “that pale sustenance, / Despair!” For the Psalmist, being-with is a personal and mutual relation between an I and a Thou; for the poet, it is a wise resignation to an impersonality that elevates solitude to humane dignity, or it is the ecstasy that comes, paradoxically enough, to the single one.

Both the Psalm and “Thanatopsis” repose trust and being-supported in a relation that looks beyond the work that people do together in their common social life. Dickinson’s “In Vain” feels the loss of companionship more intensely than either of the other texts, thereby making its insistence on the integrity of the solitary intellect all the more remarkable. Although it is no doubt a lesser poem, “Come Home” is in this respect more sociable or even sociological. Its concern is with the living of a life of supportive labor, in which strong hands clasp one another and build a life most worth living. The Israeli Declaration is sociological in just this way. Although it refers to a foundation for the community

⁸⁷ *Id.*

⁸⁸ *See id.* at 459-60.

that is laid in the land itself, its real concern is with the work that a people have done and can continue to do with and upon the land: labor that will require for its fruition that special work, the creation of a state. Without the land and its historic promise of home, without the possibility and factuality of the people's fidelity, death would in principle already have its victory. Without an institution to preserve and foster this shared existence, a cruel history would still deal death. Existent community requires both a grasp of the truth about the terms of life, so that being-with becomes possible, and an institutional form that enables supportive union to be actualized, however imperfectly, on the plane of human relations.

IV. INDIAN CEMETERY / PROTECTIVE ASSOCIATION

A discussion of the free exercise issue in *Lyng v. Northwest Indian Cemetery Protective Ass'n*⁸⁹ may suggest ways that communality bears on the analysis of a First Amendment problem and afford a contrast between this analysis and other approaches to religious liberty. In *Lyng*, the Forest Service wanted to complete a road through Forest Service land. The area transected by the road, the "high country," includes land considered sacred by members of the Yurok, Karok, and Tolowa Indian tribes.⁹⁰ The land is used for religious purposes, as described by the trial court:

Individuals hike into the high country and use 'prayer seats' located at Doctor Rock, Chimney Rock, and Peak 8 to seek religious guidance or personal 'power' through 'engaging in emotional [and] spiritual exchange with the creator.' Such exchange is made possible by the solitude, quietness, and pristine environment found in the high country. Certain key participants in tribal religious ceremonies such as the White Deerskin and Jump Dances must visit the high country prior to the ceremony to purify themselves and to make 'preparatory medicine.' [These dances provide the periodic 'World Renewal' that is essential to the Indians' religious belief system.⁹¹] The religious power these individuals acquire in the high country lends meaning to these tribal ceremonies, thereby enhancing the spiritual welfare of the entire

⁸⁹ 485 U.S. 439 (1988). The case also presented several statutory questions that I will not discuss here.

⁹⁰ See *id.* at 442.

⁹¹ See *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586, 591 n.4 (1983), *affirmed in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985), *aff'd in relevant part*, 795 F.2d 688 (9th Cir. 1986), *rev'd*, 485 U.S. 439.

tribal community. Medicine women in the tribes travel to the high country to pray, to obtain spiritual power, and to gather medicines. They then return to the tribe to administer to the sick the healing power gained in the high country through ceremonies such as the Brush and Kick Dances.⁹²

The Indian plaintiffs claimed that completion of the road would violate the sacredness of the land and impair its religious function because the road could be seen from the high country, logging and other traffic on the road could be heard in the high country, and because of the degradation of the natural environment from logging and increased recreational use.⁹³ Thus, the plaintiffs contended that these harms burdened the free exercise of their religion, and that because the Forest Service had reasonable alternatives to the completion of the road, or at least its completion along the planned route, the First Amendment barred the contemplated governmental action.

The trial court, applying *Wisconsin v. Yoder*,⁹⁴ found the Forest Service's plan for completion of the road in violation of the Free Exercise Clause. First, the court found that use of the "high country" in its pristine state was fundamental to the content and preservation of the Indians' religious way of life.⁹⁵ It concluded:

[U]se of the high country in training young persons in the tribes in traditional religious beliefs and ceremonies is necessary to preserve such practices and to convey them to future generations. Degradation of the high country and impairment of such training would carry 'a very real threat of undermining the [tribal] community[ies] and religious practice[s] as they exist today.'⁹⁶

Second, the Forest Service's interest in completing the logging road as planned was found to be less than compelling.⁹⁷

The Ninth Circuit affirmed;⁹⁸ but the Supreme Court, in an opinion by Justice O'Connor, reversed. Justice O'Connor largely

⁹² *Id.* at 591-92 (citations omitted).

⁹³ *See id.* at 592.

⁹⁴ 406 U.S. 205 (1972). For further discussion, see *supra* note 8 and accompanying text.

⁹⁵ In reaching this result, the court distinguished cases rejecting comparable Indian religious claims, finding that those unprotected religious uses were less intensive and fundamental to Indian communities than the uses threatened in the instant case. *See Northwest Indian Cemetery Protective Ass'n*, 565 F. Supp. at 595.

⁹⁶ *Id.* at 594 (quoting *Yoder*, 406 U.S. at 218).

⁹⁷ *See id.* at 595-96.

⁹⁸ 764 F.2d 581 (9th Cir. 1985) (affirming as to the constitutional question), *aff'd in relevant part*, 795 F.2d 688 (9th Cir. 1986), *rev'd*, 485 U.S. 439.

accepted the characterization of the religious harm offered by the Indians and embodied in the Forest Service's own environmental impact study. For example, she quoted the study's conclusion that the high country "is significant as an integral and indispensable [sic] part of Indian religious conceptualization and practice,"⁹⁹ and that the building of the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."¹⁰⁰ Justice O'Connor noted

that disruption of the natural environment caused by the . . . road will diminish the sacredness of the area in question and create distractions that will interfere with 'training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power.'¹⁰¹

The Court does not specifically say that it accepts all of these claims about the nature and degree of the harmful impact. Instead, Justice O'Connor relies on the briefs rather than on the trial court's findings of fact. But O'Connor states that "[i]t is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion."¹⁰² On the other hand, "it seems less than certain that construction of the road will be so disruptive that it will doom their religion. Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave."¹⁰³ Ultimately, however, O'Connor returns to the lower courts' conclusions, only to reject their view of the law: "Even if we assume that we should accept the Ninth Circuit's prediction, according to which the . . . road will 'virtually destroy the Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding [the Indians'] legal claims."¹⁰⁴

⁹⁹ *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. at 442.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 448.

¹⁰² *Id.* at 447.

¹⁰³ *Id.* at 451.

¹⁰⁴ *Id.* at 451-52 (citation omitted). Compare this passage: "The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices."

Justice O'Connor offers several reasons for her conclusion that "the Constitution simply does not provide a principle" such as that put forward by the Indians or applied by the courts below.¹⁰⁵ She does not attempt to assign any particular weight to these reasons; and I will not attempt to decide which of them, if any, were most central either to her own analysis at the time, or to the present state of free exercise doctrine after the Court's decision in *Employment Division v. Smith*.¹⁰⁶ O'Connor's reasons include these: (1) Whatever rights the Indians have, they must be subordinate to the government's rights as proprietor of its own land;¹⁰⁷ (2) The decision to build a logging road on federal land is an "internal procedure" of government, and the Free Exercise Clause creates no right to dictate such governmental internal affairs;¹⁰⁸ (3) The Free Exercise Clause protects against compelled or coerced violations of religious beliefs, not against religion-eroding impacts *per se*;¹⁰⁹ (4) Blocking the construction of the road would entail that the plaintiff Indians or other groups in other cases would have the power to prevent all invasive or intrusive uses of their sacred lands;¹¹⁰ (5) Although government may have some obligation to take religion-damaging impacts into account in its internal or proprietary decisions, it met that obligation in this case because it took a number of steps to minimize the harms.¹¹¹

Relying on some or all of these reasons, Justice O'Connor concludes that despite the harms that completion of the logging

Id. at 451. The overall effect of these many formulations of the Court's understanding of the harm is twofold. First, one gets a sense that the Court is assuming catastrophic consequences *arguendo*, so as to lay down a clear rule that will forestall argument in future cases that the harms in those cases are more devastating or more certain than in *Lyng*. Second, it seems that the Court's acceptance of these harms is at best notional; the unwillingness or inability to offer a canonical formulation of the harm clouds that harm in an atmosphere of unreality.

¹⁰⁵ See *id.* at 452.

¹⁰⁶ Justice O'Connor, concurring in the judgment in *Employment Division v. Smith*, 494 U.S. 872, 891 (1990), rejects Justice Scalia's contention that strict scrutiny is inapplicable to "neutral laws of general applicability," and explains the deferential review applied in *Lyng* as justified by government's freedom in the conduct of "its own internal affairs." *Id.* at 900-01.

¹⁰⁷ *Lyng*, 485 U.S. at 452; see *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 93 (1984) (plurality opinion of Justice White) ("Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities.").

¹⁰⁸ *Lyng*, 485 U.S. at 448 (quoting *Bowen v. Roy*, 476 U.S. 693, 699-70 (1986)).

¹⁰⁹ *Id.* at 456.

¹¹⁰ *Id.* at 453.

¹¹¹ *Id.* at 454.

road will cause to the Indians' religious way of life, they have no right under the Free Exercise Clause to overturn the government's decision. Not all of these reasons are equally strong. For example, I am not confident that a clear distinction can be drawn between "internal procedures" and regulations, or that such a distinction would be responsive to the principles and purposes of special constitutional protection for religious liberty. But I will not explore that issue here; nor will I work through the question of whether it matters, given the normative content of free exercise, whether religious harms flow from governmental action in its role as proprietor or as regulator, insurer, educator, and so on. I will assume that Justice O'Connor's concerns about the slippery slope are well-founded. And I will also assume that, if a court can look deeply enough into a government's choice set to discern that government has acted to reduce the religion-harming effects of its acts, it can also identify other more expensive impact-reducing measures that might have been taken, and balance the expense against the gravity of the harm. I make this assumption without settling the question of whether strict scrutiny is the right standard of review to apply in cases, like *Lyng*, that lack any contention that the harm to religious exercise is driven by prejudice against some or all religions.

I have treated most of Justice O'Connor's ideas cursorily, either assuming their validity or raising questions about them, while attending closely to her notion that coerced religious choices are the evil against which the Free Exercise Clause protects. The heart of this notion contains two claims: (1) that there is a distinction between laws that coerce the believer to disregard religious imperatives, and laws whose impact is harmful to religion but not coercive; and (2) that this distinction is of constitutional significance.

There is room to doubt the first claim. In a sense, all laws, even a governmental decision to build or complete a road, might be regarded as coercive or at least as potentially coercive. True, the completion of the road does not put the Indians to a choice between adherence to the tenets of their faith and receipt of some legal benefit. Nor must the Indians choose between acting as their faith demands and avoiding some threatened legal penalty. Yet, they face, at least implicitly, the choice of whether to lie down in the path of the government's bulldozers. The question of whether the existence of such an implicit or potential choice suffices to transmute the lead of "mere impact" into the gold of coercion

seems troubling and uncertain. The question strays immediately into thickets that cannot easily be cleared.

But even if the distinction between coercive and merely harmful laws can be made, O'Connor's second claim, that the distinction matters constitutionally, must still be questioned. One method of calling the distinction into question is to argue that because it seems to offer the kind of religious scrupulosity that can be coerced more protection than the kind of religiosity that can be harmed but not coerced, it is inconsistent with the spirit of the First Amendment's religion clauses, which demand even-handed treatment of all religions. A certain kind of Christianity, perhaps especially Protestant Christianity, may look with special horror upon governmental action that imposes upon the believer's choice of whether to adhere to the requirements of the faith. But other religions, and indeed other forms of Christianity, do not give such primacy to the believer's choices. They are concerned generally about the attainment of desirable religious end-states, such as mystical union, salvation, spiritual power, or the ability to heal or to be healed. Special judicial solicitude for bad religious consequences brought about through the medium of the believer's individual free choice in effect prefers Protestant-type religiosity to those forms of religion in which bad religious consequences can spring from governmental conduct directly, with or without the mediation of believer choice. Such a preference betrays the working of a constitutionally unacceptable parochialism or ethnocentrism, a selective indifference to the meaning and valence of religious ways of life.¹¹²

To me, however, the problem lies in the opposite direction. The Court fails to appreciate the nature and gravity of the free exercise burden, not because the Court is so secure in its own religious tradition that it cannot or does not understand others, but because it is not in possession of a reflectively deepened understanding of its own tradition.¹¹³ The Court need look no further than the texts explicated in the previous Part of this Article, to "Thanatopsis" and the 23rd Psalm, and to the larger genre of the

¹¹² David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 796, 787-89, 828-39 (1991).

¹¹³ The poetry and song whose themes of nature and communion I have discussed in Part III, *supra*, by no means represent the only medium for the development of these themes. See Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1595 (1991) (providing a fascinating discussion of the history of the theory and design of public parks, as well as an application of that history to *Lyng*).

pastoral hymn to communality, to see the challenged government action as threatening to snuff out the candle of mutuality that lights a people's way, through life, toward death.

The Court speaks of the function of the power quests, the prayer seats, and the dancing in the high country in terms of "belief systems" and "religious conceptualizations."¹¹⁴ Such an arid cognitivism is unconcerned about value: about the good things in life that ceremonies assure or make available. The same must be said for the Court's discussion of the projected impact of the Forest Service road on the Indians' ability to transmit their customs and beliefs to succeeding generations. It is true that socialization rights would be paramount if we were to adopt a functionalist view of the Free Exercise Clause or of group rights. If the preservation of either communal or religious communal ways of life (*Yoder*) were an end worth pursuing in its own right, then threats to the ability of a group to socialize its young, or to recruit new members, or to maintain its backbone of kinship rules or equivalent structuring principles, would give rise to powerful group rights claims. But function is no substitute or proxy for what is good or for what is real. The fact, assuming it to be a fact (and here we typically reach the limits of sociological knowledge), that a group will fall apart, assimilate, or disperse if a court does not intervene to protect its vital functions, of whatever kind, supports precious little in the way of a claim to such intervention. By adopting the language of functionalism in her description of the harms that the completion of the logging road might cause, Justice O'Connor guarantees the incoherence of the Indians' constitutional argument.

Taking a different path does not require a critique of ethnocentrism and a condemnation of selective empathy. Recall instead John Macmurray's idea¹¹⁵ that "religion is the celebration of communion." I choose to begin my analysis of *Lyng* with this claim because it reveals more completely than most such formulations its debt to a specific theological tradition. The claim is meant to be understood at two levels of generality. At the more specific or lower level of generality, the celebration of communion is the specifically and indeed the definitively Christian sacrament, reenacting Christ's redemptive pledge at the Last Supper, and securing for those who partake of the eucharist a participation in God's saving grace. At the higher level of generality, a human good is

¹¹⁴ *Lyng*, 485 U.S. at 442.

¹¹⁵ See *supra* note 32.

associated with this specific ritual: the good of being borne up against the realities of finitude and death, in virtue of a saving communion or being-supported. The higher level of generality makes the event commemorated and reenacted at the more specifically theological level intelligible in a wider context. It makes the dimension of value accessible across a broad range of assumptions and worldviews.

The intelligible harm and wrong in the construction and completion of the logging road, if harm and wrong there be, lie in the dashing of the human good that is the celebration of communion, the joyous encounter and joinder with that which supports one's personal existence. In the lives of the Indians, as in most lives, that encounter and joinder occur on both the "horizontal" and the "vertical" axes.¹¹⁶ One kind of communion is the fellowship of persons that come together in worship, while another kind of communion is with the ground of being,¹¹⁷ that which is usually called "transcendent" (but which nonetheless breaks through into the plane of human life). Both kinds of communion take place in the Indian ceremonies in the high country. The dances that achieve "world renewal," or the rites of purification that precede them, illustrate this double reality. On the one hand, there is the communion that is achieved by the dancers, who could not achieve their renewal without the work of all the other dancers, any more than the violinist in an orchestra can make a symphony without the work of all of the other musicians. On the other hand, there is the "music" to which the dancers dance. This is the music supplied by the ground of being, in this case literally the ground, the land and the mountains of the high country.

If the construction of the logging road is bad, this is because it takes from the Indians that which is good. "Belief systems" and "religious conceptualizations" are not good, although of course they also are not bad. The central move in any religiously musical interpretation of the First Amendment is to regard the word "religion" in that text as referring, in a non-dogmatic and even an evocative way, to one of the good things in life. In this Part of my Article I have tried to show how the Northwest Indians partake in that good thing, that simultaneously vertical and horizontal communion, and to contrast this view of the Indians as participating in a human good, with a more functionalist account that

¹¹⁶ See *supra* part II.F.

¹¹⁷ See 1 PAUL TILICH, *SYSTEMATIC THEOLOGY* 112, 156 (1967).

understands their ceremonials as functioning to produce meanings and to preserve the group over time. The high country, I shall say, is both the "green pastures" and the shepherd lord that makes me lie down there, it is both the "still waters" that restore my soul and the sustainer that leads me in the "paths of righteousness."¹¹⁸ So long as the Indians have their high country, "I shall dwell in the house of the Lord forever."¹¹⁹

In the high country, "Earth, that nourished thee, shall claim / Thy growth, to be resolved to earth again."¹²⁰ In their dancing and their visionary questing in the prayer seats of the high country, the Indians "So live" that they come to death "sustained and soothed / By an unfaltering trust."¹²¹

Of course, these are just claims, not proofs. I take some encouragement, however, from the name that the Indian plaintiff has given itself: "Indian Cemetery Protective Association." Protective Association is an apt description of the communality that bears us up against the inevitable death that awaits each of us; Indian Cemetery refers us not only to death but to the return of what was life to the land. Together, the two descriptions offer an apt name for that which addresses through being, dancing, and lying together, the fact of the body's dissolution.

V. TOWARD DEEPER PROBLEMS OF TERRITORIALITY

The resurgence of ethnic nationalism is one of the most striking, and, at least for those who have entertained universalistic hopes for modernity and post-modernity, shocking features of the contemporary world. Predictions from a generation and more ago of an increasingly secular world were exploded by the persistence and revival of every kind of religious life. Today, and perhaps for related reasons, what had once looked like a broad historical road toward such apparent goals as an open world market, freedom of movement between nations, and a united assault upon hunger and disease, seems to have doubled back upon itself. Especially in the vast regions of Europe and Africa that had fallen under the sway of the Soviet Empire, historical destinies now appear to be return-

¹¹⁸ See *supra* notes 66-68 and accompanying text (discussing the 23rd Psalm).

¹¹⁹ See *supra* text accompanying note 66.

¹²⁰ See *supra* notes 69-76 and accompanying text (discussing "Thanatopsis").

¹²¹ See *supra* text accompanying note 76.

ing by increasingly narrow paths to the ethnic nationalism of a previous era.¹²²

Religious sociologist Benjamin Nelson once defined modernization as the movement from "tribal brotherhood" to "universal otherhood."¹²³ Similarly, Max Weber half-celebrated, half-lamented the phenomenon he called *Entzauberung*, the "disenchantment of the world," in which rational mastery of nature and economy is furthered by interests inconsistent with a sense of wonder, of profoundly satisfying meanings, of mystical union with the stirrings of the cosmos.¹²⁴ Today, both nature and economy are everywhere breaching the levees of rational mastery, and the tribal brotherhoods experience whatever there is of wonder, meaning, and union, that accompanies the raping and disemboweling of age-old enemies.

We should search for institutional forms that can satisfy the claims of communality and serve the values of self-government, without encouraging a defensive territoriality or fostering the inter-group violence that is often associated with territorialism. Where ethnic and religious nationalism is at its strongest, demanding a territorial basis for the maintenance of a distinct people or tradition, and insisting that such a territory is the only legitimate unit for self-rule, the search for such institutional forms may be irrelevant. I do not say that institutions designed to accommodate, say, the contending political, religious, and nationalist claims to Jerusalem, cannot be imagined, or that, if imagined, cannot be imple-

¹²² Isaiah Berlin has distinguished between aggressive and nonaggressive nationalism and has dated the latter form to Herder's philosophy of belonging. See Nathan Gardels, *Two Concepts of Nationalism: An Interview with Isaiah Berlin*, N.Y. REV. OF BOOKS, Nov. 21, 1991, at 19. Berlin's effort to sort out differing ideas of group-identification and nationalism is necessary today, else inter-group violence will be simplistically attributed to notions about the value of groupness. After all, violence may be caused not only by unlimited collective pride but also by the continual dashing of hopes for membership and equal worth. Perhaps it would be helpful to draw yet another distinction: between the notions of mutuality or communality and *belonging*, the idea that Berlin says that Herder "virtually invented." *Id.*; cf. KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

¹²³ BENJAMIN NELSON, *THE IDEA OF USURY: FROM TRIBAL BROTHERHOOD TO UNIVERSAL OTHERHOOD* (2d ed. 1969).

¹²⁴ "The fate of our times is characterized by rationalization and intellectualization and, above all, by the 'disenchantment of the world.' [The concept is originally Schiller's; hence Weber's use of quotes.] Precisely the ultimate and most sublime values have retreated from public life either into the transcendental realm of mystic life or into the brotherliness of direct and personal human relations." Max Weber, *Science as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 155 (H. H. Gerth & C. Wright Mills eds., 1946).

mented. But it is as well to acknowledge at the outset that institutions that may go some distance toward satisfying communality and self-rule, without exacerbating territorialism, in the most favorable social settings, may have no chance to succeed in other settings.

Under ideal conditions, people holding common values, aspiring to live with one another, and sharing a common history, tradition, culture, or language, might coalesce into group-neighborhoods or group-communities and form a local government that could satisfy and protect these interests. If there is a market in local governments, if people are free to "vote with their feet" for the mix of tax burdens, social services, and civic symbolisms that is most attractive to them, and if group-protective or group-facilitating government is strongly preferred, then the basic political institution of self-rule by the residents of a territory might accommodate tastes for group-communities. But I doubt that the market in local governments can fully satisfy the moral requirements of communality.¹²⁵

¹²⁵ The ability of markets to satisfy the claims of mutuality might be tested by a proposal in which the large urban school district, with its jurisdiction over a territory with fixed boundaries, is replaced by a market in elective, non-territorial school districts. Under such a proposal, individuals or families residing in the territory formerly subject to the metropolitan school district would be free to join any school district meeting certain state-defined criteria and to direct a portion of their tax expenditure (that portion to be set by law) toward the school district so chosen. Residents would be free to form and to participate in the organization of new school districts, all of which would define their own district-wide curricula and standards (within the state-defined parameters). Thus, the range of school districts that would be open to residents of the metropolis would fluctuate over time, as new districts formed and old ones, perhaps, disbanded (although an equilibrium number of district "firms" in the metropolitan "market" might be reached). But the choice of district would not be dictated—certainly not *de jure*, and probably not *de facto*—by location of residence. Instead, any resident in the metropolitan area would be free to join any one school district.

By uncoupling school district choice from the choice of residential location, this plan offers some possible efficiency gains over the present, territorially-based form of school district jurisdiction. It might also involve some offsetting efficiency losses. Viewed from a different normative angle, the plan might seem attractive for reasons of justice, at least if it offers people an opportunity to exercise valued liberties in a fashion less controlled by income or wealth, assumed here to be a major determinant of residential location. Or the proposal may be problematic for such distributional reasons, for example if it were to result in affluent families paying a reduced share (in tax dollars or in managerial labor or talent) of the costs of maintaining schools for poor children. Bracketing both the efficiency and the distributive considerations, of special concern here are the ways in which the proposal might satisfy mutuality as a good.

Four questions can be identified, even on the basis of such a thin account of the proposal as that provided here. First, how might the value of mutuality be put in play in the deliberation leading to the adoption of the elective school-district plan? This is the problem of the role of the good in what might be called "market-constituting reasons."

CONCLUSION: BEYOND THE MID-RANGE ASSUMPTIONS ABOUT HUMAN NATURE

For some purposes, such as navigating on the open ocean, or driving across town, or gardening in the back yard, it does not matter that this world, our Earth, climbs up to mountain peaks or plunges into dark abysses. We can get by without facing up to the sublime or looking down into the deep. But the heights and depths are there, even if we do not ordinarily need to acknowledge them. And sometimes we must acknowledge them, if only to get our work done, or to go safely from here to there, or to find a place where life can be sustained.

Much legal and political theory is written to correspond to what might be called "mid-range" assumptions about human nature. It is assumed, for example, that people want things, that they differ to an extent from one another in what is wanted, and that they are capable of taking action to pursue those desires, on the basis of beliefs about the world. Often it is also assumed that reasoned inquiry is insufficient to identify what is most worth

Second, how might mutuality as a good be at stake in the more specific organizational choices on which the structure and outcomes of the elective school-district plan will depend? This is the problem of the role of the good in what might be called "market-regulating reasons." Third, how far is mutuality capable of being understood and advanced as a good by parents and families making their district-elective choices within the system? This question requires us to address the very significant question of how far groupness can be adopted as an end or good for individuals or families. This entails consideration into how it can be chosen, and in the case of school-district organizers and leaders, how it can be implemented. Finally, what dimensions of mutuality lie beyond the reach of a market-oriented proposal? And is it even possible that mutuality as a good is abraded or distorted by the adoption of a regime of school-district choice, or by the decisions that families make within such a system? Like the previous question, this fourth problem draws our attention to aspects of mutuality which are in some sense beyond choice.

It will also be necessary to consider possible relationships between mutuality and territoriality, or the association of groupness with a specific land. The proposal makes it marginally more possible for people to realize or participate in some valued forms of groupness without having to be concentrated in a given territory. Needless to say, powerful incentives for a territorial concentration of group members would survive the implementation of such a proposal. Orthodox Jews would still need to live within walking distance of temple on the Sabbath; immigrants speaking a common language would still find both convenience and acceptance in a common neighborhood. More external pressures, including discrimination by landlords, sellers, or mortgage lenders, and income and wealth disparities, also direct residential patterns along ethnic or racial tracks. Still, the proposal pushes modestly in an opposing direction, for under it, people can participate in some of the values of groupness, as they see those values, no matter where they happen to live. Thus the proposal enables an inquiry into a problem of central importance in a world in which renascent ethnic nationalism—some would say "tribalism"—poses fresh risks of particularism, intolerance, and violence.

pursuing in life, or that reasoned conversation may not enable disputants to discern which side is right. These may be called "mid-range" assumptions because they leave largely untouched the heights and depths of human existence, as they are known to the poet, the dramatist, the storyteller, the Psalmist, or indeed to the ordinary listener to their words.

In an earlier era of legal and political speculation, it was more fashionable than it has been recently to search for the design of institutions that would set free the human heart for love, or open barely imaginable realms of creative work and expressiveness. Such theories soar above the mid-range assumptions, to speak of nobility and commitment, peace, abundance, and all of the blessings that may come in the fulness of human life.

Or it has seemed wise to reckon with the depths of depravity and violence, of cruelty and monstrosity, to which human life can sink. Theories that have explored these depths again leave the mid-range assumptions behind, this time in an effort to deal properly with the existence of evil. And along another dimension, neither of good nor of evil, it has seemed wise to many thinkers, again of an older time, to bring forward in their work the reality that the human lives touched by the institutions of law and politics must end in death.

But from what is written today, it would scarcely be possible to infer that our lives, of wanting and acting, of reasoning and believing and feeling, are bound for death. Nor could one find in these writings any but a faint morning recollection of the dream of love; and the memory of evil is no more permitted than any other night fear to disturb the enjoyments of the day.

One can understand much about groups and their claims within the universe of the mid-range assumptions. But, more insistently perhaps than some other problems presented to modern legal and political thinking, the matter of the rights of groups asks to be considered in the light of love as a possibility for human life, of evil as the degeneration and destruction of that possibility, and of death as the fate that sets life's horizon.