

THE COST OF RIGHTS

Why Liberty Depends on Taxes

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TO GEOFFREY STONE

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Introduction:

COMMON SENSE ABOUT RIGHTS

ON AUGUST 26, 1995, a fire broke out in Westhampton, on the westernmost edge of the celebrated Long Island Hamptons, one of the most beautiful areas in the United States. This fire was the worst experienced by New York in the past half-century. For thirty-six hours it raged uncontrollably, at one point measuring six miles by twelve.

But this story has a happy ending. In a remarkably short time, local, state, and federal forces moved in to quell the blaze. Officials and employees from all levels of government descended upon the scene. More than fifteen hundred local volunteer firefighters joined with military and civilian teams from across the state and country. Eventually, the fire was brought under control. Astonishingly, no one was killed. Equally remarkably, destruction of property was minimal. Volunteerism helped, but in the end, public resources made this rescue possible. Ultimate costs to American taxpayers, local and national, originally estimated at \$1.1 million, may have been as high as \$2.9 million.

Opposition to government has been a defining theme of American populism in the late twentieth century. Its slogan is, Don't tread on me! Or as Ronald Reagan put it, "Government isn't the solution; it's the problem." More recently, critics of all things governmental, such as Charles Murray and David Boaz, have claimed that an "adult making an honest living and mind-

ing his own business deserves to be left alone,” and that the “real problem in the United States is the same one being recognized all over the world: too much government.”¹

Yet in Westhampton, on the spur of the moment, public officials were able to organize and direct a costly and collective effort to defend private property, drawing liberally on public resources contributed by the citizenry at large, for the emergency rescue of real estate owned by a relatively small number of wealthy families.

There is nothing exceptional about this story. In 1996, American taxpayers devoted at least \$11.6 billion to protecting private property by means of disaster relief and disaster insurance.² Every day, every hour, private catastrophes are averted or mitigated by public expenditures that are sometimes large, even massive, but that often go unrecognized. Americans simply assume that our public officials—national, state, and local—will routinely lay hold of public resources and expend them to salvage, or boost the value of, private rights. Despite the undesirably high incidence of crime in the United States, for instance, a majority of citizens feel relatively secure most of the time, in good measure due to the efforts of the police, publicly salaried protectors of one of our most basic liberties: personal or physical security.³

Public support for the kind of “safety net” that benefited the home owners of Westhampton is broad and deep, but at the same time, Americans seem easily to forget that individual rights and freedoms depend fundamentally on vigorous state action. Without effective government, American citizens would not be able to enjoy their private property in the way they do. Indeed, they would enjoy few or none of their constitutionally

guaranteed individual rights. Personal liberty, as Americans value and experience it, presupposes social cooperation managed by government officials. The private realm we rightly prize is sustained, indeed created, by public action. Not even the most self-reliant citizen is asked to look after his or her material welfare autonomously, without any support from fellow citizens or public officials.

The story of the Westhampton fire is the story of property ownership across America and, in truth, throughout the world. Indeed, it is the story of all liberal rights. When structured constitutionally and made (relatively speaking) democratically responsive, government is an indispensable device for mobilizing and channeling effectively the diffuse resources of the community, bringing them to bear on problems, in pinpoint operations, whenever these unexpectedly flare up.

The Declaration of Independence states that "to secure these rights, Governments are established among men." To the obvious truth that rights depend on government must be added a logical corollary, one rich with implications: rights cost money. Rights cannot be protected or enforced without public funding and support. This is just as true of old rights as of new rights, of the rights of Americans before as well as after Franklin Delano Roosevelt's New Deal. Both the right to welfare and the right to private property have public costs. The right to freedom of contract has public costs no less than the right to health care, the right to freedom of speech no less than the right to decent housing. All rights make claims upon the public treasury.

The "cost of rights" is a richly ambiguous phrase because both words have multiple and inevitably controversial meanings. To keep the analysis as focused and, along this dimension, as uncon-

tentious as possible, "costs" will be understood here to mean *budgetary costs* and "rights" will be defined as *important interests that can be reliably protected by individuals or groups using the instrumentalities of government*. Both definitions require elaboration.

DEFINING RIGHTS

The term "rights" has many referents and shades of meaning. There are, broadly speaking, two distinct ways to approach the subject: moral and descriptive. The first associates rights with moral principles or ideals. It identifies rights not by consulting statutes and case law, but by asking what human beings are morally entitled to. While no single agreed-upon theory of such moral rights exists, some of the most interesting philosophical work on rights involves an ethical inquiry, evaluative in nature, of this general kind. Moral philosophy conceives of nonlegal rights as moral claims of the strongest sort, enjoyed perhaps by virtue of one's status or capacity as a moral agent, not as a result of one's membership in, or legal relationship to, a particular political society. The moral account of rights tries to identify those human interests that may not, before the tribunal of conscience, ever be neglected or intruded upon without special justification.

A second approach to rights—with roots in the writings of the British philosopher Jeremy Bentham, American Supreme Court Justice Oliver Wendell Holmes, Jr., and legal philosophers Hans Kelsen and H. L. A. Hart—is more descriptive and less evaluative. It is more interested in explaining how legal systems actually function and less oriented toward justification. It is not a moral account.⁴ It takes no stand on which human interests are, from a philosophical perspective, the most impor-

tant and worthy. It neither affirms nor denies ethical skepticism and moral relativism. Instead it is an empirical inquiry into the kinds of interests that a particular politically organized society actually protects. Within this framework, an interest qualifies as a right when an effective legal system treats it as such by using collective resources to defend it. As a capacity created and maintained by the state to restrain or redress harm, a right in the legal sense is, by definition, a "child of the law."

Rights in the legal sense have "teeth." They are therefore anything but harmless or innocent. Under American law, rights are powers granted by the political community. And like the wielder of any other power, an individual who exercises his or her rights may be tempted to use them badly. The right of one individual to sue another is the classic example. Because a right implies a power that can be wielded, for good or ill, over others, it must be guarded against and restricted, even while being scrupulously protected. Freedom of speech itself must be trimmed when its misuse (such as shouting "Fire!" in a crowded theater) endangers public safety. A rights-based political regime would dissolve into mutually destructive and self-defeating chaos without well-designed and carefully upheld protections against the *misuse* of basic rights.

When they are not backed by legal force, by contrast, moral rights are toothless by definition. Unenforced moral rights are aspirations binding on conscience, not powers binding on officials. They impose moral duties on all mankind, not legal obligations on the inhabitants of a territorially bounded nation-state. Because legally unrecognized moral rights are untainted by power, they can be advocated freely without much worry about malicious misuse, perverse incentives, and unintended side

effects. Rights under law invariably raise such misgivings and concerns.

For most purposes, moral and positive accounts of rights need not be at odds. Advocates of moral rights and describers of legal rights simply have different agendas. The moral theorist might reasonably say that, in the abstract, there is no "right to pollute." But the positivist knows that, in American jurisdictions, an upstream landowner can acquire a right to pollute a river from a downstream landowner. The points are not contradictory, but simply pass each other in the night. Those who offer moral accounts and those who offer positive accounts are asking and answering different questions. So students of collectively enforceable rights have no quarrel with those who offer moral arguments on behalf of one or another right or understanding of rights. Legal reformers should obviously strive to align politically enforceable rights with what seems to them to be morally right. And those charged with enforcing legal rights would do well to convince the public that these rights are morally well founded.

But the cost of rights is in the first instance a descriptive, not a moral, theme. Moral rights have budgetary costs only if their precise nature and scope are politically stipulated and interpreted—that is, only if they are recognizable under law. True, the cost of rights can be morally relevant, for a theory of rights that never descends from the heights of morality into the world of scarce resources will be sorely incomplete, even from a moral perspective. Since "ought implies can," and lack of resources implies cannot, moral theorists should probably pay more attention than they usually do to taxing and spending. And they cannot fully explore the moral dimensions of rights protection if

they fail to consider the question of distributive justice. After all, collectively provided resources are often, for no good reason, channeled to secure the rights of some citizens rather than the rights of others.

Rights are ordinarily enforced in functioning and adequately funded courts of law. Not included among the rights discussed in this book, therefore, are rights such as those of women raped in war zones of Bosnia or Rwanda. Existing political authorities have in effect turned their backs on the sickeningly brutal wrongs perpetrated under such conditions, claiming that such crimes do not fall under their jurisdictions. Precisely because remedial authorities universally shrug them off, such miserably neglected "rights" have no direct budgetary costs. In the absence of a political authority that is willing and able to intervene, rights remain a hollow promise and, at present, place no burdens on any public treasury.

Not even the ostensibly legal rights guaranteed under international human rights declarations and covenants will be discussed here unless subscribing national states—capable of taxing and spending—reliably support international tribunals, such as those in Strasbourg or the Hague, where genuine redress can be sought when such rights are violated. In practice, rights become more than mere declarations only if they confer power on bodies whose decisions are legally binding (as the moral rights announced in the United Nations Declaration of Human Rights of 1948, for example, do not). As a general rule, unfortunate individuals who do not live under a government capable of taxing and delivering an effective remedy⁵ have no legal rights. Statelessness spells rightslessness. A legal right exists, in reality, only when and if it has budgetary costs.

Because this book focuses exclusively on rights that are enforceable by politically organized communities, it pays no attention to many moral claims of great importance to the liberal tradition. This regrettable loss of scope can be justified by an enhanced clarity of focus. Even if legally unenforceable rights are put to one side, enough difficult problems remain to occupy our attention.

Philosophers also distinguish between liberty and the value of liberty. Liberty has little value if those who ostensibly possess it lack the resources to make their rights effective. Freedom to hire a lawyer means little if all lawyers charge fees, if the state will not help, and if you have no money. The right to private property, an important part of liberty, means little if you lack the resources to protect what you own and the police are unavailable. Only liberties that are valuable in practice lend legitimacy to a liberal political order. This book does not focus exclusively on the budgetary costs of rights that are enforceable in courts of law, therefore, but also on the budgetary costs of making those rights exercisable or useful in daily life. The public costs of police and fire departments contribute essentially to the "protective perimeter" that makes it possible to enjoy and exercise our basic constitutional and other rights.⁶

DEFINING COSTS

American law draws an important distinction between a "tax" and a "fee." Taxes are levied on the community as a whole, regardless of who captures the benefits of the public services funded thereby. Fees, by contrast, are charged to specific beneficiaries in proportion to the services they personally receive. The individual rights of Americans, including the right to private

property, are generally funded by taxes, not by fees.⁷ This all-important funding formula signals that, under American law, individual rights are public not private goods.

Admittedly, the quality and extent of rights protection depends on private expenditures as well as on public outlays. Because rights impose costs on private parties as well as on the public budget, they are necessarily worth more to some people than to others. The right to choose one's own defense lawyer is certainly worth more to a wealthy individual than to a poor one. Freedom of the press is more valuable to someone who can afford to purchase dozens of news organizations than to someone who sleeps under one newspaper at a time. Those who can afford to litigate obtain more value from their rights than those who cannot.

But the dependency of rights protection on private resources is well understood and has traditionally attracted greater attention than the dependency of rights protection on *public* resources. Lawyers who work for the American Civil Liberties Union (ACLU) voluntarily accept a cut in personal income in order to defend what they see as fundamental rights. That is a private cost. But the ACLU is also a tax-exempt organization, which means that its activities are partly financed by the public.⁸ And this, as we shall see, is only the most trivial way in which rights protection is funded by the ordinary taxpayer.

Rights have social costs as well as budgetary costs. For instance, the harms to private individuals that are sometimes inflicted by criminal suspects released on their own recognizance can reasonably be classed among the social costs of a system that takes serious measures to protect the rights of the accused. A comprehensive study of the costs of rights, therefore, would

necessarily devote considerable attention to such nonmonetary costs. But the budgetary costs of rights, treated in isolation from both social costs and private costs, provides an ample and important domain for exploration and analysis. Focusing exclusively on the budget is also the simplest way to draw attention to the fundamental dependence of individual freedoms on collective contributions managed by public officials.

Unlike social costs, "net costs" (and benefits) cannot be temporarily put to one side. Some rights, although costly up front, increase taxable social wealth to such an extent that they can reasonably be considered self-financing. The right to private property is an obvious example. The right to education is another. Even protecting women from domestic violence may be viewed in this way, if it helps bring once-battered wives back into the productive workforce. Public investment in the protection of such rights helps swell the tax base upon which active rights protection, in other areas as well, depends. Obviously enough, the value of a right cannot be assessed by looking solely at its positive contribution to the gross national product (GNP). (While the right of prisoners to minimal medical care is not self-financing, it is no less obligatory than freedom of contract.) But the long-term budgetary impact of expenditures on rights cannot be left out of the picture.

Rights, it should also be noted, may impose a burden on the public fisc beyond their direct costs. A foreign example will help drive this point home. Freedom of movement was created in South Africa by the abolition of the notorious pass laws. But the public costs of building urban infrastructure—water supply, sewage systems, schools, hospitals, and so forth—for the millions who, using their newly won freedom of movement, have

flooded from the countryside into cities, is proving astronomically high. (Since the abolition of South Africa's pass laws was one of the most indisputably just acts of recent times, it should not be necessary to revaricate about its indirect financial costs in order to defend it.) On a more modest scale, here at home, the Third Amendment freedom from having troops quartered in private homes requires that taxpayers fund the construction and maintenance of military barracks. Similarly, a system that scrupulously protects the rights of criminal suspects will make it more costly to apprehend criminals and prevent crimes. And so on.

Such indirect costs or compensatory expenditures, because they directly involve budgetary outlays, fall within the "costs of rights" as narrowly defined in this book. They are especially important because, in some cases, they have led to the curtailment of the rights of Americans. For example, Congress has instructed the secretary of transportation to withhold funding from those states that have not yet abolished the right to ride a motorcycle without a helmet. This decision was based in part on a study made at Congress's request of medical costs associated with motorcycle accidents, including the extent to which private accident insurance fails to cover actual costs. If concern for indirect public costs plays such an important role in the legislative restriction of what some consider our freedoms, the theory of rights obviously cannot leave such costs out.

Finally, this is a book about the nature of legal rights, not a detailed study of public finance. It asks what we can learn about rights by reflecting on their budgetary costs. The rough dollar amounts cited here are therefore meant to be illustrative only. They are certainly not the product of an exhaustive and precise

inquiry into the budgetary costs of various rights. To calculate accurately the costs of protecting any given right is immensely complicated, for bookkeeping reasons alone. In 1992, judicial and legal services in the United States cost the taxpayer roughly \$21 billion.⁹ But joint costs and multi-use facilities make it difficult to specify what portion of this \$21 billion was spent on the protection of rights. Similarly, police training presumably improves the humane treatment of suspects and detainees. But while it helps protect their rights, training is primarily intended to increase the capacity of police officers to apprehend criminals and prevent crimes, and in that way to protect the rights of law-abiding citizens. So how could we possibly calculate the exact percentage of the police training budget that is earmarked for the protection of the rights of suspects and detainees?

Empirical research along these lines is certainly desirable. But before such research can be sensibly undertaken, certain conceptual foundations must be laid. To lay such foundations is one of the principal purposes of this book. Once the costs of rights becomes an accepted topic of research, students of public finance will have ample incentive to provide a more precise and thorough account of the dollar amounts devoted to the protection of our basic liberties.

WHY THIS TOPIC HAS BEEN IGNORED

Although the costliness of rights should be a truism, it sounds instead like a paradox, an offense to polite manners, or perhaps even a threat to the preservation of rights. To ascertain that a right has costs is to confess that we have to give something up in order to acquire or secure it. To ignore costs is to leave painful tradeoffs conveniently out of the picture. Disappointed by the

way recent conservative majorities on the Supreme Court have limited various rights first granted during the tenure of Chief Justice Earl Warren, liberals may hesitate to throw a spotlight on the public burdens attached to civil liberties. Conservatives, for their part, may prefer to keep quiet about—or, as their rhetoric suggests, may be oblivious to—the way that the taxes of the whole community are used to protect the property rights of wealthy individuals. The widespread desire to portray rights in an unqualifiedly positive light may help explain why a cost-blind approach to the subject has proved congenial to all sides. Indeed, we might even speak here of a cultural taboo—grounded in perhaps realistic worries—against the “costing out” of rights enforcement.

The widespread but obviously mistaken premise that our most fundamental rights are essentially costless cannot be plausibly traced to a failure to detect hidden costs. For one thing, the costs in question are not so terribly hidden. It is self-evident, for instance, that the right to a jury trial entails public costs. A 1989 study provides a dollar amount: the average jury trial in the United States costs the taxpayer roughly \$13 thousand.¹⁰ Just as plainly, the right to reasonable compensation for property confiscated under the power of eminent domain has substantial budgetary costs. And the right of appeal in criminal cases clearly assumes that appellate tribunals are publicly funded. And that is not all.

American taxpayers have a serious financial interest in damage suits against local governments involving hundreds of millions of dollars every year in monetary claims. In 1987 alone, New York City paid out \$120 million in tort expenses; in 1996, this figure had risen to \$282 million.¹¹ Understandably, every

large city in the country is trying to implement tort liability reform, for the right of individuals to sue municipal governments is placing an increasingly intolerable drain on local budgets. Why should judges, narrowly focused on the case before them, have the power to decide that taxpayers' money must be spent on tort remedies rather than, for instance, on schoolbooks or police or child nutrition programs?

Legal professionals understand perfectly well the budgetary implications of the right to sue local governments for damages. They also know that taxpayer money can be saved by openly or surreptitiously curtailing other sorts of rights. The taxpayer's interest in lower taxes can be accommodated, for instance, by defunding defense services for the poor.¹²

Public savings can be achieved just as effectively by tightening standing requirements for civil actions (by curtailing classical rights), as by tightening eligibility requirements for food stamps (by curtailing welfare rights). When judges hold pretrial conferences to encourage out-of-court settlements in order to reduce delay and congestion in court, they implicitly acknowledge that time is money—more specifically, that court time is taxpayers' money. Under the due process clause, government agencies must provide some sort of hearing in connection with taking away a person's liberty or property (including driver's licenses and welfare benefits), but courts routinely take budgetary expenses into account when deciding how elaborate a hearing to hold. In 1976, discussing the procedural safeguards required by a due process guarantee, the Supreme Court said that

the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a fac-

tor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society, in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.¹³

Statements of this sort, which have become central to the particular legal question of "how much process is due?" may seem like common sense, but their implications have not yet been fully spelled out or thought through.

In interpreting statutes and precedents, and in deciding who may sue whom, courts of appeal as a matter of course take account of the risk of being overwhelmed by costly suits. More generally, courts are given discretion over their own caseloads because, among other things, public expenditures earmarked for the system of justice are limited. Rules such as the Eleventh Amendment (which bans suits against states for money damages in federal court) suggest that American public officials have always understood the costs to the taxpayer of unrestricted individual rights to sue the government. Today, the nationwide move toward no-fault auto insurance, which restricts the rights of individuals to sue other individuals for personal injury, reflects a growing concern over the exorbitant costs, including public costs, of certain private rights. The rise of medical malpractice tribunals has similar sources. Everyone knows that it is very expensive to make existing facilities readily accessible to

people with disabilities as mandated by the Americans with Disabilities Act of 1990. But should it not be just as obvious that taxpayers (who else?) must foot the bill when judges hold that compensation is to be paid for a taking of private property or interpret overcrowding in prison as a violation of the Eighth Amendment prohibition on cruel and unusual punishment?

LIBERALS MAY BE SKEPTICAL INITIALLY about the very subject of this book. But why should cost consciousness diminish our commitment to the protection of basic rights? To ask what rights cost, first of all, is not to ask what they are worth. If we could establish to the last penny what it would cost to enforce, say, the right of equal access to justice in a given budgetary year, we would still not know how much we, as a nation, should spend on it. That is a question for political and moral evaluation, and it cannot be settled by accounting alone.

Such considerations are unlikely to assuage liberal apprehensions, however, given the current and apparently bipartisan crusade to cut public expenditures. Fearing that short-sighted voters may respond all too eagerly to “we cannot afford it” arguments put forward by conservatives, liberals may worry, reasonably enough, that cost-benefit analysis will be misused by powerful private interests. They may fear that inevitable disclosures of waste, inefficiencies, and cost overruns—while good in principle—will eventually lead to a further slashing of budgetary allocations for the protection of even our most precious rights. This fear is not wholly unjustifiable. But its appropriateness depends a good deal on what cost-benefit analysis actually entails.

Conservative anxieties are equally acute, but assume a dif-

ferent hue. Many conservatives cling instinctively to a cost-blind approach to the protection of the so-called negative rights of property and contract, because staring hard at costs would shatter the libertarian fiction that individuals who exercise their rights, in the classic or eighteenth-century sense, are just going about their own business, immaculately independent of the government and the taxpaying community. The public costs of non-welfare rights show, among other things, that “private wealth,” as we know it, exists only because of governmental institutions. Those who attack welfare programs on principle should be encouraged to contemplate the obvious—namely, that the definition, assignment, interpretation, and protection of property rights is a government service that is delivered to those who currently own property, while being funded out of general revenues extracted from the public at large.

So neither liberals nor conservatives, at the outset, are likely to welcome an inquiry into the costs of rights. And a third obstacle to such a study stems from the distinctive sensibility, and perhaps the vested interests, of the legal profession itself. The judiciary prides itself on being insulated from the political process, following the dictates of reason rather than expediency and commonly deferring to the legislature and executive in fiscal matters. But in practice, judges defer much less in fiscal matters than they appear to, simply because the rights that judges help protect have costs.

That rights are financed by the extractive efforts of the other branches does not mesh smoothly with judicial self-images. The problem is serious. Are judges, though nominally independent, actually dangling on purse strings? Does justice itself hinge on riders attached to spending bills? And how can a judge, given

the meager information at his or her disposal (for information too has costs) and his or her immunity to electoral accountability, reasonably and responsibly decide about an optimal allocation of scarce public resources? A judge may compel a street to remain open for expressive activity or a prison to improve living conditions for prisoners, but can that judge be sure that the money he or she commandeers for such ends would not have been used more effectively by inoculating ghetto children against diphtheria?

This dilemma does not affect judges alone. Take civil liberties litigators: because they conceive of rights as weapons with which to confront and attack government, they may be uncomfortable with an inquiry into the budgetary cost of rights that focuses attention on a very simple and concrete way in which rights are "creatures" of government. Generally speaking, the costliness of rights protection explodes a powerful illusion about the relationship between law and politics. If rights depend in practice on the going rate of taxation, then does not the rule of law hinge upon the vagaries of political choice? And is it not demeaning to understand rights, which after all protect human dignity, as grants awarded by the public power (even if the power in question is democratically accountable)? As guardians of priceless values, must not judges, especially, rise above the daily compromises of power-wielders and power-seekers?

Whatever the merits of the "should" in this case, it has little relevance to what "is." To imagine that American law is or can be untouched by the tradeoffs familiar to public finance can only blind us to the political realities of rights protection. For the cost of rights implies, painfully but realistically, that the political branches, which extract and re-allocate public resources, sub-

stantially affect the value, scope, and predictability of our rights. If the government does not invest considerable resources to ensure against police abuse, there will be a great deal of police abuse, whatever the law on the books may say. The amount the community chooses to expend decisively affects the extent to which the fundamental rights of Americans are protected and enforced.¹⁴

ATTENTION TO THE COST OF RIGHTS raises a flurry of additional questions, not just about how much various rights actually cost, but also about who decides how to allocate our scarce public resources for the protection of which rights, and for whom. What principles are commonly invoked to guide these allocations? And can those principles be defended?

Finally, the simple insight that rights have costs points the way toward an appreciation of the inevitability of government and of the various good things that government does, many of which are taken so much for granted that, to the casual observer, they do not appear to involve government at all. Attention to the public costs of individual rights can shed new light upon old questions such as the appropriate dimensions of the regulatory-welfare state and the relationship between modern government and classical liberal rights. Public policy decisions should not be made on the basis of some imaginary hostility between freedom and the tax collector, for if these two were genuinely at odds, all of our basic liberties would be candidates for abolition.

Chapter One

ALL RIGHTS ARE POSITIVE

IN *ROE v. WADE*, the Supreme Court ruled that the U.S. Constitution protects a woman's right to have an abortion.¹ A few years later, complications arose: does the Constitution also mandate public funding of abortions? Does it require the government to defray the costs of nontherapeutic abortions if the government is already subsidizing childbirths? In *Maher v. Roe*, the Court concluded that the Constitution does no such thing.² A denial of Medicaid payments, it explained, "places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." This is because "an indigent woman who desires an abortion suffers no disadvantage as a consequence of the state's decision to fund childbirth," for the government is in no way responsible for her penury. According to the Court, a state legislature's refusal to foot this particular bill, while it may effectively deny safe abortion to a penniless woman, in no way violates that woman's "right" to choose.

To reconcile its holding in *Roe* with that in *Maher*, the Court drew a crucial distinction. It said that "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative." Apparently, the Constitution can, with unimpeachable consistency, first prohibit the government from intruding and afterward permit the government to withhold support. A woman is constitutionally protect-

ed from impermissible restrictions by state agencies, the Court went on to explain. But her freedom of choice does not carry with it "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." Protection from a burden is one thing, entitlement to a benefit is another. And indeed such a distinction between a liberty and a subsidy sounds like common sense. But is it supportable? On what grounds?

Behind the distinction adduced by the Court lies an unspoken premise: immunity from invasion by the state involves no significant entitlement to financial resources. Theorists who share this assumption see constitutional rights as shields established solely to protect vulnerable individuals from arbitrary imprisonment, intrusions on contractual freedom, takings of property, and other forms of governmental abuse. Personal liberty can be secured, they typically argue, simply by limiting the government's interference with freedom of action and association. Individual freedom requires not governmental performance but only governmental forbearance. Construed along these lines, rights resemble "walls against the state," embodying the assurance that Congress "shall make no laws" restricting private liberty or imposing excessive burdens. By dividing government against itself, the Constitution prevents public authorities from intruding or abridging or infringing. The limited government that results leaves plenty of room for private individuals to mind their own business, to breathe and act freely in unregulated social realms. Such immunity from government meddling is even said to be the essence of constitutionalism. And while action is costly, inaction is relatively cheap, or perhaps free. How could anyone confuse the right to noninterference by public authorities with monetary claims upon the public treasury?

THE FUTILITY OF DICHOTOMY

The opposition between two fundamentally different sorts of claim—between “negative rights” such as those granted in *Roe* and “positive rights” such as those denied in *Maher*—is quite familiar.³ But it is anything but self-evident. It does not appear anywhere in the Constitution, for one thing. It was wholly unknown to the American framers. So how does it arise? It has profoundly shaped the legal landscape of the United States, but does it provide a cogent classification of different kinds of rights? Does it make sense?

Without some simplifying scheme, admittedly, the plethora of rights entrenched in American law are hard to think about in an orderly fashion. U.S. citizens successfully claim such a cornucopia of rights, and these rights are so palpably diverse, that generalization about them sometimes seems beyond our reach. How should we think systematically about rights so disparate as the right to strike and freedom of conscience, the right to sue journalists for libel and the right to be free from unreasonable searches and seizures? And how should the right to vote be compared to the right to bequeath one’s property, or the right of self-defense to freedom of the press? What do these highly variegated claims have in common? And how can we classify or subdivide, in a rational way, the rights protected and enforced in the United States today?

Even a selective list of the everyday rights of ordinary Americans will make our embarrassment of riches clear. It is not easy to arrange in useful categories such strikingly diverse claims as the right to an abortion, the right to practice one’s profession, the right to terminate an agreement, the right to be considered

for parole, consumer rights, parental rights, the right to submit evidence before a review board, the right to testify in court, and the right against self-incrimination. Under what basic headings should we classify the right to change one's name, the right of private security guards to make arrests, the exclusive right to decide who publishes (copyright), stock-purchase rights, the right to recover money damages for defamation, tenants' and landlords' rights, the right to smoke the dried leaves of some (but not all) plants, and the right to judicial review of the rulings of administrative agencies? Are there purposes for which it is helpful to sort into two basic groupings—say, the positive and the negative—the right of legislative initiative, the right not to be denied a job because of sexual preference, the right to return to a job after taking unpaid maternity leave, the right to interstate travel, freedom of testation, and the right to inform authorities of a violation of the law? And what about hunting and fishing rights, the right to keep and bear arms, a landowner's right to abate nuisances upon his land, mineral rights, the right to present testimony about the victim of a crime in order to influence the sentencing of a perpetrator, pension rights, the right to give to charity tax-free, the right to recover a debt, the right to run for office, the right to use extrajudicial arbitration methods, and the right to view obscene materials at home? And how should we classify visitation rights in prison, the right to dispose of one's property as one wishes, the right of an expelled high school student to a hearing, the right to marry and divorce, the right of first refusal, the right to be reimbursed for overpayments, the right to the presence and advice of an attorney before custodial interrogation by law enforcement authorities, the right to emigrate, the right to

receive counseling about birth control, and the right to use contraceptives?

This ramshackle inventory of only some of the everyday rights of ordinary Americans suggests the magnitude of the challenge facing anyone who wants to map the sprawling terrain of our individual liberties. Even if we set aside archaic-sounding anomalies, such as the "right of rebellion," we will have a rough time organizing into two mutually exclusive and jointly exhaustive groups the swarm of claims and counterclaims that help structure the commonplace expectations and routine behavior of U.S. citizens today.

THE LURE OF DICHOTOMY

True, grand efforts at simplification cannot be impeded. For some purposes, moreover, simplification can be useful; the question is whether the relevant simplification helps illuminate reality.⁴ Among recent attempts to impose an easily grasped order on the multiplicity of basic rights invoked and enforced in this country, the one to which the Supreme Court, for good or ill, has lent the weight of its authority has been far and away the most influential. In classrooms and on editorial pages, in judicial opinions and before congressional committees, a distinction is routinely drawn between negative rights and positive rights, or (what is often perceived to be the same thing) between liberties and subsidies. The distinction gains its initial plausibility, perhaps, because it seems to track the politically more familiar contrast between small government and big government.

This dichotomy has taken deep root in common thought and expression. Those Americans who wish to be left alone prize their immunities from public interference, it is said, while those

who wish to be taken care of seek entitlements to public aid. Negative rights ban and exclude government; positive ones invite and demand government. The former require the hobbling of public officials, while the latter require their affirmative intervention. Negative rights typically protect liberty; positive rights typically promote equality. The former shield a private realm, whereas the latter reallocate tax dollars. The former are privative or obstructionist, while the latter are charitable and contributory. If negative rights shelter us from the government, then positive rights grant us services by the government. The former rights include the rights of property and contract and, of course, freedom from being tortured by the police; the latter encompass rights to food stamps, subsidized housing, and minimal welfare payments.

This storybook distinction between immunities and entitlements has become so influential, even authoritative, that the Supreme Court was able to assume its validity without serious examination or even argument. Neither its relative historical novelty nor its palpable inadequacy has weakened its hold on academic analysis or the public imagination. But wherein lies its seemingly irresistible appeal?

The attraction of this categorization stems partly from the moral warning or moral promise it is believed to convey. Conservative devotees of the positive/negative rights distinction routinely urge, for instance, that welfare rights are potentially infantilizing and exercised on the basis of resources forked out free of charge by the government. Classical liberal rights, they add by way of contrast, are exercised autonomously, American-style, by hardy and self-sufficient individuals who spurn paternalism and government handouts.

Critics of the regulatory-welfare state also interpret the immunities/entitlements dichotomy in the light of a simplified narrative of historical betrayal or decline. Negative rights, they say, were the first liberties to be established, having been wisely institutionalized at the Founding, if not earlier, whereas positive rights were added afterward, in an ill-considered twentieth-century deviation from the original understanding. When the United States was first created, the protection and enforcement of basic rights was limited to guarantees against tyrannical and corrupt government. Only much later—with the New Deal, the Great Society, and the Warren Court—were supererogatory entitlements to public assistance introduced. Instead of protecting us from government, this conservative story continues, welfare rights make people dependent on government, thus eroding “real freedom” in two different ways: by unfairly confiscating the private assets of the wealthy and imprudently weakening the self-sufficiency of the poor. By profusely adding new positive rights to old negative ones, modern liberals such as Franklin Delano Roosevelt and Lyndon Johnson not only betrayed the Founders’ conception of freedom, but also summoned into existence a whole flock of impoverished and dependent citizens who now, alas, must be elbowed off the government soup wagon.

This narrative of decline is recounted with palpable earnestness by political conservatives. American progressives could not disagree more. Nevertheless, they too frequently assume that there are basically two kinds of rights, the positive and the negative. They merely redescribe the shift from immunities to entitlements as a progressive tale of evolutionary improvement and social growth.⁵ While conservatives deplore the emergence of

taxpayer-subsidized welfare rights, progressives applaud the rise of positive guarantees—interpreting this as a sign of political learning and an improved understanding of the requirements of justice. Charitable impulses have finally come to the fore and been codified into law. New Deal and Great Society America broke with the narrow principles that served the interests of property holders and big business to the detriment of the majority. Viewed with hindsight, negative rights were limited or perhaps even cruel. The eventual rise of positive rights registered a novel appreciation of the need to supplement non-interference with public provision.

One and the same distinction, in effect, obligingly serves two contrary outlooks. While American liberals typically associate rights of property and contract with immoral egoism, American conservatives link private liberties to moral autonomy. Progressives trace entitlements to generous solidarity, while libertarian conservatives connect welfare handouts to sickly dependency. Opposite evaluations are attached, but the conceptual skeleton is the same. Although politically nonpartisan, the negative/positive rights dichotomy is by no means politically innocent, shaping as it does some of our most important debates. It provides the theoretical underpinnings for both attacks on and defenses of the regulatory-welfare state. The negative/positive polarity, we might even say, furnishes a common language within which welfare-state liberals and libertarian conservatives can understand each other and trade abuse.

But who is correct? Are property rights instruments of selfish egoism or sources of personal autonomy? Do welfare rights (including those to medical care or employment training) express solidarity and fellow-feeling or erode initiative and

inculcate dependency? Should individuals be protected only from government or also by government? These questions encapsulate much of the American rights debate today. Naturally, any dichotomy that appeals simultaneously to both the Left and the Right is likely to be hard to criticize and immensely difficult to slough off. Taken-for-grantedness, however, does not mean that the distinction is justifiable either descriptively or normatively. Upon inspection, the contrast between two fundamental sorts of rights is more elusive than we might have expected, and much less clear and simple than our Supreme Court has assumed. In fact, it turns out to be based on fundamental confusions, both theoretical and empirical. But if the distinction itself is flawed, then perhaps neither side of the American rights debate is on solid ground.

THE COST OF REMEDIES

"Where there is a right, there is a remedy" is a classical legal maxim. Individuals enjoy rights, in a legal as opposed to a moral sense, only if the wrongs they suffer are fairly and predictably redressed by their government. This simple point goes a long way toward disclosing the inadequacy of the negative rights/positive rights distinction. What it shows is that all legally enforced rights are necessarily positive rights.

Rights are costly because remedies are costly. Enforcement is expensive, especially uniform and fair enforcement; and legal rights are hollow to the extent that they remain unenforced. Formulated differently, almost every right implies a correlative duty, and duties are taken seriously only when dereliction is punished by the public power drawing on the public purse. There are no legally enforceable rights in the absence of legally

enforceable duties, which is why law can be permissive only by being simultaneously obligatory. That is to say, personal liberty is secured merely by limiting government interference with freedom of action and association. No right is simply a right to be left alone by public officials. All rights are claims to an affirmative governmental response. All rights, descriptively speaking, amount to entitlements defined and safeguarded by law. A cease-and-desist order handed down by a judge whose injunctions are regularly obeyed is a good example of government "intrusion" for the sake of individual liberty. But government is involved at an even more fundamental level when legislatures and courts define the rights that such judges protect. Every thou-shalt-not, to whomever it is addressed, implies both an affirmative grant of right by the state and a legitimate request for assistance addressed to an agent of the state.

If rights were merely immunities from public interference, the highest virtue of government (so far as the exercise of rights was concerned) would be paralysis or disability. But a disabled state cannot protect personal liberties, even those that seem wholly "negative," such as the right against being tortured by police officers and prison guards. A state that cannot arrange prompt visits to jails and prisons by taxpayer-salaried doctors, prepared to submit credible evidence at trial, cannot effectively protect the incarcerated against tortures and beatings. All rights are costly because all rights presuppose taxpayer funding of effective supervisory machinery for monitoring and enforcement.

The most familiar government monitors of wrongs and enforcers of rights are the courts themselves. Indeed, the notion that rights are basically "walls against the state" often rests upon the confused belief that the judiciary is not a branch of govern-

ment at all, that judges (who exercise jurisdiction over police-officers, executive agencies, legislatures, and other judges) are not civil servants living off government salaries. But American courts are "ordained and established" by government; they are part and parcel of the state. Judicial accessibility and openness to appeal are crowning achievements of liberal state-building. And their operating expenses are paid by tax revenues funneled successfully to the court and its officers; the judiciary on its own is helpless to extract those revenues. Federal judges in the United States have lifetime tenure, and they are quite free from the supervisory authority of the public prosecutor. But no well-functioning judiciary is financially independent. No court system can operate in a budgetary vacuum. No court can function without receiving regular injections of taxpayers' dollars to finance its efforts to discipline public or private violators of rights, and when those dollars are not forthcoming, rights cannot be vindicated. To the extent that rights enforcement depends upon judicial vigilance, rights cost, at a minimum, whatever it costs to recruit, train, supply, pay, and (in turn) monitor the judicial custodians of our basic rights.

When the holder of a legal right is wronged, he may usually petition a taxpayer-salaried judge for relief. To obtain a remedy, which is a form of government action, the wronged party exercises his right to use the publicly financed system of litigation, which must be kept readily available for this purpose. To have a right, it has been said, is always to be a potential plaintiff or appellant.⁶ Rights can be retrenched, as a consequence, by making it harder for complainants to seek vindication before a judge. One way to do this is to deprive courts of their operating funds. To claim a right successfully, by contrast, is to set in motion

the coercive and corrective machinery of public authority. This machinery is expensive to operate, and the taxpayer must defray the costs. That is one of the senses in which even apparently negative rights are, in actuality, state-provided benefits.

To protect rights, judges exact obedience. Courts issue injunctions to restrain the unlawful infringement of patents or to force realty companies to rent to African Americans under the Fair Housing Act of 1968. To insure freedom of information, courts order federal agencies to provide information requested by the public. Liberty, in such cases, hinges upon authority. When judicial oversight is lax, rights are correspondingly flimsy or elusive. American immigration authorities routinely discriminate on the basis of physical disability, political opinion, and national origin. To remark that aliens trying to enter the United States have few legal rights is to observe that, under American law, they have little access to publicly funded judicial remedies.

But courts are not the only tax-funded government bodies to deliver remedies. For instance, consumer protection bureaus in various states regularly receive complaints and act to protect consumers' rights by penalizing the unfair and deceptive practices of retailers. At the federal level, the Consumer Product Safety Commission spent \$41 million in 1996 identifying and analyzing hazardous products and enforcing manufacturer compliance with federal standards.⁷ Many other government agencies serve similar rights-enforcing functions. The Department of Justice itself spent \$64 million on "civil rights matters" in 1996. The National Labor Relations Board (NLRB), which cost the taxpayer \$170 million in 1996, protects the rights of workers by imposing obligations on management. The Occupation-

al Safety and Health Administration (OSHA)—\$306 million expended in 1996—defends the rights of workers by obliging employers to provide a safe and healthy workplace. The Equal Employment Opportunity Commission (EEOC), with a 1996 budget of \$233 million, safeguards the rights of employees and job seekers by obliging employers not to discriminate in hiring, firing, promotion, and transfers.⁸ In every one of these cases, the cost of enforcing rights can be chalked up to the price of enforcing their correlative duties.

To be sure, it is possible to complain that several or all of these agencies are wasteful or too expensive, or even that some of them should be abolished. But while no particular set of institutions is ideal, some substantial governmental machinery for providing remedies must remain, for rights have nothing to do with autonomy from public authority. Because the wholly private and self-sufficient individual has no rights, it is implausible to be "for rights" and "against government."

A few more examples will help clarify this point. The right to bequeath one's private property to heirs of one's choice—"the right to speak after death"—is obviously a power that no individual testator can exercise autonomously, without the active assistance of state agencies. (Proceedings for construing and establishing the validity of wills, and arbitrating the disputes to which wills sometimes give rise, are managed by probate courts, which are funded by taxpayers, not merely by user fees.) And the right to make an enforceable will is perfectly typical, for *no* rightsholder is autonomous. What would the right to marry mean without public institutions, which must spend taxpayers' money to define and create the institution of marriage? What would the right to child support mean in practice if state

agencies could not successfully fulfill requests to locate parents or deduct unpaid support from federal and state tax refunds? What would the copyrights owned by private American entertainment industries be worth in, say, China, if the U.S. government did not put its official weight behind their enforcement?

Something similar can be said about the right to private property. American law protects the property rights of owners not by leaving them alone but by coercively excluding nonowners (say, the homeless) who might otherwise be sorely tempted to trespass. Every creditor has a right to demand that the debtor repay his debt; in practice, this means that the creditor can instigate a two-party judicial procedure against a defaulting debtor in which a delict is ascertained and a sanction imposed. And he can also count on the sheriff to "levy upon" the personal property of the debtor, to sell it, and then to pay the delinquent's debts from the proceeds. The property rights of creditors, like the property rights of landowners, would be empty words without such positive actions by publicly salaried officials.

The financing of basic rights through tax revenues helps us see clearly that rights are public goods: taxpayer-funded and government-managed social services designed to improve collective and individual well-being. All rights are positive rights.

Chapter Two

THE NECESSITY OF GOVERNMENT PERFORMANCE

THE IDEA THAT RIGHTS ARE ESSENTIALLY AIMED "against" government, rather than calling on government, is patently wrong when applied to what is sometimes called "private law." Rights in contract law and tort law are not only enforced but also created, interpreted, and revised by public agencies. At both federal and state levels, courts and legislatures are constantly creating and readjusting the legal rules that give meaning to rights, as well as specifying and respecifying the various exceptions to these rules. By adjudication and legislation, public authorities not only enforce contracts but also decide which contracts are enforceable and which are unenforceable, unconscionable, or otherwise meaningless pieces of paper. Judges and legislators not only award damages to the victims of negligence but also identify which excuses are legally acceptable for what might otherwise be classified as negligent behavior. The right of American citizens to sue an FBI agent for violating their rights under color of law is wholly defined by statutes and statutory and constitutional interpretation. The rights of out-of-state recreational and commercial fishers owe much of their content to judicial interpretation of the privileges and immunities clause and all of their content to positive law.

The rules defining ordinary rights of this sort are intricate, technical, and full of highly subtle qualifications. In American

jurisdictions, for instance, contract law generally stipulates that an injured party cannot collect damages for a loss that he could have avoided after he learned of the breach of contract. An individual who asserts his rights under contract law or tort law must therefore master, or submit to, a complex tissue of rules and exceptions that are, in turn, administered by state officials. He must avail himself of the public power first for the specification of these rules (and exceptions), then for their interpretation, and finally for their enforcement.

The plaintiff's right to bring an action at law against a defendant is not adequately described as a right "against" the state. It is neither a right to be independent of the state nor a right that protects the rightsholder from the state, but rather a right to use state power to give legal effect to a private agreement, to enjoin trespassers from entering private property, to collect compensatory or punitive damages from someone who has negligently or recklessly caused an injury, and so forth. When I sue someone under contract or tort law, I am not trying to get the government "off my back"; I am trying to get it "on my case." In private law, the rightsholder does not need government forbearance; he needs government performance.

To draw attention to the positive role of government in the protection of each and every American liberty is not to deny that, for very limited purposes, some versions of the negative/positive dichotomy may be usefully applied to the analysis of rights. It is perfectly plausible to distinguish between performances and forbearances. The landowner has a legal right that passersby refrain from trespassing on his land. A contract holder may have a right to ensure that third parties do not interfere with an ongoing contractual relationship. In each case, to have a right is to have a

legal power to prevent others from acting in a harmful way.¹ Such a right to the self-restraint of others can be usefully contrasted to rights to compel the desirable actions of others, such as the right of a creditor legally to coerce a debtor to repay a debt, or a right of a contracting party to compel his contractual partner to perform.

Because American law recognizes wrongful omissions as well as wrongful commissions, the distinction between rights to require action and rights to prohibit action is useful and important. *But it should not be confused with the much less plausible distinction between negative and positive rights, as these concepts are commonly deployed, not only by the Supreme Court.* The wholly reasonable distinction between forbearance and performance lends no credence to the opposition between immunity against government interference and entitlement to government service. For the forbearance/performance dichotomy, as just described, does not, in the first instance, refer to government action at all. One private individual has a right either to force another private individual to act or to preclude another private individual from acting. In both cases, obviously, enforcement of a right requires decisive government performance. To protect myself from trespassers and to collect from a delinquent debtor, I have a right to set in motion a tax-funded system of litigation, devoted to accurate fact-finding (which is far from easy) and operated by government bodies—namely, the courts.

HOW EXCEPTIONAL ARE CONSTITUTIONAL RIGHTS?

But are not private-law rights (such as the right to sue for breach of contract) quite unlike constitutional rights (such as freedom of speech)? It makes little sense to distinguish between proper-

ty rights and welfare rights by calling the former negative and the latter positive. Is it more plausible to label private-law rights as positive (requiring government action), and constitutional rights as negative (requiring governmental self-restraint)? When speaking of rights against state action, after all, the Supreme Court was referring exclusively to constitutional rights. So this question arises: are the liberties protected under the Bill of Rights wholly negative? Do they require the state to refrain from acting without requiring the state to act?

Some constitutional rights depend for their existence on positive acts by the state, and the government is therefore under a constitutional duty to perform, not to forbear, under the Constitution as it stands. If it allows one person to enslave another, by doing nothing to disrupt an arrangement that amounts to involuntary servitude, the state has violated the Thirteenth Amendment. Under the First Amendment's protection of freedom of speech, states must keep streets and parks open for expressive activity, even though it is expensive to do this, and to do it requires an affirmative act. Under the protection against "takings" of private property without just compensation, the government is probably under an obligation to create trespass law and to make it available to property owners, and a partial or complete repeal of the law of trespass—a failure to act, in other words, to protect private property—would likely be unconstitutional. If a judge accepts a bribe offered by a defendant and therefore does nothing to protect the plaintiff's rights, the judge has violated the due process clause. If a state declines to make its courts available to enforce certain contract rights, it has probably impaired the obligations of contracts, in violation

of the contracts clause. In all these cases, the government is obliged, by the Constitution, to protect and to perform.

Practically speaking, the government "enfranchises" citizens by providing the legal facilities, such as polling stations, without which they could not exercise their rights. The right to vote is meaningless if polling place officials fail to show up for work. The right to just compensation for confiscated property is a mockery if the Treasury fails to disburse. The First Amendment right to petition for a redress of grievances is a right of access to government institutions and a right, incidentally, that assumes that the government can perform for the benefit of aggrieved citizens. Nor is this all.

If an agency of the American government tries to deprive anyone of life, liberty, or property, it is required to give that person timely notice and provide an opportunity to be heard before an impartial body. The right to subpoena witnesses in one's own defense is useless if the court's solemn writs and summonses are greeted with laughter. And what does it mean to say that state and federal governments are prohibited from denying equal protection before the law if not that they are required to provide it? Protection against unequal treatment by government officials requires other government officials to receive and resolve complaints. The constitutional right to due process—like the private right to bring an action in contract or tort—presupposes that, at the taxpayers' expense, the state maintains and makes accessible complex and relatively transparent legal institutions within which the cumbersome formalities of fair, public, and understandable adjudication occur.

Admittedly, some important constitutional rights are plausi-

bly styled as duties of the government to forbear rather than to perform. But even those “negative rights”—such as prohibitions on double jeopardy and excessive fines—will be protected only if they find a protector, only if there exists a supervisory state body, usually a court of some kind, able to force its will upon the violators or potential violators of the rights at issue. Even rights reasonably described as operating “against” the state require the (affirmative) creation and strengthening of relations of oversight, command, and obedience so that rogue officials (including police officers and prison guards) do not behave cruelly or discriminatorily. In some cases, public officials must indeed be kept out of protected zones. But those zones qualify as protected only because of affirmative government, and to achieve the desired protection, vulnerable individuals must have relatively easy access to a second, higher-level set of government actors whose decisions are deemed authoritative.

Nonperforming public officials—whether apathetic or bribetaking or remissly supervised—will not enforce constitutional rights any more effectively than they enforce rights held under statutes and common law. The very idea that a certain kind of process is “due” demonstrates that constitutional rights impose affirmative obligations on the state. Giving citizens access to courts and other adjudicative forums is not like giving them access to natural harbors and navigable waters, because the government must not only brush aside hindrances to access, but must actually create the institutions to which access is being granted. “Avenues of relief” are maintained in passable condition by government officials. The operating expenses of American courts alone run in the billions of dollars every year, and the American taxpayer picks up the tab.

RIGHTS AND POWERS

Invariably, rights pit power against power. Under tort law, rights enlist the power of government to extract compensatory or punitive damages from private wrongdoers. Under constitutional law, rights bring the power of one branch of government to bear upon wrongdoers from other government agencies. For instance, in the late 1960s, the Supreme Court protected the right of students to wear black armbands to school (in a protest against the Vietnam War) by overruling public high school authorities.² Protection "against" government is therefore unthinkable without protection "by" government. This is exactly what Montesquieu had in mind when he asserted that freedom can be protected only if power checks power.³ No legal system can defend people against public officials without defending people by means of public officials.

When a right is enforced, moreover, somebody wins and somebody loses. The enforcement of a right (whether it is a right against racial discrimination or a right to collect compensatory damages) is "accepted" by the losing party because that party has no choice, that is, because the full power of the state has come down on the side of the rightsholder, and thus against the losing party. Conversely, curtailing a right often involves curtailing the power of the government agency that enforces it in the face of serious resistance. For instance, if a political pressure group wants to cut back the existing rights of American workers, it will try to diminish the authority of OSHA, the EEOC, or the NLRB. This is strong evidence that rights depend essentially on power.

The dependency of liberty on authority should be especially

obvious in the United States, where rights against abuse by state and local officials have long been enforced by federal officials. The "incorporation doctrine," which extends most of the Bill of Rights to the states, protects individual liberties not by removing government from the scene, but by giving national authorities the power to overrule state authorities. The Fourteenth Amendment prohibits the states from denying anyone equal protection of the law or depriving them of life, liberty, or property without due process of law. Such a prohibition would be hollow if the federal government did not have the power to bear down on recalcitrant states.

"Congress shall have power to enforce this article by appropriate legislation." All three Civil War amendments contain such enforcement clauses. So the amended Constitution explicitly vests the federal government with the capacity to realize in practice the individual rights it proclaims in principle. Without such governmental powers, rights would have no "bite." To protect the rights of southern blacks, more than once in our history the national government has dispatched federal troops to the South. Without such a show of force, the individual rights of a large group of Americans would have remained a cruel charade. To prevent racial segregation in education, national involvement was necessary, sometimes including the threat to meet violence with violence. Until Congress and the former Department of Health, Education, and Welfare applied irresistible financial pressure, in any case, school districts in the deep South simply ignored the Supreme Court's desegregation orders. When state government is discriminating, the right to be free from racial discrimination, like the right to property, requires affirmative assistance from government, in this case the nation itself.

In the area of voting rights, the same pattern has prevailed. The Voting Rights Act of 1964—designed to vindicate constitutional rights—called for more involvement by the national government, not less. Until Congress legally prohibited the use of literacy tests, states contrived to disenfranchise black Americans for reasons of race. This is just a further illustration of a general truth: individual rights are invariably an expression of governmental power and authority.

Not included in the original Constitution, the Bill of Rights was added to the Constitution two years after its ratification partly to appease those who desired a weaker and more constrained national government. But that was not its only purpose, and that has not been its effect in practice. By extending the scope of the Bill of Rights, the Supreme Court, a national institution, has steadily encroached on preserves of state power. State autonomy has been whittled away and federal power correspondingly enhanced in the name of individual rights. (Admittedly, the opposite has also occasionally occurred.) Indeed, one of the consequences of the enhancement of federal power has been to apply the prohibition on uncompensated takings of private property to the states—requiring state governments, for instance, to compensate people, as a matter of federal constitutional law, when regulation has rendered their beachfront property valueless.

Decentralizing government has no logical connection with limiting the encroachment of government into society. Many of the original limits on Congress's authority were not meant to preserve immunity from government, but simply to clear a space for unsupervised state regulation, as opposed to federal regulation, of private economic behavior. To create a national market,

against the protectionist impulses of local authorities, the federal government had no choice but to erode state regulatory autonomy. And this is perfectly normal: a lower authority will usually retreat only when a higher authority steps forward.

The framers of the American Constitution sought to establish a strong and effective government armed with capacities that the anemic government created under the Articles of Confederation notoriously lacked. A constitution that does not organize effective and publicly supported government, capable of taxing and spending, will necessarily fail to protect rights in practice. This has been a lesson long in learning, and not only for libertarians and free-market economists, but also for some human-rights advocates who have selflessly devoted their careers to a militant campaign against brutal and over-mighty states. All-out adversaries of state power cannot be consistent defenders of individual rights, for rights are an enforced uniformity, imposed by the government and funded by the public. Equal treatment before the law cannot be secured over a vast territory without relatively effective, honest, centralized bureaucratic agencies capable of creating and enforcing rights.

Chapter Three

NO PROPERTY WITHOUT TAXATION

ACCORDING TO THE BRITISH PHILOSOPHER JEREMY BENTHAM, "property and law are born together and die together. Before the laws there was no property; take away the laws, all property ceases."¹ Every first-year law student learns that private property is not an "object" or a "thing" but a complex bundle of rights. Property is a legally constructed social relation, a cluster of legislatively and judicially created and judicially enforceable rules of access and exclusion. Without government, capable of laying down and enforcing compliance with such rules, there would be no right to use, enjoy, destroy, or dispose of the things we own. This is obviously true for rights to intangible property (such as bank accounts, stocks, or trademarks), for the right to such property cannot be asserted by taking physical possession, only by an action at law. But it is equally true of tangible property. If the wielders of the police power are not on your side, you will not successfully "assert your right" to enter your own home and make use of its contents. Property rights are meaningful only if public authorities use coercion to exclude nonowners, who, in the absence of law, might well trespass on property that owners wish to maintain as an inviolable sanctuary. Moreover, to the extent that markets presuppose a reliable system of recordation, protecting title from never-ending challenge, property rights simultaneously presuppose the existence of many

competent and honest and adequately paid civil servants outside the police force. My rights to enter, use, exclude from, sell, bequeath, mortgage, and abate nuisances threatening "my" property palpably presuppose a well-organized and well-funded court system.

A liberal government must refrain from violating rights. It must "respect" rights. But this way of speaking is misleading because it reduces the government's role to that of a nonparticipant observer. A liberal legal system does not merely protect and defend property. It defines and thus creates property. Without legislation and adjudication there can be no property rights in the way Americans understand that term. Government lays down the rules of ownership specifying who owns what and how particular individuals acquire specific ownership rights. It identifies, for instance, the maintenance and repair obligations of landlords and how jointly owned property is to be sold. It therefore makes no more sense to associate property rights with "freedom from government" than to associate the right to play chess with freedom from the rules of chess. Property rights exist because possession and use are created and regulated by law.

Government must obviously help maintain owner control over resources, predictably penalizing force and fraud and other infractions of the rules of the game. Much of the civil law of property and tort is designed to carry out this business. And the criminal justice system channels considerable public resources to the deterrence of crimes against property: larceny, burglary, shoplifting, embezzlement, extortion, the forging of wills, receiving stolen goods, blackmail, arson, and so forth. The criminal law (inflicting punishments) and the civil law (exacting restitution or compensation) conduct a permanent, two-front,

and publicly financed war on those who offend against the rights of owners.

David Hume, the Scottish philosopher, liked to point out that private property is a monopoly granted and maintained by public authority at the public's expense. As the English jurist William Blackstone, following Hume, also explained, property is "a political establishment."² In drawing attention to the relation between property and law—which is to say, between property and government—Bentham was making the very same point. The private sphere of property relations takes its present form thanks to the political organization of society. Private property depends for its very existence on the quality of public institutions and on state action, including credible threats of prosecution and civil action.

What needs to be added to these observations is the correlative proposition that property rights depend on a state that is willing to tax and spend. Property rights are costly to enforce. To identify the precise monetary sum devoted to the protection of property rights, of course, raises difficult issues of accounting. But this much is clear: a state that could not, under specified conditions, "take" private assets could not protect them effectively, either. The security of acquisitions and transactions depend, in a rudimentary sense, on the government's ability to extract resources from private citizens and apply them to public purposes. On balance, property rights may even place a charge upon the public treasury that vies with the burden of our massive entitlement programs.

None of this denies that protection of property rights can be a valuable investment that increases aggregate wealth over time. On the contrary, the extraction and redistribution of resources

necessary to protect property rights is relatively easy to justify. Indeed, American liberalism, like its counterparts elsewhere in the world, is based on the reasonable premise that public investment in the creation and maintenance of a system of private property is richly repaid, not least of all because reliably enforced property rights help increase social wealth and therefore, among other benefits, swell the tax base upon which government can draw to protect other kinds of rights. But the strategic wisdom of an initial investment does not undo the fact that it is an investment.

The immense up-front costs of protecting private property mount even higher if we include, as we surely must, protection from foreign looters and marauders. The thousands of civilians expelled from their homes in Abkhazia or Bosnia—like other forced migrants throughout the world—know that property rights are a mirage without military forces trained and equipped to protect owners from forcible seizures by invading armies or drunken paramilitary gangs. The defense budget in a free-market society is a widely shared public contribution to, among other ends, the protection of private property. Americans spent \$265 billion in 1996 on defense and an additional \$20 billion on veterans' benefits and services.³ Military expenditures must unquestionably be counted among the public costs of the property rights that many Americans peaceably exercise and enjoy.

Conscription of low-income youth represents an important way in which property holders may benefit directly from the "civic contributions" of the propertyless. Individual property holders are fundamentally dependent on collective efforts, both diplomatic and military, organized by the government, to protect their land and housing stock from seizure by property-grab-

bing adjacent states. Montana "Freemen," citizens of the Republic of Texas, and other self-styled government-bashers who pretend they can defend their autonomy with mail-order shotguns and hunting rifles would, in reality, be wholly unable to prevent their private property from being gobbled up even by relatively weak foreign powers if most of their fellow citizens did not regularly submit themselves to taxation and conscription by the national political community.

Where real estate is involved, in fact, ownership becomes quickly enmeshed with sovereignty (or with aspirations to sovereignty, as Palestinians caught selling land to Israelis find out). Defense spending is surely the most dramatic example of the dependency of private rights on public resources. It reveals the statist preconditions of *laissez-faire*, the authority that underwrites liberty. At common law, only the sovereign is said to have an absolute interest in land: ordinary landowners "hold of the sovereign." This quaint legalism expresses a deep truth. An autonomous individual, in a liberal society, cannot create the conditions of his own autonomy autonomously, but only collectively.

The most ardent antigovernment libertarian tacitly accepts his own dependency on government, even while rhetorically denouncing signs of dependency in others. This double-think is the core of the American libertarian stance. Those who propagate a libertarian philosophy—such as Robert Nozick, Charles Murray, and Richard Epstein—speak fondly of the "minimal state." But describing a political system that is genuinely capable of repressing force and fraud as "minimal" is to suggest, against all historical evidence, that such a system is easy to achieve and maintain. It is not. One piece of evidence to the con-

trary is the amount we spend, as a nation, to protect private property by punishing and deterring acquisitive crimes. In 1992, for instance, direct expenditures in the United States for police protection and criminal corrections ran to some \$73 billion—an amount that exceeds the entire GDP of more than half of the countries in the world.⁴ Much of this public expenditure, naturally, was devoted to protecting private property. Even a purportedly hands-off state, if it wants to be serious about encouraging economic activity, must reliably protect homeowners and shopkeepers from burglars, arsonists, and other threats.

An effective liberal government, designed to repress force and fraud, must avoid arbitrary and authoritarian tactics. Those who wield the tools of coercion must be institutionally disciplined into using it for public, not private, purposes. Ideally conceived, a liberal government extracts resources from society fairly and efficiently and redeploys them skillfully and responsibly to produce socially useful public goods and services, such as the deterrence of theft. A successful liberal state must be politically well organized in precisely this sense. Its government must be capable of creating a favorable business climate in which investors are confident that they will reap rewards tomorrow for efforts made today. Without such a state, well-functioning markets, capable of producing prosperity, are very unlikely to emerge or survive. A state capable of reliably repressing force and fraud and enforcing property rights is a cooperative achievement of the first magnitude, and the world is unfortunately filled with negative examples. But if private rights depend essentially on public resources, there can be no fundamental opposition between “government” and “free markets,”

no contradiction between politically orchestrated social cooperation and footloose individual liberty.

Property owners are far from being self-reliant. They depend on social cooperation orchestrated by government officials. Defense against land-grabbing foreign predators is only one example of the way liberal individualism depends on effective collective action. Recordation is another. American taxpayers expended \$203 million for general property and records management in 1997.⁵ Sunk costs in our recordation system are much larger. For real estate markets to operate effectively, a reliable system of titles, deeds, and land surveys must be in place. Land registries and offices of public records require skilled and honest staffs. The "free market" is unlikely to put roofs on public buildings where records are stored or establish criminal penalties to deter bribery of officials in charge of registering titles to real or personal property. Surveyors, too, must be paid and monitored. The bare unobstructed latitude to buy and sell private property will not produce an explosion of mutually beneficial private exchanges unless potential buyers receive some sort of guarantee that the putative owner is selling something he (and he alone) actually owns. Without clearly defined, unambiguously assigned, and legally enforceable property rights, ownership does not encourage stewardship. Title holders will neither cultivate their fields nor repair their homes if their rights are not reliably protected by the public power.

Additional examples of government expenditures for the sake of private property owners are legion; it is unnecessary to think that all or even most are defensible in order to see the basic pattern. The American taxpayer spent almost \$10 billion in 1996 for agricultural subsidies designed to increase the value of the

private property rights of American farmers.⁶ The Army Corps of Engineers expended around \$1.5 billion in 1996 on floodplain management and other forms of flood control.⁷ The Coast Guard spent \$1.26 billion in the same year in search and rescue missions, aids to navigation, marine safety (including the removal of dangerous wrecks and derelicts at sea), ice breaking, and so forth, all of which helps protect the private property of American shippers and boat owners.⁸ Copyright, which is a form of property, also involves public expenditure. The Copyright Office and Copyright Royalty Tribunal, taken together, cost \$28 million in 1996; \$18 million of this amount was covered by user fees, leaving roughly \$10 million on the tab of the ordinary taxpayer.⁹

The relatively high rate of owner occupancy in the United States is a creation not only of governmentally conferred rights but also of American mortgage, insurance, and tax law. It is certainly not a product of government disengagement or *laissez-faire*. Some property owners would be forced to liquidate their holdings if they were not allowed to deduct the depreciation of their assets from their taxable income. And a tax deduction is a form of public subsidy. This is just one more example of the way private property is affirmatively sustained by public subsidies.

Private property is not only protected by government agencies, such as the fire department. It is, more generally, a creation of state action. Legislators and judges define the rules of ownership, just as they establish and interpret the regulations governing all of our basic rights. Does the accidental finder of goods have a legal right to judicial protection? Does a purchaser acquire an ownership right to property bought for value and in good faith from a thief? What rights against a present occu-

pant belong to the owner of a future interest in real property? How many years of wrongful possession destroy the title of the original owner? Can an illegitimate child inherit from its natural parents by intestate succession? What happens if one joint owner sells his portion of jointly owned property? Can I, without notice, cut off branches from my neighbor's tree if they overhang my land? Do I have a right to pile a mountain of garbage in my front yard? Can I build an electrical fence around my land with voltage high enough to kill trespassers? Can I erect a building that cuts off my neighbor's vista? Can I advertise the free viewing of pornographic videos in my front window? Can I stick posters on my neighbor's fence? Under what conditions is copyright assignable? How much do which creditors collect in case of bankruptcy? What rights do pawnbrokers have over goods left to them upon pledge?

Thousands of questions of this sort are continuously asked by those who have property rights and regularly answered by legislatures and courts, that is, by state agencies. The answers given shift over time. In the United States, answers also vary from one jurisdiction to another. For instance, spouses have a right to income from each others' property in Idaho, Louisiana, Texas, and Wisconsin. In most of the rest of the country, they have no such rights. The state cannot "leave the owner alone," therefore, because an owner is an owner only on the precise terms laid down at particular times by specific legislatures and courts.

To protect our property rights, American courts must administer a technically intricate and changing body of rules. These rules are especially vital when two or more individuals have overlapping claims to the same piece of property. Private property as we know it exists only because legislation and adjudica-

tion has specified the respective ownership rights of rival claimants—for instance, the property rights of authors and publishers in a book or the property rights of employers and employees in the invention of employees. Upon the death of a co-owner of real property, the law must decide if ownership rights are to be transferred to the living co-owner(s) or to the heirs of the deceased co-owner. The law assigns property rights by creating and enforcing rules for authoritatively settling disputes among rival claimants. To perform this function, judges must be trained, equipped, paid, protected from extortion, and provided with a technical and clerical staff. This is what it means to call the right to property a privately enjoyed public service.

Along the same lines, the basic ingredients of the law of tort—for example, my right to demand compensatory damages from those who have negligently or willfully damaged my property—strongly suggest that property rights are less like latitudes and more like entitlements than American public rhetoric commonly allows. Those who demand greater rights to compensation from government for public “takings”—through regulation or otherwise—are in reality seeking entitlements. They want to be protected publicly and through law. This is not an argument against their claim of right. The regulatory state might well work better if government had to pay property owners for the diminished value of land whenever, for example, new environmental regulations have impeded development. But arguments to this effect should not be based on indiscriminating protests against public invasions of autonomously held rights.

Many political conservatives, but not they alone, urge government to “get out of the marketplace.” For their part, some

liberals counter that government quite legitimately interferes with, or "steps into," the market whenever and wherever disadvantaged Americans are at risk. But this familiar debate is built on sand. No sharp line can be drawn between markets and government: the two entities have no existence detached from one another. Markets do not create prosperity beyond the "protective perimeter" of the law; they function well only with reliable legislative and judicial assistance.¹⁰

Of course, inept governments can and do commit economic blunders. Without doubt, ill-devised and poorly timed policies can and do make markets function poorly. The question is not free markets *or* government but what kind of markets and what kind of government. Governments not only have to lay the essential legislative and administrative foundations for a functioning market economy, they can also act to make market systems more productive. They do so, for example, by adjusting the exchange rate of the national tender against foreign currencies, by disrupting anticompetitive monopolies, by building bridges and railroads, and by financing the vocational training of the future workforce. As even Friedrich Hayek, the great critic of socialism, remarked, "The question whether the state should or should not 'act' or 'interfere' poses an altogether false alternative, and the term 'laissez-faire' is a highly ambiguous and misleading description of the principles on which a liberal policy is based."¹¹

A liberal economy cannot function unless people are willing to rely on each other's word. For a market to be national, and not merely local, reliance must extend beyond a small circle of mutual acquaintances. In such a system, reliance on the word of relative strangers cannot arise from personal reputations for fair-

ness alone. It must be cultivated and reinforced by public institutions. For one thing, the government must make courts and other institutions available to enforce contracts. Public authorities cultivate the "reliance interest" by attaching property and foreclosing liens. Judges can send an individual to jail for contempt of court if he fails to comply with an order to carry out a contract lawfully entered into. Likewise, laws against defamation, geared to the protection of business and financial reputations, help foster economically beneficial social trust. If contracts were not reliably enforced, it would be more difficult and perhaps even impossible to buy goods on credit or by installment. Without the active help of a sheriff, authorized by a court writ, a seller could not easily repossess consumer goods from a defaulting installment purchaser. More generally, payment by the installment plan, beneficial for the economy as a whole, would be shunned if contracts were not reliably enforced.

In the truly autonomous realm, beyond the reach of government, property is not well protected. (In the abandoned warehouse at the edge of town where you lost your wallet, your right to your property is not worth much.) Where the public power cannot effectively intrude, moreover, extortion is rampant and borrowers are unable to obtain long-term loans, for one function of the liberal state is to lengthen the time horizons of private actors by predictably enforcing known and stable rules. Property is worth little if you, and potential purchasers, do not believe in the future. Confidence in long-term stability is partly a product of reliable law enforcement, that is, of forceful and decisive state action.

But the first thing a government must do to make a market system work is to overcome the age-old rule of force and threats

of force. Free markets do not function properly if profit-seekers uninhibitedly engage in criminal violence. Libertarians recognize this fact, but they fail to appreciate the extent to which it undermines their boasted opposition to "government" as well as to taxing and spending. Long-gestation investment in productive facilities, which creates jobs, is unlikely where assets are indefensible against private extortionists. Neoclassical economics supposes that private competitors will not resort to violent crime in the pursuit of gain. Within its own framework, laissez-faire theory is helpless to explain the basis of civilization, the general renunciation of violence by advantage-seeking individuals and groups. Why do most American entrepreneurs hesitate to threaten and kill their competitors? The theory of free markets, as it is currently taught in American universities, tacitly assumes that the problems of short time horizons and violent competition, characterizing the state of nature, have already been solved. For the most part, in other words, the science of economics (unlike, say, the science of anthropology) tacitly presupposes the existence of an active and reliable system of criminal justice.

Even on their own terms, doctrinaire libertarians must acknowledge that government cannot "pull out" of the economy without leaving private individuals helplessly vulnerable to ruthless predators. The relatively peaceful exchange of goods and services, as we know it, is a product of civilized self-restraint and therefore should be understood as a historically improbable and fragile achievement. In the state of nature, a handful of killers and thieves willing to employ deadly force and hazard their lives on a dare can cow a large civilian population. They can establish anticompetitive monopolies, for instance, and dramatically

shrink the sphere of voluntary exchange. Only a reliable public power can break such an anarchical reign of fear and legal uncertainty. Only a state can create a vibrant market. Furthermore, only a national government can weave together disconnected local markets into a single national market. For why would a wholesaler in New Jersey sell to a retailer in California if contracts could not be reliably enforced across state lines?

If the government wholly disengages from the economy, the economy will not be free in the sense we admire, and it will certainly not produce the historically unprecedented prosperity to which many Americans have grown accustomed. Voluntary exchanges will occur, as they do even in the poorest of countries, and we may see inchoate versions of well-functioning markets. But government inaction creates an economic system vexed by force, monopoly, intimidation, and narrow localisms. The individual's freedom, his "right to be left alone" by thugs and thieves, cannot be separated from his entitlement to state help—that is, his claim to a range of public services (basic legal provisions and protections) from the government. The effort of social coordination it takes to build even a "minimal" state, capable of repressing force and threats of force, is truly massive and should not be taken for granted.

Capitalists certainly know this and tend not to invest where political risk is excessive, as in some of the emerging Eastern European democracies. Their problem is not too much government but too little government. When government is incoherent, incompetent, and unpredictable, economic actors do not think very far into the future. Not free-enterprise but robber capitalism—the rule of the violent and the unscrupulous—thrives in the absence of law and order.

Swindling is nearly as great a threat to free markets as force, and enforceable antifraud law also presupposes a well-organized and effective system of governance. To some extent markets themselves will deter fraud; people who lie and cheat at the drop of a hat tend not to compete well. But without effective antifraud legislation, private parties will often hesitate to undertake what both sides nevertheless anticipate would be a mutually advantageous voluntary exchange. Antifraud legislation, in turn, costs taxpayer money to enforce. The Federal Trade Commission (FTC) spent \$31 million in 1996 investigating unfair and deceptive practices and removing other obstacles to market performance.¹² Perhaps this is too much, perhaps the case for an FTC is weak, but any market requires governmental assistance in protecting against fraud, and that assistance is likely to be costly.

The Securities and Exchange Commission (SEC), through its "full disclosure" program (which cost the taxpayer \$58 million in 1996), requires publicly traded companies to furnish management, financial, and business information on a regular basis so that investors will be able to make informed decisions. The SEC spent an additional \$101 million in 1996 on the prevention and suppression of fraud in the securities market.¹³ Oversight of the stock market and commodity futures market cost the American taxpayer \$355 million in 1996.¹⁴

In the absence of government machinery capable of detecting and remedying misrepresentation and false dealing, free exchange would be an even more risky business than it is. The act of buying and selling is often worrisome in the absence of reliable means to counteract the asymmetry of knowledge between buyer and seller. The seller frequently knows some-

thing the buyer needs to know. That is one reason why the risk-averse fear commercial exchanges as possible scams, why they cling to suppliers they know personally rather than shopping around for bargains. Public officials can discourage this kind of clinging, promote market ordering, and discourage swindlers by insuring against any damage arising from the asymmetry of information between buyers and sellers. To help consumers make rational choices about where to obtain credit, for instance, the Consumer Credit Protection Act forces any organization that extends credit to disclose its finance charges and annual percentage rate. Just so, consumers benefit from competitive markets in restaurants because, as voters and taxpayers, they have created and funded sanitation boards that allow them to range adventurously beyond a restricted circle of personally known and trusted establishments. The enforcement of disclosure rules or antifraud statutes is no less a taxpayer-funded spur to market behavior than government inspection of food handlers.

The appropriate level of federal spending and government oversight will remain controversial. Nothing said above is intended as a defense of any particular program; some existing programs should undoubtedly be scaled down. What cannot be denied is that enforceable antifraud legislation is a common good, embodying biblically simple moral principles (keep your promises, tell the truth, cheating is wrong). Moreover, the benefits of antifraud law cannot be captured by a few but are diffused widely throughout society. It is a public service, collectively provided, and serving to reduce transaction costs and promote a free-wheeling atmosphere of buying and selling that would be very unlikely to arise if "caveat emptor!" were the sole rule.

Admittedly, the current economic boom in China suggests that, when suitably integrated into the world economy, a society without a strong court system can use kinship and other informal networks to breed credible commitments even in the absence of reliable judicial enforcement of property rights. In most industrialized societies and as a general rule, however, free markets depend on enforceable contract law and a liberal style of governance. To deter fraud, a government must be interventionist and well funded. American taxpayers have proven willing to foot the bill partly because they see the obvious advantages in the monitoring of private exchanges by politically accountable officials.

Government must not only repress force and fraud, invest in infrastructure and skills, enforce stockholders' rights, and provide securities exchange oversight and patent and trademark protection. It must legally clarify the status of collateral. And it must regulate the banking sector and credit markets to prevent pyramid schemes and ensure a steady flow of credit to businesses rather than cronies. The enforcement of antitrust law is also crucial. For the reliable delivery of these public services, markets require government. At the taxpayer's expense, the state must foster innovation, encourage investment, boost worker productivity, raise production standards, or stimulate the efficient use of scarce resources. It can do this, among other ways, by defining property and contract rights clearly, assigning them unambiguously, and protecting them impartially and reliably. The job is neither easy nor cheap.

To do all this, governments need first to collect money through taxation and then to channel it intelligently and responsibly. Rights enforcement of the sort presupposed by well-

functioning markets always involves "taxing and spending." Needless to say, the inevitable dependency of markets on law, bureaucracy, and public policy does not imply that government initiatives are always wise or beneficial. As a political community, we have choices—but only among competing regulatory regimes.

Chapter Four

WATCHDOGS MUST BE PAID

IN 1992, THE ADMINISTRATION OF JUSTICE in the United States—including enforcement, litigation, adjudication, and correction—cost the taxpayer around \$94 billion.¹ Included in this allocation were funds earmarked for the protection of the basic rights of suspects and detainees. Because it always presupposes the creation and maintenance of relations of authority, the protection of individual rights is never free. True of the rights of property and contract, this also applies to the rights protected within our system of criminal justice, including of course the rights of people who are not in fact criminals. Here again, rights enforcers must be in a position to tell potential rights violators what to do and what not to do. The history of *habeas corpus* confirms the validity of the thesis that an abusive power can be successfully counterattacked only by another power. Classical liberal rights necessarily depend on relations of command and obedience that, in turn, are expensive to create and maintain. This can be observed clearly in the case of prisoners, whose rights cannot be even minimally protected unless their custodians are monitored from above and penalized for abuses. Although sometimes denounced as a hindrance to law enforcement, protecting the rights of prisoners means nothing more than forcing correctional officers to obey the law. These rights are sometimes controversial, but the basic point—the need to

monitor public officials who exercise coercion—is quite general and applies, in different forms, to the rights of the law-abiding as well as of those convicted of crimes.

Protecting prisoners' rights, even quite modestly, is costly. To avoid degrading treatment, prison cells must be ventilated, heated, lit, and cleaned. Prison food must provide minimal nutrition. The Eighth Amendment demands that prison wardens and guards provide minimally humane conditions of confinement. A prison official violates a constitutional right where the deprivation alleged is, objectively, "sufficiently serious"² and if he acts with "deliberate indifference" to inmate health and safety. In the federal prison system alone, medical care costs ran to \$53 million in 1996.³ Authorities cannot segregate inmates from the general prison population without using fair procedures. Officials institutionally positioned to penalize flagrant abuses (such as murder or torture) must "monitor the monitors." And to assure access to the appeals process, prison authorities must provide prisoners with "adequate law libraries or adequate assistance to persons trained in the law."⁴

In other words, the right to be treated decently in the system of criminal justice—by police, prosecutors, judges, prison guards, and probation officers—presupposes the power of bureaucratic superiors to punish and deter misconduct by subordinates. Procedures must be established and responsibility assigned for determining the legality or illegality of detention. The enforceable rights of the interrogated are the enforceable duties of the interrogators. The rights of prisoners are the duties of wardens and guards. Protecting rights within the American criminal justice system requires oversight of the law-enforcement apparatus. Whatever their attitude toward red tape,

defenders of rights cannot be consistently antibureaucratic, for police and prison guards behave more decently when monitored than when unwatched. And second-level supervisory personnel must be given adequate training and paid a living wage.

The cost of training and monitoring correctional officers is a concrete illustration of the indispensable contribution of the tax-paying community to the protection of individual liberties.⁵ True, it is more familiar to style the rights protected within our criminal justice system as purely negative, as rights against the government, as shields from police and prosecutorial and custodial abuse. But attention to the cost of rights should help us focus attention on the other side of the coin, namely on the forms of state action required for rights of suspects and detainees to be a palpable reality rather than a mere paper promise. Nor, it is important to emphasize, are the rights protected by the criminal justice system solely protections of criminals, or even of the wrongly accused. Ordinary citizens depend, for their protection against the state and thus for their so-called negative liberties, on the taxpayer-funded training and monitoring of the police.

Because it involves federal supremacy, the extension of most Fourth, Fifth, and Sixth Amendment protections to individuals suspected, accused, or convicted of crimes within the states nicely exemplifies the positive side of ostensibly negative rights. The government, as the agent of American taxpayers, provides the accused with certain weapons (rights) which, it is expected or hoped, will help reduce improper conduct by officials and even the odds against the occasionally overwhelming power of the prosecution. Thus, the right to a speedy, fair, and public jury trial is an entitlement to a taxpayer-funded benefit or service.

Needless to say, the rights of accused Americans—rich and poor, black and white—are not protected equally. But our criminal justice system would be even more grossly unfair if the community as a whole did not subsidize some basic protections. In the 1996 U.S. budget, covering only federal trials, \$81 million went to fees and expenses for obtaining witnesses.⁶ The accused does not have to rely on his own resources to compel witnesses to testify in his favor; he is legally entitled to employ resources drawn from the community as a whole. Ability to pay bears no rational relation to innocence or guilt. This, at least, is the Supreme Court's explicit rationale for the right of the indigent accused, even on appeal, to a lawyer whose salary will be paid by the public. Equal protection implies a constitutional right of access to whatever appellate process a state makes generally available.⁷ Under existing law, American taxpayers must pay for blood grouping tests for indigent defendants in paternity cases and for psychiatric assistance for indigent defendants in some criminal cases. And to ensure that court-appointed attorneys are not in the pocket of the prosecutor, some sort of independent supervision is obviously required.

Even the right of the accused to be free pending trial presupposes the bureaucratic capacity to set up and administer systems of bail and release on recognizance. Such a right would be unavailable if the state could not perform—that is, if the criminal justice system could not, with relative accuracy, distinguish defendants who will show up for trial from those likely to jump bail, or train its police well enough to conduct a competent investigation without keeping suspects uninterruptedly behind bars.

The duty of the police to refrain from unreasonable searches

and seizures is meaningless unless the courts have the capacity to compel the police to comply with the Constitution. This capacity depends importantly on social norms and expectations and on the training and norms of the police, but it also depends on the fiscal wherewithal of the judiciary. Searches must be authorized in advance by warrants issued by neutral and detached magistrates upon proof of probable cause, and the salaries of these nonpartisan judges cannot be manipulated in an *ad hoc* manner by officials in the other branches of government. The exclusionary rule, barring from trial any evidence gathered illegally, is one way the American judiciary has tried to enforce police compliance or at least to offer constitutional instructions to officers engaged in crime prevention. The exclusionary rule has been gradually softened by exceptions, to be sure. But why has this tendency to diminish the pre-existing rights of suspects and defendants been supported by those who want to be tough on crime? Only because such a rule represents a form of supervisory interference thought to handcuff the police and weaken the fight against crime by permitting police illegality to taint otherwise solid evidence. To erode a right—whether desirable or not—often means impairing a publicly funded supervisory power.

In effect, the rights of the accused and the incarcerated contract and expand as the American judiciary is sometimes more, sometimes less deferential toward the executive branch's war on crime. This oscillation shows, yet again, that the breadth of our liberties depends upon the resolve of our authorities. But it is worth stressing that rights cannot be based on government forbearance, for an even more basic reason. Rights come into being only after a government agency, often a court, makes the effort

to define such basic terms as "excessive," "reasonable," and "cruel." The precise scope of our rights changes over time as the courts decide. The court's job is not simply to prevent the executive branch from acting abusively (taking that term as a rough placeholder for what the Constitution forbids). It also has to set down the criteria for distinguishing abusive from nonabusive action. This is an affirmative task it cannot avoid. When is a search or seizure unreasonable? At what point in time does a suspect have a right to counsel—already at the line-up, or only at the preliminary hearing? Under what conditions can officers initiate interrogation? In the criminal justice system, rights always presuppose at least one form of state action because they always assume that the court has given answers, for better or worse, to these and other similar questions. Judicial inaction, a refusal to answer, is not an option.

The Rehnquist Court has reinterpreted and thus reduced many of the rights in criminal procedure established by the Warren Court. It has achieved this end not by flat prohibitions but by its own readings—namely, by drawing distinctions and redefining a handful of essential terms. Even under Warren-era rules, the prosecution was able to introduce at trial evidence that the police, in the absence of a warrant, had found "in plain view." But the Rehnquist Court has enlarged this category by admitting, for example, evidence detected by aerial surveillance using sophisticated cameras. By distinguishing between a mere "stop" and a genuine "arrest" the current Court has also permitted the use of evidence disclosed by police friskings, such as weapons or contraband, that would otherwise have been excluded. It has similarly declared that the "reasonable expectation of privacy" does not cover sealed garbage bags deposited in a

dumpster. The Sixth Amendment guarantees an accused person the right "to be confronted with the witnesses against him," but the Court has decided that this right can be waived in cases involving the sexual abuse of children who would be psychologically harmed by having to sit face to face with their presumed victimizer.

Some of these new lines drawn by the Court are quite reasonable, while others seem less so. But this is a side issue; what matters here is that the rights of Americans are creatures of state action. The very scope of our rights against police, prosecutorial, and custodial abuse is established by judicial interpretation, that is, by government performance. The enforcement of these rights by judicial authority over executive-branch officials is merely a secondary illustration of the dependence of individual liberty on state action. The first and most basic way in which publicly funded authorities affect liberty is by defining its scope. The community does not protect any imagined freedoms, but only those which, at any given historical moment, its government, largely through its judiciary, identifies as enforceable rights, and is willing to protect, which is to say fund, as such.

The American system of criminal justice is expensive, in part, because it is designed both to avoid falsely convicting innocent defendants and to prevent lethally armed police officers and prison guards from mistreating even those who are declared guilty. That the costs of these arrangements, indispensable for the protection of basic rights, must be publicly defrayed has theoretical as well as financial significance. Such costs bring into sharp relief the essential dependency of rights-based individualism on state action and social cooperation.