

# Virtue, Rights, Practical Ethics

Volume 2 of 2

Notes toward a Selection of Papers

Lawrence C. Becker

The papers in this notional volume will eventually all be stored in the Hollins Digital Archive (HDA), an open access portal for scholarly and creative work by faculty, students, and staff of Hollins University. At the moment, while most of them are in the HDA, some are not, but are available only in publishers abstracts and/or typescripts of manuscripts accepted for publication.

A stable hyperlink adjacent to the title of a given article and marked [Read Full Text](#) (*both in the table of contents and at the end of the introductions to the various sections*) will take readers directly to the HDA page that gives that paper's full bibliographic citation and the opportunity to read and/or download a PDF copy of that paper.

Table of Contents: Volume 2 of 2  
Virtue, Rights, Practical Ethics

*Citations, Acknowledgments, and Links to Publishers* ..... 3

[Preface: coincidence, divergence, and a theory in fantasy only](#)..... 5

§1. The Virtues of Virtue Theory

[Introduction](#)..... 8

1. The Neglect of Virtue [Read Full Text](#)
2. Unity, Coincidence and Conflict in the Virtues [Read Full Text](#)
3. Good Lives: Prolegomena [Read Full Text](#)
4. The Priority of Human Interests [Read Full Text](#)
5. The Free-Rider Problem [Read Full Text](#)

§2. Rights and Some Problems in Legal Theory

[Introduction](#)..... 12

6. Criminal Attempt and the Theory of the Law of Crimes [Read Full Text](#)
7. Three Types of Rights [Read Full Text](#)
8. Individual Rights [Read Full Text](#)
9. Deserving to Own Intellectual Property [Read Full Text](#)
10. Ideal Taxation [Read Full Text](#)

§3. Some Problems in Practical Ethics

[Introduction](#)..... 17

11. Human Being: The Boundaries of the Concept [Read Full Text](#)
12. Trust as Non-Cognitive Security about Motives [Read Full Text](#)
13. The Good of Agency [Read Full Text](#)
14. Disability, Basic Justice, and Habilitation into Basic Good Health [READ PENULTIMATE TYPESCRIPT](#)
15. Habilitative Health and Disability [READ PENULTIMATE TYPESCRIPT](#)

*Table of contents for Volume 1: Reciprocity, Justice, Stoicism*..... 24

## *Citations and Online Access to the Papers in This Volume*

*In acknowledgment of the cooperation of the publishers, links to publishers' abstracts of the papers in this volume are below, along with information about their availability.*

### §1. The Virtues of Virtue Theory

1. "The Neglect of Virtue," *Ethics* 85:2 (1975): 110-122. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
- 2.. "Unity, Coincidence and Conflict in the Virtues." *Philosophia* 20, no. 1-2 (1990): 127-43.  
[PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
3. "Good Lives: Prolegomena." *Social Philosophy and Policy* 9 (1992): 15-37. Reprinted in *The Good Life and the Human Good*, edited by Ellen Frankel Paul. Cambridge: Cambridge University Press, 1993. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
4. "The Priority of Human Interests." In *Ethics and Animals*, edited by Harlan B. Miller and William H. Williams, 225-242. New York: Humana, 1982.  
[PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
5. "The Free-Rider Problem." In *The Limits of Utilitarianism*, edited by Harlan Miller and William H. Williams, 217-224. Minneapolis: University of Minnesota Press, 1983.  
[PUBLISHER'S ABSTRACT AND AVAILABILITY](#)

### §2. Rights and Some Problems in Legal Theory

6. "Criminal Attempt and the Theory of the Law of Crimes." *Philosophy and Public Affairs* 3 (1974): 262-94. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
7. "Three Types of Rights." *Georgia Law Review* 13 (1980): 1197-220.  
[PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
8. "Individual Rights," in *And Justice for All: New Introductory Essays in Ethics and Public Policy*, edited by Tom Regan and Donald Van De Veer. 197-216. Totowa, N. J.: Rowman and Littlefield, 1982. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
9. "Deserving to Own Intellectual Property." *Chicago-Kent Law Review* 68 (1993): 609-29.  
[PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
10. "Ideal Taxation." In *Applied Ethics and Ethical Theory can do justice*, edited by David Rosenthal and Fadlou Shehadi, 275-305. Provo: University of Utah Press, 1989. Pp. 275-305. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)

### 3. Some Problems in Practical Ethics

11. "Human Being: The Boundaries of the Concept." *Philosophy and Public Affairs* 4 (1975): 334-59. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
12. "Trust as Noncognitive Security about Motives," *Ethics* 107:1 (1996): 43-61. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
13. "The Good of Agency," in Leslie Francis and Anita Silvers (eds.), *Americans with Disabilities: Exploring Implications of the Law for Individuals and Institutions*. New York: Routledge, 2000. Pp. 54-63. [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
14. "Disability, Basic Justice, and Habilitation into Basic Good Health" (forthcoming in Adam Cureton and Thomas E Hill, eds. *Disability in Practice* OUP, 2017.) [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)
15. "Habilitative Health and Disability," in Adam Cureton and David Wasserman, eds. *Oxford Handbook of Disability*, Forthcoming, 2018). [PUBLISHER'S ABSTRACT AND AVAILABILITY](#)

[Go Back](#)

### **Preface: Coincidence, Divergence, and a Theory in Fantasy Only**

*Coincidence and divergence.* In the preface to the first volume of this selection of papers, I mentioned that my consistent aspiration has been to write (for publication, at least) only on philosophical problems that had some genuine existential dimension for me. Memories of that aspiration are even more vivid in this volume. Part of that comes from the fact that the occasions for the papers here – much more than those in the first volume – were purely coincidental opportunities to import some attractive idea worked out elsewhere into an essay on quite a different topic. In fact, some of the papers discussed in this volume (especially some in §2 and §3) are genuine outliers – on topics not represented anywhere else in what I have published. The reasons for this will usually become clear in the introductions to each of the three sections.

Nonetheless, each of the essays in this volume continues to interest me, philosophically, and in the immortal words of a graduate student addressing a colloquium speaker, leave me wondering whether I could “get [another] article off of it.” (Wondering, but not motivated to try.) I cannot say the same for any of the articles I have left unselected. But I would be happy to be proved wrong. Happy, but unmotivated to do anything about it.

*A theory in fantasy only.* Another thing I said in the first volume was that I didn’t have a theory of justice – meaning not one of my own making, nor one that I was willing to adopt as my own in the way I seem to have adopted a revised version of Stoic ethics. But what is clear to me now, after assembling these two volumes, is that I am finally able to see the *outlines* of what such a theory *could* be, if I could just successfully describe it and argue for it.

Such a theory of justice would be consistent with the continuous threads that run through both these volumes and my monographs as well. It would run backward, so to speak, starting from much of the writing I have done most recently – on virtue, eudaimonistic health, healthy agency, and habilitation. That writing began with *A New Stoicism* (1998) and concluded with some follow-on articles to *Habilitation, Health, and Agency* (2012). It is represented in these selected papers by “Stoic Virtue,” the final paper of volume 1, and in the papers on agency and habilitation in the final section of this volume. But such a theory is entirely in the realm of fantasy, and saying much more about it seems pointless, especially since I now lack the time or energy to replace the fantasy with philosophical argument.

But I will say this much. Though it begins with my recent work, my fantasy for a theory of justice also includes material from *On Justifying Moral Judgments* (1973). It would treat justice as part of the all-things-considered conception of the moral point of view (see “The Finality of Moral Judgments” (1973), as developed in *Reciprocity*, chapters 1-2. It would be built up from a new account of the circumstances of justice, barely begun in the habilitation book, and existing only in outline in about 10,000 words of material cut from the manuscript of that book before publication. Based on that new account, it would then go on to give a fundamental place, *normatively*, to habilitation into basic good health and healthy agency – justified as a set of habilitative necessities understood as individual and collective duties (and mostly derivative rights; see “Three Types of Rights,” below). It would show how the development of healthy agency, in the social and physical environments hospitable for it, yields an impressive array of self-regarding and other-regarding virtuous dispositions (see chapters 7-8 of the habilitation book). Those virtues include many from Aristotle’s catalog, but also ones defined by norms of reciprocity and various forms of mutuality. And the virtues in my imaginary theory would also include practical *wisdom*, not just practical intelligence, along the lines described in the article “Stoic Virtue,” (in volume 1). It would show how those dispositions yield stable, persistently motivated, virtuous ends. Some of these ends correspond to ones that have the requiredness characteristic of deontological theories. Others have features of the ends characteristic of consequentialist or agent theoretic theories. All of these ends would then be prioritized, coordinated, and brought forward toward action by practical wisdom operating in an all-things-considered way, but *constrained* by all virtuous ends, including those of practical wisdom itself. Moreover, the whole account would be naturalistic in the sense that it is based in fundamental facts about the human condition – in actual and humanly accessible social and physical environments. The theory would be meant to specify the requirements of a form of basic justice which, in so far as they are achieved, would make it possible for healthy human agents to imagine, and be motivated to pursue, practical paths toward forms of real-world justice beyond merely basic justice.

A fantasy indeed. I haven’t done anything like this. But I would be very pleased if someone else did. The unpublished chapter on the circumstances of justice mentioned above might conceivably be of use to others in this regard. It, along with various other unpublished

writings, may eventually be freely available through the open access “commons” maintained by the Hollins University library. [Go Back](#)

[Go Back](#)

### §1. The Virtues of Virtue Theory

The category of contemporary philosophy loosely described as virtue ethics has grown remarkably since the publication of the first paper in this section, “The Neglect of Virtue” (1974). At the time, my concern was mainly to shore up my insistence (in *On Justifying Moral Judgments*) that agent morality be given better standing in ethical theory – that is, be accorded fundamental importance in a way that was suitably independent from axiological and deontological concepts and theories.

As it turned out, I pursued this theme (on and off) for the next twelve years mainly by trying to show how, by appealing to admirable dispositions or character traits, we can resolve philosophical problems that otherwise seem deeply problematic for ethical theory. The book *Reciprocity* (1986) essentially marks the end of this in my published work, except for passing remarks here and there. Even when the term reciprocity occurs in the title of a later essay, it is not the virtue-theoretic aspect of the reciprocity book that is being put forward. *A New Stoicism* (1998) is also about virtue, of course, but is not an outgrowth of the more limited aims of this paper on the neglect of virtue.

If I had been more systematic in developing the thesis that agent morality, or virtue theory, resolves deadlocks between consequentialism and deontology, I would certainly have tried to make the point with respect to the trolley problem (or its antecedents). But I didn’t. Instead, I deployed agent morality considerations (about dispositions; character traits; virtues) in a variety of circumstances – both before and after *Reciprocity* – in which I was writing on topics of independent interest to me. “The Neglect of Virtue” mentions one of them – “Criminal Attempt and the Theory of the Law of Crimes” – but the role of agent morality there is not central enough to the paper to warrant including it in this section. It appears in §2 below, as paper 6. Papers 8 in §2 and 12 in §3 are relevant also.

Before “The Neglect of Virtue” I had begun to recommend virtue theory as an entry point into the priority problems introduced by pluralism. In *On Justifying Moral Judgments* (1973) I urged that axiology, deontology and agent morality should all have independent standing in ethical theory, and need to be “coordinated” so as to avoid priority problems. There is a gesture there toward a procedural method for coordinating them, which is then heavily revised for use in



the final chapter of the property rights book to deal with plural lines of justification for such rights (see *Property Rights* chapter 9, at 99-119). But procedural arguments are weak unless, for example, they are embedded in an overarching account of the practical reasoning characteristic of an agent capable of constructing moral theory. I didn't have anything approximating such an account until much later, in *A New Stoicism* (1998), and then, in even more satisfying terms, in the revised version of that book (2017), and in "Stoic Virtue" (2017).

However, "Unity, Coincidence, and Conflict in the Virtues" (1990), paper 2 below, is a step in the direction of filling out the notion of coordinating a plurality of virtues while keeping them distinct and independent. It appeared in a volume of the journal *Philosophia* honoring the work of Philippa Foot, whose work on virtue (and the conception of moral argument more broadly) has consistently prompted me to write about both issues. This paper on the unity or disunity of the virtues is, oddly, a bridge between the pessimism on this topic exhibited in the "Good Lives" paper published two years later and the optimism of the stoicism book.

"Good Lives" (1992) is a catalog of the various ways in which human lives can plausibly be considered good ones, ending with a dismissive argument against the possibility of getting a defensible account of the best form of life, insofar as this has to be guided by a unitary account of the final good. It is decidedly not an article on stoicism. In fact, it makes some conventional mistakes about stoicism. But it is part of the lead-up to *A New Stoicism* (1998) in a causal sense. Both the paper and the book grew out of a seminar on good lives and the human good. Successive editions of that seminar led me away from the project of writing a book about good lives generally and toward writing about stoicism.

The catalog of criterial goods and good lives is still instructive reading for me (and, so I'm told, for some others), but the dismissive argument in the paper's final section is flatly wrong. At least I came to think so when I began to work seriously on stoicism. And I still think so. But that is no reason for withdrawing the paper. Indeed, it is a reason for reprinting it. Perhaps its lengthy catalog will prompt others to turn to stoicism. (One of the talented undergraduates in the good lives seminar finally said to me, with some heat, "Why don't you just write a book on stoicism. It's obvious that you *are* one, after all.")

"The Priority of Human Interests" (1982), paper 4 below, was written for a large, multidisciplinary conference, organized by Harlan Miller and Bill Williams at Virginia Tech. The conference was dominated by the emotional intensity and intellectual tenacity of rival

groups of non-philosophers: scientists who used animals in their research; advocates devoted to limiting or eliminating such research; vegetarians and vegans; representatives of animal rescue and animal shelter organizations. The philosophers in attendance were arguing mostly along utilitarian or deontological lines and mostly in sympathy with either Peter Singer or Tom Regan (both of whom were speakers there). My paper was thus an outlier.

The gist of my argument is that moral character counts in a full-fledged philosophical argument about our treatment of non-human animals. The virtues rule out cruelty to animals, along with the unnecessary infliction of pain and suffering. And they draw boundaries for the use of animals for food and for scientific and medical research. But the very same virtues tend to order moral priorities in terms of social distance. That means that a person of good moral character will typically give significant priority to human interests, and to non-human animals who have become, in effect, members of human families. (Firefighters will sometimes risk their lives to save other people's pets.) This priority may not show up in a properly nuanced way on a utilitarian or rights-based approach to our treatment of non-human animals.

"The Free Rider Problem" (1983), paper 5, was also given at a Virginia Tech conference organized by Miller and Williams. It is a reflection on one aspect of the use of rational choice theory in utilitarian and social contract accounts of distributive justice. Specifically, it addresses the way we might handle n-person prisoners' dilemmas there, in a way distinct from the one then being proposed by David Gauthier at conferences such as the one at Virginia Tech, and soon to be proposed in his book *Morals by Agreement* (1986).

Some such accounts are dismissive of the social psychological evidence that even in the stark environment of controlled experiments, people solve prisoners' dilemmas at a rate greater than game theory suggests is rational. Nor are such accounts embarrassed by the abundant evidence that n-person prisoners' dilemmas do not stymie voting, or the operation of blood banks, or the success of the vast variety of voluntary organizations in contemporary societies.

None of that background is mentioned in the paper. Instead, I thought at the time it was more important to refresh my own and perhaps conference attendees' appreciation of prisoners' dilemmas and their possible consequences for social and political philosophy. Once that was accomplished, the paper's constructive argument stays within the concept of rationality used in applications of game theory, and simply proposes that it is perfectly rational in that sense to embark on a program of moral education that creates a stable, durable disposition in ourselves

and others through which we are led to be fundamentally cooperative – at least until it is clear cooperation will actually lead to destructive consequences in the real world. Such a disposition amounts to a form of “basic trust” in the sense described in “Trust as Non-Cognitive Security about Motives,” paper 12 below in §3. [Go Back](#)

## §1. The Virtues of Virtue Theory

[Introduction](#)..... 8

1. The Neglect of Virtue [Read Full Text](#)
2. Unity, Coincidence and Conflict in the Virtues [Read Full Text](#)
3. Good Lives: Prolegomena [Read Full Text](#)
4. The Priority of Human Interests [Read Full Text](#)
5. The Free-Rider Problem [Read Full Text](#)

[Go Back](#)

[Go Back](#)

## §2. Rights and Some Problems in Legal Theory

### Introduction

Each of the papers in this section is an outlier in the body of my work as a whole. There are some other apparently exhausted interests – e.g., a couple of early papers on philosophy of religion; a self-unraveling definition of philosophy; a piece on analogy in legal reasoning; and so forth. So I should say something about why these five outliers are included. The answer is simple in each case, but not quite the same for each.

In the case of “Criminal Attempt and the Theory of the Law of Crimes,” paper 6 below, the motivating idea was that we needed a better justification than I had been able to find for making criminal law part of public rather than private law. Legal theorists and judges who bothered to discuss the topic would typically give an answer in terms of social harm. The claim would be that crimes require a public response (prosecution and punishment for public purposes) due to the public or social harm done, or which might be done if the response were left to the individual victims or their families. But it is clear that torts and breaches of contract and many other legal wrongs also do social harm.

So is there a conception of social harm that can sort out these cases? That question led me to use apparently harmless criminal attempts as the test case for analysis, and that then led me on a chase through the complexities of the distinction between preparation to commit a crime and an attempt to commit one; attempts that might possibly have been successful versus attempts that could not possibly have succeeded; and so forth. The resulting account of social harm is not meant as an explanation of the history of this aspect of the criminal law, but it turns out to yield a fairly robust justification for much of it. And it also helps to resolve some puzzles about other aspects of criminal law: the legalization of blackmail, the sale of human body parts, and some other so-called victimless crimes. I have written on some of these topics, notably blackmail, for colloquia or teaching purposes, but I have not tried to put them into publishable form because they rely too heavily on the account of social harm given in the criminal attempt paper.

The scale of my intellectual debt to HLA Hart is very great in many matters. It comes from reading his work, of course, but also from the opportunity to study philosophy of law (and much else) with him during the academic year 1971-72 in Oxford. That year was profoundly

important for me, philosophically, and Hart's guidance and generosity were a large part of what made it possible. He quickly found, however, that we couldn't make much progress on philosophy of law until I had learned some case law beyond the twenty or so cases collected in a good anthology then circulating among philosophers in the United States. So I spent the fall of that year reading roughly 3000 cases, most of them of historic importance in British law. (Most of them were also mercifully terse, even those written after the invention of the typewriter.) That reading binge started with criminal law, in the hope that the cases would at least be intrinsically interesting, and especially good fodder for real-life examples for moral philosophy. As it turned out, criminal law cases taken in large doses were intrinsically depressing, and rather unhelpful for developing philosophical arguments in moral philosophy. Torts were much better in both respects, and contract law was even better in some respects. So it is possible that this paper on criminal attempt, written after I returned to Virginia, may have been motivated in part by a subconscious desire to say farewell to that criminal law, philosophically. And at the time, I had no idea that property rights would soon become a limited philosophical preoccupation for me.

The next two papers in this section are mostly desiccated, descriptive analysis, but with enough argument to prevent them from being merely analysis in search of an idea.

"Three Types of Rights" (1980), paper 8, tries to make clear the sources and limits of my persistent discomfort, over the years, with treating rights rather than duties as foundational for deontological theories in ethics. The paper was published in a symposium devoted to the work of Alan Gewirth, who had been my dissertation advisor at Chicago. That may explain why I stuck to analysis rather than normative argument based on it – partly out of loyalty and partly out of risk aversion. (I had the same objection most critics had to a crucial move in Gewirth's argument for the soundness of individual claims to rights to freedom and well-being – namely the "dialectical" move from the agent's recognition of those things as necessary goods to the agent's claim to them as a matter of right. But as his former student I also had, perhaps, a clearer idea of how many times he had heard that objection, and how many impressively distinct refutations of it existed in typescript in his file cabinets.)

But my discomfort remains, and has shown itself several times in my published writings on rights. It shows up, for example, in the final section of "Reciprocity, Justice, and Disability" (2005), volume 1. In "Three Types of Rights" I make it clear that in principle there is a place in ethical theory for "original" rights – meaning those whose justification is not derivative from or

“coincident” with corresponding duties. But the normative impact of this within the paper is quite weak. On reconsideration, however, I must admit that it has had some staying power for my work. And it helps to strengthen my reasons for thinking that it is better for everyone if practical, political, and philosophical discussion focuses on the duties we all have to each other rather than the rights we have against them. The rights, liberties, powers, and immunities are there of course. But it seems to me that the practical, political, and philosophical discussion of conflicts about duties and rights is more productive if everyone focuses first on the duty side of the ledger.

“Individual Rights,” (1982) was written for a volume of new introductory essays in ethics and public policy. It is more expository than argumentative. But I include it here for four reasons. First, its indecently elaborate riff on Ronald Dworkin’s metaphor of rights as trumps continues to be useful (in my own thinking) as a warning about the complications and dangers of putting rights at the foundations of ethical theory. The warning is that treating rights as trumps can easily distort ethical theory if the weakest of rights will take any trick made up of other moral considerations, no matter how strong they might be. Second, it makes obvious that if we take that warning seriously, we will have to have an account of when other moral considerations will trump rights. Third, again, it supports the view that duties would be a better choice than rights for theorists who insist on being deontologists – because that choice would reduce the frequency of conflicts about deontological considerations being trumps, and perhaps make it easier to resolve such conflicts. None of that is made explicit in this article, but the possibility interests me. And fourth, the article contains useful and compact reminders about various types of rights and the justificatory problems of each.

“Deserving to Own Intellectual Property” (1993), paper 9 below, addresses a topic that was omitted from the property rights book – a topic that has become increasingly prominent since the book’s publication in 1977. In this paper, the framework of the property rights book was used to address the problem, but both the concept of desert from that book and the conception of reciprocity from *Reciprocity* (1986) play substantial roles. The peculiar strength of the claim that artists, inventors, or discoverers deserve to have a right to the product of their intellectual labor if anyone does, together with the fact that such products almost always “leave as much and as good” for others (in terms of opportunities for other inventions or discoveries)

has interesting consequences for the social welfare provisos attached to every plausible justification for private property rights.

The final paper in this section, “Ideal Taxation” (1989), began as something quite different than what it eventually became. Early versions in the late 1970s were called “The Obligation to Pay Taxes,” and that paper was meant to be a test case of a reciprocity argument for non-voluntary social obligation. Its companion test case was “The Obligation to Work” (see volume 1). I read the taxation paper at a topical conference in 1979, where I had the pleasure of a lengthy conversation about it and many other things with G.A. Cohen. His response and those of other hearers and readers, both there and elsewhere, made it clear that the paper would not work unless the reciprocity argument was either discarded or made much stronger. I also got the general idea that people were not impressed with my grasp of 20<sup>th</sup> century fiscal policy in the United States. So I put it aside, mostly, and worked on the reciprocity book. I also studied some aspects of the limits, history, and possibilities of tax policy – not for any philosophical reason in particular, but just as a matter of intellectual interest. That led to the conviction that there is something unfortunate in the way tax policy people define the desiderata for an ideal tax.

Fiscal policy theorists want taxes that are as broad-based as possible (and thus capable of generating lots of revenue), easy to collect (and thus cost-efficient), have acceptable economic consequences (are not self-defeating, economically), and are equitable (not regressive, for example), among other things. Below the level of the ideal, politicians, judges, and administrators are expected to find an appropriate balance of these desiderata.

The idea that equity was just one among several equally important factors that could each be compromised to achieve a balance was not attractive. So I began to think about the tax paper again, and when in the late 1980s an invitation arrived to submit a paper to a proposed book on applied philosophy, I produced a paper on “Ideal Taxation” that had very little to do with reciprocity. It did, however, argue for replacing the comprehensive income tax with a comprehensive expenditure tax, and comes close to arguing for what seems to me now to be an otherworldly (if not charmingly crazy) single tax theory. I had second thoughts about it immediately, but now find its arguments philosophically interesting again, and its weirdness amusing. I’m glad that the editors of the collection urged me to publish it, and even put up with my ambivalence, which shows itself in the epigraphs to the piece, the introduction to it, and the

footnote about how I would have liked to rewrite it even then. Now, however, I am happy to reconsider it myself, and offer it to others for their reconsideration. [Go Back](#)

## §2. Rights and Some Problems in Legal Theory

<a href="#">Introduction</a> .....	12
6. Criminal Attempt and the Theory of the Law of Crimes	<a href="#">Read Full Text</a>
7. Three Types of Rights	<a href="#">Read Full Text</a>
8. Individual Rights	<a href="#">Read Full Text</a>
9. Deserving to Own Intellectual Property	<a href="#">Read Full Text</a>
10. Ideal Taxation	<a href="#">Read Full Text</a>

[Go Back](#)



[Go Back](#)

### §3. Some Problems in Practical Ethics

#### Introduction

In “Human Being: Boundaries of the Concept” (1975), paper 11, the idea was to give a purely biological account of entry and exit from the category of human being. This effort was motivated, in the early 70s, by dissatisfaction with the cursory philosophical treatment given to those matters in the growing literatures on abortion and brain death. In retrospect, the paper is an obvious example of my insistence that philosophical discussions of human conduct be grounded in the facts about human physiology and psychology, in the actual physical and social environments in which we live. The weakness of the paper, as I now reconsider it, is that its focus on physiology is too narrow. It should consider things more broadly, in order to make its relevance to moral argument stronger and clearer. But then it would either have been a much longer paper, probably not publishable in a journal, or have sacrificed a good deal of its focus on developmental biology and physiology. More about that in a moment.

During the writing of the paper, the US Supreme Court decided *Roe v. Wade* (1973), correlating developing levels of state interest in preserving the fetus to levels of development at the end of the first and second trimesters of pregnancy. But the details of that correlation were not clear to me. At the same time, some philosophers were pushing the line that the existence of a “person” – and not of a human being – was the relevant criterion for homicide generally, and thus for abortion, infanticide, and euthanasia. Advocates of the personhood criterion found themselves struggling with questions about the beginning of personhood (was it at conception, live birth, the beginning of distinct personality?) and having a much easier time with the then-popular questions about whether “whole brain death” was a sufficient condition of death, legally. This asymmetry of supposed philosophical difficulty was intriguing, to say the least.

The final motivating factor for me was the frequency with which philosophers and lawyers and judges dismissed the possibility of getting decisive biological answers to the questions of when a developing organism has become, or has ceased to remain, a human being – rather than an entity entering or exiting that category. My hunch was that one *could* construct decisive answers to those questions, though by themselves they might or might not be decisive for the moral or legal questions. I thought it would be interesting to work on it, in any case.

On the entry question, conception is an obvious candidate, but seems defeated by the fact that the number of human beings that will develop from the fertilized ovum is not decided at that point. The end of “twinning possibility” is another candidate (roughly 14 days), as is the point at which gross anatomy is more or less fixed (more or less 12 weeks). Viability is yet another candidate, but seemed to me then, and still seems to me now, insupportably problematic because it is so movable in terms of the available life-support technology. In current practice in the US, however, it now seems to be the de facto criterion underlying statutes and Supreme Court decisions that try to draw a line within pregnancy beyond which abortion is not permitted. My argument, however, was then and remains now that the biological process of becoming a human being is best understood as the point at which the generative phase of histological development is more or less complete. On the exit question, I opposed the conflation of brain death with death because I thought it papered over a philosophically important distinction.

As far as I can tell, from looking at the outlines of current medical school textbooks on embryonic and fetal development, the dramatic advances in those fields in the decades since the paper was published do not call for significant changes in the “entry” argument of the paper. This is so because the advances in the developmental biology have been about the details of the fundamental processes involved rather than their overall sequence or timelines.

On the “exit” side, subsequent clinical and legal developments seem to have done at least two things. The first of these is to change the subject, in some contexts, from the definition of death to the presence or absence of an advance directive from the patient – and the consequent need to follow or construct a set of legally binding instructions about organ donation, conditions under which a Do Not Resuscitate order should be issued, and the circumstances under which nothing other than palliative care should be provided. The second of these is to change the subject in other contexts, to getting conclusive evidence of various types of brain death (from new kinds of imaging studies as well as more refined electroencephalographic ones) in order to refine the legal definition of brain death, and the permanence of a persistent vegetative state. These things now take a leading role in interpreting the patient’s advance directive, and altering the debate about using a brain death criterion in various medical and legal contexts.

Rewriting the “exit” argument of the paper now would certainly be useful in order to make the point that the argument still stands or falls on its original philosophic points, even though some of its practical aims may have been mooted. But I am not going to revise it now,

and I knew at the time I finished it that it was likely to be a dead-end for me in terms of my own continued philosophical projects.

It is selected here because it has been reprinted several times without added comments like these from me, and has been, over the years, useful to some people in some aspects of the abortion debate. If I were to rewrite it now, I would make sure that both of its sections (the entry and the exit arguments) were explicitly embedded in discussions of our duties of care to other human beings rather than in discussions of everyone's rights against each other. And I would use the opportunity, in the entry argument, to discuss its relevance to the moral question of the difference in the strength of our duties of care to the women who carry the embryo and fetus (including our duties of noninterference in their decisions about their pregnancies) versus the strength of our duties of care to the embryo and fetus itself.

"Trust as Noncognitive Security about Motives" (1996), paper 12 below, could, I suppose, have been included in §1 above on virtue theory. While I was finishing the stoicism book, I was also trying to work through some questions about the kinds of trust involved in contracts, social contracts, and agreements of all sorts. I had earlier advanced an argument about the free rider problem – see paper 5 above -- that relied on the development of a disposition to cooperate. Dispositions to be trusting are closely related to that, but the tendency in the economic and rational choice literature about trust was then to stress the importance of determining the trustworthiness of others. That seemed to me to run the risk of emptying the notion of trust of any special, independent significance. The paper on trust was aimed at enlarging that discussion.

Once immersed in working out the argument of the paper, I was especially struck by what I thought was an explanatory gap in the social science on trust in government. On the one hand, by most measures, trust in government shows up in the evidence as volatile and often very low. On the other hand, in many countries, citizens' overall sense of security about the government (as shown in moments of crisis or danger, and in decisions to emigrate) doesn't seem volatile in the same way. And it doesn't seem to be linked very closely to the usual measurements of low trust. I thought that this might be because trust in government has typically been measured by asking people whether they believe government officials are truthful, credible, and competent. I thought that there was an important dimension missing in such an account – something about the extent to which people felt basically secure about the *motives* of government officials, and perhaps about the way those motives were implemented through institutions. This connects trust

to some fairly stable, and often deep, feelings of security and insecurity – feelings or dispositions deep enough to be connected to psychological health, since its absence (that is, the level of insecurity it represents) can reflect a form of basic anxiety that can be the root of personal instability. The argument is that to the extent that social institutions and practices contribute to such basic anxiety, as opposed to basic trust in the form of basic security about others' motives, they threaten to become self-defeating.

The connection to psychological health here anticipates material relevant not only to the link between health, agency, and virtue in the reconstructed version of Stoic ethics (on which I was then working) but to the concerns about basic good health of a eudaimonistic sort at the center of what eventually became *Habilitation, Health, and Agency* (2012). More to the point here, both of those projects connect to the next paper in this section.

“The Good of Agency” (2000), paper 13 below, is a public policy argument, grounded in views about the value of human life and human agency that are widely held in contemporary liberal democratic societies. Those views are thus appropriate starting points for public policy arguments in those societies. Philosophically, the argument of the paper is part of an effort to get clear about the value of agency – eventually to be understood as healthy agency. Formally, it is a consistency argument, guided by the maxim *If you are going to save the life, save the agent in it first*. (I have since seen the use of this maxim in other contexts. At the time I used it, it struck me as being something I must have read or heard somewhere else, but I couldn't find a source for it. I will look again, but unless I eventually hear otherwise, I will play finder's keepers.)

The argument proceeds through the following steps, which I quote from the text: (1) Being an active, effective human agent is overwhelmingly more valuable than being merely a human who is alive, or conscious, or capable of acquiring agency. (2) If we are ever committed to saving and sustaining *mere* human life, consciousness or capacity, even though doing so is expensive and inconvenient, then it is inconsistent with the values involved (not to mention cruel and wasteful) not to have a superordinate, prior commitment to saving and sustaining that human being as an active, effective agent. (3) We are often committed to saving and sustaining human lives in expensive and inconvenient circumstances. (4) We ought not to be inconsistent, cruel or wasteful. (5) Therefore, in every case where we are committed to saving the life, consciousness, or agency potential of a given human being, we ought to commit ourselves first to saving or

sustaining the active, effective agency of that human being, even when doing so is expensive and inconvenient.

(There is also a more recent public policy paper on agency, not reflected in this volume of selected papers, that addresses the ethical importance of agentic health in discussions of long-term rehabilitation and patient care generally. Its title – and date of publication – suggest that it is a follow-on from my habilitation book. And it does wheel in some of the apparatus from that book. But it is better thought of as an introductory chapter to a book on patient engagement in healthcare. And that is exactly what it became: "Habilitation, Healthy Agency, and Patient-Participation," in Guendalina Graffigna (ed.), *Promoting Patient Engagement and Participation for Effective Healthcare Reform*. IGI Global Medical Information Science Reference, 2016. Pp. 1-24. Its contribution to a philosophical discussion of habilitation is minimal.)

There are two other papers, however, that do extend the project of the *Habilitation* book (2012). One of them is “Disability, Basic Justice, and Habilitation into Basic Good Health” (forthcoming, 2017) Habilitation is the process of equipping others, and ourselves, with the abilities needed to survive and thrive in the physical and social environments we inhabit. This involves acquiring the ability to habilitate our environments, as needed, as well as ourselves. Human beings need habilitation – and self-habilitation – throughout their lives. This makes habilitation into a major set of problems for theories of justice, along with the traditional elements of what Hume called the circumstances of justice: scarcity of resources, limited altruism, and inequalities of power and vulnerability. All of these things yield problems of coordination, cooperation, and conflict resolution which are the basic stuff of theories of justice. The habilitation book argues that all of this, including the problems generated by the human necessity for habilitation, rightly belong among the features of the human condition that form the pre-theoretical background of any theory of justice, and thus any comprehensive moral theory. It is thus at the same level of abstraction as *On Justifying Moral Judgments* (1973) and of the first paper in the first volume of these selected papers, “The Finality of Moral Judgments” (1973).

By contrast, paper 14 below does three things. First, it addresses the worry some critics have had that the book somehow covertly smuggles part of a substantive moral theory into the account of the pre-theoretical background conditions for all moral theories. It responds to this by reemphasizing the warrant for including habilitation into the account of the into the set of background conditions within which every theory of basic justice must work. Second, it

reemphasizes that this pre-theoretical background involving habilitation is “disability-friendly” only within certain physical and social environments – for example, in environments rather like those of contemporary, affluent, liberal democratic societies. So it is natural for readers in such environments to suspect that the background conditions might be disability-friendly in themselves. But they are not. In a sparsely populated preindustrial frontier situation, for example, the same background conditions are likely to be disability-hostile. Then third, the paper goes on to argue that in such physical and social circumstances as our own current ones, when we focus moral theory (of any sort; utilitarian, contractarian, virtue theory) on the abilities agents need to solve habilitation problems, there are likely to be some sweeping disability-friendly consequences.

People working on the ethics of care – both the need for care and the need for caregiving – have been making similar arguments for care. However, it seems to me that the fundamental pre-theoretical consideration raised by care theorists is better captured by the notion of habilitation, which includes the need for care and the need for caregiving, but is a broader notion in ways that are useful for a theory of justice. Justice must also deal with evil, violent conflict, physical and social threats that disrupt the caregiving virtues and the receipt of care. There are people who, once launched by the effective care of others, develop the illusion (or worse, the aspiration) of being completely independent and self-sufficient. And there are people who have an intractable resistance to the caregiving virtues and to cooperative ventures in general. It thus seems better to include the need for care and the caregiving virtues in a broader range of concerns with similar, but more inclusive aims – and perhaps more progressive and self-sustaining ones.

One consequence of this is that basic good health becomes a leading concern in moral theory – partly as an index to how well the theory addresses fundamental human problems. And a special aspect of human health is what I came to call healthy agency. In this case the concern would be with the sort of agency required for seeking and accepting habilitation from others, and for habilitating oneself, and one’s physical and social environments. Such basic good health and healthy agency is fundamental also to the solution of conflict, cooperation, and cooperation problems in strategic situations. So it became clear that the concept of health involved here would have to be both physical and psychological, and both positive (the presence of certain

rooms physical and psychological strengths) as well as negative (the absence of certain physical and psychological weaknesses or deficiencies or diseases).

This line of thought led eventually to the habilitation book. But oddly, that book has rather little to say about disability directly. Instead, it assumes that disability-friendly consequences follow immediately from the concern for basic good health. “Disability, Basic Justice, and Habilitation into Basic Good Health,” paper 14 below, addresses these matters directly.

So does the final paper in this collection, “Habilitative Health and Disability,” paper 15 below. It explicitly defines a special conception of “habilitative health” as the physical, psychological, and behavioral strengths needed to successfully pursue habilitative tasks in the physical and social environments a person must inhabit. It then uses that distinction to distinguish disabilities from various human limitations, difficulties. Finally, it shows how such disabilities are not only of special concern to theories of justice but how the necessity of some measure of habilitative health clearly yields an all-things-considered justification for human duties – social duties – to achieve and sustain such health. [Go Back](#)

### §3. Some Problems in Practical Ethics

<a href="#">Introduction</a> .....	17
11. Human Being: The Boundaries of the Concept <a href="#">Read Full Text</a>	
12. Trust as Non-Cognitive Security about Motives <a href="#">Read Full Text</a>	
13. The Good of Agency <a href="#">Read Full Text</a>	
14. Disability, Basic Justice, and Habilitation into Basic Good Health <a href="#">READ PENULTIMATE TYPESCRIPT</a>	
15. Habilitative Health and Disability <a href="#">READ PENULTIMATE TYPESCRIPT</a>	

[Go Back](#)

Table of Contents for Volume 1:  
Reciprocity, Justice, Stoicism

<i>Citations and Online Access to the Papers in this Volume</i> .....	4
<i>Preface: unintended constancy</i> .....	6
§1. The General Conception of Morality	
Introduction.....	12
1. The Finality of Moral Judgments	
§2. Reciprocity: Reprise and Extensions	
Introduction.....	15
2. Reciprocity, Justice, and Disability	
3. Disability, Strategic Action, and Reciprocity	
4. Reciprocity and Social Obligation	
5. The Obligation to Work	
§3. Justice: Theories, Property, and Community	
Introduction.....	19
6. The Moral Basis of Property Rights	
7. Against the Supposed Difference Between Historical and End-State Theories	
8. Property Rights and Social Welfare	
9. Community, Dominion, and Membership	
§4. Stoicism: Emotion, Health, and Virtue	
Introduction.....	23
10. Stoic Emotion	
11. Stoic Children	
12. Human Health and Stoic Moral Norms	
13. Stoic Virtue	
<i>Table of contents for volume 2: Virtue, Rights, Practical Ethics</i> .....	27