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## Social Contract Theory in American Case Law

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## DUNWODY DISTINGUISHED LECTURE IN LAW

### SOCIAL CONTRACT THEORY IN AMERICAN CASE LAW

*Anita L. Allen\**

I.	INTRODUCTION . . . . .	2
	A. <i>Methods and Assumptions</i> . . . . .	11
	B. <i>Purposes</i> . . . . .	13
II.	THE STATE OF NATURE . . . . .	18
	A. <i>Environmental Attributes</i> . . . . .	20
	B. <i>Realms of Risk</i> . . . . .	23
	C. <i>Freedom to Contract</i> . . . . .	25
	D. <i>Things Without Owners</i> . . . . .	25
III.	THE SOCIAL CONTRACT . . . . .	26
	A. <i>Social Contract as Consensual, Rational Principles</i> . . . . .	27
	1. In Tort and Property Law . . . . .	28
	2. In Criminal Law . . . . .	30
	B. <i>Social Contract as Revolution and Constitution</i> . . . . .	33
	C. <i>The Legal System as a Social Contract</i> . . . . .	35
	D. <i>Contracts and Reliance Interests as Social Contracts</i> . . . . .	36
IV.	CONCLUSION . . . . .	38

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## I. INTRODUCTION

The concept of contract is the “union of the ideas of agreement and obligation.”<sup>1</sup> Social contract theories seek to legitimate civil authority by appealing to notions of rational agreement.<sup>2</sup> These diverse theories of morality, politics, and law posit actual or hypothetical circumstances of pre-regulated society, termed the “state of nature”<sup>3</sup> in early modern social contract theories and the “original position” in John Rawls’s theory.<sup>4</sup> Social contract theories provide that rational individuals will agree by contract, compact, or covenant to give up the condition of unregulated freedom in exchange for the security of a civil society governed by a just, binding rule of law.

The legal system of the United States has an important relationship to social contract theory.<sup>5</sup> Scholars believe social contractarian<sup>6</sup> philosophy

1. WELLSTOOD A. WATT, *THE THEORY OF CONTRACT IN ITS SOCIAL LIGHT* 1 (1897).

2. See, e.g., THOMAS HOBBS, *LEVIATHAN* 132-33 (Michael Oakeshott ed., MacMillan 1977) (1651); JOHN LOCKE, *An Essay Concerning the True, Original, Extent and End of Civil Government: Second Treatise on Government*, in *SOCIAL CONTRACT* 3, 10-11 (Oxford Univ. Press 1962) (1690); JEAN-JACQUES ROUSSEAU, *On the Social Contract*, in *THE BASIC POLITICAL WRITINGS* 141 (Donald A. Cress ed. & trans., Hackett Publ’g 1987) (1762).

3. Locke, *supra* note 2, at 4.

4. JOHN RAWLS, *A THEORY OF JUSTICE* 17-22 (1971). Rawls revived scholarly interest in social contract theories. His theory has been widely discussed, criticized, and applied in diverse scholarly legal and philosophical circles. See, e.g., Charles W. Collier, *Intellectual Authority and Institutional Authority*, 42 *J. LEGAL EDUC.* 151, 167-68 (1992); Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 *PHIL. & PUB. AFF.* 146, 161-65 (1981); John M. Evans, *Let Our Parents Run: Removing the Judicial Barriers for Parental Governance of Local Schools*, 19 *HASTINGS CONST. L.Q.* 963, 1007-08 (1992); George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 *COLUM. L. REV.* 533, 543-44 (1987); Thomas M. Franck, *Is Justice Relevant to the International Legal System?*, 64 *NOTRE DAME L. REV.* 945, 951-54 (1989); W. Robert Gray, *The Essential-Functions Limitation on the Civil Rights of People with Disabilities and John Rawls’s Concept of Social Justice*, 22 *N.M. L. REV.* 295 (1992); Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 *B.C. L. REV.* 529, 546-47 (1991); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 *U. PA. L. REV.* 45, 60 (1974) [hereinafter Richards, *Free Speech*]; David A.J. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 *GA. L. REV.* 1395, 1408-13 (1979) [hereinafter Richards, *Human Rights*]; Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 *CAL. L. REV.* 1339, 1375 n.108 (1987); Andrew E. Wetzler, Note, *The Ethical Underpinnings of the Endangered Species Act*, 13 *VA. ENVTL. L.J.* 145, 178-79 (1993); Jeffrey Abramson, *Ronald Dworkin and the Convergence of Law and Political Philosophy*, 65 *TEX. L. REV.* 1201, 1202-08 (1987) (book review); Richard Schmalbeck, *The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal*, 83 *COLUM. L. REV.* 488, 510-12 (1983) (book review).

5. See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION ITS ORIGINS AND DEVELOPMENT* 118 (6th ed. 1983); *THE ORIGINS OF THE AMERICAN CONSTITUTION* at viii-ix (Michael Kammen ed., 1986); Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 *AM. HIST. REV.* 467, 467 (1900) (“Students of American history or political philosophy need not be told that in the Revolutionary period men believed that society originated in compact.”); see also BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN*

influenced the founding of the United States and its Constitution.<sup>7</sup> According to some historians, the American colonists relied upon liberal, Lockean notions of a social contract to spirit rebellion against unwanted British rule.<sup>8</sup> Historians have maintained that social contractarian theories of political order significantly influenced the people who wrote and defended the Declaration of Independence, the original Constitution, and the Bill of Rights.<sup>9</sup> Legal scholars have assumed or argued the propriety of

REVOLUTION 58-59 (1967); ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA: ORIGIN AND EVOLUTION OF ITS FUNDAMENTAL IDEAS* 6 (1965); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 282-91 (1969); Louis Henkin, *Revolutions and Constitutions*, 49 *LA. L. REV.* 1023, 1029 (1989); Thad W. Tate, *The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument*, 22 *WM. & MARY Q.* 375, 376 (1965).

6. Early Americans often used the terms "compact," and "covenant" synonymously with "contract." See WOOD, *supra* note 5, at 541 (quoting a colonial era writer who treated the words compact, agreement, covenant, and bargain as synonyms); see also CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* 405 (1953) (noting that "Colonial writers used the words compact, contract, or covenant"). Still, as Rossiter suggests, each of the three terms has its own history and connotations. See *id.* at 53 (describing the original Puritan concept of "covenant" as instrumental in helping to swell the broader social contract idea).

7. See PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION* 27 (1972) (noting that social contractarian thinkers generated "a corpus of ideas about public and popular authority and popular political responsibilities that shaped the American revolutionary movement"); JOHN WITHERSPOON, *LECTURES ON MORAL PHILOSOPHY* 45 (Jack Scott ed., 1982); Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 *LAW & INEQ.* 1, 18 (1992) ("American civil rights theory derives in part from the 17<sup>th</sup> century 'social contract' tradition . . ."); Martin C. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 1069, 1074 (1991) ("The Revolution in America in 1776 found philosophical foundation in the social contract theorists. . ."). See generally John F. Fenton, Jr., *The Theory of the Social Compact and Its Influence Upon the American Revolution* 37-65 (1891) (unpublished doctoral thesis, Columbia College) (on file with author) (discussing the impact of social contractarian thought on colonial America).

8. See, e.g., WITHERSPOON, *supra* note 7. But see STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 5-7 (1990) (stating that by the 1960s historians began to regard liberal Lockean contractarianism as having little influence on pre-revolutionary American political thought compared to civic republican influences); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 *J. AM. HIST.* 9, 9-33 (1987) (depicting Lockean liberalism as only one of three significant intellectual influences in early America).

9. See *State v. Clark*, 592 S.W.2d 709, 721 (Mo. 1979) ("History tells us that the Framers . . . were influenced by the teachings of Aristotle, Locke, Rousseau, and others, and by the social contract concept they espoused."); CARL BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* A27-31, 62-63, 79 (1972); KELLY ET AL., *supra* note 5, at 118; Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 *HASTINGS CONST. L.Q.* 267, 310 (1993) ("To Americans searching for a way to legitimate their separation from England, social contract theory provided an ideal inspiration. . . Jefferson relied upon the rhetoric of social contract theory in the Declaration of Independence. . . State constitutions, and ultimately the federal one, were conceived as new

advancing social contractarian arguments for or against doctrinal traditions and innovations in law.<sup>10</sup> Professor David A.J. Richards has argued both that American law has roots in the social contract tradition, and that the social contract tradition has direct implications for how courts ought to interpret provisions of the Constitution today: social contractarian influences on constitutionalism in the United States justify adopting normative social contractarian analysis as a framework for constitutional interpretations of religious freedom, free speech, and personal privacy.<sup>11</sup>

Scholars disagree about the precise character of the relationship between U.S. law and social contractarian thought.<sup>12</sup> They dispute the extent to which liberal philosophy, as opposed to civic republican philosophy, guided the founding. They also dispute the extent to which the seminal ideas of John Locke and other liberal social contractarians played a role.<sup>13</sup> Moreover, scholars who accept a significant social contractarian

social contracts.”) (footnotes omitted). *See generally* Fenton, *supra* note 7.

10. *See, e.g.*, Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1718 (1975) (“[P]arallels between private and public law appear ultimately to stem from a contractarian view of the state as an artificial person.”); Edward J. Sullivan, Lucas and Creative Constitutional Interpretation, 23 ENVTL. L. 919, 919 (1993) (certain “cases have eroded the underpinnings of the social contract which underlies environmental regulation”); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1435 (1988) (“[t]he underlying theory [of the early period of administrative law] was based on notions of social contract”); *see also* Aileen M. Bigelow, *In the Ghetto: The State’s Duty to Protect Inner-City Children from Violence*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 533, 556-59 (1993) (arguing that the social contract requires states to protect inner-city children from violence); Brenneke, *supra* note 7, at 19-22 (arguing that the state’s failure to enforce the social contract, in favor of women, leads to spousal abuse); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 CINCINNATI L. REV. 3, 12-13 (1983) (using social contract theory to enforce international human rights); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1409-13; Stephen Holmes, *Welfare Rights as Property Rights*, in RESPONSIBILITY, RIGHTS, AND WELFARE: THE THEORY OF THE WELFARE STATE 88 (J. Donald Moon ed., 1988) (stating that the duty to help the poor is founded on the social contract); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 923-27 (1991) (finding that aliens’ rights are based on the social contract).

11. *See* DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); *see also* Richards, *Human Rights*, *supra* note 4, at 1404-05; Richards, *Free Speech*, *supra* note 4, at 60-61.

12. A popular traditional reading of history assigned a large role to contractarian thought. *See, e.g.*, DWORETZ, *supra* note 8, at 5-6; JOHN C. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION 170-76* (1943); *see also* BAILY, *supra* note 5, at 58-59. Scholars began to read the history differently in the 1960s. *See, e.g.*, DWORETZ, *supra* note 8, at 6; *cf.* Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 13-17 (1992) (accounting for the “paradigm shift” that, in the 1960s and 1970s, led republicanism to supplant liberalism, including social contract theory, as the supposed major influence on early American political and legal thought).

13. Compare John Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in JOHN LOCKE: PROBLEMS AND PERSPECTIVES 45, 79 (John W. Yolton ed., 1969) (stating that Locke may have influenced colonialists, but only by “intellectual osmosis”) and GARY

influence on the founding of the United States dispute the degree to which exposure to social contractarian philosophy may have influenced particular historical figures, for example, John Quincy Adams, Thomas Jefferson, and James Madison.<sup>14</sup>

A great deal has been written about the seeming social contractarian foundations of the Declaration of Independence and the Constitution. However, little has been written about the roles social contractarian thought may have played in subsequent jurisprudence in the United States. Indeed, one prominent scholar has concluded that “[t]he idea of the social contract implicit in America’s rights ideology served the new nation well at the beginning, but had no further use.”<sup>15</sup>

My central thesis is that the idea of the social contract has had noteworthy uses since the American Revolution. As discussed below, the idea of the social contract as a source of legitimate and consensual authority has surfaced in constitutional, statutory, and common law cases in this century and the last.<sup>16</sup> Judicial opinions relating to matters as varied

WILLS, INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 239 (1978) (“Jefferson drew his ideas and words from these men, who stood at a conscious and deliberate distance from Locke’s political principles.”) with MILLER, *supra* note 12, at 170 (“If any one man can be said to have dominated the political philosophy of the American Revolution, it is John Locke.”); *cf.* Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Gary Wills’s Inventing America: Jefferson’s Declaration of Independence*, 36 WM. & MARY Q. 503, 505-08 (1979) (assessing evidence of Locke’s influence on Jefferson).

14. See, e.g., ADRIENNE KOCH, THE PHILOSOPHY OF THOMAS JEFFERSON 140-41 (1957); THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON xxiii-xxiv, 367, 420, 439 (Marvin Meyers ed., 1981). Recent courts have cited Madison’s appeal to the social contract to explain the evils of bills of attainder and ex post facto laws. See *State v. Myers*, 923 P.2d 1024, 1030 (Kan. 1996); *State v. Cookman*, 920 P.2d 1086, 1092 (Or. 1996).

15. Henkin, *supra* note 5, at 1033; *cf.* *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220 (9th Cir. 1988), *rev’d* 494 U.S. 259 (1990) (finding that framers rights ideology explicated by reference to the state of nature).

16. An interesting social contractarian legacy is article 1, section 1 of the Connecticut Constitution. See M. Kate Curran, Note, *Illegal Aliens, the Social Compact and the Connecticut Constitution*, 13 BRIDGEPORT L. REV. 331 (1993) (concluding that the state constitution “expressly incorporates a social compact theory of government”). Article I, section 1 of the Connecticut Constitution provides that “All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.” This provision has surfaced in the case law as a source of alleged rights and duties. See, e.g., *Hilton v. City of New Haven*, 661 A.2d 973, 984 (Conn. 1995) (constitutionality of decision to close overflow homeless shelter); *Moore v. Ganim*, 660 A.2d 742, 749-50 (Conn. 1995) (constitutionality of statute terminating general assistance benefit).

A similar social contractarian equal protection clause appears in the Texas Constitution. See *Rodriguez v. Motor Express, Inc.*, 909 S.W.2d 521, 526 (Tex. App. 1995) (quoting TEX. CONST. ART. 1, § 3). Such a clause, but declaring all “freemen” who join in compact as equal, was deleted from the Alabama state constitution. See *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 909 (Ala. 1995) (Houston, J., concurring).

as sovereignty,<sup>17</sup> slavery,<sup>18</sup> alienage,<sup>19</sup> the negligence rule,<sup>20</sup> criminal incarceration,<sup>21</sup> Congressional nondelegation,<sup>22</sup> land use,<sup>23</sup> the law of finds,<sup>24</sup> public health,<sup>25</sup> self-incrimination,<sup>26</sup> civil forfeiture,<sup>27</sup> debt

17. See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its permission, but the answer has been public property since before the days of Hobbes. (*Leviathan*, C. 26,2.)”); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978) (“In their external relations, sovereigns are bound by no law; they are like our ancestors before the recognition or imposition of the social contract.”); *Carl Marks & Co. v. USSR*, 665 F. Supp. 323, 333 (S.D.N.Y. 1987) (“The classic expression of the doctrine of absolute immunity in our courts was offered, in language resonant of Thomas Hobbes by Chief Justice Marshall in *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 137, 3 L.Ed 287 (1812).”).

18. See *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *State v. Post*, 20 N.J.L. 368 (1845) (blacks outside the social contract).

19. See *Verdugo-Urquidez*, 856 F.2d, at 1231-33. Courts sometimes describe each nation of the world as having its own social contract. See, e.g., *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 447 (S.D.N.Y. 1980), *aff’d in part*, 658 F.2d 875 (2d Cir. 1981) (finding that a new social contract in a foreign nation does not give rise to claims for compensation for bad investments abroad). So, while aliens may be excluded from our social contract, they have the possibility of inclusion in their own.

20. See *Losee v. Buchanan*, 51 N.Y. 476 (1873).

21. See *Baker v. Cuomo*, 58 F.3d 814 (2d Cir. 1995) (stating that New York statutes disenfranchising incarcerated felons were rationally related to social contract principles). Cf. *Imprisoned Citizens Union v. Sharp*, 473 F. Supp. 1017, 1027 (E.D. Pa. 1979) (finding that prisoners’ rights were supported by the social contract).

22. See *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (stating that Locke was opposed to legislative delegation); *United States v. Williams*, 691 F. Supp. 36, 44 n.5 (M.D. Tenn. 1988) (“[T]he nondelegation doctrine is derived from the contractarian view that ‘laws derive their legitimacy from the consent of the governed and, in the American polity, the constitutional delegation of lawmaking power to the Congress establishes this consent.’” (quoting Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 5 (1982))).

23. Cf. *Sarasota County Anglers Club, Inc. v. Burns*, 193 So. 2d 691, 693 (Fla. 1st DCA 1967) (stating “that the public interest demands that there be some impairment of the individual citizen’s right to enjoy absolute freedom in the use of public” lands).

24. Cf. *Texaco, Inc. v. Short*, 454 U.S. 516, 526 n.19 (1982) (“right to appropriate a derelict . . . existed in a state of nature”); *Hener v. United States*, 525 F. Supp. 350, 353 (S.D.N.Y. 1981) (involving a dispute over rights to salvage silver from a sunken barge and stating that “[t]he common law of finds treats property that is abandoned as returned to the state of nature”).

25. See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (holding that state police powers extend to compulsory vaccinations and citing a phrase from the Massachusetts Constitution “that laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for ‘the common good’”); cf. *Munn v. Illinois*, 94 U.S. 113, 124 (1876) (finding that the state may regulate the maximum charges allowed for the storage of grain); *Home Tel. & Tel. Co. v. City of Los Angeles*, 155 F. 554, 568-69 (C.C.S.D. Cal. 1907) (power to regulate telephone charges); *City & County of Denver v. Denver & Rio Grande R.R.*, 167 P. 969, 969-70 (Colo. 1917) (ordering removal of certain railroad tracks in town); *Board of Barber Examiners v. Parker*, 182 So. 485, 504-05 (1938) (power to regulate barbers).

26. See *Phelps v. Duckworth*, 772 F.2d 1410 (7th Cir. 1985) (“Even Thomas Hobbes,

collection,<sup>28</sup> and the right to privacy<sup>29</sup> feature social contractarian rationales or rhetoric. Some of these opinions set major precedents. For example, the first American case to recognize a free-standing right to privacy did so on distinctly natural law and social contractarian grounds.<sup>30</sup> That judges have drawn upon the social contract tradition in their written opinions, has gone pretty much unexamined. In this lecture, I describe a broad selection of state and federal judges' most explicit uses of social contractarian philosophy.<sup>31</sup>

Social contractarian thought figures in American case law in at least three explicit ways, the first one less interesting than the others. First, courts invoke the names and views of noted contractarian philosophers—Locke, Hobbes, Rousseau, and Rawls—as corroborating scholarly authority. Locke's theory of government stressed individual rights against civil authority.<sup>32</sup> Accordingly, judges cite Locke as scholarly authority for decisions that would limit the power of government in the interest of individual liberty or private property.<sup>33</sup> Judges have cited both

staunch defender of authoritarian government" defended the right against self-incrimination.).

27. See *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 402 (2d Cir. 1993) ("The true reason for permitting forfeiture, according to Blackstone, was that it is part of the price a citizen must pay for breaking the social contract by violating the law.").

28. See *Davis v. Richmond*, 512 F.2d 201, 204-05 (1st Cir. 1975) (distrain of lodger's property).

29. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905).

30. See *id.* ("The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society.").

31. What counted as an example of legal contractarianism for purposes of this study? I rejected as overly broad any judicial appeal to reason or the rational self as a limitation on government power or individual freedom. I adopted two criteria: (1) any judicial appeal in a published opinion to the need to accept government power or limitations on government power for the sake of a civilized or civil society, by reason of rational assent, contract, compact, or covenant; and (2) any express judicial use of the terms "social contract, compact, or covenant," "state of nature," or Locke, Hobbes, Rousseau and Rawls in a published opinion. The majority of the cases included in this paper are those meeting criteria (2), with a few meeting criterion (1).

32. See *People v. Walton*, 383 N.E.2d 1000, 1002 (Ill. App. Ct. 1979) (citing Locke's *Second Treatise on Government*).

33. Grandly describing "the importance of private property as a concomitant to liberty," a dissenting judge in *United States v. \$12,390*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting) stated that "[t]he Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole." In an eminent domain case, *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct 160, 168 (1985), Judge Kozinski firmly stated that the court would not "free the United States of all constitutional constraints in the area of economic regulation." Kozinski went on to quote libertarian Professor Richard Epstein: "Our guiding principle should derive from our Lockean tradition—a tradition that speaks about justice and natural rights." *Id.* at 168-69 (quoting Richard Epstein, *Judicial Review: Reckoning on Two Kinds of Errors*, 4 CATO J. 711, 716 (1985); see also *Garner v. United States*, 501 F.2d 228, 245 (9th Cir. 1972) (Koelsch, J., dissenting) ("Concern for the accusatorial system is a concern for the

Locke and Hobbes as venerated support for the Fifth Amendment privilege against self-incrimination.<sup>34</sup> Notwithstanding the civil libertarian understanding of the right against self-incrimination defended in his *Leviathan*, Hobbes argued for a near absolute form of sovereign government over the individual.<sup>35</sup> From time to time judges cite Hobbes with plain disapproval as a paradigm of illiberal political extremism.<sup>36</sup> Judges seeking warrant for extending government power or granting governmental immunities have cited Hobbes with approval.<sup>37</sup> Rousseau's

preservation of individual privacy as well, reflecting the Lockean notion that government is essentially a restraint on liberty and ought to leave the individual alone.”); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 815 (S.D. Ohio 1995) (“John Locke, the ideological father of the American Revolution,” asserted that “[t]he function of the law . . . [is] to protect individual liberty from restraint by government or others.”); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 n.6 (6th Cir. 1983) (stating that Locke called for rules of law designed to protect against arbitrary government).

34. See *Garner*, 501 F.2d at 245 (Koelsch, J., dissenting). In *Garner*, Judge Koelsch argued in his dissent that Lockean ideas of government protect an individual's right to invoke the Fifth Amendment. Courts cite Hobbes, along with Locke, in support of the constitutional right against compulsory self-incrimination:

A covenant to accuse oneself, without assurance of pardon, is likewise invalid. For in the condition of nature, where every man is judge, there is no place for accusation; and in the civil state the accusation is followed with punishment, which, being force, a man is not obliged not to resist.

*Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 180 (1961) (quoting HOBBS, *supra* note 2, at 110-11). Justice William O. Douglas chose to quote at length the distinctly contractarian rationale for the prohibition against compulsory self-incrimination. See *id.* In a dissenting opinion by Justice Douglas in *Communist Party* he made the case for a strict application of the Fifth Amendment prohibition against self-incrimination on behalf of members of the Communist party. See *id.* Douglas quipped that “even as ardent an advocate of the totalitarian state as Thomas Hobbes respected this core of privacy.” *Id.* *Phelps v. Duckworth*, 772 F.2d 1410 (7th Cir. 1985), is another example of the “even Hobbes” rhetorical move, in association with a liberal defense of the Fifth Amendment privilege against self-incrimination. In *Phelps*, Judge Cummings alludes to the “centuries old” principle, asserting that “[e]ven Thomas Hobbes, staunch defender of authoritarian government though he was, wrote that . . . ‘no man can be obliged by covenant to accuse himself.’” *Id.* at 1417 (quoting HOBBS, *supra* note 2, at 110).

35. See HOBBS, *supra* note 2, at 132; *cf.* *United States v. Cox*, 342 F.2d 167, 193 n.19 (5th Cir. 1965) (citing proposition that “Hobbes told us long ago, and everybody now understands that there must be a supreme authority, a conclusive power, in every state on every point somewhere.” (quoting WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 248 (1872))).

36. See, e.g., *Times Film Corp. v. City of Chicago*, 365 U.S. 43, 79 (1961) (Douglas, J., dissenting) (“Hobbes was the censor's proponent.”); *Phelps*, 772 F.2d 1417; *cf.* *Communist Party*, 367 U.S. at 180 (Douglas, J., dissenting) (“Even as ardent an advocate of the totalitarian state as Thomas Hobbes respected this core of privacy.”). *But see* *Christensen v. Valentine*, 122 F.2d 511, 523 (2d Cir. 1941) (“Hobbes . . . perhaps erroneously [is] regarded as an extreme absolutist”).

37. Thus one court cited Hobbes' rule of law warning that: “For as long as every man

views about the role of the public in rearing and educating children were contrasted with the contemporary U.S. view favoring private child rearing in *Franz v. United States*.<sup>38</sup> In another court of appeals case, the judge again mentioned Rousseau in relation to the dilemma of introducing public law into the private sector.<sup>39</sup> The name of John Rawls, the leading contractarian political theorist of our times, appears more than a dozen times. Rawls is cited, for example, in a dissenting opinion in a torts case in which the judge adopted Rawls's methodology of reasoning about justice from the original position.<sup>40</sup> Rawls's overall influence on case law may be more subtle. One detects a slight increase in the number of cases employing generic, overt social contractarian references in the decades following the publication of *A Theory of Justice*<sup>41</sup> than in the immediately prior few

holdeth this Right of doing anything he liketh, so long are men in the condition of War." *Christensen*, 122 F.2d at 523 (quoting HOBBS, *supra* note 2). Hobbes's view that the powers of sovereigns are absolute and indivisible make his *Leviathan* an apt cite, as in *United States v. Cox*, 342 F.2d at 193 & n.19, a case concerning the discretionary prosecutorial powers of the United States through its Attorney General.

38. 707 F.2d 582, 599 n.72 (D.C. Cir. 1983).

39. See *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 722 (3d Cir. 1978) (citing Rousseau, Selnick, Judith Sklar and Roberto Unger). Judge Adams commenced a labor relations case with an unusually philosophical statement of the difficulty of reconciling "ideals of public law" and responsibility with "norms of private right and individualism, fundamental to our society." *Id.*

40. See *Barnes v. Tools & Machinery Builders, Inc.*, 715 S.W.2d 518, 523-24 (Mo. 1986) (Donnelly, J., dissenting). This heavy-handed importation of the *Theory of Justice* to the common law was an attempt to resolve with fairness the issue of liability in a negligence action. See *id.* at 524.

Judges have cited Rawls in more than a dozen other cases. His version of social contract theory is recognized in the majority opinion in *Davis v. Fulton County*, 884 F. Supp. 1245, 1254 (E.D. Ark. 1995), *aff'd*, 90 F.3d 1346 (8th Cir. 1996) (private sphere limits public responsibility); *In re Joint Eastern and Southern District Asbestos Litigation*, 878 F. Supp. 473, 561 (E. & S.D.N.Y. 1995), *aff'd*, 100 F.3d 944 (2d Cir.), *aff'd*, 100 F.3d 945 (2d Cir. 1996), *aff'd in part, vacated in part*, 78 F.3d 764 (2d Cir. 1996) (contractual basis for society); *McAdoo v. Diaz*, 884 P.2d 1385, 1390 (Alaska 1994) (altruism possible); *Runway 27 Coalition, Inc. v. Ergen*, 679 F. Supp. 95, 105 (D. Mass. 1987) (limits of public authority); *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 285 (2d Cir. 1981); *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956, 958 (6th Cir. 1980) (desire for good will of others); *Repetti v. Gil*, 372 N.Y.S.2d 840, 848 (Sup. Ct. 1975) (liberty is first principle of justice); *Auld v. Estridge*, 382 N.Y.S.2d 897, 904 (Sup. Ct. 1976), *aff'd*, 395 N.Y.S.2d 969 (App. Div. 1977) (justice is fairness); and *K-Mart v. Ponsock*, 732 P.2d 1364, 1368 (Nev. 1987). Rawls is cited in a concurring opinion in *Goetz v. Crosson*, 967 F.2d 29, 30 (2d Cir. 1992) (Newman, J., concurring) (veil of ignorance) and *United States v. Lucas*, 2 M.J. 834, 838 (A.C.M.R. 1975) (control of individual conduct). Finally, Rawls is cited in a dissenting opinion in *Western Addition Community Org. v. NLRB*, 485 F.2d 917, 938 (D.C. Cir. 1973), *rev'd sub nom, Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975) (requirements of justice); *Jensen v. ARA Servs., Inc.*, 736 S.W.2d 374 (Mo. 1987) (justice as fairness); and *People v. Julliet*, 475 N.W.2d 786, 810 (Mich. 1991) (reflective equilibrium).

41. RAWLS, *supra* note 4.

decades.

Invocations to the social contract tradition occur in passing as rhetorical flourishes, adding little more than a thin luster of literacy to a judge's prose.<sup>42</sup> Sometimes, they run deeper.<sup>43</sup> Indeed, there is more to social contractarianism in the case law than explicit mentions-in-passing of the names of famous philosophers. As described below in Part I, judges have relied on the social contractarian idea of the state of nature as a principle of decision. Social contractarians use the term "the state of nature" as the imagined original condition of pre-civil society, and the condition into which human society would devolve without effective government. In some instances, judges link the term "state of nature" to specific philosophers or political theorists. But in other instances, judges use the term without mentioning its philosophic roots. "State of nature" has come to have several distinguishable jurisprudential meanings in the case law, only one of which is "natural state."<sup>44</sup>

Like "state of nature," the expression "social contract" has multiple meanings in the law. As elaborated below in Part II, in dozens of instances, and for a variety of purposes since the late eighteenth century, judges have made explicit mention of the idea of the "social contract" or "social compact" in the course of articulating majority, concurring, or dissenting opinions. Judges mention the social contract both with approval, as part of efforts to justify a particular conclusion of law, and with disapproval to condemn what they mean to present as archaic thinking.<sup>45</sup> Of particular

42. See, e.g., *Justice v. Elrod*, 832 F.2d 1048 (7th Cir. 1987) ("Yet apart from a vague and legally ungrounded invocation of a supposed pre-constitutional right to bear arms—a Hobbesian right of self-defense in the state of nature. . ."); *Archie v. City of Racine*, 826 F.2d 480, 486-87 (7th Cir. 1987) ("We hasten to add that our recognition of the nonjusticiability of these issues is not acquiescence in a Hobbesian state of nature where criminals or madmen terrorize others with impunity."); *United States v. Cangiano*, 491 F.2d 906, 915 n.2 (2d Cir. 1974) (Oakes, J., dissenting) ("[I]n a true state of nature—zoological or otherwise—obscenity would not exist; it is, as the philosopher Berkeley would have said, only because it is perceived in the eye of the viewer."). Judge Irving Younger began one of his opinions: "Perhaps chief among the assurances which together make up the social contract is the judiciary's promise never to close the courthouse doors." 500 West 174 St. v. Vasquez, 325 N.Y.S.2d 256, 257 (Civ. Ct. 1971); see also *Johnson v. Pataki*, 655 N.Y.S. 2d 463, 467 (App. Div. 1997) ("They have no greater identifiable 'right' to a district attorney who universally renounces the death penalty than any other group of voters would have to a governor who embraces their own particular vision of Mr. Thomas Hobbes' [sic] Social Contract.").

43. See *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (1905).

44. The phrases "natural" and "natural state" are not strong signs of social contractarianism; but "state of nature" is, particularly when used to refer to something other than an actual natural state of a person or thing. In a case alleging that the foul odor emanating from a calf-feeding facility violated the Clean Air Act, the court cited an earlier court's definition of "natural"; one of 15 meanings of natural in the 1934 Webster's Dictionary was "state of nature." See *State v. F/R Cattle Co.*, 828 S.W.2d 303, 305 (Tex. App. 1992).

45. Judge Mikva, in dissent, dismissed "state of nature" based rationales as "antediluvian"

interest are cases in which courts use the concept of a social contract with implicit or explicit approval as part of a serious-seeming effort to justify a legal result.

### A. *Methods and Assumptions*

The computer greatly improves a scholar's ability to survey case law efficiently and to provide factual answers to specific questions about the social contractarian dimensions of case law.<sup>46</sup> How often, and in what eras, have courts explicitly invoked the social contract tradition in published cases? In what kinds of cases, and for what purposes, have judges adduced the idea of the social contract? Which judges have most frequently cited social contractarian ideas? Does contractarian thought appear more often in majority and concurring opinions, or in dissenting opinions? Which philosophers' versions of the social contract have judges most commonly cited, and for what purposes? Fairly good answers to these questions are available and worth having. My traditional and electronic search uncovered numerous instances of judges mentioning or using social contract theory in 18th, 19th, and 20th century published case opinions.

I uncovered fewer instances of distinctly social contractarian language and thought than I had anticipated. The currency of the idea of the social contract in popular culture<sup>47</sup> and academic scholarship,<sup>48</sup> combined with the

thought. *Washington Water Power Co. v. Federal Energy Regulatory Comm'n*, 775 F.2d 305, 338 (D.C. Cir. 1985) (Mikva, J., dissenting).

46. This is a computer-assisted study. I employed an on-line computer service to identify cases containing specific contractarian terminology and the names of specific contractarian philosophers. I employed search terms, including "social contract," "social compact," "covenant," "state of nature," "Hobbes," "Rousseau," "Rawls," "Kant," and "Locke." Search terms and potential search terms such as "Locke" and "civilized society" posed problems of over-inclusiveness. I also used computers to create a data-base for sorting cases by date and subject matter. I am grateful for the help of research assistants Norma Schrock, Thaddeus Pope, Michael Seidl, and Erin Kidwell.

47. The popular vitality of the modern idea of the social contract is in evidence in the realms of public law. It was in evidence in 1994 when the Republicans in Congress signed what they termed a "Contract with America," exploiting the pervasive habit of conceiving good and legitimate government as the product of political bargains. Cf. Kery Murakami, *Suit Claims GOP Stole Idea for 'Contract': Washington Man Wants Credit for Inventing Campaign Tactic*, WASH. POST, July 6, 1996, at A13 (describing Newt Gingrich-led Contract with America and similar pledges by another politician).

The idea was in evidence in 1995 when Congressional Telecommunications Sub-Committee chair Ed Markey said he wanted "to reinvigorate the social compact between broadcasters and the American people." Kim McAvoy, *Markey Lays out Legislative Agenda*, BROADCASTING & CABLE, Oct. 10, 1994, at 22, 22. An attorney's materials for a recent continuing legal education course introduced a "social contract interpretation of the power of eminent domain." Gavin M. Erasmus, *Eminent Domain Jurisprudence*, ALL-ABA COURSE OF STUDY, Jan. 7, 1994, at 1 & 3.

48. Numerous scholars have studied social contract thought and incorporated social

broad claims some historians and philosophers make about the significance of the social contract tradition to America's founding and Constitution,<sup>49</sup> led me to expect to uncover a couple of thousand, rather than a couple of hundred relevant cases making express use of the "social contract." I uncovered fewer instances of distinctly social contractarian language and thought than anticipated. Of course, not all American judicial opinions are available through on-line services. And subtle manifestations of social contractarianism in case law elude mechanical discovery. The opinion of the New York Court of Appeals in the definitive negligence case *Losee v. Buchanan*<sup>50</sup> includes an argument to the effect that we are surely willing to surrender the freedom to demand compensation for blameless accidental injury in exchange for the conveniences of a civilized industrial society. The court's argument strongly suggests the social contractarian tradition, but without specific mention of the name of a contractarian philosopher. The same is true of *State v. Post*,<sup>51</sup> in which the court invoked consensualism and reciprocity in defense of a gradual approach to ending slavery.<sup>52</sup>

In designing my search I distinguished between contract theory and *social* contract theory. Ideals of contract flourished in Western thought in one form or another before the full flowering of social contract theory. To be sure, liberal social contract theorists have tended to emphasize the importance of freedom of contract, along with property rights.<sup>53</sup> But in American law, judicial appeal to principles of free contract are not, *ipso facto*, appeals to social contract theory. Owen Fiss might disagree. He discerns quite a bit more social contractarianism in case law than I do.<sup>54</sup> Eben Moglen got it right when he criticized Fiss for interpreting as an

contractarian thinking in their work. See generally DAVID GAUTHIER, MORAL DEALING: CONTRACT, ETHICS, AND REASON (1990) [hereinafter MORAL DEALING]; DAVID GAUTHIER, MORALS BY AGREEMENT (1986); JEAN HAMPTON, HOBBS AND THE SOCIAL CONTRACT TRADITION (1986); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); cf. CHARLES W. MILLS, THE RACIAL CONTRACT (1997); BRIAN SKYRMS, EVOLUTION OF THE SOCIAL CONTRACT (1997).

49. See sources cited *supra* notes 5-15.

50. 51 N.Y. 476 (1873) (imposing liability for injuries caused by an exploding boiler depending upon whether defendant acted negligently).

51. 20 N.J.L. 368 (1845).

52. See *id.* at 386.

53. See *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987) ("[T]he fundamental function of contract law (and recognized as such at least since Hobbes's day) is to deter people from behaving opportunistically toward their contracting parties. . . ." (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 81 (3d ed. 1986))); James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORNELL L. REV. 371, 387-88 & n.72 (1993) (noting that both social contract and legal contract theory emphasize freedom and "respect for private property").

54. See OWEN M. FISS, 8 TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910, at 159 (1993).

instance of social contractarianism just about any example of a judge grappling with issues of freedom from government restraint.<sup>55</sup> For purposes of this study, I did not treat stand-alone legal contractualism as evidence of post-Revolutionary era uses of social contract theory in law. One would find an overwhelming abundance of social contractarianism in the case law if one attributed to social contract theory all glorification of the idea of binding private agreement and freedom from restraint.

### B. Purposes

My central purposes in examining the significant post-Revolutionary uses of the social contract tradition are to isolate and to put into perspective, social contractarianism as a potentially problematic form of judicial doctrine and figurative legal rhetoric.<sup>56</sup> The fiction of the social contract evolving from a state of nature<sup>57</sup> has powerful meaning in American culture. Attractive and entrenched, social contractarianism has utility for judicial opinion-writing. Judges required to justify their decisions in written opinions can capitalize on the flexibility and broad appeal of social contract theory.

The potentially problematic character of social contractarianism in law derives precisely from the cultural status of social contract theory as a source of an especially seductive, malleable fiction. In the past, judges' reliance on social contractarianism led courts to provide palatable but superficial rationales for decisions that may have been genuinely controversial. Moreover, judges' reliance on social contractarianism has served the interests of injustice—even extremes of injustice. Past errors of inadequate rationalization and injustice are easily repeated, so long as the myths and metaphors of social contract theory retain force.

As myth, social contractarian thought functions to enlarge judicial attributions of legal obligation beyond the realm of mere compulsion and

55. See Eben Moglen, *Holmes's Legacy and the New Constitutional History*, 108 HARV. L. REV. 2027, 2033-34, 2038-39 (1995) (reviewing FISS, *supra* note 54).

56. See L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995). The study of legal metaphor is not uncommon. See HAIG A. BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* (1992); Jan G. Deutsch, *Law as Metaphor: A Structural Analysis of Legal Process*, 66 GEO. L.J. 1339 (1978); Burt Henly, "Penumbra" *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053 (1989); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1159-71 (1989). I do not attempt in this article to answer all the worthy questions one might ask and answer about the social contract legacy in American law in the computer age.

57. See *Edwards v. Leopoldi*, 89 A.2d 264, 267 (N.J. Super. Ct. App. Div. 1952) (acknowledging perspective that "social contract" is a legal fiction); cf. LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993).

competing interests. Roland Barthes's account of mythology suggests that "myth has the task of giving an historical intention a natural justification, and making contingency appear eternal."<sup>58</sup> This same account suggests that "myth is depoliticized speech" that gives things "a natural and eternal justification."<sup>59</sup> Literal law can be politically raw; naming our actual predicament can diminish us. Mythic law enlarges us with stories of agency and purpose. Myth-making, like other modes of legal fiction, is a useful but dangerous dimension of judicial law.<sup>60</sup> In its mythic dimension, the social contract invites us to see our rights and duties as more than merely human or local conventions, even though they are recognizably at least that. The state of nature and the social contract unite in a myth that invites us to see our practices and the society that they constitute as justified and just by virtue of inevitable rational choices made against a background of risk and violence not of our own creation. Urging realism in law, Justice Hugo Black suggested that the social contract, natural law and other "great juristic myths of history"<sup>61</sup> are best shelved.

As metaphor, social contract rhetoric is a vehicle for moving language beyond the limitations of literal speech. Metaphorical speech shapes how we view reality; indeed, what we regard as reality. Metaphor can hide what is unpleasant and unwanted, and focus attention on what is pleasant and wanted.<sup>62</sup> The metaphorical transformation of reality has important consequences for conduct in the practical realm where metaphors become "a license for policy change and political and economic action."<sup>63</sup> Metaphors and other judicial tropes should be identified and understood, since their acceptance or rejection "will determine the legal principles and doctrines by which we will be guided and ruled."<sup>64</sup>

The judicial opinion has many functions: it teaches, it explains, it exhorts, it compels. Strictly literal rationales for legal decisions would require judges and the general public to confront law in its coercive and contingent aspect as an instrument of power and pragmatism. Literal law can be frightening. The idea of a social contract forged out of natural chaos and competition has functioned to cushion, though not fully disguise, the

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58. ROLAND BARTHES, *MYTHOLOGIES* 142 (Annette Lavers trans., 1972).

59. *Id.*

60. See LON FULLER, *LEGAL FICTIONS* (1967).

61. *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 605 n.6 (1941) (Black, Douglas, & Murphy, J.J. concurring).

62. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 10-13 (1980). In *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 641 n.1 (Mass. 1986) (Lynch, J., dissenting), the dissenting judge shifted focus from the grim realities of a comatose, helpless life in a persistent vegetative state by appeal to the idea of the social contract empowering us and compelling the state to respect the "sanctity of life."

63. LAKOFF & JOHNSON, *supra* note 62, at 156.

64. BOSMAJIAN, *supra* note 56, at 205.

coercive dimensions of law. According to David Gauthier, “[t]he contractarian brings good news—there is a touchstone for moral practices and political institutions.”<sup>65</sup> Judges evoke the idea of the social contract to package as good news what is bound to be received as bad news to losing litigants. The contractarian judge locates morality and justice, not in feeling, fixed duties, or utility, but “in the intelligent ordering of our mutual affairs in ways that benefit each, and so are rationally acceptable to each.”<sup>66</sup> The litigant who loses in the resolution of a particular dispute nonetheless wins as a “potential partner in ‘a cooperative venture for mutual advantage.’”<sup>67</sup> In its metaphoric dimension, the social contract converts positive law into gospel.

Invoking the key elements of social contract theory—the state of nature and the social contract—masks judicial and other governmental coercion in a cloak of consensualism and rational self-interest. Pointing this out is not a condemnation of social contractarianism in law. There are often good reasons to present the literal truth of inevitable coercion in metaphor. Appeal to a social contract can foster the spirit of cooperation and compromise. Yet, there are sometimes good reasons not to conceal truth in metaphor.

An elderly woman is working alone in a store across the street from a county jail. Exploiting his status as a trustee, a pretrial detainee with a history of assaulting senior citizens, escapes and brutally rapes and beats the shopkeeper. The federal district court hearing motions in the subsequent civil action brought by the woman and her spouse is drawn to the logic of *DeShaney v. Winnebago County*:<sup>68</sup> the public sector is not liable for private misconduct.<sup>69</sup> The judge cites *DeShaney*, but also cites John Rawls and the social contract tradition.<sup>70</sup> But, the contractarian’s argument that the powers and duties of government are justly limited by conditions of rational consent does not explain the holding of *DeShaney* or why the woman’s injuries in this case should go uncompensated. The explanation could be that the injury was foreseeable and the shopkeeper was the cheapest cost avoider; or that the public sector’s financial resources are limited and better allocated to other purposes; or that the potential for a flood of litigation is too great. Liberal social contract theory’s generic preserve of a private sphere does not dictate the level of care owed citizens by the state.

65. GAUTHIER, MORAL DEALING, *supra* note 48, at 1.

66. *Id.* at 2.

67. *Id.* (quoting John Rawls).

68. 489 U.S. 189 (1989).

69. See *Davis v. Fulton County*, 884 F. Supp. 1245 (E.D. Ark. 1995), *aff’d*, 90 F.3d 1346 (8th Cir. 1996).

70. See *id.*

Judges err when, exploiting myths and metaphors derived from social contract theory, they present controversial outcomes as *required* by natural order and rational pact. Their error is not merely the error of heavy-handed fiction and formalism in a post-realist age, an age less tolerant of “transcendental nonsense”<sup>71</sup> than past ages. The error is potentially one of simple injustice and immorality. Contractarian arguments were employed by the Antebellum courts to justify slavery and political exclusion. Social contract rationalizations “validated” slavery by characterizing blacks as outside of the American social contract<sup>72</sup> or as parties to a social contract under which they consented to bondage in exchange for protection.<sup>73</sup> These

71. See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 36 COLUM. L. REV. 809 (1935).

72. See *Pendleton v. State*, 6 Ark. 509 (1846); *Jackson v. Bulloch*, 12 Conn. 38 (1837); cf. *Vance v. Crawford*, 4 Ga. 445, 459 (1848); *Mitchell v. Wells*, 37 Miss. 235, 250 (1859); *Anderson v. Poindexter*, 6 Oh. 623 (1856); WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT* (1856). The Supreme Court applied a kind of social contract thinking to the question of black citizenship in the infamous case of *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), in which Justice Taney argued that slaveholding states would not have agreed to the Constitution if they had thought the word “citizens” included free blacks. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 355 (1978); Hans W. Baade, “Original Intent” in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1054-55 (1991); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 940 (1991).

73. See *State v. Post*, 20 N.J.L. 368 (1845). Locke held both that no man can by compact enslave himself to anyone and that negro slaves were justifiably enslaved as captives of a just war; Blackstone agreed with the former point, but not the latter. See *THE SOVEREIGNTY OF THE LAW* 115 (Gareth Jones ed., 1973); Robert Garson, *Proslavery as Political Theory: The Examples of John C. Calhoun and George Fitzhugh*, 84 S. ATLANTIC Q. 197, 200-01 (1985). Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 14-15 (1995) (finding religious paternalism as a justification for slavery and Lockean natural law as a threat to slavery); Jonas Bernstein, *New Study Sweeps Arab Slaving Out from Under the Carpet*, WASH. TIMES, July 3, 1989, at D7 (finding a paternalistic contractarian justification for slavery in Arab culture).

Some courts argued that slaves were actually benefitted by their “consent” to bondage. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825) (holding that slavery was founded on captivity in war, which was a “legitimate result of force”); *Hervy v. Armstrong*, 15 Ark. 162, 169 (1854) (“The elevation of the white race, and the happiness of the slave, vitally depend upon maintaining the ascendancy of one and the submission of the other.”); *Pendleton v. State*, 6 Ark. 509, 512 (1846) (“The two races, differing as they do in complexion, habits, conformations, and intellectual endowments, could not nor ever will live together upon terms of social or political equality.”); *American Colonization Soc’y v. Gartrell*, 23 Ga. 448, 464 (1857) (Liberia is filled with “[a] few thousand thriftless, lazy semi-savages, dying of famine, because they will not work! To inculcate care and industry upon the descendants of Ham, is to preach to the idle winds.”); *Collins v. Huchins*, 21 Ga. 270, 274 (1857) (“A negro . . . [has] the power of thought and volition . . . but does not generally have judgment to direct him in what is proper for him, or prudence and self-denial to restrain him from use of what is injurious.”); *Bryan v. Walton*, 14 Ga. 185, 205-06 (1853) (“[T]he slave who receives the care and protection of a tolerable master, is superior in comfort to the free negro.”); *Gorman v. Campbell*, 14 Ga. 137, 143 (1853) (“We must . . . [make] it the interest of all who employ slaves, to watch over their lives and safety. Their improvidence

uses of the social contract metaphor are objectionable and degrading<sup>74</sup> because of what they hide and repress.<sup>75</sup> It is surely wrong to make people complacent about the institution of human chattel slavery through the use of a persuasive metaphor of consent and self-interest. As they enlarge and comfort humanity, some social contractarian myths and metaphors “can lead to distortion and inhumanity.”<sup>76</sup>

Judges go wrong, too, when they purport to derive outcomes from “axiomatic arguments about the ‘state of nature.’”<sup>77</sup> A survey of the many uses the courts make of the expression “state of nature” reveals quite clearly that “nature” in law extends to objects and states of affairs permeated with human artifice—an urban park, a violent prison cell-block,<sup>78</sup> and an abandoned jar of money dug up at a construction site.<sup>79</sup> What judges mean by “nature” shifts from one context to another, as they struggle to justify their assignments of entitlement. There are many good economic reasons to limit municipal liability for accidental injuries on public roadways. Yet, capricious injustice, rather than justice or rational public policy otherwise conceived, is suggested by a holding that denies recovery to an injured jogger on the median-strip or shoulder of the road, because it is deemed in a “state of nature.”

Lon Fuller observed that getting rid of old legal fictions may simply invite new legal fictions, no less worrisome.<sup>80</sup> I remain agnostic about whether, all things considered, social contractarian arguments merit a place in case law’s justificatory tool-box.<sup>81</sup> I am certain, however, that the public

demands it. They are incapable of self-preservation, either in danger or in disease.”); *Neal v. Farmer*, 9 Ga. 555, 582 (1851); *Vance v. Crawford*, 4 Ga. 445, 459 (1848) (“[W]e concede that the condition of our slaves is humble, still it is infinitely better than it would have been, but for this very system of bondage, better than the lower orders of Europe, and better far that it would be, if they were emancipated here.”); *Peter v. Hargrave*, 46 Va. (5 Gratt.) 12, 19 (1848); *Spencer v. Pilcher*, 35 Va. (8 Leigh) 565, 584 (1837).

74. See Lakoff & Johnson, *supra* note 62, at 236.

75. See EVA FEDERKITTAY, *METAPHOR: ITS COGNITIVE FORCE AND LINGUISTIC STRUCTURE* 103 (1989).

76. BOSMAJIAN, *supra* note 56, at 42; see also Henly, *supra* note 56, at 81 (stating that legal metaphors intended to liberate thought often end up enslaving thought) (quoting *Berkey v. Third Ave. Ry.*, 155 N.E. 58, 61 (1926)).

77. *Stevens v. Tillman*, 855 F.2d 394, 399 (7th Cir. 1988).

78. See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

79. See *Couch v. Schley*, 272 S.W.2d 171, 173 (Tex. Civ. App. 1954) (stating that “\$1000 in currency found while working on another’s land belong[s], as in a state of nature, to the first occupant or fortunate finder”).

80. See FULLER, *supra* note 60, at 17 (“Eliminating the ‘fiction’ from law often means only substituting dead metaphors for live ones.”).

81. See Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CINN. L. REV. 461 (1987) (suggesting social contract arguments are heuristic devices for enlarging normative understanding).

should scrutinize figurative social contractarian rationales when they appear in decisions with broad and controversial impact. My hope is that this brief examination of the term “state of nature” and the “social contract” in case law will go a little ways toward making judicial opinion-writers more circumspect about reliance on social contractarian rationales, and the public more circumspect about easy acceptance.

## II. THE STATE OF NATURE

In social contract theory, the state of nature is the antecedent of social contract and civil society. States of nature figure prominently in social contract theory, seldom as peaceable kingdoms, most often as conditions of unmatched peril. The social contract theory of Thomas Hobbes posits a condition of natural freedom and risk prior to the formation of civil society.<sup>82</sup> Although individuals are free in the state of nature, their freedom is obtained without reliable protection. Life is famously “solitary, poor, nasty, brutish, and short.”<sup>83</sup> Rational individuals join with others in the social contract for enhanced freedom and security. In defense of the rule of law, one court observed that the social contract creates the rule of law, and thereby allows society to benefit from the rejection of the state of nature.<sup>84</sup> Neither Hobbes nor Locke strictly believed in the existence of the state of nature as a historical event. The state of nature is a fiction. Hobbes did, however, point to pre-Columbian North America as an example of the savage condition of uncivilized natural man that England had done well to escape centuries earlier.<sup>85</sup> As noted by the Missouri judge who used John Rawls’s *The Theory of Justice* as an unlikely framework for crafting a dissenting opinion in a products liability case, “the original position of equality corresponds to the state of nature in the traditional theory of the social contract.”<sup>86</sup> The original position is indeed a parallel fiction. Rawls explicates the original position as a heuristic for normative reflection about the requirements of justice and fairness.

The expression “state of nature” has had an interesting and varied life in the law. It appears literally thousands of times in published opinions. Specific legal doctrines and their applications rely on the distinction between those people and things that exist in a state of nature and those that do not. Judges employ the term “state of nature” to denote one of four things: (a) the placement or condition of environmental attributes—such as

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82. See HOBBS, *supra* note 2, at 100-02.

83. *Id.* at 100.

84. See *Hester v. City of Milledgeville*, 598 F. Supp. 1456, 1473 (M.D. Ga. 1984).

85. See HOBBS, *supra* note 2.

86. *Barnes v. Tools & Machinery Builders, Inc.*, 715 S.W.2d 518, 523 (Mo. 1986) (Donnelly, J., dissenting) (quoting RAWLS, *supra* note 4, at 11-12).

parklands,<sup>87</sup> unchanneled waterways,<sup>88</sup> untamed wildlife,<sup>89</sup> unmined minerals,<sup>90</sup> unoccupied fields or forests;<sup>91</sup> (b) artificial or natural realms that expose human beings to foreseeably high risks of physical injury—such as unguarded beaches,<sup>92</sup> and poorly managed prisons;<sup>93</sup> (c) benign states of human freedom or self-sovereignty—such as the state of freedom-to-contract enjoyed by prospective employees who may accept or reject proffered terms of employment, or composers who may negotiate or forego fees from prospective music users;<sup>94</sup> and (d) the status of unowned, lost or abandoned personality, realty, or other things deemed available for appropriation and ownership.<sup>95</sup> What the courts say exists in a state of nature and what they say does not can be surprising. Nature is not always natural in the case law.

87. *Laird v. City of Pittsburgh*, 54 A. 324 (Pa. 1903) (“No doubt the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word [park] . . .”).

88. *See, e.g., Thornhill v. Skidmore*, 227 N.Y.S.2d 793 (Sup. Ct. 1961) (canal).

89. *See State v. Barte*, 894 S.W.2d 34, 42 n.9 (Tex. App. 1994) (holding that white tail deer in a natural state of liberty cannot be subject to theft and criminal mischief statutes because Texas statute defined wild animals as a “species that normally lives in a state of nature”); *Powers v. Palacios*, 794 S.W.2d 493, 497 (Tex. App. 1990) (pit bull kept in defendant’s residence not a wild animal because wild animals are “[a]nimals of an untamable disposition” or “animals in a state of nature”).

90. *See White v. Smyth*, 214 S.W.2d 953, 962 (Tex. Civ. App. 1947) (stating that “the thing taken is mineral in place, as it lies in a state of nature. It is this of which the tenant out of possession is deprived, and it is this for which he ought to be compensated . . .”).

91. *See Bydlon v. United States*, 175 F. Supp. 891, 895-96 (Ct. Cl. 1959) (referring to a national forest) (“It was envisaged that the canoe and foot travel would be the sole means of transportation into this perpetuated state of nature.”). An example in the context of Native American land rights is found in *Oregon Dept. of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 756 n.3 (1985) (citing federal statute).

92. *See Spiegle v. Borough of Beach Haven*, 281 A.2d 377, 382 (N.J. Super. Ct. App. Div. 1971).

93. *See Nettles v. Griffith*, 883 F. Supp. 136, 146 (E.D. Tex. 1995) (stating that although prison conditions may be harsh, the government is “not free to let the state of nature take its course”); *Langston v. Peters*, 100 F.3d 1235, 1237 (7th Cir. 1996) (holding that prison officials not liable for rape of inmate by cellmate).

94. *See United States v. American Soc’y of Composers, Authors & Publishers*, No. 13-95 (WCC), 1993 WL 187863, at \*8 (S.D.N.Y. May 27, 1993) (“By leaving parties in a ‘state of nature’—that is, by leaving them to address between themselves the question of whether any particular music use . . . triggered a fee—the court avoided embodying ambiguity and controversy in the fee structure itself.”); *cf. Davis v. Richmond*, 512 F.2d 201, 204-05 (1st Cir. 1975) (“[I]n either a state of nature or an organized society . . . a boardinghouse keeper might reasonably assert the right to hold a guest’s property within the premises until the rent is paid.”). *But see McKnight v. General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990) (“Employment at will is not a state of nature but a continuing contractual relation.”).

95. *See Texaco, Inc. v. Short*, 454 U.S. 516, 526 n.19 (1981) (noting that the right to appropriate a derelict existed in a state of nature), *aff’g* 406 N.E.2d 625 (Ind. 1980).

### A. *Environmental Attributes*

Judges commonly describe environmental attributes as existing in a state of nature. In these instances, “state of nature” is a name for the placement or condition of land, plants, animals, water, and minerals antecedent to human enterprise or divorced from it. Judges commonly assert in passing that thus and such was the location of water, oil, gas, or minerals in a state of nature. In a typical instance, the court in a California case deciding riparian rights mentions in passing that “[i]n a state of nature Temecula Creek flowed through Nigger Canyon.”<sup>96</sup>

Water in a river, lake, or stream is in a state of nature, courts say, if its quality or course has not been altered by human agency.<sup>97</sup> Polluted water exists in a state of nature if the pollution in question is not due to human action. Water that humans have dammed, re-routed, or depleted of wildlife may no longer exist in a state of nature.<sup>98</sup> A court’s judgment that a thing exists in a state of nature is not necessarily a judgment that the thing is in a pristine condition, untouched or unmarred by human enterprise. For example, land that exists in a state of nature is land that human beings have not yet exploited,<sup>99</sup> or have exploited, but not much altered. Uncultivated, unworked, unimproved land is in a state of nature until cultivated, worked, or improved. Acquiring title to land in a state of nature by adverse possession requires that the “adverse” possessor bring about “a change in condition,” in addition to the usual requirements of adverse possession.<sup>100</sup>

96. *United States v. Fallbrook Pub. Util. Dist.*, 109 F. Supp. 28, 32 (S.D. Cal. 1952); *see also United States v. Fallbrook Pub. Util. Dist.*, 110 F. Supp. 767, 773-76 (S.D. Cal. 1953) (describing the path of various bodies of waters “in a state of nature”); *Coleville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1334 (E.D. Wash. 1978) (“In a state of nature, No Name Creek entered Omak Lake. . .”).

97. *See, e.g., Nu-Dwarf Farms, Inc. v. Stratbucker Farms, Ltd.*, 470 N.W.2d 772, 777-78 (Neb. 1991) (“The record indicates that in a state of nature Tax Lot 25 did not receive surface waters from Nu-Dwarf’s land. Therefore, no natural servitude was impressed upon Tax Lot 25 in favor of Nu-Dwarf’s land.”); *Krafka v. Brase*, 353 N.W.2d 276, 278 (Neb. 1984) (“The Court concludes that in a state of nature the water simply would not flow in the manner that the plaintiff claims.”); *Purdy v. Madison County*, 55 N.W.2d 617, 619 (Neb. 1952) (concerning an unlawful diversion of water, “the question . . . is whether the county could properly . . . dam the natural drainage course where the surface waters were wont to flow in a state of nature.”).

98. *Cf. Idaho v. Oregon*, 462 U.S. 1017, 1035 (1983) (O’Connor, J., dissenting) (concerning the impact of dam construction on fish supply) (“This period did not reflect a pristine and irretrievably lost state of nature.”); *United States v. New Mexico*, 438 U.S. 696, 710 (1978) (citing federal land use statute requiring that natural features of a region remain in a state of nature).

99. *See, e.g., Shellow v. Hagen*, 101 N.W.2d 694, 698 (Wis. 1960) (allowing public use of unimproved property in a state of nature); *cf. Howard County v. Carroll*, 526 A.2d 996, 1001 (Md. Ct. Spec. App. 1987) (finding that the state of nature is the opposite of a state of cultivation).

100. *Calhoun v. Woods*, 431 S.E.2d 285, 287 (Va. 1993); *Leake v. Richardson*, 103 S.E.2d

Once cultivated, worked or improved, land may “revert” to a state of nature if abandoned and permitted to return to a physical condition approximating the prior uncultivated, unworked condition.<sup>101</sup> Faced with the need to define the term “park,” several judges have cited a declaration of the Pennsylvania Supreme Court that the word conveys “the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature.”<sup>102</sup> A court’s definition of “scenic easement” incorporated the idea that certain land uses should not involve “jarring human interference with a state of nature” for “there is enjoyment and recreation for the traveling public in viewing a relatively unspoiled natural landscape.”<sup>103</sup>

“State of nature” commonly appears in passing as a descriptive term designating geographical placement or physical condition. It is not clear that all or even most of these appearances have a significant relation to social contract theory. The term “state of nature” makes non-trivial appearances in cases whose outcomes hinge on whether something is located where non-human forces of nature placed it, or whether something exists now in a condition for which non-human forces of nature are responsible. A defendant’s right to be free of additional *ad valorem* taxes may hinge on whether a drug import is a “native” substance “present in a state of nature.”<sup>104</sup> The right to produce natural gas from a well may hinge on whether the gas in question would have been located at the same site in a state of nature.<sup>105</sup> In an action to quiet title to water rights, the United States argued that the outcome hinged on whether the water in question then existed where it had been located in a state of nature.<sup>106</sup> In another case, the plaintiffs alleged that officials operating a dam owned by the United States wrongfully diverted water that in a state of nature flowed in a direction of benefit to plaintiffs as riparian land owners.<sup>107</sup> Permanent impairment of a residential property’s market value would support a casualty loss deduction to the extent of the permanent change in market value, held a court citing evidence that a government project would cause

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227, 234 (Va. 1958).

101. *Cf. Oyama v. California*, 332 U.S. 633, 685 (1948) (Jackson, J., dissenting) (“The lands would require continuous cultivation if they were not to revert to a state of nature.”).

102. *795 Fifth Ave. Corp. v. City of New York*, 242 N.Y.S.2d 961, 971 (Sup. Ct. 1963) (quoting *Laird v. Pittsburgh*, 54 A. 324, 325 (Pa. 1903)).

103. *Kamrowski v. State*, 142 N.W.2d 793, 796 (Wis. 1966).

104. *Pharmacia Fine Chems., Inc. v. United States*, 324 F. Supp. 1113, 1118 (Cust. Ct. 1971).

105. *See Oklahoma Natural Gas Co. v. Mahan & Rowsey, Inc.*, 48 B.R. 767, 774 (Bankr. W.D. Okla. 1985).

106. *See California v. United States*, 235 F.2d 647, 655 (9th Cir. 1956).

107. *See Turner v. Kings River Conservation Dist.*, 360 F.2d 184, 187 (9th Cir. 1966).

rainwater to run off faster than it would have in a state of nature.<sup>108</sup>

In several categories of doctrine, tort liability hinges on whether a condition on a defendant's land exists in a state of nature. Injuries caused by conditions on unimproved lands may go uncompensated to the extent that courts find no duty of care on the part of land owners for perils existing in a state of nature on their property.<sup>109</sup> One crosses, climbs, or jogs on an unimproved road, or portion of a road, at one's peril. The median strip, but not the main road, exists in a state of nature, according to one subtle judge.<sup>110</sup> Distinguishing conditions on land that exist in a state of nature from those that are of human artifice, courts have generally refused to extend the attractive nuisance doctrine that benefits juvenile plaintiffs and their families, to dangerous natural conditions on land.<sup>111</sup> The unsettling implication of the doctrine is that a person who would not be responsible for omitting to fence a dangerous pond, would be responsible for omitting to fence a dangerous swimming pool of equal size and depth. Criminal liability can hinge on the claim that police entered onto land in a state of nature—because entry on “unmarked, unoccupied, [and] undeveloped” land does not constitute an unreasonable search.<sup>112</sup>

Liability for damage caused by an animal depends upon whether the offending animal is wild or domesticated. One is not normally liable for the trespasses of *ferae naturae*—wild animals. Wild animals exist in a state of nature. Domesticated or captured animals generally do not. In one case illustrative of these principles, a landowner granted an easement to a turnpike authority who then built a bridge on the land.<sup>113</sup> The bridge attracted nesting pigeons, and when the pigeons damaged the landowner's adjacent property, he sued.<sup>114</sup> The trial court asserted that the turnpike

108. See *Finkbohner v. United States*, 788 F.2d 723, 727 (11th Cir. 1986).

109. See, e.g., *Gregory v. City of Seattle*, 203 P.2d 340, 342 (Wash. 1949) (holding city not liable “[m]erely because this area is in a location which might reasonably be used as a means of ingress to the traveled portion of the street”); *Belt v. City of Grand Forks*, 68 N.W.2d 114, 120-21 (N.D. 1955).

110. See *Belt*, 68 N.W.2d at 120-21.

111. See, e.g., *Batzek v. Betz*, 519 N.E.2d 87, 89-90 (Ill. App. Ct. 1988) (finding that a teenager who fell from a tree and was rendered quadriplegic while removing dead branches that posed risk to camper was owed no duty by the landowner to warn of danger “because the unreasonable burden of improving land in a state of nature is great compared to the risk to children”); *Loney v. McPhillips*, 521 P.2d 340, 342 (Or. 1974); cf. *Clarke v. Edging*, 512 P.2d 30, 33-34 (Ariz. Ct. App. 1973) (stating that whether a condition on land is artificial or natural for purposes of the attractive nuisance doctrine in a case seeking damages for death of a child is a question of fact for the jury).

112. *United States v. Sterling*, 244 F. Supp. 534, 536 (W.D. Pa. 1965).

113. See *Seaboard Airline R.R. v. Richmond-Petersburg Turnpike Auth.*, 121 S.E.2d 499, 501 (Va. 1961).

114. See *id.* at 501-02.

authority was not liable because pigeons are wild animals.<sup>115</sup> However, another court held that attracting wild geese to an artificial pond where the defendant placed food and tended lame geese rendered the defendant liable in nuisance for crop damage done to a neighbor's lands.<sup>116</sup> A dissenting judge in the goose droppings case urged that liability for acts of animals existing in the state of nature was contrary to the law.<sup>117</sup> A court held that state game laws protecting wild animals from off-season hunting extended to feral hogs "existing [by definition] in a state of nature."<sup>118</sup>

Animals living on property owned by private persons or government exist in a state of nature if they have not been domesticated or tamed. For example, a wild buck was captured and penned on county land when it injured the plaintiff.<sup>119</sup> The Supreme Court of Wisconsin concluded that although the buck was being held in captivity, it was a wild animal whose injurious conduct was not the legal responsibility of its captors.<sup>120</sup> The court argued that mature bucks have "untamable" and "ugly" dispositions, inclining them to "fight anything, including a man armed with a shovel."<sup>121</sup> Unlike bucks in captivity, rats in captivity are not wild animals. Albino white rats raised for research purposes and judged incapable of surviving "in a state of nature" were not "wildlife" for purposes of interpreting the Unemployment Compensation Act's provisions exempting agricultural labor engaged in raising wildlife.<sup>122</sup>

### B. *Realms of Risk*

The "state of nature" is a name judges give to the conditions of extreme risk they reason is the fate of society without the rule of law.<sup>123</sup> The Supreme Court of New Hampshire once described its state government as one that "originates in a social compact running between the State and the people, whose end is the protection of man's natural rights."<sup>124</sup> The court went on to explain that, "[a]ccording to eighteenth-century thought, such a social compact is a necessity because our natural rights are insecure while

115. *See id.* at 502.

116. *See Andrews v. Andrews*, 88 S.E.2d 88, 92-93 (N.C. 1955); *cf. Sickman v. United States*, 184 F.2d 616, 619-20 (7th Cir. 1950) (finding government not liable for crop damage caused by migratory wild geese allowed to congregate on federal game preserve).

117. *See Andrews*, 88 S.E.2d at 93 (Parker, J., dissenting).

118. *Key v. State*, 384 S.W.2d 22, 24 (Tenn. 1964).

119. *See Hudson v. Janesville Conservation Club*, 484 N.W.2d 132, 133 (Wis. 1992).

120. *See id.* at 135-36.

121. *Id.* at 136.

122. *Sprague-Dawley, Inc. v. Moore*, 155 N.W.2d 579, 582-83 (Wis. 1968).

123. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) ("[I]t is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.'").

124. *State v. Brosseau*, 470 A.2d 869, 877 (N.H. 1983).

we exist outside of a justly organized society or inside the ‘state of nature.’”<sup>125</sup> Appeals in case law to the rule of law ideal warn that the state of nature is the intolerable alternative to legal order. A “civilized” society needs laws and law enforcement as reasonable constraints on individual liberty.

A court deciding whether Mexican defendants enjoy the protections of the Bill of Rights protections cited a scholar quoting Blackstone’s definition that “‘absolute rights of individuals’” are those “‘as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.’”<sup>126</sup> A dissenting opinion in a West Virginia eminent domain case described Hugo Grotius’s explication of the theory of eminent domain.<sup>127</sup> Under this theory, eminent domain is the sovereign’s right because “[t]o wish for an ownership of land that shall not be subject to royal rights is to wish for a state of nature.”<sup>128</sup> Hobbes argued in like vein that investing substantially less than absolute rights in the sovereign would not effectuate the escape from the state of nature.<sup>129</sup>

Those who breach the social contract’s terms against violence are subject to just punishment. One court found that persons of both sexes are subject to governmental punishment for criminal acts because, “in a state of nature no one is in subjection to another.”<sup>130</sup> A civilized society needs prisons to confine dangerous criminals who violate the social contract. But according to United States Supreme Court Justice Souter, government is obligated to maintain prisons as settings for measured punishments, rather than as cruel and degrading states of nature.<sup>131</sup> Prison conditions cannot be permitted to devolve into a state of nature: “Having incarcerated ‘persons [with] demonstrated proclivit[ies] for antisocial, criminal, and often violent conduct . . . having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.’”<sup>132</sup>

125. *Id.*

126. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220 (9th Cir. 1988), *rev’d*, 494 U.S. 259 (1990) (quoting BERNARD SCHWARTZ, 1 A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON 170 (1968)).

127. *See Handley v. Cook*, 252 S.E.2d 147, 152-53 (W. Va. 1979) (McGraw, J., dissenting).

128. *Id.* at 153.

129. *See HOBBS*, *supra* note 2.

130. *United States v. Kerr*, 13 F.3d 203, 207 n.3 (7th Cir. 1993) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 28-29).

131. *See Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994) (holding that the federal government is not liable for beatings and rape, unless it was deliberately indifferent to the constitutional rights of a preoperative transsexual with feminine characteristics imprisoned in a federal penitentiary for men).

132. *Id.* at 833. The quoted language from *Farmer* has been cited repeatedly. *See, e.g., In re Haley v. Gross*, 86 F.3d 630, 640 (7th Cir. 1996); *Dodson v. Reno*, 958 F. Supp. 49, 55 (D.P.R.

Parties to the social contract yield rights of criminal enforcement to the state. Citizens must rely upon the judicial system to punish, but a person in a “state of nature” can secure his rights with justice for himself.<sup>133</sup> In a case holding that a sheriff’s deputies were immune from liability for a jailhouse suicide, a dissenting judge argued that the fact that public officers are in the service of the public “does not mean, however, that they are free agents, existing in a state of nature” without duties to specific citizens to whom they should be liable in tort.<sup>134</sup> Similarly, a Wisconsin appeals court argued that an agent of the Ford Motor Credit Company entitled to repossess an automobile in the possession of a debtor is not entitled to breach the peace to accomplish his or her ends, since zealously pursued private remedies threaten to revert society to a state of nature.<sup>135</sup>

### C. *Freedom to Contract*

Thus far I have adduced examples of courts using the term “state of nature” to denote (a) characteristics of environmental attributes and (b) realms of risk to human safety. “State of nature” also denotes a judicial freedom, including the freedom to contract. An “at will” employee exists in a state of nature and is therefore free to bargain from that state with unions or employers on terms of mutual interest. A judge has asserted, however, that “[e]mployment at will is not a state of nature but a continuing contractual relation.”<sup>136</sup> The state of affairs before a collective bargaining agreement “is not quite Hobbes’s state of nature.”<sup>137</sup> To say that it is not quite a state of nature may be a way to suggest the expectations of cooperation apply.

### D. *Things Without Owners*

In the law of finds, abandoned property and shipwrecks exist in a state of nature.<sup>138</sup> Anyone who finds or salvages them may legitimately claim

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1997); *Hadix v. Johnson*, 947 F. Supp. 1100, 1102 (E.D. Mich. 1996); *Southern Ohio Correctional Facility*, 166 F.R.D. 391, 397 (S.D. Ohio 1996); *cf. Madrid v. Gomez*, 889 F. Supp. 1146, 1245 (N.D. Cal. 1995) (stating that “government officials must ensure that prisons . . . do not degenerate into places that violate basic standards of decency and humanity”).

133. *See Garry v. Garry*, 467 N.Y.S.2d 175, 176 n.1 (Sup. Ct. 1983) (quoting Locke, *supra* note 2, at 176).

134. *Wilson v. Sponable*, 439 N.Y.S.2d 549, 557 (App. Div. 1981).

135. *See Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449, 453 (Wis. Ct. App. 1993).

136. *McKnight v. General Motors Corp.*, 908 F.2d 104, 109 (7th Cir. 1990).

137. *See Merk v. Jewel Food Stores*, 734 F. Supp. 330, 332 (N.D. Ill. 1990).

138. *See, e.g., Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 965 (M.D. Fla. 1993) (observing that in maritime law a found shipwreck is assumed to have returned to a state of nature).

them as property.<sup>139</sup> A jar of money, notwithstanding all the human artifice and culture it represents, if found buried in the earth exists in a state of nature.<sup>140</sup> Implicit in the law of finds (and the law of adverse possession) is the idea that things not plainly owned are unowned and may be allocated as though they had reverted to the commons.<sup>141</sup> To award ownership to finders and salvagers is to adopt the principle that things should belong to those whose labor contributes to their value. The fiction that lost money exists in a state of nature gives courts a basis for treating the person whose effort and luck leads to recovery as its rightful owner.

### III. THE SOCIAL CONTRACT

What is the juridical meaning of “social contract”? To what does it refer? In the dozens of cases in which it appears, the term “social contract” variously denotes, either (a) principles of just and fair government with which rational persons should agree, would agree, or have in fact agreed;<sup>142</sup> (b) the American Revolution and the United States Constitution;<sup>143</sup> (c) a polity’s entire body of positive law, including its constitutional law;<sup>144</sup> or (d) specific quotidian bargains, agreements, and commercial contracts struck between, for example, employers and workers.<sup>145</sup>

139. *See id.*

140. *See Couch v. Schley*, 272 S.W.2d 171, 173 (Tex. Civ. App. 1954) (stating that \$1000 in currency found while working on another’s land belonged to the finder because unclaimed items revert to a state of nature).

141. *See Hener v. United States*, 525 F. Supp. 350, 353 (S.D.N.Y. 1981) (stating, in a dispute over rights to salvage silver off of sunken barge “the common law of finds treats property that is abandoned as returned to the state of nature”).

142. *See Rosenberger v. University of Virginia*, 515 U.S. 819, 856 (1995) (Thomas, J., dissenting); *California Dep’t of Corrections v. Morales*, 514 U.S. 499, 515 (1995) (Stevens, J., dissenting); *Landgraf v. USI Film Prod.*, 511 U.S. 244, 267 (1994) (citing Madison’s view that bills of attainder and ex post facto laws “contrary to the first principles of the social compact”); *Lovelace v. Leechburg Area Sch. Dist.*, 310 F. Supp. 579 (W.D. Pa. 1970) (suggesting that the normative basis of the Ninth Amendment may be the social contract principle of John Locke and Thomas Jefferson “according to which individuals living in a ‘state of nature’ prior to the establishment of civil society enjoyed certain unalienable natural rights . . . and governments were established by consent of the governed for the purpose of protecting and making secure such pre-existing rights”); *Curtis v. Kline*, 666 A.2d 265, 274 (Pa. 1995) (Montemuro, J., dissenting).

143. *See Echols v. Dekalb County*, 247 S.E.2d 114, 118 (Ga. Ct. App. 1978) (Deen, P.J., dissenting) (“The people acknowledged parting of this power by the social contract of forming one United States of America.”); *California ex rel. Franchise Tax Bd. v. Gardner*, No. 03A01-9508-CH-00253, 1996 WL 11394, at \*1 (Tenn. Ct. App. Jan. 10, 1996).

144. The idea that the law is a social contract affording parties various categories of rights is suggested by, for example, *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182, 1199 (D. Conn. 1974) (“We recognize . . . that ‘social rights’ and ‘civil rights’ are but extremes on the broad spectrum of the ‘social contract.’”).

145. *See supra* Part LC.

### A. *Social Contract as Consensual, Rational Principles*

Under the first usage, judges employ the expression “social contract” to denote principles of law and government with which rational persons should, would, or do agree in exchange for greater freedom and security. Functioning as natural law, here the social contract is construed primarily as a moral reality of legal significance, rather than as a specific document or historical event. For example, in *Vanhorne’s Lessee v. Dorrance*<sup>146</sup> the Supreme Court declared void and unconstitutional Pennsylvania’s Confirming Act of 1789.<sup>147</sup> Under the Act, Connecticut settlers were permitted to claim land in Pennsylvania owned by citizens of Pennsylvania for which Pennsylvanians would be compensated.<sup>148</sup> Justice Patterson argued that “[t]he preservation of property then is a primary object of the social compact” and that “it is contrary to the principles of social alliance” to divest citizens of land without just compensation.<sup>149</sup> Justice Patterson also referred to certain legislative powers as having been “urged from the nature of the social compact.”<sup>150</sup> Patterson’s analysis treated the social compact not as a historical fact, but as a normative reality of social organization with distinct content accessible to the courts charged with resolving disputes. In *Jacobson v. Massachusetts*,<sup>151</sup> a major precedent in the field of public health law, the Court found that the social contract authorized the government to exercise its police powers for the protection of public health.<sup>152</sup> So, a private person who prefers not to submit to vaccination for a contagious disease can be justly compelled by law to submit, because protection from infectious diseases is something all rational, self-interested persons would choose.

The appeal to principles of social contract has been condemned as illegitimate by recent judges favoring more positivistic directions for jurisprudence.<sup>153</sup> It is not only in older cases, however, that courts refer to the social contract as if it were a taken-for-granted literal feature of jurisprudential normative reality. In 1986, a judge wrote that by virtue of the social contract, the very purpose of the states is to protect the “sanctity of all human life.”<sup>154</sup> Referring to a dispute over an oil drilling concession in

146. 2 U.S. (1 Dall.) 304 (1795).

147. *See id.* at 320.

148. *See id.* at 306.

149. *Id.* at 310.

150. *Id.* at 310-11.

151. 197 U.S. 11 (1905).

152. *See id.* at 27.

153. *See Seminole Tribe v. Florida*, 517 U.S. 44, 167 (1996) (Stevens, J., dissenting) (rejecting claim of Justice Chase that legislation in violation “of the social compact cannot be considered a rightful exercise of legislation authority”).

154. *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 640 & n.1 (Mass. 1986); *cf.*

the Persian Gulf as a political dispute between sovereigns, one federal court commented in *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*<sup>155</sup> that “[i]n their external relations, sovereigns are bound by no law; they are like our ancestors before the recognition or imposition of the social contract.”<sup>156</sup> This Hobbesian understanding of sovereignty presumes that the justification for the sovereign power of political states is that precisely this kind of power was possessed by individuals and transferred by individuals to the state through the social contract. This same court adopted John Austin’s teaching that among sovereign nations there can be no genuine binding law to resolve conflicts.<sup>157</sup>

### 1. In Tort and Property Law

Tort and property law are the home of numerous examples of “social contract” used by judges to denote consensual rational principles. I have already mentioned the role an overtly natural law-based appeal to the social contract played in the Supreme Court of Georgia’s landmark right to privacy decision, *Pavesich v. New England Life Insurance Co.*<sup>158</sup> Who, asked the court, would sign on to the social contract without the promise of protection for personal identity?<sup>159</sup> Social contract notions also played a role in the development of the fault principle in American tort law in the nineteenth century. In *Loosee v. Buchanan*,<sup>160</sup> the New York state court confronted a dilemma: it could abandon seemingly relevant English precedent and appear unprincipled, or embrace it and appear unrealistic. A landowner whose personal and real property was damaged by an exploding boiler operated by a paper mill located on adjacent property sought compensation under the rule of the English case *Rylands v. Fletcher*.<sup>161</sup> That case endorsed a rule of strict liability for damages to adjacent property caused by “non-natural” uses of land and by “escaping perils.”<sup>162</sup> To follow the English rule of strict liability posed a threat to the progress of American industry, which seemed dependent upon accepting a degree of commercial risk and peril. To adopt a negligence principle outright posed a threat to the

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Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (1997) (upholding statutes banning physician assisted suicides).

155. 577 F.2d 1196 (5th Cir. 1978).

156. *Id.* at 1204; see also *DeRoburt v. Gannett Co.* 548 F. Supp. 1370, 1376 (D. Haw. 1982) (citing *Occidental*).

157. See *Occidental*, 577 F.2d at 1204-05.

158. 50 S.E. 68 (Ga. 1905). For additional discussion of *Pavesich*, see *supra* notes 29-30 and accompanying text.

159. See *Pavesich*, 50 S.E. at 70.

160. 51 N.Y. 476 (1873).

161. L.R. 3 H.L. 330 (1868).

162. *Id.*

model of precedent-driven adjudication.

Judge Earl's escape from the dilemma was no bold rejection of English precedent as one finds in the New Hampshire decision of *Brown v. Collins*.<sup>163</sup> In that case the court rejected the rules of trespass and strict liability validated in *Rylands* as rules "introduced in England at an immature stage of English jurisprudence, and an undeveloped stage of agriculture, manufacture, and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends."<sup>164</sup> Instead, Judge Earl claimed to carve out an exception to the strict law of trespass, an area of law, he said, that had always admitted of exceptions.<sup>165</sup> In addition, Judge Earl appealed with high rhetorical flair to an ad hoc mixture of utilitarian and social contractarian principles to support the negligence rule. "By becoming a member of civilized society," Earl wrote, hinting at government by consent, "I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me."<sup>166</sup> Modern enterprises that provide benefits, but also impose risks on all who would benefit, must take on the burdens of accidental injury:

We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of our civilization. . . . He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands. . . . I hold my property subject to the risk that it may be unavoidably or accidentally injured by those who live near me. . . . Most of the rights of property, as well as of person, in the social state, are not absolute but relative, and they must be so arranged and modified, not necessarily infringing upon natural rights, as upon the whole to promote the general welfare.<sup>167</sup>

As Judge Earl explained it, the "manifold wants" of accident victims themselves countermand strict liability as the principle of tort compensation. Under the negligence regime, accident victims who leave court feeling like losers, are winners in a scheme of reciprocal cooperation.

Courts have employed social contract principles to illuminate the fault

163. 53 N.H. 442 (1873).

164. *Id.*

165. *See id.*

166. *Losee v. Buchanan*, 51 N.Y. 476, 485 (1873).

167. *Id.* at 484-485.

principle, and also to illuminate limitations on the principle, such as the doctrine that no one may recover in negligence for purely economic injuries and the doctrine known as the “fireman’s rule.”<sup>168</sup> In *Sandarac Ass’n, Inc. v. W.R. Frizzell Architects, Inc.*,<sup>169</sup> a condominium sought to sue an architectural firm for negligence resulting in economic losses.<sup>170</sup> In explaining the traditional bar against negligence actions for purely economic losses, the court emphasizes negligence doctrines as “allocat[ing] . . . risks among the members of society because private agreements . . . cannot effectively accomplish the task.”<sup>171</sup> The court added in a footnote that contemporary negligence doctrines have roots in the nineteenth century when they were created by judges influenced by the “political theories of social contract” of Hobbes and Rousseau.<sup>172</sup> The court appears to have thought that the social contract case for negligence liability among strangers and neighbors would not justify liability for losses that could have been avoided had parties struck a bargain in advance.

In a case determining whether injured public safety employees can recover against a citizen, contrary to the “fireman’s rule,” the court noted in defense of the rule that “[i]ndeed, it would be a breach of the social contract for all of us to say to any one of us ‘fire and police protection are available only at your peril.’”<sup>173</sup> The point seems to be that emergency assistance is one of the things we enter the social contract to obtain, and it should therefore be available as inexpensively as possible.

## 2. In Criminal Law

Courts appeal to the idea of the social contract to help describe both the wrongness of criminal acts, and the rightness of criminal prohibitions<sup>174</sup> and procedures.<sup>175</sup> Judges explicate the genesis of criminal prosecutions and evidentiary requirements of criminal trials with the assistance of social contract ideas. For example:

From the earliest beginnings of human society, as people bound themselves together under a variety of social contracts,

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168. See *Sam v. Wesley*, 647 N.E.2d 382, 384 (Ind. Ct. App. 1995).

169. 609 So. 2d 1349 (Fla. 2d DCA 1992).

170. See *id.* at 1351.

171. *Id.* at 1353.

172. *Id.* at n.4.

173. *Fox v. Hawkins*, 594 N.E.2d 493, 496 (Ind. Ct. App. 1992).

174. See *People v. Acuna*, 929 P.2d 596, 603-04 (Cal. 1997) (upholding injunction prohibiting gang members from associating with one another); *Roe v. Butterworth*, 958 F. Supp. 1569, 1582 (S.D. Fla. 1997) (upholding prostitution ban on grounds that protecting morals is a compelling state interest incorporated into the social contract).

175. See *Agard v. Portondo*, 117 F.3d 696, 717 (2d Cir. 1997) (stating that defendant’s right to be heard was one of the first principles of the compact).

they promulgated rules of behavior for the group and they provided for the enforcement of those rules. Whenever the tenets of acceptable behavior were transgressed, men bound themselves together as a *posse comitatus* . . . and demanded an answer to the question, “WHODUNIT?: Who killed the boy?, Who stole the pig?, Who burned the cottage?”<sup>176</sup>

Locke’s social contract theory provides for the possibility that breaking an unjust law can be justifiable. A federal judge suggested that criminal “draft dodgers” wrongly seek to justify disobeying the law on the basis of individualistic social contract theory.<sup>177</sup>

Social contract theory has served the need for providing a philosophic justification for punishment in general<sup>178</sup> and for particular punishments, such as disenfranchisement<sup>179</sup> and the death penalty.<sup>180</sup> Affirming a death penalty conviction, a court opined that:

It is not vengeance for society to require the same price to be paid by one who has intentionally taken a life under circumstances where he knows the cost. It is the fulfillment of the terms of our social contract. It is the essence of general deterrence that the price *must* be paid.<sup>181</sup>

Dissenting from the majority opinion in *Roberts v. Louisiana*,<sup>182</sup> Justice Rehnquist argued that to commit a crime is to breach the social contract.<sup>183</sup> *Roberts* held that a Louisiana statute mandating the death penalty for

176. *Jacobs v. State*, 415 A.2d 590, 596 (Md. Ct. Spec. App. 1980); *see also* *People v. Wynn*, 424 N.Y.S.2d 664, 667 (Sup. Ct. 1980) (“Anglo-American criminal procedure . . . is a corporal part of our social contract covenanted by the Constitution.”); *State v. Trexler*, 334 S.E.2d 414, 417 (N.C. Ct. App. 1985) (Becton, J., concurring) (“[I]mplicit in our criminal justice system is the social contract notion that in exchange for our inability to discover the ‘absolute’ truth, we assure criminal defendants that we will provide them as fair a trial as humanly possible.”)

177. *United States v. Moore*, 356 F. Supp. 1321, 1323 (S.D.N.Y. 1972) (discussing an “individualistic adherence to some sort of personal Social Contract” alleged by defendant to extinguish criminal intent).

178. *See State v. Perry*, 610 So. 2d 746, 767 (La. 1992) (citing Immanuel Kant and Jeffrey Murphy) (“The retributory theory of punishment presupposes that each human being possesses autonomy, a kind of rational freedom which entitles him or her to dignity and respect as a person which is morally sacred and inviolate, but that an original social contract was entered by which the people constituted themselves a state.”).

179. *See Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (felons “have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly”).

180. *See Vandiver v. State*, 480 N.E. 910, 915 (Ind. 1985).

181. *Id.*

182. 431 U.S. 633 (1976).

183. *See id.* at 646.

certain crimes was unconstitutional under the Eighth and Fourteenth Amendment, absent provisions for considering particularized mitigating factors that might bear on the imposition of the penalty.<sup>184</sup> Justice Rehnquist observed that: "In all murder cases, and of course this one, the State has an interest in protecting its citizens from such ultimate attacks; this surely is at the core of the Lockean 'social contract' idea."<sup>185</sup>

It is indeed a feature of Locke's social contract theory that a principal function of the state is to protect the physical integrity of individuals. Locke held that persons contract for mutual, reciprocal protection of our rights. Of course, it does not follow from social contract principles that once a murderer is apprehended, he or she must be put to death. Nor does it follow that felons should be disenfranchised, although this was urged in *Shepherd v. Trevino*.<sup>186</sup> Those who have "manifested a fundamental antipathy to the criminal laws . . . have breached the social contract and . . . have raised questions about their ability to vote responsibly."<sup>187</sup> Judges also have offered the social contract to justify civil forfeiture in narcotics cases. A historical account of the origins of, and rationale for, forfeiture in *United States v. 785 Saint Nicholas Ave.*,<sup>188</sup> included an appeal to Blackstone: "The true reason for permitting forfeiture, according to Blackstone, was that it is a part of the price a citizen must pay for breaking the social contract."<sup>189</sup>

Judges appeal to the flexible idea of the social contract in arguments favoring capital punishment as the just punishment of cop-killers; but, interestingly, judges also appeal to the social contract in arguments for a strict requirement that police officers exercise their powers with appropriate restraint, for the sake of the "rule of law."<sup>190</sup> In *Roberts*, Justice Rehnquist argued that breaching the social contract by murdering a police officer is especially egregious since police officers "are literally the foot soldiers of society's defense of ordered liberty."<sup>191</sup> In *Briggs v. Malley*,<sup>192</sup> the court cited Locke and asserted that "[t]he exercise of police power *within* the law is the very foundation of the social contract."<sup>193</sup> Combining the invocations to Locke in *Briggs* and *Roberts*, the social contract gives

184. *See id.* at 637.

185. *Id.* at 646.

186. *See* 575 F.2d 1110, 1115 (5th Cir. 1978).

187. *Id.*

188. 983 F.2d 396 (2d Cir. 1993).

189. *Id.* at 402.

190. *Stroik v. Ponseti*, 683 So. 2d 1342, 1349 (La. Ct. App. 1996) (stating that the social contract confers a duty on a police officer "to exercise . . . respect and concern for the well-being of those he is employed to protect and serve").

191. *Roberts v. Louisiana*, 431 U.S. 633, 647 (1997) (Rehnquist, J., dissenting).

192. 748 F.2d 715 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986).

193. *Id.* at 719-20.

police officers a special role in securing persons and property, but constrains them to adhere to the laws that society establishes to protect the persons and property of persons suspected of criminal involvement.

Other cases characterize criminal wrongs as breaches of the social contract. In a case involving possible government entrapment of a narcotics dealer, the court characterized criminal harms as a “violation of the social contract.”<sup>194</sup> Similarly, another court stated that criminals and juvenile delinquents have, by their wrongdoing, breached the social contract.<sup>195</sup> In one case, a pro se criminal defendant humbly described his own criminal transactions and others’ as having “broke our social contracts [sic].”<sup>196</sup>

Parties to the social contract bargain with one another or the state for protection from serious harms. Individuals give up a measure of liberty for a measure of protection. The social contract authorizes society to limit the liberty of persons who interfere with the very interests whose protection motivates rational persons to consent by contract to collective authority. A corollary of this understanding is the further understanding that the liberty of persons whose conduct does not injure the essential rights and interests of others may not be infringed. For David A.J. Richards and like-minded contractarians advocating constitutional protection of privacy, it seems to follow that even dangerous and immoral conduct cannot be prohibited by criminal regulation, if no one else’s rights and interests are violated; and that neither homosexual nor heterosexual consensual adult sex can be legitimately prohibited by criminal laws. One court observed that the right to privacy has antecedents in Rousseau and Locke, but nonetheless concluded the regulation of sexual conduct is permissible “even . . . [in a nation] founded upon notions of social contract, as ours was.”<sup>197</sup>

### B. *Social Contract as Revolution and Constitution*

Judges have written about the social compact as though it were an actual historical event. Very early references to the “social contract” in American case law sometimes seem to presuppose the literal existence of a binding agreement with determinate terms forged between either specific individuals or groups, or between individuals, groups, and government.<sup>198</sup>

194. *People v. Juillet*, 475 N.W.2d 786, 811 n.5 (Mich. 1991) (Boyle, J., concurring in part & dissenting in part).

195. *See Doe v. New Jersey Division of Youth & Family Servs.*, 429 A.2d 596, 600 (N.J. Super. Ct. App. Div. 1981).

196. *Alexander v. State*, 447 A.2d 880, 886 (Md. Ct. Spec. App. 1982).

197. *Schochet v. State*, 541 A.2d 183, 205 (Md. Ct. Spec. App. 1988) (Wilner, J., dissenting).

198. *See, e.g., Vanhorne’s Lessee v. Dorrance*, 2 U.S. (1 Dall.) 304, 310-11 (1795). It is not only early cases that imply that the American Revolution created a social contract. *See, e.g., Lusch v. State*, 387 A.2d 306, 309 (Md. Ct. Spec. App. 1978) (“It was in the very act of ratifying a new social contract in 1788 that we perceived the need for a set of fundamental protections. . .”).

In *Calder v. Bull*,<sup>199</sup> Supreme Court Justice Chase associated the erection of the United States Constitution with the formation of a “social compact,” whose “nature and terms” depended upon the “purposes for which men enter into society.”<sup>200</sup> In *Dawson’s Lessee v. Godfrey*,<sup>201</sup> a Supreme Court case upholding a Maryland law depriving a British citizen from inheriting land in the state, Justice Johnson refers to aliens as “never having been a party in our social compact.”<sup>202</sup> While not strictly identifying the compact as the United States Constitution, Johnson’s reference to the social compact seems to imply a pact among actual persons, with a knowable content. The idea of the social contract would be used similarly to exclude aliens in other cases, in which the rights of citizens and the (inferior) rights of non-citizens would be controverted. *Cooper v. Telfair*<sup>203</sup> concerned the disposition of property belonging to someone who had been banished for treason.<sup>204</sup> The Court upheld the power of the state to confiscate the personal property of a traitor, asserting that the power of government to banish and confiscate “grows out of the very nature of the social compact . . . inherent in the legislature.”<sup>205</sup>

In recent decades, as in the eighteenth and nineteenth century, judges have sometimes expressly depicted the formation of the American government as a social contract.<sup>206</sup> Judges have depicted ratification of the United States Constitution in 1788 as a social contract, whose Bill of Rights is “a set of built-in limitations” on government.<sup>207</sup> One court’s high-toned characterization of popular elections appealed to the social contract. In this case, which was brought by a defeated contender in a county government election, the court declared that “[e]ach election sees a convergence in space-time when each of us by law is as equal as when we were created” and that election day is more than a “ritual renewal of the social contract.”<sup>208</sup> However appealing it might be to view the centuries-old Constitution as a social contract, it seems more plausible to regard government institutions created by a contemporary democratic electorate as a “renewed” social contract.

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199. 3 U.S. (3 Dall.) 386 (1798).

200. *Id.* at 388.

201. 8 U.S. (4 Cranch) 321 (1808).

202. *Id.* at 323.

203. 4 U.S. (4 Dall.) 14 (1800).

204. *See id.* at 14-15.

205. *Id.* at 19.

206. *See Echols v. Dekalb County*, 247 S.E.2d 114, 118 (Ga. Ct. App. 1978) (Dean, J., dissenting) (dissenting from a decision upholding the immunity of a county from a suit by a county employee seeking back wages, and signaling general opposition to the idea of sovereign immunity by citing article entitled “Hobbes, Holmes and Hitler”).

207. *Von Lusch v. State*, 387 A.2d 306, 309 (Md. Ct. Spec. App. 1978).

208. *Wilbourn v. Hobson*, 608 So. 2d 1187, 1196 (Miss. 1992) (Robertson, J., concurring).

Nineteenth-century jurists employed an arsenal of arguments in defense of slavery, some of which owed a debt to social contractarian philosophy.<sup>209</sup> One argument stated that the United States Constitution was a white-only social compact, designed to protect slavery as a social and economic institution. Justice Taney, authored the Supreme Court's opinion in the notorious 1856 *Dred Scott* decision denying federal citizenship to free blacks and slaves.<sup>210</sup> Taney thus vindicated the opinion of the Court in *Prigg v. Pennsylvania*<sup>211</sup> who defended slave holding "as a cherished right, incorporated into the social compact, and sacredly guarded by law."<sup>212</sup> A second contractarian argument judges used to support slavery posits a hypothetical contract under whose terms blacks rationally agree to subordinate themselves to whites in exchange for protection. In *State v. Post*,<sup>213</sup> the New Jersey Supreme Court argued along these lines in an effort to show that slavery is not logically inconsistent with liberal egalitarian principles.<sup>214</sup> The court argued that slavery was the best deal blacks could get in their quest to escape the state of nature, given their limited natural endowments.<sup>215</sup> Rational persons of African ancestry chose slavery, we are urged to believe.

### C. *The Legal System as a Social Contract*

It is one thing to view the American Revolution or federal Constitution as social contracts, and something else to view the positive legal system as a whole as a social contract. A number of judges have characterized the United States' legal system as a social contract. Judge Blumenfeld does so twice in a case dating from the 1970s.<sup>216</sup> The first time, he describes the American system of law as a "social contract" of social and civil rights.<sup>217</sup> His use of scare quotes around the term "social contract" implies self-

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209. See generally 12 PROSLAVERY THOUGHT, IDEOLOGY, AND POLITICS (Paul Finkelman ed., 1989); Anita L. Allen & Thaddeus Pope, *Social Contract Theory, Slavery, and the Antebellum Courts*, in A COMPANION TO AFRICAN AMERICAN PHILOSOPHY (Tommy Lott & John Pittman eds., forthcoming 1999) (manuscript on file with author).

210. See *Scott v. Sandford*, 60 U.S. (19 Howe) 393, 404-05; Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 21 (1995) (finding that Justice Taney in *Scott* based his argument on the social contract theory of government); cf. CHARLES W. MILLS, *THE RACIAL CONTRACT* (1996) (arguing that a global agreement among whites insures blacks' subordination).

211. 41 U.S. 539 (1842).

212. *Id.* at 660.

213. 20 N.J.L. 368 (1845).

214. See *id.*

215. See *id.* at 385-86.

216. See *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182, 1199, 1200 n.26 (D. Conn. 1974).

217. See *id.* at 1199.

awareness of the fictional nature of the social contract. The second time, the judge uses the term without scare quotes in a footnote referring to “histories which emphasize the 39th Congress’ ideological perspective and its perception that it was fundamentally changing the social contract.”<sup>218</sup> Federal judges have implied that the governments and laws of other nations are social contracts, subject to birth and death with the political tides.<sup>219</sup> (It stands to reason that if the people of the United States are parties to a social contract, so are the people of other nations.)

In *Monarch Insurance Co. v. District of Columbia*,<sup>220</sup> the federal district court rejected a plaintiff’s claim that government has a duty, “arising from the common law and ancient English statutes,” to compensate for losses that resulted from race riots in the District of Columbia.<sup>221</sup> Such a duty, plaintiff argued, was “epitomized in the notion of a ‘social contract’ between the state and its citizens to preserve social order and the property of the citizens against mob violence.”<sup>222</sup> A technical question raised by this plaintiff’s perspective is whether the social contract is a citizen-to-state pact or a pact among individuals to form a state with particular powers and duties. In another case, the characterization of the social contract clearly assumed that the contract is an individual-to-individual pact, an “agreement between the members of society by which each member undertakes duties in consideration for the benefit received when all members fulfill similar duties.”<sup>223</sup>

#### D. *Contracts and Reliance Interests as Social Contracts*

The relationship between social contract theory and the law of contracts holds special interest.<sup>224</sup> Contemporary legal theorists commonly point at the large role the idea of contract came to play in the jurisprudence of the nineteenth century, following the demise of status-based legalism.<sup>225</sup> Nineteenth century formalist judges were unwilling to ascribe legal duties in the absence of contractual relations, and upheld the terms of contracts

218. *Id.* at 1200 n.26.

219. See *Associated Imports, Inc. v. International Longshoremen’s Ass’n*, 609 F. Supp. 595, 597 (S.D.N.Y. 1985) (finding that whether Soviet labor was “forced” depends on the “social contract between the Soviet state and its citizens”); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 447 (S.D.N.Y. 1980), *aff’d in part*, 658 F.2d 875 (2d Cir. 1981) (detailing a dispute between Cuba and Chase Manhattan Bank).

220. 353 F. Supp. 1249 (D.D.C. 1973).

221. *Id.* at 1259.

222. *Id.*

223. *Sandarac Ass’n v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1353 n.4 (Fla. 2d DCA 1992).

224. See Boyle, *supra* note 53, at 373.

225. *Cf. id.* at 388.

strictly, as final expressions of the will of the parties.<sup>226</sup> If these judges had a view about the requirements of the social contract, it was that the social contract required strict enforcement of actual, everyday contracts.

Modern judges do not always assume that the social contract compels the enforcement of actual contracts. Holding that the landlord of a limited-profit apartment complex was entitled to a higher rent ordered by a housing commissioner rather than the rent set out in the oldest tenants' original lease, a New York court stated: "As Rousseau recognized in his theory of the social contract, the individual living in society relinquishes certain of his liberties, including absolute freedom to contract, in return for the benefits of living in an organized society."<sup>227</sup> A legal system based on the social contract may, ironically, need to limit freedom of contract.<sup>228</sup>

The relevance of the social contract to contract law is not limited to any special status that actual contracts may or may not have within a legal system conceived to be a product of a social contract. In a couple of contexts the courts have chosen to characterize actual contracts as social contracts or compacts. Thus in *Edwards v. Leopoldi*,<sup>229</sup> a judge asserted that labor union collective bargaining agreements are not mere contracts, but social compacts.<sup>230</sup> In *S.D. Warren Co. v. United Paperworkers, International Union Local 1069*,<sup>231</sup> the court was asked to decide whether an employer could overturn the decision of an arbitrator to reinstate employees terminated for possession of marijuana in the workplace.<sup>232</sup> Emphasizing the cost and emotional intensity of labor negotiations, and the "balance of rights and obligations . . . essential to the administration of the enterprise," the court characterized the management-union contract as a social contract "[d]ealing with the economic survival of all concerned."<sup>233</sup> Thus, "the wills of the parties are tempered and accommodated to the point where the meeting of the minds is forged into a social contract, the collective will of all."<sup>234</sup> In *Rodgers v. Workers' Compensation Appeals Board*,<sup>235</sup> Justice Reynoso, dissenting in an action upholding the determination of a California workers' compensation appeals board, argued that the workers compensation statutes create a social contract between the

226. *Cf. id.* (analyzing competing formalist and realist conceptions of contract liability).

227. *Lafayette Morrison Housing, Inc. v. Patterson*, 292 N.Y.S.2d 785, 789 (Civ. Ct. 1968).

228. *See id. But cf. DuPont v. Admiral Ins. Co.*, No. 89 C-AU-99, 1996 WL 769627 at \*2 (Del. Super. Ct. Dec. 24, 1996) ("It is not for the court to rewrite the parties' insurance agreement . . . under the pretense of promoting an alternative social contract.").

229. 89 A.2d 264 (N.J. Super. Ct. App. Div. 1952).

230. *See id.* at 267.

231. 815 F.2d 178 (1st Cir. 1987).

232. *See id.* at 181.

233. *Id.*

234. *Id.*

235. 682 P.2d 1068 (Cal. 1984).

employer and the employee.<sup>236</sup> Curiously, having so elevated the effect of the statutes, the judge went on to simply emphasize the familiar, traditional understanding that injured workers have a right to recover without regard to the fault of the employer, and that the employer's duty to pay damages is limited by the terms of the statute.<sup>237</sup> A number of other courts have described the workers' compensation statute as a social contract.<sup>238</sup>

In *Staub v. Harris*,<sup>239</sup> the court acknowledged an argument made by the parties that a "social contract" between taxpayers and state taxing authorities invalidated the use of private collection agencies to collect taxes.<sup>240</sup> Hinting at disappointment, the court wrote that "[i]n order to fall within the statutory language, they creatively evoke the concept of the social contract between the people and the government to show a quasi-contractual transaction between the taxpayer and the local taxing units."<sup>241</sup> Citizens dependent on municipal services and beneficiaries of government welfare programs enjoy a social contract with government, it is sometimes alleged.<sup>242</sup> Personal relationships and commitments are sometimes classified as social contracts. A judge described marriage as a social contract in a sad case involving parents alleged to have killed one child by force and another, who died of pneumonia, by neglect.<sup>243</sup>

#### IV. CONCLUSION

Whether one takes a sympathetic<sup>244</sup> or an unsympathetic<sup>245</sup> philosophical view of social contract theory, one must admit the possibility that the intellectual foundations of American law include social contract theory.

236. *See id.* at 1076 ("The worker's compensation statutes created a 'social contract' between the employer and the employee."); *accord* *Great Atlantic & Pacific Tea Co. v. Imbruglio*, 697 A.2d 885, 890 (Md. 1997).

237. *See Rodgers*, 682 P.2d at 1076 (Reynoso, J., dissenting).

238. *See Archer v. Roadrunner Trucking*, 930 P.2d 1155, 1158 (N.M. 1996); *Milwaukee County v. Labor & Indus. Review*, 556 N.W.2d 340, 342 (Wis. Ct. App. 1996).

239. 626 F.2d 275 (3d Cir. 1980).

240. *See id.* at 278.

241. *Id.*

242. *But see Reedy v. Mullins*, 456 F. Supp. 955, 957 (W.D. Va. 1978) (rejecting plaintiffs' reliance on the social contract as establishing a property right to fire protection).

243. *Westerville v. Kalamazoo County Dep't of Soc. Servs.*, 534 F. Supp. 1088, 1102 (W.D. Mich. 1982).

244. *See generally* DAVID GAUTHIER, *MORAL DEALING* (1986); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); BRIAN SKYRMS, *EVOLUTION OF THE SOCIAL CONTRACT* (1997).

245. *See generally* CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* 70 (Roy M. Mersky & J. Myron Jacobstein eds., William S. Hein & Co., reprint 1974) (1890) (stating that natural law "doctrine reaches the extreme limits of absurdity in the social contract").

Assuming, as a matter of history, that the nation and its Constitution have arguable social contractarian foundations, it is worth understanding the extent to which the courts may rest on those foundations in applying, interpreting, and making law. Moreover, examining the place of social contractarian thought in the rhetoric of judicial opinions illuminates the overall significance of an idea that has been, and remains, a major cultural phenomenon, particularly in legal, political, and philosophical circles.<sup>246</sup> The rewards of an improved understanding of the social contract legacy include a more complete portrait of American jurisprudence, and a more complete intellectual history of one rhetorical strand in American legal thought.

Appeals to social contract theory—premised as they so often are on the assumption that our law has a special relationship to the social contractarian tradition—frame unavoidable judicial discretion in a familiar normative vocabulary that many people continue to find reassuring. It is pointless to quarrel with a judge who appeals to social contract theory merely to add literary flourish to his or her written opinion. My real concern is with judicial opinion writers who adduce social contract theory seemingly to determine, corroborate, or justify their conclusions. Social contract theory is too flexible to point with certainty in any one direction, particularly where the right answer is a matter of controversy, and particularly in the absence of detailed argument and analysis of the sort associated with the discipline of academic philosophy rather than the pragmatic discipline of law. As the examples of flexibility cited throughout this article show, using the apparatus of social contract theory, one can make the case for individual rights against government and likewise the case for government authority over individuals. Social contract theory must be interpreted in some detail before it can be applied with any confidence and rigor.

Nearly six hundred years old, the early modern idea of the “social contract” is going strong.<sup>247</sup> I have described and illustrated judicial uses of

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246. The popular vitality of the modern idea of the social contract is in evidence in the realms of public law. It was in evidence in 1994 when Republicans in Congress signed what they termed a “Contract with America,” exploiting the pervasive habit of conceiving good and legitimate government as the product of political bargains. The idea was in evidence in 1995 when Congressional Telecommunications Sub-Committee Chair Ed Markey said he wanted “to reinvigorate the social compact between broadcasters and the American people.” Kim McAvoy, *Markey Lays Out Legislative Agenda*, BROADCASTING & CABLE, Oct. 10, 1994, at 22. Materials for a continuing legal education course introduced a “social contract interpretation of the powers of eminent domain.” Gavin M. Erasmus, *Eminent Domain Jurisprudence*, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation, Scottsdale, Ariz., Jan. 6-8, 1994. A 1997 report of the Council for Aid to Education argued that the Morrill Act of 1862 creating the land grant university guarantees that “all citizens who can profit from higher education will have access to it,” but that “there are signs this far-sighted social contract may soon be broken.”

247. See Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal*

two terms employed in social contract theory: “state of nature” and “social contract.” What is the pay off for my work? First, this essay reveals to philosophers who work on social contract theory something about the roles various contractarian historical figures and ideas have played in legal developments in the United States. Second, my essay reveals why humanists should be circumspect in making claims about the social contract tradition in American law. The history is ambiguous; it is easy to overstate, understate, and mis-state the impact of social contract theory. Clearly though, there have been significant post-revolutionary uses of the theory in American law. Finally, my essay should make judges and law clerks more self-conscious about their uses and potential abuses of social contractarian reasoning.

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*Protection Analyses*, 52 U. CIN. L. REV. 3, 12-13 (1983) (“consensus about international human rights is replacing the original social contract theory underpinning the European liberal state that formed the basis for our present constitutional system of rights”).