Published with assistance from the Louis Stern Memorial Fund.

Designed by Thos. Whitridge and set in Garamond type.
Printed in the United States of America by The Vail-Ballou Press, Inc., Binghamton, N.Y.

Published in Great Britain, Europe, Africa, and Asia (except Japan) by Yale University Press, Ltd., London.
Distributed in Australia and New Zealand by Book & Film Services, Artarmon, N.S.W., Australia; and in Japan by Harper & Row, Publishers, Tokyo Office.

Library of Congress Cataloging in Publication Data

Vining, Joseph, 1938–
Legal identity.

Includes index.
1. Public law. 2. Locus standi. I. Title.
K3150.V56 342 78-5994
ISBN 0-300-02207-7

To D.M.

Preface

A preliminary note on words. *Standing* is a term of art that mesmerizes. It is part of a special language lawyers love to use and nonlawyers quiver on hearing. "You can't get into court," a lawyer says. "Why not?" a nonlawyer asks. "You have no standing," the lawyer replies, much as if he were saying, "You have no feet." A matter of perception, understanding, and choice on the lawyer's part is translated into a concrete attribute of the nonlawyer to whom he is speaking, something to be looked for outside the lawyer's mind, something another has or lacks. "Poor man, he has no standing. What a pity. If he did I might be able to help him."

Pursuing the discussion, the nonlawyer does not ask, "Why don't I have standing?" He repeats his question: "Why can't I get into court?" The lawyer then says (with just a touch of irritation), "Oh, you can get into court, but if you do you won't be given a hearing."

The nonlawyer forgives the lawyer for continuing to talk about nonlawyers' having or being given things. He assumes that this is a harmless foible, a habit acquired perhaps during an extensive practice in real property law. He does not suspect that this may be a manner of thinking, not merely a manner of speaking. Continuing to try to come to some common ground he asks, "What will happen if I go into court and speak?"

The lawyer answers, "People there like me, lawyers and judges, will act as if you are not there. They won't listen. They won't hear you."

Then the nonlawyer knows the real question is why lawyers and judges would behave in that impolite way, or why he might be inclined to do so if he became a lawyer or judge. The focus has shifted from the nonlawyer to the legal mind itself—which is what this book is about.

And, of course, since law is involved, more than politeness and impoliteness is at stake.

Identity is used here in its ordinary meaning. Although it appears in discussions of legal questions, it has no special legal con-

notation unfamiliar to the nonlawyer. It is the right word for the phenomenon we have to describe, in all of its senses: equivalence, unity, coherence, existence, perceptibility, coming of age.

Finally, the word *person*. Much of this book is an inquiry into who legal persons are, from judge and litigant to those whom judges and litigants talk about. Persons have identity in a way that other things do not. They ought not properly to be viewed as things at all. They are, however, building blocks of thought like those of any other field and thus resemble a number in mathematics or a particle in physics even though numbers and particles have no immediate human connotation. In speaking here of persons, we must move back and forth across the line between the human and the nonhuman, that which is part of us and that which we hold outside ourselves.

Entities, units of reference, building blocks may be essential to thought itself. They have, indeed, something of a secret importance. A large part of thinking *seems* to consist of the rearranging or modifying of already given units of reference. But the establishment of a unit of reference is often the critical point in reasoning or discussion, legal or nonlegal, and when one is unpersuaded by an argument but does not know quite why, analysis often shows that one has tacitly rejected the unit of reference being used.

The problem of legal persons is thus part of a larger problem. In biology inquiry begins with the choice of a unit: the genetic material within a cell, the cell, the organism, the colony or symbiotic pair, the gene pool, the ecosystem itself. The precision of economics enters only after entities have been defined: the unit of production or consumption or decision making or the relevant market. In political science and political theory, rights, interests, and commitments are entirely without substance until they have been attached—to citizen, party, race, nation, government, or country. Child psychology is the study of the formation of entities, the growth of self and the separation of self from the nurturing parent and the world at large; but its teachings may reach only those for whom its basic terms have intuitive meaning. The process of defining and designating entities, communicating and agreeing upon them, shifting and changing them is as common as it is fascinating.

Any book on perception of self and others—on hearing and being heard, seeing and being seen—necessarily rests on the greater part of the author's reading and experience. The influence of major intellectual currents upon what is said here will be evident. Louis Jaffe started me thinking in an organized way about the impact of

courts on the rush of events. Lon Fuller's emphasis on the complexity of human purposes, at a time when the dominant mode of legal thinking took too little account of it, is reason for special gratitude. My father, Rutledge Vining, showed me that an economic system is a system of law and put Frank Knight and Michael Polanyi into my hands. Geoffrey Elton did much to develop my interest in what the practicing historian has to tell the lawyer. Joseph Sax has been working with many of the problems I treat here. I have often relied upon his judgment and been buoyed by his conversation and insight.

Place and time have their influence also. I began this book in Ann Arbor in the fall of 1972. It took shape in the congenial atmosphere of Clare Hall, Cambridge, during the spring and summer of 1973. I am indebted to the fellows of Clare Hall and members of the faculties of law and history at the University of Cambridge for their many kindnesses during my visit. The University of Michigan and the W. W. Cook Endowment provided the necessary support both then and on a sabbatical leave to complete the manuscript in the spring and summer of 1976. I have drawn upon my colleagues in Ann Arbor in many ways and am grateful for their unfailing interest.

The manuscript was read by Robert Burt and Owen Fiss of Yale University, Sallyanne Payton, Joseph Sax, and Peter Westen of the University of Michigan, and my wife, Alice Vining. To them I am especially indebted, for both their criticisms and their generous encouragement.

J. V.

1
The Thread of Standing

In 1929 the distinguished Chicago economist Frank H. Knight asked whether classical economics is not, in fact, an apologetic. The only ethical justification for the ideal of a pure, or laissez faire, market, he concluded, is the sanctity of the existing distribution of power and wealth—or property. The sanctity of property was a principle of order, like the divine right of kings, and so perhaps a necessary axiom, but it was also the basis for exploitation of the many by the few. "Whether the human race is capable of establishing order on a principle which does not expressly sanctify exploitation," he added, "remains for the remote future to determine."[1]

Law is the vehicle of order. It cannot fail to reflect the values of its time. But it has an intellectual structure of its own and an inner dynamic. Law was never fully captured by economics, and law today, particularly that branch of it called "administrative" or "public," is in the course of supplying the principle of order for which Knight hoped.

That is the larger theme of this book, which may make it of interest to readers other than lawyers. The book also has a "technical" subject matter, which I have sought to keep from becoming too technical. The observations of general interest grow out of an inquiry into the evolution and future of the nonconstitutional law of *standing* in the federal courts of the United States.

Standing is part of the law of judicial jurisdiction, that law which defines the role of courts in society and is, of all law, the most judge-made. Standing in particular determines whom a court may hear make arguments about the legality of an official decision. One cannot read recent celebrated cases deciding whether a judge may listen to the arguments of this or that person, without coming away with a sense of intellectual crisis. Judicial behavior is erratic, even bizarre. The opinions and justifications do not illuminate. Yet there is no evidence of duplicity: The struggle is a serious one.

What we are witnessing is nothing less than the breakdown of individualism as a basis for legal reasoning. The political battles that surrounded the movement of legislatures into so-called social legislation appear to be over. While the courts as political institutions ceased imposing the tenets of judicial thought on the legislative process over a generation ago, those tenets were not then abandoned. They continued to operate within the judicial sphere, at the center of the law. The insights now replacing them, on which our legal system is in part actually operating today, make it possible to think that the father of the Chicago School would have been encouraged.

I use the term *individualism* cautiously but, I think, correctly. It has nothing to do with concern for the dignity, happiness, or importance of the individual. It defines rather a particular way of populating our thought with living units of reference, no more universal or basic than the various personifications of wind and water which have lost their vivid meaning for most of us. Instead of saying individualism is collapsing, I could appropriate the term and say that individualism—respect for each man as such and for what he truly is in all the fullness of his life and hopes—is only now coming into its own as it is perceived that individuals are not in fact known to the law. We achieve our ends, which we cherish as individuals, and we realize ourselves precisely because individuals are not legal persons.

Ultimately, then, this is a book about the problem of legal identity and legal personification. The judge personifies himself in giving content to the doctrine of standing. Standing defines his jurisdiction, his role, who he is when he acts as a judge. But in law, as in life, we cannot achieve a sense of identity without acknowledging the identities of those around us. For the judge, those around happen to be all the rest of us. When they work with the doctrine of standing, judges define who legal persons are, far beyond that central figure "the judge."

We who are around judges as they identify themselves are not, however, simply objects of judges' thoughts. The role of the judge lies in all of us. Donning black robes does not fundamentally change or add to the apparatus by which individuals perceive the cues that determine when a judge may appropriately act. Those cues will not have meaning for "them" unless they also have meaning for "us," from whom "they" are suddenly plucked. In identifying a judge, we in fact identify ourselves.

The inquiry undertaken here can be only a preliminary exploration of a large and currently neglected subject. Maitland and Durkheim approached the modern process of personification

through their studies of the law of corporations at the end of the last century.[2] I hope this essay will prompt others to pick up the thread of their work and to be curious again about the referents of the "he's," "she's," and "its" that insert themselves so easily and pervasively in legal writing and legal argument. We do personify and create identities throughout the law, and perhaps must. There is no mere play on words in suggesting that we cannot experience the twentieth-century difficulties of personal and national identity, which are undeniably acute, and expect to escape problems of identity in the intellectual structure of law.

Principles of Order

The comptroller of the currency was authorized by Congress to regulate the activities of national banks under a statute that restricted banks to "the business of banking." He changed a prior position and decided to permit national banks to sell data-processing services. The managements of the banks were happy with the change and this new freedom. Independent sellers of data-processing services were not. They believed that bank competition would make success in the data-processing business much more difficult for them, indeed restrict their freedom, and that the comptroller's ruling was forbidden by the statute that defined his powers. They presented themselves to a judge as data processors about to be harmed by the comptroller's action and sought to argue that the comptroller's action was illegal and should be reversed by a court. The federal district court and the Court of Appeals for the Eighth Circuit dismissed the case for want of jurisdiction. "Plaintiffs possess no private legal interest nor do they plead any harm that is recognized at law. Their status is not one which places them within a class designedly protected by statute."

The data processors could not look to Congress for relief; the comptroller of the currency was not appointed by Congress. In any event, Congress had already spoken, and by the time it could be brought to speak again the world would be a different place and the data processors might well have put their resources in another business and have become something other than data processors. They appealed to the Supreme Court. The Supreme Court reversed the lower courts in 1970, recognized the "standing" of the data processors, and asserted judicial jurisdiction.[3]

The secretary of agriculture was authorized by statute to regulate the purposes for which tenant farmers might assign the cash subsidy payments they received from the upland cotton program. He changed a prior position and decided to permit tenant farmers to assign their payments in advance for rent. Landlords were happy with the change; the tenant

farmers were not. They believed their situation was like that of men in shark-infested waters whose cage is about to be snatched away. If landlords could take the cash for rent, which they would if the tenants were free to assign it to them, the tenants would be deprived of their opportunity to use the cash to escape their dependence upon the landlord for their personal and farming supplies. They sought therefore to prevent this increase in their legal freedom in order to continue their efforts to achieve economic liberty, and presented themselves to a judge to argue that the secretary's action was illegal under the statute, which permitted assignment only for "advances to finance making a crop," and should be reversed. The federal district court and the Court of Appeals for the Fifth Circuit dismissed the case for want of jurisdiction. "There is nothing in this record to show a statute or contract between the government and appellants granting them a property right in being restrained from assigning their payments to their landlord. . . . However outrageous or unfair appellants consider the effect of this regulation, their remedy lies not in the Courts but in Congress."

But Congress was far away and had already spoken. The secretary of agriculture was not appointed by Congress. Years of needless peonage lay ahead. The farmers' children might leave farming and become something other than farmers, when but for this they might stay. The farmers appealed to the Supreme Court. The Supreme Court reversed the lower courts, also in 1970, *recognized the "standing" of the tenant farmers, and asserted judicial jurisdiction.*[4]

All litigation begins with a felt loss, an injury. This is the reality that brings a litigant into a lawyer's office. The loss is in the future, because all matters about which we can seek to do anything at all are in the future. A search then begins, with the expert help of a lawyer, for reasons to believe that a decision causing the loss is illegal and unauthorized. Today much of the search is among statutes authorizing and justifying the decisions that might be challenged. When and if found, these arguments and reasons constitute the legal *merits* of the case, which are different from the "reality" of the case, or what motivates the arguments. The litigant decides to challenge a particular person on particular grounds, and then goes to court. There he must persuade the judge that as a judge he is authorized to listen to the arguments and take action if they should be convincing. This the judge must determine before hearing the arguments themselves, for the question is whether to hear them. This is the *jurisdictional* inquiry, made immediately upon entry into the courtroom.

Often, if the person challenged is a public official, the challenger is not heard, and the answer to the question Why not? is

rarely self-evident. Anyone unfamiliar with law might suppose that this question, so central and so inevitable, must have been disposed of by statute or some other authoritative and agreed-upon formula. But it is not, perhaps because it *is* so central. The Constitution of the United States says that the "judicial power shall extend to all cases . . . arising under . . . the laws of the United States. . . ." Statutes repeat this language and occasionally state that a "person" who is "aggrieved" may have judicial review of official action or inaction. Some statutes in particular situations are more definite, saying, for instance, that an "applicant for a license" may have judicial review of the "denial" of a license. But that is all. Courts and lawyers use the most basic terms of law in arguments over, and explanations of, jurisdiction, terms analogous to "force" or "field" or "matter" in physics.

In refusing to take jurisdiction, judges have said that the challenger must have a "legally protected right." But on its face that seems no answer at all, for if the court asserted jurisdiction and the challenger won, he would be legally protected by the remedy the court gave. He would have a "right" to that remedy. Or judges say that the challenger must be vindicating an interest of his "own." But is he not when he says he is injured? What does "own" mean? Or they say the challenger must be injured in a way that separates him from the public at large. He cannot represent the public, as can the attorney general. But again, the harm the challenger asserts is always particular, if he can describe it at all. Even if he is genuinely interested in maintaining "legality," he is interested for a reason. Again, judges have said that the challenger must face sanctions before courts can be concerned. But the sanction that may or may not be involved in the situation is not what the challenger is challenging: it is rather the effect on him of obedience or of others' obedience. One finds judges talking about cause, and saying that the effect on the challenger is not "sufficiently" caused by the decision he is challenging. But how does one distinguish between one or another cause of an event in history?

Until recently there was an axiomatic answer to the question Why not? underlying and explaining the various replies of courts in various situations. It is to be found in the definition of the person that men and women believed the role of judge permitted them to recognize. This will be the subject of chapter 2. But in 1970 that answer lost its meaning, through a process we will examine in chapter 3, and the difficult jurisdictional question then became Why?

Judges were freed of what had limited and defined them before, but to what end? What are judges to do with their freedom? Can a court now listen to any and all arguments that might be made

PART III
Legal Identity

9
Persons, Values, and Equality

Sanctions, property, special benefit all fade as distinctions between challengers as the common-law substructure of public law loses its grip. "Injury" and a demonstration that the "interest the challenger seeks to protect" is "protected or regulated by the statute or constitutional guarantee in question" remain in the language of the law today to guide the judge in his assumption of jurisdiction over a dispute about official action. What remains alive in the legal mind, not just in our language but in our thought, to give content to this formula? What will mold the language of future attempts to capture in a set of words the cues to the judicial role in government?

A Final Touchstone: Foreseeability and Remoteness of Effect

We have noted to what great extent the distinctions between complainants based on, or growing out of, the concept of property—privity, direct regulation through sanctions, special benefit—were defenses erected by the legal mind against the truth of causation in the world, shields, we might say, against the Donne effect. Blood might flow and cities die as the consequence of an illegality radiating through the social organism, but that was of concern to everyone but lawyers. Lawyers could act as if nothing had happened: the consequences were not "legally relevant." (Of course, safe behind the pretense that the consequences did not exist, lawyers did peek at them from time to time.) With defenses gone and pretense abandoned, lawyers might well stand transfixed by the complexity of things and the enormity of the consequences of any action. Thinking that to be

saved they *must* find distinctions between causal chains, they might instinctively turn to one last shield used in private law: the mind of the actor, what he can and cannot foresee. Here the relevant mind would not be that of the legislature, which we discussed in chapter 7, but of the agency whose action causes the consequence that sparks the challenge.

"Foreseeability" is often introduced as a limit on judicial restructuring of the past and as a protection of individual expectations of property. A man shoots a gun without looking and the consequences radiate out like those of an official act. If the bullet hits a passer-by the man is responsible for the wound. If the bullet strikes a water tank, and water dribbles out and makes a depression in the ground in which a messenger with an artificial leg falls so that his message, which is that a dam is weak, does not reach a radio station and cities are wiped out, the actor is not responsible for the devastation.[1] The difference between the two causal chains is said to lie in the capacity of the actor to predict them, their "foreseeability." That capacity objectified, the act is said to be the "proximate" or "direct" cause in the one case and an "indirect" cause in the other. Or the consequence is called "direct" in the one and "remote," or "collateral," in the other.

Since the abandonment of the legal interest test, there has been a hint of a turn to these distinctions in the language used by courts to explain their assumption or denial of jurisdiction. In *Data Processing,* it will be recalled, the Court observed that the organic statute "does not in terms protect a specified group" and went on to say, "Those whose interests are *directly* affected by a broad or narrow interpretation of the Act are easily identifiable" (emphasis supplied). The "broad or narrow interpretation of the Act" would seem the doing of the agency and what was challenged on the merits. Two years later, in *Sierra Club* v. *Morton,* the Court explicitly avoided any use of the words in the second half of the new formula and relied upon an assertion that the challengers were not "directly injured" unless they "used" the valley whose beauty was to be illegally destroyed.

But there is no promise in this turn. It is always true, and often abundantly clear, that "foreseeability" is purely conclusory and provides no distinction between causal chains and thus no protection against losing oneself in the web of cause. A defendant is responsible for an effect not because it is a foreseeable result of his action; rather, the effect is foreseeable because he is responsible. This sad truth is attributable in large part to the fact that the predictability of any chain of events depends upon the degree of specificity with which one chooses to describe the chain. Does one say that the random shooting injures Mary Jones? No. That would be too specific. If Mary Jones were a stranger to the actor he could never have known

that *she* might be there. Does one say it injures a human being? No. That would be too general. Some human being, somewhere, sometime, is likely to be injured in some way by almost every act or omission. We say the shooting injures a "passer-by." And in personifying who is injured we also go quite far in specifying how she is injured, what loss of importance it is we are concerned about. The "passer-by" is injured by being hit in the flesh, not by some other effect of the shooting that can be conceived. But even then we have a choice. The bullet that hits the passer-by passes through a tree because a wind arises and pushes a branch aside ever so slightly. The bullet hits a canteen on the passer-by's belt, but because she is turned at a particular and very precise angle, it goes through the canteen rather than glancing off. Once through the canteen it might have lodged in the flesh of the buttocks, where it would have done minor damage, but it hits a belt buckle and lodges in a kidney instead, doing terrible damage. None of this is foreseeable, and thus if there is to be responsibility one "must" generalize the description of what happened. The result was not "kidney-destruction-by-a-bullet-directed-by-a-belt-buckle-after-passing-through-a-canteen-and-a-tree," but "injury-to-a-passer-by." But if one generalizes, one can generalize to "injury," which would include "destruction-of-a-village-by-reason-of-lack-of-warning-because-of-a-messenger-with-an-artificial-leg-stepping-in-a-depression-made-by-water-from-a-tank-pierced-by-a-bullet." Where one stops in the process of generalization cannot be determined by any characteristic of the causal chain or anything in the mind of the actor. Where one stops and says, "Yes, any reasonable person could have foreseen *this* as a possibility" is governed by the determinants of the decision to hold the defendant responsible for the injury to the challenger.*

These determinants may consist of what we have defined as the merits. What *can* be foreseen is what *ought* to have been taken into account by the decision maker electing to shoot the gun, and what ought to have been taken into account need not be drawn even principally from statute in private law, but is rather, in private law, the product of a direct assessment by court or jury (aided by lawyers' arguments) of the balance of relevant values then alive in the social organism. Often in the law of tort there are simply no other merits than those designated by "foreseeability." If we are not willing to say that a man's shooting a gun might impair a public value that he ought

*If the reader prefers to treat the matter as one of relative probabilities we need only note that the acceptability of a given level of probability is entirely a question of value. So also, for that matter, is the categorization of the effect that must precede any calculation of numerical probability—the definition, in greater or less specificity, of what it is you wish to measure the probability of.

therefore to take into account and balance against any public values that might be furthered (including the value of self-expression in making a big bang), we cannot say he ought not to shoot.

Or the determinants of responsibility may consist of those considerations, such as they are, that cause a court to stop restructuring the past and transferring wealth where the remedy is damages, as it so often is in private law. The act is "illegal" on the merits. The actor ought not to have made the decision he did. But in seeking to put those affected by the decision where they would have been, the court is limited by its need to justify defeating the expectations of innocent persons connected with the defendant and soon reaches the limit of justification. The two categories, of limitations upon illegality and limitations upon remedy, tend to merge in the jurisprudence of the common law. Each case is discrete, each right "private," and if the particular effect of which the particular challenger complains does not lead to a recovery, it need not have been taken into account; for purposes of that case, there is no "cause of action." But where there is an independent source of the merits in private law, so that "foreseeability" is left as an expression of what outcomes rather than what *decisions* or *values* a court should be concerned with, then it becomes quite apparent that it is being used as a cover for unresolved conceptual difficulties, as we have seen in chapter 6 in examples from antitrust and securities, and as is impressed upon any student of the law of "strict liability" or the law of agency (where an enterprise may be vicariously liable for the illegal acts of an agent).

In administrative law there is always an independent source of the merits. Foreseeability cannot act as a surrogate for what ought and ought not to have been taken into account in decision making. It would invariably serve to express the justifications, such as they are, for defeating the expectations of some innocent persons but not others as the court goes about restructuring the past after an illegality has affected it. But there again the notion has no place in administrative law, for the remedies of administrative law do not seek to restructure the past. If a layman asks a lawyer, "Why do you *try* to distinguish between effects on the basis of their foreseeability by the decision maker?" the answer will be, "Because you cannot blame a person for what he cannot help." And this has an intuitive appeal, until it is remembered that the statement has nothing to do with administrative law.[2] The agency *can* help, if there is a case to be made on the merits against what it has done.

And the question on judicial review is not blame or making the agency pay. It is stopping the continuing effects of an illegality and ensuring that the decision is a legal one. Thus, even if an actual outcome was unforeseeable no matter how generally described, was bizarre and a total surprise, there is no reason to withhold judicial

action. On the contrary, the unexpectedness of an effect may be a reason to hasten judicial review; for whatever the merits, an agency cannot have weighed an unexpected effect and balanced it against other considerations. If a man enters a course of action and the land begins to turn brown, we may hesitate before we blame him for the loss, but we instinctively and immediately ask, "By what right do you do that?"

The Creation of Legal Persons

Thus, salvation does not lie in the use of this last legal touchstone. Like those we have examined previously, it can contribute nothing to the coherence of mind and sense of identity for which courts search in their basic precepts of jurisdiction. In fact, any attempt to distinguish between causal chains as such, to look for breaks between them, categorize them on the basis of past experience, and say, "These we recognize and those we don't" may be expected to fail, for the ways in which outcomes are brought about in the human world are still mysterious and the subject of fascinating speculation and endless discovery for those who inquire seriously into them. Let the mind range for a moment on why a particular family is happy or unhappy, or on what the impact of the automobile has been upon the United States. Some of us in all moods and all of us in some moods may boast and pretend and proclaim that we have the world under our control, but the world continues to refuse to be boring. The courts know this, and while the justices hold on to the touchstone of "directness" as they face the web of cause, if we look carefully we see they do not rub it. In 1973 the Court confessed how much "less direct" and "far more attenuated" the "line of causation" was that they were "asked to follow" to environmental harm in *SCRAP* than in *Sierra Club*. The defendants complained that linking the appearance of particular refuse in the parks of a particular city to a national railroad across-the-board rate increase was pushing the concept of directness to extinction. But that did not matter, the Court said, for the challengers had shown that *they themselves* were among the *injured*.[3] In the *Sierra Club* opinion denying standing the year before, the frequent observations that "the injury in fact" part of the *Data Processing* test must be interpreted to mean "direct injury" were transformed unself-consciously into the simple assertion that *he*, the challenger, must be injured.[4] The legal mind turns away from an attempt to unravel the web of cause and find a chain that stops and an effect that is separate and private. It looks instead to the persons that populate the legal world.

We cannot take the reader through the scores of recent opinions

and the thousands of briefs that genuinely wrestle with standing and the appropriateness of a court's entry into a given situation; but were we to do so I believe it would be striking how often the question, Is there an injured person speaking? would be found latent in them all, and how often the sputtering and wide-ranging discussion, argument, speculation, phrase making, and parsing of the troubled words of the authorities ultimately spirals down to it. The opinions in *Sierra Club* and *SCRAP* are representative.[5] In turning at last to consider explicitly who the person is who is asking them to step into their role, judges put themselves in touch with the limits and justification of their assertion of power. The development of the formula for standing that replaced the legal interest test leads now and, I believe, will continue to lead to an examination of that most basic of the workings of the legal mind, the creation of the persons that are the objects of social concern. That will be the ground, or what we have called the ether of standing, which the action of legislatures and the rule making of Supreme Courts may modify but can never supply, when the prior ground, the private-dispute-settling model, has faded entirely from understanding if not from memory, and its traces no longer remain in legal language. That will be what would remain if the Administrative Procedure Act were repealed.

In chapter 4 we speculated upon the relationship between courts and other decision-making agencies that would obtain if the legal interest test were all that was designated as a jurisdictional limit and a law of standing, and if it simply disappeared because its axiomatic supports ceased to have meaning in our world. Our consideration of what in fact is left of the law of standing after the legal interest test has been officially excised from it has led us back to the discussion of that chapter. Persons do not come before a court self-defined or ready-made. A court must make a judgment before it can perceive, hear, or talk about "he," "she," "you," "it," "the plaintiff," "the challenger," or whatever other general term is used to refer to those who make the argument on the merits. That judgment is guided by law like any other judgment. It is not whimsical or "personal" to the particular human being who happens to be asked to assume the role of judge. Nor is it obvious or automatic. It is a judgment. The body of law that guides the perception of persons in the social world is not drawn from what we have called organic law, the statutes that authorize agencies to act and that provide the merits for both agency decisions and for judicial decisions if a court assumes jurisdiction. The law of legal persons is separable and prior to any particular case. In making inquiries about the persons before it, listening to arguments, writing opinions, and making decisions about the matter, courts are not engaged in a self-indulgent search for identity when there is work to be done, or in wasteful, ritualistic, or deceptive behavior,

but are rather fulfilling a continuing social function of the highest importance. The inquiry leads a court far beyond the question whether there is a dispute or a conflict before it, *adversariness* in legal terminology. It does not implicate a court in the business of estimating the competence or the resources of the challenger to argue the merits, any more than the receipt of arguments from Mr. Jones or Mrs. Smith of the attorney general's office involves a court in evaluating the qualifications of Mr. Jones or Mrs. Smith to argue the case. When this law is not satisfied, the court cannot act. The law sets limits. When it is satisfied it provides a positive and understandable justification for a court's exercise of power. It is, in short, a law that we might wish to create, were it within our capacities to create anything so basic out of whole cloth.

The Relation Between Legal Identities, Human Individuals, and the Function of Courts. Consider again who this "he" or "she" is that must be "among the injured." We say loosely that persons appearing in court are "individuals" or "groups in society" who are carrying into the judicial forum their conflicts with other "individuals" or "groups," and we are taught early that the reason for courts, from which all else flows, is to replace and avoid the settling of these conflicts by fists and guns. The picture is of human bodies, and the minds that go with them, corralled into geographically separate camps. But we know that is not true, and correspondingly, it is doubtful that the prevention of violence is the reason for courts. The "reason" for courts is the development, articulation, and celebration of what we as individuals believe is important—or worthwhile, significant, of value. To state the matter as an analogue of the image of warring camps, courts exist to resolve conflicts within ourselves. The persons or groups who appear in defense of the federal highway program and the Highway Trust Fund, the so-called highway lobby, are the cement, motor, construction, rubber, steel, and oil industries and the American Automobile Association. The opponents have been mayors of large cities and the United Auto Workers. The mayors represent city dwellers, but are city dwellers not associated economically, "interested" in, and part of the rubber, steel, construction, and automobile industries? These are not foreign suppliers or located away in the desert. The fortunes of Akron, Detroit, and Pittsburgh rise and fall with them, and during part of the day at least, probably the large majority of city dwellers in such places would identify themselves as "rubber workers" or "automobile people" or "hardhats." Their jobs and income, perhaps their personal identity if there is tradition or pride in the occupation, depend upon the highway program.

Does the job or income flow or substantive identity of each indi-

vidual human being among "them" depend upon the program? No. If we pick a human being identified as an "automobile worker," we may find "him" protected against the ax by seniority; or we may find that he would really rather prefer to expand his carpentering, which he does in his off hours, or that his wife is capable and willing to work and earn as much and needs only the psychological boost and the bite of necessity to do so; or we may find that the ax will fall after "he" is gone and no longer identifiable as an "automobile worker" even part of the day. When we say "their jobs," the possessive "their" refers only to the class that is alive in our minds and identified as "automobile workers," and into which and out of which named human beings move each day, some to return and some not. And unfortunately for our separation of "persons" in time, even when named human beings are in that class or grouping they are simultaneously, in their capacity as automobile workers, members also of the United Auto Workers, which opposes the "automobile industry" and the highway lobby, perhaps in the hope of long-term diversification of job opportunities in rapid transit, perhaps to eliminate the agony of the freeways for newly suburbanized workers trying to get to their jobs.

The lady in the industrial town whose curtains are blackened by the aerial discharge of the local plant is a classic example of a person harmed by administrative or corporate decisions to continue the discharge. But the same lady may be a devoted "consumer" of the product whose cost is kept low by the same decision. She may also be an "employee" of the plant whose job is secured and who participates in a profit-sharing plan fattened by the exclusion of this "externality" from the corporate accounts. She may be simultaneously a "stockholder." She may be a volunteer nurse who specializes in helping victims of respiratory disease that may be aggravated by the discharge.

The Distinctions and the Connections between Legal Persons and Individuals: Identity and Individual Belief. Thus, the identities of those human beings whose interests are advanced or retarded by a set of decisions—a highway program or a pollution abatement program—and who defend or oppose it are not separable in space. They do not reside in different human bodies or minds. Nor are they separable in time. The human being does not move in linear fashion through a series of identities during the day. Identities lie mixed in the same breast, mind, or soul. They cut across and connect together a number of minds and souls, but are not reducible to those minds or souls, any more than we as individuals are reducible

to the cells in our bodies, which come and go and are completely replaced in a decade. They are, on a larger and more slowly changing scale, like the majorities or the strengths that the reader has perhaps seen coalescing and dispersing as a sizeable group debates a complex matter, shifting about, now gaining the support of this mind, now losing the support of that, presences hovering above the heads of those speaking and thinking.

But the relationship between an individual and the identities that lie within him and that he shares with others, and that leads us to say that the identity is "his," is not one from which "he" can be dropped so that "it" can be studied objectively. We would not say that an automobile worker whose job is protected by seniority or prospective retirement has no "interest" in "automobile workers' jobs" and cannot be identified as an "automobile worker" for purposes of the debate over the highway program. We may try to create new identities or interest groups, for instance by dividing automobile workers into the young and the old, giving them different names and seeing them as opposed. But we may find that difficult to do if the division is not in harmony with the basic reality of individuals' feeling. The young may not be against the old. They know they will become old, and soon. The old may not be against the young. The young are their sons and daughters, or themselves going on beyond the death of their bodies. And the difficulty of the division will be signaled by the fact that no good name for the new and less inclusive identities comes to the lips. Similarly, the tenant farmers who, it will be remembered, were found by the Supreme Court to be "within the zone of interests protected or regulated" by the act governing the uses that might be made of federal subsidies for "making a crop" of cotton did not have to experience profit or security in order to have a recognizable "interest" in or connection to those values. A human being tilling cotton land in the South could characteristically experience only a yearning for profit and security in his capacity of "tenant farmer." Nor does a motorcyclist blasting down a country road automatically and objectively read himself out of the class of those with an interest in quiet. He may be on his way to a park, in which he delights because it is quiet and he can hear the birds. If he is stopped and berated by a "quiet person" on the road, he may be brought to acknowledge that he was wrong to ride without a muffler. Indeed, what we mean when we say an individual "does wrong" is that he disregards one of his own values. If the value that defines the wrong, as respect for human life defines the wrong of murder, truly has no meaning for an individual, we do not think of him as a wrongdoer, and do not personify him as such. "He" is not a "murderer."[6] Our notion of wrong, cer-

tainly the notion of wrong within the legal mind, assumes that an individual may be connected to a value despite the inconsistency of his actions.

Neither actions nor circumstances define objectively "who" a person "is." A human being "has" an identity by virtue of his love of a thing or belief in a thing, not his possession of the thing itself. And belief, of course, requires a believer. The "persons" who speak to the legal mind may not be reducible to individual human beings, but they cannot be separated either from individuals who "as individuals" give them life.

The Question of Primary Identity

But surely, it will be said, there is more to each of us than this, and more to the notion of an individual in a proudly individualistic society. We are left with the observation that many "persons," many "he's" or "she's," inhabit each one of us, and that many of us inhabit each person. Surely there is more unity, more coherence, and more discreteness to the individual than is to be found in this jostling set of loves and beliefs in shared values. Our language tricks us and does not convey the reality that is present to our minds. We are not many persons. We are each one person. At the least we rank our values and order our loves. We each resolve the conflicts within us and speak with a single voice. We would otherwise feel ourselves "falling apart." If we have a number of roles and a number of identities, we have a primary identity. A court may meaningfully ask, not just whether a "person" is harmed, but whether an individual is harmed, and in doing so inquire "who" the "individual" really and basically "is."

Occupational Identity. In a subsistence economy there is perhaps some plausibility in assuming that there is a primary identity, to be drawn from the occupation by which an individual sustains life. Other "interests" become frills and playthings. The relative strength of beliefs and loves is meaningless. They all defer to the pursuit of the means of survival because they must and, among themselves, are ranked according to the degree with which they may conflict with the overriding object of existence. They are in any event unimportant because the individual is consumed with his occupation during most of the time he is not asleep or drunk. Since change involves risk and the risk is that of starvation, the individual remains in the same occupation throughout his life. There is no real doubt about who he or she "is." The answer to the childhood question What are you going to be when you grow up? or the adult question What do you do? is unhesitating. It describes a specific way of obtaining the means of living—butcher, tailor, candlestick maker.

But a subsistence economy is not our economy. There is no objective necessity ordering an individual's interests from without. An individual is not, in general, consumed with survival throughout his working hours and does not, in general, remain in the same occupation from an early age to an early death. Beyond subsistence other values must govern individual and social life. Indeed, it is questionable whether any human society that can produce a language and, from language, a body of law has ever been so gripped by necessity that choices and conflicts of value do not arise. The very possibility of conceiving individuals as inhabited by a single driving aim, like a Skinnerian rat, may be a product of the horrors of the early industrial age, where massed human beings, without distinction of age or sex, did appear to labor at tasks of no meaning to them throughout their days and their lives. Anthropologists have shown how rich and multifaceted the life of an individual can be in societies that we label "undeveloped," "marginal," or "subsistence." In our own society it is demonstrated time and again that among those groups of individuals whose economic situation is least secure and most demanding, the economic may be less important in the making of decisions than the social or religious.

Even if it were true that individuals consistently identified themselves and others primarily by the occupations through which they secured the means of living, there would still be a multitude of contending values with which each would have to deal, on his own part and in his perceptions of others; for note that we do not say, in identifying an individual "economically," that he is a "money maker." We identify him as a "carpenter," a "jeweler," a "hotelier," a "farmer," words with the flavor and color, ambiance and substance that characterize descriptions of what we have called end values. Around each occupation is an "occupational morality,"[7] which defines what the occupation is and what connections individuals have to it. An individual can be a "good carpenter" or a "good forester," satisfying himself and others, and be "hurt" if being a good carpenter or a good forester is made more difficult, without regard to the amount of money he makes or the quantity of his production, which are separate considerations. This is accepted without question for doctors, lawyers, soldiers, priests, and scholars, the traditional professions, but the same is true for any of hundreds of thousands of "ordinary" occupations in which individuals undertake any responsibility for what they do. Inside the complex world of

the steel industry to "be" a mold maker has meaning, and defining what a "good" mold maker is and what values should and should not be taken into account in the definition, can be debated as endlessly and as profitably as the question of what a good chemist is.*.

The Test of "Full Time." But complex and full of contrary pulls as "occupation" may be, is it not enough to give an individual a primary identity that organizes his or her life? It may be voluntarily assumed and may possibly be abandoned even in the middle of a litigation, but once assumed and while assumed, it surely simplifies determinations of who an individual is. Is not time again a standard, and whatever one is "full-time" what one basically is? A full-time artist is "an artist." A part-time artist is someone else, a politician or a parent, who enjoys art as a pastime—to pass the time—not with his or her whole soul and being. And if this is so, the various persons that populate our language (and legal analysis) can be linked to particular human beings, each of whom would embody one and only one person really, though they might also have "interests" in other persons. Litigation and legislation could then be seen as a resolution of conflicts between individuals, and "the reason" for courts as simply the avoidance of bloodshed, having little to do with the process of social decision making in which individuals identifying themselves as "judges" have become so self-consciously involved.

But consider: Is there any individual who does not have *a* full-time identity? No individual is "no one." If someone puts in an hour here and an hour there on a number of occupations on which others spend the bulk of their time, do we not shift up on the scale of generality and supply a new name: "playboy" or "handyman," "suburban housewife" or even "capitalist"? And conversely, is it not true that the "occupations" to which we see individuals devoting their lives in the most full-time way—business executive, for instance—are just such general covers for the playing of a variety of roles and movement among a number of identities, which we could describe separately if we wished? The executive may be a gourmet

*No one can know from the inside more than a small part of the occupational structure of society, each occupation with its rules and rituals, its heroes and villains; but the pervasiveness of the qualitative and social aspects of occupational identity should be clear enough from the modern tendency of so many to seek to become a "profession," with conventions, licensing, and a trade press. The phenomenon may be dismissed as an excuse for fun or a sad aping of the form of the ancient professions, but the seriousness of the endeavor cannot be doubted by anyone willing to sympathize with the efforts of others to give dignity to their lives. What "professionalization" represents is the transformation of an activity that is merely a means into an activity that is an end in itself, and which thus can provide an identity for its practitioners.

at his long lunches, a trustee as he sits at a board meeting, a patron as he decides upon architecture and art, a counselor, an engineer, a lobbyist. The same is true of a "professor," for whom teaching, counseling, writing, administering, and staring at the ceiling are different, somewhat competing and somewhat complementary roles, some of which he may do well and some badly or not at all. That we call the day of a businessman, professor, or diplomat an "eighteen-hour day" is a consequence very largely of the very broad definition we give his occupation.[8]

Furthermore, the search for full-time embodiments of all persons or roles whom we do in fact recognize must fail, simply for the reason that they do not exist. While we can, if we choose, find a single name to cover the mix of interests and activities of each individual, we cannot find a single individual to match "full time" each person we may have in mind. There would be no "voters" at all, no "consumers" but gluttons, many too few "poets" and "fathers," and as "stockholders" only mutual funds, which are of course not individuals. For some persons, such as "heirs," the notion of "full time" or "part time" is meaningless. They do not inhabit an individual a certain number of discrete minutes a day. An individual may *consume* no time at all in the role and yet embody the role throughout the day. The role is immanent in him.

The same is true of any person defined by expectations not yet realized, and these are the "persons" with whom the law distinctively deals. Even the "bank customers" and "bank depositors" who were advanced as the special beneficiaries of the banking acts at issue in *Data Processing* were associated with what we may call layered rather than linear time, for they had both long-term and short-term interests. It was in their interest for banks to engage in selling data-processing services, for the profit might reduce the cost of banking services if the bank still considered itself a "bank" and the accounts were not kept separate. They might vote in favor of expansion. But the banking acts restricting banks to banking were passed for their protection, to prevent the loss of confidence and instability it was feared would occur if bank managers divided their attention and multiplied their roles. The "they" behind the "their" are defined by long-term interests, which, because of the conflict with a short-term interest in lower costs, the individual identified as a "bank depositor" might find difficult to argue. Most individuals, and most persons, have such long-term or immanent interests and the identities that go with them. The young have a stake in the treatment of the old, the well a stake in the treatment of the sick. The notion of full time will thus not do as a standard for who a person basically, really is; nor, in fact, will the notion of time.

Objective Characteristics. Finally, we may be drawn to think that the core of an individual consists of those characteristics that he cannot escape. Even if the need for means of subsistence cannot organize a unity, the other givens about an individual may go some way toward doing so. An individual *has* a race, a sex, an age, a past. He *is* a black, a woman, a youth, and, yes, an exconvict, because he must be. As to the rest, he may deceive us, but as to these we may be objective and define him without regard to what he loves or believes, wills or values. Since there is more than one such characteristic to an individual, we cannot eliminate internal conflict, but the list is finite, and we can run combinations and permutations to create a "young white female" or an "old black female." Individuals can be attached to one of these groupings, and thus can be separated from one another. These are the "persons" of biology and certain of the social sciences, particularly survey research.

They are not, however, persons that emerge in law or in ordinary speech. While purporting to give individuals separate identities, this process of grouping actually eliminates the individual altogether. An individual "has" a characteristic only if we choose to note it. We choose to note it only if we give it significance. We note blackness and maleness. We do not note, in the process of personification, round-headedness and long-headedness, though societies in our ancestry did so and other societies do so today. The "objective" characteristic is nothing unless it expresses a value, an importance, meaning. It is everything, like an earlobe to a lover, when it does express value. And values are matters of the mind and heart, not the given and external world that exists despite oneself.

Individuals can no doubt be trained and nurtured to love some things and not others, to see meaning where others see meaninglessness, and to attribute no importance to what others value highly. We do inherit values, and as we have seen frequently in previous chapters, our cast of mind may be the way it is simply because that is the way it is. But this takes nothing from the fact that at any present moment, meaning is the product of uncoerced and, we may properly say, spontaneous affirmation. A man does not value a thing unless he *sincerely* values it, does not believe in a thing unless he *truly* believes. This is the ultimate power of the individual and source of his individuality, if not his identity. He can be made to behave, but not to believe. There is no way in which he can be forced to feel the meaning or intrinsic value of a thing, though the consequence of its having meaning for others may be forced upon him. There are values that he does have in fact and values that he does not have, but there are no values he must have. Thus, for the individual there are no objective characteristics that define who he

is. We cannot say that where there is red there is the possibility of not-red. But where belief is necessary, there is the possibility of nonbelief. There are no givens. All depends upon the individual himself. We speak of individuals old before their time and young for their age. The skin color of some blacks tells no more about them than a chicken-pox scar, and the phenomenon of a black "in search of his black identity" is a familiar one. The maleness and femaleness of an individual do not depend upon genital shape.

All this is expressed in the constitutional and statutory law of discrimination. Laws prohibiting age, sex, racial, and other such classifications are not merely accidents of history, developed to prevent internecine bloodshed in a society where passions are aroused by tangible differences and to require grown men, like little boys at a mixed party, to pretend they do not see what is most relevant to them in fact. Nor are they an outgrowth of concern for "fairness," to relieve individuals of handicaps which "they cannot help" with the implication, quite obviously false, that the values represented by one side of the young-old, black-white, male-female, and other such dichotomies are "weaknesses." Antidiscrimination laws are rather a recognition that in fact *individuals* cannot be assumed to "have" characteristics such as these. By the same token, being values that are connected to an individual and given life by belief, they can become "his" whatever the givens of his situation.

Then lastly, there is the past, with which each of us is saddled. Often wearying of responding to individuals as they are, we turn to the evidence they have left behind and do the same to ourselves when the adventure and complexity of our inner life become frightening. "Who am I?" we ask, and look back. I settled and did not roam. Or I roamed and did not settle. I had a chance to build my house and built it in classical style. Or I built my house asymmetrical. I must be "a roamer" or "a settler," a "classicist" or a "modernist": the evidence shows it. But as we say it, we know that is not the whole truth. There are many reasons for what actually happened, and the outcome does not tell us what they are. The whole truth is the process and the conflict, which continue on. The roamer may settle, the classical facade may be made asymmetric, and we cannot begin to know *from the evidence* who we are until we die, when perhaps the answer makes no difference. The law expresses this recognition also. Statutory disabilities are limited in duration, and in constitutional thinking the continuing force of the retributive principle as a limit on rehabilitation or punishment reminds us as we personify individuals as "criminals" that the whole of an individual is not revealed by a single act.

That the human being has no dominant identity, to which the

generic "he" in legal discourse might refer, does not threaten his, or our, individuality. Quite the reverse. Variety is most human. In the rare glimpse Marx gave of man restored to himself after the dictatorship of the proletariat and the withering of the state, the individual could hunt in the morning, fish in the afternoon, rear cattle in the evening, and write after dinner.[9] A devout capitalist would probably dream of the same ultimate state. Nor should the fact that identities are values that must live through affirmation suggest that the individual is without substance and exists entirely by an effort of will, so that a failure of will means the loss of identity and "being no one" is an ever present danger, and so that also a mere change of will means a change of identity and asking who an individual is is meaningless since an individual is whoever he wants to be. We said before that belief must be uncoerced and, we added advisedly, spontaneous. A "runner" who *has* a love of or belief in the value of extending oneself and making the air rush past the face cannot put that love away, like a material thing. However much he may will it otherwise, the delight and meaning of the experience remain. We say running is "*in* his blood," and our language shifts back and forth between the possessive and the personifying: he *has* an interest in running; he *is* a runner.[10] The same is true of the values to which we refer as "masculine" or "feminine," or the value of quiet. One cannot escape "being" manly or womanly. One cannot escape a love of quiet if one has such a love. That is part of one for the present. Nothingness does not catch up if the self-conscious will rests. The loves, the beliefs, the desires continue. The individual is still there. And who an individual is is a question that can be asked, by the individual himself *or* by a court.

Individual Life and the Process of Government

If values are so mixed within an individual, pulling him this way and that like the motorcyclist who loved quiet but also self-expression, or the housekeeper who loved the whiteness of her curtains but also her job and the product of the manufacturer who produced the soot, how are they to be served? The individual cannot realize them all simultaneously. In pursuing one he may harm another more than he would want and so defeat himself. The ordinary person, aware of and accepting the complexity and the surprise of the world, senses that this must be so more often than not. He is also without time, information, or technique to know the ultimate structure of his wants. How often we hear ourselves and others say, "I never knew how important I thought that was until now." Presented like Faust or Christ with a series of ready-made worlds, some of which had

more children and less quiet reflection, others the reverse, some more rewarding jobs and less greenery, others the reverse, most if not all men and women being truly honest would say they could not choose. We want it all, they would wail: serenity and heart-racing challenge, privacy and society, white curtains and employment. There may indeed be no ultimate structure of our wants. The inner world no less than the outer is too complex to be centrally ordered or controlled, a place to be known as much as possible but always still full of surprises, and never dull. And there is change—or at least we call it change. How often have we also heard ourselves or others say, "I never knew I really didn't care about this until I had it." Is that change or discovery? It really doesn't matter. The fact is that the meaning of a thing for us and our desire for it are different at one time and at another, thus upsetting any previous calculations we may have made in reliance upon our estimation of its importance. Religion does not solace; irreligion is not freedom; white curtains no longer delight.

How then can we live with ourselves? Why are we not paralyzed in this welter of desires and promptings? Why are we not canceled out by all that is within us? For most assuredly we are not. Most live vigorous and purposeful lives, acting, deciding, arguing, and criticizing with a sense of movement and development. The reason is that we personify our various values and trust our fate to the persons we create. As individuals we identify ourselves now with one, now with another, perhaps give some of our time each day to a number of them. But we do not choose, because we know we are connected to all those that have meaning for us, whom we understand. It is they who contend in legislatures, courts, and agencies, pushing for attention, recognition, and realization of "their" interests. And in their creation is the origin of government, rather than in a social contract among individuals that could, if one reflects about the matter for a moment, never treat with one another as wholes, or in the dictatorial imposition of the will of an individual that would, if again one reflects about the proposition, not know himself better than any of those of our acquaintance.

It is not peace we seek, but self-realization, with all the variety that implies. In personifying our values and lifting the contention among them outside ourselves, we raise the possibility and live in the hope that we will realize them all. If we cannot choose among them, then our only course is to eliminate the necessity of choice so far as possible. That is the process of government, finding a way, accommodating, harmonizing, searching, experimenting, discarding, trying again. The curtain lady need not choose between being an environmentalist, a consumer, an employee, or a stockholder.

There is no inconsistency in her "belonging to" the Sierra Club, the Consumers Union, a labor union, and an investment club. When they speak they urge their particular claims, but their object will be the devising of an institutional structure that will produce outcomes satisfactory to them all. Unlike true adversaries—or disputants over rights of property—who seek to triumph and exclude, these persons must seek to cooperate and create. They cannot really want to annihilate each other, for like the head and the stomach in the fable, they are not separate. They may forget the fact and occasionally overreach, but they eventually rediscover that they are parts of the same human being.

Institutional and Noninstitutional Persons

In view of who the person is that speaks in social discourse, the attribution of "legal personality" to institutions—corporations, associations, partnerships, unions—should occasion no surprise and require no special justification. They make decisions and arguments in pursuit of "their" interests without regard or inquiry into the effect upon any of the individuals, viewed as wholes, who are associated with them. An aluminum company, for instance, may make an investment in ore and mining infrastructure in a foreign country that is not meant to be fully used for decades and that, after discounting for uncertainty, may not be reflected in the market value of the company's stock during the lifetimes of any of the current human stockholders. The purpose of the investment may be either pure growth or maintaining the company as an *aluminum* company. But either will be accepted as a legitimate purpose if the decision is challenged by another person, such as a stockholder or the attorney general. If the majority, even an overwhelming majority, of the individuals associated with an institution wish to define its interests and change its purposes to reflect another aspect of their concern, they may, depending upon the rules of the institution, be utterly unable to do so.[11] They must create a new and different person. The name, the identity, the power, the contracts, and the property of the institution remain in the hands of those individuals whose belief still matches that personified in the institution. This is the orthodoxy of the law of organization and, I think, also of lay thinking about organizational roles. The embarrassing facts of the large modern corporation or the multinational corporation—that control over its voice is secured and transferred quite without regard to its vast membership, and equity investment is treated as merely one among many of a number of sources of capital to be maintained to the degree necessary but no more—do not fit standard conceptual

models, but do confirm the independent life of these institutions. One need postulate no special corporate *Volksgeist* to explain the phenomenon, or think the public especially deluded by clever corporate advertising that uses "we" and "us" and "the Company" to give the impression that something is operating other than the human beings temporarily in control. Corporate or associational existence is little different from the existence of the "person" who speaks without obvious institutional affiliation—the "father," the "consumer," the "environmentalist." Each is the embodiment of a value or a set of values.

Institutions may be somewhat less identified with a coherent set of values than other persons. The modern business corporation is the prime example, with its legally acknowledged responsibility to a number of client groups with different interests: stockholders, creditors, employees, consumers, the local, national, and international community, and government agencies.[12] But we have pointed out before that most persons are complex and are in a continuous process of redefinition, splitting, and merger. The pecularity of institutions is that when they become too multivalued and lose the grip of meaning, they do not disappear, but rather become simply part of the framework for the devising of decision-making systems in which the persons alive to our minds press their claims and seek realization. Government, or "the state," is a person of this sort. It is not unitary in any way. The Court may say, "The *state* also continues to possess authority to safeguard the vital interests of *its* people." But we know that the referent is a multiplicity of institutions, tied together by the legislature and the courts, each pursuing a limited set of values. Indeed, they are often authorized to sue one another, if "their" interests are at stake.[13]

Economic and Noneconomic Persons

Thus, lines cannot be drawn between persons on the ground that some are "aspects" of individual human beings and others "institutional identifications." Nor can lines be drawn on the basis of the "economic" and "noneconomic." There is nothing *distinctively* economic about the interests in survival, growth, power for its own sake, competitive struggle, or technological advancement represented by what we call economic institutions, nor about the commitment of a life to automobiles, toys, innkeeping, or any of the other substantive human concerns that particular business institutions are created to serve. The only economic value is doing what one is trying to do efficiently, choosing among means in such a way as to maximize the satisfactions of all one's wants.[14] A musician can

be as economic as a venture capitalist. Indeed, money maximizing may not be economic, since the time and capacities used to maximize money might have been better spent. Profit maximization is a meaningful notion only if "cost" is arbitrarily defined to exclude social costs, and only if it is assumed that the rules of play are given, when it is in fact the case that profit maximizers participate in the change of rules. "Profit" and "business" are by no means the same, as is illustrated by the Not For Profit Business Corporation that may be created under New York law.[15] Striving, the value most associated with the business ethic, is decidedly foreign to economics. As Knight has observed, if the object of a football game is to get the ball over the goal line, an economist would put all twenty-two men on the same side.[16] And the meaning of the pursuit of "individual self-interest" depends entirely on the definition of the interest. If the happiness of another, or the world, is essential to the satisfaction of an individual, then he is being "selfish" in seeking it.

Economic institutions pursue identifiable substantive ends, as do noneconomic institutions. The labels refer to traditional groupings of values, like those that cluster around sport in contrast to those that cluster around art. There is no way of distinguishing between such substantive ends on the authority of the science of economics. Some ends we choose to subsidize by refusing to tax, but those include exploration for oil and production of airplanes as well as exhibiting art and healing the sick. It is this absence of distinction between institutions such as the Sierra Club and Lockheed Aircraft according to the intrinsic "nature" of their respective purposes that makes such an obvious and temporary aberration of the Court's refusal in *Sierra Club* v. *Morton* to recognize the Club's interest in natural beauty over and beyond the interests of its "members."*

*Individual members, viewed as wholes, may have as much interest in the recreational opportunities being pursued by Disney Enterprises as in the redwoods that are endangered. Personified as "members," they have the same interests as those the institution represents.

There was, however, an attempt on the part of the Court in Sierra Club to distinguish not only between the club and its members, but between groups of members. The Court sought to separate out individual members of the club who "used" the particular valley being threatened by administrative action and to perceive them as "themselves among the harmed." Other members would then have a "mere interest" or an "abstract" interest. It will be recalled that bona fides were not in issue. The "use" distinction was thus not a crude device for distinguishing those who truly believed in the threatened value from those who were fabricating belief—a problem discussed in chapter 8. Indeed the Court explicitly assumed bona fides.

One might suppose that anyone who loves natural beauty and knows of Mineral King Valley "uses" Mineral King. But "use" was probably meant to exclude some of these from the Court. Perhaps the Court had in mind those who could not walk. But what is this but a distinction between images of beauty that come through the air to the retina, and images that come through electrical or photographic transmission? When the redwoods are cut, what is the difference in the loss suffered by a paraplegic who has been feasting on the beauty of the forest through movies and recordings, enjoying its changes and discovering new delights with each new movie, and the loss suffered by one who sees and hears without such devices? If the walker wore glasses and a hearing aid, would the Court say he was not "himself" among the harmed? Or perhaps the Court had in mind those who had not already walked in the valley. But again, if bona fides are not in issue, what is the difference between one who has walked in the valley and intends to return, and one who has yet to walk there but intends to do so? What, indeed, is the difference between one who wants to see Mineral King and one who intends to see it? A person with a great love of Gothic is surely hurt when Chartres is bulldozed, even though he is too poor to afford the air fare to travel to or return to France.

But taking those who walk as the relevant group of members, what is the nature of the loss they suffer that the Court had in mind? The movement of particular trees past the eye? Surely it is purely speculative that an individual will walk by the particular trees that will be cut. He can be warned to stay away from cut areas. He can in fact go walk in another park. And why do we care, why do we define the loss of these *particular* trees as "harm" rather than a boon? Because he says so? Certainly not. The loss is harm only because we can see it as an instance of the loss of natural beauty, just as "the beauty of Mineral King Valley," which is nowhere protected as such by statute, is itself an instance of natural beauty.

One must wonder what drove the Court to introduce such distinctions. There was no stay pendente lite of the sort discussed in chapter 6. The bulldozers might have moved against the redwoods. The Court sent the club back to single out or add a walker to its membership rolls and begin the lengthy litigation over again (assuming a feigned personality, pretending to appear as the walker's agent), knowing that the club would of course be able to do so. What lay behind this bizarre behavior, which would have evoked laughter from a nonlawyer coming upon the scene if the possible consequences had not been so serious and irreversible? Is not the explanation to be found in those vestiges of property still embedded in the conceptual structure of legal thinking? Was this ritual not a bow to the private-dispute-settling function?

The Equality of Values and the Place of Results in Law

Criticism of Process and Criticism of Result. We have spoken of realizing a value, not choosing among values but seeking to realize them all, and devising systems of decision making that will produce outcomes satisfactory to all. There is an ambiguity in these statements, which returns us to our discussion of the meaning of legality on the merits.

To what extent is the realization of a value to be found in the outcome of the decision-making process? We have suggested on the one hand that outcomes cannot be critical, because they depend too much on the web of cause, which in the workings of its infinite mutual dependencies produces surprising results. And we have said

on the other that the essence of the process of government is that it is experimental, setting up rules and taking positions to influence the decisions of those operating in the regulatory field, all of which points obviously to the crucial importance of results. Before, we were examining the particular function of courts in the maintenance of legality and could put aside the administrative process, which could produce a particular outcome or its opposite quite legally. Here, however, we cannot escape the dilemma: for if values are realized or not in a concrete outcome, then there must be a standard for judging their relative importance. Otherwise any outcome that did not fully realize them all would be equally defective, and there would be as much reason for an agency to discard it as to build upon it. But if there is such a standard of judgment and some values are of more meaning and, therefore, of more "importance" and "weight" than others, then individuals also, it would seem, must be able to know what they would want as a whole and thus determine who they "really" are. The model of territorial armies menacing one another would regain plausibility, and the only object of government would be peace, to be secured by duplicity and illusion if need be.

The problem is an old one, and, sadly, I suppose we should expect to find it lurking at the roots of legal concepts. It came to a head in the twenties and thirties with the appeal of Marxism to generous and sensitive people, outraged at the outcome of the industrial revolution. In Lionel Trilling's *Middle of the Journey* a central character named Maxim renounces Marxism, to the distress of his friends, who have never fully committed themselves:

> "I was a professional," said Maxim in a cold voice. "What mattered to me were results. I always knew what the means were. They are not delicate or charming. They are even brutal. Please understand that I never had any of the liberal illusions about that. I was not, as you are, interested in *ideals*. I was interested in results. As a revolutionary I was wholly professional. But now the results do not please me. The present results and the inevitable later results. It's not what I bargained for."[17]

And so Maxim turns to religion, interesting himself only in ideals and letting results take care of themselves.

Is it possible that we must do the same, not just while performing the special judicial role in determining the legality of a decision, but in general? And since we *are* outraged by results, are we condemned to learn the lesson over and over again, living a life torn as it were between divinity and brutishness, between the sense of free will and the fact of determinism, the life of a caged thing that must beat against its bars knowing all the while that the outcome is in the

hands of another? This is the solace of much religion, which teaches that the individual is responsible and that *actions* may be criticized, but that *results* are to be accepted, even praised.

Much of what we take to be concern with results—no-nonsense hardheadness, what Maxim calls professionalism—is simply single-mindedness. It is a necessarily temporary state of concern by an individual with only one or a few of the values that are in fact meaningful to him. Hence the disappointment and revulsion: Men bring about what they do not "intend" not just because the workings of the world are mysterious, but because in choosing and in creating the framework of choice they fail to respond to their "better selves" (by which I think we really mean "other selves," since we do not generally deny the value of what we seek too single-mindedly). If this is the case, however, the response should be to try again, not to turn away from the world. For much of what we take to be the idealist's concern with values is indulgence in fantasy and a disregard of both his and others' actual values. The cruelty of the otherwordly is remarked upon quite as much as the stupidity of the hard-headed. Values are ideals in the sense that they are often not realized in the past and are of course always only expectations for the future, and in the sense that we wish to see them *fully* realized. They are, however, goals to be reached in fact: a value has life and meaning only so long as it is an object to be realized, and insofar as an idealist is conceived as detaching himself from concern for results, he has detached himself from concern for values also.

Thus, we are not condemned to either of these poles, "religious" indifference or acceptance of powerlessness on the one hand and self-defeating result orientation on the other, nor to vacillate back and forth between them, because we can escape them both by attending to all our concerns and accepting the demands they make upon us. Certainly if we seek to realize all our values we do not know what outcome we want, except as it is the outcome of a process in which all our values are respected. We set up a decision-making system devised as best we can. Then we must simply see what happens. After a criminal trial for murder, no one of us can say that the result should be different unless he is willing to say that he does not care for the privacy that is served by a refusal to break into people's homes for evidence, or the dignity that is served by a refusal to trick or torture, or the family unity that is served by refusing to require a spouse to speak, or the personal honor that is vindicated by accepting "reasonable provocation" in mitigation, or the preservation of art or sexual integrity that are promoted in accepting a desire to protect them as an excuse for what the defendant did, or any of the other on the long list of values that are taken into account in the process of deciding whether a defendant should

be put behind bars. One may hate the defendant and want to kill him if one loved the victim and it appears that the defendant caused his death. But that grief and rage cannot determine what the future should be, as each of us is aware: we all cause death all the time. The number of deaths of construction workers per mile of highway built can be predicted. If an individual believes in the values that are respected in the process, then the outcome of the process is the outcome he wants.

And yet he can still be unsatisfied with the outcome. Without finding fault with the execution of the process or disagreeing with the values taken into account, he may still say, in the case of the criminal justice system, that he feels unsafe. Does this mean that he believes "too much weight" has been given other values in the process, and that safety is more important in a hierarchy of values? Not at all: It means only that he wants, in the future, to realize the value of safety as well as the values respected in the production of the outcome at hand. It would be foolish for him to say that the outcome at hand, simply because it is unsatisfactory, is not the outcome he wanted. He has no alternative outcome to match against it. He knows that an alternative outcome would also have to be the result of a process, and that he cannot now change the process and rerun it, even in his mind, to see what the outcome would be and whether he would prefer it, because the world has changed and moved on. But the future is different. The process can be redesigned and one can see whether its outcome will produce the safety desired. The redesign need not involve the sacrifice of other values that continue to contend for recognition. If it does involve such sacrifices, there is no implication that those other values have less importance and that the search is for the point of balance where each is accorded its appropriate *relative* weight. Indeed "sacrifice" or "cost" connote just the opposite, that there is pain involved and that they are not being realized as they should be. The outcome of a new process that ignores, for the sake of safety, the demand for dignity or the love of art or the need for hope that springs from the happiness of children will also be unsatisfactory, and there will be another redesign and another try.[17]

The object of each redesign will be the realization of all values, if not simultaneously then at different times in a day or a life. There

[17] Individuals' and societies' attentions shift from value to value in the course of history. The absence of one value may be felt just as acutely at one time as the absence of another value at another time. Men are made equally restless by the lack of realization of one or another of their desires. They drive for security and then drive for challenge. They sacrifice for generations to build smiling landscapes. They sacrifice landscapes to the thrill of war and triumph. They withdraw to brood about how they might have both.

is no impossibility or belief in impossibility save that produced by the fact of death. The very notion of impossibility depends upon rules. Impossibility is a result of rules. In solitaire one cannot get at a card because one cannot move the card covering it. Why not? Because of the rules. In geometry parallel lines cannot meet, and in physics matter cannot travel faster than speed of light, or carry both a positive and a negative charge at the same time—because of the rules.[18] But rules are man-made and can be changed by men. In games, in science, and of course in individual and social life they are under continuous reexamination and reformulation. Scientists change their rules when they cannot achieve both simplicity and predictability, and in response to the surprises of their experiments. Individuals and societies change theirs for the same reasons, to eliminate impossibilities, situations that require choice between values. The difference is that the scientific is but one part, one role, of an individual or a society. Individuals and societies pursue far more numerous values and do not enjoy the luxury of dealing in "controlled" experiments with less than the world as a whole. Their rules must be adapted continually.

There do appear to be some limits other than death. A particular resource may be exhausted. But then we may find ourselves in a position to move to Mars and expand our frontiers, or come to understand ourselves in a new way that makes the external constraint irrelevant. The drudgery, the repetitiveness, and the monotony of agricultural work may motivate the inventiveness, the investment, and the decision making that transfers such work from men and women to labor-saving machines dependent upon large quantities of petroleum. But as people become increasingly separated from the land they may wish to return and sweep away the labor-saving machinery to get near the land and near the land in numbers. A machine that saves energy and reduces the number of people needed for a function from ten to one is inefficient for these purposes. On the return, the work is not drudgery, the repetitiveness has meaning as a reflection of the cycle of nature, and the monotony is felt like the drumbeat in music. The drying up of petroleum supplies, that might have produced a crisis, is now of no consequence. It is not wanted. It is said that intellectuals in China are sent part time to the fields to let them feel the need for new methods of agriculture and to give them a stake in changing the set ways of peasant culture. Suppose it should turn out that intellectuals like the work instead?

Ignoring or Discounting Values in Administrative and Judicial Decision Making. What then of the merits of an administrative decision? Agencies pay more attention to some values than to others and

ignore some values entirely. The Federal Trade Commission and the Antitrust Division pursue competition without regard to the effect of their decisions upon the development of technology, long-term resource planning, or minority racial or cultural access to communications media. Competition is often thought to be a means to these and other values as well as an end in itself, but these are hopes, whose realization is a matter of continuous study[19] but not direct concern to the decision-making body. Economies of scale may occasionally be introduced as a "defense," to justify a merger and to be weighed against the virtues of competition; but in general the agencies administering the antitrust laws shy away from such balancing. If the toppling of a television management generous to black culture or to ballet is a consequence of a divestiture, so be it. Black culture will have to find other means of access. The Maritime Board, on the other hand, makes decisions without regard to the principles mandated by antitrust policy. Its concern is the preservation of a strong shipping industry, and it may exempt corporate decisions from the antitrust laws. The decisions of the National Labor Relations Board are taken without regard to the inflationary impact of the settlements reached by the "collective bargaining in the interest of labor peace" that the board was established to promote. Inflationary impact is the concern of the Wage Price Control Board and the Federal Reserve Board. The Equal Employment Opportunity Commission is not concerned with economy, though, again, there is hope that there is no inconsistency and that equality will lead to less waste of talent. In routing new highways through cities the Department of Transportation gives "predominant" weight to the preservation of urban parkland, where the alternative is the disruption and cost of relocation of homes and businesses to make way for the road. In deciding whether to decide how high buses built with federal funds must be off the ground and, and if it does decide, what the height should be, the Urban Mass Transportation Administration concludes that buses must be twenty-nine inches above the road, over the protest of Disabled in Action, representing the elderly and handicapped whose mobility is affected by the difficulty of entering buses, and against the wishes of local governments interested in local autonomy and design variety.[20]

The agencies are fully authorized to behave in this way. Their decisions are legal and sometimes follow clear statutory commands. On judicial review the courts ensure that the agencies do give weight to some values and not to others, and not too much or too little, if there is statutory guidance. Does not all this bespeak weighing and balancing, and does not weighing and balancing imply

the assigning of greater and lesser weight to values, like the specific weight of chemical elements?

The Difference Between Design of a Whole and Design of a Part. Surely the giving of *no* weight to a value, the ignoring of a consequence, does not say that the value is not a value and the consequence is of no consequence. Agencies are in many instances embodiments of the persons of our law and speech. They are not wholes. That they give no weight, and that courts agree they should give no weight, and Congress decrees that they can or must give no weight to a value does no more than define who they are. The value may be no concern of theirs, *but it may be the concern of another agency.* What is "legal" under one statute and set of regulations may be illegal under another.

Is the taking of a value or consequence into account, but letting another value or consequence "outweigh" it in situations where that other value is involved, different? Perhaps not. Even if it were, another agency and another statute might make it dominant in other situations. Agencies are no more omnipotent than they are omnicompetent. To give a value lesser weight in a decision may be only to conclude that it can be realized in some other way, and to say nothing about its relative importance. If preservation of parkland is kept predominant, it may be that there will be no disruption of a neighborhood either. The road will be stopped entirely, and reliance on surface transportation itself will come into question. If bus heights are kept at twenty-nine inches, "kneeling" devices by which buses can be lowered for entry and optional wheelchair equipment are required for the handicapped, and local governments are left with autonomy over other specifications.[21] To protests, the response is often not "Your concerns are not as important to us as other concerns," but rather "See how this works out." The focus is shifted to results, that may or may not satisfy.

Cyclical and Postponed Realization of Values. We have said that the only source of impossibility is time, which is really a consequence of individual death. "Persons" and societies viewed apart from the individuals that give them life have all the time in the world. It may perhaps be possible to enjoy several different aspects of the self simultaneously, warmth, taste, sound and sight, beauty, pride, health, and love all blending together in a single sense of well-being; but generally attention flicks over satisfactions and dissatisfactions, presences and absences, in sequence. Like experience, results are spread over time, and what individuals have for the most

part are expectations. When the felt absence of the realization of a value leads to a proposal that the decision-making process be redesigned—either the process of a particular agency or the process of all agencies acting together—one response may be "wait." Our childhood fears that those who go first in line are better loved or that there will be nothing left when our turn comes may then suggest the thought that a choice to realize a value later rather than now is a decision that it is of lesser importance. "Justice postponed is justice denied." "Work now, play later."

But the timing of a satisfaction says nothing about its relative importance—despite the discounting involved in calculating the present value of a promise of money in the future. There is no favoritism in taking turns. Taking turns is a device to achieve equality. Some values may be connected together as means as well as ends. Until one is realized another cannot be sought, though that other may be no less desired throughout. Stability may be necessary to art, and the realization of some values may be linked with the cycle of nature. One hopes in the spring and remembers in the fall. The farmer hays in the sunlight and does his accounts at night.

In fact there is no first and second in a cycle of experience, just as there is no head of a circular table. We are all familiar with the round of life and with cycles of taste in fashion, literature, and art. There are intellectual and "political" cycles also, that occasionally lead one to feel there is nothing new and that individual and social experience is rediscovery rather than discovery. Only individual death or a true change in values prevents experience from coming full circle. And when a value whose time has come presents itself, it need not always jostle another aside. We have noted before that there is no difference between the positive and the negative, omission and commission, in the process of government and administrative law. If the Hoover Dam produces adverse effects upon the ecology of the region, those effects do not become the status quo, change in which would require administrative action. They are the result of administrative actions taken daily to repair and maintain the dam. Left to itself the dam would disintegrate, and the world would be different.[22] A Cambridge college has Gothic architecture not because of a decision in the past whose results have become embedded in the present, but because of current decisions to continue having Gothic architecture. The very stones of the ancient fabric are replaced as the centuries go by. Shape, form, values, meaning must be sought again and again if they are to be realized. A decision maker does not have to erase the effects of the pursuit of one value in order to pursue another. Time and the effects of decisions made by others will often have done that for him. The possibility of choice is continuously renewed.

The Process of Designing a Process: The Necessity of Interstitial Creation and the Legitimation of Unsatisfactory Results. Nonetheless, there are times when the realization of a value, like racial equality, seems postponed forever. Or if there is a cycle, the wheel does not turn within the lifetime of individuals. Or other values are taken out of turn, with consequent postponement and perhaps irrevocable loss for some individuals who must wait. The absence of the value is felt. Expectations have been defeated. There are also absolute conflicts between the results that flow from the decision-making processes of different agencies, and results that thwart or annihilate any hope of achieving a goal in any way. In these cases, "persons" representing the value come to the maker of the decision-making system and seek legislation.

Legislation results from a process, not from the will of a centrally organized intelligence. But we do personify the legislature and the legislative role. We say an individual is "a legislator," and courts recognize harm that an individual suffers "as a legislator." We must therefore ask, Is it here at last that values are ranked and ordered? And again, on reflection, I think we must admit that they are not and cannot be. Legislators and the "persons" to whom they listen may discuss and agree that this or that value should or should not be taken into account, or be taken into account to a greater or lesser degree, in the decision-making process of a particular agency. The legislator may create an agency to pursue a value or change the jurisdiction of agencies with the hope that, though a value is not pursued directly, its realization will emerge in the interaction of the results of decision-making processes devoted to other ends. In disposing of claims and complaints and problems, however, the legislator will be engaged only in adjustment. Like the individual and the agency the legislator too must wait and see what the results will be and decide then whether they do not satisfy and whether and how to make further changes in the process. He cannot redesign the process as a whole. He accepts it, yes, insofar as he does not go further in changing it; and in accepting it he "legitimates" the results that are produced by the process as a whole, with the realization of some values to some degree and the defeat of others. But he accepts it because he must.* Where everything depends on everything else and nothing is fixed even for the moment, he would not know where to begin a completely new design. The notion of replacing or redesigning a system or machine "as a whole" or "from

*If it appears in a concrete situation that one or another evil *must* occur, we avert our eyes, wring our hands, leave it to the system of interacting processes of limited decision-making to produce an outcome, and then say, whichever the outcome, that the system must be changed.

the ground up" assumes a context of the given around the system in question.[23]

Thus, the legitimation of the results does not mean that the results reflect the relative importance of the values they realize. By injecting a new statute and specific commands to specific decision makers into the extant matrix of statutes devoted to the pursuit of the whole range of public values, the legislature does not locate its current concern on a scale of importance. It does not rate one value more important than another. It says only that a particular value is being neglected. The judicial posture that there is no standard for saying the policy enforced by one statute is more important than the policy enforced by another (for instance for the purpose of awarding attorneys' fees or allocating judicial time to one or another kind of case),[24] which is at first so puzzling and apparently disingenuous in view of courts' continual weighing and balancing of factors in particular cases, becomes understandable. There is no standard of choice, no structure of values, not because morality is subjective and the law objective (and therefore amoral), but because choices are in fact not made. Is it more important to preserve human life or to preserve the meaning in human life? Surely we cannot say. It is not that we do not know or cannot know because something is hidden from us; it is that we do know that each is equally important. What is life without meaning or meaning without life? The answer is nothing. How many farm laborers should starve that a poet may eat? How many old people should be immobilized that the young may be given greater mobility? The answer is none. No individual, much less judge or legislator, could pretend that he could reduce these claims to some common coin and choose between them. Persons are indeed equal before the law, although individuals as such manifestly are not.

The Equality of Persons

This may explain why we continue to believe that as a society we are devoted to equality. Individuals are not equal in the sense of equivalency, "being" the same or "having" the same, and we have no intention of trying to treat them as such. Equality of opportunity means only that persons with separate identities are not mixed. A "wrestler" does not lose the object of his striving to an "entrepreneur" or an "heir." Wrestling matches are not to be bought or inherited. Wrestlers are to be treated as wrestlers, not as "heirs" or "entrepreneurs." Otherwise equality of opportunity has nothing to do with equality. To say that a wrestler and a runner who enter a room have "equal opportunity" to get a bowl of food placed in the

corner is to say only that one prefers strength over speed. To say they have equal opportunity to get a bowl of food placed at the end of the next block is to say that one prefers speed over strength. Critics of laissez faire ethics are justly impatient with equating equality of opportunity with equality as an ethical ideal, and if this, or uniformity, were all that "equality" meant, then our talk of equality would be delusion or worse. But equality means something else. It refers to equality of persons and the shared values they represent, and in this I think we do believe.